

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

In the matter of an appeal in terms of Section 331 of Criminal Procedure Code Act No. 15 of 1979.

CA No: CA/HCC/ 299/2012
Negombo HC – CASE NO: HC 200/1998

The Democratic Socialist Republic of
Sri Lanka

Complainant

Vs.

Lathwahandi Kithsiri Pradeep Silva alias
Captain Ranji
No. 117, Line Road, Thimbirigaskatuwa,
Negombo.

Accused

And now between

Lathwahandi Kithsiri Pradeep Silva alias
Captain Ranji
No. 117, Line Road, Thimbirigaskatuwa,
Negombo.

Accused- Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Jagath Abenayaka AAL for the accused-appellants
Dilan Ratnayake SDSG for the complainant-respondent

Written Submissions: By the accused-appellant on 30.04.2021 and 27.05.2022
By the complainant-respondent 28.07.2017

Argued on : 04.05.2022

Decided on : **17.10.2022**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Negombo, dated 07.12.2012, by which, the accused-appellant, was convicted and sentenced to 10 years rigorous imprisonment and fined Rs. 10,000/- and in default, 3 months simple imprisonment.

The accused-appellant was indicted in the High Court of Negombo on the following count;

- (1) That on or about 06.12.1997 within the jurisdiction of this court, at Katunayake for keeping in possession of a revolver in terms of regulation 29 (4) read with 29 (1) of the Emergency Regulation as issued in the Gazette (extraordinary) No. 43/ 12 dated 04.11.1994.

The said revolver was alleged to have been found in the person of the accused-appellant by a team of investigators attached to the CID led by Inspector Fonseka (PW 1). The said recovery was made during a raid carried out at the waiting lounge of the taxi drivers operating at Bandaranayaka International Airport at Katunayaka. The raid was conducted under the directions of PW 1, Inspector Fonseka. The trial had been held in absentia against the accused-appellant since the commencement of the trial on 13.07.2009.

On 08.03.2011 an application was made to represent the accused-appellant and requested to cross-examine the witnesses who had given evidence before, in terms of section 241 (2) of the Criminal Procedure Code. This application was refused on the ground that the appellant had not placed sufficient grounds before the High Court to consider such application under section 241 (3) of the Criminal Procedure Code.

During the trial, 5 witnesses gave evidence including a Senior Assistant Government Analyst. After the trial, the accused-appellant was convicted and sentenced to 10 years of rigorous imprisonment and a fine of Rs.10,000/- with a default sentence of 3 months simple imprisonment. Being aggrieved by the aforesaid conviction and sentence, the accused-appellant preferred this appeal.

The charge against the accused-appellant was that he had a revolver in his possession without proper authority or license. Evidence of the Chief Investigating Officer IP Fonseka was that he was present when the said revolver was recovered from the Appellant. He further testified that the weapon recovered from the accused-appellant was one of Smith and Wessen and carried Serial No. 68680. Inspector Fonseka said that it turned out to be a weapon issued to a retired Police Officer. There was no evidence of change or forgery attempted on the said Serial Number. The said weapon was recovered by Police Sergeant Nazeer (PW 3). The production was entered into the Production Registry under PR 197 personally by Inspector Fonseka.

Then the said weapon was wrapped in a paper sealed with IP Fonseka's seal marked as PR 197 and handed over to Sergeant Hemachandra. Sergeant Nazeer helped IP Fonseka with sealing. Sergeant Hemachandra 3417 (PW 4) gave evidence as the officer who took over the production from IP Fonseka.

It is important to note that Sergeant Hemachandra gave two contradictory pieces of evidence on the issue of the contents of PR 197. First, he said that PR 197 refers to a revolver of point 45 calibre which is a make of mark 05 bearing 147106 as the Serial Number. Then he made a mistake

and said that the number should be 686802 and the weapon is one Smith Yard revolver of .38 Calibre. The prosecution sought permission to mark a document from the PR book as 2. However, it is not in the record whether such a document was marked or whether 2 refers to PR 197 at all.

Sergeant Hemachandra failed to give any evidence on the issue of whether he handed over to anyone the production so taken over from IP Fonseka. At this, the prosecution fails to offer any cogent, comprehensive uncontradictory evidence to prove the continuous and undeserved chain of production.

Sergeant Rodrigo 10598 (PW 5) (Inspector at the time he gave evidence) gave evidence of a parcel taken over by him from an officer at reserve duty however, he could not name from whom, at what time the said parcel was taken over to be delivered to the Government Analyst. His evidence was referred to in PR 200/08. According to Rodrigo, he could name the list of items he took over under PR 200/08 by reference to a report prepared for the Magistrate to obtain permission to produce them to the Government Analyst.

The item recovered from the appellant was one revolver bearing No. 18855/ 686800 and six cartridges of the same caliber. In view of the above evidence, it is clear that the prosecution has failed to establish the production chain particularly between Sergeant Hemachandra and Sergeant Rodrigo and in documents between PR 197 and PR 200/08. However, the Learned Trial Judge in his Judgment has drawn a fatal inference that it was the production related to the trial that was taken over by Sergeant Rodrigo on 02.04.1998, on PR 200/ 08, whereas there was no evidence offered by the prosecution to prove that Sergeant Hemachandra handed over anything relevant to this case to anyone let alone Sergeant Rodrigo.

This was a trial conducted in absentia. In the course of the oral argument, an argument was advanced on behalf of the appellant challenging the order of the learned Trial Judge, to have fixed the trial in absentia. It is significant to note in the instant case that the appellant who had furnished the appellate brief to the respondent has failed to furnish the respondent with any of the journal entries and some parts of the proceedings. As per the date stamp on the indictment, the High Court of Negombo received it on 09.09.1998. In the absence of the journal entries and the initial proceedings, it is difficult to understand the date of issue of notice to the accused and the date on which notice was returnable. However, proceedings were available for perusal from 28.05.2001 to 13.06.2001 revealing that the accused had been absent during this period.

The accused had been present in court on 25.06.2001 & 12.11.2001. Thereafter 21.01.2002 being yet another date on which the accused-appellant was present, he had been represented by a counsel. On 20.05.2002 the accused had been absent and his counsel had submitted a Medical Certificate.

Thereafter from 01.07.2002 onwards, the accused had not appeared in court and the legal representation also stopped. Having led the evidence of the police officer on the inability to execute the warrant on the accused-appellant, prosecution made an application on 11.07.2005 to fix the trial in absentia. Being satisfied with the evidence placed before the court on the non-availability of the accused person, on 11.07.2005 the learned Trial Judge ordered the trial to proceed in absentia. Thereafter, the trial finally commenced against the accused-appellant in absentia on 13.07.2009.

In terms of section 241(1) of the Code of Criminal Procedure Act No. 15 of 1979' the trial of any person on indictment with or without a jury may commence and proceed or continue in his absence if the court is satisfied. The Court takes this decision considering any of the following instances;

- (i.) Section 241(1)(a) when the indictment has been served
- (ii.) Section 241(1)(b) when it has not been possible to serve the indictment on him.

In the absence of any journal entries and part of the proceedings, it is difficult to state under which limb the instant case would fall. However, having arrived at the conclusion that the accused deliberately avoids attending court, a trial in absentia was ordered. The limited material available demonstrates the presence of the accused before the court and his legal representation. His counsel had requested material in terms of Regulation 14(5) of the Emergency Regulation.

When an experienced counsel requested relevant material in terms of Regulation 14(5) of the Emergency Regulations, he did so only with the awareness of the charge framed against the accused person. On the other hand, a counsel would not just stop at requesting the documents for which the accused-appellant becomes eligible as provided under the Emergency Regulations, but also would have demanded the service of the Indictment had it not been received by his client. Nowhere in the proceedings, including the Petition of Appeal, non-receipt of the indictment is taken up. In paragraph 2 of the petition, the accused has admitted his arraignment by Court.

All these circumstances point towards the fact that the indictment had been served on the accused-appellant hence, the instant case falls under section 241(1)(a) of the Criminal Procedure Code where he absconds after the service of the indictment. The circumstances qualify this case under section 241(1)(a)(i) of the Criminal Procedure Code. Considering the attendant factors, on behalf of the respondent, it was argued that the decision of the learned Trial Judge was in accordance with the law.

On 08.03.2011 whilst the case was proceeding in absentia, attorney-at-law Mr. Ariyaratne had submitted a letter alleged to have been sent by the accused and requested permission to intervene in the case and defend the interest of the accused-appellant. In support of his application few letters were submitted. The said letter does not provide the address of the accused person in Japan. The sheet of paper used to write this letter is a paper that is commonly available anywhere in the world including Sri Lanka. The learned Counsel for the respondent submitted that neither the letter nor the application of the counsel reveal how the accused had made contact with the said attorney-at-law. The application of the learned Counsel does not reveal that he has any personal knowledge of or contact with the accused person and the counsel does not reveal that he is familiar with the handwriting of the accused-appellant.

Learned Counsel for the respondent argued that the alleged signature in the letter is a name simply written which does not carry any uniqueness in the signature hence the possibility of any person placing it cannot be overruled. He further says that the pattern of writing in the letter is different to the pattern of writing in the signature and the counsel had failed to attribute any reasons to satisfy the court that he was familiar with the signature of the accused person.

Learned Counsel for the respondent says that the order of the learned Trial Judge to have rejected the application based on the letter was factually correct. On the other hand, the application of the counsel appears to be two-fold thus attracting two situations under section 241 of the Criminal Procedure Code.

The first is permission to enter an appearance on behalf of the accused and defend his interest which falls under section 241(2) of the Criminal Procedure Code. The second is permission to recall the witnesses whose evidence already concluded which application falls under section 241(3)(a) of the Criminal Procedure Code.

It was argued by the learned counsel for the respondent that the counsel for the accused-appellant had failed to satisfy the court that he indeed had been authorized by the accused in the instant case to defend him. The decision of the learned Trial Judge in refusing the application of the counsel for the accused-appellant was legally correct & supported by the facts of this case.

It is important to note that a careful perusal of the wording of section 241(3) reveals that the application of this section operates subject to two preconditions,

- (i.) The accused should appear before Court, and
- (ii.) He should satisfy Court that his absence from the whole or part of the trial was *bona fide*.

In the instant case when the council made this application, the trial was not concluded. However, the accused primarily fails in the first pre-condition as he fails to appear before the court. Thereafter, he fails in the second pre-condition as his reasons given had not satisfied the learned Trial Judge as revealed from his order. Therefore, the order made on 08.03.2011 rejecting the request of the counsel is lawful and justifiable.

The prosecution led direct evidence through eye witness as well as circumstantial evidence in proof of its case. They marked P1 to P7 productions in support of its case.

Upon conclusion of the trial conducted in absentia, the accused was convicted on 07.12.2012 and was sentenced to 10 years of Rigorous Imprisonment. A fine of Rs.10,000/= too was imposed whilst a default sentence of 3 months simple imprisonment was ordered. The open warrant was issued through the SSP Negombo whilst copies of the same have been issued to the Controller of Immigration and OIC, Criminal Investigation Department.

Being aggrieved by the above decision and the sentence, the Accused has preferred this appeal to this Court on 21.12.2012.

The grounds of appeal are as follows;

- (i.) The prosecution has failed to prove the chain of custody of production
- (ii.) Evidence led by the prosecution on the identity of the weapon is contradictory

Learned Counsel for the respondent submitted that the recovery of the revolver from the accused-appellant was challenged by the appellant when this matter was argued before this court. In November 1997 information received by Inspector Fonseka of the Criminal Investigation Department through a private informant of an officer of his team revealed that a team of persons at the Katunayake Airport terrifies people showing firearms. The said information further disclosed that this team moves with the trishaw drivers at the 'passenger arrival terminal'.

A team of police officers was detailed to ascertain the accuracy of this information. Sequel to this verification, 3 groups of police officers were arranged. Inspector Fonseka functioned as the chief investigator. On 06.12.1997 a raid was conducted in the morning as more passengers arrive at that time. Members of the team and the vehicles were searched before departure, for possession of any unauthorized weapons. The 3 teams clad in civil clothes left in a car, a cab and a trishaw. Having arrived at the airport around 8.30 hours Inspector Fonseka and Inspector Daramitipola went to the passenger arrival area whilst the other two teams were deployed on the road outside. They focused their attention on the restroom of the drivers, situated within the airport premises. On a previous occasion, Inspector Daramitipola had been on surveillance which occasion facilitated him to identify the relevant suspects.

On the date of the raid, Inspector Fonseka waited with his team and Inspector Daramitipola's team until all those identified suspects got inside the drivers' restroom. Around 10.10 hrs after the suspects went in, Inspector Fonseka instructed that he would go first and for the other officers to follow. Around 10.20 hrs Inspector Fonseka entered the room and introduced himself. He ordered everybody to raise their hands and be quiet. Other officers who entered the room, searched the persons.

Police Sergeant Nazeer under the supervision of Inspector Fonseka, searched the accused and recovered a .38 revolver which the accused was hiding in his waist. The name of the suspect who was in possession of the revolver was Pradeep de Silva alias Captain Ranji. 6 live cartridges were also recovered. The revolver was not of Sri Lankan origin and was found to be a 'Smith & Wesson' American make for which he did not have a valid license. Thus, the arrest was caused in terms of Regulation (18)1 of the Emergency Regulations.

The learned Counsel who appeared on behalf of the accused-appellant was arguing that the evidence was contradictory on the serial number of the weapon. The serial number in the weapon has gone on record as 686800,68680,68802,383800.

The Government Analyst corroborates the production marked P1 received at the Government Analyst's Department was a .38 'Smith and Wesson revolver number which is 686800.

The number of the revolver had been 686800 and the witnesses had referred to this number. The proceedings in this brief do not disclose the correction of any proceedings. Therefore, it is my view that these errors are purely typographical. There is no basis for that argument raised by the learned Counsel for the appellant regarding the contradictory possession of the serial number of the revolver.

It was further argued by the appellant that the chain of production has not been proved beyond reasonable doubt by the prosecution. Consequent to the recovery of the revolver by Police Sergeant Nazeer, Inspector Fonseka took charge of the revolver & ammunition. As the place was crowded with people, they have not spent time sealing the production at the place of detection. It was sealed at the CID office assisted by Nazeer and was entered in PR 197. Thereafter, it was handed over to the reserve Sergeant Hemachandra. The reserve officer has corroborated Inspector Fonseka on this fact. The property receipt marked P 2 enhanced the credibility of this fact which is a contemporaneous note made in handing over the production on 06.12.1997.

It is evident that the weapon was sent to the Government Analyst's Department through Police Sergeant Rodrigo on 02.04.1998 by the Magistrate's Court of Negombo under case No 3226/97.

The memorandum marked P6 corroborates the fact that the production brought by Police Sergeant 10598 Rodrigo on 02.04.1998 was about case number B 3226/97. In P6 the Government Analyst has given the registration of receipt of the production as cf/61/98. The Government Analyst's report dated 18.05.2006 has been issued under the same reference cf/61/98 discloses that the parcel sent by the Magistrate included a .38 'Smith & Wesson' revolver product of America of which the cylinder number was 686800. It is very clear that the chain of production is proven to be intact.

This is a weapon used by the police. Further investigations conducted revealed that the revolver in issue was a weapon that had gone missing from the Kuliypitiya armoury on which the SSP of Kuliypitiya was conducting an inquiry. Inspector Fonseka in his evidence has referred to a number on the handle of the revolver as A 391. Police Sergeant Nazeer too in his evidence has referred to a number in the handle of the revolver as A391. In the Government Analyst's report marked P 5 the Government analyst has corroborated the availability of number A 391 in the handle of the revolver. It is evident therefore that there is no confusion on the serial number of the weapon marked P 1 as the number A 391 is the handle of the weapon and number 686800 is on the cylinder of the weapon.

At the raid, Inspector Daramitipola had recovered a pistol from one of the suspects whilst PC 16497 Ratnayake recovered a revolver from a third suspect. The revolver the accused-appellant was carrying in the present case was recovered by Police Sergeant 14512 Nazeer. A firearm had been recovered from the house of a suspect called 'Titus'.

On 13.07.2009 when the production sent by the Government Analyst was opened in courts there had been a sub-machine gun along with the other productions.

The parcel opened in court had been sent by the Government Analyst under reference cf/61/98. The questionnaire dated 02.04.1998 sent along with the productions to the Government Analyst by the Magistrate on pages 41 - 47 of the MC brief reveals that several questions had been asked about 7 productions that were sent through Police Sergeant 10598 Rodrigo. The report prepared by the Magistrate included the productions recovered from 4 suspects. The response of the Government Analyst to that questionnaire is the Government Analyst report marked P5. The said report itself divulges that there had been several productions and that the .38 revolver was one of those productions. Page 2 of this report reveals the availability of a submachine gun which had gone to the Government Analyst's Department marked as P 4.

Several persons had been arrested on the day in question and many weapons other than that of the accused in the present case had been recovered. All those had been sent to the Government Analyst through the Magistrate's Court under case number B 3226/97. All these productions that had been accepted by the Government Analyst for examination under reference number cf/61/98 had been sent back to the High Court under the same reference number. The reason for a submachine gun to have surfaced in the proceedings of 13.07.2009 on pages 88 and 89 of the briefs is evident, therefore.

The Government Analyst has confirmed P 1 the revolver bearing serial number 686800 to be a firearm. The said firearm had been recovered from the unauthorized possession of the accused-appellant by Police Sergeant Nazeer. Recovery of the said weapon from the accused person has been corroborated by witnesses Inspector Fonseka & Inspector Daramitipola, two senior officers

who took part in the raid. The oral evidence of the witnesses, Police Sergeant Nazeer, Inspector Fonseka, Inspector Daramitipola, Sergeant Hemachandra & Sergeant Rodrigo that the serial number of the revolver was 686800 has been corroborated by the contemporaneous writing in P2 the production receipt, the scientific evidence of the Government Analyst & his report marked P5.

The accused was found in possession of the firearm P1 the .38 revolver, but he had failed to produce or submit any license to possess the revolver.

In view of the foregoing, the finding of the learned Trial Judge for the accused to be guilty of the offence is supported by evidence. The sentence that could have been imposed was either the death sentence or a period of imprisonment not less than 5 years and not exceeding 20 years. Hence, the period of 10 years imposed by the learned Trial Judge is legal and justifiable.

In light of the evidence led by the prosecution, the police have displayed a great degree of caution when handling the production and adhered to the proper procedure laid down in the Police Regulations.

In view of the aforementioned circumstances, the prosecution has successfully linked the appellant to the weapon alleged to have been recovered from his possession.

In conclusion, in light of the reasons aforesaid, having regard to the facts and legal principles involved in the present matter in question, this appeal has failed to hold any merit. Thus, the conviction and the sentence should stand and therefore be affirmed.

Appeal dismissed.

Learned High Court Judge of Negombo is directed to issue a warrant against the accused-appellant, arrest him and carry out the sentence imposed on 07.12.2012.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal