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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act 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/0254/16

High Court of Kuliyapitiya

Case No: HC/132/2011

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Loku Arumage Nimal Jayasinghe

ACCUSED

AND NOW BETWEEN

Loku Arumage Nimal Jayasinghe

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : J. P. Gamage with Dulshika Wijerathna and Chamara Fernando for the Accused Appellant

: Anoopa De Silva, DSG for the Respondent

Argued on : 31-01-2023

Written Submissions : 25-07-2018 (By the Accused Appellant)

: 05-11-2018 (By the Respondent)

Decided on : 16-03-2023

Sampath B Abayakoon, J.

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

The appellant was indicted before the High Court of Kuliyapitiya on two counts. In count 01, he was charged for having in his possession a gun, that is to say a repeater shot gun (තුවක්කුවක්, එනම් රැලි තුවක්කුවක්) on or about 6th September 2007 at Dambadeniya, without a valid permit and thereby committing an offence punishable in terms of section 22 (3) read with section 22 (1) of the Firearms Ordinance No. 33 of 1916 as amended by Firearms Amendment Act No. 22 of 1996.

The 2nd charge preferred against him was that at the same time and at the same transaction, having in his possession 60 live cartridges without a valid permit, and thereby committing an offence punishable in terms of section 27 of the Explosives Act No. 21 of 1956 as amended by Amendment Act No. 33 of 1969.

After trial, the learned High Court Judge of Kuliyapitiya of his judgement dated 30th November 2016, found the appellant guilty as charged on the basis that the charges proved that he had in his possession a gun and 60 live cartridges.

Accordingly, he was sentenced to 4 years rigorous imprisonment on count 1 and ordered to pay a fine of Rs. 10000/-. In default of paying the fine, he was sentenced to 01-year rigorous imprisonment.

On count 2, he was sentenced to 01-year rigorous imprisonment and to a fine of Rs. 2000/-. In default of paying the fine, he was sentenced to 6 months rigorous imprisonment.

It has been ordered that the default sentences should commence at the conclusion of the rigorous imprisonment sentences ordered in relation to the two counts.

Since it has not been ordered that the sentences should be concurrent to each other, it has to be taken as that the total imprisonment period for both the counts should be 5 years rigorous imprisonment.

The Facts in Brief

PW-01 was serving in the Peliyagoda Police Crime Investigation Division at the time relevant to this incident. On 6th September 2007, one of his subordinate officers PS-48856 Chandana has received an information of a person who is possessing a T-56 weapon and ammunition, as well as two magazines.

Accordingly, since his unit had the jurisdiction to investigate information of this nature throughout the island, PW-01 has organized a raid. After informing his superior officers, he has left the police station with seven other officers, including police sergeant (PS) Chandana, and had reached Giriulla area where PS Chandana had met the informant. The informant has pointed out the house of the suspect and has left. The police party has surrounded the house of the suspect around 10.50 pm, and PW-01 has called for the suspect by his name.

The suspect Nimal has opened the door querying who is calling at this time of the night.

According to the evidence of PW-01, when he saw the police party, he appeared to be panicked. Apart from the suspect, he has seen two females and two small male children in the house. It was his evidence that he questioned the suspect and recorded a short statement from him, and based on the information received, he recovered a T-56 weapon under a bed in the house. When recovered, it was in a yellow-coloured gunny bag. Apart from the T-56 weapon, he has recovered 60 live cartridges and 2 magazines.

The witness has properly identified the items recovered by him before the trial Court, and had marked the weapon as P-01, the 2 magazines as P-02 and the live cartridges as P-03. The witness has identified the appellant as the person whom he arrested for having in his possession, the said productions without a valid permit.

On a subsequent date, the witness has marked the extract of the statement made by the appellant in terms of section 27 of the Evidence Ordinance, which led to the discovery of the productions marked as P-01, P-02 and P-03.

It needs to be noted that when cross-examining PW-01, the position taken up by the Counsel for the appellant had not been that the productions were not recovered from his possession, but the recovered productions were owned by a person called Bandu.

It had been the evidence of PW-01 that although they looked for a person called Bandu, no such person was found, and it was from the possession of the appellant, the weapon and the ammunition were recovered, based on his statement to the police in terms of section 27 (1) of the Evidence Ordinance.

PW-02 called by the prosecution to prove the charges against the appellant has been PS-48856 Chandana, who was the officer who received the information from one of his private informants that led to the raid. He has corroborated the

evidence of PW-01, and has stated in his evidence that when they entered the house, there was a middle-aged male and a female, as well as a boy of about 6 years of age.

It was his evidence that after the statement of the appellant was recorded, the weapon and the other items of evidence were recovered while hidden under a bed in a room. According to him, when PW-01 lifted the mattress of the bed, the yellow coloured polysack gunny bag was visible on the floor and the marked productions were found inside that bag. He too has identified the appellant as the person from whom the productions were recovered.

In this action, the prosecution has called witnesses to establish the chain of custody of the productions from the point of recovery up to it being taken to the Government Analyst and taken back to the Court. PW-05, PC-32693 Aruna Kumara was one of the officers who took part in the raid which led to the discovery of the productions and also one of the officers who had the custody of productions before it was taken to the Government Analyst. In his evidence, he has stated that when the appellant pointed out the productions to PW-01, the productions were under a mattress of a bed that was found inside a room.

PW-09, the Government Analyst has given evidence in this action and has marked his report as P-07. It has opined that the production marked and sent to him as P-01 was an automatic gun and has stated that it falls within the interpretation of a gun in terms of section 2 (a) of the Firearms Ordinance.

At the closure of the prosecution case and when the appellant was called up for a defence, he has made a statement from the dock. He has claimed that he was not arrested on the day as claimed by prosecution witnesses, but six days before, and was kept at the police station and harassed. He has also claimed that PW-01 never came to his house, but it was PS Chandana and a team of police officers who came around 1.00 am along with his own brother and arrested him. He has stated that the police could not find any weapon in his house and as pointed out by his brother, a weapon was recovered in an abandoned house nearby, and

police went after a person called Bandu, also as informed by his brother. The appellant has claimed that he was produced before the Magistrate Court as the police could not find the said person named Bandu.

It had been his position that due to the enmity he had with his brother, he was falsely implicated by him, and he is innocent of the charges.

The Grounds Of Appeal

At the hearing of this appeal, the learned Counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

1. The prosecution failed to establish exclusive possession against the appellant.
2. The learned High Court Judge has failed to evaluate the evidence placed before the Court and has failed to consider the contradictions *inter se* and *per se* between the evidence of PW-01, PW-02 and that of PW-05.
3. The admissibility of the recovery allegedly made in terms of section 27 (1) of the Evidence Ordinance was not according to law.
4. The learned High Court Judge has failed to properly consider and evaluate the dock statement made by the appellant.

At the outset of his submissions, the learned Counsel for the appellant informed the Court that he will not be challenging the times mentioned by witnesses with regard to the arrest and other related matters.

It was his position that the prosecution has failed to prove the exclusive possession of the gun and the ammunition. He referred to the evidence of the witnesses to argue that they are contradictory to each other in relation to the occupants of the house when this raid took place.

It was his position that although PW-01 has stated that only the appellant and two females and two minor children were at the house, PW-02 has stated that there was another male person in the house. Accordingly, it was his position that the prosecution has failed to prove the exclusive possession since the

productions have been allegedly recovered under a bed in one of the rooms of the house.

The learned Counsel cited several judgements pronounced by our superior courts to substantiate his argument in this regard. The learned Counsel cited several pieces of evidence where it was contended that the evidence of the key witnesses is contradictory to each other *inter se* and *per se,* to argue that depending on such evidence was unsafe for a conviction in a criminal case.

Making submissions in relation to the alleged section 27 (1) recovery, it was his position that when the police party entered the house, it was within their knowledge about the productions that had been allegedly recovered later. It was his position that under the circumstances, a section 27 (1) statement has no value.

It was his contention that the learned High Court Judge has failed to properly evaluate the dock statement made by the appellant and, especially, his stand that nothing was recovered from his possession. It was his contention that the appeal should succeed for the reasons advanced by him.

It was the submission of the learned Deputy Solicitor General (DSG) that this is a matter where the productions have been recovered in consequent to a statement made by the appellant in terms of section 27 (1) of the Evidence Ordinance and hence, the principle of exclusive possession would not arise.

It was her stand that at the trial, the appellant has never denied the recovery of the productions, but only has claimed that it belonged to somebody else. It was her position that the appellant has failed to confront the witnesses with his stand taken up when he made his dock statement, and was of the view that the learned High Court Judge has correctly considered his dock statement as well as the stand taken at the trial in its correct perspective.

The learned DSG submitted that the alleged contradictions cannot be considered as contradictions which go into the root of the matter or create any doubt as to

the evidence of the prosecution. It was her position that the grounds of appeal urged have no merit and the appeal should be dismissed.

Consideration of the Grounds of Appeal

As the first three grounds of appeal are interrelated, I will now proceed to consider the said grounds of appeal together.

As argued correctly by the learned Counsel for the appellant, there cannot be any dispute that possession in a criminal case must be actual and exclusive to impose criminal liability on an accused person.

In the cited case of **Banda Vs. Haramanis 21 NLR 141**, it was held:

> *"Possession to be criminal must be actual and excusive for criminal liability and it does not attach to constructive possession where property is found in a house in the possession of more than one inmate more of them could be said to be in possession of it for the purpose of this offence unless there is evidence of exclusive conscious control against them."*

In the cited case of **Muththaiyah Sriyalatha Saraswathi Vs. The Attorney General CA No. 212/95 decided on 30-06-1999**, it was stated by **F. N. D. Jayasuriya, J**. :

> *"There is some rather incoherent and unimpressive evidence led in regard to the issue as to who was the owner of the said premises…When this evidence is evaluated, analyzed and weighed; his evidence is not cogent and impressive enough for the Court to hold that the accused is the chief householder and the owner of the premises. The criminal liability attached only to possession on which is proved to be actual, exclusive and conscious possession on the part of a person."*

In his submission before this Court, one of the main grounds urged by the learned Counsel for the appellant to argue that the prosecution has failed to prove who had the actual possession of the gun and the ammunition found was

the alleged contradictory evidence as to who were the occupants of the house. It was his position that although PW-01 had stated that the only male present in

the house was the appellant, according to the evidence of PW-02, there had been another male person when they entered the house.

I would now reproduce the relevant portions of the evidence for better understanding of the judgement.

PW-01 states at page 69 of the appeal brief,

> ප්‍ර: කවුද කතා කරේ?
>
> උ: මා විසින් නිමල් නිමල් කියා කතා කරා.
>
> ප්‍ර: ප්‍රතිචාරයක් ලැබුනාද ?
>
> උ:ඔව් ඒ අවස්තාවේ නිවසේ ඇතුලත සිටි පුද්ගලයෙකු මොනවද බං මේ රැයාමයේ කියා විමසා සිටියා.
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> ප්‍ර: ඊට පසුව දොර ඇරියාද?
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> උ: මම නිමල් කිව්වට පසු ලයිට් දමා දොර ඇරියා. ඊට පසුව මම දැක්ක සාලය ඇතුලේ හිටියා. ඔහු එකපාරට බය උනා. ලයිට් එළියෙන් බය වූ බව දැක්කා.
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> ප්‍ර: එම අවස්ථාවේදී මෙම පුද්ගලයට අමතරව කවුද සිටියේ?
>
> උ: ඔහුට අමතරව මෙම නිවසේ කාන්තාවක් සහ කුඩා පිරිමි ළමයෙක් සිටියා. තවත් පිරිමි ළමයෙක් හිටියා. තවත් කාන්තාවක් හිටියා. සාලයට පැමිණියා.

In relation to the above evidence, PW-02 in his evidence has stated as follows,

> ප්‍ර: සාක්ෂිකරු මෙම නිවසට ඇතුල් වෙනකොට එම නිවසේ කවුද සිටියේ?
>
> උ: මැදිවියේ පිරිමි කෙනෙක් සහ ගැහැණු කෙනෙක් සිටියා. අවුරුදු හයක පමණ කුඩා පිරිමි ළමයෙක් සිටියා.
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> ප්‍ර: සාක්ෂිකරු එම අවස්ථාවේදී එම තැනැත්තන් එම නිවසේ රැඳී සිටියා කියල කිව්වා.

උ: එහෙමයි.

Although the learned Counsel contends that the evidence of PW-02 shows that there was another person in the house, I have no reason to agree with such a contention. If one reads the evidence without compartmentalizing it, it becomes very much clear that both the witnesses are referring to the appellant as the only male occupant of the house. When PW-02 says that when he entered the house, there was a middle-aged man, a female and a small child, he is not referring to a third person, but to the appellant, as the person whom they encountered.

It is well settled law that when evaluating evidence, it must be done by considering the evidence as a whole and by not compartmentalizing it. In the cited case of **Saraswathi Vs. The Attorney General (supra)**, the Court of Appeal had considered the evidence and come to a finding that the evidence adduced in that case was not cogent enough as to who the main householder and the owner of the premises. Although the ownership of the house may have been relevant when it comes to the facts considered in that case, I am of the view that proving the ownership of a house where an alleged raid takes place is always not necessary to prove exclusive possession as it is a matter depending on the facts and circumstances unique to each case.

In the case of **Alagaratnam and Others Vs. The Republic of Sri Lanka (1986) 1v1 SLR 237,** the Court observed that the question of possession must be determined on the facts and the circumstances of each case.

In the matter under consideration, the information received had been that the appellant is in possession of a weapon in his home. When the raiding party approached the house, it has been in the middle of the night and there was no evidence to suggest that there were any outsiders, other than the occupants of the house, were in the house. According to PW-01's evidence, when he knocked at the door and called the name of the appellant, it is he who has opened the door blaming why he is being disturbed at that time of the day. There had been only female occupants and children in the house.

Therefore, there cannot be any doubt that the appellant was the main occupant of the household and who had the control of it.

It is the evidence of both the main witnesses that the weapon, ammunition and the magazines were found after PW-01 recorded a short statement from the appellant. The prosecution has marked the relevant portion of the statement which led to the discovery of the productions in terms of section 27 (1) of the Evidence Ordinance.

E. R. S. R. Coomaraswamy in his book **The Law of Evidence Volume 1 at page 442,** refers to the limitations and essentials of the admissibility of a section 27 statement in the following manner.

> "The language of section 27 shows that the legislature has prescribed certain limitations in order to define the scope of the information provable against the accused. Viewed from another aspect, this means that the section requires the following essentials.
>
> a) The information must have been received from a person accused of an offence, that is, the accused.
> b) A fact must be deposed to as having been discovered in consequence of such information; that is, the information must be the cause of the discovery.
> c) The accused must have been in the custody of a police officer at the time of the statement.
> d) If these facts concur, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

Citing several decided cases where it has been stated, if a fact was already known to the police, a recovery based on such knowledge cannot be attributed to a section 27 statement of an accused, **Coomaraswamy** at page 442 and 443 states,

*"A fact cannot be said to have been 'discovered' in consequence of information received from the accused, if it is already known to the police from another source. A fact already known to the police cannot be rediscovered on the statement of an accused person. If the fact was known to other police officers, but not to the particular officer who deposes to it, there would be no discovery and the section would be inapplicable.(**Aher Raja Khima Vs. State of Saurashtra A.I.R. (1956) S.C. 217, Naresh Chandra Das Vs. Emperor A.I.R. (1942) Cal. 593, Adu Shikdar Vs. Emperor (1885) 11 Cal. 835**)."*

It is clear from the evidence that other than of an information that the appellant is in possession of a weapon, police have had no knowledge as to the exact place where it would be, when PW-01 has recorded his statement. I am of the view that fact was not within the knowledge of the police when the discovery of the weapons and the ammunition was made upon relying on the section 27 statement. Therefore, I find no reasons to agree with the contentions that the section 27 recovery would not be applicable as evidence against the appellant.

The question whether it can be determined that it was the appellant who had the exclusive possession of the discovered productions are concerned, it was the evidence of the witnesses that the relevant productions were discovered as pointed out by the appellant from under a bed in a room of the house. Although such a discovery could have been made even without a statement in that regard by the accused, if the police team searched the house, in this instant, I find no basis to doubt that the discovery was made as a result of the section 27 statement. The items of productions discovered had been a T-56 weapon, 60 rounds of ammunition and 2 magazines concealed in a polythene gunny bag kept under a bed. I am of the view that evidence led in this action cannot attribute the possession of such weapons and ammunition to the females of the house and minor children under any circumstances.

Besides all that, when the relevant witnesses gave evidence in Court, the line of cross-examination by the learned Counsel who represented the appellant had not been on the basis of a denial that the productions were not found in the possession of the appellant.

The only position taken had been to imply that the gun found belongs to another person called Bandu and nothing else.

I am in no position to agree with the contention that there are serious infirmities *inter se* and *per se* between evidence of PW-01, 02 as well as PW-05.

I have already discussed that the evidence of both PW-1 and 02 relates to only one male in the house when the raid was conducted. If one reads the evidence of PW-01 and 02 as a whole, it becomes clear that the informant has gone near the house of the appellant only for the purpose of showing the PW-01 the correct house. It is clear from the evidence of PW-01, what he had been saying was that the informant did not take part in the raid itself, but left after showing the house. What PW-02 says in that regard is also similar to the stand of PW-01.

In his evidence, PW-01 has stated that after the arrest, there was no revelation about another person, but later in his evidence, he has admitted that they went looking for a third person. In fact, what PW-02 says is also the same thing. In their evidence, PW-01 and 02 had clearly stated that the recovery of the gun and the ammunitions was by PW-01 as pointed out by the appellant. Both of them say that PW-01 went into the room and removed the mattress that was on the bed and they were able to witness a yellow-coloured gunny bag on the floor under the bed, through the gaps in the wooden poles of the bed, and later the productions were recovered inside the bag. What Pw-05 says is also that PW-01 removed the mattress and recovered a gunny bag, although he doesn't say that the gunny bag was on the floor under the bed.

I am of the view for contradictions and infirmities to be considered as material in a criminal trial, such contradictions and infirmities must go into the core of the matter. Such infirmities which are trivial in nature, that do not create any doubt or doubts in the prosecution case cannot be considered to conclude that the prosecution has failed to prove its case.

For the reasons stated as above, I find no merit in the first three grounds of appeal urged.

The fourth ground of appeal is that the learned High Court Judge failed to consider and evaluate the dock statement made by the appellant.

I find no reason to subscribe to such an argument in this appeal. The learned High Court Judge has clearly summarized what the appellant has stated in his dock statement and has considered whether it has created a reasonable doubt as to the prosecution case, or at least had provided a reasonable explanation as to the evidence placed before the Court.

The learned High Court Judge has been very much mindful that although a dock statement is not evidence that can be valued similar to that of evidence given under oath, and subjected to the test of cross-examination, such evidence also has evidential value. It is clear from the judgement, that the learned High Court Judge has considered the dock statement, the value that can be attached to such a statement.

In his dock statement, the appellant has stated that when he was arrested, the police officers came into the house with his own brother who had a previous grudge against him and it was at his instigation that he was taken away from the house. It had been his position that it was his brother who showed a gunny bag near an abandoned house, and the police party went looking for a person called Bandu as informed by his brother and since the mentioned Bandu could not be located, he was produced in Court after six days.

I find that none of these positions have been put to the relevant witnesses when they gave evidence and confronted them, if that was the stand of the appellant. On the contrary, the line taken up by the defence had been not of a denial but a statement saying that these things belong to one Bandu, which in other words, implying that the things were recovered as the witnesses say, but they were not belonging to the appellant.

I am of the view that since the learned High Court Judge has correctly analyzed the defence and the dock statement of the appellant, there exists no basis for the 4th ground of appeal either.

The appeal of the appellant is dismissed as it is devoid of any merit.

The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal