

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 75 of 2007

Ashadul Molla

-Vs-

The State of West Bengal

Amicus Curiae : Mr. Santanu Talukdar

For the State : Mr. Avishek Sinha

Heard on : 10.08.2023, 12.10.2023

Judgment on : 17.01.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of conviction and sentence dated 13th day of November, 2006 passed by the Learned Sessions Judge, North 24 Parganas, Barasat in Sessions Trial Case No. 1(5)06 arising out of G.R. No. 1880/03 under Section 399/402 of the Indian Penal Code and 25/27/35 of Arms Act finding the accused-appellant guilty under Section 25(1) of Arms Act and convicting and sentencing the accused-appellant under Section 25(1) of Arms Act to suffer rigorous imprisonment for one year and to pay a fine of Rs. 2000/- in default to suffer rigorous imprisonment for more ten days.

2. The prosecution case in brief is that on 12.11.2003 at about 22:35 hours an information was received at Rajarhat Police Station over telephone that some miscreants had assembled near Jhaliga more on Bhojerhat bound road under Rajarhat Police Station and were making preparation to commit 'dacoity' of the passersby on the road at there. Accordingly, the Officer of the said Police Station noted the matter in the G.D. dated 12.11.2003 and intimated the matter to the O.C. of the said Police Station. Accordingly, the Officers along with constables left the police station under the leadership of Officer-in-Charge and reached there at 23:05 hours. Getting down from the vehicle they called two local persons to act as witnesses in their endeavor. They expressed their willingness and disclosed their identities as (1) Mansur Ali Molla, Son of Hafij Ali Molla of Uttar Nayabad, P.S. Rajarhat, (2) Buddhishw Mondal, Son of Late Haru Charan Mondal of Kada P.S. Rajarhat. Then they started to ambush at nearby conducive place. Under street light they observed that some persons were gossiping among themselves keeping three motor cycles and were moving suspiciously. Then they approached to them. As soon as they had advanced to them, they saw police and started to flee away. After chasing two of them could be apprehended as they fell down from a motor cycle. They sustained injuries on their pers others managed to escape. Then on interrogation they disclosed their identities. They also confessed that they assembled at the place in order to commit 'dacoity' of the passersby on the road and were watching on the passersby hiding themselves under the veil of darkness but seeing police they started to flee away. They were 8/10 in number. Then the Officer-in-Charge of the Police

Station told them to search the person of the available police personnel in the presence of available witnesses but they refused to do so. Then the O.C. of the Police Station intended to conduct search of the apprehended persons and on search one country made improvised Pipegun 9½ inches loaded with one round of 0.303 ammunition was found to be kept in the waist of wearing trouser of Ashadul Molla and one polythene packet filled with four live bombs was found in the right hand of Md. Mofijul Islam. On demand none of them could produce any document in support of possession of those arms and ammunitions and bombs. Then those articles were seized preparing proper seizure list in between 00:15 hours and 00:35 hours in presence of witnesses who put their signature on the same. Then those seized articles were packed labeled, sealed and marked as Exhibit.

3. The accused/appellant pleaded not guilty and claimed to be tried.
4. The prosecution examined in all 10 witnesses and exhibited certain documents.
5. The Learned Trial Court acquitted the accused/appellant of the Charge under Sections 399/402 of the Indian Penal Code for alleged preparation to commit 'dacoity'.
6. Learned Amicus Curiae representing the appellant submitted as follows: –
 - i. The facts, circumstances and probabilities of and the evidence adduced in this case tend to throw considerable doubt as to the exact circumstances under which the alleged incident had taken place and the complicity of the appellant in the crime alleged.

- ii. The order of conviction was contrary to the evidence on record and the proved facts and circumstances of this case.
 - iii. The entire trial had been vitiated by the reception of the reliance on inadmissible evidence in this case and that if the said inadmissible evidence was excluded from the records, the order of conviction and sentence was not sustainable in law.
 - iv. The prosecution evidence was contradictory in material particular and the Learned Trial Court should have discarded such evidence and ought to have acquitted the appellant.
 - v. The prosecution case had been developed from stage to stage to prove the case under Section 25(i)(a) of Arms Act in as much as PW-5 and PW-8 failed to prove the case against the accused/appellant.
 - vi. The Learned Trial Judge failed to consider the deposition of PW-5 and PW-8, the seizure list witnesses who did not support the prosecution case in particular and ought to have given benefit of doubt in favour of the appellant.
7. The Learned Advocate for the State in all fairness submitted that prevalent discrepancies in the evidence of the prosecution witnesses failed to establish the preparation of the offence of dacoity and therefore acquittal under Sections 399/402 of the Indian Penal Code was justified. However, the recovery of the pipe gun was corroborated through the consistent evidence of PW-1, PW-2, PW-3, PW-5 and PW-6. Therefore the conviction under Section 25(1) of the Arms Act should not be interfered with.

8. A circumsppection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-1, serving as constable no. 3290 at Rajarhat police station on 12.11.03, deposed that he had received information on that day regarding a potential dacoity at Jhaligachi. Acting on this, PW-1, Constable Lotan Mondal, PW-3 and PW-6 proceeded to the place of occurrence. Upon arrival, they noticed individuals gathering, few of them dispersed on their approach. Two individuals then approached them, expressing their willingness to serve as witnesses to the incident. Subsequently, Md. Mofijul Islam and the appellant were apprehended, with incriminating items including a pipe gun from the appellant and 4 live bombs from Mofijul. Additionally, a motorcycle was seized. Notably, no signatures from the accused or witnesses were found on the seized materials. The seized materials were marked as Ext. I and II.
- ii. During cross-examination, PW-1 informed the Investigating Officer that initially, 8/10 individuals had gathered at the scene, but most of them fled upon their arrival. Ultimately, they apprehended two individuals in the act. The raid commenced at 11:15 am and concluded at 1:30 am.
- iii. PW-2, serving as constable no. 2244 at Rajarhat police station on 13.11.03., recounted a similar incident involving the apprehension of two individuals and the recovery of a pipe gun along with ammunition.
- iv. PW-3, serving as Bordering H.G. at Rajarhat police station on 13.11.03, provided a comprehensive account of his participation in the raid, describing the recovery of a pipe gun, .303 bone ammunition and 4 live

bombs. The pipe gun was marked as Mat. Ext. 1. He noted being instructed to prepare for the raid at 10 pm.

- v. During cross-examination, PW-3 stated that he had arrived at the place of occurrence at 11 pm.
- vi. PW-4, serving as Inspector at Salt Lake police station on 24.12.03, provided an opinion regarding the recovered weapons in context of Rajarhat police station case no. 302 dated 13.11.03. Specifically, a pipe gun with an iron bat measuring approximately 9.5 inches long and one round of .303 ammunition were seized. His report was marked as Ext. 1 and his signature on the report was identified as Mat. Ext. 1. Importantly, the weapon and ammunitions were not submitted for Muzzle velocity examination.
- vii. PW-5, residing close to the incident site, witnessed the accused persons snatching money from an individual, resulting in the public assaulting them. He witnessed the incident on 13.11.03 between 10:30 and 11pm. He corroborated the seizure of a pipe gun and ammunition. The signature of PW-5 on the seizure list was marked as Ext. 2. The testimony of PW-5 did not corroborate with the testimonies of the police personnel, including, PW-1, PW-2, PW-3 and PW-7.
- viii. PW-6, posted at Rajarhat police station, reported receiving information at 11 pm about a gathering at Ghaligachi. The information corroborated the testimony provided by PW-1. However, despite the corroboration, PW-6 did not sign the seizure list. Notably, the time at which PW-6 received the

information did not align with the time mentioned in the testimony of PW-7.

- ix. PW-7, serving as the S.I. of police at Rajarhat police station on 13.11.03, narrated receiving information at 10:30 pm about a potential dacoity, leading to arrests and the seizure of arms and a motorcycle. Upon arrival at the place of occurrence, two individuals volunteered as witnesses, but PW-7 suspected their involvement in the dacoity's preparation and apprehended them. After interrogation, they confessed to their role in planning the crime. Subsequently, during the search, one suspect was found with a pipe gun and loaded ammunition, while the other had a live bomb; lacking valid documents for these items led to their seizure. PW-7 then filed a complaint, marked as Ext. 3. However, discrepancies emerged regarding the seized materials. PW-7 reported seizing one live bomb, while PW-1 and PW-3 mentioned seizing four live bombs.
- x. During cross-examination, PW-7 stated that only the accused individuals were present at the scene and noted that the seizure list was not prepared within an hour. The testimony of PW-7 contradicted with the testimony of PW-1, PW-2, PW-3 and PW-6.
- xi. PW-8 witnessed an incident involving money snatching on 13.11.03 at 11pm. He observed the money belonging to his brother-in-law, Joydeb, being snatched. Consequently, he signed as a witness to the seizure list marked as Ext. 2/1.
- xii. PW-9, serving as the A.S.I. of police at Rajarhat police station on 13.11.03, was responsible for filing the formal FIR on the same date as

instructed by PW-7. However, PW-9 had limited knowledge about the case beyond this responsibility. The endorsement made and signed by O.C. Paresh Roy was marked as Ext. 4/A.

- xiii. PW-10, serving as the S.I. of police at Rajarhat police station on 13.11.03, was the investigating officer for the case. He provided a detailed account of the investigation process, which included examining witnesses, visiting the place of occurrence, seeking expert opinions, and eventually submitting a charge sheet against the appellant. Additionally, he made a sketch map marked as Ext. 5, but it lacked specific details such as road names and the perspectives of witnesses regarding the place of occurrence. PW-10 also sent the alamat for expert opinion and obtained the report marked as Ext. 7. His signature on the seizure list was marked as Ext. 7/1.

9. In ***Mohmed Rafiq Abdul Rahim Shaikh Vs. the State of Gujarat***¹, the Hon'ble Supreme Court held as follows:-

“5. Section 25(1)(a) of the Arms Act, 1959 reads as follows:

“25. Punishment for certain offences.—(1) Whoever—

(a) manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer, or has in his possession for sale, transfer, conversion, repair, test or proof, any arms or ammunition in contravention of Section 5; or

(b) shortens the barrel of a firearm or converts an imitation firearm into a firearm in contravention of Section 6; or

¹ (2018) 10 SCC 501

(d) bring into, or takes out of, India, any arms or ammunition of any class or description in contravention of Section 11, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.”

6. *Section 25(1-A) of the Arms Act, 1959 reads as follows:*

“25. (1-A) *Whoever acquires, has in his possession or carries any prohibited arms or prohibited ammunition in contravention of Section 7 shall be punishable with imprisonment for a term which shall not be less than five years, but which may extend to ten years and shall also be liable to fine.”*

7. In effect, this section provides for the punishment of a person who has in his possession, etc., prohibited arms or prohibited ammunition in contravention of Section 7. Section 7 prohibits possession, etc. of prohibited arms or ammunition; it reads as follows:

“7. Prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms or prohibited ammunition.— *No person shall—*

(a) acquire, have in his possession or carry;

*(b)-(c) * * *” [“7. Prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms or prohibited ammunition.—No person shall—(a) acquire, have in this possession or carry; or(b) *[use, manufacture], sell, transfer, convert, repair, test or prove; or(c) expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test for proof,any prohibited arms or prohibited ammunition unless he has been specially authorised by the Central Government in this behalf.”*Note: Subs. by Act 42 of 1988, Section 4 (w.e.f. 27-5-1988).]*

8. *Section 25(1)(a) essentially makes a person who is found to be in possession for sale, transfer, etc. of any prohibited arms or ammunition in contravention of Section 5 punishable with imprisonment for a term,*

which shall not be less than three years but which may extend to seven years and shall also be liable to fine.”

10. The recovery of the pipe gun was corroborated by PW-1, PW2, PW-3, PW-5 and PW-6. However, there's a discrepancy in the dates mentioned regarding the raid. PW-1 stated the date as 12.11.03, which differed from the testimonies of the other prosecution witnesses who mentioned the date as 13.11.03.

11. The document marked as Exhibit-1 stated as follows:-

“Received the following exhibits in my office on 24.12.03 in sealed condition in 2 packets from Ld. SDJM Barasat Court through O/C, Rajarhat PS for examination in connection with the above noted case. The seals were found intact and tallied with specimen seal. Signed paper label were found pasted on the packets.

Exhibit- A) One improvised Fire Arms made in the shape of shot Gun with iron butt measuring about 9.6” long.

Exhibit- B) One round improvised .303” Ammunition.

Those were labelled and marked by me as 522/NP/03. I examined the above noted articles on 09.06.04 and results of examination are as follows:-

Exhibit- A) The Fire Arms is an improvised type of shot Gun designed for firing .303” caliber Ammunition. It was found in working condition on test. One round improvised .303” Ammunition (Exhibit-B) sent with the Fire Arms was fired by me for test through the said fire Arms and found in order. It comes under the purview of Indian Arms Act and endanger for human life.

Exhibit- B) The improvised Ammunition was meant for use in .303” caliber Rifle. Percussion cap of the Ammunition was found un-indented. This was live Ammunition and was fired from Exhibit-A. It is endanger for human life and comes under the purview of Indian Arms Act.”

12. The seizure list marked as Exhibit-2 bore the signature of the present appellant with regard to the seized articles sent for seeking expert opinion. PW-5 and PW-8 had been the seizure list witnesses who evinced the fact of seizure of the ammunitions and the country made pipe gun. The sanction was obtained in accordance with the provision of Section 39 of the Arms Act, 1959 and Section 7 of the E.S. Act, 1908 as per the document marked as Exhibit-6.
13. The possession of the pipe gun was actual and could not be retracted by the present appellant, the appellant could not prove the validity of possessing such prohibited ammunition through documentary evidence. He was devoid of any statutory or otherwise power and control of the pipe gun to have conscious possession of the same under a valid law.
14. In view of the above discussions, the conviction awarded by the Learned Trial Court was proper. Accordingly, the instant appeal being CRA 75 of 2007 is dismissed.
15. I record my appreciation for the able assistance rendered by Learned Advocate, Mr. Santanu Talukdar, as *Amicus Curiae* in disposing of the appeal.
16. Let the copy of this judgment be sent to the Learned Trial Court as well the police station concerned for necessary information and compliance.
17. All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Ananya Bandyopadhyay, J.)