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

C.A. Case No. 120/ 2012

H.C. Embilipitiya No. 28/2009

Democratic Socialist Republic of Sri Lanka,

Complainant

V.

Sudath Danasiri,

Accused

AND

Sudath Danasiri,

Accused-Appellant

V.

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

Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

COUNSEL : Kalinga Indatissa PC with Sandeepani Wijesooriya, Samantha Premachandra, Rashmini Indatissa and Razana Saleek for the Accused-Appellant.

Chethiya Goonesekara DSG for the AG.

ARGUED ON : 14.05.2019

WRITTEN SUBMISSIONS

FILED ON : 13.01.2017 by the Accused Appellant
02.03.2017 by the Respondent

JUDGMENT ON : 18.07.2019

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted in the High Court of Embilipitiya on two counts. In count No.01, he was charged for being in possession of an automatic weapon punishable under section 22(1) and 22(3) of Fire Arms Ordinance, and on count No. 02 he was charged for being in possession of 28 live cartridges, an offence punishable under Section 27(2)a of the Explosives Act. After trial, upon conviction, the learned High Court Judge imposed life imprisonment and imprisonment for 01 year for counts 01 and 02 respectively. Being aggrieved by the said conviction the Appellant preferred the instant appeal. As settled by the learned President's Counsel for the Appellant at the argument, the grounds of appeal urged are;

1. That the prosecution has failed to prove the case beyond reasonable doubt.

2. That the inward journey of the productions to the government analyst was not proved, and that the learned Trial Judge failed to consider that the chain of custody was not properly established.
3. That the learned Trial Judge failed to evaluate inconsistencies on major matters between PW1 and PW2.
4. That the statement of the Appellant made from the dock did not receive proper judicial analysis by the learned Trial Judge.

Case for the Prosecution.

02. Case for the prosecution in brief was that PW1 and PW2 were attached to the Sevanagala Police Station and they were on duty at the road block at Moraketiya junction when the vehicle (a white dolphin van) bearing registration No. 254-1396 came from Moraketiya towards Embilipitiya. When PW1 signaled the van to stop, it had stopped further about 08 meters away from them. PW1 had asked PW2 to go and check the documents of the vehicle. PW2 had gone towards the van and PW1 had been checking the other vehicles. In a little whilst time he had seen PW2 and the passenger who was in the left front seat pulling a weapon from each other. He had immediately gone towards the vehicle and he had seen the weapon coming to the hand of PW2. PW1 had identified the passenger who was in the left front seat as the Appellant. As he went close to the vehicle, it had moved fast. PW2 then had informed the Sevanagala Police Station over the phone about the incident. It was also evident that Appellant had been arrested by the Embilipitiya police and that PW4 had taken over the Appellant and the vehicle from the Embilipitiya Police Station and had brought to the Sevenagala Police Station.

Defence case

03. Appellant giving a dock statement from the dock had said that when he was at home, one Namal had come and asked him to drive the vehicle to go to Embilipitiya, as Namal did not have the driving license. At the Moraketiya Police road block, upon being signaled, he had stopped the vehicle. He had gone to the OIC to show the license and insurance. Meantime another police officer had gone towards the van. After opening the side door of the van, the officer had said that "මේ තියෙන්නෙ බඩු" and had shown a gun. Namal had run away. He also had driven the van towards Embilipitiya where he was stopped and arrested by the Embilipitiya police. He said that he was not aware of any weapon being inside the van.

Ground No.02

04. Ground of appeal No.02 will be discussed first. It is submitted by the learned President's Counsel for the Appellant that the prosecution has failed to establish the chain of custody of the weapon from the time of detection until it was examined by the Government Analyst.

05. In ***Perera V. AG [1998] 1 SLR*** at page 378, J.A.N. De Silva J held that;

> "It is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the Analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the Analyst. Therefore it is correct to state that the most important journey is the inwards journey because the final Analyst report will be depend on that. The outward journey does not attract the same importance."

06. It is important that the prosecution proves beyond reasonable doubt that the weapon detected in this case was the weapon that was analyzed by the Government Analyst who prepared and submitted the report to Court. In the instant case, the Prosecution has called witnesses who detected the weapon, the officer who was on reserve duty at the police station who took over the weapon, officer who handed over the weapon to Magistrate's Court, Production clerk in the Magistrates Court and the officer who took the weapon to the Government Analyst.

07. On 16th November 2011, at the end of the proceedings the learned Trial Judge has adjourned the proceedings to enable the Prosecution to add the police officers who were on reserve duty under whose custody the weapon was during the relevant period, to the list of witnesses. (Page 102 of the brief). However, the Prosecution has failed to call the rest of the reserve police officers under whose custody the weapon was. However, the learned Trial Judge has addressed this issue sufficiently in pages 11 and 12 on his judgment. As rightly said by the learned Trial Judge, the productions in this case are not illicit liquor or illicit drugs like heroin that cannot be identified by an identification mark or a number. In the instant case it is a weapon (T56 gun), which has an identification number engraved. Prosecution has proved that the weapon taken into custody at the detection, and analyzed by the Government Analyst is the same weapon (T56 gun) by the identification number. Hence, the learned Trial Judge was right when he decided that the chain of custody of the weapon was established by the prosecution and that there is no doubt that the weapon analyzed by the Government Analyst was the same weapon detected by the police officers.

Therefore, I find that the ground of appeal No.02 has no merit and should be dismissed forthwith.

Grounds of appeal No. 01, 03 and 04.

08. These three grounds will be dealt together. It is the contention of the learned President's Counsel for the Appellant, that the learned Trial Judge has failed to analyze the evidence of the prosecution. It was further submitted that the dock statement made by the Appellant was not considered by the learned Trial Judge. There had been another person with the Appellant in the vehicle, and as to what happened to him is not disclosed by the Prosecution. Learned President's Counsel submitted that there is a doubt as to the person with whom the weapon was, and that the dock statement in that regard was not considered by the learned Trial Judge.

09. Evidence of PW1 was that he saw PW2 and the Appellant pulling the weapon. PW2 had been outside the van and Appellant had been in the front passenger seat. Just before the vehicle left, the weapon had come to PW2's hand.

10. According to PW2, he had first gone to the driver. When asked for the documents, driver had asked him to get it from the person in the passenger seat. That shows that the owner of the vehicle had been the person in the passenger seat and not the driver, as stated by the Appellant in his dock statement. Then, PW2 had gone to the person in the front passenger seat where he saw a weapon in between his legs. PW2 further said that the driver switched on the light inside the vehicle, so that he could identify the Appellant. It is highly improbable that the driver would switch the light inside the vehicle on, on his own, if he knew that the passenger was keeping

a T56 gun in between his legs. It is important to note the evidence of PW2 in cross examination on 16.11.2011 at page 71 of the Court record;

ප්‍ර: දොර ඇරියද?

උ: එහෙමයි

ප්‍ර: ඒ අවස්ථාවේ වාහනයේ එන්ජිම කොහොමද තිබුණේ?

උ: ස්ටාර්ට් එකේ තිබුණේ.

ප්‍ර: පොර බදින කොට ගිනි අවිය අතට ආවා කියල කිව්වා?

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ප්‍ර: කොහාටද විසි කලේ?

උ: පස්සට දැම්මා.

ප්‍ර: මහත්මයා ඔය වාහනය උ.පො.ප. ධර්මපාල නිලධාරියා පරීක්ෂා කලාද?

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ප්‍ර: මහත්මයා කියන්නේ පොරබදින අවස්ථාවේ මහත්තයා අතට ගිනි අවිය ආවා කියලද?

උ: ධර්මප්‍රිය මහත්තයා දුවගෙන ආව එතකොට වැන් එක ඇද්දුවා. ඒ වෙලාවේ ගිනි අවිය අතට ආවා.

ප්‍ර: මහත්තයාට ඒ අවස්ථාවේ වාහනයේ වම් පැත්තේ සිටි පුද්ගලයා හොඳට පේනවද?

උ: එහෙමයි.

11. It is clear that answering the questions posed by the defence counsel, he contradicted himself as to how the weapon came to his hand. He initially said that the Appellant threw the weapon to the back side and immediately changing his version he said that when he pulled it came to his hand. The position that was taken by the Appellant in his statement from the dock was, that PW2 got the weapon that was in a bag after opening the side door of the van. According to him, the passenger was one 'Namal' who owned the vehicle.

12. Evidence of the PW1 and PW2 makes it clear that there was another person in the van. Version of the Prosecution is that the 3rd person was the driver at the time of the detection. Evidence of the PW2 suggests that the owner of the vehicle was the person who was driving. PW2 said that when he asked the driver for the documents, the driver asked him to get it from the person who was in the front passenger seat. Although the Embilipitiya police stopped the vehicle within few minutes, only the Appellant was arrested with the van. Prosecution has failed to disclose the 3rd person, nor has taken any interest to investigate about him. Appellant says he was Namal who owned the vehicle and that he did not know about a weapon being in the vehicle. The learned Trial Judge has failed to take into consideration about the presence of the 3rd person in the vehicle, with the dock statement of the appellant. A clear doubt is created as to whether the weapon involved was in the possession of the 3rd person referred to as 'Namal' by the Accused, and the Prosecution has failed to exclude that doubt. Although their evidence shows that the 3rd person was driving the vehicle, police have failed even to investigate about him. The evidence of PW2 as mentioned in paragraph 10 of this judgment further creates doubts about the detection of the weapon, especially as to who possessed the weapon. The evidence of the prosecution witnesses was that the ammunition was attached to the weapon.

13. In case of ***The Queen V. D.G.De S. Kularatne and 2 others ([1968] 71 N.L.R. at page 529)*** Court of Criminal Appeal held;

' ... when the evidence led for the prosecution lends itself to a reasonable inference that either of the two persons could have committed an act, the burden is on the prosecution to exclude one person effectively if it seeks to attach responsibility for that act to the other person; the best way-

often the only way- in which this can be achieved is by the prosecution calling as a witness the person sought to be excluded. ... '

14. In the instant case, apart from calling the 3rd person, the Prosecution has failed even to investigate into that person, knowingly that he was driving the van, according to the PW1 and PW2. Hence, the grounds of appeal 01, 03 and 04 taken together has merit.

15. In the above premise, I find that the learned Trial Judge has erred when he found that the prosecution proved the charges beyond reasonable doubt. Hence, the Appellant is acquitted on both counts 01 and 02.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL