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.

The Democratic Socialist
Republic of Sri Lanka.

Court of Appeal Case No.
HCC/0043/18

Complainant

High Court of Puttalam
Case No. HC/10/2014

Vs.

1. Ramalan Mohamed Hafeel.
2. Mohamed Fahruk Yusuf Aruf Lebbe.

Accused

AND NOW BETWEEN

Ramalan Mohamed Hafeel.

1st Accused-Appellant

Vs.

1. Director,
   Criminal Investigation
   Department,
   Sri Lanka Police, Colombo.

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

Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Amila palliyage with Sandeepani Wijesooriya, Savani Udugampola, Lakitha Wakishta Arachchi and Subaj De Silva for the 1st Accused-Appellant.
Jayalakshi De Silva, SSC for the Respondents.

ARGUED ON : 15.07.2024

DECIDED ON : 07.08.2024

WICKUM A. KALUARACHCHI, J.

Two accused in this case were indicted under Section 22(3) read with Section 22(1) of the Firearms Ordinance as amended by Act No. 22 of 1996 for illegally possessing an automatic rifle and under Section 27(1)(b) of the Explosives Act as amended by Act No. 18 of 2005 for illegally possessing 30 live ammunitions by violating Section 9(2).

After trial, the 1st accused was convicted for both counts and the 2nd accused was acquitted of both counts by the Judgment dated 28.05.2018 of the learned High Court Judge of Puttalam. Life imprisonment was imposed against the 1st accused for the first count and a fine of Rs. 2500/- which carries a default sentence of simple imprisonment of three months were imposed on the 2nd count. The 1st accused preferred this appeal against the said Judgment.

Prior to the hearing of the appeal, written submissions were filed on behalf of both parties. However, apart from mentioning four grounds of appeal, no facts or arguments relating to those grounds were mentioned in the written submissions of the appellant. In consequence, in the written submissions of the respondents also nothing has been mentioned apart from the two charges, four grounds of appeal mentioned by the appellant and the sentences imposed by the learned Judge. At the hearing of the appeal, the learned Counsel for the appellant and the learned Senior State Counsel (SSC) for the respondents made oral submissions.

The facts of the case, according to the prosecution, may be briefly summarized as follows:

PW-1, was the Officer in Charge of the Traffic Division of the Police Station of Anamaduwa at the time of the incident. On the day in question, around 4.15 p.m., he had gone on petrol duties with Police Constable Rathnayaka. They had toured about 9 kilometers in the direction of Puttlam from Anamaduwa and met Police Constable Sumith (PW-5) and Police Constable Samantha (PW-2) in Kottukatchchiya area. The four Police Officers had put up road barriers near Kottukatchchiya temple to search vehicles that commit motor traffic offences. While they were on duty, a Dolphin model van bearing No. 253-4691 was moving fast from Puttlam side and O.I.C. Ranbanda (PW-1) has signaled to stop the van. The van stopped after moving little further passing the police officers. Then, PW-1 had gone near the van and asked the driver his driving license. At this instance, the diver had submitted only a photo copy of the driving license and accordingly PW-1 had summoned the other three police officers to the place where the van was stopped. The driver of the van was seen to be in a frightened state. PW-1 has got on to the driving seat and searched the vehicle. PW-1 had observed that the carpet under the driving seat was protruded and upon search, he observed a gun and two magazines below the carpet. According to PW-1 one of the magazines was loaded with 30 live ammunitions while

the other one was not loaded. Accordingly, the officers arrested the driver of the van (the 1st accused) and the person who was sitting in the left side front seat of the van (the 2nd accused) and brought them with the van to the police station at 7.00 p.m.

Although, four grounds of appeal have been mentioned in the written submissions tendered on behalf of the appellant, the learned Counsel for the appellant based his arguments at the hearing on following three grounds:

i. The learned High Court Judge is erred in law by rejecting the defence evidence and the principle of presumption of innocence has been reversed in evaluating the evidence.
ii. The learned High Court Judge has based his decision on surmises and conjectures and the findings are not supported by the evidence.
iii. The prosecution has not eliminated the involvement of a third party.

As explained previously, the 1st accused-appellant was arrested by the police officers who were engaged on traffic duty. They checked the vehicle that the appellant and the 2nd accused was travelling and found the automatic rifle and two magazines, one of which contained live ammunitions. In a case where the charges are proved on circumstantial evidence, the possibility of third person's involvement must be clearly excluded. This is not a case proved on circumstantial evidence. The learned Counsel for the appellant pointed out certain items of evidence and contended that the appellant was driving a vehicle owned by somebody else. The learned Counsel raised the issue of ownership of the van to show that some other person could have kept this firearm and the ammunitions without the knowledge of the appellant as this is not a vehicle owned by the appellant. This argument fails because the position taken up by the 1st accused-appellant was not that the firearm and ammunitions were in the vehicle without his knowledge but no

firearm, magazines or ammunitions were found in the van. According to the statement made by the appellant from the dock, nothing was found in the van that he was driving. Hence, there is no issue regarding the possibility of a third person's involvement in this case.

The main contention of the learned Counsel for the appellant was that the dock statement has not been considered in correct perspective. The learned Counsel contended that the learned High Court Judge neither rejected the defence version nor accepted the same. In the last paragraph of page 8 of his Judgment, the learned High Court Judge stated that no reasonable doubt is created as a result of the dock statement. When a dock statement is evaluated, there are three aspects to be considered.

i. If the dock statement cannot be believed, it must be rejected.
ii. If the court believes the dock statement, it must be acted upon.
iii. If the dock statement raises a reasonable doubt in the mind of the court about the prosecution case, the accused is entitled for an acquittal.

If the learned Trial Judge acted upon either the 1st or the 2nd of the aforesaid aspects, the learned Judge must state in analyzing the defence version whether he accepted the defence version or rejected the defence version. In this case, the learned High Court Judge has acted upon the aforesaid 3rd aspect and stated that the dock statement does not raise a reasonable doubt regarding the evidence of the prosecution witnesses.

The learned High Court Judge has come to the said conclusion not only for the reason that the prosecution has presented strong evidence that can be accepted without a reasonable doubt. The learned Judge stated in his Judgment that the 1st accused-appellant, as the driver of the van should have observed that there is something under the carpet where he was seated in the van. The learned Counsel for the appellant stated

that this is a surmise of the learned Trial Judge. That is why he raised the 2nd ground of appeal that the Judgment is based on surmises and conjectures.

The learned Counsel for the appellant handed over a picture at the hearing of this appeal that demonstrate the length of a firearm similar to the firearm produced in this case. According to the said picture, the length is about 99 centimeters. When such a big weapon was there under the carpet below the driving seat, obviously, the appellant who was seated in the driving seat should have noticed the same. According to the *Cambridge Dictionary,* the meaning of surmise is "*to guess something, without having much or any proof.*" It is certainly not a surmise of the learned High Court Judge. It is an observation made by the learned Judge based on the evidence of the case. The learned Judge has stated in making the said observation that if PW-1 observed without any difficulty that there was something under the carpet in searching the van, the appellant who was driving this vehicle should have definitely noticed this. I am also of the view that the learned Judge's said observation is perfectly correct.

At page 143 of the appeal brief, it is recorded that PW-1 had demonstrated how he searched the van and the learned Trial Judge has observed that the carpet under the driving seat has protruded when the firearm that was recovered was there under the carpet. The learned Judge has also observed when the firearm was under the carpet in that way, there was no difficulty for the driver to drive the van. These observations establish the probability of the prosecution case.

The learned Counsel for the appellant contended that when the police officers signaled to stop the van, in a little distance, they had stopped the van and if they possessed an illegal article, they could have fled without stopping the van. The learned Counsel stated that since the vehicle was empty, the appellant waited until the police officers came

and searched the vehicle. The learned SSC for the respondents contended that when there was a police team in the main road and if they asked to stop a vehicle, no prudent person would try to escape. It should be noted that the learned SSC's position is more rational since if they tried to flee, the police officers would undoubtedly know that they had been involved in some illegal activity, and the police officers on traffic duty could have easily apprehended them. If they stopped the vehicle obeying the direction given by the police officers, there was a chance for them to escape, if the police officers had not noticed the weapon hidden under the carpet.

The learned Counsel for the appellant also contended pointing out the proviso to Section 22(3) of the Firearms Ordinance that the exclusive possession of the 1st accused-appellant has not been established. The learned Counsel contended further that the 2nd accused who was travelling with the 1st accused sitting in the left front seat was acquitted from the charges on the ground that he had no knowledge. The contention of the learned Counsel was that if the 2nd accused had no knowledge, the same yardstick could be applied to the 1st accused-appellant as well.

Proviso to the Section 22(3) of the Firearms Ordinance states that *"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."*

Therefore, if the prosecution has proved that the appellant was in the custody or possession of an automatic gun, the appellant is guilty for the 1st charge. When considering whether the exclusive possession of the 1st accused-appellant has been established, it must be noted that an accused who has been charged for possessing an illegal substance or article, can take up two positions in presenting his defence. Firstly, the accused can take up the position that he was physically in

possession of the prohibited substance or article, but was unaware of the true nature. Secondly, the accused can deny the possession. In the case at hand, the 1st accused-appellant had taken up the position that there was no firearm or any weapon in the vehicle that he was driving. Therefore, the learned High Court Judge had to consider whether the accused's version can be believed or the prosecution version that the firearm and the ammunitions were found under the driving seat can be believed. Considering the entirety of the evidence of the case, the learned Judge has correctly found that the prosecution version is true and believable and no reasonable doubt would be cast on the prosecution case as a result of the dock statements made by the accused.

In "An Essay on Possession in Common Law" [1888 Part III Chapter 1 page 119] by R.S. Wright [Pollock and Wright], it is stated that "… *they [the jury] must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess or* ***knowledge that he does possess what is in fact a prohibited substance****. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance."* (Emphasis added)

In the case at hand, there is no issue regarding the knowledge of the appellant in respect of the firearm and the ammunitions because they were under the carpet which was there under the driving seat. As shown by the learned Counsel for the appellant, the firearm was about 99 centimeters in length and necessarily the appellant had the knowledge about this weapon, as the person who was driving the van. Only the 1st accused and the 2nd accused were in the van. Hence, the 1st accused is guilty for possessing a firearm and ammunitions without a valid license as his knowledge is well established. Therefore, the learned High Court Judge is correct in convicting the 1st accused-appellant for the 1st and 2nd counts.

The 2nd accused travelled in the van with the appellant. The appellant was in the driving seat and the 2nd accused was in the left front seat. The firearm and the ammunitions were under the carpet below the driving seat where the 1st accused was seated and drove the vehicle. Therefore, it has already been decided that the appellant had the knowledge about the thing that was under the carpet. The 2nd accused may have noticed that the carpet was protruded than normal or he may have not noticed. There is a doubt about the knowledge of the 2nd accused. The benefit of the doubt has to be given to the 2nd accused. Therefore, the learned High Court Judge is correct in deciding that there is no evidence to prove beyond a reasonable doubt that the 2nd accused had the knowledge about the firearm or the ammunitions. Hence, acquittal of the 2nd accused has no impact in deciding the 1st accused-appellant's case.

The other vital matter to be mentioned is that there was no reason for these police officers to introduce a firearm and live ammunitions to the appellant. As contended by the learned SSC, these police officers had no animosity whatsoever with the appellant. Even in the dock statement of the appellant, he had not stated about any animosity or any other reason for these police officers to introduce a firearm and bring criminal charges against the appellant. So, there was no reason for these police officers who came for traffic duties to falsely imply criminal liability to the appellant. Also, it is impossible for the police officers who were engaged in traffic duties to introduce a weapon and ammunitions to the appellant.

For the reasons stated above, I hold that the Judgment of the learned High Court Judge is correct in law and this court has no reason to interfere with the said Judgment.

Therefore, the Judgment dated 28.05.2018, the convictions and the sentences imposed by the learned High Court Judge are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL