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.15/1979.

C.A.No.185/2016
H.C. Nuwara Eliya No.HC/NE/44/09

Chaminda Jeewan Ratnayake

Accused-Appellant

Vs.

Hon. Attorney General
Attorney General's Department

Colombo 12.

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI J.

COUNSEL : Senarath Jayasundera with Sumith Wijesinghe, and Chathurangani Widanage for the Accused-Appellant.

A. R. H. Bary S.S.C. for the respondent

ARGUED ON : 197.07.2018

DECIDED ON : 28th September, 2018

ACHALA WENGAPPULI J.

The Accused-Appellant was indicted by the Hon. Attorney General for illegal possession of an automatic firearm, an offence punishable under Sections 22(1) and (3) of the Firearms Ordinance No. 33 of 1916 as amended by Firearms (Amendment) Act No. 22 of 1996.

After trial, he was convicted by the High Court of Nuwara Eliya and was sentenced to life imprisonment.

Being aggrieved by the said conviction and sentence, the Accused-Appellant seeks to challenge its validity on the basis that he was deprived of a fair trial. In further expanding this ground of appeal, the Accused-Appellant contended that;

i. the findings of the trial Court were not supported by the evidence,

ii. the trial Court had failed to properly evaluate the prosecution evidence, particularly on the consideration of improbability,

iii. the trial Court had failed to note that the Accused-Appellant was denied of the procedural protection he is entitled to during investigations,

iv. the trial Court had failed to properly evaluate the dock statement.

In support of his 1st ground of appeal, the Accused-Appellant submits that the trial Court had arrived at a finding that the firearm he is alleged to have possessed is an automatic firearm when in fact the Government Analyst Report (tendered to Court marked as P3) merely described it as a "firearm" as per the definition of Section 2 of the Firearms Ordinance. Therefore, the Accused- Appellant claims that the conclusion reached by the trial Court on this fundamental element of the charge against him is without any supporting evidence.

The 2nd ground of appeal is in relation to evaluation of the prosecution evidence in its entirety.

The complaint of the Accused-Appellant is that the evidence of the witnesses for the prosecution are contradictory *inter se* and *per se* and, in addition, their version of events is not a probable one.

It was submitted that witness *Dayaratne's* evidence given before the High Court of Kandy is contradictory to his evidence at the High Court of Nuwara Eliya. In addition, it contradicted with the evidence of other witnesses for the prosecution. The Accused-Appellant, in his oral and written submissions highlighted those inconsistencies in relation to the detection, delivery of the weapon, the way the magazines were attached to it, arrest of the Accused -Appellant and his questioning.

The 3rd ground of appeal was based on the evidence that the production item was not labelled when it was handed over to *Maskeliya*

Police, and it was done in the absence of the Accused-Appellant, contrary to the procedure established by law. He also relied on the fact that there was no marking made on the item of production by the Police before it was sealed in a parcel.

In relation to the 4th ground of appeal, the Accused-Appellant submitted that his evidence that the weapon belonged to one *W.G. Ranasinghe*, who travelled in another vehicle and was a candidate of that election, has not properly been considered by the trial Court as only a passing reference has been made to it in its judgment.

Consideration of these grounds of appeal requires a brief description of the case presented by the prosecution.

On 10th October 2000, an election was held to elect people's representatives for the Provincial Councils. In order to assist the Police to keep peace, Sri Lanka Army has assigned some officers and soldiers to conduct mobile patrols in the designated areas and also to man road blocks.

Second Lieutenant *Hangilipola* (PW4) was in charge of a platoon of 28 soldiers and they have reported to Senior Superintendent of Police *Meegoda* on the 9th October 2000 and was assigned to *Maskeliya* Police area on the election day. He had reported to the Officer-in-Charge of *Maskeliya* Police, *Heenketiya* at about 2.45 or 3.00 p.m. with some soldiers and had immediately taken steps to set up a road block in close vicinity to the Police Station, upon instructions of the SSP who conveyed the message that there was an incident of shooting near Princess Junction of Hatton

town, to a Police mobile unit. PW4 instructed his men to stop all the vehicles and check them.

PC 25766 *Dayaratne* (PW 2) was also assigned to the contingent led by PW4 along with Lance Corporal *Lalinda* (PW 5) and eight others.

Soon after they set up the road block, a convoy of vehicles arrived, and they were travelling towards Hatton. The vehicles were stopped at the check point and PW 5 conducted a search on a white coloured van. On the opposite side of its driver, PW5 saw, the Accused-Appellant was keeping a weapon between his knees with one magazine fitted to it whilst being seated. Then he alerted PW4, that a weapon was found in the possession of the Accused-Appellant. As PW4 walked up to the van, PW5 handed him over a T 56 weapon taken from the Accused-Appellant. There were other passengers in the back of the van.

Upon examination of the firearm, it was noted by the witnesses that the serial number of the T56 weapon had been filed off, but upon dismantling its number was seen by the witness carved on the spring in the firing mechanism. When questioned about the authority to possess the firearm, the Accused-Appellant could produce none. Altogether there were 48 ammunitions in the two magazines that were taken charge by the officers from the possession of the Accused- Appellant.

Then the officers have taken the Accused-Appellant into the Police station where he was later arrested and detained at. The candidate who travelled in the vehicle that came first in the convoy also came into the Police. No other person was arrested since the weapon was found in the possession of the Accused-Appellant.

Thereafter, he was produced before the Magistrate's Court. The T 56 weapon was sent for analysis and the Government Analyst Report (marked as P3) confirmed that it is an automatic firearm.

In the light of evidence reproduced above, it is appropriate at this stage to consider the reasoning of the trial Court *vis-a-vis* the several grounds of appeal raised by the Accused-Appellant.

As already noted the first ground of appeal is about the absence of any evidence that the firearm possessed by the Accused-Appellant is an automatic firearm. When the evidence presented by the prosecution through PW1 and his report marked as P3 are examined there were clear oral and documentary evidence before the trial Court to decide that the firearm possessed by the Accused-Appellant is in fact an automatic firearm. The evidence concerning this element of the offence has been clearly referred to by the trial Court in its judgment. In the circumstances, it appears that this particular ground of appeal is founded on a totally misconceived notion of evidence.

The 2nd ground of appeal concerns two aspects of the evidence of the prosecution. Firstly, the Accused-Appellant contended that the evaluation of the credibility of the version of events as claimed by the prosecution witnesses on the basis of probability is erroneous. Secondly, he contended that due to the inconsistencies that exist in the prosecution evidence *inter se* and *per se*, the trial Court fallen into error in accepting them as credible and reliable evidence.

In support of the first segment of the 2nd ground of appeal, the Accused-Appellant heavily relied upon the probability of the conduct

attributed to him by the prosecution witnesses by posing the question that when the army soldiers stopped the vehicle he was travelling in, would he hold an automatic weapon in between his knees as they claimed ?

Since the complaint of the Accused-Appellant is based on an erroneous finding on a question of fact by misapplying the test of probability should be considered at this juncture.

In ***Wickremasuriya v Dedoleena and Others*** (1996) 2 Sri L.R. 95, Jayasuriya J. observed that;

> *"A Judge, in applying the test of Probability and Improbability, relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."*

The trial Court, in accepting the prosecution version as credible and probable, had the support of the evidence of the prosecution witnesses to conclude that it is a probable version of events. There is clear evidence that the decision to set up a road block was an instantaneous act upon hearing the news of a shooting incident. It is therefore essentially a surprise move by PW4 and when the convoy of vehicles arrived there with their headlights on, its passengers had no prior notice of setting up of a the road block. The Accused- Appellant was seated in the left front seat and his movements could clearly be observed by the army officers who manned the road block. When a person carries an unlicensed firearm, and is about to be detected there is no other way for him to hide the weapon, except to have it between his knees, hoping the examiner would not notice

it. In fact, PW5 had seen it only when he ventured to examine the Accused-Appellant through the side window. Upto that point, the Accused-Appellant was successful in concealing it from the notice of the army officers.

The prosecution evidence in relation to the manner in which the firearm was held by the Accused-Appellant, when viewed in this angle, seemed a probable version and therefore we are not inclined to accept the submission that the conduct attributed to him by the prosecution witnesses, particularly by PW5, should be disbelieved only on the basis of improbability.

The second segment deals with the acceptance of the prosecution evidence, in spite of the inconsistencies that exist in it *inter se* and *per se.* The trial Court had focused its attention to the inconsistencies highlighted by the Accused-Appellant in his long closing address. It had the extra benefit of considering the prosecution evidence when the Accused-Appellant made an application under Section 200(1) of the Criminal Procedure Code Act No. 15 of 1979. Having examined the evidence led by the prosecution, in the light of the submissions of the Accused-Appellant, particularly in relation to inconsistencies, the trial Court concludes that the prosecution version is consistent and was corroborated and therefore is credible. Having carefully considered the inconsistencies referred to by the Accused-Appellant was concur with the conclusion reached by the trial Court.

The judgment of ***Samaraweera v The Attorney General*** (1990) 1 Sri L.R. 256, in relation to the evaluation of evidence, observed that;

> *"... Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood."*

In ***Wickremasuriya v Dedoleena and Others*** (supra) it was observed that;

> *"After a considerable lapse of time, as has resulted in this application, it is customary to come across contradictions in the testimony of witnesses. This is a true characteristic feature of human testimony which is full of infirmities and weaknesses especially when proceedings are held long after the events spoken to by the witnesses. A judge must expect such contradictions to exist in the testimony."*

When such discrepancies do exist in the evidence, a trial Court could utilise the test adopted in ***Jagathsena v Bandaranaike*** (1984) 2 Sri L.R. 397 that;

> *"Whether the discrepancy due to dishonesty or to defective memory or whether the witnesses power of observations were limited ? "*

In the light of the collective reasoning of these judgments, that the inconsistencies that were highlighted by the Accused-Appellant are on insignificant points and could easily be attributable to human error in the observation and in limitations of expression of what was observed.

It is noted that the learned High Court Judge who convicted the Accused-Appellant has had the benefit of observing the demeanour and deportment of all the witnesses for the prosecution when they gave evidence before him. The Police witness had no notes to refresh his memory as the relevant information books were destroyed in 2007. The army officers, had only their memory to rely upon to give evidence. They all gave evidence after 13 years since the detection.

In spite of all these negative factors, they have made a consistent, probable and therefore a truthful and reliable version of events before the trial Court for it to act upon. The credibility of a witness is clearly a question of fact and when that question of fact is based on the demeanour of the witnesses, as in this particular instance, this Court would be reluctant to interfere with such finding of facts, unless "such evidence could be shown to be totally inconsistent or perverse and lacking credibility" (as per ***Kumar de Silva & two Others v Attorney General*** (2010) 2 Sri L.R. 169).

The trial Court had devoted significant space in its judgment to consider the challenge mounted by the Accused-Appellant on the prosecution evidence on the footing that it had failed to prove the "chain of production". Soon after the firearm was detected it was dismantled in the presence of the Accused-Appellant and its serial number was recorded. This number did match with the weapon examined by the Government Analyst. The trial Court considered the oral and documentary evidence presented before it in the light of the submissions of the Accused-Appellant and correctly concluded that the prosecution has established the inward chain of productions beyond reasonable doubt.

The 4th ground of appeal is also presented on a misconceived basis that the trial Court had made only a passing reference to his dock statement and failed to consider it in the light of applicable legal principles.

At the commencement of the judgment itself, the trial Court had clearly and accurately laid down the legal principles that are applicable to a case presented by an accused and has referred to the "intermediate position" as well. Then it summarises the version of the Accused-Appellant as stated in his dock statement. The trial Court then holds that his claim of pinning the culpability on him for illegal possession of a firearm when in fact it was in the possession of his political leader, *W.G. Ranasinghe*, is taken up for the first time in the dock statement as an afterthought and proceeded to reject it on that basis. We are in agreement with the view held by the trial Court in relation to the dock statement of the Accused- Appellant.

In these circumstances, we are of the firm view that the appeal of the Accused-Appellant is devoid of merit. Accordingly, his conviction and sentence is affirmed and this Court makes further order to dismiss his appeal.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL