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

In the matter of an application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Complainant

SC Appeal 128/2018

CA Appeal No. CA 206/2013

HC Kaluthara Case No. 134/2002 -Vs-

1. Badde Kankanamage Chinthaka Kumara Ruwan.
2. Weerasinghe Pedige Ajith Kumara Weerasinghe.

Accused

And then between

1. Badde Kankanamage Chinthaka Kumara Ruwan.
2. Weerasinghe Pedige Ajith Kumara Weerasinghe.

Accused-Appellants

-Vs-

Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.

Complainant-Respondent

And now between

Weerasinghe Pedige Ajith Kumara Weerasinghe

2nd Accused-Appellant-Petitioner

-Vs-

Hon. Attorney-General,
Attorney-General's Department,
Colomb0 12.

Complainant-Respondent-Respondent

Democratic Socialist Republic of Sri Lanka

Complainant

SC Appeal 129/2018
CA Case No. CA 206/2013
HC Kaluthara Case No. 134/02

-Vs-

1. Badde Kankanamage Chinthaka Kumara Ruwan.
2. Weerasinghe Pedige Ajith Kumara Weerasinghe.

Accused

And then between

1. Badde Kankanamage Chinthaka Kumara Ruwan.
2. Weerasinghe Pedige Ajith Kumara Weerasinghe.

Accused-Appellants

-Vs-

Hon. Attorney-General,
Attorney-General's Department,
Colombo 12. Complainant-Respondent

And now between

Badde Kankanamage Chinthaka Kumara Ruwan

1st Accused-Appellant-Petitioner

-Vs-

Hon. Attorney-General,

Attorney-General's Department,

Colomb0 12.

Complainant-Respondent-Respondent

BEFORE: Buwaneka Aluwihare, PC, J

A.H.M.D. Nawaz, J

Janak De Silva, J

COUNSEL: Chathura Amarathunga for the 2nd Accused-Appellant in SC Appeal 128/2018.

M.C. Jayaratne, PC with H.A. Nishani, H. Hettiarachchi instructed by M.D.J. Bandara for the 1st Accused Appellant in SC Appeal 129/2018.

Lakmali Karunanyake, DSG for the Complainant-Respondent-Respondent.

ARGUED ON: 24.05.2022

WRITTEN SUBMISSIONS: 26.03.2019 for the 1st Accused Appellant in SC Appeal 129/2018.

09.06.2022 for the 2nd Accused-Appellant in SC Appeal 128/2018.

01.07.2022 for the Complainant-Respondent-Respondent in SC Appeal 128/2018 and SC Appeal 129/2018.

DECIDED ON: 09. 11.2023

Judgement

Aluwihare, PC, J

The 1st Accused-Appellant-Appellant in SC Appeal No. 129/2018 and the 2nd Accused-Appellant-Appellant in SC Appeal No. 128/2018 (hereinafter sometimes referred to as the 'Appellants') were indicted in the High Court of Kalutara on the following Counts:

1. That on or about 26.03.2000 the two accused along with one Edirisinghe Arachchige Gemunu Ranjith who is now deceased, committed **the offence of Robbery** of Rs. 37,579/- from the Pelpola Co-Operative Rural Bank, an offence punishable **under Section 4 of the Offences Against Public Property Act, No. 12 of 1982 read with Section 32 of the Penal Code**; and
2. In the course of the same transaction in the aforementioned count, the two accused along with the said Edirisinghe Arachchige Gemunu Ranjith **Possessed a Firearm without a license, and thereby committed an offence punishable under Section 22(1) read with Section 22(3) of the Firearms Ordinance as amended by Act, No. 22 of 1996**; and
3. In the course of the same transaction in the aforementioned count, the two accused along with said Edirisinghe Arachchige Gemunu Ranjith **Possessed a Hand Grenade without lawful authority and thereby committed an offence punishable under Section 2(1)(b) of the Offensive Weapons Act, No. 18 of 1996.**

At the conclusion of the trial, the two Appellants were convicted of all counts referred to above and accordingly were imposed the following sentences.

Count 1: 20 Years of rigorous imprisonment with a Fine of Rs. 112, 737/= with a default term of 6 months.

Count 2: Imprisonment for life.

Count 3: 10 Years rigorous imprisonment with a Fine of Rs. 10,000 with a default term of 3 months.

In consideration of the Appellants' commendable services in the Army during a time of war, and the fact that the 1st Accused-Appellant-Appellant is disabled, the learned High Court Judge ordered that the terms of imprisonment imposed to run concurrently.

Being aggrieved by the Judgement of the High Court, the two Appellants appealed to the Court of Appeal against the same. In the Court of Appeal, the learned Counsel for the Appellants submitted that they would confine their challenge in relation to the conviction and the sentence imposed in respect of Count 2, [possession of the firearm] and the Judgement of the Court of Appeal therefore addresses matters relating to Count 2 alone. By its judgement dated 17.03.2017, the Court of Appeal affirmed the judgement of the High Court. Being aggrieved by the said Judgement, the Appellants sought special leave to appeal from this Court and special leave was granted on the following question of Law in respect of both appeals.

Did the Court of Appeal err in holding that the Petitioner was guilty of the offence of 'possessing a firearm' under the provisions of the Firearms Ordinance without it being established that what was possessed by the Petitioner was a 'firearm' within the meaning of the Firearms Ordinance?

This judgement shall apply to both appeals, that is SC Appeal No. 128/2018 as well as SC Appeal No. 129/2018. Before addressing the question of law, I will briefly state the factual narrative relating to the 2nd count in both appeals.

The version of the Prosecution, per the evidence adduced at the trial was that the Police had recovered a Pistol from the trouser pocket of the 1st Appellant at the time of his arrest. The Officer-in-Charge [Rex Jensen] gave evidence to the effect that after taking the pistol into custody, it was handed over to the Police reserve but had then been misplaced, and that an inquiry regarding the misplacement was pending. The prosecution stated that the gun could not be located and as such it was not sent to the Government Analyst for examination and report, and that therefore, the Government Analyst's report could not be produced at the trial. The non-production of the Pistol and the Government Analyst's Report forms the crux of this appeal.

Submission of the Appellants

The learned President's Counsel for the 1st Accused-Appellant-Appellant in SC Appeal No. 129/2018 contended that the convictions were bad in law as the said Pistol (alleged by the Prosecution to have been possessed by the Appellants without license), and the Government Analyst's Report which would have affirmed possession were not

produced at the trial. Essentially, the Counsel argued that a prosecution for an offence of possession of a firearm under the Firearms Ordinance could not succeed without the production of the supposed Firearm, and the Government Analyst's Report on the said Firearm as it could not be proven beyond reasonable doubt that what was possessed was actually a 'Firearm' within the meaning of the Ordinance. Learned Counsel for the 2nd Accused-Appellant-Appellant in SC Appeal No. 128/2018 took up a similar position and associated himself with the submissions made by the learned President's Counsel.

Section 2 of the Firearms Ordinance as amended defines an 'Automatic Gun' as "a gun which repeatedly ejects an empty cartridge shell, and introduces new cartridge on the firing of the gun". Since the pistol was not produced, the learned Counsel for the Appellants argued that the prosecution had necessarily failed to prove that the item which was possessed by the Appellants was in fact a Firearm, and an 'automatic gun' within the meaning of Section 2 of the Ordinance, and that it follows therefore that the prosecution had failed to prove that the Appellants were in possession of a Firearm without a license punishable under Section 22(1) read with Section 22(3) of the Firearms Ordinance as amended by Act, No. 22 of 1996. The learned President's Counsel also noted that the High Court relied on the proviso to Section 22 of the Ordinance as amended and argued that as the count 2 on the indictment does not allege possession of "an automatic gun or a repeater shotgun" but merely refers to "a gun", even if the prosecution had succeeded in establishing that the Appellants possessed a firearm, the Appellants could not have been sentenced to Life Imprisonment upon conviction of said count.

The proviso to Section 22(3) stipulates 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".

Submission of the Prosecution

The learned DSG contended that the facts of the case are of a distinct nature in that the mere absence of the Pistol or the Government Analyst's Report in evidence should not defeat the conviction. At the High Court, and the Court of Appeal, the learned DSG sought to prove that the evidence led at the trial by way of Witnesses, particularly the

evidence of Captain Bandara of the Ganemulla Army camp was sufficient to prove possession of the pistol, and that it was a Firearm within the meaning of the Ordinance. The fact that specific oral evidence in relation to the recovery of the Pistol was only provided by the arresting officers is significant.

Drawing attention of the court to Section 47 of the Evidence Ordinance which makes the opinions of persons who are not experts relevant when it comes to identification of hand writing, the learned DSG submitted that the evidence of Captain Bandara should be considered with regard to the firearm in issue. In my view, the application of Section 47 of the Evidence Ordinance relates to handwriting and handwriting alone and by any stretch of imagination Section 47 cannot be applied to other fields where expert opinion is required.

Judgement of the Court of Appeal

Their Lordships of the Court of Appeal have relied on the judgements in ***Sudubanda v. The Attorney General*** **[1998] 3 SLR 375** and ***Suduweli Kondage Sarath and Another v. The Attorney General*** **(decided on 26.10.1998)** to hold that the non-production of a material object is not necessarily fatal to a conviction and that a conviction can be sustained upon the description of instruments in the hands of the accused by lay witnesses respectively.

I will now consider the question of law upon which submissions were made by Counsel.

Determination

In my opinion, while the non-production of material in the prosecution of offences which only require a literal understanding of certain words or phrases may not be essential, it is only logical that material which are provided specific interpretations by legislation and form the pith and substance of the offence is *sine qua non*. The rationale for this view lies in the fact that the nonproduction is merely a symptom of the larger defect of the lack of evidence to prove the allegation that the pistol claimed to have been possessed by the Appellants was of a nature, make, model and function as that of an 'automatic gun' or a 'repeater shotgun' within the meaning of the Firearms Ordinance. Their Lordships in the Court of Appeal have therefore been remiss in failing to note this glaring defect of the impugned conviction.

The judgement of ***Sudubanda v. The Attorney General*** **[1998] 3 SLR 375** merely discusses the non-production of a material object in respect of an offence which did not require the object to conform to a particular interpretation. For example, in ***Sudubanda's*** case [supra], the accused was prosecuted for *Attempted Murder*. The Court drew a distinction between 'real evidence' and oral evidence which may serve to establish the use of such real evidence in the commission of the offence. In fact, the Court referred to the rationale for the exclusion of 'real evidence' from our evidentiary regime as explained by Sir Fitzgerald Stephen, the author of our Evidence Ordinance. "*Sir Fitzgerald Stephen …in his speech in the Indian Parliament, in introducing the Act, has stated categorically that he did not, in defining evidence, include real evidence as part of the definition of evidence. He has said that omission was deliberate and intentional so that the law in India would be different to the law in Great Britain... However, in proviso 2 to section 60 of the Evidence Ordinance he has made provision for the adduction of real evidence subject to a condition. Section 60 proviso 2 sets out thus: Provided also that if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection*" [at pages 377-378].

The proviso referred to in the above extract merely provides the Court the discretion to call for a production, i.e.: 'real evidence', when it deems it necessary. The prosecution in relation to Count 2 in the present case is for the *possession of a firearm without license* whereby the specific firearm alleged to have been possessed by the two accused is an 'automatic gun' as defined by the Firearms Ordinance. Thus, the consideration in ***Sudubanda*** is manifestly different to the consideration before this Court. As stated before, what is crucially lacking in the present conviction is evidence to establish beyond a reasonable doubt that the pistol claimed to have been possessed by the Appellants was of a nature, make, model and function as that of an 'automatic gun' or a 'repeater shotgun' within the meaning of the Firearms Ordinance, which is a fact- in- issue in the case, as opposed to the weapon used to cause the injury in a case of attempted murder as referred to in Sudubanda [supra] . Therefore, the conclusions drawn above are consonant with the views of Sir Fitzgerald Stephen.

Material which bears a literal meaning for the operation of law do not require the establishment of their use by specific evidence are wholly distinctive from material

with a specific legal meaning-such as a 'gun' as defined in the Firearms Ordinance. Crucially, what both the learned High Court Judge and their Lordships in the Court of Appeal have failed to note is that the Firearms Ordinance imposes what may be referred to as the 'Straw Board Test' to determine whether an ordnance is in fact 'a gun'. Per Section 2 of the Ordinance as amended, 'a gun' is only 'a gun' "if any barrelled weapon of any description from which any shot, pellet or other missile can be discharged with sufficient force to penetrate not less than eight straw boards, each of three-sixty-fourth of an inch thickness placed one-half of an inch apart, the first such straw board being at a distance of fifty feet from the muzzle of the weapon, the plane of the straw boards being perpendicular to the line of fire". Accordingly, if the projectile fired from a weapon is not capable of penetrating the straw boards in the manner set out above, the weapon would not fall within the types of Ordnances regulated by the Firearms Ordinance. The evidence that a weapon so alleged to have been possessed was in fact a weapon which falls within the definition of 'a gun' as aforesaid must be presented from an expert, who in cases such as these is ballistic expert.

The aforementioned distinction does not have to be established, for instance, where a person alleges that he was robbed at gun point and charged under Section 383 of the Penal Code for Robbery with attempt to cause death or grievous hurt. Even if the firearm is not produced, or no evidence is led to establish the make, model, function or other specification of the firearm, the suspect may be convicted since the Penal Code does not impose a specific interpretation for the word 'gun' and therefore the word only bears a literal meaning and does not carry a specific legal meaning.

It is to be noted that the Court of Appeal made the cardinal error in misdirecting itself by failure to appreciate the distinction of the non-production of a 'material object' with that of "lack of proof" to establish a fact-in-issue. The failure on the part of the prosecution here is not the non-production of the pistol alleged to have been recovered from the Accused before court *per se*, but the lack of evidence to establish that, what was recovered from the accused falls within the meaning of a 'a gun' under the Firearms Ordinance. Assuming that, as in the instant case, the firearm was misplaced after it was forwarded and examined by the Government Analyst, yet the prosecution could have proceeded, as then expert evidence would have been available

to ascertain this fact.

For the reasons stated above, I am of the view that the absence of evidence of a ballistic expert [Government Analyst] is fatal to the conviction in respect of Count No. 2 and that it was not proven beyond a reasonable doubt that the 1st Accused-Appellant-Appellant in SC Appeal No. 129/2018 and the 2nd Accused-Appellant-Appellant in SC Appeal No. 128/2018 committed the offence of Possessing a Firearm without a license punishable under Section 22(1) read with Section 22(3) of the Firearms Ordinance as amended by Act, No. 22 of 1996. Accordingly, the conviction of the Appellants on Count No. 2 of the indictment and the term of life imprisonment imposed on them by the learned High Court judge are hereby set aside. The convictions entered and sentences imposed on the other Counts are to remain intact.

Appeal allowed.

JUDGE OF THE SUPREME COURT

A.H.M.D. Nawaz, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT