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

In the matter of an appeal against an order of the High court under Sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

HC: KALUTARA 134/02

B.K.C. RUWAN KUMARA
W.P.A. KUMARA WEERASINGHE
(Appellants)

CA NO: 206/2013

Vs.

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

(Respondent)

Before : P.R. Walgama, J

: S. Devika de L. Tennekoon, J

Counsel : Indika Mallawarachchi for the 1st Accused – Appellant.

: Dr. Ranjith Fernando for the 2nd Accused – Appellant.

Argued on : 05.07.2016

Decided on : 17.03.2017

CASE NO- CA- 206 /2013- JUDGMENT- 17.03.2017

P.R. Walgama, J

The Appellants are before this Court aggrieved by the judgment dated 11.06.2013, passed by the Learned High Court Judge, in the Provincial High Court holden at Kalutara.

A conspectus of the relevant facts are stated here under;

As per indictment the Accused – Appellants were indicted on the following counts to vit;

That on or about the 26.03.2000, the both Accused named in the indictment committed robbery of Rs. 37,579 from the Pelpola Co operative Bank, and thereby had committed an offence punishable under Section 4 of the Public Properties Act No. 12 of 1982 read with Section 32 of the Penal Code.

That the 1st and the 2nd Accused along with one Edirisinghe Aratchige Gemunu Ranjith who is now

deceased, possessed a gun without a license had thereby committed an offence punishable under Section 22(1) and 22(3) of the Firearms Ordinance No. 33 of 1916 as amended by Act No. 22 of 1996.

That the Accused – Appellants along with the deceased as stated above did possess a hand bomb and there by had committed an offence punishable under Section 2(1)(b) of the Offensive Weapons Act No. 18 of 1966.

The Court below on a scrutiny of evidence adduced, held the Accused – Appellants herein, to be guilty of the charges levelled against them and imposed the following sentence;

On count No.1 , 20 years Rigorous Imprisonment and fine of Rs. 112,737, with a default term of 6 months, and on the count No. 2 had imposed life Imprisonment, and on the count No. 3, 10 years Rigorous Imprisonment.

Being aggrieved by the sentence above the Accused-Appellants had appealed to this court to have the conviction and the sentence set aside. It is contended by the Counsel for the 1st Accused – Appellant that she will not challenge the conviction and sentence in respect

of count Nos 1 and 3, but only challenge the conviction and sentence imposed on the 2nd count.

The counsel for the 2nd Accused – Appellant, submits that he will concur with the submissions of the Counsel for the 1st Accused – Appellant.

The principle ground of appeal raised by the Counsel for the Accused – Appellants is that the pistol allegedly used by the 1st Accused – Appellant was not produced at the trial court below.

As per version of the prosecution and the evidence elicited at the trial it was revealed that the police recovered a pistol from the trouser pocket of the 1st Accused – Appellant at the time of arrest. Thereafter the said pistol was handed over to the police which was never produced at the said trial. It was the evidence of the Officer in charge that the pistol was handed over to the police reserve but had been misplaced and that an inquiry was pending as to the missing item. It is also admitted by the prosecution that the said gun was missing before it was sent to the Government

Analyst Department for examination, and hence there was no report being produced at the trial.

Thus in the above setting it is the contention of the counsel for the Accused – Appellants that without the production in issue the trial court should not have convicted the Accused – Appellants of the 2nd count to vit. for possessing a firearm.

It is salient to note that the identity of the accused and the fact that the Accused – Appellants used a pistol to threaten the complainant to rob the Bank has been established by cogent evidence.

Further it is intensely relevant to note that the Accused – Appellants were attached to the Ganemulla Army Camp and the alleged gun has been removed from the armoury of the above camp.

To cap it all it is to be noted that the 2nd Accused – Appellant was attached to the said armoury. It is contended by the counsel for the Respondent, that the end result of a non production of any item used in the commission of the alleged crime should not defeat the case of the prosecution.

In dealing with the case of SUDUBANDA.VS.AG- (1998-3SLR- 375) wherein it was held that if court may require the production of the material object for inspection, and that nonproduction of a material object is not necessarily fatal to a conviction.

The said principle has been recognised by His Lordship F.N.D.Jayasuriya in the case of SUDUWELI KONDAGE SARATH AND ANOTHER. VS. THE ATTORNEY GENERAL -decided on 26.10.1998. His Lordship has opined that the lay witnesses have described the instruments which were in the hands of the accused, and held that the conviction was well sustained.

The Learned DSG has adverted this Court to the case of RATNAYAKE MUDUYANSELAGE RATNAPALA- decided on 27.05.1999 which stated thus;

" the best evidence rule and the rule enshrined in Section 91 of the Evidence Ordinance excluding parol evidence is only applicable to documents and not to material objects." (emphasis added)

Hence it is to be mentioned that the contentions advanced by the counsel for the Accused – Appellant are devoid of merit.

Thus analysed, this court is of the view that the submissions of the counsel for the Accused – Appellants enter into the realm of total insignificance.

For the forgoing reasons we are of the view and are persuaded to dismiss the appeal.

Accordingly appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J
I agree,

JUDGE OF THE COURT OF APPEAL