

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

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

Court of Appeal No:

CA/HCC/0396/17

High Court of Gampaha

Case No. HC/76/2009

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Maspatha Ralage Wasantha Kumara

Pathmasiri

ACCUSED

AND NOW BETWEEN

Maspatha Ralage Wasantha Kumara

Pathmasiri

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : U. R. de Silva, P.C. with Savithri Fernando for the
Accused-Appellant
: Janaka Bandara, D.S.G. for the Respondent

Argued on : 12-06-2023

Written Submissions : 14-02-2019 (By the Respondent)
: 06-12-2018 (By the Accused-Appellant)

Decided on : 11-08-2023

Sampath B. Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Gampaha for the following offence.

වෂර් 2005ක් වූ නොවැම්බර් මස 8වන දින හෝ ඊට ආසන්න දිනයකදී මෙම අධිකරණයේ බල සීමාව තුළ පිහිටි දොලව, නිට්ටඹුව හිදී යුෂ්මතා බලපත්‍රයක් නොමැතිව තුවක්කුවක් එනම් ටී-56 වගර්යේ ගිනිඅවියක් සන්නකයේ තබා ගැනීමෙන් 1996 අංක 22 දරණ පනතින් සංශෝදිත 1916 අංක 33 දරණ තුවක්කු ආඥා පනතේ 22 (1) වගන්තිය සමග කියවිය යුතු 22 (3) වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදු කරන ලද බවය.

After the indictment has been served on the appellant, the charge has been read out to him on 10th November 2017 by the learned High Court Judge of Gampaha.

The appellant has pleaded guilty to the charge, and accordingly after being satisfied that the appellant has pleaded voluntarily, the learned High Court Judge has convicted the appellant on his own plea.

At that stage, the learned Counsel who represented the appellant has informed the Court that he had no instructions from the appellant that he is going to plead

guilty to the charge. This has resulted in the learned High Court Judge inquiring from the appellant and recording the following observation.

මේ අවස්ථාවේදී විත්තිකරු අධිකරණයේදී වරද පිළිගත්තද, වරද පිළිගන්නා බවට නීතීන්ඥ මහතාට උපදෙස් ලබා නොතිබූ බවට නීතීන්ඥ මහතා ප්‍රකාශ කල බැවින් නැවත වරක් චූදිත ගෙන් ඒ සම්බන්දයෙන් විමසා සිටිමි. ඒ අවස්ථාවේදී නැවතත් චූදිත දක්වා සිටින්නේ මෙම ආයුදය ලඟ තබාගැනීම සම්බන්දයෙන් අධි චෝදනාවට ඔහු වරද පිළිගන්නා බවයි. එම වරද පිළිගැනීම ස්වේච්චාවෙන් සිදු කරනු ලබන බවට මම සැහීමට පත් වෙමි. ඒ අනුව ඔහුගේම වරද පිළිගැනීම මත චූදිත වරදකරු කරමි.

After convicting the appellant, the learned High Court Judge has allowed the parties to make their submissions in relation to the sentence and on the basis that the only sentence he can pass according to law, for a person convicted of an offence of this nature, is to sentence that person for a life imprisonment, has passed a sentence of life imprisonment on the appellant.

It is against this sentence that the appellant has filed this appeal, primarily on the basis that the order dated 10-11-2017 by the learned High Court Judge was contrary to the law and the appellant was not afforded a fair trial for the reasons mentioned in the petition of appeal.

At the hearing of this appeal, it was the contention of the learned President's Counsel that since it appears that the appellant has pleaded guilty to the charge on his own accord, he has been misled in the way the charge has been preferred against him, believing that he is pleading guilty to the charge for possessing a gun.

Referring to section 22 of the Firearms Ordinance as amended by Firearms (Amendment) Act No. 22 of 1996, the learned President's Counsel brings to the notice of the Court that the section envisages several situations where a varied sentences can be passed on a person, depending on number of conditions, as well as, depending on whether the gun was an automatic gun or a repeater shotgun or even whether the gun was a smooth-bore shotgun of the muzzle-loading variety.

It was the position of the learned President's Counsel that the charge in the indictment does not specify the type of the gun, but only refers to a gun of a T-56 variety and the appellant was clearly misled because of this lack of information and if he was properly informed of the charge against him, he would not have pleaded guilty to the charge on his own accord. It was the contention of the learned President's Counsel that because of this misdirection, a fair trial has not been afforded to the appellant, and moved for the setting aside of the conviction and the sentence on that basis.

It was the contention of the learned Deputy Solicitor General (DSG) when the appellant pleaded guilty on his own accord, he very well knew that the charge against him was for possessing a T-56 weapon and it cannot be said that the appellant was misled at the time of pleading guilty. However, he conceded that the Government Analyst Report has not specifically mentioned that the relevant weapon sent to the Government Analyst as an automatic gun.

It was his view that this is a matter that should be clarified by the Government Analyst and he expressed the view that this is a fit matter where a retrial should be ordered in view of the submissions made before this Court, and the explanation that needs to be obtained for the Government Analyst in relation to the weapon produced before him for analysis.

As I have stated before, the indictment does not state that the weapon alleged to have been possessed by the appellant is an automatic weapon, but merely says that he had in his possession a gun namely, a T-56 firearm. In the Government Analyst Report too, the Government Analyst has not specifically identified whether it was an automatic gun or a repeater shotgun but has stated that the weapon comes under the definition of a gun.

Section 22 (1) of the Firearms Ordinance No. 23 of 1916 which has not been amended by Firearms (Amendment) Act No. 22 of 1996 reads as follows.

22 (1). No person shall have in his custody, or possess or use, any gun, unless he shall hold a licence therefor in accordance with this Ordinance (herein referred to as a gun licence).

By Firearms (Amendment) Act No. 22 of 1996, section 22 (3) of the principle enactment has been repealed and the following subsection has been substituted.

22 (3). Any person contravening the provisions of this section shall be guilty of an offence against this ordinance and shall on conviction be punishable-

(a) for the first offence with a fine not exceeding ten thousand rupees or with rigorous imprisonment for a period not exceeding five years or with both such fine and imprisonment;

(b) for the second or any subsequent offence, with rigorous imprisonment for a period of not less than ten years and not exceeding twenty years:

Provided that where the offence consists of having the custody or possession of, or of using, an automatic gun or repeater shotgun, the offender shall be punished with imprisonment for life:

Provided further that where the offence consists of having the custody and possession of, or of using, a smooth bore shotgun of the muzzle loading variety, the offence, shall be punishable as provided for in section 44.

For better understanding of this judgement, I will now reproduce the repealed section 22 (3) of the principal enactment which reads thus.

22 (3). Any person contravening any of the provisions of this section shall be guilty of an offence against this Ordinance and shall on conviction be punishable –

(a) for the first offence with a fine of not more than two thousand five hundred rupees, or with rigorous imprisonment for a period not exceeding one year, or with both such fine and imprisonment; and

(b) for the second or any subsequent offence with a fine of not more than two thousand five hundred rupees or with rigorous imprisonment for a period not exceeding two years or with both such fine and imprisonment:

Provided that where the offence consists of having the custody or possession of, or of using, a smooth bore shot gun of the muzzle-loading variety the offence shall be punishable as provided in section 44.

When one compares section 22 (3) before it was repealed, and as it stands now, it is clear that the present section 22 (3) envisages several situations where different kind of punishments can be imposed based on the type of the gun that comes within the offence.

It appears that when this indictment was drafted, the necessity to indicate whether the appellant has committed an offence in relation to any gun as stated in section 22 (1) or whether the indictment refers to as stated in section 22 (3) in relation to an automatic gun or repeater shotgun has evaded the attention of the drafter of the indictment.

It is the view of this Court that it is essential to mention in a charge under Firearms Ordinance, the above-mentioned information as the punishable section for possessing a gun which is not an automatic gun or a repeater shotgun or even a smooth-bore shotgun of the muzzle-loading variety is the same section 22 (3) of the Firearms Ordinance as amended by Firearms (Amendment) Act No. 22 of 1996.

I find merit in the learned President's Counsel's argument that when the charge was read over to him, the appellant pleaded guilty on his own accord as the charge does not refer to having him in his possession, an automatic gun but merely a gun.

I find it may be the reason why he has stated when questioned by the Court that he is pleading guilty to possessing this weapon (මෙම ආයුද්ධය ලඟ තබාගැනීම).

It is the considered view of this Court that all these above factors may have led to the appellant pleading guilty to the charge expecting a punishment for possessing a gun in terms of section 22 (3), which is different from the punishment that can be imposed for a person who possessed an automatic gun or a repeater shotgun.

It is the view of this Court that the way the charge has been drafted has denied a fair trial, towards the appellant, and therefore, the conviction and the sentence of the appellant cannot be allowed to stand. Accordingly, the conviction and the sentence of the appellant is hereby set aside.

Having considered the facts and the circumstances, it is the view of this Court that this is an action where a retrial should be ordered, and a retrial of this matter is hereby ordered.

Appeal allowed to the above extent.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal