IN THE COURT OF APPEAL OF THE SOCIALIST REPUBLIC OF SRI LANKA

CA HC/104-107/2014

U. Sajith
Molligodawatte,
Wakwella,
Galle.

Appellant

Vs.

Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent

CA 104-107/2014 **HC Anuradhapura 58/2009**

Before: W.M.M. Malinie Goonerathne, J. &

S. Devika de L. Tennakoon, J.

Counsel : Dr. Ranjith Fernando for the accused-appellants.

Shavindra Fernando, ADSG for the State.

Argued &

Decided on :24.03.2016

W.M.M. Malinie Goonerathne, J

When this case was taken up for argument counsel for all the accused-appellants submitted that, there is one common submission on behalf of all four accused – appellants which he is placing before this court. Namely count two which makes reference to the use of fire arms, whereas there was no evidence led at the trial that a firearm was used or possessed by the accused. Although the indictment has listed the government analyst as a witness he was not called or any report marked confirming that the purported firearms recovered, fell within the definition of a firearm under the Firearms Ordinance which would be a mandatory requirement. More so as there was no usage and or firing and the victim's evidence mentions "something like a pistol" and the

police evidence mentions the recovery of a "Galkatas pistol" and that he was aware that it had been sent to the government analyst. This issue had not been addressed by the learned trial judge.

Secondly, although the trial judge correctly accepts in his judgment that the victim has never seen the accused before and that he did not look behind to see the faces of the passengers and that the victim was unable to positively say or identify who got into and traveled in his three wheeler. The trial judge further accepts the evidence that the victim did not identify the persons who came and traveled and robbed this three wheeler. Also that there was no sufficient light where they had stopped with only the front light of the three wheeler shining in a forward direction. The accused had been arrested within 24 hours but no identification parade was held and eventually there was a dock identification almost 7 years later. However, unfortunately, the trial judge in spite of he is accepting the evidence on record had eventually concluded that the accused were guilty as there was no corroboration or confirmation of the positions the accused had taken up in their dock statements. This would be legally erroneous.

However, considering the infirmity on record it is submitted on behalf of the accused that the court may be entitled to and legally justify in considering a conviction under Section 394 of the Penal Code which relates to dishonestly receiving or retaining any stolen property knowing or having reason to believe that the same were stolen since the accused had been found with the stolen three wheeler approximately 2 ½ hours after

the incident. Therefore, it is submitted that this Court be persuaded to set aside this conviction or robbery/aggravated robbery and substitute therefore the conviction retaining dishonestly stolen property under Section 394 of the Penal Code.

He also urged from this Court when considering the imposition of the sentence to take into account all the accused as per record are first offenders with no pending cases, with no evidence or any physical harm or material loss caused to or suffered to by the owner of the three wheeler and most important of all that they had been incarcerated to date for almost a period of five years i.e. three years prior to conviction, as the incident and the arrest in April 2006, the bail granted in 2009 as set out in journal entry in page 47 and after the conviction a period of 1 ½ years incarceration since May 2014. He further urged, even if the court considers that notwithstanding first offender and no pending cases etc. and they must be visited with the maximum sentence that at least the period after conviction be taken into account either in the imposition of the quantum of sentence or the date of which have between intact.

Counsel for the respondent submits that, there was certain infirmities in the evidence with regard to identity but clearly since the accused were apprehended along with the stolen three wheeler within four hours after committing of the offence certainly presumption under Section 114 (a) of the Evidence Ordinance will apply in this case and the incident itself discloses that it appears that the accused were proceeding for something more dangerous which was pre-empted by them being caught at the check

point and subsequently taken to the police station. Therefore, he urges from Court that by conceding it, the conviction can be considered under Section 394 for retention of stolen property that, this is a fit case to consider the maximum three years sentence starting from the variation that is from today. The learned State Counsel does not object to the application made by the Counsel for the appellant.

Having taken into consideration the submissions made by the Counsel we have carefully considered the oral evidence and circumstances available in the case. No identification parade was held and there was only a dock identification which was after 7 years of the incident. We are of the view that, in the absence of positively admissible and reliable evidence, which is lacking in the identification of the appellants, is not sufficient to convict the appellants under Section 380 and 383 of the Penal Code.

There are other reasons why in our opinion the judgment of the learned Trial Judge is not satisfactory. With regard to the 2nd charge the judgment does not refer to any evidence, whether the firearms recovered falls within the definition of Fire Arms Ordinance. Although, the prosecution has listed the Government Analyst as a witness, he was not called and even a report has not been submitted.

On perusal of the judgment, it is relevant to note that, the leaned Trial Judge has not paid attention to any of these aspects. In view of the premises aforesaid, and having taken into consideration the submissions made by the counsel and the evidence led before the learned Trial Judge we set aside the conviction and sentence entered against

the appellants under Section 380 and 383 and, convict them under section 394 of the Penal Code and impose a sentence of rigorous imprisonment for a period of 3 years each. The fine should be remained as it is.

Subject to the above variation of the conviction and sentence, the appeal is dismissed.

We direct the Prison Authorities to implement the sentence imposed by this Court from today.

Learned Trial Judge is directed to issue a fresh committal indicating the conviction and the sentence imposed by this Court.

The registrar is directed to forward the case record with a copy of this judgment to the High Court of Anuradhapura for the implementation of the said sentence.

Appeal dismissed subject to the above variation.

JUDGE OF THE COURT OF APPEAL.

S. Devika de L Tennakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL.

Appeal dismissed.

NR/-