

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.323 OF 2017

Mrs. Rachelle Joel Oseran	]
aged 61 years, Occupation : Childbirth	]
Educator, Yoga and Pilates Instructor	]
Trainer at Mindfulness Based Childbirth	]
and Parenting, Group Leader	]
Nationality : Israeli	]
having her permanent place of address	]
and residing at 53 Kore Hadorot	]..... Petitioner
Jerusalem, Israel	] (Org. Accused.)

versus

1]	The State of Maharashtra	]
		]
2]	The Senior Inspector of Police	]
	Sahar Police Station, Mumbai	]
		]
3]	Mr. Bharat Vilas Rane	]
	Deputy Security In-charge of GVK Co	]
	residing at Flat No.2, Vanmala Niwas,	]..... Respondents
	Subhash Road, Vile Parle (E), Mum – 67	] (First Informant)

Mr. Jatin P Shah a/w Mr. Mudit Gupta, Ms. Snehankita Munj, Mr. Tushar Patel, Mr. K M Jhangiani and Mr. Siddharth Mehta for the Petitioner.
Mrs. S V Sonawane, APP for the Respondent/State.

CORAM : R. M. SAVANT &
SARANG V. KOTWAL, JJ.
DATE : 06th APRIL 2018

ORAL JUDGMENT : - [PER R. M. SAVANT, J.]

1 Rule, with the consent of the learned counsel for the Petitioner
and the learned APP, made returnable forthwith and heard.

2 The above Writ Petition has been filed for quashing of the Criminal Case being No.871/PW/2016 pending on the file of the learned Additional Chief Metropolitan Magistrate, 22nd Court, Andheri, Mumbai arising out of the LAC No.23 of 2015 registered with Sahar Police Station for the offences punishable under Sections 3 and 25 of the Arms Act.

3 The Petitioner herein is an Israeli National. The Petitioner claims to bring tourist groups to India from Israel and other parts of the world on educational trips known as “Mindful India Seminars”. The Petitioner claims to be known widely for her exemplary work in the field of Childbirth education. The Petitioner also claims to be a certified Yoga and Pilates Instructor, Childbirth Educator and has been practicing in the said field for more than 30 years. The Petitioner had arranged for Mindful India Seminar in January 2015. the said Seminar was to be held in the period between 02/03/2015 and 17/03/2015. the Petitioner obtained the Indian Visa for the said period of 3 months from 14/01/2015 to 13/04/2015. The Petitioner whilst travelling to India was carrying sweets, toys and clothing for the children of people who had helped the Petitioner over the years and also for the children of an orphanage in Rishikesh which the Petitioner's group planned to visit as a part of the Seminar. It seems that for carrying the said sweets and gifts purchased by the Petitioner, the Petitioner's friend and travel agent Mrs. Hillary Weiss lent a bag to the Petitioner. The said bag which was given to the Petitioner was previously

used by the husband of Mrs. Hillary Weiss i.e. Mr. Dani Weiss. It seems that the said Mr. Dani Weiss had previously served in the Israeli army under the army reserve duty and during his service with the Israeli army, he has used the bag which was borrowed by the Petitioner. It is the case of the Petitioner that she was totally unaware of the bag's contents. The Petitioner carrying the said bag amongst her other luggage arrived with her group of tourists at Chattrapati Shivaji airport, Terminal 2, Mumbai on 01/03/2015 by a flight on the said date. The Petitioner after landing in Mumbai thereafter boarded Jet Airways flight No.9W-307 for travelling from Mumbai to New Delhi. The Petitioner's hand luggage was also screened and no ammunition was detected or screened in the Petitioner's luggage at the Mumbai Air Port. The Petitioner's bags underwent baggage screening in the domestic transfer terminal at the Mumbai airport and whilst her baggage was getting screened one live cartridge was found by the Central Industrial Security Force (CISF) personnel having description "5.56 mm rifle cartridge" in Petitioner's luggage bag having baggage tag 9W – 221222. The Petitioner was thereafter taken for interrogation by the CISF. Thereafter the Petitioner on 02/03/2015 was handed over by the CISF to the Sahar Police Station and the first information report was lodged against the petitioner under Sections 3 and 25 of the Indian Arms Act. The said FIR was lodged by Mr. Bharat Vilas Rane, Security Incharge of GVK Company which is maintaining the security at the Airport. The Petitioner whilst at the Sahar Police Station gave her explanation. However, it

is the case of the Petitioner that the Sahar Police Station ignored the Petitioner's explanation, impounded the Petitioner's passport, and arrested the Petitioner. The Petitioner was shown arrested on 03/03/2015 and was produced before the learned Additional Chief Metropolitan Magistrate, 22nd Court, Andheri, Mumbai on the very same day. The learned Metropolitan Magistrate was pleased to remand the Petitioner to police custody till 05/03/2015. The Petitioner thereafter preferred a Bail Application being No.98 of 2015 which was allowed by the learned Addl. Chief Metropolitan Magistrate, 22nd Court, Andheri, Mumbai vide order dated 05/03/2015. It is the case of the Petitioner that she has complied with the terms and condition of the said bail order.

4 The Investigating Agency i.e. Sahar Police Station has thereafter completed the investigation and on 17/03/2016 it has filed charge sheet against the Petitioner for the offences punishable under Section 3 r/w Section 25 of the Indian Arms Act and the same is now registered and numbered as Case No.871/PW/2016 which is pending in the Court of the learned Additional Chief Metropolitan Magistrate, 22nd Court, Andheri, Mumbai.

5 At this stage it is required to be noted that Mrs. Hillary Weiss who as indicated above had lent the bag to the Petitioner has affirmed an affidavit that the bag in which the live cartridge was found was given by her and the

said bag in which the live cartridge was found was previously used by her husband Mr. Dani Weiss who had served in the Israeli Army under the army reserve duty. The Petitioner's statement was also recorded by the Sahar Police Station in the course of the investigation. In the said statement the Petitioner has mentioned that it is to carry sweets and other gifts which were purchased by the Petitioner for distribution in India that she had sought a bag from the friend and travel agent Mrs. Hillary Weiss who had accordingly lent her a bag. It seems that the statement of the said Mrs. Hillary Weiss was not recorded by the Investigating Agency.

6 It is also required to be noted that there is also a letter dated 09/12/2016 of the Deputy Consul General wherein he has stated that the luggage carried by the Petitioner does not belong to her and that she borrowed the same prior to a trip and apparently the bullet was kept in the bag mistakenly.

7 As indicated above, the Petitioner has approached this Court for quashing of the proceedings on the ground that the ingredients of the offences under Section 3 and 25 of the Indian Arms Act are conspicuously absent in the present case.

8 Heard the learned counsel for the Petitioner Shri Jatin P Shah and

the learned APP Smt. Sonawane. The principal contention of the learned counsel for the Petitioner Mr. Jatin Shah is that the *sine qua non* for an offence under Sections 3 and 25 of the Indian Arms Act is the conscious possession of ammunition. It was the submission of the learned counsel for the Petitioner that in the instant case the said ingredient is conspicuously absent. The learned counsel for the Petitioner sought to place reliance on the following judgments of the Division Benches of this Court in support of his said contentions.

- 1] 2012 All MR (Cri) 942 in the matter of Nurit Toker v/s. State of Maharashtra and others.
- 2] MANU/MH/3492/2017, in the matter of M.A. Latif Shahrear Zahedee v/s. The State of Maharashtra and ors.
- 3] Unreported decision dated 29/11/2016 in Criminal Writ Petition No.2912 of 2016 in Ms. Pallavi d/o Santprasad Satsangi v/s. The State of Maharashtra and anr.

9 The underlying principle laid down in the aforesaid judgments is that mere possession of the fire arm or ammunition would not constitute offence under Section 3 and 35 of the Arms Act and that the essential ingredient is the knowledge of possession or power or control over the arm or ammunition when not in actual possession. The facts involved in each of the cases would be adverted to a bit later.

10 We have with the assistance of the learned counsel for the Petitioner and the learned APP for the State perused the charge sheet. Except the recovery of the said bullet, there is no other incriminating material which has been uncovered during the course of the investigation so as to make the Petitioner culpable under Sections 3 and 25 of the Indian Arms Act.

11 Now coming to the judgments cited by the learned counsel for the Petitioner Shri Jatin Shah.

In *Nurit Toker's* case (supra) the facts were that the Petitioner therein had to undergo compulsory military service in the Israeli Army. She was given a personal side arm an M-16 assault rifle along with her personal ammunition. Like the Petitioner in the instant case, the Petitioner in the said case decided to travel abroad from Israel to Mumbai. She was thereafter to travel to Kathmandu, Bangkok and back to Israel. She was accordingly granted Indian Visa. She landed at Mumbai International Airport on 27/10/2011 and on the next date she was scheduled to leave for Kathmandu as per the travel itinerary. On 28/10/2011 she was complying with the formalities to board Jet Airways Flight No.9W 0266. However during screening of her baggage, two live cartridges were found by the Central Industrial Security Force (CISF) having description of 0.1 M.M. TZZN and other being 0.5 M.M.IMI. The said bullets were compatible with the M-16 assault rifle which the Petitioner used

during her compulsory military service. The CISF had handed over the Petitioner Nurit Toker to Sahar Police Station who registered an offence against the Petitioner for the offence punishable under Section 3, 25 of the Arms Act. The Petitioner was thereafter produced before the learned Metropolitan Magistrate who released her on bail. It was the case of the Petitioner Nurit Toker in the said case that the said two live cartridges had remained in her baggage when she left Israel due to mistake. The said fact was reinforced by the report given by the Embassy of Israel. After the receipt of the report the Investigating Officer decided to submit his report to the learned Metropolitan Magistrate under Section 169 of the Criminal Procedure Code. The said report came to be rejected by the learned Metropolitan Magistrate on 29/12/2011 on the ground that the contents of the application filed by the Investigating Officer do not make out a case under Section 169 of the Criminal Procedure Code. The Writ Petition filed by the Petitioner Nurit Toker in this Court was thereafter amended so as to lay a challenge to the said order dated 29/12/2011. The Investigating Agency reiterated its stand before the Division Bench of this Court that there was not sufficient material to file charge sheet against the Petitioner since it was not a case of conscious possession. The said stand taken by the Investigating Officer commended acceptance to the Division Bench on the ground that the report submit under Section 169 of the Criminal Procedure Code and more particularly the affidavit of the Assistant Commissioner of Police dated 17/01/2012 indicate that there is no manner of

doubt that the Investigating Officer has reached subjective satisfaction that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate. The Division Bench further held that it is well established position in law that conscious possession is the core ingredient to establish the guilt for the offence under Sections 3, 25 of the Arms Act. The Division Bench thereafter relied upon the judgment of the Apex Court in *Sanjay Dutt v/s State through C.B.I., Bombay (II)* reported in *(1994) 5 SCC 410* wherein the Apex Court whilst construing the word “possession” occurring in the said provision held that it would mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. In the light of the report of the Investigating Officer, the Division Bench held that there was no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, as it was not a case of conscious possession of two live cartridges recovered from the baggage of the Petitioner. The Division Bench accordingly allowed the Petition thereby quashed the FIR as also set aside the order dated 29/12/2011 passed by the learned Metropolitan Magistrate rejecting the report under Section 169 of the Criminal Procedure Code.

In *M.A. Latif Shahrear Zahedee's* case (supra), the Petitioner Zahedee was a permanent resident of Bangladesh and for the purpose of his

business, he had travelled to India on several occasions. On 25/09/2013 he left Dhaka by Jet Airways 9W-0273 for Kolkata for the purpose of business. From Kolkata he boarded another flight to Pune. Thereafter he travelled from Pune to Goa by road and after completing his work in Goa, he came to Ahmedabad by Spice Jet Airways Flight No.138 and from Ahmedabad, he flew to Mumbai by Air India Flight No. AI-191. On 29/09/2013 the Petitioner booked his ticket to Dhaka via Mumbai-Kolkata by Jet Airways 9W-615. When the Petitioner's luggage was screened, five live cartridges and one empty was found in his toilet kit pouch. On inquiry being carried out by the CISF, the Petitioner Zahedee immediately informed them that the said live cartridges and empty belonged to his brother Md. Nasser and they were inadvertently carried by him as the travel kit pouch was common between him and his brother. It seems that from the Mumbai Airport itself, the Petitioner Zahedee called upon his brother Md. Nasser to send by fax a copy of his licence to hold Fire Arm and live cartridges and empty. The said copies were received by fax from the brother of the Petitioner. The Petitioner accordingly handed them over to the CISF. However at the instance of the CISF an offence came to be registered being C.R. No.16 of 2013 against the Petitioner for the offences punishable under Sections 3 and 25 of the Arms Act. In the said case the defence taken by the Petitioner Zahedee was that he had a valid explanation for the five live cartridges and empty found in his toilet kit pouch. The Petitioner had also produced Arms Licence issued to his brother and therefore the defence taken

was that the possession of the Petitioner cannot be said to be conscious possession as required under Sections 3 and 25 of the Arms Act. In support of the said contention reliance was placed on the judgments of the Apex Court in *Sanjay Dutt v/s State through C.B.I., Bombay (II)* reported in *(1994) 5 SCC 410* and in *Nurit Toker v/s. State of Maharashtra* reported in *2012 (2) Bom. C.R. (Cri) 154*. In the facts of the said case the Division Bench held that the possession of the Petitioner was not conscious and that the live cartridges and empty remained in the Petitioner's baggage inadvertently on account of he carrying the toilet kit pouch of his brother with him. The Division Bench adverted to the judgment of the Apex Court in Sanjay Dutt's case as also in Nurit Toker's case (supra) and came to a conclusion that the possession of the Petitioner of the said five cartridges and empty being not conscious, there was no other material produced against the Petitioner under Sections 3 and 25 of the Arms Act and accordingly quashed and set aside the Criminal Case bearing No.301/PW/2015 pending against the Petitioner in the Court of the Metropolitan Magistrate, 66th Court, Andheri, Mumbai.

Similar view was taken by another Division Bench of this Court in *Ms. Pallavi d/o Santprasad Satsangi v/s. The State of Maharashtra and anr. in Criminal Writ Petition No.2912 of 2016* which is an unreported decision dated 29/11/2016.

There are also judgments of the learned Single Judges of the Delhi

High Court and the Division Bench of the Delhi High Court taking a similar view. We do not propose to refer to the said judgments, lest not to unnecessarily burden this judgment.

In our view, the judgments of the Division Benches of this Court would apply on all fours to the facts of the present case.

12 In the light of the legal position which has been consistently enumerated by this Court we are of the view that no useful purpose would be served in proceeding with the case in question registered for the offences punishable under Sections 3 and 25 of the Indian Arms Act. This is a case wherein the Petitioner cannot be said to have consciously possessed the cartridge in question and that the cartridge has remained in the bag which the Petitioner was carrying without her knowledge. Admittedly no fire arm or weapon has been recovered from the Petitioner. The Petitioner had not concealed the bullet, the Petitioner on being questioned had immediately given her explanation. The charge sheet filed by the Sahar Police does not disclose any incriminatory material against the Petitioner. Hence in the facts and circumstances of the present case, we deem it appropriate to allow the above Writ Petition and the same is accordingly allowed. Rule is accordingly made absolute in terms of prayer clause (c).

[SARANG V. KOTWAL, J]

[R.M.SAVANT, J]