

(1983) 08 GAU CK 0012
In the Gauhati High Court
Case No : Criminal Appeal No. 13 of 1982

Salhauna

APPELLANT

Vs

Union Territory of Mizoram

RESPONDENT

Date of Decision : 09-08-1983

Acts Referred:

Arms Act, 1959 — Section 25, 25(1), 27, 29, 3
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27

Citation : (1984) 1 GLR 91

Hon'ble Judges : T.N. Singh, J

Bench : Single Bench

Advocate : S.K. Senapati and B.L. Singh, for the Appellant; M.K. Sarma, for the Respondent

Final Decision : Allowed

Judgement

T.N. Singh, J.—Mizoram is Indian, soil. Laws and institutions established by and under the Constitution confer the same rights on the people of the other parts of the great Indian Republic. Unfortunately, the Union Territory is having a troubled time and the aid of armed force has been called in by civil authorities to deal With problems of law and order which, albeit, accords well with the recognized norms of counter insurgency jurisprudence common to all legal systems of the world. What is uncommon, however, is that these norms appear in the locale as suspects, in the Constitutional as well as legal perspective. Possibly, because they react, indeed strongly and albeit inevitably, on the effer-vescive democratic ethos emerging though unevenly in the free society of this free country. It is not unusual, therefore, that Appellant's sad and forceful grievance is this appeal is that he is a victim of a witch hunt. The over-arching question which, therefore, looms large on the forensic Held in this case is whether the special laws enacted to enable the security forces to act in the manner prescribed there under have been violated in this case or, further still, if these laws have taken away or impaired unconstitutionally the rights of the Appellant available to him under the

ordinary laws also grown on Indian soil.

2. This appeal was heard at length on facts but on law within marginal limits as Dr. Sarma, the learned Standing Counsel for the Union Territory of Mizoram submitted that he would need further instructions on certain aspects of the case involving questions of constitutional importance. Mr. S.K. Senapati, the learned Counsel appearing for the Appellant impressed upon me the need for an expeditious disposal of the matter and in this connection he drew my attention to several orders passed earlier by the Court in this appeal wherein this imperative necessity was duly recognized making it difficult for me to accept Dr. Sarma's prayer for further adjournment of the hearing which has already been much delayed as this Bench was not available for a long time. It is also Mr. Senapati's submission that the contentions based on procedural infractions, constitutional as well as legal, need not be dealt with inasmuch as the case can be disposed of otherwise in favor of the Appellant in view of the fact that ingredient of the offence u/s 25(1)(a) of the Arms Act (for short, the Act) with which the Appellant has been charged have not been proved by the prosecution. This submission of the learned Counsel has weighed with me as the primary duty of the Court, according to me, is to see that delayed disposals be avoided for accuser's benefit. I directed my anxious consideration therefore to the submissions made by both sides on the basis of evidence produced in the case and I have accordingly come to the conclusion that it would be proper to dispose of the matter by merely indicating, but not dealing with the effect of procedural infractions, for the reason that it is necessary also for this Court acting as a constitutional guardian of liberty of citizens to bring home to the law-enforcement agencies operating in the Union Territory the importance of due compliance with the procedures prescribed by law in the course of investigation to give life and meaning to, the constitutional and legal safeguards available to an accused under the laws and Constitution of India. Law-makers have taken due care to enact adequate counter insurgency measures and the Fundamental Duties constitutionally mandate the rulers and the ruled alike to conduct themselves appropriately to ensure proper administration thereof with due care and caution so that the prescribed limits are not over stepped by either.

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5. It is the common case of both sides that the only evidence in this case is that of discovery of the arms and ammunitions at the instance of the Appellant for which support is sought to be obtained from the confessional statement of the Appellant. Mr. Senapati's further contention, however, is that besides the fact that the evidence of discovery and the confession are inadmissible, the ingredients of the offence u/s 25(1)(a) of the Act even on the tainted evidence having not been proved, the Appellant is entitled to an acquittal. It is necessary for me to refer to the relevant evidence to deal with these contentious. However, before doing so I may indicate that although the Appellant did not adduce any

evidence in his statement u/s 313 Code of Criminal Procedure be denied the fact that any arms and ammunitions were seized from him or at his instance on 12.7.74. About seizures on the subsequent dates, he further stated that he was arrested by the CRPF personnel on 11.7.74 and was confined in but not taken out of, the camp for about a month, from where he was taken to Kolasib P.S. and from there to Aizawl Jail. About the recording of the confessional statement he merely gave an evasive answer and therefore the said confession whatever it was worth, stands unrestricted, indeed only in the formal sense as he denied all recoveries.

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10. Despite the fact that the evidence as discussed above leaves no room for doubt that it was Scrappy, discrepant and contradictory and therefore a conviction for any offence on such evidence cannot be sustained, it is necessary for me to examine the main contention in this case that the ingredients of the offence, u/s 25(1)(a) of the Act have not been brought home to the Appellant. Section 3 of the Act provides that no person shall "acquire, have in this possession, or carry any firearm or ammunition unless he holds in this behalf a license in accordance with the provisions of this Act and the Rules" while Section 25(1)(a) provides that "whoever acquires, has in his possession or carries any firearms or ammunitions in contravention of Section 3" shall be liable to be punished for a term of imprisonment which may extend up to 3 years or fine or both. Indeed, Dr. Sarma rightly concedes that if the Appellant has to be convicted he must in this case, on the evidence on record,, be found to have been in "possession" of the arms and ammunitions as it is not a case of the Appellant either acquiring or carrying the same.

11. In this connection my attention has been drawn to two decisions of the apex Court. In Gunwantlal Vs. The State of Madhya Pradesh, it was held that "the first precondition for an offence u/s 25(1)(a) of the Act is the element of intention, consciousness or knowledge with which a person possessed a firearm before it can be said to constitute an offence". However, their Lordships also added that "the possession need not be physical but can be constructive, having power and control" over the prohibited article. It was further held that 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 the article. in Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others, Superintendent and Remembrance Legal Affairs v. Anil Kumar the term "possession" was construed in the context of Section 29(b) of the Act. It was the case of a person giving a fire-arm for repairing but the proposed repair was carried out at a place different from the place of business

where the license-holder was entitled to undertake such a repair. The Court held that "possession" was polymorphous term having different meanings in different contexts and a completely logical and precise definition thereof uniformly applicable to all situations in the context of all statutes was not easy to work out. By referring to their work on Jurisprudence the exposition of the term by Dias and Hughes as well as by Saimond was taken into consideration and the dictum in *Gunwantlal* (supra) was reiterated, The Court held that the term implies "a right and a fact, the right to enjoy annexed to the right of property and the fact of the real intention" adding that "it involves power of control and intent to control."

[Emphasis is their Lordships]

12. In this case Dr. Sarma relies on the following facts which according to him proved "possession" of the recovered fire-arms and ammunitions within the meaning of Section 25(1)(a).

(1) The articles were found concealed in a schedule place about which only the Appellant had exclusive knowledge.

(2) The Appellant did not report to the authorities about the concealment of the weapons which, according to his confession was witnessed by him.

(3) He led the police party to the place of recovery.

I have therefore to decide in this case if on these facts the Appellant could be said to be in "control" of the prohibited articles and to have "an intention to control" the same in view of the test laid down by their Lordships of the Supreme Court which according to Dr. Sarma, in facts of the case, ought to provide the real test for determining "possession" thereof of the Appellant. Indeed, Dr. Sarma conceded that it is not prosecution's case that the prohibited articles were found in physical possession of the Appellant, actual or constructive. But, as held in *Gunwantlal* (supra) the existence of de facto relation of control or dominion at the Appellant over the same have to be established by the prosecution to prove his possession thereof. In Oxford's English Dictionary "dominion" in the legal sense is said to mean ownership of property and also right of possession as the term was understood in Roman law ("dominium"). In the same Dictionary the word "control" is meant to imply the some short of power and function of the nature of restraint, check or regulation. Indeed, Dixon J. in *Bank of New South Wales v. Commonwealth* (76 C.L.R.1) described the word "control" as an unfortunate word of wide and ambiguous import which according to his Lordship ought to be construed to mean something weaker than "restraint", something equivalent to "regulation". It must not, however, according to me, be forgotten that in construing the legal import of any particular word the content in which it is used in the statute should actually receive paramount importance, indeed, the maxim *Noscitur a Sociis* really manifests this rule of construction. Thus, the stress on the expressions "dominion or control" and "power of control" or "intent to control" finding place in apex Court's

decisions have to be read in the light of the fact that word "possession" is used along with other words "acquire" and "carry" and also of the object of the particular penal provision itself. If it is so construed the word "control" used in the underlined expressions will be found to have a more concrete and less ambiguous import. Indeed, even their Lordships qualified the words and expressions as well, eg. "power", "right to enjoy" "dominium" etc." In my opinion, the "control" of the person over the article concerned in the content of Section 25(1)(a) must be of such nature whether in respect of "factum" or "animus" that some overt act on his part in dealing therewith in any manner must be established so that the elements of "restraint" or "regulation" being exercised by him in respect thereto becomes unequivocally apparent. Mere knowledge of the person concerned of the articles being hidden by somebody at any particular place unless the place was such to which he had exclusive access would not amount to his having "control or power of control" and dominium" over the articles in question. Because, in my opinion, the object of Section 25(1)(a) of the Act is to punish a person who has not only the opportunity but the "power" as well as intention to deal or handle any firearm or ammunition if he does not possess the legal authority to do so as contemplated by Section 3 of the Act. Mere omission on his part to act positively in any manner to deny to himself such "control" has not been made punishable by the Legislature according to me. Indeed, this position is borne out by Section 36 of Chapter VI (Miscellaneous) which is deliberately excluded from Chapter V. (offence or penalties) which includes Section 25 and also Section 29 which were construed in the above decisions by the apex Court.

13. Therefore, neither the fact that the Appellant had knowledge of the place nor the fact that it was a secluded place nor even the fact that he failed to report to the authorities about the concealment would invest him with the power or function in the nature of "control" or even "in mention to control" the arms and ammunitions concerned. Further, in my opinion, neither the fact that none else had knowledge about the place where the articles were concealed nor the fact that it was the Appellant who led the patrol party to the place of recovery will be material for the purpose of construing "control" of the Appellant over them. Indeed, in this case the two last mentioned facts have not been established either on evidence. The evidence of P.W. 1 who brought one Ralliautawna into the scene leading to the discovery and the "local man" of whom the Appellant spoke of in his confessional statement could very well be said to have knowledge of the concealment. Indeed, it is only the fact of concealment and not the exact place thereof which is material for this purpose. The recovery itself at the instance of the Appellant on the evidence on record in this case as discussed cannot be accepted de hors the fact that this was not in accordance with law. As held in 1983 (7) ACR 222 (SC) what Section 27 of the Evidence Act contemplates is that "the discovery mostly and really is as regards the authorship of concealment". If, therefore, neither from the confessional statement nor from the other evidence in the case it can be found that it was the Appellant who had concealed the arms

and ammunitions which were alleged to have been recovered in the course of search of which the leadership is attributed to the Appellant, then no case of discovery u/s 27 can be said to have made out on which indeed hinges the factor of "possession", the ingredient of offence.

14. In this cast on a reading of the confessional statement as a whole the ingredient of the offence cannot be said to have been admitted by the Appellant and the same being therefore not exculpatory is no confession in the eye of law. Neither on the other evidence even considering the facts highlighted by Dr. Sarma, I am in a position to hold that the Appellant can in any way be said to have had "possession" of the arms and ammunitions said to have been recovered in this case. Accordingly I find that the ingredients of the offence contemplated u/s 25(1)(a) of the Act not having been proved against the Appellant in this case he is entitled to be acquitted. The appeal is, therefore, allowed and the conviction and sentence passed in this case against the Appellant are set aside. The Appellant, who is on ball, need not surrender to his bail bond.