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

In the matter of an Appeal in terms of section 331 (1) of the Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0236/2019

High Court of Kegalle Case No:

HC/3399/2014

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Udugamage Jayarathne

ACCUSED

AND NOW BETWEEN

Udugamage Jayarathne

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J.
	: Sampath B Abayakoon, J.
Counsel	: Kalinga Indatissa P.C. with Niranjan Inyagolla, Rashmi Indatissa and Razana Salih for Accused-Appellant
	: Dileepa Peris D.S.G. for the Respondent
Argued on	: 03-03-2021
Written Submissions	: 01-07-2020 (By the Accused-Appellant)
	: 10-02-2021 (By the Respondent)
Decided on	: 31-03-2021

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) being aggrieved by the conviction and the sentence imposed on him by the learned High Court Judge of Kegalle.

The accused was indicted before the High Court of Kegalle for having in his possession an automatic firearm on or about 31st March 2012, thereby committing an offence punishable under section 22(3) read with section 22(1) of the Firearms Ordinance.

After trial, the appellant was found guilty as charged by the learned High Court Judge by his judgment dated 09-10-2019, and was sentenced to life in prison.

This is an action instituted based on an alleged recovery of a T-56 weapon from the possession of the appellant. According to the evidence led on behalf of the prosecution, the recovery has been made by a team of Police Officers of the Criminal Investigation Department (CID) led by the PW-01 namely IP Nishantha

De Silva. It was the position of the PW-01 that on receiving information of the T-56 weapon, he went to the house of the appellant on the morning of 31-03-2012 with his team and recovered the mentioned weapon based on the statement made to him by the appellant. The main piece of evidence relied on by the prosecution has been the said recovery based on the alleged section 27 statement made by the appellant under the provisions of the Evidence Ordinance marked P-01 at the trial. It has been stated that the weapon was recovered about 35 meters away from the house of the appellant in a Habarala thicket and it would not have been recovered if not for the statement of the appellant.

It has been the consistent stand of the appellant that he was arrested in the early hours of the 30th of March and not on the 31st. It was his position that he being a worker at the Sri Lanka Ports Authority, was taken into a vehicle by a group of persons around 4 am on the 30th while awaiting a bus to go for work, and blindfolded, questioned, and taken to various places along with two other persons a male and a female. According to his version of events he was taken to Rambukkana and from there to Polonnaruwa where another person was arrested and only on the morning of the 31st that he was brought to his house in Kegalle. The appellant has made a total denial that any weapon was recovered from his custody on a statement made by him.

Interestingly, while under cross examination by the defence, PW-01 has admitted that he and his team of officers left their station in order to investigate the information they received on possession of weapons on the 29th of March and spent the night in Kegalle, and although they went in search of the appellant around 6 am on the next day, namely on the 30th , he came to know that the appellant was not in his home. It was his position that in order to further investigate the matter, they went to Rambukkana and arrested a female called Hansika and her father and along with them left to Polonnaruwa looking for one Sampath but could not find him. According to the evidence

given by PW-01 under cross examination, it was only after returning from Polonnaruwa on the 31st the recovery of a T-56 weapon was made from the appellant's possession and his arrest was made.

PW-02 too, who has allegedly assisted the PW-01 has denied that the appellant was arrested on the 30th and the version of events as suggested by the defence.

The defence has also brought to the notice of the Court of the fact that the wife of the appellant has lodged a complaint with the Kegalle Police on the 30th evening of her husband's failure to report to work at his place of work in Colombo.

When called for a defence at the end of the prosecution case, the appellant has chosen to give evidence and has also called his wife to substantiate his evidence. She has marked as V-01, the complaint she made to the Kegalle Police on the disappearance of her husband.

At the hearing of the appeal, it was the contention of the learned counsel for the appellant that the evidence made available before the learned High Court judge has failed to prove the charge against the appellant beyond reasonable doubt. It was his position that in the High Court, the appellant has given evidence and called a witness to testify on behalf of him and has faced the test of cross examination before the Court. Therefore, it was his position that the learned High Court Judge should have looked at the totality of the evidence in its correct perspective and come to a firm finding as to the probability of the version of events placed before the Court, which in his view stands in favour of the version of the appellant. It was his position that the prosecution has failed to divulge the material facts to the Court until raised by the defence and has chosen to suppress evidence which would otherwise favour the appellant's stand. He found fault with the prosecution for failing to call the father and the daughter who was admittedly in the custody of the Police and had been present at house of the appellant at the time of the alleged recovery of the weapon,

whose evidence would have revealed the actual truth and also would have rebutted the evidence of the appellant if he was not telling the truth.

It was his contention that it was the duty of the prosecution to prove its case beyond reasonable doubt and an accused person has no obligation as such and it is enough for an accused person in a criminal trial to create a reasonable doubt as to the prosecution case or to provide a reasonable explanation which the appellant has done and the appellant should have been given the benefit of the doubt.

The learned Deputy Solicitor General making submissions on behalf of the Attorney General was gracious enough to admit that the prosecution has failed to lead evidence on several factual matters which came to light during the hearing of the appeal, and was of the view that he is no longer in a position to defend the conviction in view of the same, for which the Court is thankful to the learned Deputy Solicitor General.

In the instant action, in view of the total denial of the appellant that a weapon was recovered from his possession or based on a statement made by him, the onus was with the prosecution to prove that fact beyond reasonable doubt in order to ensure the conviction of the appellant.

In the case of the **Queen Vs. Sumanasena 66 NLR 350** it was stated that;

> *"In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give evidence or call evidence."*

Although section 31 of the Firearms Ordinance provides that any occupier of any house or premises in which any gun shall be found shall for the purposes of the Firearms Ordinance be deemed to be the possessor of the gun unless he proves that he had no knowledge or some other person had the possession, as

contended correctly, I am of the view that the provisions of the section becomes applicable only if the Court believes the evidence as to the recovery of the Firearm as stated by the prosecution.

It was held in the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148** that;

> *"As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it's sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt."*

There cannot be any argument that there is a duty cast upon the prosecution witnesses to divulge the full truth as to what happened and not the suppression of facts which they may think that are not favourable to the case of the prosecution.

According to the facts revealed during the argument of the appeal, a female called Hasanthi and her father has been in the custody of the PW-01 when he and his team allegedly visited the house of the appellant on the 31st, a fact PW-01 or PW-02 for that matter, failed to mention until questioned by the defence. PW-01 has given his evidence in chief to show that it was only on the 31st that he visited the house of the appellant and recovered the weapon. But under cross examination, it has been revealed that in fact, the Police team has visited the area looking for the appellant on the morning of the 30th as well. The evidence of PW-02 suggests that they have gone looking for the appellant around 5 am, which fits the appellant's evidence as to the time he was taken in by a group of people in civilian clothing.

According to the evidence of PW-01, when the alleged detection was made, the weapon was found covered by plastic sheets and inside a black coloured bag. I find that these items would have been vital pieces of evidence if produced in Court to boost the prosecution version of events. Although the counsel for the

defence has asked about the black coloured bag and where it is now, other than saying that it is available, it has never been produced as a production. I find that it was important for the prosecution to clarify these matters at least while during the re-examination of the witnesses since the stand of the appellant has been that nothing was recovered based on a statement by him and that he was taken into custody not on the 31st but on the 30th.

Under the circumstances, the complaint made by the wife of the appellants is also of vital importance. She has made the complaint marked V-01 at 5.40 pm. on the 30th, the day the appellant alleges that he was taken in to custody. The wife has given a clear reason to Kegalle Police as to why she is making the complaint. There cannot be any reason for the wife to make such a complaint expecting an imminent arrest as the prosecution evidence has been that they went to the house of the appellant for the first time on the 31st morning.

As mentioned before, the appellant has given evidence under oath in this trail and has stated his defence. It is clear from the cross examination of the appellant by the prosecution that, at no point the prosecution has challenged the version of events as told by the appellant. I find that even the evidence of the wife of the appellant has not been challenged on the material points, if the prosecution wanted the Court to disbelieve them.

In the case of **James Silva Vs. republic of Sri Lanka (1980) 2 SLR 167 at 176** it was held:

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

When considering the evidence as a whole, it is clear to me the stand taken by the appellant as to his arrest on the 30th and the events that unfolded

thereafter is more probable than that of the version of events presented in Court by the prosecution witnesses. I find that the prosecution witness Number 01 and 02 was not truthful about the arrest of the appellant which is a matter that goes into the root of the prosecution case against him. I am of the view that a reasonable doubt has been created and a reasonable explanation has been provided by the appellant in this action, which should have been viewed in favour of him by the learned High Court Judge.

I am also of the view that since this an action instituted based solely on an alleged section 27 statement made by the appellant to PW-01, it would be unsafe to convict the appellant for the charge against him under the above-mentioned circumstances.

Therefore, allowing the appeal, I set aside the conviction and the sentence imposed, as it cannot be allowed to stand and acquit the appellant of the charge.

Judge of the Court of Appeal

K Priyantha Fernando, J.

I agree.

Judge of the Court of Appeal