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

In the matter of an Appeal under and in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979 as amended.

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

Court of Appeal Case
No. HCC/255/19

Complainant

High Court of Polonnaruwa
Case No. 051/14

Vs.

Beligolle Sujith Thushara Jayasinghe,
No.220, Medagama,
Medirigiriya.

Accused

AND NOW BETWEEN

Beligolle Sujith Thushara Jayasinghe,
No.220, Medagama,
Medirigiriya.

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**

WICKUM A. KALUARACHCHI, J

COUNSEL : Darshana Kuruppu with Sajini Elvitigala for the Accused-Appellant

Sudharshana De Silva, DSG for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 26.06.2020 (On behalf of the Accused-Appellant)

31.07.2020 (On behalf of the Respondent)

ARGUED ON : 26.05.2022

DECIDED ON : 19.07.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Polonnaruwa on the first count of possessing a T-56 automatic weapon, an offence punishable under section 22(3) read with section 22(1) of the Fire Arms Ordinance No. 33 of 1916 as amended by Act No. 22 of 1996; and on the second count of possessing of 30 bullets, an offence punishable under section 27(1)(a) read with section 9(2) of Explosives Act No. 21 of 1956 as amended by Amendment Acts No. 33 of 1969 and No. 18 of 2005. After the trial, the learned High Court Judge convicted the appellant and imposed life imprisonment for the first count and a fine of Rs. 15000/= with a default term of six months simple imprisonment for the second count. This appeal is preferred against the said convictions and sentences.

The facts of the case, according to the prosecution, may be briefly summarized as follows:

On the day in question, around 6.30 a.m., the Chief Inspector of Police Station, Hingurakgoda (PW-1) received information from a private informant about a group of armed persons going for a robbery. He arranged a raid and a group of police officers went with him to "Marasinghe estate" on Medirigiriya road. The 'Elf' lorry mentioned in the information was searched by him and the other officers. The appellant was seated in the front left with a dark blue colored bag. When this bag was opened, there was a T-56 weapon and a magazine with 30 bullets.

Both parties have tendered written submissions prior to the hearing of the appeal. At the hearing, the learned counsel for the appellant advanced his arguments on the following three grounds:

I. The learned trial Judge was in error when he failed to consider the serious contradictions in the prosecution story.
II. The prosecution has failed to prove beyond reasonable doubt the chain of production.
III. The learned trial Judge has misdirected himself in law by failing to evaluate the evidence of the prosecution and the defence in the proper perspective.

Apart from the aforesaid grounds of appeal, the learned counsel for the appellant pointed out that PW-1 stated in his evidence that the raid was carried out after receiving information on 27.09.2010. However, the learned counsel submitted that according to the charges, the offences were committed on 28.09.2010, and thus it was not proved that the offences were committed on the date mentioned in the charges.

However, it is apparent that it is only a mistake because PW-1 stated in cross-examination that the accused-appellant was arrested on 28.09.2010 at 11.50 hours. (The said answer of PW-1 is found on page 57 of the appeal brief). In addition, PW-20 who went for the raid has also explained that the raid was carried out on 28.09.2010 (Page 193 of the appeal brief). Therefore, the date of the raid is not an issue and no prejudice is caused to the appellant as a result of the above mistake.

The learned counsel for the appellant has brought to the notice of the court a vital discrepancy. PW-1 stated that the serial number of the T-56 weapon purported to be recovered from the appellant is No. 28032467 (Page 48 of the appeal brief). PW-1 stated on another occasion that the serial number mentioned in the notes is 38032467 (Page 50 of the appeal brief). In fact, on the same page, in response to a question, PW1 stated correctly that the serial number mentioned in the notes is 28032467. Only when the learned state counsel who prosecuted the case asked whether the number mentioned in the notes is 38032467, PW-1 answered in the affirmative. Apart from that, the government analyst has stated, in one instance, that the serial number of the weapon is 18032467. (Page 88 of the appeal brief). Here also, only the first digit of the serial number differs. However, this is a discrepancy that should be carefully examined because the serial number is the best method of identifying a gun. Also, if the gun examined by the Government Analyst does not have the same serial number as the gun allegedly recovered from the appellant, the first charge cannot be proved.

The learned Deputy Solicitor General contended that there could be a typographical error or mistake of this nature, but these numbers are correctly noted in documents and since the documents are tallied, there would be no issue in identifying the gun. He submitted further,

that only on aforesaid occasions, the first digit of the number differs, but on all other occasions, witnesses have stated the number correctly as 28032467 and that number appears correctly in all relevant documents. I agree with the contention of the learned Deputy Solicitor General because even the Government Analyst has stated in his evidence found on page 80 of the appeal brief that he observed the number as 28032467 and made notes. In addition, in the Government Analyst Report dated 18.07.2012, the serial number of the T-56 gun that he received was mentioned as 28032467. In addition, the same number appears in the property receipt (PR document is found at page 354 of the appeal brief) produced in this case. This court perused the notes in the police information book to ensure the correctness of the number. (The said notes are attached to the appeal brief and found at page 700) From the said notes also, it is apparent that the serial number of the gun recovered from the appellant is 28032467. Therefore, there is no reasonable doubt regarding the identity of the T-56 gun recovered from the appellant.

The learned counsel for the appellant pointed out that according to PW-1, the main investigating officer; only one magazine and 30 bullets were found with the T-56 gun. However, according to PW-5, two T-56 guns and two magazines were recovered during the raid. The learned counsel for the appellant added that the Government Analyst has stated that he received a magazine with 30 bullets and another magazine with 19 bullets. Therefore, the learned counsel for the appellant contended that the said contradiction casts serious doubt as to what articles were recovered during the raid.

The learned Deputy Solicitor General submitted in reply that since the other magazine and 19 bullets were not relevant to this case, PW-1 has not given evidence regarding those items recovered. It is to be noted that according to the property receipt (PR) No.13/10 pertaining to this

case, only the magazine with 30 bullets has been mentioned. Therefore, it is apparent that PW-1 has given evidence only with regard to the items pertaining to this case. The Government Analyst has stated about the other magazine with 19 bullets because he received the said production marked as P7 also with the productions of this case. In the Government Analyst Report, it is clearly mentioned that a magazine with 19 bullets was received as the production marked P7. This is also apparent from the contents of the affidavit marked P5 found at page 471 of the appeal brief. PW-1 tendered this affidavit to the Magistrate Court of Hingurakgoda in order to send the productions to the Government Analyst. According to the affidavit, the magazine with 19 bullets was marked as P7, and what was recovered from the accused-appellant was a T-56 gun and a magazine with 30 bullets. It is specifically stated in the said affidavit that the other T-56 gun and a magazine with 19 bullets were recovered from the custody of one Nimal Weerasekera, who was held in custody on detention orders. Therefore, it is obvious since the other magazine was recovered from the custody of an accused in another case, PW-1 has not stated regarding those productions that were not relevant to this case. However, since the Government Analyst received all the productions, he has mentioned about those productions as well in his report. Anyhow, it is precisely clear from the Government Analyst Report that the other magazine had been sent as the production marked P7. Hence, it is evident that the other magazine has also been recovered in this raid from another person but is not relevant to this case.

Another discrepancy that was shown by the learned counsel for the appellant was that according to the evidence of PW-1, three persons were in the front of the lorry and two persons were at the rear. However, the learned counsel pointed out that according to PW-2, eight suspects were arrested and produced in the Magistrate Court. Therefore, the learned counsel contended, it is clear that the

prosecution has not presented the true story of this case. The learned Deputy Solicitor General explained how eight suspects were produced in court. PW-2 who spoke about eight suspects did not participate in the raid. He stated about producing the suspects to court. Apart from the five suspects including the accused in this case arrested at the time of the raid, three other suspects were arrested subsequently and all eight suspects have been produced in court under B report bearing number 921/10 on the 30· 09.2010. Prosecution witnesses number 5 and 20 who participated in the raid have stated in their evidence that there were five suspects in the lorry, three persons in front including the driver, and two persons in the back. Therefore, it is apparent that there was no contradiction regarding the number of suspects arrested at the initial stage of the raid.

Another discrepancy that was shown by the learned counsel for the appellant was that, according to the PW-1, once the lorry was stopped, a bag was on the legs of the appellant, who was seated on the left side of the front seat. But according to the PW-20, the bag was near the legs of the appellant. As far as I see, it is a minor discrepancy that does not go to the root of the case because if the bag was on the toes of the appellant, it can be stated, as stated by PW-1 that "එම පුද්ගලයාගේ කකුල් දෙක උඩ බෑග් එකක් තිබුණා". When the bag was in that position, one can also state, as stated by PW-20 that "වම් කෙළවරේ සිටි පුද්ගලයාගේ කකුල් දෙක අසල නිල් පාටට හුරු බෑග් එකක් තිබෙනවා දුටුවා". Therefore, that is not a discrepancy that creates a reasonable doubt about the prosecution story.

The learned counsel for the appellant advanced another argument that, according to the evidence in chief of PW-1, there was a magazine and 30 bullets in the bag. The magazine was not loaded into the gun and the bullets were also not loaded into the gun. However, he pointed out that in cross-examination PW-1 has stated that bullets were loaded

into the gun. When the aforementioned two instances (found on pages 53 and 61 of the appeal brief) are considered, it cannot be determined conclusively that PW-1 has taken contradictory positions because, when the magazine in which the bullets were loaded had been removed from the gun, he may have said that the bullets were not loaded. Therefore, there is no apparent contradiction to be considered.

The learned counsel for the appellant also pointed out as a contradiction that PW-1 has stated that the appellant was arrested at 11.30 hours, in cross-examination he said that the appellant was arrested at 11.50 hours, and PW-20 has stated that the appellant was arrested around 10.30-10.45. In stating the time, it is clear that PW-20 has not perused the notes. That is why he stated "10.45 ට, 10.30 ට ආසන්නව ඇති." Also, there is only a slight difference between the times mentioned by PW1. Minor discrepancies of this nature do not affect the credibility of the witnesses or the prosecution case. It is to be noted that in the case of The Attorney General V. Sandanam Pitchi Mary Theresa – S.C. Appeal No. 79/2008, decided on 06.05.2010, it was observed that *"Police officers are not infallible observers and may, like any other witness, make honest mistakes."*

In addition, in the case of Sunil vs. The Attorney General (1999) 3 Sri LR 191, it was observed that *"the Court must not be unmindful of the fact that they are human witnesses and it is a hallmark of human testimony that such evidence is replete with mistakes, inaccuracies, and misstatements.* Also, it is stated in this judgment that *the court has to be equally mindful of the fact that the evidence tendered by human testimony will suffer from certain deficiencies and defects. It is in this light that Justice Cannon in Attorney General v. Visuavalingam - 47 NLR 286 emphasized that no prudent and wise Judge would disregard testimony for the mere proof a contradiction but that a wise Judge should critically assess and evaluate the contradiction. He emphasized*

the Judge must give his mind to the issues what contradictions are material in discrediting the testimony of a witness".

The observations made in State of Uttar Pradesh v. Anthony - 1985 AIR SC 48 are cited in the aforesaid case of Sunil v. Attorney General in the following way. *"The danger of disbelieving an otherwise truthful witness on account of trifling contradictions has been spotlighted. The Indian Judge observed that the witness should not be disbelieved on account of trivial discrepancies, especially where it is established that there is substantial reproduction in the testimony of the witness in relation to his evidence before the Magistrate or in the session Court and that minor variation in language used by witness should not justify the total rejection of his evidence".*

Also, it was held in Bandara V. The State- (2001) 2 Sri L.R 63 that *"discrepancies and inconsistencies which do not relate to the core of the prosecution case, ought to be disregarded especially when all probabilities factor echoes in favour of the version narrated by a witness".*

In Bhoginbhai Hirjibhai V. State of Gujarat AIR 1983 SC 753, The Indian Supreme Court held as follows:

"By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image

on one person's mind, whereas it might go unnoticed on the part of another.

Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on".

The aforesaid portion of the Indian Supreme Court Judgment is cited in the case of A.K. Kamal Rasika Amarasinghe V. OIC Special Investigation Unit and Hon. Attorney General - SC Appeal No.140/2010 – Special Leave to Appeal No.118/10, decided on 18.07.2018.

In considering the aforesaid circumstances with the decisions and observations of the aforesaid judicial authorities, I hold that the learned High Court Judge has correctly assessed and evaluated the contradictions in this case and held that those contradictions have not affected the credibility of the prosecution case. For the reasons stated above, the appeal would not succeed on the first ground of appeal.

The learned counsel for the appellant advanced the argument that the chain of production had not been proved beyond a reasonable doubt, by drawing attention to the fact that Amila Wijesekera who had accepted productions from the Hingurakgoda Magistrate Court was not called in evidence. It is to be noted that the necessity of calling witnesses to establish the chain of production is to ensure that the productions taken from the custody of the accused-appellant have in fact been forwarded to the Government Analyst. There is no dispute on the facts that PW-1 requested from the Magistrate Court by way of an affidavit marked 'P5' to send the productions to the Government Analyst, after the relevant productions have been handed over to the Magistrate Court. PW-8, P.S. 25608 then took the productions and handed them over to the Government Analyst. A memorandum issued

by the Government Analyst proves that PW-8 handed over the productions to the Government Analyst Department. PW-8's evidence on taking the productions from the Hingurakgoda Magistrate Court and handing them over to the Government Analyst has not been challenged in cross-examination. Hence, no reasonable doubt would be cast on the chain of production. Accordingly, the second ground of appeal would fail.

The learned High Court Judge has evaluated the prosecution evidence and stated his findings in the Judgment with reasons. In this Judgment, it was discussed and found that the contradictions and the deficiencies pointed out by the learned counsel for the appellant do not create a reasonable doubt about the prosecution case. In addition, the learned Judge has evaluated how the ingredients of the charges have been proved by the prosecution evidence. Hence, it appears that the learned High Court Judge has properly evaluated the prosecution evidence.

The learned counsel for the appellant contended, citing the relevant judicial authorities, that the dock statement of the appellant and the defence evidence had not been considered by the learned trial Judge. In paragraph one of the Judgment, on page 11, the learned High Court Judge analyzed the defence version. Although the analysis is brief, as the learned Deputy Solicitor General pointed out, it appears that the entire defence version has been considered by the learned Judge in this analysis. It would be preferable if the conclusion regarding the defence case was set out in the Judgment with more reasoning, but I agree with the learned High Court Judge's conclusion of not accepting the defence version in light of all of the evidence presented in this case. Therefore, I am not inclined to agree with the contention that the evidence in the case has not been evaluated in the proper perspective

by the learned High Court Judge. Accordingly, the third ground of appeal would also not succeed.

In the circumstances, I find no reason to interfere with the Judgment of the learned High Court Judge. Accordingly, the Judgment dated 19.09.2019, conviction, and sentence are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL