

## APPELLATE CRIMINAL.

*Before U San Maung, J.*

THA GYAW AUNG (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).\*

H.C.  
1948

July 15.

*Arms Act, s. 19 (f)—Possession of Arms—Meaning of—Evidence Act, s. 27—Admissibility.*

*Held*: From mere fact that a person is able to point out the place where a fire-arm is hidden there is no presumption that he himself hid it there in the absence of other evidence of possession.

*Khuda Baksh v. The Crown*, A.I.R. (1923) Lah. 283 ; *Gian Chand v. Emperor*, A.I.R. (1933) Lah. 314, referred to.

If a person is able to point out where a fire-arm is hidden it only means that he knows the hiding place, not that the fire-arm is in his possession or under his control.

Under s. 27 of the Evidence Act the portion of the information given by the accused which was the immediate or approximate cause of the fact is provable.

*Naurang Singh v. Emperor*, 28 Cr.L.J. 250 ; *Emperor v. Chokhey*, A.I.R. (1937) All. 497 ; *Sukhan v. The Crown*, 10 Lah. 283 ; *Pulukuri Kotayya and others v. King-Emperor*, (1947) 74 J.A. 65, referred to and followed.

The statement to the Police by the accused to the effect that the revolver was hidden by him was made either at the time when the revolver was actually pointed out or after the revolver was pointed out. Such a statement is inadmissible in evidence under s. 162, Cr.P.C.

*Tha Nge Gyi and one v. The King*, (1946) Ran. L.R. 229.

In a Criminal Case onus is upon the prosecution to prove its case beyond reasonable doubt and not for the accused to prove his innocence.

*U Dhamapala v. King-Emperor*, 14 Ran. 666.

*Ba Shun* (Government Advocate) for the respondent.

U SAN MAUNG, J.—The appellant Tha Gyaw Aung has been convicted under section 19 (f) of the Arms Act by the Special Judge (U Pha Tha Htaw) of Akyab for the possession of a revolver and six rounds of sten-gun cartridges and sentenced to transportation for life as the offence took place after the Arms (Temporary

\* Criminal Appeal No. 509 of 1948 from the Order of Special Judge of Akyab, dated the 7th April 1948 in Special Trial No. 16 of 1948.

H.C.  
1948

THA GYAW  
AUNG

v.  
THE UNION  
OF BURMA.

U SAN  
MAUNG, J.

Amendment) Act, 1947 (Burma Act No. LXIV of 1947) had come into force in Arakan Division.

The prosecution case in brief is as follows :

On the 8th of February 1948, the appellant Tha Gyaw Aung and five others were arrested by the Special Police Reserves of Agridawma outpost under the command of Tun Aung Gyaw (P.W. 4), who had the rank of a Sub-Inspector of Police. When examined by Tun Aung Gyaw, the appellant revealed the existence of a hidden revolver, which he apparently undertook to produce. When the police party from Myohaung arrived some members of that party and members of Special Police Reserves proceeded to Pyade which was reached at about 3 p.m. Then, while the regular police remained outside the village the Special Police Reserves led by the appellant Tha Gyaw Aung went through the village to the north where the village cemetery was situated.

On arrival at the village cemetery, Tha Gyaw Aung pointed out a bush and with his own hands uncovered the portion where a revolver lay hidden. Then, as Tha Gyaw Aung was about to pick it up, he was told not to do so and the revolver was actually picked up by Kyaw Aung (P.W. 2), Head Constable of the Special Police Reserves. The revolver was found to be loaded with six sten-gun cartridge which had been adapted for use in it by the simple process of covering the grooves thereon with threads. The revolver and cartridges were later handed over to the Head Constable Sein Kyaw Aung (P.W. 1) of Myohaung Police and the appellant was sent up for trial under section 19 (f) of the Arms Act as amended after the requisite sanction for his prosecution had been obtained from the District Magistrate.

Kyaw Aung (P.W. 2) tried to exaggerate the prosecution case by saying that when Tha Gyaw Aung

pointed out the bush in the cemetery all the members of the search party made a search inside the bush in vain and that the actual spot where the revolver lay hidden was found only when Tha Gyaw Aung was made to point it out. He is not supported on this point by other searchers including Maung Saw (P.W. 3). However, the discrepancy is immaterial as it must be held as established that the actual spot where the revolver lay hidden in the bush was in fact pointed out by the appellant.

The appellant's defence was that the revolver belonged to one Kyaw U (a lieutenant of U Pyinnyathiha) who was then absconding and that he knew the exact spot where it was hidden because he happened to see Kyaw U hiding it there. He gave evidence on behalf of his own defence and also cited one witness Hla Tha Tun, who was also supposed to be present at the time the revolver was hidden by Kyaw U. According to the appellant, the revolver was hidden inside the bush of a *thinbar* tree near a *dani* garden and the particular bush where it was actually found was connected with other bushes whereas according to Hla Tha Tun, it was hidden under a heap of rubbish consisting of old *dani* leaves. The defence story was, however, rejected by the learned trial Judge on the ground that the appellant and his witness contradicted each other on many points especially as regards the spot where the revolver was hidden.

The learned trial Judge then held that on the evidence on record the appellant must be deemed to be in possession of the exhibit revolver and cartridges and that he should, therefore, be convicted of the offence under section 19 (f) of the Arms Act, with which he had been charged.

From the mere fact that a person is able to point out the place where fire-arm is concealed, it cannot be

H.C.

1948

THA GYAW  
AUNGv.  
THE UNION  
OF BURMA.U SAN  
MAUNG, J.

H.C.  
1948  
—  
THA GYAW  
AUNG  
v.  
THE UNION  
OF BURMA.  
—  
U SAN  
MAUNG, J.

presumed that he himself must have hidden it there. See *Khuda Bakhsh v. The Crown* (1) where it was held that in the absence of any other evidence of possession by the petitioner it cannot be presumed that because he knew where the rifle was, he had concealed it himself. See also the case of *Gian Chand v. Emperor* (2) where the accused led the police to a cattle shed near the house in which he was living with his father and brother and pointed out the place where a revolver was lying, it was held that the mere knowledge of the fact that the revolver was lying there without proof that the place was in the exclusive possession of the accused was not sufficient to hold the accused guilty under section 19 (f) of the Arms Act.

If a person is able to point out the spot where fire-arm is hidden, it only means that he knows its hiding place. Something more is necessary to enable the Court to presume that the fire-arm is in his possession or under his control.

In the case of *Naurang Singh v. Emperor* (3) where a revolver was found in a well which the accused had pointed out to the police as being the place in which he had thrown the weapon, it was held that where an article, the possession of which is forbidden by the Arms Act, has been discovered by reason of information given by an accused person, the conviction based upon that evidence is legally sound. That decision was followed by a Bench of Allahabad High Court in *Emperor v. Chokhey* (4) where an accused while in police custody made a statement that he had himself buried a gun at a certain place, and a gun was subsequently found at that place, it was held that the statement of the accused was admissible in evidence

(1) A.I.R. (1923) Lah. 283.

(3) 28 Cr.L.J. 450.

(2) A.I.R. (1933) Lah. 314.

(4) A.I.R. (1937) All. 497.

under section 27 of the Evidence Act and that although the gun was found hidden in the railway premises within the railway fencing, which was accessible to the public; no member of the public could have ordinarily got at the gun inasmuch as it was concealed from view, whereas the accused could have access to it at opportune moments and hence in the eye of the law he must be deemed to be in possession and control of the gun.

However, in these cases, in addition to the fact that the fire-arm was found concealed at the spot pointed out by the accused, there is the fact that the accused before taking the police to the spot where it was hidden, had stated that he himself had concealed it there. Such a statement of course is admissible in evidence. See the case of *Sukhan v. The Crown* (1) where a Full Bench of seven Judges of the Lahore High Court held that under section 27 of the Evidence Act the portion of the information given by the accused which was the immediate or proximate cause of the fact is provable and that when the accused says that he had hidden a certain article at a certain spot and that article is subsequently discovered at that spot, the statement of the accused to the effect that he had hidden it there is admissible in evidence. This decision of the Lahore High Court is approved by the Privy Council in *Pulukuri Kctayya and others v. King-Emperor* (2) where information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" was held to be admissible in evidence if the information leads to the discovery of the fact that a knife was concealed in the house of the informant to his knowledge.

Unfortunately in the case now under consideration, there is no evidence on record to show that the

H.C.  
1948THA GYAW  
AUNGv.  
THE UNION  
OF BURMA.U SAN  
MAUNG, J

(1) 10 Lah. 283.

(2) (1947) 74 I.A. 65.

H.C.  
1948  
—  
THA GYAW  
AUNG  
v.  
THE UNION  
OF BURMA.  
—  
U SAN  
MAUNG, J.

appellant had stated to the police that he himself had hidden the revolver and cartridges in a bush near the cemetery of Pyade and that it was in consequence of the information thus received from the appellant that the revolver and cartridges were subsequently found at the place indicated by him. According to the Sub-Inspector of Police Tun Aung Gyaw (P.W. 4) of the Special Police Reserves what the appellant merely stated to him was that there was a revolver in existence. No doubt, where Kyaw Aung (P.W. 2) was cross-examined by the pleader for the appellant he stated—

“The accused did not say that the revolver pointed out by him was the revolver hidden by Kyaw U and he saw him hiding it there. He however said that it was the revolver hidden by him.”

As Kyaw Aung is prone to exaggerate the prosecution case, his statement on this point must be treated with great caution. Besides, the statement alleged to have been made by the appellant to the effect that the revolver was hidden by him is not such a statement as is admissible under section 27 of the Evidence Act as it is not one leading to the finding of the revolver and cartridges in the bush. From the context it is clear that it was a statement made by the appellant either at the time he actually pointed out the revolver or after the revolver had been pointed out by him. Such a statement is inadmissible in evidence *vide Tha Nge Gyi and one v. The King* (1) where it was held that where persons in police custody pointed out objects to a magistrate or searcher, the statements which accompanied the discovery of such objects are not admissible in evidence in view of section 162 of the Criminal Procedure Code.

The appellant's defence that he was able to point out the place because he saw Kyaw U hiding the exhibit revolver and cartridges there may or may not be true. However in a criminal case the onus is upon the prosecution to prove its case beyond reasonable doubt and not for the accused to prove his innocence. See *U Dhamapala v. King-Emperor* (1). Therefore unless the prosecution has adduced sufficient evidence to justify a presumption that an accused person has in his possession or under his control arms and ammuntions in contravention of sections 14 and 15 of the Arms Act a conviction under section 19 (f) of the Arms Act cannot be allowed to stand.

In the result the appeal succeeds. The conviction of the appellant under section 19 (f) of the Arms Act and the sentence of transportation for life are set aside and the appellant is acquitted and released so far as this case is concerned.

H.C.  
1948

THA GYAW  
AUNG

v.  
THE UNION  
OF BURMA.

U SAN  
MAUNG, J.

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(1) 14 Ran. 686.