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

In the matter of an Appeal in terms of Section 331 of the Code of Criminal Procedure Act No 15 of 1979.

Court of Appeal No:

CA/HCC/0170/18

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Colombo

Case No: HC/3172/2006

Wickramaarachchige Nihal Ranjith

ACCUSED

AND NOW BETWEEN

Wickramaarachchige Nihal Ranjith

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Kalinga Indatissa P.C. with Ms. Rashmini Indatissa, Ms. Razana Salih for the Appellant

: Sudarshana de Silva, D.S.G. for the State

Argued on : 02-10-2023

Written Submissions : 29-04-2019 (By the Accused-Appellant)

: 30-08-2019 (By the Respondent)

Decided on : 12-02-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo on following counts.

(1) The Appellant possessed a T-56 gun without a lawful authority on 22nd May 2005, and thereby committed an offence punishable in

terms of section 22(3) read with section 22(1) of Act No-37 of 1916 as amended by Amendment Act No- 22 of 1996.

(2) At the same time and at the same transaction, he possessed 29 live ammunitions, and thereby committed an offence punishable in terms of section 27 read with section 9 of the Explosives Act No- 21 of 1956.

Although the prosecution has not mentioned the relevant Act by its name in the first count, it has not been disputed that it was in fact, the Firearms Ordinance under which the appellant has been indicted in relation to the first count.

After trial, the learned High Court Judge of Colombo found the appellant guilty as charged of his judgment dated 24-08-2018. Accordingly, he had been sentenced to life imprisonment on count one, and for a period of six months imprisonment on the second count.

Being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

Before I move on to consider the grounds of appeal raised by the learned President's Counsel, I find it useful to mention the facts in brief that led to the arrest of the appellant.

Facts in brief

PW-01 who was the officer-in-charge of the Organized Crimes Division of Criminal Investigations Department has been informed on 22-05-2005 at around 1.30 - 2.00 p.m. by a subordinated officer that an information had been received about an illegal possession of a T-56 gun in the Peliyagoda police area. This has resulted in him joining with the police team who were already in that area and leading the raid conducted in that regard.

Acting on the information provided by the private informant, PW-01 and his team of officers had surrounded the house mentioned and had confronted the appellant who was in the upper floor of the house.

When they searched the room occupied by the appellant, it is alleged that they discovered the T-56 gun and the ammunition under the mattress of the bed used by the appellant. Accordingly, the appellant has been arrested for the offences of illegal possession of a gun and ammunition, and the indictment preferred against him was the result of that arrest.

At the trial, although two Sub Inspectors of Police and several other police officers had accompanied the PW-01 in the raid, the prosecution has called PW-09, PS23481 who was one of the officers who took part in the raid to substantiate the evidence of PW-01 in relation the discovery of the T-56 gun and ammunition.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel formulated the following ground of appeal for the consideration of the Court.

(1) The case has not been proved beyond reasonable doubt as required in an action of this nature.
(2) The conviction cannot be supported having regard to the evidence led at the trial.
(3) There is no evaluation of the prosecution evidence.
(4) The learned High Court Judge has failed to appreciate the credibility of PW-01 and PW-09 who gave evidence before the Court, especially in the context that the raid was a planned detection.

(5) The learned High Court Judge misdirected himself of the burden of the prosecution and that of the defence, and the Ellenborough dictum was applied erroneously.
(6) There was no proper analysis of the dock statement.
(7) The judgment was totally contrary to section 283 of the Code of Criminal Procedure Act.
(8) The absence of notes by the police officers in the context of fact that this was a planned detection has not been considered by the learned High Court Judge.
(9) Whether it is safe to convict the accused under the circumstances.

Consideration of the Grounds of Appeal

The learned President's Counsel made extensive submissions in relation to the evidence led before the trial Court to argue that the prosecution has failed to prove the charges against the appellant beyond reasonable doubt. However, the learned Deputy Solicitor General (DSG) on behalf of the respondent contended that there was sufficient evidence before the trial Court to prove the guilt of the appellant.

Although submissions were made in relation to the facts, since it was mainly contended that the judgment pronounced by the learned High Court Judge has denied a fair trial towards the appellant because of the way the learned High Court Judge had apparently decided to convict the appellant, I find it necessary to consider the relevant grounds of appeal urged before moving onto other grounds of appeal. Hence, I will now consider the relevant 3rd, 4th, 5th, 6th, 7th, grounds of appeal collectively.

It was contended that the learned High Court Judge has decided the matter based on the defence taken up by the appellant and not deciding whether the

prosecution has proved the charges beyond reasonable doubt. It was pointed out that the judgment cannot be considered as a Judgement in terms of section 283 of the Code of Criminal Procedure Act and, therefore, should be set aside.

In this regard, the submission of the learned DSG has been that each trial Judge has his or her own way of writing judgements, and merely because the learned High Court Judge has not followed the conventional approach of writing a judgement, it cannot have the effect of vitiating the same. He was of the view that since the prosecution has established a strong *prima facie* case against the appellant at the trial, this is a fit case where ordering a retrial should be considered in the event the Court agrees with the submissions of the learned President's Counsel on the validity of the judgment.

The essential ingredients of a judgement in terms of section 283(1), (2) and (3) of the Code of Criminal Procedure Act read as follows;

> **283. The following provisions shall apply for the judgments of courts other than the Supreme Court or Court of Appeal:-**
>
> > **(1) The judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in a case where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.**
> >
> > **(2) It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.**
> >
> > **(3) If it be a judgment of acquittal it shall state the offence of which the accused is acquitted.**

In this regard, **Jayasuriya, J.** with reference to several other decided cases observed the following, in the case of **Chandrasena and Others Vs. Munaweera (1998) 3 SLR 94 at 96,**

> *"In **Ibrahim Vs. Inspector of Police 59 NLR 235**, the Supreme Court emphasized that the mere outline of the prosecution and the defence without reasons being given for the decision but embellished by such phrases as "I accept the evidence of the prosecution and I disbelieve the defence" is by itself an insufficient discharge of duty cast upon the Judge by section 306 (1) of the Criminal Procedure Code. Vide also the decision in **Thusaiya Vs. Pathihamy 15 CLW 119** by Nihill, J.- According to the presently applicable section 283(1) of the Code 283(1) of the Code of Criminal Procedure Act No. 15 of 1979, the judgement shall contain the point or points for determination, the decision thereon and the reasons for the decision. In the Supreme Court stressed that the object of the statutory provision is to enable the Supreme Court to have before it the specific opinion of the Judge in the lower Court on the question of fact, so that it may enable the Court to ascertain whether the finding is correct or not. The weight of authority is to the effect that the failure to observe the imperative provisions of the section is a fatal irregularity and that even in a simple case that the provisions of this statute must be complied with."*

Considering grounds of appeal similar in nature, **Ranjith Silva, J.** in **C.A. Appeal No. 62-65/2005 decided on 07-06-2011** made the following observation emphasizing the importance of a proper judgment.

> *"We have perused the judgement and the judgement runs into nine pages but not a single paragraph contains any evaluation of evidence. The learned Judge has not said anything about omissions and had just brushed aside one of the contradictions stating that they are insignificant*

but does not refer to the other two contradictions. This judgement is only a repetition of evidence and does not amount to a judgement in terms of section 283 of the Code of Criminal Procedure Act. The learned Judge appears to have very conveniently discharged her functions without taking any pains to write a proper judgement. It is extremely pathetic to note how much time and how much money that has been spent on this case over the years and finally it has to end up in a situation where this Court is compelled to order a retrial. It is also true that the learned High Court Judge has turned a blind eye with regard to the dock statement. She has not mentioned the concepts or a single authority or tried to appreciate or evaluate the dock statement in that light. In this context although we find that the Judge could have find that easily supported the conviction with real evaluation of evidence and contradictions and omissions, we are unable to justify this although a Court of Appeal will not lightly interfere with the findings of facts especially with regard to the credibility."

Although I am in agreement with the learned DSG that each Judge has his or her own way of judgement writing, and no specific format can be expected in a judgement, I am also of the view that whatever the way of writing may be, the basic ingredients of a judgement cannot be disregarded in the guise of one's own way of writing.

As pointed out correctly by the learned President's Counsel, the learned High Court Judge has commenced the judgement by considering the defence put forward by the appellant. After commenting on the defence case, the learned High Court Judge has stated that, firstly, it is necessary to consider whether the prosecution has proved the case beyond doubt and any attempt by the accused to create a doubt should not be a mere doubt but a reasonable doubt.

Having determined as above, I find that the learned High Court Judge, rather than analyzing the prosecution evidence and coming to a finding that the evidence can be believed and the prosecution has established a strong *prima facie* case, has compared the stand taken up by the accused with the prosecution evidence to determine that the defence case cannot be accepted.

Throughout the judgement, it is clear that the learned High Court Judge has relied on the weaknesses of the defence put forward by the appellant at the trial in order to find him guilty.

In the Indian case of **Narender Kumar Vs. State (NCT of Delhi) AIR 2012 SC 2281,** it was stated that;

> *"Prosecution case has to stand on its own legs and cannot take support from the weaknesses of the case of defence. However, grate the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material before the court, he cannot be convicted for an offence."*

In the case of **R. Venkatakrishnan Vs. Central Bureau of Investigation (2009) INSC 1409 (7th August 2009),** it was held:

> *"The law is certain that the prosecution must stand on its own legs basing its findings on the evidence that has been led by it. It matters little as to whether the accused has made out a plausible defence or not."*

It is well settled law that the duty of a trial Judge is to consider the evidence placed before the Court, whether by the prosecution or by the defence as a whole, and come to his findings, rather than compartmentalizing as happened in the impugned judgement.

Although the learned High Court Judge has claimed that the evidence was considered as a whole towards the very end of the judgement, I find no basis to accept that this was a judgement reached after considering the evidence placed before it in its correct perspective.

In the case of **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167,** the trial Judge stated, "I had considered the defence of the accused and I hold that it is untenable and false in the light of the evidence led by the prosecution."

Held:

There is a serious misdirection in law. It is a grave error for trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the defence of the accused in the light of the prosecution witness is to reverse the presumption of innocence.

Per Rodrigo, J.

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty or not guilty.- See the Privy Council judgement in* ***Jayasena Vs. The Queen 72 NLR 313****."*

For the reasons as considered above, I find that this a judgment that shall not be allowed to stand on the considered grounds of appeal alone, since it cannot

be considered a judgement pronounced in accordance with the law. Hence, I find it unnecessary to consider the other grounds of appeal urged on behalf of the appellant.

Accordingly, I have no option but to set aside the conviction and the sentence dated 24-08-2018 by the learned High Court Judge of Colombo.

Having determined as such, for completeness of this judgement, I find it appropriate to reproduce the Indian Supreme Court judgement in the case of **State of Uttar Pradesh Vs. Anthony (1984) SCJ 236/ (1985) CRI L.J. 493 at 498/499,** cited by the learned DSG in his written submissions, which I believe would provide clear guidance as to how to approach the analyzing of evidence in a case by a trial Judge.

It was held:

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as whole appears to have ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly 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 evidence given by the witness and whether earlier evaluation of the evidence is shaken as to tender 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 and 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 the rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court

which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weightily and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

The next matter to be considered is whether this is a fit case to send back for a retrial as contended by the learned DSG.

This is an incident that is said have occurred on 22 May 2005, more that 18 years ago. The indictment is dated 8th May 2006. The trial proper has commenced on 24-10-2007. The judgement has been pronounced on 24-08-2018. More that 13 years after the alleged incident. The appellant had been in incarceration since his conviction, which amounts to almost five and a half years from the date of the judgement.

In the case of **Nandasena Vs. Attorney General (2008) 1 SLR 51,** it was held:

"A discretion is vested in thew Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice taking into consideration the nature of the evidence available, the time duration since the date of the appeal, the period of incarceration the accused had already suffered, the trauma and hazards an accused person would have to suffer in being subjected to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime, should be considered."

In the case of **L.C. Fernando Vs. The Republic of Sri Lanka 79-II NLR 313 at 374** it was held:

> *"It is a basic principle of the criminal law of our land, that a retrial is to be ordered only, if it appears to the Court that the interests of justice so require.*
>
> *The charge laid against the accused is of serious nature, and it may be, a trial Court may find the accused guilty at a retrial upon relevant and admissible evidence. But it must be remembered that the acquisitions have been made about seven years ago.*
>
> *…Further, the trial had been long and protracted. There have been no less than thirty-five trial dates. The accused would have to bear undue hardship and heavy expense to defend himself again. I must also state that the defence in no way contributed to the reception of inadmissible and irrelevant evidence, which prejudice the trial.*
>
> *Under the circumstances, it seems to me to be harsh and unjust to order a retrial. It does not appear to me that the interests of justice require a retrial."*

Apart from the above considerations, I find it necessary to consider that that this was a raid conducted by a group of police officers where the appellant is said to have been found possessing a weapon. If a retrial is ordered, the witnesses being police officers who have the advantage of referring to their notes will be in a position to rectify whatever the shortcomings in their evidence, which amounts to a denial of a fair trial towards the appellant.

Therefore, having considered the above factual matters and the law, I am of the view that this is not a case fit to order a retrial.

The appellant is acquitted of the charges preferred against him.

Appeal allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal