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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC/345/2007 **VS**

High Court of Colombo
Case No: HC/1808/2004

Sembulingam Pakkiam

Accused

And now between

Sembulingam Pakkiam

Accused– Appellant

VS

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : K.S. Ratnavale, AAL, with
G.C. Ranitha, AAL and
Suwathikka Ravichandran
for the accused-appellant

Janaka Bandara, DSG
for the Respondent

ARGUED ON : 28/09/2022

DECIDED ON : 20/10/2022

R. Gurusinghe, J.

The accused-appellant was indicted in the High Court of Vavuniya for being in possession of a T56 gun without a license on the 13th of March 2002 at Pesale, an offence punishable in terms of section 22 of Firearms Ordinance No. 33 of 1916, as amended by Act No 22 of 1996 and for being in possession of 45 live cartridges at the same place and date, an offence punishable in terms of section 27(1) of Explosives Act No 21 of 1956, as amended by Act No. 33 of 1969.

The appellant was tried in absentia and sentenced to life imprisonment for the first charge and sentenced to one-year rigorous imprisonment for the second charge.

The appellant was arrested later and produced before the Court in 2017. After an inquiry under section 241 of the Code of Criminal Procedure Act, the said punishment was made effective from 19.02.2018.

The appellant preferred an appeal against the said conviction and sentence. The appeal was filed years after the conviction and obviously was out of time. Counsel for the appellant and the respondent conceded that it was out of time. Counsel for the appellant invited this Court to act under sections 364 and 365 of the Code of Criminal Procedure Act and consider the appeal as a revision application.

Facts of the case

A team of police officers attached to the Pesale police guard post was on petrol duty on 13.03.2002. Between 8.00 and 8.45 p.m., they were on the "Kiwi" road in Pesale that leads to a place called Gal Palliya. They saw three people coming towards them. When one of the police officers flashed the torch, one person ran away, and the other two who remained were arrested. One person was clad in trousers and a shirt, while the other person was in a sarong and a shirt. The person wearing a sarong and shirt had a fertilizer bag in his hand. When the police officers checked the bag, they found one T56 assault rifle and three magazines. In the three magazines there were 45 cartridges. The two arrested persons, the T56 gun and the ammunition were handed over to PW9 the Reserve Officer at the Pesale police guard post. PW1 and PW2, who were in the team of the police officers who arrested the appellant, gave evidence in court. PW9, PW10, PW11, PW12 and PW13 also gave evidence regarding the chain of

custody of the productions. The court interpreter gave evidence and marked the Govt. Analyst report. The judgment was pronounced on 15.3.2007. An open warrant was issued to arrest the appellant.

The fact that the appellant was sentenced to life imprisonment would itself be an exceptional ground to consider this appeal as a revision application. Therefore, I would consider the merits of the appeal as a revision application.

When the appellant was produced before the High Court, the Counsel who appeared for him had not called the appellant to testify as to why he did not turn up for the trial. Counsel could have done a better job in the High Court. On behalf of the appellant, no documentary evidence or any other evidence relevant to this matter was produced before the High Court Judge in order to vacate the judgment. There must have been sufficient evidence to satisfy the learned High Court Judge to vacate the judgment entered in absentia. However, the High Court Judge also noted that there was no evidence to show that the appellant was absconding. The learned High Court Judge had refused to vacate the judgment on the basis that the appellant should have come before court and made an application. As the appellant had not testified before the High Court Judge, there was no evidence for the learned High Court Judge to consider and vacate the judgment entered, without the presence of the appellant.

The learned High Court Judge who had decided to proceed with the trial against the appellant in his absence had not considered the fact that whether the appellant was absconding. At the inquiry, no witness said or indicated that the appellant had purposely evaded the Court. Three witnesses stated that the appellant was living in an uncontrolled area, and they had no information about the appellant. This was during the time when there was ongoing fighting between the Sri Lanka Army and the LTTE. When considering the evidence led before the learned High Court Judge, there was no sufficient ground to say that the appellant was absconding. In the case of CA.NO.96/2013, decided on

10thJuly 2015, H.N.J.Perera J.(as he was then) stated that a Judge should satisfy himself on evidence that whether in fact the accused was absconding and set aside the conviction and send the case back for a re-trial. Therefore, the decision to proceed with the trial in the absence of the appellant was irregular.

I now consider whether it is appropriate to order a re-trial.

As per the evidence of the prosecution, the police team saw three people. One person ran away, and the other two were arrested. Detailed evidence was not elicited in the High Court. PW2, the person who arrested the appellant, had given a statement to the police regarding the arrest of the appellant. In his statement, he said as follows;

විදුලි පන්දම් එළිය අල්ලන විට, තුන් දෙන්නා ගෙන් එක් ඇයකු පැනලා දිව්වා. අනිත් දෙන්නා නතර වී සිටියා.

The prosecution's position is that the appellant was carrying a fertilizer bag; inside it, there was a T56 gun and three magazines containing 45 live cartridges. The evidence is that the gun and the live cartridges were handed over to PW9 Weerasekera. Weerasekera then handed them over to PW10 Dayananda. Dayananda handed over the same to PW11 Kithsiri. Kithsiri then handed them over to an officer at the reserve on 14.3.2002. PW11 did not state to whom he referred to as the Reserve Officer. PW11 said that he handed over the production numbers PR95 and PR96. There was no evidence, led before the High Court, as to what happened to the gun and cartridges during the period between14.3.2002 and 29.07.2002. The custody of the items mentioned above was therefore an issue during the said four months period, which is considerably a longer period of time.

Then PW13 stated that he served at the Mannar police station in July 2002. He took the productions under production no. 109 (not under 95 and 96). He

handed them to the Magistrate Court of Mannar on 29.07.2002. On 30.7.2002, with a letter from the Magistrate Court of Mannar, he handed them over to the Govt. Analyst Dept.

From 14.3.2002 to 27.7.2002, there was no evidence as to who was entrusted with the gun and the ammunition during that period. Therefore, the chain of production is broken, and the four months period can be considered as a massive gap in the chain of production. This gap creates a reasonable doubt in the prosecution case, and it is sufficient to acquit the appellant on that ground.

As per the evidence, there were three people. One of them immediately ran away when the torch was flashed, and the other two remained.

Out of those two, one person was discharged by the Magistrate on the instruction of the Hon. Attorney General. The discharged person's position was that the LTTE summoned him in connection with non-payment of some money, due on a dry fish business. He stated to the police that he, the appellant and one of the LTTE cadre came with them. The LTTE cadre was sent to get money. When they saw the police, the LTTE cadre had run away. The appellant also stated that when they saw the police, the LTTE cadre had shoved the fertilizer bag at him and had run away.

The evidence is that there were three people, and one of them had immediately run away when they saw the police. Therefore, there is doubt as to who was carrying the fertilizer bag with the gun and the cartridges at that time.

The officers who arrested the appellant had recorded a statement from the appellant to the effect that the LTTE cadre shoved the bag at him and ran away. If there be a re-trial, the appellant would repeat the same story that was already recorded in the police statement, and that would itself suffice to create a reasonable doubt in the prosecution case, as one out of three people had run away by shoving a bag at the appellant.

In these circumstances, it is not expedient to send the case for a re-trial, especially when there is a considerable lacuna in the chain of custody of the production. The prosecution cannot be given a second chance to fill the gaps in the prosecution case. Furthermore, the stance of the appellant to the police, if it comes as evidence, would create a reasonable doubt. The appellant has already been in custody for more than four years. At the time of the arrest, the appellant was 45 years. Now, after twenty years, he should be 65. Counsel for the appellant stated that the appellant is 72, and as the appellant had not given evidence, we cannot ascertain his age. However, it seems that he is an older man. Considering all the circumstances, sending this case back for a re-trial will not serve a useful purpose.

Considering the above circumstances, I, acting in revision, set aside the conviction and sentence.

The appellant is acquitted.

Appeal is allowed

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal