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

In the matter of an application under Section 331 (1) of the code of Criminal Procedure Act No: 15 of 1979.

Court of Appeal Case No: CA /HCC/0091-093/17
HC Kurunegala Case No: HC/136/12

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

Complainant

Vs.

1. Susantha Rathnasiri Jayawardana
No. 166, Bandaranayakapura,
Dunkannawa, Naththandiya.
2. Suwandi Kankanamlage Vijitha
No. 226/D, Digpitigoda,
Kelaniya
3. Maha Uthum Mudiyanselage Thissa Podimahaththaya
No. 166, Bandaranayakapura,
Malkaduwawa, Kurunegala.

Accused

And Now Between

1. Susantha Rathnasiri Jayawardana
No. 166, Bandaranayakkapura,
Dunkannawa, Naththandiya.
2. Suwandi Kankanamlage Vijitha
No. 226/D, Digpitigoda,
Kelaniya
3. Maha Uthum Mudiyanselage Thissa Podimahaththaya
No. 166, Bandaranayakapura,
Malkaduwawa, Kurunegala.

Accused-Appellants

Vs.

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

Complainant-Respondent

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

&

R. Gurusinghe J.

Counsel: Darshana Kuruppu AAL with Chinthaka Udadeniya AAL, Buddhika Thilakaratne AAL, Sajini Elvitigala AAL and Dineru Bandara AAL for the 1st and 2nd Accused-Appellants

Neranjan Jayasinghe AAL with Harshana Ananda AAL for the 3rd Accused-Appellant

Janaka Bandara DSG for the Complainant-Respondent

Written Submissions: By the 01st and 02nd Accused-Appellants on 12.01.2018

By the 03rd Accused-Appellants on 16.11.2017

By the Complainant-Respondent 28.01.2019

Argued on : 06.06.2022

Decided on : **31.10.2022**

N. Bandula Karunarathna J.

The accused-appellants had been indicted in the High Court of Kurunegala on the following counts that charged them with having committed robbery thereby committing an offence punishable under section 380 of the Penal Code read with section 32 of the same and section 44A of the Firearms Ordinance No. 30 of 1916 amended by Act No. 22 of 1996. In addition to the aforementioned, the third accused-appellant had been charged with having possessed a firearm (non-automatic gun) and explosives (bullet).

Evidence of three eye-witnesses (PW 1, PW 3 and PW 4), two police officers (PW 5 and PW 8), the interpreter of the court (PW 10) and the Government Analyst (PW 17) had been led by the prosecution at the trial and the three accused-appellants had made statements from the dock.

At the conclusion of the trial, on the 2nd of May 2017, the judgment had been delivered by the learned Judge of the High Court convicting all three accused-appellants of all charges against them and sentencing them to life imprisonment. Moreover, the third accused-appellant had been sentenced to rigorous imprisonment for five years each for the two additional counts of possessing a firearm and a bullet. All sentences had been ordered to run concurrently.

With regard to the said convictions and sentences, this appeal has been brought before this court by the accused-appellants.

Grounds of appeal raised by the first and the second accused-appellants are as follows:

1. Evidence of the police witnesses (PW 5 and PW 8) were contradictory with that of the lay witnesses (PW 1, PW 3 and PW 4) as to the number of suspects arrested at the scene of crime.
2. Nothing had been recovered from the possession of the accused-appellants although they were arrested at the scene.
3. The learned Judge of the High Court had failed to consider and evaluate the dock statements.
4. There had been no proper identification of the accused-appellants by the witnesses and their identification amounts to a dock identification.
5. Only PW8 had seen a pistol falling off the third accused-appellant while he was escaping and his evidence on this fact and the identity of the third accused-appellant is a concocted story to fix his culpability.
6. The third accused-appellant was never arrested at the crime scene and therefore, it had not been proved that the first and the second accused-appellants had a common intention with him.

Grounds of appeal raised by the third accused-appellant are as follows:

1. The accused-appellants had been wrongly convicted under section 44A of the Firearms (Amendment) Act since there had been no evidence to prove that he had used the firearm and that mere pointing of the firearm is not sufficient to secure a conviction under the said section.
2. The evidence in relation to the identity of the third accused-appellant and the identification parade had not been properly led and therefore, the identification of the third accused-appellant too amounts to a dock identification.
3. The learned Judge of the High Court had failed to apply guidelines set out in R v Turnbull to the identification of the third accused-appellant by PW 8.
4. The prosecution at the trial had failed to prove exclusive possession of the pistol by the third accused-appellant and that the pistol produced was the same one that was used in the offence.
5. The prosecution had failed to prove the value of the jewellery and money that had been robbed.

The facts of the case are as follows:

As per the prosecution, around 7.30 p.m. on the day of the incident, three people had come to the house of Piyadigamage Gunaseeli. They had robbed their jewellery. It is evident that one person had a pistol in his hand and that person had been identified as the third accused-appellant. At the time of the robbery, around 8 p.m. on information received by the police,

Officer Premawardena along with Police Officer Seneviratne had gone to the scene and two people had been taken into custody while they were inside the house. S.I. Ananda Serasinghe had arrived at the place of the incident around 8.35 p.m. and according to him, at that time the first and the second accused-appellants were in police custody. His evidence indicated that the third accused-appellant had been seen on the roof of the house and had jumped over the wall and disappeared into a thicket. At that time, a pistol had fallen from the third accused-appellant which S.I. Ananda had taken into custody. There had been a bullet inside the pistol.

As regards the first ground of appeal put forth by the counsel for the first and the second accused-appellants, the number of accused-appellants arrested at the crime scene was not made clear by the evidence led by the prosecution. On page 99, witness Latha Silva mentioned that only one person had been arrested at the crime scene whereas on page 67 another two witnesses mentioned that two persons had been taken into custody by the police. Since fourteen years had elapsed by the time this matter was taken for trial, none of the witnesses could remember the incident well. Furthermore, the evidence of the two police officers contradicts the evidence of the eyewitnesses in this regard. Under these circumstances, it is doubtful as to which accused-appellant had been present at the crime scene and the presence of any one of the two cannot be established beyond any reasonable doubt.

Counsel for the third accused-appellant too contented on the infirmities that had surfaced in the evidence led by the prosecution:

According to the evidence of Gunaseeli at the trial, three people had come inside the house whereas in her statement to the police she had mentioned that four persons had entered the house.

The testimony of Chandrapala stated that he had gone inside the house with his wife and two daughters and had rung the bell subsequent to which they had been taken in by the people who were inside. However, in the statement made to the police, he stated that his wife was in the car when he had walked inside the house with one of his daughters and the door was not locked.

It is highly improbable that the accused-appellants had allowed the door to be opened by the residents of the house before they had made their escape from the house.

Evidence from Latha Silva indicated that three people had entered the house one person had taken their mother to her room and another one had taken her and her sister to their room. Conversely, evidence from the sister indicated that their mother and the elder sister were taken inside a room together, wherein, jewellery had been stolen.

At this point, it is worth mentioning the law that is being followed in dealing with contradictions, omissions and the credibility of witnesses.

The Supreme Court of India in State of U.P vs. M.K. Anthony; AIR 1985 SC 48 has held that,

'Appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by him and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.'

Further guidelines have been set forth in Bhoginbhai Hirjibhai vs. the State of Gujarat; AIR 1983 SC 753 wherein 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.'

On the issue of whether the witnesses had failed the test of credibility, criteria that need to be looked into had been set forth as follows in Bhojraj Vs. Sita Ram: (1936) 38 BOMLR 344**.**

‘The real tests are: how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case.’

What is meant by the credibility of a witness had been closely examined by the Court of Appeal in Ontario, Canada, in R Vs. Morrissey; (1995), 22 O.R. (3d) 514, 80 O.A.C. 161 (Ont. C.A.) in which it was held thus,

'Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness’s testimony, one speaks of the reliability of that testimony. A witness whose evidence on a point is not credible cannot give reliable evidence on that point...'

Applying the law to the facts of this matter at hand, it is obvious that neither the first nor the second accused-appellant could be linked to the offences mentioned above since none of the lay eyewitnesses (albeit the police officers) had been able to recall with precision as to whether both the accused-appellants had been arrested at the crime scene. Such a discrepancy undoubtedly shakes up the core of the case of the prosecution and casts doubt upon the culpability of the said accused-appellants.

The next ground of appeal is related to the absence of any recovery in relation to the crimes committed. The prosecution not only had failed to produce any of the items alleged to have been robbed by the said accused-appellants but also had failed to lead evidence to establish that the said accused-appellants had been in possession of any of the said productions at the time of their arrest. No evidence had been led regarding the value of the jewelry and money that was robbed. According to the indictment it had been stated that the value of all that had been robbed was Rs. 578,300/- but, the prosecution had failed to prove the amount through evidence. Owing to this, it is apparent that the elements of the offence of robbery had not been established by the prosecution in order to secure the conviction under section 380 of the Penal Code since this charge under robbery requires proof of theft in this instance. Thus, failure on the part of the prosecution to specify, identify and reveal the subject matter of the alleged robbery yet again put the case of the prosecution at stake.

It had been held by the High Court of India in Biswanath Satpathy vs The State; AIR 1967 Ori 46**,** that 'the onus is with the prosecution to establish the identification of the recovered money or to adduce evidence showing that the recovered money belonged to the complainant.'

Counsel for all three accused-appellants opined that the dock statements of the accused-appellants had been rejected without giving proper reasons for doing so. All accused-appellants had denied their involvement in the robbery and had stated in their dock statements that they knew nothing about a robbery and that they were arrested at a bus stand in Kurunegala.

A dock-statement, though considered as evidence, is subject to the infirmity that it was not given under oath and thus cannot be subjected to cross-examination.

> In The Queen Vs. Buddharakkitha Thera and 2 Others 1962 (63) NLR 433, it had been held that,
>
> 'the right of an accused person to make an unsworn statement from the dock is recognized by our law. That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination.'

The manner in which such a statement should be evaluated was analysed in The Queen vs. Kularatne 1968 (71) NLR 529 as follows.

'We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,

(a) If they believe the unsworn statement it must be acted upon,
(b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and
(c) That it should not be used against another accused '.

The Supreme Court in Karunanayake vs. Karunasiri Perera 1986 (2) SLR 27 held thus with regard to the facts that should be taken into account in rejecting a dock statement.

'These principles must be satisfied in order to reject a dock statement and can be summarized as follows:

1. It must be deliberate;
2. It must relate to a material issue;
3. The motive for the lie must be realization of guilt and fear of truth;
4. The statement must be clearly shown to be a lie other than that of the accomplice who is to be corroborated.'

The case Sarath Vs. Attorney General 2006 (3) SLR. 96 too had shed light on the issue of how a dock- statement must be evaluated, wherein, it had been held that 'one must bear in mind that when a dock statement is considered anywhere in the judgment, the judge who heard the evidence is aware of the prosecution case and would always consider the dock statement while considering the prosecution story. One cannot consider the dock statement in isolation. How can one accept or reject the dock statement without knowing the other side of the story?'

The duty of a Judge to give reasons for his decisions is based on the premise that a trial judge has a duty to give adequate reasons for his decision that facilitate review, accountability and transparency.

It was held by the Canadian Supreme Court in R Vs. Sheppard [2002]1 S.C.R. 869 that,' the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job at of expressing itself" in fact the duty goes no further than to render "a decision which having regard to the particular circumstances of the case is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision." In the words of the Supreme Court, to quash a decision on the basis of inadequacy of reasons "the appellant must show not only that there is deficiency in the

reasons but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case.'

In the present scenario, it is quite evident that the evidence relied upon by the prosecution is with infirmities that go to the root of the case. Therefore, despite the inherent weaknesses, totally discarding those statements made by the accused-appellants without considering them in comparison with evidence led by the prosecution would have been prejudicial to the case of the defence.

Counsel for the first and the second accused-appellants argued that albeit dock identification by the police witnesses (PW 5 and PW 8), none of the accused-appellants had been identified properly by the prosecution witnesses. In the case of the third accused-appellant to identification of the third accused-appellant in Court by the witnesses had been doubtful and it amounted to dock identification. Prosecution witnesses had stated that since the incident had taken place fourteen years ago it was difficult for them to identify the people who came to their house on that day.

It was contented by the counsel for the respondent that since the aforementioned accused-appellants had been arrested red-handed at the crime scene, their identities had already been ascertained by the police and therefore, it cannot be argued that their identification was bad in law. The question as to whether the said accused-appellants had been arrested at the scene is doubtful as discussed above and therefore dock identification alone of the said accused-appellants cannot be considered sufficient. The inadequacy and dangers of dock identification have been reiterated in SC (Spl) Appeal No. 07/2018 thus:

'To establish the identity of an accused, it is not mandatory the witness should have known him by his name or otherwise, prior to the incident. Even in a situation where a witness had seen a person at an incident for the first time, his evidence in court identifying the accused in the dock as the person whom he saw at the 8 incidents should not be rejected merely because the witness had neither seen him before nor had known his name before the incident. A "Dock Identification" is a valid form of identification. However, time and again courts have been mindful of the dangers of convicting an accused solely based on 'dock identification. On page 256 in Volume 1 "The Law of Evidence" by E.R.S.R. Coomaraswamy, in the context of "dock identification", it is observed, "This practice is undesirable and unsafe and should be avoided, if possible". Court of Appeal in Munirathne & Others vs. The State, 2001 (2) SLR 382 observed the undesirability of conviction based on dock identification and in K.M.Premachandra & others vs. The Attorney-General, C.A. 39-41/97, decided on 13.10.1996, to set aside the conviction of one accused whose conviction was based on a dock identification. In Roshan vs. The Attorney-General, 2011 (1) SLR 364 at 377, held, ".. in the backdrop of an acknowledged disparity in the complexion and appearance of the accused at the trial stage, the assailant being a total stranger to the complainant who had a mere 04-hour visual contact with the assailant, the evidence of subsequent dock identification several years later would not

eliminate the generation of a reasonable and justifiable doubt as to the veracity and geniuses of the identification unless there are other supervening and compelling reasons to justify".

The most decisive pieces of evidence that had led to the conviction of all three accused-appellants had been the evidence relating to establishing the identity of the third accused-appellant at the scene of the crime. Counsel for the first and the second accused-appellants is of the view that only PW8 had seen a pistol falling off the third accused-appellant while he was escaping and his evidence on this fact and the identity of the third accused-appellant had been a concocted story to fix his culpability and the other two accused-appellants. It is indeed unconvincing how no other police officers, eyewitnesses or the other members of the public gathered in their twenties and thirties at the crime scene had seen the third accused-appellant escape through the roof and how PW 8 had failed to inform others about what he had witnessed at that point in order to take steps to take the third accused-appellant into custody.

In his testimony, PW 8 had stated that he had been able to identify the third accused-appellant who was on the roof with the aid of lights that emanated from nearby houses and the moonlight and thus it is intelligible that identification of the said accused-appellant had been somewhat difficult. In such a situation, to arrive at a conclusive decision as regards identification, it would have been appropriate to follow specific guidelines. The English Court of Appeal in R Vs Turnbull l (C.A.), [1977] 1 Q.B. 224 at 228 prescribed rules to guide Judges faced with contested visual identification evidence. It had been held that a Judge should examine closely the circumstances in which the identification by each witness came to be made. This may include asking themselves questions such as:

How long did the witness have the accused under observation? At what distance? In what light?

Was the observation impeded in any way e.g. by traffic or other people?

Had the witness ever seen the accused before? If so, how often?

If only occasionally, had he any special reason for remembering the accused?

How long had elapsed between the original observation and the subsequent identification to the police?

Was there any material discrepancy between the description given by the witness and the actual appearance of the accused?

The importance of these guidelines has been reiterated by the Supreme Court in SC (Spl) Appeal No. 07/201 as follows:

'Facts leading to assess the quality of evidence of visual identification are important facts a court needs to take into account in deciding on the identity of an accused. What matters is the quality of the evidence. In such situations, the evidence of the witness should demonstrate that there was sufficient opportunity for the witness to have seen the person concerned at the time of the incident and thereafter had the ability to identify the person concerned during his testimony in court.

Factors such as the duration of the interaction between the witness and the suspect, the distance between them, the nature of light under which the witness observed, whether there are any special reasons to remember the suspect such as the presence of unique physical features, the existence of any factors impeding the opportunity for clear and uninterrupted observation, whether the witness had seen the suspect before and if so the number of occasions and whether the suspect was known by name or not, are relevant to determine the quality of visual identification evidence. Dayananda Lokugalappaththi and eight others vs. The State, 2003 (3) SLR 362 at 390, R Vs. Turnbull (C.A.), [1977] 1 Q.B. 224 at 228. This list of factors is not exhaustive but could vary according to the facts and circumstances of each case.

These factors are equally relevant and important in situations of both “identification” and “recognition”.

In Turnbull, guidelines were laid down in regard to evidence of visual identification in situations of “fleeting glance” or “identification in difficult circumstances” and subsequent jurisprudence clarified, that such guidelines need not be adopted in each and every case of visual identification. R vs. Courtnell [1990] Cr. Law Review 115, R vs. Oakwell, 66 Cr. App. R. 174, R vs. Curry and Keeble [1983] Crim. L.R. 737, Keerthi Bandara vs. AG 2000 (2) SLR 245.

However, in R vs. Bowden [1993] Crim. L. R. 379 and Beckford and others vs. R, 97 Cr. App. R. 409 at 415, the importance of Turnbull Guidelines in cases of visual identification was re-emphasized. A trial court in determining the guilt or innocence of an accused need to examine and analyse the evidence of “visual identification” of any witness, bearing in mind the factors discussed hereinbefore and make an assessment on the quality of evidence and decide whether the identity of the accused had been proved or not.’

In the context of the present scenario, given how important the evidence relating to the identification of the third accused-appellant had been to the case of the prosecution in establishing the guilt of the accused-appellants as mentioned above, it is imperative that well-established guidelines should have been followed by the learned Judge in arriving at his decision.

Furthermore, counsel for the third accused appellant argued that the learned Judge of the High Court was wrong in law in taking into consideration notes of the identification parade as

corroborative evidence regarding the identification of the third accused-appellant when the evidence had not been properly led.

In spite of the fact that the eye-witnesses were able to identify the third accused-appellant at the identification parade as the person who pointed a gun at them, the credibility of their evidence as regards material facts of this case is highly questionable as discussed above. Moreover, evidence of PW 8 that had been led at the trial is unconvincing in ascertaining the identity of the third accused-appellant. Therefore, none of the said evidence corroborates each other in proving the culpability of the third accused-appellant.

Another issue raised by the counsel on behalf of the first and the second accused-appellants is the fact that there had been no shared common intention between them and the third accused-appellant. It was further submitted by the counsel for the said accused-appellants that the prosecution had attempted to bring in the third accused-appellant into the crime scene through a police witness (PW8)

It had been rightly held by the Privy Council in Mahbub Shah Vs. Emperor (1925) (A. C. 118), that,

> 'it is no doubt difficult if not impossible to procure direct evidence to prove the intention of the individual; it has to be inferred from his act or conduct or other relevant circumstances of the case.'

Common intention is defined in section 32 of the Penal Code in this manner.

> 'When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.'

With reference being made to King Vs, Asappu (1950); 50 NLR 324**,** a summary of the law relating to common intention has been spelt out in S.C. TAB Appeal No.02/2012 as arrayed below.

'It is noteworthy that the law pertaining to common intention has developed greatly since the decision in The King vs. Asappu (1950) (50 NLR 324), and thus must be updated before consideration. In this regard, the Court endeavours to summarise the law relating to common intention as follows:

(a) The case of each accused must be considered separately.
(b) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
(c) The common intention must not be confused with the same or similar intention entertained independently of each other.
(d) There must be evidence either direct or circumstantial of pre-arrangement or some other evidence of common intention.

(e) It must be noted that the common intention can be formed in the 'spur of the moment
(f) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.
(g) The question of whether a particular set of circumstances establish that an accused person acted in furtherance of common intention is always a question of fact.
(h) The prosecution case will not fail if the prosecution fails to establish the identity of the person who struck the fatal blow provided common murderous intention can be inferred
(i) The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.'

It had been held by the Supreme Court of India in Rishideo Vs. State of Uttar Pradesh (1955) (AIR 331) that,

> 'the existence of common intention said to have been shared by the accused is, on an ultimate analysis, a question of fact.'

At this stage, it is indisputable that the version of the said PW8 was not corroborated by any of the other police witnesses or eyewitnesses despite the fact that there was a large number of persons including police men and civilians present at the place of the incident. The third accused-appellant neither had been arrested along with the first and the second accused-appellants nor had there been clear-cut evidence to support the fact that the first and the second accused-appellants had been taken into custody together at the crime scene. Although the third accused-appellant had been identified by eye witnesses at the identification parade as the person who pointed a gun at them, the prosecution had failed to establish that he had been in possession of the said weapon thus, the link between the third accused-appellant and the pistol had not been properly formed. None of the lay witnesses was able to identify the first and the second accused-appellants at the dock other than the police witnesses and they weren't identified by any of the witnesses following an identification parade. With these unresolved pieces of evidence in the background, it is absurd to hold that the first two accused-appellants had shared a common intention with the third accused-appellant.

It has been submitted on behalf of the third accused-appellant that the said accused-appellants had been wrongly convicted under section 44A of the Firearms (Amendment) Act since there had been no evidence to prove that he had used a firearm and that mere pointing of a firearm is not sufficient to secure a conviction under the said section. Firstly, the prosecution had failed to prove that the accused-appellant had exclusive possession over the pistol since the evidence that had been relied upon to prove the same had been the testimony of PW 8 which is flawed. Secondly, even if the third accused-appellant had exclusive possession over the said firearm, the fact that he had used the firearm should have been proved in order to support a conviction under the aforesaid section. Furthermore, it needs to

be proved that the third accused-appellant had used the firearm in the commission of an offence specified in schedule C.

Section 44A of the Firearms (Amendment) Act No. 22 of 1996 states the following:

'Notwithstanding anything in this Ordinance or any other law, any person who uses a gun in the commission of an offence specified in Schedule c of this Ordinance shall be punished on conviction for the such offence with death or imprisonment for life, and shall also be liable to a fine not exceeding twenty thousand rupees.'

The prosecution had failed to link any offence specified in schedule c of the said Act with the use of the firearm by the third accused-appellant with compelling evidence. The third accused-appellant had been indicted and convicted for committing the offence of robbery punishable under section 380 of the penal code the elements of which, the prosecution yet again had failed to prove beyond reasonable doubt for want of precise and unambiguous evidence. As a result, any conviction under the above act is deemed untenable.

The issues raised above indicate that the prosecution had no strong prima facie case due to a lack of unequivocal evidence that proved the commission of the offences of which the accused-appellants had been convicted. Hence, this Court sets aside the above judgment delivered by the learned Judge of the High Court and acquits all three accused-appellants of all charges.

Appeal allowed.

Judge of the Court of Appeal

<u>R. Gurusinghe J.</u>

I agree.

Judge of the Court of Appeal