HARI KRISHNA

v.

REGINAM

[COURT OF APPEAL, 1963 (Finlay V.P., Marsack J.A., Hammett J.A.), 1st, 19th July]

Criminal Jurisdiction

Criminal law—possession of unlicensed arm—joint possession—Arms and Ammunition Ordinance 1961 s. 4 (2) (*a*) (ii).

Criminal law—aiding and abetting—possession—need for some activity in relation to act of possession.

The appellant and his father Bechu were convicted *inter alia* of being in possession of an arm without a licence. The evidence showed that the appellant was present when his father negotiated the sale of a shot-gun and also when the price was paid. He went, on his father's instructions, and got the shot-gun from some place of concealment and he counted for his father the money received. The transaction took place in the shop and living quarters of the father, the appellant residing some little distance away.

Held.—(1) That on the facts a conclusion that the appellant was in joint possession with his father of the shot-gun was not justified.

(2) That activity on the part of the appellant in relation to the act of obtaining or retaining possession of the shot-gun had not been shown and that therefore he could not be convicted of aiding or abetting the possession of his father.

Cases referred to:

R. v. Young (1838) 8 Car. and P. 644: *R. v. Coney* 51 L.J.M.C. 78; (1882) 8 Q.B.D. 534.

Appeal against conviction.

Koya for the appellant.

Palmer for the Crown.

Judgment of the court [19th July, 1963]—

This is an appeal against conviction for two offences under the Arms and Ammunition Ordinance, 1961, and also against the sentences imposed upon those convictions.

Appellant was on the 16th January, 1963, convicted of the following offences:

(1) Being in possession of an arm without a licence contrary to section 4 (2) (*a*) (ii);

(2) Not being a licensed dealer did sell an arm contrary to section 10 (1) (iii).

The sentences imposed were two years' imprisonment in respect of the first count and one year's imprisonment in respect of the second count, the sentences to be consecutive.

The appeal against conviction for selling an arm without a licence may be dealt with very shortly. An integral part of the offence is that the sale should have been made " by way of trade or business ". All the evidence tends to show that the sale of the arm made by Bechu, the father of appellant, with the active assistance of appellant, was not part of a general course of dealing but was an isolated sale. The same reasoning, therefore, applies as in the case of the appeal by Bechu and the same result must follow. Accordingly the conviction and sentence on that count are quashed.

The appeal against conviction for the offence of being in possession of an unlicensed arm presents more difficulty. It is urged for appellant that the arm in question was in fact in the sole possession of appellant's father Bechu, who was properly convicted on this charge. Counsel further submits that there was no evidence, or insufficient evidence, to support the finding of the learned trial Judge to the following effect:

> " It is equally clear that Hari Krishna . . . was either in joint possession of the shot-gun or aiding and abetting his father's possession."

Negotiations for sale and purchase of the shot-gun in question were conducted entirely between the police witness who was referred to as an agent provocateur, Chandar Bali, on the one hand and appellant's father, Bechu, on the other hand. Appellant was, however, present when the first meeting took place and again when the agreed price was paid and the gun handed over. These negotiations took place in what Chandar Bali describes as " Bechu's room "; his room is in the same building as his shop. On the evening when the transaction was completed the evidence is that Chandar Bali brought in the purchase price of £40 to Bechu at the same place. Appellant was present. Bechu asked appellant to count the money as it was dark and Bechu had poor eyesight. When appellant informed his father that the amount was correct his father said: " If all the money is there do not waste time, get the thing and give it to him ". Appellant then went through the front room of the living quarters towards the back. Appellant returned about 15 minutes later, according to Chandar Bali, carrying a sack parcelled up. He asked Bechu if this was the parcel. Bechu said: " Yes this is the one give it to him ". Appellant, who had returned round the outside of the house, then gave the parcelled-up sack to Chandar Bali. There is no evidence identifying the place from which appellant brought the sack containing the gun. It was apparently some distance away from Bechu's house in view of the time taken by appellant in going to get the parcel. The only inference that can be drawn from the evidence is that appellant knew of this hiding-place; there was no evidence that the hiding-place was on appellant's premises, or on premises occupied jointly by father and son. There is, in fact, some suggestion that appellant did not actualy know what was in the parcel, as he asked his father to confirm that the parcel he had brought was the correct one.

Throughout the evidence the shop and living quarters occupied by Bechu are referred to always—e.g., by Chandar Bali and by Deputy Superintendent Caldwell—as Bechu's house or Bechu's property. There is no suggestion that the place was also occupied by appellant, though there is some evidence that appellant managed his father's store. According to Deputy Superintendent Caldwell, appellant's dwelling is situated about a chain and a half from Bechu's shop and dwelling. Appellant's house was searched by the police, under the authority of a search warrant, but nothing incriminatory

was found. A further search of appellant's house was made by the police about 3 a.m. on the 1st October, 1962, but, as the Deputy Superintendent deposes, they found nothing.

We are unable to find any other evidence concerning the possession of the shot-gun by appellant.

It is difficult to understand the basis for the finding of the learned trial Judge that appellant was either in joint possession of the shot-gun with his father or aided and abetted his father's possession. The gun, throughout, was treated as the property of Bechu, and all the negotiations for sale took place directly between him and the purchaser, though it is clear that appellant was aware of the sale and its terms. It is a reasonable inference from the evidence that Bechu had the shot-gun in a hiding-place which was known to appellant. We are asked, however, to draw the further inference that the gun was kept in such a place that it could properly be regarded as in the possession of the father and son jointly, or in the possession of the father aided and abetted by the son. There is nothing in the evidence, in our opinion, to justify either conclusion. We do not know where the gun was kept. We do know that all the acts of ownership, proved in the evidence, were exercised by Bechu. It is true that appellant had the gun in his physical possession for a short time when he was instructed by his father to go and " get the thing ". We do not think that this temporary possession comes within the scope of the penal section in the Ordinance, particularly as appellant was merely carrying out the order of his father to go and " get the thing ". In any event it may be doubtful whether appellant knew what the parcel contained. If he had known, it would hardly have been necessary that he ask his father on his return: " Is this the parcel ?".

The learned trial Judge appears to have accepted the undoubted assistance given by appellant to his father in the matter of the sale as evidence of aiding or abetting possession of the gun by Bechu. In our opinion, however, there is no evidence of any positive act performed by appellant to aid or abet the possession of the gun of his father. Activity is an essential characteristic of aiding and abetting. For one who aids is one who gives actual assistance in the commission of an offence: one who abets is one who instigates and incites another in the commission of an offence.

It is this conception which lies at the root of that part of the judgment of Vaughan, J., in *R. v. Young* 8 C. & P. 644, at 652 where he said:

> " Mere presence alone will not be sufficient to make a party an aider and abettor; but it is essential that he should by his countenance and conduct in the proceedings bring present aid and assist the principals."

The same conception is put forward by Hawkins, J., in *R. v. Coney* 51 L.J.M.C. 78:

> " To constitute an aider or abettor, some active steps must be taken by word or action, with intent to instigate the principal or principals."

Activity of that kind on the part of appellant in relation to the act of obtaining or retaining possession of the arm in question must therefore be proved by the prosecution as a condition of conviction. If it could be shown that appellant had assisted his father to conceal what he knew to be a weapon in a safe hiding-place, or had taken any active steps to maintain his father's possession, he could quite properly, in our opinion, be considered as aiding or abetting his father's possession. The essential is that he must do something to aid and assist possession. But there is no such evidence here, and we are unable to find any evidence of any positive action taken by appellant to aid or abet

his father's possession of the weapon. In the result, as we are unable to find evidence either of joint possession or of aiding and abetting the possession by Bechu, in our opinion the conviction cannot stand.

It will thus be unnecessary for us to consider the appeal against sentence. We should, however, like to make it clear that, in our opinion, the sentence of two years' imprisonment would not have been excessive in the circumstances if appellant had been properly convicted of an offence under section 4 (2) (*a*) (ii).

For the reasons given the appeal will be allowed and the conviction and sentence on this count also will be quashed.

Appeal allowed.

Solicitors for the appellant: *Koya & Co.*

Solicitor-General for the Crown.