

**(2014) 09 CAL CK 0090**

**Calcutta High Court**

**Case No:** C.R.A. No. 222 of 2014

Md. Imtiyaz

APPELLANT

Vs

The State of West Bengal

RESPONDENT

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**Date of Decision:** Sept. 16, 2014

**Acts Referred:**

- Arms Act, 1959 - Section 25(1)(a), 25(1-B)(a), 35
- Criminal Procedure Code, 1973 (CrPC) - Section 100(4), 374(3), 407

**Hon'ble Judges:** Joymalya Bagchi, J

**Bench:** Single Bench

**Advocate:** Souvik Mitter and Rituparna Ghosh, Advocate for the Appellant; Subir Banerjee, Advocate for the Respondent

**Final Decision:** Partly Allowed

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### **Judgement**

Joymalya Bagchi, J.

The appeal is directed against the judgment and order dated 25.02.2014 passed by the learned Judicial Magistrate, 5th Court, Barrackpore, North 24 Parganas in G.R. Case No. 4578 of 2013/T.R. No. 610 of 2013 convicting the appellant for commission of offence punishable u/s 25(1-B)(a) of the Arms Act and sentencing them to suffer simple imprisonment for three years and to pay a fine of Rs. 1,000/- each, in default to suffer simple imprisonment for two months more each for the offence punishable u/s 25(1-B)(a) of the Arms Act.

2. The prosecution case, as alleged, against the appellants is to the effect that on receipt of secret information on 20.09.2013 at 12:20 hours that a gang from Munger, Bihar with a body was coming to Jessore Road and its adjacent areas to sell arms and ammunition to a Bagna for circulation in West Bengal, Sub-Inspector Sougata Ghosh of SOG, CID, West Bengal along with other police personnel left for Jessore Road and its adjacent area to work out such information after consulting superiors. On arrival at Airport Police Station, he diarised the information vide

General Diary Entry No. 1383 dated 20.09.2013 at 13:40 hours. Thereafter the police party left for 30B Bus Stand at Jessore Road crossing under Airport Police Station as per the source information. At 13:50 hours, they reached at the spot and kept their vehicle at a distance and placed themselves strategically at the said crossing. After 20 minutes they found that two young persons were coming from Barasat end of Jessore Road and the said persons stood near the 30B Bus Stand. At around 14:30 hours the source indicated four persons were coming from Kolkata side of Jessore Road with one lady. They intercepted all the four persons in front of the 30B Bus Stand but two persons who had arrived earlier ran away. PW-1 disclosed his identity and looked for public witness in order to effect search of the detained persons. No person was willing to become public witness. PW-1 offered himself and other members of the police party to be searched by the detained persons. They declined to do so. Thereafter the detained persons were searched one after another. From appellant No. 1 one improvised 7.65 mm black coloured pistol with trigger, firing pin, brown butt, body and barrel measuring about 6 inch approximately, fitted with one empty magazine and one separate extra magazine and three boxes of 7.65 mm ammunition, each box containing 20 rounds of ammunition was recovered. From the other appellants similar fire arm, magazines with two boxes of 7.65 mm ammunition, each box containing 20 rounds of ammunition was recovered. The detained persons could not produce valid documents of such arms and ammunitions. The fire arms, ammunitions were kept in four white nylon bags, one of such bags were carried by each of the appellants. The aforesaid fire arms, magazines, ammunitions and white nylon bags were seized under a seizure, packed and labelled in the presence of the Police party and the detained persons. The detained persons were arrested and taken to Airport Police Station along with the seized articles. PW-1, Sougata Ghosh lodged written complaint resulting in registration of Airport Police Station Case No. 234 of 2013 dated 20.09.2013 u/s 25(1)(a) of the Arms Act.

3. In course of investigation in respect of seized arms and ammunitions expert opinion and sanction from the Commissioner of Police were collected. In conclusion of investigation, charge-sheet was submitted against the appellants under Sections 25(1)(a)/35 of the Arms Act. Charges were framed under Sections 25(1)(a)/35 of the Arms Act. The appellants pleaded "not guilty" and claimed to be tried.

4. In course of trial, prosecution examined as many as eight witnesses and exhibited a number of documents including the seized articles as material exhibits. Expert report and sanction order was exhibited as Exbts. 7 and 11 respectively. The defence of the appellant was one of innocence and false implication. In conclusion of trial, the trial Judge by judgment and order dated 25.02.2014 convicted the appellants u/s 25(1-B)(a) of the Arms Act and sentencing them to suffer simple imprisonment for three years and to pay a fine of Rs. 1,000/- each, in default to suffer simple imprisonment for two months more each for the offence punishable u/s 25(1-B)(a) of the Arms Act.

5. Although in view of Section 374(3) of the Code of Criminal Procedure the appeal ought to have been instituted before the Court of Sessions, I find that by order dated 04.04.2014, the appeal was admitted by this Court. The appeal is presently ready for hearing and the lower court's record have already arrived. In view of the aforesaid facts, I am inclined to hear the matter on merits as this Court has ample power u/s 407 of the Code of Criminal Procedure to withdraw itself and hear any appeal on merits instituted before any Subordinate Court for ends of justice.

6. Mr. Mitter, learned counsel appearing for the appellant No. 1 along with Soumyajit Das, submitted that the search and seizure in the instant case was not conducted in accordance with law. Independent witnesses have not been examined to prove the seizure although the place of occurrence is a busy thoroughfare and the seizure allegedly took place in the afternoon. It is further submitted that there is no labeling or sealing of the seized articles giving rise to reasonable suspicion as to the genuineness of the prosecution case. It has also argued that the sanction in the instant case has been improperly granted. Hence, it was prayed that the appellant No. 1 be acquitted of the charges levelled against him.

7. Mrs. Ghosh, learned counsel appearing as amicus curiae as appellant nos. 2, 3 and 4 are unrepresented adopted the submissions of Mr. Mitra. She further submitted that the prosecution case is based on the evidence of Police witnesses only and hence ought not to be believed. She prayed for acquittal of the appellants.

8. Mr. Banerjee, learned Additional Public Prosecutor submitted that adequate explanation has been given for not joining independent witnesses. He further submitted that there labels were put on the seized articles and exhibited during trial. He further submitted that the articles were duly examined by expert that they were in working and live condition by the expert. Sanction was granted after perusal of relevant documents. He submitted that actual production of seized articles before the sanctioning authority is not a sine quo non for grant of valid sanction. He prayed for dismissal of the appeal.

9. PW-1 (Sougata Ghosh) was the leader of the police party and first informant in the instant case. He stated at the relevant time he has attached to SOG, CID, West Bengal as S.I. of Police. On 29.09.2013 he received service information that some persons with a lady from Munger, Bihar was coming to Jessore Road area to deliver the fire arms and ammunition. He got such information around 12 noon. He informed the superior and obtained command certificate to work out such information. Thereafter, he along with Timir Acharya (PW-2), Kazi Najrul Islam (PW-3) and others including two lady A.S.I. Pratima Pandey and Bulu Senapati (PW-5) left in vehicle bearing No. WB 24C 5576, around 12:25 hours. They reached Airport Police Station and the aforesaid information was diarized as Airport Police Station GD Entry No. 1383 dated 29.09.2013 at 13:40 hours. As per showing of the source they sanctioned themselves at Jessore Road crossing near 30B Bus Stand around 13:50 hours. Fifteen minutes later two young persons came from Barasat side towards bus

stand. Around 14:30 hours four persons along with a lady (minor and not arrested) came from Calcutta side from Jessore Road and approached 30B Bus Stand. When they reached the Bus Stand the police party apprehended five persons along with the girl. The police party disclosed identity PW-1 requested passerbyes to join such operation and even issue notice to three passerbyes but they refused to participate. The detained person disclosed their identities. They were informed that they would be searched and they were given option the raiding party they declined to do so. One 7.65 mm Pistol fitted with and one magazine along with one extra magazine and three packets of 7.65 mm ammunitions is containing 20 rounds was recovered from the appellant No. 1. These articles were kept in a white colour bag in his right hand. Similar fire arms with magazines and two packets of 7.65 mm ammunitions, each packets containing 20 rounds of ammunitions kept in white colour bag were recovered from the possession of each of the other appellants. In all four numbers of 7.65 mm pistol fitted with empty magazine along with one extra magazine and 180 rounds of 7.65 mm ammunitions and four white colour bags were recovered from the appellants. Nothing was recovered from the girl accompany the appellants. The aforesaid articles were searched under a seizure list and signed by PW-2 and PW-3 as well as the appellant seized articles were packet and label was signed by the appellants and witnesses. Appellant stated that they had brought the fire arms of ammunitions for sell to one "Bagna" from Bongawn, who could not be traced. The appellants were arrested and taken to Airport Police Station along with the seized articles. PW-1 prepared the written complaint on his laptop and submitted the same at the police station which was treated as First Information Report. The appellants, seized articles and other documents were handed over to the Investigating Officer of the case. As the girl accompany the appellant who was a minor, she was sent to Child Welfare Committee. PW-1 put the notices issued to the appellants as well as the independent notices prior to the search. He put the seizure list as well as the First Information Report seized Alamat were produced in Court and exhibited. He proved the labels on the Alamat containing his signature and that of the appellants and other witnesses.

10. PW-2, PW-3 and PW-5 are the Police Officers who accompanied PW-1 in the raid. They have corroborated the evidence of PW-1. They have also proved the seizure and firearms and ammunition from the appellants and have proved their signatures on the seizure list as well as labels. Their evidence remained unshaken in cross-examination.

11. PW-4 was the Assistant Sub-Inspector of Police posted at Airport Police Station at the relevant time. He stated that general diary was lodged at Airport Police Station prior to the holding of the raid. He further stated that after the raid the PW-1 prepared the written complaint on his laptop and submitted the same to him. He received the compliant and drew up the formal first information report. He proved the formal First Information Report.

12. PW-6 has proved the report of the arms expert (Exbt. 7). He stated he prepared the report and signed it. He has also proved the signature of the arms expert thereon (Exbt. 7/1). He has stated that he received the arms and ammunition in sealed packet and on examination of the same he found that the seized arms were in working condition and ammunitions were live. He also stated that the seized arms and ammunition could endanger human life.

13. PW-7 proved the general diary being General Diary No. 1383 dated 20.09.2013 which has been exhibited as Exbt. 8.

14. PW-8 is the Investigating Officer of the case. He collected the sanction order and has proved the same (Exbt. 11). He submitted the charge-sheet.

15. Evidence of PW-1, PW-2, PW-3 and PW-5 clearly establishes that the active firearms and the ammunitions which could endanger human life were seized from the possession of the appellants.

16. It has been argued that police witnesses alone have deposed about seizure. No independent local witness was adduced to prove the seizure. I find from the evidence of PW-1 that efforts were made to join independent witnesses who however declined to participate in the seizure. Notices to such witness to join the search have been established in this case. It is common knowledge that ordinary persons did not like to get involved in criminal cases and do not voluntarily offer themselves as witnesses to police action like searches and seizures. Circumstances leading to the search and seizure in the instant case have been duly proved by producing the general diary. Exbt.-8 lodged prior to the raid disclosing source information. Search and seizure in the course of such raid from the appellants is wholly established by the evidence of PW-1, PW-2, PW-3 and PW-5. There is nothing on record to show that such witnesses have reasons to be inimical to the appellants so as to falsely implicate them in this case. Evidence of a police witness cannot be discarded merely on the account of his being a member of the police force. Such evidence is to be evaluated like any other evidence on the touchstone of probability and credibility. As no additional weightage may be given to the version of police witnesses their version ought not to be outright rejected in the absence of corroboration from independent witnesses unless it is shown that such evidence is unreliable and unworthy of credence. Section 100(4) of the Code of Criminal Procedure enjoins a duty upon a police officer to call upon two or more independent local inhabitants to witness a search to be conducted in the locality. Mere failure to do so does not render the search invalid unless it is shown that such non-compliance has occasioned failure of justice. Such failure of justice is to be determined in the factual backdrop of each case. Non-compliance of the aforesaid provision per se does not render the evidence of police witnesses relating to search inadmissible and the search illegal. In the instant case, there is ample evidence to show adequate efforts including notices under the aforesaid provision of law upon local persons were issued thereby refusing to join the search. In view of such

evidence on record, I am of the opinion that prosecution has amply explained circumstances for not adducing local witnesses to prove the search and no failure of justice can be said to have occasioned to the appellants on that score.

17. Coming to the issue of non-sealing of the seized articles, I find that the articles were labelled and seized at the place of occurrence in presence of the appellants. The seized alamats were produced in Court and the labels thereon containing the signature of the witnesses and the appellants have been proved. In view of such evidence on record, I am of the opinion that the contentions that seized articles were not properly labelled and sealed have no legs to stand.

18. I find that the prosecution has proved the expert opinion (Exbt. 7) the seized firearms were in working condition and ammunitions were live. Sanction order has also been duly proved in the instant case. I am unable to accept the argument that sanction order is invalid as the alamats were not physically produced by the sanctioning authority.

19. In view of the aforesaid discussion, I find that the prosecution has been able to prove its case beyond reasonable doubt. The conviction of the appellants u/s 25(1-B)(a) of the Arms Act has been upheld.

20. Coming to the issue of sentence it has been argued that the appellant No. 1 is very ill and suffering from cancer. Mr. Mitter argued that appellant No. 1 had not been convicted in any case till date. Mrs. Ghosh argued that appellant nos. 2, 3 and 4 do not have any criminal antecedents.

21. In view of the aforesaid facts, I am inclined to reduce the sentence imposed upon the appellant and directed that the appellants shall suffer simple imprisonment for one year and to pay fine of Rs. 1,000/-, in default shall suffer simple imprisonment for two months more for the offences punishable u/s 25(1-B)(a) of the Arms Act.

22. The appeal is partly allowed to the aforesaid extent.

23. I record my appreciation for the able assistance extended by Mrs. Ghosh as amicus curiae to this Court for disposal of the appeal.

24. Let a copy of the judgment along with the Lower Court Record be sent down to the trial Court at once.

25. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.