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 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.
CA/HCC/0081/2021
High Court of Hambantota
Case No. HC 22/2011

Complainant

Vs.

Dilwella Vidana Kankanamlage
Chamila Priyanga.

Accused

AND NOW BETWEEN

Dilwella Vidana Kankanamlage Chamila Priyanga.

Accused-Appellant

Vs.

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

Respondent

BEFORE : P. KUMARARATNAM, J
K.M.G.H. KULATUNGA, J

COUNSEL : Nalin Ladduwahetty, PC, with Vajira Ranasinghe and Kavithri Hirusha Ubeyesekera for the Accused-Appellant.
Shanil Kularatna, PC, ASG for the Respondent.

ARGUED ON : 11.02.2025

DECIDED ON : 27.03.2025

K.M.G.H. KULATUNGA, J.

JUDGEMENT

1. The accused-appellant, Dilwella Vidana Kankanamlage Chamila Priyanga (also referred to as the 'accused') was indicted in the High Court of Hambantota with the following two counts:
   i. for the unauthorised possession of an automatic firearm, punishable under Section 22(3) of the Firearms Ordinance; and
   ii. for the unauthorised possession of 125 Nos. of live ammunition (90 Nos. of 9 mm calibre live cartridges and 35 Nos. of 7.65 mm calibre live cartridges) punishable under Section 27(1) of the Explosives Act.

2. He was found guilty and convicted of both counts as indicted and sentenced to life imprisonment and a fine of Rs. 25,000 respectively. This appeal against the said convictions entered and the sentences imposed on 06.08.2021.

Facts

3. Facts that led to the recovery of the firearm and cartridges are as follows. In the course of an investigation under the PTA the accused-

appellant was arrested at the Manning Market in Colombo on 1st of May, 2009 and a statement was recorded. Then recoveries *inter alia* of a firearm and cartridges were made on 2nd May 2009 in consequence of information received on a statement made by the appellant under Section 27(1) of the Evidence Ordinance. The appellant led the Police Officers to a house at Hambantota. The key to the house was in a pot concealed in the roof of an outer toilet in the compound of the house which the appellant himself retrieved and the rear door was opened. The appellant then pointed out a cylindrical plastic container in which *inter alia* dismantled parts of a weapon and live cartridges were found. PW-01, IP Kaluarachchi, has then assembled the said components and it constituted into a complete firearm of the make MP5. The ballistics expert Mr. Madawala confirms that this is a submachine gun of the type MP5 with a distinctive serial number 00823. The accused was then indicted for the unauthorised possession of the said firearm and the live ammunition in respect of which the accused-appellant was convicted.

4. The prosecution led the evidence of eight witnesses, out of which, PW-01, IP Kaluarachchi, and PW-04, PS 20342 Karunathilaka testified as to the arrest, recording of the Section 27 statement, and the recovery of the weapon at Hambantota. These two witnesses are the main witnesses who narrate the entire sequence of events and the recovery. PW-07 to PW-11 were called to establish the chain of productions. PW-12 is the Government Analyst who is a ballistics expert, who testified as to the examination of the firearm and the ammunition and produced the report. As for the defence, the accused gave evidence and called two Officers to produce court records and documents.

Grounds of Appeal

5. The appellant did initially raise several grounds of appeal in the written submissions, but learned President's Counsel Mr. Ladduwahetty, for

the appellant, abandoned the said grounds and reframed the following grounds of appeal;

i. that the High Court Judge failed to consider the applicability of the Section 27 of the Evidence Ordinance;
ii. that the production recovered was not produced in the same form and substance (recovery was parts but what was sent to the Government Analyst was a complete gun);
iii. that the High Court Judge failed to consider if the accused had exclusive possession of the weapon;
iv. that the High Court Judge erred in deeming knowledge as possession;
v. that the High Court Judge erred in concluding that the chain was proved; and
vi. that the defence case was wrongly evaluated.

Grounds of appeal (i), (iii) and (iv)

6. Grounds (i), (iii) and (iv) will be considered together as they are inter-connected. They are that the High Court Judge failed to consider the applicability of the Section 27 of the Evidence Ordinance; if the accused had exclusive possession of the weapon; and that the High Court Judge erred in deeming knowledge as possession.

Section 27 of the Evidence Ordinance

7. Mr. Ladduwahetty, PC, urged that the High Court Judge had wrongly construed the effect and import of Section 27 of the Evidence Ordinance in coming to the conclusion that there was "exclusive possession" of the firearm solely based on the Section 27 recovery. The argument advanced is that the High Court Judge has simply accepted and acted upon the Section 27 recovery as being sufficient proof to bring home the charges of possession (counts No. 01 and 02). It was argued that the only inference that may emanate from a Section 27 recovery is that

the accused had the knowledge as to the existence of the weapon or thing so recovered, and that it was kept at the place from which it was found. In support, he cited the case of **Heen Banda v. The Queen** 75 NLR 54, where Sirimane, J., Samarawickrama, J., and Weeramantry, J., held 'where part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is the duty of the Trial Judge to explain to the Jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more.'

Following the above dicta, in **Ranasinghe v. Attorney General** (2007) 1 Sri L.R 218, Sisira de Abrew, J., reiterated that,

> "*…discovery in consequence of a section 27 statement only leads to the conclusion that the accused had the knowledge as to the weapon being kept at the place from which it was detected*."

8. Then, Mr. Ladduwahetty, PC, developed his argument and submitted that to prove the charges of possession as alleged, it is required and necessary to prove *exclusive and conscious possession*, in support of which he cited **Banda vs. Haramanis** 21 NLR 141, **Muttaiah Siriyalatha Saraswathie vs. Attorney General.** (CA/212/95, decided on 30.06.1999) and **Sundaralingam Sankar Kumar vs. Attorney General** (CA/12/2008 decided on 26.01.2018), all of which basically followed **Banda vs. Haramanis** (supra), where De Sampayo, J cited with approval the following passage from page 1892 of the second volume of Gour, that;

> "*Possession to be criminal must be actual and exclusive, for criminal liability does not attach to constructive possession… [w]here property is found in a house in the possession of more than one inmate, none of them could be said to be in possession of it for the purpose of this offence, unless there is evidence of exclusive conscious control against them*" (emphasis added).

9. Then, *exclusive* and *conscious possession* were considered in **Muttaiah Siriyalatha Saraswathie vs. Attorney General** (CA No. 212/95, decided on 30.06.1999). Justice F.N.D. Jayasuriya, considering an allegation of possessing heroin, where the narcotic was found embedded in the coconut scraper in a house occupied by the accused together with three other families and the doors and windows were generally kept open, it was opined that criminal liability attaches only to possession on which it is proved to be in actual, exclusive and conscious possession on a part of a person. This opinion was based on the dicta of **Banda vs. Haramanis** (supra).

10. **Sundaralingam Sankar Kumar vs. Attorney General** (CA No. CA/12/2008, decided on 26.01.2018), concerned also a charge of possessing heroin of which the facts are as follows. The accused was arrested at a lodge at Colombo 12. The accused led the Police to a communication shop at Dehiwala, and at the shop a bunch of keys was found concealed a drawer that of a house. When a nearby house was opened and searched. The heroin was found in a cupboard in a room. The accused was convicted in the High Court. In appeal, the main ground of challenge was that the evidence has failed to prove exclusive possession and knowledge cannot be deemed as possession.

11. Thus, for "possession" to suffice to entail criminal liability it must be actual and exclusive. De Sampayo J., in **Haramanis** (supra) did say that, *"for criminal liability does not attach to constructive possession".* This was so stated in the context of the thing or drugs found in a house in the possession and occupation of more than one inmate. However, this was qualified by stating that none of them could said to be in possession of a thing found in the house, *unless there is evidence of exclusive conscious control against them*. The sum total of this exposition is that if a thing or property is found in a house as opposed to actual physical possession, there should be further and additional evidence to prove exclusive conscious *control* to prove possession that entails criminal

liability. Therefore, even if there be several persons in possession of a house exclusive possession may be proved, provided that there is additional material or evidence to infer and conclude that the particular accused had control of a conscious and exclusive nature. This will be so when a thing is recovered on a section 27 statement in a house in which the accused may have not been physically present as in this appeal.

Conscious possession

12. The sum total of the authorities cited is that *conscious and exclusive possession* is required to be proved to establish criminal possession. Consciousness, in context, will mean no more than the knowledge of the accused as to the offensive item, i.e., the firearm. This ingredient of knowledge may be inferred from a Section 27 recovery. This proves the element of knowledge or consciousness but is not sufficient as it is only knowledge and knowledge is not possession.

Exclusive possession

13. Possession is also required to be e*xclusive* to establish criminal possession. Exclusive possession, would in the strict sense be, personal and actual possession of the accused. However, criminal liability does attach to persons who would have control with the requisite knowledge of any offending item found at a place physically away and distinct from where such person was. Criminal possession may be proved on the basis of *control* and *knowledge*.

14. That being so, I will now consider as to what may constitute possession, for the purposes of the Firearms Ordinance and the Explosives Act. It goes without saying that if a person is found to be in physical possession, that would clearly suffice to prove conscious possession unless the circumstances throw a doubt as to the knowledge. Similarly, if a person had, in his control a thing with the requisite knowledge, that to my mind would also be sufficient to prove criminal possession under

the Firearms Ordinance. If 'possession' is strictly limited to actual physical possession only, it would lead to an absurdity. For instance, if the firearm was found in the house of the accused, and if such accused was at a different place when or at the time the recovery was made, he could not be held liable. Can this be so? I think not.

15. To my mind, if the prosecution is able to prove *control* and *knowledge*, it would suffice to prove possession as required by the Section 22 (1) of the Firearms Ordinance. This would require proof of consciousness or knowledge in the first instance and then, in the absence of actual physical possession, proof of *control* will establish criminal possession. If not, an owner of a house with the requisite knowledge who has an unlicenced weapon in his house would go scot-free. The question of possession is one of fact. When a person keeps a thing in his house or on his land, he will have the benefit of the attributes of ownership such as sanctions against trespass and the general respect for them may be relevant to the factual basis of such person's control. If such premises is under lock and key of such person then possession may become exclusive. This may be proved either by direct evidence, or inferentially, by circumstances.

16. *Control*, will necessarily be, and mean effective control. In this context, Section 31 of the Firearms Ordinance, of which the side note is *"Proof of possession"* becomes relevant:

> *"31. Any occupier of any house or premises in which any gun shall be found shall for the purposes of this Ordinance be deemed to be the possessor of such gun, unless he proves*
>
> *(a) that such gun was in such house or premises without his knowledge or privity; or*
>
> *(b) that some other person is the possessor of the gun"* (emphasis added).

Therefore, Section 31 contains a deeming provision and also there is a reverse evidential burden placed on an occupier. Who is then an

"Occupier"? **Black's Law Dictionary**, 11th Edition defines an "occupier" as *'one who has possessory rights in or control over certain property or premises.'* To my mind, possession in this context contemplates exclusive occupation, whereas control involves exercising dominion over the property having a measure of control over the property.

17. To sum up, the first prerequisite to establish an offence under Section 22(1) is the proof of the element of consciousness or knowledge that such person possesses a firearm. In the instant matter, the Section 27 recovery proves this element. Then, such possession is not required to be physical possession, but having power and control over such weapon, if proved, should suffice to bring home a conviction under Section 22(1).

18. That being the law, it was argued in this appeal that exclusive possession has not been proved. The Trial Judge has held otherwise. It is correct that the Section 27 recovery as proved in this case will establish only the knowledge of the accused as to the existence of and the place where the items were. In this case it is the MP5 weapon, magazines and the live ammunition found in the storeroom of the Hambantota house. The house at Hambantota was locked. The MP5 weapon was concealed in a store room within the house in a plastic tube of which the two ends were closed with endcaps. It is also relevant to note that, at the point of recovery, all the constituent components of the MP5 weapon were in the dismantled form. PW-01 had, upon its recovery, assembled the components, which according to him was a complete weapon of the said description.

19. The Section 27 statement was that of a large firearm and ammunition. What was pointed out and found was in a dismantled form and the said components put together constituted a complete weapon. This leads to a very significant and relevant inference that when the accused made the Section 27(1) statement he knew that the said dismantled components would constitute a complete weapon. This leads to the

additional inference that either the accused himself had dismantled or it was dismantled with his knowledge, as opposed to merely having seen some dismantled components of a weapon. This should necessarily be so, as he otherwise could not have positively stated that it was a weapon.

Control of the weapon

20. As considered above, in view of the recovery based on Section 27 of the Evidence Ordinance, the knowledge of the accused as to the weapon, can be inferentially proved. However, as it was not recovered from his personal possession, there should be other evidence to prove beyond reasonable doubt the aspect of control of the said item.

21. It is common ground that the Police went to a house at Tissamaharama, at No. 302/A, Alabagahawatta, Udasgama, Tissamaharama. The accused also gave evidence and refers to this house as *his house*. The accused under cross-examination admits that during the relevant time, namely at the time of the recovery, he spent much of his time and lived at his house as No. 302/A, Alabagahawatta, Udasgama, Tissamaharama (*vide* page 256, "මගේ නිවසේ තමයි වැඩිපුර කාලයක් ගතකලේ. 302/ඒ, ඇලබගහවත්ත, උඩස්ගම, තිස්සමහාරාමය. වැඩි කාලයක් ජීවත්වුනේ").

22. Further, the accused in his evidence-in-chief has specifically stated that at the time of the recovery, his parents were living in a hut in their fields, and his only sibling, his sister, was married and living elsewhere, and that the parental home is his. He also admits that there was no one else in that house (*vide* page 203, "තාත්තාට කුඹුරක් තියෙනවා බලපත්‍රයක් රජයෙන් හම්බ වෙච්ච තුවක්කු සිංහලේ කියන ලුණුගම්වෙහෙර ජලාශය යටතේ කෙරෙන කුඹුරක්. ඒකෙ තමයි අම්මයි තාත්තයි දෙන්න ඒ වෙනකොට ඒකේ පැළක් හදාගෙන ගොවිතැන් කරමින් හිටියේ. එතකොට මහගෙදර මගේ කවුරුත් නැහැ මගේ පවුලේ අක්කයි මමයි ඉන්නේ අක්ක බැඳල වෙනම ජීවත් වෙනවා").

23. The fact of the existence of a house of this description, in that location, is confirmed by PW-01 and PW-04. At the time the accused led the police

to the said house, it was locked and there was no one present in that house. This is confirmed by the accused himself and is common ground. The key to the house had been retrieved by the accused from a concealed place, as narrated above. What would the necessary inference be from these proved circumstances? In the normal course of events, the accused admittedly happens to be the owner of this house, and at this point of time, there had been no other in occupation, and the accused also admits that he spends much of his time and lived in this house. That, considered with the fact of it being kept locked, and the key being available to the accused, clearly leads to the only inference that the accused had exclusive control and possession of this premises. Then, the weapon was found in a storeroom concealed in a plastic tube, of which the two ends were covered with end caps, the sum total of this evidence necessarily leads to the only inference that the accused had control of the weapon and other items kept in and recovered from the said house. The evidence has thus clearly established knowledge and control of the weapon and therefore it is clear and sufficient proof of exclusive possession.

Proof of knowledge

24. The prosecution has led circumstantial evidence to prove and establish both knowledge as well as control. The Section 27 recovery is based on the statement that the accused is able to point out a "big weapon" ("ලොකු වෙපන් එක"). Based on this portion of his statement, the accused had led the Police to a house at Tissamaharama. Admittedly, the house belongs to, and at that time was generally occupied by the accused and no other. It was locked. The accused had then retrieved the key of the house from a concealed place located on the roof of a toilet. This key had opened the door of the house. These items of evidence lead to the necessary inference that the accused was privy to the location of the key and he was aware that the said key would open the door. The accused, in his evidence, had admitted that the said house is now owned by him; and his parents, at that point of time, were residing elsewhere in a hut close

to their paddy field. The accused also admits that his only sister does not live there. It is also relevant to note that he admits that his permanent residence is at this address. Then it is also admitted that he spent most of his time at this house during this period.

25. It is on this evidence that the learned Trial Judge has come to the finding of conscious and exclusive possession of the accused, (*vide* pages 23 and 26 of the judgement). In paragraph 2 of page 23, the Trial Judge, in determining exclusive possession, has considered the said circumstances referred to above. Having adverted to these items, the Trial Judge has drawn the inference that the accused had the knowledge as to the concealed place of the key to the house, and pointing out the improvised container in which the dismantled components of the firearm and the ammunition was found. Then, having so adverted and considered the said items of evidence the Trial Judge has at page 26 of the judgement comes to the finding that the prosecution has presented cogent evidence to establish conscious and exclusive possession. I find that these findings and inferences are reasonable and possible on the evidence.

26. The learned Trial Judge had not compartmentalised this evidence and considered in that manner. However, he had certainly arrived at this conclusion, which is a reasonable inference and a correct conclusion, any trier of fact can reach on this evidence. Therefore, the submission that the Trial Judge had erred in coming to the finding of exclusive possession, is misconceived. Accordingly, grounds of appeal (i), (iii) and (iv) are misconceived.

Ground of Appeal No. (ii)

That the production recovered was not produced in the same form and substance (recovery was parts but what was sent to the Government Analyst was a complete gun);

27. It was submitted that at the point of making the recovery, the weapon was in a dismantled condition, and PW-01 had assembled the same at that point, and then dismantled, brought it to Colombo, and once again assembled the parts into a complete weapon. The contention is that this is a change in the form and substance of the item recovered, which amounts to tampering, and as such, the production forwarded to the Government Analyst is in a different form from that which was recovered. According to the evidence of PW-01 and PW-04, the aforesaid sequence of events is submitted. This process had taken place in the presence of the accused. After it was assembled at Colombo, the same had been sealed *inter alia* with the left thumb impressions of the accused. What has been forwarded to the Government Analyst, as referred to in the notes, and the Government Analyst's Report, is a complete weapon of the type MP5.

28. If this assembly or putting together of the components caused any change of form and substance of the item that was recovered on the Section 27 statement is to be considered now. What prompted and why was it necessary to assemble the components of the weapon as done by PW-01? It is apparent that the Section 27 statement refers to a weapon/firearm. Proceeding on the said Section 27 statement, the recovery made was of parts of a weapon, which PW-01, with his training and experience, has identified. When the suspect has in the Section 27 statement made a specific reference to the existence of a firearm, it is to that extent necessary to ascertain if the components found constitute a complete weapon. Therefore, with the experience and the training of PW-01, putting it together is quite natural in the circumstances, and in fact to my mind, is necessary.

29. Further, Section 2 of the Firearms Ordinance defines a "gun" as follows;

> *"'gun" includes –*
> *(a) any barrelled weapon ……..; or*
> *(b) any component part of any such weapon; or*

(c) any accessory to any such..." (emphasis added).

Accordingly, a "gun" includes *any component part of any such weapon.* Thus, any component part of a weapon (firearm) comes within the meaning of a gun as defined under Section 2 of the Firearms Ordinance. So, even if a component part was recovered, that would suffice to come within the meaning of a firearm as aforesaid. That being so, assembly of the components in the context of the Firearms Ordinance has not caused any prejudice or a change of form or substance that affects the liability under Firearms Ordinance so to say.

30. This immediate step taken to put together these components in the presence of the accused, on the one hand confirms that the components recovered constituted parts of a complete weapon. This weapon having a distinctive serial number is very relevant and significant. This was observed and noted by PW-01 at the point of recovery, and, in cross-examination, clearly states that notes were made at the scene immediately upon the recovery. Accordingly, in view of the definition of "firearm" and for the aforesaid reasons, I hold that putting together the dismantled components, has not in any way changed the character of the item recovered *vis-à-vis* the definition in the Firearms Ordinance. Ground of Appeal No. (ii) is thus misconceived and lacks merit.

Ground of Appeal (v)

That the High Court Judge erred in concluding that the chain was proved.

31. It is admitted that the sealing of the production, the firearm as well as the ammunition had taken place in Colombo. However, it had been sealed on 02.05.2009. As adverted to above, the sealing had included wrapping of the weapon and other productions with paper, tying with twine and sealing with sealing wax, *vide* evidence at page 109:

"ප්‍ර: ඔබතුමා සීල් තැබුවා කියන්නේ කොහොමද?

ඌ: භාණ්ඩ 6ක් තිබුණා. පළමුව ගිනිඅවි එකලස් කර එම භාණ්ඩ මුද්‍රා තැබුවා සැකකරු ඉදිරිපිට සිටියා. ගිනිඅවිය එකලස් කර එම ගිනිඅවිය ඉදිරිපස තිබෙන ඊයම් සහ පිටුපස සිමෙන්ති බෑග් කවරය හැඩැති කඩදාසි යොදාගෙන ගිනි අවි නැවත ටුවයින් නූලක් ඔතා එම ගැට සහිත ස්ථානවලින් මෙම භාණ්ඩය ඉවත් කර ගැනීමට හැකි ස්ථාන හඳුනා ගෙන එම ස්ථාන මාගේ ලාකඩ මුද්‍රාවත්, තොරතුරු පොතේ අංකයත්, සැකකරුගේ වම් මාපටැඟිලි සලකුණත් තබා මාගේ අත්සන සහ දාතම යොදා මුද්‍රා කලා. එසේම ගිනිඅවිය වෙනම පාර්සලයකටත්, උණ්ඩ පිස්තෝල ගැබ් වෙනම පාර්සලයකටත්, ජීව පතරොම් වෙනම පාර්සලයකටත්, පිස්තෝල උණ්ඩ 35 වෙනම පාර්සලයකටත්, උණ්ඩ පතරොම් ගැබ් වෙනම පාර්සලයකටත් සහ ගිනි අවි පිරිසිඳු කිරීමේ කොටස් දෙක වෙනමත් මෙම දේපළ බහා තිබූ බටය වෙනමත් මුද්‍රා තබා නඩුබඩු දේපල කුවිතාන්සි 121/09 ට මා විසින් ඇතුලත් කලා.”

32. The paper used for the said sealing had been produced in evidence. This evidence the proper sealing was done in the presence of the accused. The counsel for the appellant did point out to some inconsistencies in respect of the chain of productions in respect of the inward journey. In this instance, what is significant and relevant is that the recovered components of the firearm had a distinctive number, which was engraved. It is unchallenged that the MP5 weapon which constituted when the components were put together had this distinctive serial number 00823. It is in evidence that this distinctive number is unique to a weapon. The said number had been observed and identified when this production was examined by the Government Analyst as well as when it was produced in court, during the trial.

33. The object and purpose of proving the chain of productions is to ensure that what was recovered is sent to the Analyst and to exclude any mix-up or tampering with the production. “*The prosecution must prove the chain relating to the inward journey. The purpose is to establish that the productions have not been tampered with and that the very production taken from the accused-appellant was examined by the Government analyst. To this end, the prosecution must prove all the links of the chain from the time it was taken from the accused-appellant to the Government*

Analyst's Department" [*vide* **Witharana Doli Nona vs. Republic of Sri Lanka** (CA 19/19) **and Perera vs. Attorney General** (1998) 1 SLR 378].

34. The evidence in this appeal clearly proves that the weapon, ammunition, and other items recovered along with the improvised container was in the custody of PW-01, from the time of recovery up until they reached the Police Station at Slave Island. At this point, the weapon had been assembled once again, and productions sealed, placing the left thumb impression of the accused. It is the evidence of PW-01 that these sealed parcels were forwarded to the Government Analyst. The prosecution had endeavoured to lead all the witnesses who handled the production from the point of sealing until it was taken to the Government Analyst.

35. In **Thushara Jayasinghe vs. Attorney General** (CA**/**HCC/255/2019), Justice Wickum Kaluarachchi opined that, "*…the serial number is the best method of identifying a gun.*" Certain discrepancies, which as I see are not significant, in the chain evidence was emphasized by the appellant. Be that as it may, when there is a distinctive or a serial number which is fixed, as on the MP5 weapon marked P5, the identity can be clearly established with reference to this number.

36. The evidence is that this is a number unique to this weapon. The existence of the said serial number 00823 had been observed and noted at the very inception at the point of recovery. There is no dispute that the production marked and produced at the trial as well as examined by the Government Analyst has this same number. This is confirmed by the evidence of the ballistic expert Mr. Madawala, and the Government Analyst's Report. The same number appears in the relevant production registers. Therefore, the identity of the firearm is clearly and positively established with reference to and by the said distinctive serial number. In such circumstances, establishing the chain in that context may not be critical and significant in respect of this matter.

37. The live ammunition along with the other two weapons recovered from two others, have been sealed along with the MP5 firearm P5 and then taken to the Analyst and brought back to Court together. In these circumstances, once again, the credibility and the authenticity of the items recovered being examined is confirmed by this itself. The object and purpose of this requirement is to ensure that there is no tampering with the productions intentionally or a possible mix-up between the recovery and the examination by the expert. When the recovered item clearly can be identified with an exclusive and distinctive marking or a number, this requirement of the chain is not critical or significant. Therefore, considering the totality of the evidence, the argument based on proving of the inward journey is misconceived. Therefore, this submission, in the present context, is not relevant and Ground of Appeal No. (v) is thus misconceived and is devoid of merit.

Ground of Appeal No. (vi)

That the defence case was wrongly evaluated.

38. The complaint of the appellant is that the rejection of the defence is made on a comparative basis with the prosecution evidence. At pages 313 and 314, the Trial Judge has made the following observations: *that the prosecution has placed before court evidence sufficient to prove beyond reasonable doubt the charges*; then the Trial Judge has also observed that*, the accused is required to explain his innocence only when the prosecution has placed such cogent evidence may be sufficient to prove its case beyond a reasonable doubt.* Having so observed, the Trial Judge proceeds to consider the accused's evidence. Having summarised the accused's evidence, the Trial Judge comes to the finding that the evidence is not consistent as he had failed to complain to any relevant authority of the alleged assault by the Police, then concluded that the evidence of the accused is not credible and trustworthy (*vide* page 319). On that basis, the Trial Judge has considered the totality of the evidence

and come to the finding that the defence version has failed to create any reasonable doubt on the Prosecution evidence as a whole.

39. At the very commencement of the judgement, at pages 291 and 292, the Trial Judge has clearly laid down the principles pertaining to the burden of proof, the standard of proof and the presumption of innocence. He observes that the prosecution is required to prove the charges beyond reasonable doubt, on its own evidence. He also observes that the presumption of innocence would remain until the prosecution proves the case beyond reasonable doubt. ("පැමිණිල්ල විසින් පැමිණිල්ලේ නඩුව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කරනු ලබන තෙක් චූදිතයෙකු නිර්දෝශීභාවයේ පූර්ව නිගමනයෙන් ආරක්ෂා වේ" (*vide* page 5 of the judgement, page 292 of the brief).

40. However, he does state that an accused may require to explain his innocence only if the prosecution has placed before court, cogent evidence that may suffice to prove its case beyond reasonable doubt. When the Trial Judge asserts that an accused may be required to explain his innocence it in context it is no more than a reference to the evidential burden in the lines with the Ellenborough dictum. However, the learned Trial Judge's narration of the burden of proof and the standard has emphasised that it is the prosecution that is required to prove the case beyond reasonable doubt and that the presumption of innocence would remain until the prosecution proves the case beyond reasonable doubt.

41. A misstatement of law by the learned Trial Judge as to the burden of proof or the standard of proof to that matter would tantamount to a denial of the benefit of the presumption of innocence. A misdirection on the burden of proof is so fundamental in a criminal trial that it may vitiate a conviction. [**Nandana vs. Attorney-General** (2008) 1 Sri L.R 51].

42. However, whilst writing a judgment a Judge must have in his mind the principles of law for example the principles relating to presumption of

innocence, the accused's right to remain silent, the burden cast on the prosecution to prove the case beyond reasonable doubt which stays throughout the case etc. [**Sarath vs. Attorney General** (Eric Basnayake J.) (2006) 3 Sri L. R96].

43. The Trial Judge has in fact adverted to the correct burden and standard of proof beyond reasonable doubt and the presumption of innocence at the commencement the judgment, "පැමිණිල්ල විසින් පැමිණිල්ලේ නඩුව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කරනු ලබන තෙක් චූදිතයෙකු නිර්දෝශීභාවයේ පූර්ව නිගමනයෙන් ආරක්ෂා වේ" (page 5 of the judgement, page 292 of the brief), but has then also stated that "චූදිතයෙකු විසින් තම නිර්දෝශීභාවය පැහැදිළි කල යුතු වන්නේ පැමිණිල්ල විසින් පැමිණිල්ලේ නඩුව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කිරීමට ප්‍රමාණවත් ප්‍රබල සාක්ෂි මෙහෙයවා ඇති විටදි පමණි." The Trial Judge has certainly been mindful of the required burden and the standard of proof in a criminal case and the presumption of innocence. Hence, this is not an instance of a blatant unequivocal misdirection. It is, if at all, ambiguous. In this regard, I find the following dicta of the Canadian Supreme Court enlightening, that, "*trial judges are presumed to know the law: That presumption must apply with particular force to legal principles as elementary as the presumption of innocence. Where a phrase in a trial judge's reasons is open to two interpretations, the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law.*" [**R. vs. Burns**, 1994 CanLII 127 (SCC): [1994] 1 S.C.R. 656 at pp. 664-65, 89 C.C.C. (3d) 193 at pp. 199-200.: **R. vs. Smith** (D.A.) (1989), 1989 ABCA 187 (CanLII), 95 A.R. 304 (C.A.) at pp. 312-13, affirmed 1990 CanLII 99 (SCC), [1990] 1 S.C.R. 991].

44. The Trial Judge has in fact adverted to the correct burden and standard of proof of beyond reasonable doubt and the presumption of innocence at the commencement of the judgment. Then upon considering the prosecution evidence, the Trial Judge has merely stated that the prosecution has placed before court cogent evidence that may suffice to

prove its case beyond reasonable doubt. However, there is no positive finding that the prosecution has proved its case beyond reasonable doubt at this stage. Thereafter, the Trial Judge summarises and evaluates the accused's evidence. It is at the end, upon considering the accused's evidence that the learned Trial Judge has come to the finding of proof beyond reasonable doubt (*vide* page 319). As a matter of rule, there is no fixed process or sequence fixed by law or otherwise as to how a Judge should come to a finding in a criminal judgement. One of the methods would be to consider the prosecution evidence, and if there be a case established on cogent evidence, then to consider the defence version, and finally, consider the totality and determine if there be any reasonable doubt or otherwise. The learned Trial Judge has followed this process. He had not placed any burden on the accused as stated by the Appellant's counsel. Hence this ambiguity has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

Contradiction *inter se*

45. PW-01, IP Kaluarachchi, and PW-04, PS 20342 Karunathilaka are the main witnesses who narrate the entire sequence of events from the arrest, recording of the Section 27 statement, and to the recovery of the weapon and the other recoveries at Tissamaharama, Hambantota. It was submitted that PW-01 denied stopping at Ambalantota whilst PW-04 admited stopping at Ambalantota. This according to the Learned Counsel for the appellant is a serious contradiction which goes to the root of the case, especially in view of the defence position that this weapon was obtained or introduced by the police at Ambalantota.

46. It was suggested to PW1 in cross-examination that the accused was taken to Ambalantota, approximately an hour before they reached Tissamaharama. Which PW-01 denied, and specifically stated that their journey to Tissamaharama was *via* Ratnapura, Udawalawa, and Thanamalwila. The relevant portion is as follows:

"ප්‍ර: යෝජනා කරනවා ඔබතුමා විත්තිකරුගේ ඇස් බැඳගෙන අරගෙන ඇවිල්ලා ඔබතුමා තිස්සමහාරාම යන්න පැයකට කලින් අම්බලන්තොට, බැරගම තැනකට මේ විත්තිකරු අරගෙන ගියා කියලා?

උ: එය ප්‍රතික්ෂේප කරනවා. මම විමර්ෂණ කටයුතු සඳහා පැමිණියේ රත්නපුර, උඩවලව, තණමල්විල හරහා තිස්සමහාරාම ප්‍රදේශයට පැමිණියේ." (*vide* page 101).

When PW-04 was under cross-examination, he was specifically questioned *as to whether they did not go towards Ambalantota*. His answer was that they did go to Ambalantota. The said questions and answers are as follows:

"ප්‍ර: අම්බලන්තොට පැත්තට ගියේ නැහැ?

උ: අම්බලන්තොට යන අවස්ථාවේ යනකොට ගියා.

ප්‍ර: කීදෙනෙක් එක්කද ගියේ?

උ: අපේ කණ්ඩායමේ සැකකරු හිටියා. තවත් සැකකරුවන් තුන්දෙනෙක් හිටියා." (*vide* page 123)

47. PW-04 has thus stated that their journey to Hambantota was through Ratnapura, Godakawela and Udawalawa, and then admitted going to Ambalantota along with the team of Police Officers, the accused and *three other suspects*. It is common ground and the Accused too admits that the other suspects were apprehended after reaching Tissamaharama, and on their return journey ("යන අවස්ථාවේ යනකොට ගියා.") If so, stopping at Ambalantota as admitted by PW-04, should necessarily be during their *return journey to Colombo*, after searching the house at Tissamaharama, Hambantota. But what was suggested to PW-01 was that the accused was taken to Ambalantota an hour before they reached Tissamaharama. That is on their way to Hambantota, which PW-01 denied. PW-04 specifically has given the route taken to Tissamaharama, Hambantota, as being through Ratnapura and Udawalawa. This is consistent with the evidence of PW-01. Both witnesses deny stopping at Ambalantota on their way to Tissamaharama, Hambantota. What is

admitted by PW-04 was stopping at Ambalantota on their return to Colombo and what was denied by PW-01 is stopping at Ambalantota on their way to Hambantota. Therefore, there is no contradiction *inter se* and this submission is baseless and misconceived.

Credibility of PW-01 and PW-04

48. The sum total of the defence position is that nothing was recovered at the Tissamaharama, Hambantota house, but a weapon was introduced by the Police. If that be so, there would be no rational or logical reason or any necessity for such a Police Officer to concoct and complicate his recovery by spinning a fictitious story that the gun was in a dismantled form. Therefore, the suggestion and the defence position become inherently improbable. Correspondingly, the testimony that it was in the dismantled form and the fact that PW-01 has documented the condition in which the weapon was recovered and the procedure adopted by him, buttresses and enhances his credibility and the probability of his version. It is a clear indicator that PW-01 has narrated the events truthfully in the very manner they happened and transpired. Thus, the Trial Judge's finding that the prosecution evidence is cogent, convincing and reliable is correct and justified.

Conclusion

49. An Appellate Court exercises a jurisdiction to examine the effect of the grounds raised in appeal. However, the Appellate Court will not step into shoes of the trier of fact and revisit the evidence afresh and substitute its own findings. The defects or insufficiency in the evidence and errors of law and procedure are required to be tested and considered in the context of the totality of the evidence and trial. Upon so endeavouring I am satisfied that the convictions are not unsafe and there is no miscarriage of justice that warrant the intervention of this Court.

50. On an appeal from a conviction by a Judge alone, where the issue is whether the verdict is unreasonable, an Appellate Court must determine whether the verdict is one that a properly instructed jury or judge could reasonably have reached. The question whether a verdict is reasonable is one of law but the evaluation of evidence is one of fact. This court cannot interfere with those assessments of fact unless it cannot be supported on any reasonable view of the evidence. [vide **R. v. Burke**, 1996 CanLII 229 (SCC)].

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51. In the above premises, we see no merit in the grounds of appeal raised on behalf of the accused-appellant. There is overwhelming evidence to prove the two charges beyond reasonable doubt. Hence, we see no reason in law or otherwise to interfere with the findings of guilt and the convictions.

52. Accordingly, the appeal of the accused-appellant is dismissed, and the convictions entered and sentences imposed on the accused-appellant are affirmed.

This appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J

I agree.

JUDGE OF THE COURT OF APPEAL