APPELLATE CRIMINAL.

Before Mallik and Patterson JJ.

JOGENDRAMOHAN GUHA

v.

EMPEROR.*

1932

Aug. 31; *Sept.* 1.

Indian Arms Act—s.20, when applies—Presumption of intention—Ordinance —"Cases under the Ordinance," meaning of—General Clauses Act (X of 1897), ss. 6, 30—Indian Arms Act (XI of 1878), ss. 19 (f), 20—Bengal Emergency Powers Ordinance (XI of 1931), ss. 15, 17, 30, 31.

The two parts of section 20 of the Indian Arms Act are quite independent of one another: the first part relates to the possession of arms prior to the time of the search.

Mere possession of an unlicensed weapon is punishable under section 19(*f*) of the Indian Arms Act but if the circumstances indicate an intention that the possession may not be known to the police, the offence is punishable under section 20. Whether such intention exists or not is a pure question of fact to be determined in each particular case with reference to the facts proved in that case.

From the very nature of the weapon, and, especially in view of the severe restrictions imposed by the authorities on the possession of revolvers, there is a strong presumption that a person in unlicensed possession of a revolver, who cannot or will not account for such possession, has procured it for unlawful purposes and has a fixed intention that such possession shall not become known to the authorities. This presumption is, however, one that can be easily rebutted in the case of persons whose only fault is carelessness, thoughtlessness or ignorance of the law.

The expression "Cases under the Ordinance", as used in section 31 of Ordinance XI of 1931, relates to the trial of cases by special magistrates appointed under the Ordinance, and does not mean the same thing as the expression "Offences punishable under the Ordinance". The latter expression relates to offences created by the Ordinance.

If the conviction and sentence were legal at the time the magistrate delivered the judgment, the question whether the continued detention of the accused does or does not become illegal by reason of the expiry of the term of the Ordinance is not a question that the High Court, *sitting as a court of appeal,* can properly adjudicate on.

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The material facts appear sufficiently from the judgment.

*Criminal Appeal, No. 390 of 1932, against the order of S. K. Sinha, Chief Presidency Magistrate and Special Magistrate of Calcutta, dated April 29, 1932.

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H. M. Bose (with him *Phaneendramohan Sanyal*) for the appellant. The sentence of six years' rigorous imprisonment is in excess of the magistrate's powers and, therefore, illegal. The magistrate has not found as a fact that this particular offence was committed in furtherance of or in connection with any terrorist movement. The magistrate is right, because there is no evidence on the record to justify any such finding. The trial, therefore, is not a trial under the Ordinance at all, in which case alone the special magistrate can pass a sentence in excess of his powers under the ordinary law as a first class magistrate, namely, two years. Being a scheduled offence, it can be tried by a special magistrate, but that does not by itself make it a trial under the Ordinance. Sections 30 and 31 of the Ordinance. Secondly, the order of the magistrate remains valid so long as the Ordinance remains in force. With the expiry of that Ordinance, the magistrate's order ceases to have any force. The accused should be set at liberty at once.

The conviction under section 20 of the Indian Arms Act in this particular case is illegal for two reasons. Firstly, it applies only to a case where, at the time a search is being made under section 25 by virtue of a search warrant properly issued under that section, the possessor attempts to conceal the weapon. Here it is admitted that, as soon as the searching officer went there, the accused himself pointed out the spot where it was. He made no attempt to conceal it. Secondly, there must be some concealment at least before section 20 could apply and there is none in this case. That it was kept in a box is of no importance. Even a licensee keeps his revolver under lock and key for safe custody.

The Deputy Legal Remembrancer, Khundkar (with him *Anilchandra Ray Chaudhuri*) for the Crown. The Ordinance nowhere requires that there must be a finding by the magistrate that the offence is committed in furtherance of any terrorist movement. It is entirely absent from section 30 of the Ordinance, which deals with the appointment of

special magistrates. Section 31 deals only with the procedure. The expression occurs only in section 25, which relates to the appointment of a special tribunal. Even in that case, it is entirely a matter for the Local Government, who make the appointment, to consider. With regard to the second point, there seems to be a confusion made between the expressions "Trials of cases under the "Ordinance" and "Offences punishable under the "Ordinance." The former means the trial of all cases by special magistrates, duly appointed under section 30 of the Ordinance, of the scheduled offences, which include all offences under the Indian Arms Act. The latter means offences created by the Ordinance itself, namely, those mentioned in section 15 or created by rules framed under section 17.

A complete answer to the third point is given by section 6(*d*), read with section 30 of the General Clauses Act. The language used there is clear and shows that a sentence validly passed is not affected by the subsequent repeal or expiry of an Act and the word Act includes Ordinance wherever it occurs.

With regard to the last point raised, it may be noted that the present case comes under the first part of section 20 of the Indian Arms Act. This part is quite independent of the second part of that section. What is necessary under that section is not physical concealment but an intention to conceal. That intention must be assumed in cases of possession of unlicensed, specially smuggled weapons. The provisions for the possession of arms in this country are very strict. Section 19(*f*) applies to cases of carelessness, for example, when a man has negligently failed to renew his license in time, or the son has failed to deposit his father's weapons when the latter is dead or a foreigner ignorant of the law purchases a revolver from an unauthorised person, *bonâ fide* believing he is entitled to do so. It can have no application to the present case. The accused managed to keep it concealed from everyone till the arrival of the police made him realise that the show

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was up. The accused has been rightly convicted and sentenced.

Cur. adv. vult.

PATTERSON J. The main facts of the case out of which this appeal arises are not disputed and are briefly as follows:—

The appellant, Jogendramohan Guha, was arrested in Sukea Street on the 16th March, 1932, in consequence of certain information which had been received by the police. Later in the day, he was taken to the house of his cousin, Babu Lalitmohan Guha, at No. 2, Kalu Ghosh Lane, where he had been living for some time back and working as private tutor to certain members of the family in return for his board and lodging. He had been sharing a room with Lalit Babu's son, Haripada, and when the police were about to search this room, the appellant showed them a locked steel trunk, and told them that what they wanted was in that trunk. The key of the trunk was produced from a drawer under the direction of the appellant, and on the trunk being opened a loaded revolver was found therein, concealed among some books and clothes belonging to the appellant. A note book (which is said to contain instruction and formulas for making bombs, though there is no evidence on this point), as well as a manuscript copy of a Bengali poem (said to be of a seditious character) were also found in the trunk along with the revolver. The appellant made no attempt to account for his possession of the revolver, —which is an *unlicensed* weapon, and in all probability a *smuggled* weapon which never *has* been licensed.

On the above allegations, the applicant was, in due course, placed on his trial before a special magistrate appointed under the provisions of Ordinance No. XI of 1931, with the result that he was convicted under section 20 of the Arms Act and sentenced to six years' rigorous imprisonment.

The other occupant of the room, Haripada, was tried along with the appellant and was acquitted, the

magistrate holding that he had no knowledge of the contents of the appellant's trunk.

Possession being admitted, the only question for determination in this appeal is whether the circumstances were such as to bring the offence within the mischief of the first part of section 20 of the Arms Act, that is, whether the circumstances were such as to indicate an intention on the part of the appellant that his possession of the revolver should not be known to the police.

It has been pointed out, on behalf of the appellant, that concealment at the time of search is specifically dealt with in the second part of section 20, and it has been contended that the question for determination in the present appeal ought to be whether the offence comes within the mischief of that part of the section,—that the first part of the section does not apply to cases where arms are found on a search being made under section 25 of the Act. In my opinion, there is no force in this contention. The two parts of section 20 are quite independent of one another, and what we are concerned with in the present case is the character of the appellant's possession of the revolver prior to the time of the search.

In deciding this question, it has to be borne in mind that a revolver is not an ordinary weapon intended for purposes of sport or display, or for occasional use in the event of its possessor becoming involved in a fight, or something of that sort. It is intended for use at close quarters, and owing to its deadliness and to the ease with which it can be used and concealed, it is *par excellence* the chosen weapon of the murderer and the robber, and especially of the secret assassin. This being so, and especially in view of the severe restrictions imposed by the authorities on the possession of revolvers,—there is, in the nature of things, a strong presumption that a person in unlicensed possession of such a weapon, who cannot or will not account for his possession thereof, has procured it for unlawful purposes, and has a fixed intention that his possession thereof shall not

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become known to those public servants, namely the police, whose duty it is to enforce the provisions of the Arms Act with a view to the protection of the ordinary private citizen and the law-abiding public generally. Lest it be said that such a presumption would tend to place in jeopardy persons who have, through carelessness, thoughtlessness or ignorance of the law, offended against the provisions of the Arms Act in respect of the possession of such weapons, it should be pointed out that the intention referred to in the first part of section 20 is only one of the factors that would have to be taken into consideration in deciding what sentence would be appropriate in any particular case, and that it does not follow that a person who has been convicted under the first part of section 20 will necessarily receive a heavier sentence than would have been inflicted on him under section 19(*f*) of the Act. It should also be pointed out that the presumption referred to above is one which could very easily be rebutted in the case of persons whose only fault has been carelessness, thoughtlessness or ignorance of the law, and who have not been inspired by any deliberate intention of keeping the fact of their being in possession of an unlicensed revolver from the knowledge of the authorities. In the present case the appellant has not attempted to rebut the presumption referred to above, or to give any explanation of his having been found in possession of an unlicensed revolver. In the present case, moreover, the appellant had, as the evidence clearly shows, kept the fact of his having a revolver,—and a loaded one at that,—in his possession, a dead secret from all his relations, including even Haripada with whom he shared a room. The evidence is that the trunk was always kept locked, that the key always remained with the appellant, and that the latter used never to open the trunk when anyone else was present.

It has rightly been contended on behalf of the appellant that mere *concealment* of an unlicensed weapon may not of itself be sufficient to bring the offence within the mischief of the first part of section

20, more especially if the circumstances are such as to indicate that the intention of the offender was merely to keep the weapon concealed from his friends, relations and other private persons, and not necessarily from the police, but it should be pointed out that actual physical concealment is not a necessary ingredient of the offence, but a mere piece of circumstantial evidence, which may be taken into consideration along with other circumstances with a view to ascertaining the real intention of the offender. It may also be pointed out that, although in the case of a revolver, the immediate object of keeping such a weapon concealed may be to prevent the offenders' friends and relations from getting to know about it, the main and ultimate object would in the majority of such cases be to guard against the possibility of any information regarding the offender's possession of the weapon reaching the ears of the authorities, and especially of the police.

Learned counsel on both sides have drawn our attention to various decisions of the courts regarding the applicability of section 19(*f*) on the one hand and the first part of section 20 on the other hand, to certain sets of facts. We have looked into those decisions, but, speaking for myself, I have not been able to derive much assistance from them.

The position, as I understand it, is this:—

Mere possession of an unlicensed weapon is ordinarily punishable under section 19(*f*) but, if the circumstances are such as to indicate an intention that the possession may not be known to the police, the offence is punishable under section 20. Whether the intention referred to above exists or not is a pure question of fact, and this question must, therefore, be determined in each particular case with reference to the facts proved in that case. Each case has to be considered on its own merits, and the decisions of other courts in other cases are, therefore, of very little assistance in coming to a conclusion.

It is impossible to lay down any hard and fast rule that will apply to all cases of this kind, but, so far

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as the present case is concerned, it is, in my opinion, abundantly clear that, up to the moment when his room was about to be searched, it was the deliberate intention of the appellant to do all he possibly could to prevent the fact of his having a revolver in his possession from coming to the knowledge of the police. The appellant must, therefore, be held to have committed an offence under the first part of section 20 of the Arms Act, and to have been rightly convicted under that section.

Another point urged before us on behalf of the appellant relates to the power of the special magistrate who tried the case, to impose a sentence of imprisonment for more than two years. The argument, so far as I have been able to follow it, is to this effect:—Although any offence under the Arms Act is a "scheduled offence" as contemplated by the Ordinance, the trial of such an offence by a special magistrate appointed under the Ordinance is not a "Trial under the Ordinance" within the meaning of section 31, sub-section (*1*), in the absence of a clear finding to the effect that the offence was committed *in furtherance of or in connection with the terrorist movement.* It is said that there is no such finding in the present case, and no evidence on which such a finding could properly be based. It is, therefore, contended that the trial was not a "Trial "under the Ordinance" within the meaning of section 31, sub-section (*1*), and that, this being so, the special magistrate who tried the case is, under sub-section (*2*), to be deemed to be merely a magistrate of the first class, and that his powers, as such are limited by the Criminal Procedure Code to two years' rigorous imprisonment. In my opinion, this argument is not only fallacious, but is based on a misunderstanding of the very clear provisions of the relevant sections of the Ordinance. I do not, therefore, propose to discuss the matter in detail, but shall content myself with pointing out that nowhere in the sections relating to the appointment, powers and procedure of special magistrates is there any

reference to "Offences committed in furtherance of or "in connection with the terrorist movement" and that section 31, on which special stress is laid, relates exclusively to questions of *procedure* and has nothing to do with the *powers* of special magistrates appointed under the Ordinance. It may further be remarked that the expression "Cases under the "Ordinance," as used in section 31 of the Ordinance, clearly relates to the trial of cases by special magistrates appointed under the Ordinance, and does *not*, as has been contended, mean the same thing as the expression "Offences punishable under the "Ordinance" as used in sections 30 and 31. The latter expression clearly relates to offences created by the Ordinance, *viz.*, Offences made punishable by section 15 or by rules framed under section 17. The argument under discussion appears to be founded on these and other misconceptions, and is in my opinion entirely devoid of substance.

It has also been suggested that, even if the conviction and sentence were legal at the time the magistrate delivered his judgment, the continued detention of the appellant has since become illegal by reason of the expiry of the term of the Ordinance. This is not a question that this Court, *sitting as a court of appeal*, can properly adjudicate on, but it may be remarked that section 6 of the General Clauses Act would, if read with section 30 of that Act, appear to be an insuperable bar to any such objection being successfully urged before any court.

All the points urged on behalf of the appellant having failed, it must be held that he has been rightly convicted and that the sentence of six years' rigorous imprisonment imposed on him was not in excess of the powers of the magistrate who tried the case.

Apart from the question of the legality of the sentence, I am of opinion that the sentence is by no means excessive, and I would accordingly dismiss the appeal.

MALLIK J. I agree.

A. C. R. C. *Appeal dismissed.*