

Equivalent citations: AIR 1961 All 438, 1961 CriLJ 176

Bench: M Desai

Kamta Prasad vs State on 20/11/1959

ORDER

M.C. Desai, J.

1. The applicant challenges his conviction under Section 19(f), Arms Act. He is a blacksmith and is a member of a joint Hindu family consisting of himself and his brother Ram Charan and his father Mahendra, living in one house. It has been found by the Courts below that the house was searched by a sub-inspector of police when the applicant and his father were present but Ram Charan was absent, having gone to another village two days previously, and a sword, a kanta, a pistol, a barrel of a pistol and triggers were recovered from a room and that the applicant and his father had no licence.

The trial Court convicted all the three members of the joint family under Section 19(f), Arms Act, but the Additional Sessions Judge, on appeal, maintained the applicant's conviction and quashed that of Ram Charan and the father on the ground that they had no knowledge of the presence of the the arms because of being away from the house for two days Or of being too old and weak. The applicant raises the usual plea that he has not been proved to be in possession of the arms and that they might have been in possession of his brother or father. In the trial Court a suggestion was made that the arms might have been planted by some enemy through a hole in the roof of the room but the suggestion was rightly rejected by the Courts below.

2. A person is guilty under Section 19(f), Arms Act, if he has in his possession or under his control any arms without licence. It is not disputed that the applicant had no licence to possess the pistol and the parts of a pistol and the only question is whether he was in possession of them. The evidence to prove his possession consists of the facts that they were recovered from a room of a house occupied by himself and (his father and brother as member of a joint Hindu family and that his brother and father might not be aware of their being inside the house because the former was away from it for two days and the latter is old, weak and short-sighted, is hardly able to do any work and seems to be spending his time lying down.

3. In legal terminology no term is more ambiguous than the word "possession". Dias and Hughes in their book on Jurisprudence say at p. 308 that if a topic ever suffered from too much theorizing it is that of possession, at page 317 that the idea of possession is no longer tied to fact and has become "a concept of the utmost technicality" and at page 329 that it is "no more than a device of convenience, and policy". According to Stephen, a chattel is said to be in possession of a person

"when he is so situate with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need."

According to Pollock and Wright ("Possession in the Common Law", p. 1) in common parlance a man is said to possess anything of which he has the apparent control or from the use of which he has the apparent power of excluding others. "Possession" is explained as follows in 72 CJS

233. It expresses the closest relation of fact which can exist between a corporeal thing and the person who possesses it implying an actual physical contact (as by sitting or standing upon it) or denoting custody coupled with a right or interest or proprietorship.

It implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real detention. It also implies a right to deal with property at pleasure and to exclude others from meddling with it. It involves power of control and intent to control. In law the word is defined as meaning an act, fact or condition of a person having such control of the thing that he may legally enjoy it to the exclusion of others having no better right than himself. Salmond's theory that corporeal possession involves two ingredients, corpus possessionis and animus possidendi, is adversely criticised by Dias and Hughes at page

330. With reference to corpus possessionis, they point out that an expectation of non-interference is not necessary either for commencement of possession or for continuation of possession. They state that corpus and animus are only conditions of acquisition of possession and are not possession itself and that possession once acquired may continue even though either or both disappear. The conclusion reached by them at page 334 is that no single theory will explain possession, that corpus, and animus have no fixed meaning but are facts which the law generally requires for the commencement of possession and that possession carries with it the right to possess.

4. De facto possession or possession in fact or detention is in the words of Pollock and Wright (page 12) effective occupation or control. Occupation is effective if it is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment. "Any power to use and exclude others, however small, will suffice, if accompanied by the animus possidendi provided that no one else has the animus possidendi and an equal or greater power." It may be lost without anyone gaining it.

It is an actual relation between a person and a thing whereas legal possession is legal relation between them. It may exist without possession in law. Winfield on Tort (6th edition p. 365) adopts these views and explains that it is possible to have de facto possession of a thing without any bodily contact, as for instance, possession over papers and furniture in the office miles away from the residential house. Pollock and Wright say at page 118 that possession in relation to moveables is used in three different senses, (1) physical possession, (2) possession in a legal sense and (3) right to possession.

Physical possession is rather a set of facts than a legal notion because the law does not define modes or events in which it may commence or cease.

"When a person is in such a relation to a thing that, so far as regards the thing, he Can assume, exercise or resume and manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in some receptacle belonging to him and under his control, he is in physical possession of the thing" (119).

At page 147 they point out, as also does Winfield at page 367, that mere physical possession involves no rights except as against strangers. Custody alone is not tantamount to possession, vide Pollock and Wright, page 27. It means such a relation towards the thing as would constitute possession, if the person having custody had it on his own account; see Stephen, Article 359. Just as a thing on your land may be in your possession even though you are not in physical contact with the land so also it is in your possession if it is in the hands of your servant; although the servant has the custody the possession remains yours.

In the view of the Supreme Court of Canada, de facto possession is a Conception which is itself much more extensive than that of physical custody. It is wide enough to include the case of a person who has hidden the thing effectively so that he can take it into physical custody at his will and where others are unlikely to discover it except by accident; see Williams v. Douglas, 78 CLR 521.

5. Legal possession, which is also called possession in law, is the state of being a possessor in the eye of the law; it may exist without physical possession as in the case of household goods of a man away from his home. It is defined by modes or events in which it commences or ceases and by the legal incidents attached to it and is a notion of a particular or municipal law; (Pollock and Wright page 119). It is definite legal relation of the

possessor to the thing and may exist either with or without detention and either with or without a rightful origin; (ibid p. 26). If it is rightful or at least excusable it becomes lawful possession; (ibid p. 28).

The distinction between possession in fact and possession in law lies, as pointed out by Pollock and Wright at page 17 and Winfield at page 368, in the presence of a certain mental element. For possession in law there must be manifest intent, not merely to exclude the world at large from interfering with the thing in question, but also to do so on one's own account and in one's own name. It is said in Roscoe's Criminal Evidence, 16th edition, at page 648, that legal possession does not necessarily coincide either with actual physical control or with the right to possess and need not have a rightful origin.

6. The right to possess, though distinct from possession, is treated as equivalent to possession itself for certain purposes and is then called constructive possession. It includes the right to physical possession and can exist apart from both physical and legal possession; it is what remains to a rightful possessor immediately after his wrongful dispossession. Unlike possession itself it is not necessarily exclusive and may exist in different persons at the same time against a third person by virtue of different proprietary rights; see Pollock and Wright at pages 25, 27 and 146 and Winfield at page 146. F. Pollock in his comments on *Milgate v. Kebble*, 1841-3 Man & G 100 : 60 RR 475 in the preface to 60 R. R. says that in a case of delivery of the key of a locked store, though the possession is said to be constructive, it is the better opinion that it operates not as a constructive or symbolic delivery but as giving actual control of the goods.

In *S. M. Yaqub v. T. N. Basu*, AIR 1949 Pat 146 a Full Bench interpreted constructive possession as possession inferred from actual possession of another property, for instance possession of the whole inferred from actual possession of a part or possession of all strata of minerals from actual possession of the topmost stratum. The learned Judges pointed out that the words "Constructive possession" are not used in only one sense, that in the ideal sense they mean

"possession in law but not possession in fact, that it is to say, though a party may not be in possession of the property, the law attributes to him the advantages and results of possession fictitiously by applying the legal fiction that possession follows title,"

and that they are also used with reference to possession of the whole inferred from actual possession of a part. I may say, with respects, that the meaning given to constructive possession is not supported by any authorities and is against the view of the jurists mentioned above.

"Possession is single and exclusion Physical possession is exclusive, or it is nothing."

This is the fundamental rule in English law (see Pollock and Wright, pages 20 and 21). Joint tenants or tenants in common, when they have not parted with possession, possess in law, and may possess in fact, according to their interest as owners. Whether they are all in joint occupation or only one of them holds or occupies the property or it is held or occupied by their servant, there is not a plural possession, but a single possession exercised by, or on behalf of all (ibid 21). They say at page 129 that

"possession is essentially indivisible. Two persons cannot at the same time have the possession of a thing except jointly or in common."

That possession is exclusive and indivisible is quite consistent with its being in more than one person. Statutory law (viz. Section 19, Arms Act, Section 60, Excise Act, Section 411, I. P. C., etc.) which punishes possession of an article punishes it without requiring it to be the exclusive possession of the accused, e. g. the possession of him alone.

"Joint possession by accused and another may, be sufficient for conviction, since joint possession may also be exclusive;" 76 C.J.S. "Receiving Stolen Goods", paragraph 6, page 9. See also *Moors v. Burke*, 26 CLR 265;

State of Bihar v. Amir Hasan, AIR 1951 Pat 638 and In re, Arthur Flatman, 8 Cr App Rep 256. In Abdul Rahman v. Emperor, AIR 1940 All 449; Emperor v. Santa Singh, AIR 1944 Lab 339; Emperor v. Sikhdar, ILR 54 All 411 : (AIR 1932 All 441); Lalu Singh v. Emperor, 43 Cri LJ 666 : (AIR 1942 Oudh 448), Harbans Singh v. Emperor, 43 Cri LJ 62 : (AIR 1941 Nag 296); State v. Santappa, AIR 1956 Bom 217 and Sughar Singh v. Rex, 51 Cri LJ 776 : (AIR 1950 All 277), it was observed that what is punished is not exclusive possession or control but mere possession or control. In Santa Singh's case, AIR 1944 Lab 339 at page 345 Harries, C. J., said that an article may be in possession or control of more than one and that if a father and his sons buy a gun for the joint use of all, it is in the joint possession and under the joint control of all and not in the exclusive possession or control of any of them.

In Sughar Singh's case, 51 Cri LJ 776 : (AIR: 1950 All 277), Raghubar Dayal, J., said that there is no bar to an article being in the possession of several persons. In Queen Empress v. Sangam Lal, ILR 15 All 129, it was observed that exclusive possession is required for an offence of Section 19(f), Arms Act, It may be respectfully pointed out that really no question whether the possession is exclusive or not can at all arise because, as I pointed out, possession is in its very nature exclusive.

The real question is whether the accused was in possession of the incriminating article or not; if he was, he must be held responsible for the possession and the question whether the possession was exclusive or not is wholly irrelevant. Once the nature of possession is correctly understood one would realise that his possession is enough to saddle him with the responsibility. It is wholly unnecessary to inquire whether it was exclusive or not because it is bound to be exclusive possession of the accused, alone or with others. Since a person can be in possession jointly with others, he must be held guilty even if he is found to be in joint possession.

Where an accused is acquitted on the ground that his possession was not shown to be exclusive it is really a case of his not being proved to be in possession at all. Cases do arise in which the evidence points to one or some out of a number of persons being in possession but fails to prove that all were in possession or that any particular person or persons were in possession; these are the cases in which the accused must be held not to be proved to be in possession. If the evidence points to the accused and one or more other persons being in possession, he must be held guilty. This was made clear in Narendra Goswami v. State, AIR 1955 Assam 123. The observation in the case of Sangam Lal, ILR 15 All 129 was disapproved in Abdul Rahman's case, AIR 1940 All 449.

7. One often comes across the observation that possession of an incriminating article must be actual physical possession and not constructive possession, for instance see AIR 1940 All 449 at p. 451, Lakhan Singh v. Emperor, AIR 1934 Oudh 200, 78 CLR 521, AIR 1944 Lah 339 (FB), "Possession and control mean something more than mere constructive or legal possession and control" per Harries, C. J., at page 343), Mohan Lahiri v. Emperor, 51 Cri LJ 977 : (AIR 1950 Pat 243) and Chitta v. Emperor, 48 Cri LJ 17 : (AIR 1947 Oudh 114).

What is called "Constructive possession" in these cases is really not constructive possession but possession inferred from some facts, such as the ownership or occupation of a house. Possession is not a tangible thing which can be perceived by any of the senses; it has always got to be inferred from facts which can be perceived by any of the senses, possession does not become constructive merely because it is presumed from certain facts. It is always actual possession that is presumed and in the case of Yaqub, AIR 1949 Pat 146 it was actual possession that was presumed from the possession of another property.

It was pointed out in Re, George Wetherden, 16 Cri LR 1, with reference to possession of implements for counterfeiting coins, that possession includes constructive possession. In 76 Corpus, Juris Secundum "Receiving Stolen Goods", page 9, actual, physical or manual possession was held to be not necessary for the requirement of possession of stolen goods and constructive or potential possession or control was held to be sufficient. It may be that constructive possession standing alone, i. e. without physical or legal possession, may not be possession within the meaning of penal laws, but obviously it is wrong to apply this rule to

possession which is not Constructive possession but actual possession presumed from certain facts.

8. It is said by Winfield at page 371 that it is not possible to say that with respect to the same article one person has possession in the law of tort and another person in criminal law. The law does not contemplate two different persons (who are not joint owners) having possession at the same time in the same thing. It follows that possession which gives a right to the possessor is also possession within the meaning of the penal laws which subject (sic) to the possessor to a liability.

But judges in criminal cases have approached the question of possession in a method different from that employed in questions of civil liability and the exigencies of English criminal law, particularly that dealing with larceny, have forced Judges to treat possession in criminal law on lines that was not entirely the same as those in civil law (ibid pages 370 and 371).

9. It can hardly be disputed that it is for the prosecution to prove possession; if necessary, reference may be made to AIR 1944 Lah 339, Bhekha Ahir v. Emperor, AIR 1947 Pat 236 and Sahendra Singh v. Emperor, AIR 1948 Pat 222. The difficulties that arise in determining whether the prosecution has discharged its onus or not arise often from not knowing what is meant by "possession". If the real nature of possession is understood some of the difficulties would disappear. The dictum of Dias and Hughes (at page 320) that "there is no fixed factual criterion for possession" should always be borne in mind.

10. It is often laid down that possession means conscious possession and that the accused must have mens rea or knowledge of the existence of the article. For example see In re, K. Ramaswami, AIR 1956 Andh 160, AIR 1940 All 449 ("You cannot have either possession or Control over something which you do not know exists" per Braund J., at page 451); AIR 1944 Lah 339, 51 Cri LJ 977 : (AIR 1950 Pat 243), AIR 1947 Pat 236, AIR 1948 Pat 222, Abdul Rahim Khan v. Emperor, 50 Cri LJ 838 ; (AIR 1949 Nag 289), Thimma Reddy v. State, AIR 1957 Andh-Pra 758, Lal Bahadur Keshi v. State, AIR 1957 Assam 47, Norendra Nath v. State, AIR 1951 Cal 140, Mehtab Ali Shah v. Emperor, AIR 1947 Sind 192, AIR 1951 Pat 638 and Baender v. Barnett, (1921) 255 U.S. 224 : 65 Law Ed 597 ("The statute is not intended to include and make criminal a possession which is not conscious and willing. While its words are general, they are to be taken in a reasonable sense" per Van Devanter, J., at page 597).

Existence of mens rea Or guilty knowledge was said to be the sine qua non of conviction for possession in AIR 1944 Lah 339 (per Harries, C. J., at page 344), 51 Cri LJ 776 : (AIR 1950 All 277) ("Mens rea is an essential element in criminal offences" per Raghubar Dayal, J.), 48 Cri LJ 17 : (AIR 1947 Oudh 114) ("obviously cannot be visited with legal liability unless it is established that he had mens rea or guilty knowledge of the existence," Walford, J., at page 18), 50 Cri LJ 838 : (AIR 1949 Nag 289), 51 Cri LJ 977 : (AIR 1950 Pat 243), AIR 1951 Cal 140 ("The animus must be there and the mens rea must be there" per Mukharji, J., at p. 143), AIR 1947 Pat 236 and AIR 1948 Pat 222.

The contention that "possession" necessarily involves consciousness or knowledge of the existence of the article is inconsistent with the contention that nobody can be punished for possession of an incriminating article in the absence of mens rea. If possession itself requires the element of consciousness, if it is proved, it means that there is consciousness and there cannot arise any further question of mens rea in such a case all that is required to be proved by the prosecution is possession.

If possession does not necessarily include consciousness, the question whether in addition to possession the guilty knowledge or mens rea should be proved or not may arise. Section 19(f), Arms Act, with which I am concerned, and other similar statutory penal provisions do not make mens rea an element of the offence; they make mere possession an offence and do not require the prosecution to prove the existence of the guilty knowledge. The real question is of onus of proof.

When a definition of an offence requires a certain knowledge as an ingredient of it, it is for the prosecution to prove the existence of the knowledge; otherwise the offence cannot be said to be proved. In other cases in which the definition itself does not require the knowledge as an ingredient, the offence is proved by the prosecution even though it does not prove the existence of the knowledge, and all that doctrine of mens rea means is that the accused would be acquitted if he proves the absence of the knowledge. Thus in other Cases the onus lies upon the accused to prove the absence of the knowledge.

If the meaning of possession itself does not include the element of consciousness, the accused cannot be acquitted of the charge of possession simply by showing the absence of consciousness. There are two possible views, one that possession itself does not include the element of consciousness but the accused is entitled to be acquitted on his showing that he had no mens rea behind his act of possession and the other is that possession includes the element of consciousness but the onus of proving the absence of consciousness is upon the accused, in either view the prosecution is under no obligation to prove the guilty knowledge.

11. One of the most common facts giving rise to the presumption of possession is the ownership of the article or the ownership or occupation of the property. I am not concerned in the present case with presumption of possession from ownership and, therefore, say nothing more about it. "The finding of stolen goods in a house may be.... sufficient evidence that they are in possession of the occupier of the house", Russell on Crime, 10th edition, Volume 11, 1335, but it is pointed out that this does not always hold good and regard must be had to the circumstances of the occupation, the degree of control over the goods, etc. In *R. v. Cohen*, (1951) 1 KB 505, Lord Goddard, C. J., observed at page 506 :

"If they are found in his house; warehouse or other place under his control, that would establish a prima facie case that he knowingly harboured them."

From the fact that the accused was in charge of a godown the Supreme Court presumed that he was in possession of the liquor found in it even though there was no evidence to prove that he was aware of its existence, vide *Vijendrajit v. State of Bombay*, 1953 Cri LJ 1097 : (AIR 1953 SC 247). The general principle laid down by Lord Russell, C. J., in *South Staffordshire Water Co. v. Sharman*, (1896) 2 QB 44 at page 47 is:-

"Where a person has possession of house or land, with manifest intention to exercise Control over it and the things which may be upon or in it, then, if something is found on that land, the presumption is that the possession of that thing is in the owner of the locus in quo."

Isaacs, C. J., conceded in *re, Ernest Foreman* 9 Cr. App Rep 216, that if stolen goods are found in a house it may be evidence in some cases that they are in the occupier's possession. It is not necessary for the occupier to have conscious specific intention concerning all the chattels in his house or on his land because his general intention that unauthorized persons shall not meddle with them is enough; see *Pollock and Wright* at page 39. There is no difficulty in applying the rule when only one person is the owner or occupier of the house.

There being no other owner or occupier the question whether somebody else might be in possession or not does not arise. The sole owner or occupier has been presumed to be in possession in *eases of 51 Cri LJ 776* : (AIR 1950 All 277); *Gian Chand v. Emperor*, 34 Cri LJ 1256 : (AIR 1933 Lah 314), *Manger Koiri v. Emperor*, AIR 1936 Pat 512, AIR 1948 Pat 222, *Swami Dayal v. State*, AIR 1953. All 353 and *Banwari Lal v. Emperor*, AIR 1914 Lah 455. The prosecution could not be required to prove specifically that the sole occupier was aware of the existence of the article on his land or in his house. Even if possession is held to include the consciousness of possession of the article, the presumption must be drawn that he is in such possession.

The presumption is a discretionary presumption of fact and, therefore, can be rebutted. In 1951-1 KB 505 it was pointed out by the Lord Chief Justice that the presumption can be rebutted by the accused's proving that he did not know of the presence of the article, for instance by showing that it was dumped there without his

knowledge or privity. Even if possession involves the consciousness of possession, it should be left to the accused to prove that he was not aware of the existence of the article and thereby rebut the presumption of conscious possession.

In the absence of rebuttal he must be held liable for his possession. If possession does not include the consciousness of the possession and the doctrine of mens rea applies, the onus would still be upon the accused to prove the absence of mens rea and if he does not discharge it, he must be held liable for the possession.

12. The difficulty arises when there are two or more occupiers of the house or the land in or on which an incriminating article is found. The question that arises is whether all of them should be presumed to be in possession or the presumption should not be drawn at all or in which circumstances any particular occupier or occupiers should be presumed to be in possession. If Section 149 or Section 34 of the Penal Code applies, i.e. if it is proved that the occupiers had a common intention or object to be in possession of the article, all must be held liable for the possession regardless of which of them is in actual possession.

It was observed in *R. v. Lester*, 1955 Cri LR 648, following *R. v. Thompson*, (1869) 11 Cox C.C. 362, that where several persons are acting in pursuance of a common purpose to break into houses and one is found in possession of a housebreaking implement, all may be convicted of possessing it. See also *Queen v. John Wiley*, (1851-52) 2 Denison 37, Ordinarily one does not come across possession in pursuance of a common intention or object and, therefore, neither Section 149 nor Section 34, I. P. C., can be applied and one is faced with the notorious problem of one or more out of several accused, but not all, being proved to be guilty but without any evidence to prove which of them is or are guilty.

The solution naturally is to acquit all; Ram Saran v. Rex, AIR 1949 All

594. In 43 Cri LJ 666: (AIR 1942 Oudh 448) it was suggested that in such a case all the occupants should be presumed to be in possession because otherwise it would be impossible to secure conviction. But I have never known the law to be that if it is found that one out of several persons is guilty but which one is guilty cannot be ascertained, all must be held guilty. It is the duty of the prosecution to prove which one is guilty and by failing to discharge if it cannot get conviction of all the persons.

In some cases amendment of the law has been suggested; for example *Satdeo v. Rex*, 51 Cri LJ 800 ; (AIR 1950 All 284) and 48 Cri LJ 17 : (AIR 1947 Oudh 114). It was said in the former case that the law is defective, but with respect I do not see any defect in the law. If the prosecution is not able to ascertain which of the several persons was in possession and consequently none of them can be convicted, the acquittal is the result not of any defect in the law but of the inefficiency of the investigating authority.

In the absence of common intention or common object of the occupants of a house, they all cannot be presumed to be in possession. In the cases of *Sikhdar*, ILR 54 All 411 : (AIR 1932 All 441) and *Harbans Singh*, 43 Cri LJ 62 : (AIR 1941 Nag 296) all the occupants were presumed to be in possession, but I respectfully doubt the correctness of the presumption. In *Sughar Singh's case*, 51 Cri LJ 776 : (AIR 1950 All 277) it was said at page 777 (of Cri LJ) : (at pp. 278-279 of AIR) that if the occupants know that an article exists in the house it is sufficient to raise a presumption that all are in possession of it, though the presumption is rebuttable.

The same view was taken in the case of *Sahendra Singh*, AIR 1948 Pat

222. It is not easy to see how from the mere fact of knowledge of the existence possession can be inferred. Even if possession includes the consciousness of possession, it only means that there cannot be possession without the consciousness and not that the knowledge of the existence itself amounts to possession. Generally though an article is in possession of one person its existence is known to others.

Even in a house occupied jointly by several persons an article can be in possession of anyone of them even though its existence is known to the other occupants; it follows that the others Cannot be said to be in possession simply because they know that it exists. In Sughar Singh's case, 51 Cri LJ 776 : (AIR 1950 All 277) itself it was recognized at page 782 (of Cri LJ) : (at p. 283 of AIR) that a joint occupier may not be in possession of an article even though he knows of its existence, but this was said to be confined to the case where it is proved to be in the exclusive possession of a particular occupant.

This seems to be Confounding possession with the proof of possession. Surely if one out of several joint occupiers can be in possession of an article, the existence of which is known to the others, he does not lose his exclusive possession, i. e. his possession does not become joint possession of all the occupiers, just because his identity cannot be proved. In the cases of Harbans Singh, 43 Cri LJ 62 : (AIR 1941 Nag 296) and Jwala v. Emperor, 35 Cri LJ 428 : (AIR 1934 All 548) knowledge was held to raise the presumption of possession.

I respectfully agree with the view taken in Gian Chand's case, 34 Cri LJ 1256 : (AIR 1933 Lah 314) that mere knowledge is not enough; it depends on other facts whether the presumption should be drawn or not as observed in the cases of Santa Singh, AIR 1944 Lah 339 (FB), Jwala, 35 Cri LJ 428 : (AIR 1934 All 548) and Lalu Singh, 43 Cri LJ 666 : (AIR 1942 Oudh 448). In R. v. Watson, (1916) 2 KB 385, Watson accompanied W. and C., who had some stolen property for disposal, to a jeweller's shop, the jeweller refused to receive it and subsequently they were arrested with the stolen property in the possession of W. and it was held that Watson could not be said to be in possession. Lord Reading, C. J., observed at page 389: "He was a negotiator for disposing of the jewellery with the full knowledge that the goods were stolen, but it cannot be said that that amounts to a finding that he was in possession or control of the goods....."

Notwithstanding that there is the clearest evidence that the appellant had full knowledge that the other two persons were in possession of stolen property and that he was assisting them to dispose of it, it is impossible to support the conviction." In Santa Singh's case, AIR 1944 Lah 339 (FB), it was stated at page 345 that if there are other facts all the occupiers may be presumed to be in possession. In the cases of AIR 1956 Andh 160, AIR 1940 All 449, AIR 1947 Pat 236, 48 Cri LJ 17 : (AIR 1947 Oudh 114), 51 Cri LJ 776 : (AIR 1950 All 277), 51 Cri LJ 800 : (AIR 1950 All 284), etc. it was held that all the occupiers cannot be presumed to be in possession; I respectfully agree that the presumption that can be drawn when only one person is in occupation cannot be drawn when two or more persons are in occupation, because in such a case the possession can be with all or some or anyone, and in the absence of proof that it is not with a particular occupier or particular occupiers it cannot be presumed to be with all.

In the cases of Santa Singh, AIR 1944 Lah 339 And Satdeo, 51 Cri LJ 800 : (AIR 1950 All 284), it was said that all the occupiers cannot be presumed to be in possession if the article was not exposed to the view of all but hidden. Possession does not at all depend upon whether the article is hidden or kept in the open; a person in exclusive possession of it does not lose it by keeping it in the open and an article hidden in a safe can be in the joint possession of all the occupiers. Whether an article is hidden or not is only one of the facts to be taken into consideration; it is not conclusive.

If a sole occupier can be presumed to be in possession even though the article is hidden, I see no justification for not drawing the presumption in the case of several persons being in occupation simply because of the fact that it is hidden. In the cases of Lakhani Singh, AIR 1934 Oudh 200 and Lal Bahadur Keshi, AIR 1957 Assam 74, it was said that unless all the occupiers are found to be in joint possession none can be convicted; what is meant is that in the absence of common intention or common object all cannot be presumed to be in possession.

If all cannot be presumed to be in possession it follows that anyone of them arbitrarily cannot be presumed to be in possession. This was the view taken in the cases of Santa Singh, AIR 1944 Lah 339 at p. 347, Bhikha Ahir, AIR 1947 Pat 236 and Pakhar Singh v. State, AIR 1958 Punj

294. In the cases of Sangam Lal, ILR 15 All 129 and Mangar Koiri, AIR 1936 Pat 512, it was laid down that no presumption can be drawn against any occupier other than the head of the family. If it was meant to suggest that the head of the family should be presumed to be in possession I respectfully differ.

13. If there are circumstances indicating the possession of a particular occupier he may be presumed to be in possession. The most important circumstance that is generally relied upon by the Courts is the fact of ownership of the house or of being the head of the family. I have said earlier that possession is exclusive and an article can be in the exclusive possession of one out of several occupiers. Just as the fact that its existence is known to another occupier would not make him also in possession so also the fact that one of the occupiers is the head of the family or the owner of the house would not by itself make him also in possession.

It is within common experience that different articles can be in the exclusive possession of different members of the family occupying a house. The possession of a member of the family is not ipso facto that of the head and there is no law that the head is in possession of not only the property in his own exclusive possession but also the property in the exclusive possession of every member of the family. There have been conflicting decisions in respect of the head of the family being presumed to be in possession.

On the one hand there are cases, such as of AIR 1936 Pat 512, Harbans Singh, 43 Cri LJ 62 : (AIR 1941 Nag 296), Hirdey Ram v. Emperor, 1945 All LJ 528 : (AIR 1946 All 4), Latif v. King Emperor, 1946 All LJ 489 : (AIR 1947 All 91), Sangam Lal, ILR 15 All 129; In re Satyanarayana, 1953-1 Mad LJ 175 : (AIR 1953 Mad 534), etc., laying down that he can be presumed to be in possession and some drawing the presumption only when he is aware of the existence of the article, such as in AIR 1956 Andh 160, ILR 15 All 129 and Mahabir Singh v. State, AIR 1951 Pat 296, or when it is not hidden, such as that of Jwala, 35 Cri LJ 428 : (AIR 1934 All 548).

On the other hand there are the cases of Santa Singh, AIR 1944 Lah 339, Mohan Lahiri, 51 Cri LJ 977 : (AIR 1950 Pat 243) which follows it, Sughar Singh, 51 Cri LJ 776 : (AIR 1950 All 277), Kaul Ahir v. King Emperor, 1932 All LJ 1072 : (AIR 1933 All 112) which dissents from ILR 54 All 411 : (AIR 1932 All 441) and Norendra Nath, AIR 1951 Cal 140 which follows Kaul Ahir's case, 1932 All LJ 1072 : (AIR 1933 All 112), laying down that no one occupier, even if he be the head of the family, can be presumed to be in possession. It was rightly emphasized by Harries, C. J., in Santa Singh's case, AIR 1944 Lah 339 that he cannot be presumed to be in possession even if he is aware of the existence of the article.

Another circumstance which is frequently relied upon is the occupier's knowledge of the existence of the article. In the cases of Jwala, 35 Cri LJ 428 : (AIR 1934 All 548); Bhekha Ahir, AIR 1947 Pat 236; Sahendra Singh, AIR 1948 Pat 222; Chitta, 48 Cri LJ 17 : (AIR 1947 Oudh 114); K. Thimma Reddy, AIR 1957 Andh-Pra 758 etc. it was held that one of the occupiers of a house can be presumed to be in possession of an article in the house if he was aware of its existence. In R. v. Higginbottom, 8 Cri App. Rep 79, A had the key of a box containing goods belonging to him and B, which contained stolen property, and it was held that he could not be said to be in possession unless he knew that the stolen property was in it.

For the reasons already given I cannot agree with the view that one can acquire possession simply by seeing it in one's house, or that one can lose possession by exposing the article to the view of a co-occupier. Even if knowledge of the existence of an article is an essential element of possession, it itself does not constitute possession and there must be something more to indicate possession. In re Annie Lewis, 4 Cri App Rep 96, a co-occupier was held to be not in possession even though she knew all about its presence. I am therefore, of the view that no particular occupier can be held to be in possession of an article found in the house simply because he is aware of its existence there, even if he be the head of the family or the owner of the house. There must be evidence to show that the article is in his possession and not in that of any other occupant or that he is in joint possession with any other occupier.

13A. If one out of several occupiers is in the sole occupation of a room in which an article is found, he may be presumed to be in possession of it even though other rooms are in occupation of others. Such a case is in essence same as that of one person being the sole occupier of the house. Another circumstance that is considered is the presence or absence of an occupier at the time of the recovery; there is a tendency to hold him to be in possession if he alone is present at the time of the recovery and to hold other occupiers, who are absent not to be in possession.

This criterion is of doubtful soundness; it overlooks the undisputed law that possession need not be manual possession and that a person may be in possession even though, he is not in physical contact with the article or is at a Considerable distance from it and may not be in possession even though he is in physical contact with it or can see it. All that can be said is that even when it is legitimate to presume possession of a co-occupier, the presumption cannot be drawn if the article was recovered from his house in his absence and there is no evidence to prove that it was in his house before he left it.

In the case of K. Thimma Reddy, AIR 1957 Andh Pra 758, the court refused to draw the presumption of possession merely from the presence of a co-occupier. If a co-occupier has in his possession the key of the lock put on the receptacle or the room containing the article, he can be presumed to be in possession of the article according to some authorities, such as AIR 1947 Sind 192 and Ghudusab Ibrahim v. State, AIR 1956 Bom 225.

"The delivery of a key may also be sufficient by itself to pass possession of the Contents of a room or a box, at all events if it provides the effective means of control of the goods."

Dias and Hughes at page 318. The presumption of possession of an article kept in a receptacle is a very old presumption. In the laws of Cnut (A. D. 1017-1035) one reads that if a man brings home a stolen thing and it is put into the wife's chest, of which she has the key, then she is guilty; see (1889-90) 3 Harvard Law Review, 1571. In Bhikha Ahir's case, AIR 1947 Pat 236, he took the key from his daughter-in-law and was consequently not held to be in possession of the article found in the room; really his daughter-in-law and not he was in possession of the key.

In the case of Milgate, (1841) 3 Man & G 100, the vendee, though he had the key of the godown, was held to be not in possession of its contents because the key of the external enclosure was kept by the vendor. In 16 Cri LR 1, the accused was held to be in control of the room of which he had the key. If the box or room, the key of which is with the accused, contains his property and another's property and an incriminating article, he cannot be said to be in possession of it unless he knew of its existence; see Higginbottom, 8 Cri App Rep 79.

If a Co-occupier himself delivers the article or points out where it is hidden or kept, the fact of delivery or pointing out itself is not decisive; there must be something in the circumstances attending the delivery or the pointing out to show that the delivery or the pointing out was by the possessor and not by a finder. In Mohammad Ali v. State, 59 Cal WN 1028, the accused pointed out the property in a bush in a public place and was held to be in possession of it because there was evidence that he had concealed it there.

In the case of Lal Bahadur Keshi, AIR 1957, Assam 74 the fact that the article was kept by the accused under his bedding was held to justify the presumption of his possession. In Sikhdar's case, ILR 54 All 411 : (AIR 1932 All 441), the information received by the police that the accused had taken part in an armed dacoity was held to justify the presumption of his possession of the arms recovered subsequently from a house occupied by him with others. Sometimes one out of several co-occupiers is presumed to be in possession by eliminating the presumption of possession of any other occupier.

In Jwala's case, 35 Cri LJ 428 : (AIR 1934 All 548), the sons were said to be unlikely to keep an unlicensed pistol without their father's knowledge. A patient of phthisis and females occupying the house from where an incriminating article was recovered were eliminated and the remaining occupant was held to be in possession

in Amir Husain's case, AIR 1951 Pat 688. There is nothing illegal in eliminating all co-occupiers but one and thereby converting the case into one of possession by a sole occupier and presuming him to be in possession, but the elimination must be done on sound grounds and not on any ground and must not be resorted to with the object of being left with one occupier.

That the eliminated occupiers were not in possession must be a presumption permitted by Section 114, Evidence Act and not a mere suspicion. Any weakness in the reason for elimination will mean weakness in the case against the remaining occupier and will render the presumption against him weak. A Court may acquit an accused on the ground of reasonable doubt but cannot convict an accused except on reasonable certainty of his guilt; consequently when the conviction of A is to be the result of the acquittal of B, the acquittal of B must be on a reasonable certainty of his innocence and not on the ground of reasonable doubt of his guilt. If there was some likelihood of his being in possession, in the absence of anything to show that he could be in possession jointly with A, it cannot be said that there was a reasonable certainty that A was in possession.

14. So far I have dealt with possession. The offence of Section 19(f), Arms Act, is committed not only when there is possession but also when there is control. This brings within the scope of the section many acts which would not have been within it if it punished only possession. Control may be essential for possession and unless one has control over an article one may not be said to be in possession of it, but one can have control over an article without being in possession of it.

Griffith, C. J., observed at page 535 in *Hedberg v. Woodhall*, 15 CLR 531:-

"Possession is a larger term, and involves Control; so that the charge of having in possession involves the charge of having in control."

In the case of Amir Hasan, AIR 1951 Pat 638, it was pointed out that "control" has a wider concept than possession, meaning thereby that more is comprehended within control than within possession. Thomas, C. J., said in *Lalu Singh's case*, 43 Cri LJ 666 : (AIR 1942 Oudh 448) that

"control must be taken in wider sense and to mean something more than actual possession."

This dictum was criticised by Mukharji, J., in the case of *Narendra Nath*, AIR 1951 Cal 140 at page 143. What the learned Chief Justice meant, and this is also what Mukharji, J., meant, is that control is not confined to actual possession and includes within its scope something other than actual possession. An owner of a house or land has control over all articles in the house or on the land regardless of whether they are in his possession or in the possession of a co-occupier. As the owner he has the right to remove from the house or the land any article from it; so prima facie he has control over any article found in, or on, it.

In *Santa Singh's Case*, AIR 1944 Lah 339 Harries, G. J., defied that an owner of a house can be presumed to be in control of anything found in it, but he has not given any reason for the view. He may not be presumed to be in possession of anything found in it but it does not follow that he cannot be deemed to be in control also, because less is required for an article to be under his control than for it to be in his possession. If possession of any article is prohibited by the law, it becomes his duty to remove it from his house or land.

It is true that he can discharge his duty only if he is aware of its existence in his house or on his land, but it would be for him to rebut the ordinary presumption by showing that he was not aware of its existence. He can discharge the onus by showing that it was concealed from his view and that consequently he had not seen it. It is in this sense that knowledge of the existence of an article becomes relevant; he can escape punishment for having an incriminating article under his Control by rebutting the presumptive evidence of his control by showing that since he was not aware of it he could not be said to have control over it.

As in the case of possession, it has been said in several cases that actual control is required and not constructive or legal control. In Santa Singh's case, AIR 1944 Lah 339, the learned Chief Justice said that "possession and control mean something more than mere constructive or legal possession and control," that there must be actual control and that a man must know of the existence of something before he can be said to have it under his control. In Abdul Rahman's case, AIR 1940 All 449, Braund, J., observed that you cannot have control over something which you do not know exists.

The above quoted observation of Harries, C. J., was approved by Sinha J., in the case of Bhekha Ahir, AIR 1947 Pat 236, by Sinha and Dalziel, JJ., in the case of Sahendra Singh and Hemeon, J., in Abdul Rahim Khan's case, 50 Cri LJ 838 : (AIR 1949 Nag 289. In no case has it been explained what is the distinction between culpable control and legal or constructive control. There are pronouncements explaining the distinction between actual possession and legal or constructive possession, but since possession is a concept entirely different from control, what distinguishes between actual possession and legal or constructive possession does not necessarily distinguish between actual control and legal or constructive Control.

If an owner of a house occupied by others is not aware of the existence in the house of an article possessed by a co-occupier he is not in Control of it at all; it is not that he is in some kind of control such as legal or constructive control but not actual control. The real question is of onus of proof, as I pointed out earlier; an owner presumed to be in control of every article found in his house but can rebut the presumption by proving his ignorance of its existence.

15. The presumption that a person is in control of an article found in a house or on land cannot be drawn against one who is not the owner of the house or the land; if cannot be drawn against a mere occupier. In a house occupied by the owner and others a co-occupier who is not the owner has no control over an article not possessed by him even though he is aware of its existence, because he has not the same right as the owner.

16. The applicant is not the sole owner of the house nor the head of the family. He could be in possession of the incriminating articles jointly with his father and brother, but there is no evidence of common intention or object and, therefore, he cannot be presumed to be in joint possession with them. There is no evidence such as exclusive occupation of the room, possession of key i.e. to prove that he was in exclusive possession; merely because the articles were not hidden and must, therefore, have been in the house within his knowledge he cannot be presumed to be in sole possession of them because his knowledge of their existence is quite consistent with the sole possession of his brother or father.

The brother's possession cannot be eliminated simply because of his absence, since there is no evidence that they came into the house after his departure from it, and he could be in possession of them even though absent temporarily. That the father is too old and weak is too slender a ground for eliminating his being in sole possession. He was too old and weak at the time of their recovery, but he could have obtained them in his possession when he was not too old and weak. Also neither youth nor strength is required for possession of a kanta, a pistol and parts of a pistol. The facts accepted by the Courts below, therefore, do not prove that the applicant was in possession or control of the arms.

17. The application is allowed, the conviction, and sentence of the applicant are quashed and he is acquitted. His bail bonds are discharged.