

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.A. 169 of 2006
Sham Mohammad @ Samu Sk
-Vs-
The State of West Bengal
With
CRA 239 of 2006
Riajuddin Sk
-Vs-
The State of West Bengal**

For the Appellant : Mr. Ashraf Ali
in CRA 169 of 2006 Mr. Indrajit Chatterjee
Mr. Sankar Banerjee
Mr. Rafikul Islam Sardar

For the Appellant : Mr. Navanil De
in CRA 239 of 2006 Ms. Monami Mukherjee

For the State : Mr. Avishek Sinha

Heard on : 19.12.2023, 22.02.2024, 20.06.2024,
15.01.2025

Judgment on : 14.05.2025

Ananya Bandyopadhyay, J.:-

1. These instant appeals are preferred against the judgment and order of conviction dated 22.02.2006 passed by the Learned Additional Sessions Judge, 1st Court, Murshidabad in Sessions Trial No. 9/July/2005 arising

out of Sessions Case No. 302 of 2005 convicting the appellants under Section 25 of the Arms Act.

2. The prosecution case precisely stated that on 21.04.2004, PW-1/Sanjib Kumar Dey, Officer-in-Charge of Hariharpara Police Station had been to a place known as Lalnagar along with his officers named Prabin Kumar Sarkar, A.S.I. of Hariharharapara Police Station (PW-4), H.C. 470/Yunus Ali (PW-5), Constable 320/ Ataur Rahaman (PW-6) of Hariharpara Police Station. He had been to the place of occurrence along with his officers and staff to work out a telephonic information that some miscreants had assembled in that village Lalnagar to commit dacoity. Between 23.00 hrs. to 23.30 hrs., he along with his staff along with two villagers rushed to the spot which was situated by the side of Bhandardah "*beel*" which was abandoned and lonely place. There he found some miscreants talking to themselves at a low voice. Out of them, two could be apprehended. Their names were Samu @ Samsuddin Sk and Riajuddin Sk and the rest of the miscreants managed to flee. After arrest, search on the person of the accused Samu Sk was made. A musket type gun having length of about 42" loaded with one .303 ammunition was recovered whereas a 9" long pipe gun loaded with one .303 ammunition was recovered from the possession of accused Riajuddin. PW-1 seized those alamats under a proper seizure list in presence of Abdul Latif (PW-2) and Safikul Hasan (PW-3). He also pasted label on the seized alamats on the spot and thereafter came back to the police station and lodged a written complaint of the incident and initiated a case of an offence punishable under Section 25(1)(a) and 27 of the Arms Act against both the

appellants and endorsed the case to S.I. Dulal Sarkar/ PW-8 for investigation.

3. On completion of the investigation, the charge-sheet against the appellant and Reajuddin Sk. for the offence under Section 25(1)(a) and 27 of the Arms Act and Sections 399/402 of the Indian Penal Code.
4. Charges were framed under Sections 25 and 27 of the Arms Act against the appellant Sham Mohammad @ Samu Sk and the said Reajuddin Sk. to which they pleaded not guilty and claimed to be tried.
5. During the trial, the prosecution examined as many as 8 witnesses and exhibited certain documents.
6. The Learned Advocate representing the appellant (Sham Mohammad) submitted as follows:-

- i. The appellant of the appeal, Sham Mohammad, had submitted that according to the prosecution witnesses—PWs 1, 4, 5, and 6—all members of the police raiding party, there had been no light in the area at the relevant time. The place of occurrence, Bhandar Daha Beel, had been described as an abandoned and lonely area. Except for PW-5, none of the other members of the raiding party had explained how seizures had been conducted under such darkness. PW-5 alone had stated in cross-examination that the operations had been conducted with the help of a torchlight. This assertion, the appellant submitted, had remained uncorroborated by the other witnesses. Furthermore, the prosecution had failed to seize or produce the torch allegedly used during the raid, thereby casting

serious doubt on whether any such operation had been conducted with transparency and legality.

- ii. PW-5 had further deposed that he had not called the two outsiders who had accompanied the police party to the spot. In contrast, PW-1 had claimed in his examination-in-chief that the police party, along with four villagers, had proceeded to the location between 11:00 PM and 11:30 PM. The appellant submitted that only two villagers—PWs 2 and 3—had been cited as seizure witnesses, both of whom had been declared hostile. This had cast grave suspicion upon the fairness and completeness of the investigation, and raised legitimate doubts about the truthfulness of the prosecution's case
- iii. PW-1 had further claimed that after the arrest of two miscreants, a country-made musket approximately 42 inches in length, loaded with one .303 cartridge, had been recovered from the exclusive possession of Samu Sk, who had been wanted in connection with G.R. No. 245/2000. The appellant had submitted that no such occurrence had taken place, and that this had been evident from the depositions of PWs 1 and 4, which contained material contradictions.
- iv. PW-1, the Officer-in-Charge, had deposed that on 21.04.2004, he, along with the police party and four villagers, had rushed to the area beside Bhandar Daha Beel. He had alleged that some miscreants had been conversing in hushed tones and, upon being

chased, two persons—Samu Sk and ReajuddinSk—had been apprehended, while the others had managed to flee.

- v. However, PW-4, ASI Prabir Kumar Sarkar, had contradicted this account by stating that upon reaching the vicinity of the High School at Lalnagar, the Officer-in-Charge had instructed the team to summon two local villagers to guide them forward. Those two villagers, who had been identified as Abdul Latif and another individual, had been brought along to assist.
- vi. PW-3 had also corroborated PW-4's version, stating that around 10:30 PM to 10:45 PM, the raiding party had gone to Lalnagar and, after being asked by the Officer-in-Charge, had brought two local men to guide them. The team had then proceeded approximately 100 to 150 yards to a river pump. There, they had surrounded the area, detained two individuals who had identified themselves as Reajuddin and Samu alias Shyam Mohammad, while the others had fled.
- vii. The appellant submitted that the failure to seize the torch, coupled with the contradictions between the depositions of PW-1 and PW-5 regarding the source of light and seizure procedure, had struck at the root of the prosecution's narrative. It had further been contended that the prosecution had only sought to implicate the appellant after executing a warrant in G.R. Case No. 245/2000, and had failed to come with clean hands. The appellant had

therefore prayed that the judgment and order of conviction and sentence be set aside.

7. The Learned Advocate representing the appellant (Riyajuddin Sk.) submitted as follows:-

- i. The appellant of the appeal, Riajuddin Sk., had submitted that PW-1, in the written complaint, had alleged that the appellant had been a wanted accused in connection with G.R. No. 1070/96. However, in his examination-in-chief, he had claimed instead that the appellant had been wanted in G.R. No. 1025/96. Later, in cross-examination, PW-1 had admitted that no dacoity case had ever been reported against the appellant during his tenure in service. These material contradictions regarding the antecedents of the appellant had created serious doubts about the veracity of the prosecution's allegations.
- ii. PW-1 had also admitted that the miscreants had not fired upon seeing the police party and that the police team had not sustained any injuries. He had further acknowledged that although there had been an electrical connection in the area, the light had been switched off at the time of the raid.
- iii. PW-4, PW-5, and PW-6 had all confirmed that it had been completely dark at the time of the seizure. PW-5 had mentioned that all operations had been carried out with the help of a torchlight. The appellant had submitted that in such complete

darkness, the identification of the appellant in court had been extremely doubtful and could not have been credible.

- iv. PW-2, an independent seizure witness later declared hostile, had stated that he had not known the appellant Riajuddin Sk. but had recognised Shyam Mahammad. He had further stated that the arms and ammunition had been recovered from the possession of Shyam Mahammad. Similarly, PW-3 had deposed that he had known Shyam Mahammad but not Riajuddin, and had explicitly stated that nothing had been recovered from the person who had accompanied Shyam, referring to the appellant. PW-3 had identified the musket as being recovered from Shyam Mahammad's possession.
- v. Although PW-8, the Investigating Officer, had recorded during the investigation that PW-3 had mentioned recovery from Riajuddin, this had directly contradicted PW-3's own sworn testimony before the court. This fundamental discrepancy had undermined the prosecution's case. The Hon'ble Supreme Court, in *Sanjeet Kumar Singh @ Munna Kumar Singh v. State of Chhattisgarh*, had held that where doubt had been cast on the legality and fairness of search and seizure, the accused must be given the benefit of such doubt.
- vi. Furthermore, PWs 4, 5, and 6 had all confirmed that Abdul Latif and Safiul—PWs 2 and 3—had been the independent seizure

witnesses. Both had clearly stated that they had neither known the appellant nor seen anything being recovered from him.

vii. Additionally, PWs 4, 5, and 6 had stated that the pipe gun alleged to have been seized from the appellant had not been produced in court. PWs 5 and 6 had also stated that their signatures had not been obtained on the seizure list. PW-7, the Arms Expert, had confirmed in cross-examination that the arms and ammunition he had examined had not been produced before the court.

viii. The appellant had thus submitted that the cumulative evidence had failed to establish guilt beyond reasonable doubt. The testimonies of PWs 2 and 3 had exonerated the appellant, and the prosecution's narrative had been riddled with contradictions, omissions, and lack of material evidence. Accordingly, the appellant had been entitled to the benefit of doubt.

8. The Learned Advocate for the State submitted that the prosecution was able to prove its case based on corroborative evidence of the prosecution witnesses and the appeal shall be dismissed.

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

i. PW-1 submitted to have received an information regarding the assemblage of certain miscreants at Lalnagar village within the jurisdiction of Hariharpara police station. Being Officer-in-charge of the aforesaid police station, PW-1 recorded a General Diary bearing

No. 754 dated 21.04.2004 accompanied by ASI Prabir Sarkar and others and left for Lalnagar in a hired police jeep to execute the information received as aforesaid. On the night in between 23.30 hours PW-1 along with his companions and 4 villagers rushed to the spot situated by the side of 'Bhandar Daha Beel', an isolated and abandoned place and detected certain miscreants talking to them at a low voice and being chased they could apprehend two miscreants, namely, Samu Seikh and Reajuddin Sk. while the others escaped. The aforesaid miscreants were arrested and a country-made improvised musket type gun about 42 inch in length loaded with 1.303 ammunition was recovered from the exclusive possession of Samu Seikh who was earlier implicated in connection with a case bearing No. G.R. 245/2000, another pipe gun of about 9 inches in length loaded with 0.303 ammunition was recovered from the possession of appellant, Reajuddin Sk. was also wanted in W/A vide G.R. No. 1025/96. PW-1 after arresting the aforesaid appellants prepared the search list at the place of occurrence in the presence of two villagers affixing a label to it duly signed by the witnesses and PW-1 marked as Exhibit 1. The miscreants had assembled at the place for the purpose of committing dacoity. PW-1 had identified the seized articles marked as Mat Exhibit 1 and Mat Exhibit 2. PW-1 had initiated Hariharpara PS Case No. 43 dated 22.04.2004 under Section 399/402 of the Indian Penal Code and 25(1a) and 27 of the Arms Act and endorsed the case to S.I. Dulal Saha for investigation. The

written complaint and the formal FIR were marked as Exhibit 2 and Exhibit 2/1 respectively.

- ii. During cross-examination PW-1 failed to state about the criminal case of dacoity instituted against the appellant Reajuddin. He denied to disclose the source of information received by him which prompted him into action. He contradicted himself in the cross-examination stated to have reached the place of occurrence which was 152-200 meters away from village Nalnagar on foot. It was dark night and the raiding members were 6-7 in numbers. The miscreants did not open fire witnessing the police party and they did not sustain any injuries. Admittedly, there was no electricity to light off the area in spite of the presence of the electric connection. He further stated the other accused persons to escape his names might have been disclosed by the arrested accused persons.
- iii. PW-2 was a member of the raiding party who deposed to have heard the miscreants whispering to themselves at a considerable distance away from the pump the police surrounded them and could arrest appellant Sham Mohammad while the others escaped. PW-2 was asked by the police to accompany the Officer-in-Charge. He further stated to have witnessed a musket along with ammunition to have been recovered from the possession of Sham Mohammad and denied to identify the other appellant Reajuddin. PW-2 was declared hostile by the prosecution.

- iv. PW-3 reiterated the evidence of PW-2 in similar fashion. However, mentioned two of the miscreants to have been arrested while the others fled. He too deposed the recovery of one musket along with ammunition from the possession of Sham Mohammad while nothing was recovered from the possession of the other appellant. PW-3 too was declared hostile by the prosecution.
- v. PW-4 was asked by the Officer-in-Charge, PW-1 to call for two local persons to bribe them and accordingly PW-3 and PW-4 were called to, thereafter, turned hostile. Contrary to the statement of PW-1, PW-4 stated to have surrounded the place instead of chasing the accused persons. PW-4 confirmed the recovery of the ammunition from the possession of the two appellants respectively. PW-4 deposed that the pipe gun was not produced before the Court which was alleged to have been seized from the possession of the appellant Reajuddin.
- vi. PW-5 being a police personnel accompanied PW1 and others to the spot which was dark and the operations were held with the help of a torch light which was produced before the Court though he claimed to have been present at the spot, however, did not sign the seizure-list. He too could not identify the pipe gun which was seized from the possession of Reajuddin for its non-production before the Court.
- vii. PW-6 reiterated the evidence of PW-1 and others police personnel.
- viii. PW-7 had examined the arms in question submitted his report marked as Exhibit A, Exhibit B, Exhibit C and Exhibit D endorsing the ammunition to be a country-made musket type pipe gun with a

butt, body barrel, trigger, firing pin of 42 ½ inch of length which was a firearm in working condition coupled to endanger human life.

“Exbt.-B was one improvised country made Pistal type singular shorter pipe gun made of iron having butt, body bar trigger, firing pin etc., length 9” (approx.). It was a fire arm endanger to human life. It was in working condition.

Exbt.-C was 0.303 ammunition, marked as OK/97-7Z. It was a live ammunition which was fired by me. It was endanger to man life.

Exbt.-D was one improvised ammunition, marked 04/OK-7. It was a live ammunition and it was fired by me and endanger to human life.

Exbt.-C was properly fitted to Exbt.-A and I tested firing Exbt.-C through Exbt.-A. I also tested the potentiality of Exbt.-D by firing it through Exbt.-B. This is my report prepared and signed by me, marked Exbt.-3.” He, however, stated the aforesaid ammunitions were not present before the Court.

- ix. PW-8 was the Investigating Officer to have conducted the investigation who in the course of investigation arrested the accused Ichha Haque on the basis of the statements of co-accused Sham Mohammad. He had sent the seized arms and ammunitions to the expert for examination and report through Learned SDJM, Berhampore. He stated to have examined the witnesses PW-3 and PW-4 in whose presence the ammunitions were recovered.
10. The order and judgment dated 21.02.06 passed by the Learned Additional Session Judge, 1st Court, Murshidabad, inter alia stated as follows:-

“So, taking the above discussions, oral and documentary evidence into consideration, I am of the view that the prosecution has been able to prove the possession of fire arms and ammunitions against each of the accused persons. The recovered and seized alamats were found in the possession of the accused persons. The report of PW-7 has established it further how dangerous for human life the seized arms and ammunitions could be. So, the recovery of the seized fire arms from the possession of accused persons has been proved beyond all shadow of reasonable doubts. They had consciously possessed them without having any legal authority to possess.

Accused persons have been prosecuted in this case u/s 25 and 27 of the Arms Act only after the sanction for prosecution against them of the aid offences was obtained from the D.M., Murshidabad. Prosecution has proved the sanction letter which is Exbt.-5 in this case. It may be that we do not find the names of the accused persons in the sanction letter but we do find that case number with reference to the Hariharpara P.S. Prosecution case is that the present trial has arisen out of the said P.S. case. On perusal of the Exbt.-5 I do find that it is in order. It has been signed and forwarded to the O/C, Hariharpara P.S. by D.M., Murshidabad. So, the sanction letter (Exbt.-5) is in order and can be relied upon and finally it is held that accused persons have been prosecuted with valid sanction obtained from D.M., Murshidabad.

In view of all the discussions made above I hold that the accused persons are guilty of the charge punishable u/s 25 of the Arms Act and as such they are convicted there under u/s 235(2) Cr.P.C. However, there is no sufficient evidence in support of the charge of the offence punishable u/s 27 of the Arms Act. As such they are entitled to get an order of acquittal on that score.

Regarding quantum of sentence the accused persons is to be heard. So, they are today taken into custody and remanded to J/C with direction to produce them 22.02.06 for hearing them in the matter of sentence.”

11. The Hon'ble Supreme Court held the following in **Deomuni Sharma v.**

State of Jharkhand¹:-

“26. For inviting conviction under Section 27 of the Arms Act, it has to be proved that the firearm has been used in contravention of Section 5 or Section 7 of the Arms Act. Since it was a licensed gun, there was no question of Section 7 coming in. Insofar as Section 5 is concerned, we do not think that an act on the part of the accused in firing in the air to scare the aggressors would come within the mischief of Section 5(1) of the Arms Act. Therefore, the appellant is liable to be acquitted even of the offence under Section 27 of the Arms Act.”

12. The Hon'ble Supreme Court held the following in **Surinder Singh v. State (UT of Chandigarh)²:-**

“B. Whether the conviction of the appellant under Section 27 of the Arms Act is sustainable?”

29. Adverting to the conviction of the appellant under Section 27 of the Arms Act, it appears to us that the trial court has erred in arriving at his culpability. There is no gainsay that in order to prove a charge under Section 27 of the Arms Act, the prosecution must necessarily demonstrate contravention of either Section 5 or 7 of the Act. In the instant case, although not explicitly stated, it appears that the trial court has held it to be a case of breach of Section 5 of the Arms Act, which stipulates that no person shall use, possess, manufacture, etc. any firearms, unless such person holds a licence in this behalf, and prescribes a minimum punishment of 3 years of imprisonment.

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31. True it is that prior to the amendment of Section 27 of the Arms Act, vide Arms (Amendment) Act, 1988, the said provision penalised

¹(2009) 16 SCC 80

²(2021) 20 SCC 24

the use of any arms and ammunition for any “unlawful purpose”. However, post its amendment, Section 27 of the Arms Act is strictly confined to violation of conditions mentioned either under Section 5 or 7 of the Arms Act and the “unlawful purpose” of using arms and ammunition is no longer an inseparable component of the delinquency.”

13. The Hon’ble Supreme Court held the following in **Mohd. Rafiq Abdul Rahim Shaikh v. State of Gujarat**³:-

“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 in contravention of Section 7. Section 7 prohibits possession, etc. of prohibited arms or ammunition; it reads as follows:

³(2018) 10 SCC 501

“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.

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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)

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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 order to sustain a conviction under Section 25(1a) the prosecution has to prove that the prohibited arms and ammunitions recovered from the possession of the accused persons who were acquired and possessed for certain purpose of sale and transport etc. in contravention of Section 5 of the Act as enumerated therein. The prosecution has to prove that the accused persons were aware and conscious of possessing the firearm with an intention to utilize the same for committing an offence. The accused persons consciously and knowingly possessed the same exercising power and control to accomplish the objective and criminal intention. In the instant case, the prosecution has failed to explicitly cite an instance that the appellants possessed country-made musket type gun, pipe gun and other ammunitions consciously knowing the motive of utilizing it for illegal purposes.
15. The prosecution further failed to prove the source of possession, validity and legality of the same. There had been inconsistencies with regard to the

seizure of the arms and ammunitions writ large in the contradictions of the prosecution witnesses the manner in which the accused persons were apprehended in the darkness of night creating suspicious enough to discredit the conviction of identification.

16. The raiding party went to the village in a hired jeep but the driver of the jeep was not examined. Thereafter they travelled a considerable distance on foot and collected two individuals supposedly exposing one of the appellants to be incriminated barring the other. The seizure list witnesses displayed their apathy towards Sham Mohammad however tried to protect Riazuddin contrary to the claim of the members of the raiding party to have individually seized the arms and ammunitions from both the appellants respectively.
17. It further appeared that both the appellants had past history to have been implicated in criminal cases which might have added fodder to institute the instant case against them.
18. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and as such these instant criminal appeals being CRA 169 of 2006 and CRA 239 of 2006 are allowed.
19. Under such facts and circumstances, the judgment and order of conviction dated 22.02.2006 passed by the Learned Additional Sessions Judge, 1st Court, Murshidabad in Sessions Trial No. 9/July/2005 arising out of Sessions Case No. 302 of 2005 is set aside.
20. Accordingly, CRA 169 of 2006 and CRA 239 of 2006 stand disposed of.
21. There is no order as to costs.

22. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action
23. 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.)