

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 678 of 2009

Bene Sk. @ Abdul Hossain Sk.

-Vs-

The State of West Bengal

For the Appellant	: Mr. Arkaprabha Roy Mr. Aniruddha Lahiri
For the State	: Mr. Pravas Bhattacharyya Mr. Mirza Firoz Ahmed Begg
Heard on	: 19.01.2024, 27.02.2024, 15.03.2024, 21.06.2024
Judgment on	: 14.08.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 10.09.2009 passed by the Learned Additional District and Sessions Judge, 2nd Fast Track Court, Diamond Harbour, South 24 Parganas in Sessions Trial Case No.1(1)08, Sessions Case No.3(9)06 and G.R. No.166/06, whereby convicting the appellant under Sections 25(1)(a) Arms Act and under Section 5 of Explosive Substance Act, 1908 and thereby sentencing the appellant to suffer rigorous imprisonment for 4 years and also to pay a fine of Rs.1000/- in default to suffer additional rigorous imprisonment for 3 months for the offence punishable under Sections 25(1)(a) Arms Act, and under Section 5 of the Explosive Substance Act, 1908.

2. A suo-motu complaint was lodged by one Arup Paul, S.I. of Police at the Magrahat Police Station dated 20.02.2006 at 00.25hrs., inter alia, stating that he had arrested the accused person namely Bene Sk., son of Golam Ali Sk. of Mamudpur Kantikatapara, P.S.- Magrahat, 24 Parganas (South) along with seized articles; one country made improvised pipe gun measuring about 9" inches in length including iron butt having firing pin, barrel trigger etc., one round 8 mm live cartridge marked KF, one piece live bomb and original seizure list in duplicate and custody memo; during holding raid along with S.I. D.R. Mukherjee, A.S.I. S. Banerjee, A.S.I. Chandan Sarkar, C/3071 Tufan Ghosh against rowdies, warrantees at Mamudpur area under the leadership of S.I. N.D. Ghosh, Officer-in-Charge of Magrahat Police Station with Govt. vehicle No. WB-20B-8475 vide Magrahat GDE No. 1203 dated 20.02.2006 and found the accused person was moving there suspiciously which had arisen suspicion in their mind. Seeing them the accused tried to flee. Then after a hot chase they managed to apprehend the accused person. Thereafter, they called three local persons namely Md. Akbar Laskar, son of Ali Hossain Laskar of Dakshin Mamudpur, Magrahat P.S., Ajim Ali Pukait, son of Late Jamiruddin Purkait of Dakshin Mamudpur, P.S.- Magrahat, Ali Md. Sk., son of Late Nur Md. Sk. of Dakshin Mamudpur, P.S.- Magrahat as witnesses at the time of search. S.I. Arup Paul offered the accused person to search their persons but he denied. Thereafter, as per order of Officer-in-Charge, Magrahat P.S., S.I. Arup Paul conducted search on his person in between 00.40 hrs. and 01.05 hrs. in presence of above witnesses and recovered one country made improvised pipe gun measuring about 9" inches in length including iron butt having firing pin, trigger etc. loaded

with one 8 mm live cartridge marked KF from his right side waist where the accused person concealed it and one piece live bomb from the right hand of accused Bene Sk. The accused person neither gave any satisfactory account nor he produced any valid document for his possession of those arms and ammunition and bomb. Thereafter, S.I. Arup Paul seized the above noted recovered articles and prepared proper seizure list, in presence of witnesses, which was duly signed by them and accused person. His accompanying officers and force labelled those firearms, ammunitions and bomb. S.I. Arup Paul arrested the accused person at 01.05 hrs. as he violated Sections 25(1)(a)/27 of Arms Act and Sections 4/5 of the E.S. Act for possessing those firearms, ammunition and bomb illegally.

3. Based on the aforesaid complaint Magrahat P.S. Case No. 25 dated 20.02.2006 under Sections 25(1)(a)/27 of the Arms Act and Sections 4/5 of the Explosive Substances Act.
4. Charges were framed against the appellant under Sections 25(1)(a)/27 of the Arms Act and Sections 4/5 of the Explosive Substances Act to which the appellant pleaded not guilty and claimed to be tried.
5. Learned Advocate for the appellant submitted as follows: –
 - i. Three local witnesses namely Akbar Laskar, Azim Ali Purkait and Ali Md. Sk. as PW-2, PW-3 and PW-4 had been declared hostile by the prosecution as they had stated to have not witnessed any incident of seizure of fire arm and ammunition from the possession of the appellant a boy of their para by police on 20.02.2006.
 - ii. The said three witnesses PW-2, PW-3 and PW-4 identified their signatures appearing on the seizure list which had been marked as

Exbt.1, 1/1 and 1/2. All three of them have stated in their cross-examination to have signed on a blank paper at the police station.

- iii. PW-5 too was declared hostile by the prosecution who denied knowing of any incident occurring in the night at 12:30 a.m., on 20.02.2006 relating to the appellant.
- iv. The conviction and sentence were too severe and thereby caused serious prejudice to appellant.

6. Learned Advocate for the appellant further submitted as follows:-

- i. PW-2, PW-3 and PW-4 did not support the case for the prosecution and instead supported the case for the defence which was about fabrication and implantation of evidence. From such circumstances, inference was to be drawn in favour of the accused as law settled, in case like that of *Raja -versus- State of Karnataka, (2016) 10 SCC 506* and *Pooja Pal versus- Union of India, (2016) 3 SCC 135*, that evidence of a hostile witness cannot be rejected outright and both parties are entitled to rely on such parts of his evidence which assists their case.
- ii. It had been held in *Rajesh and Another-versus- State of Madhya Pradesh, 2023 INSC 839* that Panchnama was inadmissible in court where witnesses merely acted as attestors and did not disclose how objects were discovered. It was further held that if the searches and seizures were in complete defiance of law and procedure and there was any possibility of the evidence collected having been tampered with or interpolated during the course of such search and seizure which it was in the instant case then that evidence could not be admitted.

- iii. Second best evidence of recovery failed to corroborate prosecution's case and relied on the decision in *Rameshbhai Mohanbhai Koli and Ors. -versus- The State of Gujarat, (2011) 11 SCC 111 [para 35]*, in the event of *panch* witnesses turn hostile, the case of the prosecution, to the extent in deals with recovery, can be relied upon if the same is based on the testimony of the Investigating Officer. In that case, the Investigating Officer categorically stated in his cross examination that he did not seize anything.
- iv. The existence of third best evidence was doubtful and dubious in nature and relied on the decision in *Anter Singh versus State of Rajasthan, (2004) 10 SCC 657 para no. 10*), even if the *panch* witnesses turns hostile the evidence in person who affected the recovery wouldn't stand vitiated. Furthermore, the Hon'ble Apex Court in *Modan Singh - versus- State of Rajasthan, (1978) 4 SCC 435 (para 8)* makes way for the prosecution that evidence as to recovery need not to be rejected when the evidence of the investigating officer recovered the material objects was convincing.
- v. The third best evidence, that was the officer at whose instance such recovery was made, was dubious in nature as it was not clear as to whose instance the recovery was made.
- vi. There were number of contradictions and omissions as could be seen from the depositions of PW-1, PW-6, PW-7 to PW-9 and PW-11 on the point of who were the persons that were the members of raiding party and furthermore most of such prosecution witnesses failed to ascertain as to whose instance the recovery was made. PW-7, Sanjay Banerjee stated in his cross examination that he was the

only one present in the time of arrest and the seizure of aforesaid arms and ammunitions.

vii. As far as the question of recovery of live bomb is concerned there is no proof of such claim, as the same was never produced before the Learned Trial Court for identification, neither the Malkhana Register was produced. Further in addition to that PW-01, ASI Chandan Sarkar who was a member of the raiding party has claimed in his cross examination that the allegedly seized bomb was not produced before the Learned Trial as it was destroyed. However he could not say whether any permission was obtained from the Learned Court of concerned jurisdiction to destroy the same bomb. Such action on the investigating agency is contrary to section 451 of the Code of Criminal Procedure, 1973 and the Judgement passed by the Hon'ble Supreme Court in *Sunderbhai Ambalal Desai versus- State of Gujarat, (2002) 10 SCC 283 [para 04]* which states as follows:

The object of the Code seems to be that any property which is in the control of the court either directly or indirectly should be disposed of by the court and a just and proper order should be passed by the court regarding its disposal. In a criminal case, the police always acts under the direct control of the court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the court exercises an overall control on the actions of the police officers in every case where it has taken cognizance.

7. Learned Advocate for the State submitted that on the date of incident PW-1 along with superior officer PW-11 Nandalal Ghosh, PW-9 S.I. Dipak

Ranjan Mukherjee, PW-8 Constable Tufan Kanti Ghosh went for search but could not arrest the warranted person. Subsequently, S.I. Magrahat P.S. found an improvised country made pistol from Bene Sk. and he could not produce any legal document thereto. The prosecution was able to prove its case and the appeal should be dismissed.

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

- i. PW-1 in his deposition stated that as an A.S.I. of Police posted at Baruipur P.S. on 20.02.2006 at about 12:30 a.m. in the night, he went with his superior officers viz. Nandulal Ghosh, S.I. Dipak Ranjan Mukherjee, S.I. Arup Paul, A.S.I. Balai Bhowmik, A.S.I. Sanjay Banerjee and Constable Tufan Kanti Ghosh to Mamudpur village, under Magrahat P.S. to execute warrant pending against the accused persons of other cases, but in vain. Subsequently they chased certain boys trying to run away on seeing them. They could catch hold of one of them, named Bene Sk. @ Abul Hossain Sk. S/o. Golam Hossain Sk. of Kanthikata of Mamudpur village.

On apprehending him, they suspected him to possess an illegal item. Then as per the direction of O.C. Magrahat P.S., S.I. Arup Paul searched the body of the said Bene Sk. in presence of two local witnesses. From his possession country made improvised pistol was recovered along with one live bomb, who could not produce any document to prove his legal possession of such arm and bomb. S.I. Arup Pal seized those items under a seizure list, in the presence of two local witnesses who signed on the seizure list in his presence. The said pistol and marked as Mat. Exbt.-I. The seized cartridge

was marked as Mat. Exbt.-II. The bombs which was seized from the possession of the accused had been destroyed.

- ii. PW-1 in his cross-examination stated that the label affixed on the seized articles did not bear his signatures. He did not see the seized bombs in the court as the same was destroyed. He could not say exactly whether any permission was obtained to destroy the said bombs from the court or not.
- iii. PW-2, PW-3, PW-4 and PW-5 were declared hostile by the prosecution.
- iv. PW-6 in his deposition stated on the intervening night of 19.02.06 and 20.08.06 he along with O.C. Nandulal Ghosh, 2nd Officer S.I. Dipak Ranjan Mukherjee, A.S.I. Chandan Sarkar, A.S.I. Sanjoy Banerjee, Constable Toofan Ghosh, went out of P.S. for patrolling duty as well to arrest warrantee accused persons towards Mahmoodpur, in a police vehicle after making necessary entry in the S.D. They entered into Mohamoodpur village and a person, witnessing them escaped and was chased by him and apprehended, who disclosed his identity as Bene Sk. They called local witness and searched his body in presence of witnesses and recovered a loaded iron butt pipe gun like fire arm from his waist and a bomb from his hand. He seized those articles and a seizure list as per direction of O.C. The said seizure list was marked as Exbt.1/3. The said seized fire arms cartridge was identified and marked Exbt.-I and II. PW-6 lodged the complaint and marked as Exbt.-2.
- v. PW-7 in his deposition stated that he was a A.S.I. of Police and posted at Jaynagar P.S. He was posted as A.S.I. at Magrahat P.S. on

20.02.06. At that time S.I. Nandulal Ghosh was the O.C. of Magrahat P.S. S.I. Dipak Mukherjee was 2nd officer and Arup Paul was S.I. of Police and posted at Magrahat P.S. In the intervening night of 19.02.06 and 20.02.06 at about 12:30 a.m. They went for a raid duty to arrest warrantee accused persons along with other police force. On reaching village Mamudur they saw a number of boys running away after witnessing them but they could arrest one of them. The name of the said boy was Bene Sk. After his arrest, the superior officer called local persons as witnesses and in their presence his body was searched and they found bomb in his hand and one shooter loaded pipe gun from the right side of his waist. He could not produce justify legal possession of such arms and ammunition and as such the officer seized those articles under a seizure list and arrested the accused person and brought him to P.S. along with the seized articles. The said seized fire arm and cartridge were marked as Mat. Exbt.- I and II.

- vi. PW-7 in his cross-examination stated he was all alone present at that time of arrest and seizure of fire arms. The label and the seizure list did not bear his signature. He could not state the number of the cases in connection of which they went to arrest the warrantee accused persons. He did not remember at that stage whether they made any attempt to arrest or apprehend the other miscreants who fled after seeing them.
- vii. PW-8 in his deposition stated that he was an A.S.I. of Police and posted at Mali Panchghara as Traffic Guard. He was posted as a Constable No.3071 at Magrahat P.S. On 19/20.02.06. In the said

night he went for a raid along with officer-in-charge of Magrahat P.S. and other police personnel to Mamudpur village. On seeing them the boys fled but they could apprehend one of them who disclosed his name to be Bene Sk. His officer searched his body and recovered a country made fire arm, marked as Mat. Exbt. – I. He could not produce any paper to prove his legal possession. His superior officer seized the said fire arm under a seizure list in presence of local witnesses.

- viii. PW-8 in his cross-examination stated that he was not enquired about the occurrence by any superior officer.
- ix. PW-9 reiterated the deposition of PW-8.
- x. PW-10 in his deposition stated he was an assistant commandant, posted at India Reserve Battalion, Durgapur. He was posted as a Reserve Inspector and Police, Alipore, South 24 Parganas on 10.03.06. On that day he received two exhibits viz. concerning improvised country made pipe gun marked as Exbt.-A and round 8 m.m. ammunition marked as Exbt.-B which were sent by O.C. Mograhat P.S. through Court for examination for opinion as an arms expert in connection with P.S. case no.25 dated 20.02.06. On examination of Exbt.-A he found the same to be in working condition. Exbt.-B in chambered through Exbt.-A was test fired and appeared to be live. His report with official seal was numbered as Exbt.-3.
- xi. PW-11 in his deposition stated that he was a S.I. of Police posted at Magrahat P.S. as O.C. on 20.2.2006. On receiving the complaint he registered Magrahat P.S. Case No. 25/06. He filled up the formal

FIR form which was marked as Exbt. 4. He being the O.C. he endorsed the case to S.I. Manidra Nath Chakraborty. Prior to the proceeding proceeding he along with S.I. Dipak Ranjan Mukherjee, S.I. Arup Pal, ASI Sanjay Banerjee and Constable Tufan Ghosh went to Mamudpur village for conducting raid to arrest warrantee accused persons at about 12:30 a.m. on 20.2.2006 and he further narrated the process in which the accused was arrested and the seizure list of seized articles was prepared.

xii. PW-12 in his deposition conceded the facts stated by PW-9, PW-10, and PW-11.

xiii. PW-12 in his cross-examination stated that he had not mentioned the distance between Point – A and Point – B and from Point – B to Point – C as shown in the sketch map. He did not make any seizure from the person of the accused. He did not find the seized arms of that case in the court at that day.

9. Section 25(1)(a) of the Arms Act states as follows:-

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

(a) [manufactures, obtains, procures], 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

.....

[(1A) 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 [seven years but which may extend to fourteen years] and shall also be liable to fine.

[Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than seven years.]”

10. Section 5 of the Explosive Substance Act 1908 states as follows:-

“5. Punishment for making or possessing explosives under suspicious circumstances.— Any person who makes or knowingly has in his possession or under his control any explosive substance or special category explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punished,—

(a) in the case of any explosive substance, with imprisonment for a term which may extend to ten years, and shall also be liable to fine;

(b) in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

11. Section 27 of the Arms Act states as follows:-

“27. Punishment for using arms, etc.— (1) Whoever uses any arms or ammunition in contravention of section 5 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.

(2) Whoever uses 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 seven years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with imprisonment for life, or death and shall also be liable to fine.”

12. In the case of **Gunwantlal v. State of M.P.**¹, the Hon'ble Supreme Court held the following:-

“5. What is meant by possession in the context of this section? Is it that the person charged should be shown to be in physical possession or is it sufficient for the purposes of that provision that he has constructive possession of any firearm or ammunition in contravention of Section 3 which prohibits him to be in such possession without a licence. It may be mentioned that under Section 19 of the Arms Act, 1878, an offence corresponding to Section 25(1)(a) is committed if a person had in his or under his control any arms or ammunition in contravention of Sections 14 and 15 of that Act. The word “control” under Section 25(1)(a) has been omitted. Does this deletion amount to the Legislature confining the offence only to the case of a person who has physical possession or does it mean that a person will be considered to be in possession of a firearm over which he has constructive possession or over which he exercises the power to obtain possession thereof when he so intends? If the meaning to be given to the word “possession” is that it should be a physical possession only, then certainly the charge as framed on the facts of the prosecution case will not be sustainable but if the meaning to be given to the word “possession” is wider than that of actual or physical possession then it is possible, if the evidence produced by the prosecution is such as would sustain a finding, that he had constructive possession on September 17, 1966, when he handed it over to Miroo and Miroo handed it over to Chhaganlal because if it was not seized from Chhaganlal, the appellant could have at any time got back the physical possession of the revolver through Miroo. The possession of a firearm under the Arms Act in our view must have, firstly the element of consciousness or knowledge of that possession in the person charged with such offence and secondly where he has not the actual physical possession, he has nonetheless a power or control over that weapon so that his possession thereon continues despite physical possession being in someone else. If this were not so, then an owner of

¹ (1972) 2 SCC 194

a house who leaves an unlicensed gun in that house but is not present when it was recovered by the police can plead that he was not in possession of it even though he had himself consciously kept it there when he went out. Similarly, if he goes out of the house during the day and in the meantime some one conceals a pistol in his house and during his absence, the police arrives and discovers the pistol, he cannot be charged with the offence unless it can be shown that he had knowledge of the weapon being placed in his house. And yet again if a gun or firearm is given to his servant in the house to clean it, though the physical possession is with him nonetheless possession of it will be that of the owner. The concept of possession is not easy to comprehend as writers of Jurisprudence have had occasions to point out. In some cases under Section 19(1)(f) of the Arms Act, 1878 it has been held that the word "possession" means exclusive possession and the word "control" means effective control but this does not solve the problem. As we said earlier, the first precondition for an offence under Section 25(1)(a) is the element of intention, consciousness or knowledge with which a person possessed the firearm before it can be said to constitute an offence and secondly that possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power and control. In any disputed question of possession, specific facts admitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question. In this view it is difficult at this stage to postulate as to what the evidence will be and we do not therefore venture to speculate thereon. In the view we have taken, if the possession of the appellant includes the constructive possession of the firearm in question then even though he had parted with physical possession on the date when it was recovered, he will nonetheless be deemed to be in possession of that firearm. If so, the charge that he was in possession of the revolver on September 17, 1966, does not suffer from any defect particularly when he is definitely informed in that charge that he had control over that revolver. It is also apparent

that the words “on or before” were intended to bring home to the accused that he was not only in constructive possession of it on September 17, 1966, but that he was in actual physical possession of it prior to that date when he gave it to Miroo. It is submitted, however, that the word “on or before” might cause embarrassment and prejudice to the defence of the accused because he will not be in a position to know what the prosecution actually intends to allege. From a reference of Form XXVIII of Schedule 5 of the Code of Criminal Procedure, the mode of charging a person is that he “on or about”... did the act complained of. In view of the forms of the charge given in the Schedule to the Code, we think that it would be fair to the appellant if the charge is amended to read ‘on or about’ instead of ‘on or before’ which we accordingly order.”

13. The Hon’ble Supreme Court held the following in Mohd. **Rafiq Abdul Rahim Shaikh v. State of Gujarat**²:-

“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

(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

² (2018) 10 SCC 501

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.

20. In *Gunwantlal v. State of M.P.* [*Gunwantlal v. State of M.P.*, (1972) 2 SCC 194 : 1972 SCC (Cri) 678] , this Court held that a person cannot be charged with the offences unless it can be shown that he had the knowledge that any sort of prohibited item was present in his house.

“5. ... In some cases under Section 19(f) of the Arms Act, 1878 it has been held that the word “possession” means exclusive possession and the word “control” means effective control but this does not solve the problem. As we said earlier, the first precondition for an offence under Section 25(1)(a) is the element of intention, consciousness or knowledge with which a person possessed the firearm before it can be said to constitute an offence and secondly, that possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power and control. In any disputed question of possession, specific facts admitted or proved will alone establish the existence of the *de facto* relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question.” (SCC p. 198, para 5)

29. In *Gunwantlal* [*Gunwantlal v. State of M.P.*, (1972) 2 SCC 194 : 1972 SCC (Cri) 678] this Court has held in para 5 that: (SCC p. 198)

“5. ... the first precondition for an offence under Section 25(1)(a) is the element of intention, consciousness or knowledge with which a person possessed the firearm before it can be said to constitute an offence and secondly that possession need not be physical possession but can be constructive, having power and control over the gun, while the

person to whom physical possession is given holds it subject to that power and control.”

14. In the instant case, the prosecution failed to prove the seizure since the attesting witnesses turned hostile. The seized article did not bear the label endorsing the signature of PW-1 or any other person to have seized the improvised gun and the bomb. The seized bomb was not produced before the Court and was destroyed without permission obtained from the Court. The eye witness, i.e., PW-5 too turned hostile. PW-6 did not mention of a special identity mark on the seized arms and ammunitions. PW-7 failed to specifically state the recovery to have been instituted through a direction of concerned authority. He further endorsed that the label and the seizure list did not bear his signature.
15. There are contradictions in the evidence of PW-8, PW-9, PW-10 and PW-11. PW-12 denied to have seized anything from the person of the accused and the seized ammunition was not produced before the Court.
16. The prosecution failed to prove the seizure of the arms seized from the custody of the accused. The prosecution further failed to prove that the accused had knowledge of illegal possession of the arms as claimed to have been seized from his custody to be utilized for illegal purposes.
17. The prosecution did not endeavour to establish the source of illegal possession from physical or constructive possession of the arms by the appellant as well as the intention or conscious knowledge for subserving ulterior motive to possess the same. The nature of investigation, the process of seizure and the evidence on record being vague and inconsistent, the appellant could not have been convicted where the

prosecution failed to justify either the possession or the intention to possess the arms for his wrongful gain.

18. Under the facts and circumstances, the prosecution has failed to establish its case beyond reasonable doubt and as such the criminal appeal is allowed.

19. Accordingly, the instant criminal appeal being CRA 678 of 2009 is disposed of.

20. There is no order as to costs.

21. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

22. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)