WIJERATNE BANDA
v.
STATE

COURT OF APPEAL
JAYASURIYA. J.,
KULATILAKE. J.,
C.A. NO. 48/97
H.C. BADULLA NO. 276/93
SEPTEMBER 17TH, 1998.

Prevention of Terrorism (Temporary Provisions) Act 48 of 1979 – S. 22 (ii) S. 2 (1) e, S. 2 (1) (g) Penal Code S. 32, 300 – Public Security (Amendment) Act 28 of 1988 – Emergency Regulations – Robbery of Government Property – Attempted Murder – possession of a gun – S. 57 S. 165 Evidence Ordinance S. 2 Interpretation Ordinance – lex non logit ad impossibilia.

The Accused appellant was indicted on three counts viz. Robbery of Government Property under S. 2 (2) (ii) read with 2 (1) e of the P. T. A., attempted murder under S. 300 Penal Code punishable under S. 24 (1) b of the Emergency Regulations 1 of 1989 read with Public Security Act, and in possession of a gun punishable under S. 2 (2) (ii) read with S. 2 (1) (g) of the P. T. A. After trial the accused was found guilty of all charges.

It was contended that (i) the learned High Court Judge has failed to consider whether the facts would warrant a charge under the P. T. A. and the Public Security Act read with Emergency reugulations (ii) there is no proof to establish that the Emergency Regulations and the P. T. A. were in operation at that relevant time/area (iii) the learned High Court Judge had put leading questions to a witness which is not warranted in law.

Held:

1. When the accused appellant was served with the indictment objection to the legality of the charges had been raised by him. The learned High Court Judge who heard the submissions in regard to this impugnment had before him the indictment, the list of productions and the list of documents, and among the list of productions was a reference to a confession made to a Superintendent of Police by the accused appellant which was admissible in terms of S. 16 of the P. T. A. Having examined the charges and the annexures which manifested the nature of the material that the Prosecution is proceeding to rely upon, the learned High Court Judge had over-ruled the objection. The contents of the attached confession clearly established that the prosecution fell within the ambit of the preamble to the P. T. A. as amended by the Public Security Act and read with the Emergency Regulations 1 of 1989.

2. The relevant point of time at which such objection to a charge should be considered is that of accusation and not the eventual result.

3. The learned High Court Judge had taken judicial Notice of the operation of the Emergency Regulations and the P. T. A. Where a charge is laid down under a statutory rule, regulation or by-law which is required by law to be published in the Government gazette the prosecution is not bound to produce the gazette.

4. The trial Judge in order to discover or to obtain proper proof of relevant facts may ask any question at any time of any witness or of any person about any fact relevant or irrelevant.

Per Kulatilake. J,

1. "The significant fact is that the Police had not recovered the gun, complaint that the prosecution failed to produce the Government Analyst Report is groundless because the law does not expect one to do what is impossible".

APPEAL from the Judgment of the High Court of Badulla.

Cases referred to:

1. *Weerakutty v. Pullenayagam* – 47 NLR 14.
2. *Choughani v. King Emperor* – 1938 107 Law Journal PC 35.
3. *Sivasampu v. Juan Appu* – 38 NLR 369 (DB).
4. *Arumugam v. Range Forest Officer* – 1986 2 SLR 398.
5. *Gunananda Thero v. Atukorale and others* – 29 CLW 77.
6. *Edirisinghe v. Cassim* – 46 NLR 334.
7. *Cassiere v. Edirisinghe* – 30 CLW 94.
8. *Jayakody v. Paul Silva & another* – 25 CLW 45.

Ranjan Mendis with *Ananda Mohottala, J. Wickremasinghe* and *Manjula Wellalage* for accused-appellant.

Suhada Gamlath, S.S.C. for Attorney-General.

Cur. adv. vult.

October 29, 1998.

KULATILAKE, J.

The accused-appellant was indicted before the High Court of Badulla on three counts. Firstly that he had committed robbery of government property to wit: a sum of Rs. 29,000/- being monthly salaries of Lunuwatte Maha Vidyalaya teaching staff an offence punishable under Section 2 (2) (11) read with Section 2 (1) (e) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 and Section 32 of the Penal Code.

Secondly, that he had committed attempted murder of Kangana Mudiyanselage Sudu Banda an offence punishable under Section 300 of Penal Code thereby committing an offence punishable under Regulation 24 (1) (b) of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 1989 published in the gazette extraordinary of the Democratic Socialist Republic of Sri Lanka No. 563/17 of June 20th 1988 read with Public Security (amendment) Act No. 28 of 1988.

Thirdly, that he had been in possession of gun an offence punishable under Section 2 (2) (11) read with Section 2 (1) (g) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

After trial the learned High Court Judge found the accused-appellant guilty of all three charges and sentenced him to a term of 10 years rigorous imprisonment on each count and ordered the sentences to run concurrently. This appeal arises from these convictions and sentences.

The prosecution case may be summarised to the following effect:

On 20.10.92 the Principal of Lunuwatte Maha Vidyalaya W. P. Padmasiri and three teachers of the same school namely Piyasena, Madduma Bandara and Sudu Banda had gone to the Peoples Bank at Ambagasdowa to collect the monthly salaries of the teachers of the school. The total amount collected was Rs. 1,60,583.50. Having collected the money from the Bank they put the money into three parcels as a safety measure and thereafter set out on their journey back to the school on foot. They took a short cut and as the road was narrow, it appears from the evidence that they went in single file with the injured Sudu Banda leading the way. As they were going through a tea estate an unknown person had passed them. Then a second person carrying a weapon like a pistol had emerged from the bushes and demanded money. Without giving into the demands Padmasiri and Piyasena had struggled with this individual. Piyasena managed to extract his pistol but the money they had carried in their person was extracted and thrown to a side. There was another person standing on a higher elevation behind the individual who had engaged in the scuffle. This person carried a gun.

According to witness Madduma Bandara who had witnessed the incident he had seen this person shooting at Sudu Banda, as Sudu Banda was proceeding towards the school. Thereafter within a short time the police had arrived at the scene. There were villagers, school children and Grama Arakshaka Niladari who came to the assistance of the police to apprehend the culprits. About four hours after the incident the Grama Arakshaka Niladari who were carrying on a search operation were able to locate a person hiding behind a bush. The police officers intervened and they were successful in apprehending this person. Soon after the arrest witnesses Madduma Bandara and Piyasena had identified the arrested man as the "third person" who had carried a gun and had shot at Sudu Banda.

At the trial Madduma Bandara, Piyasena, Sudu Banda, Sub Inspector Wickremaratne had given evidene for the prosecution. The accused-appellant had made a dock statement. His defence was a total denial.

The learned counsel for the accused-appellant contended that the learned High Court Judge has failed to consider whether the facts in the case would warrant a charge under the provisions of the Prevention of Terroism (Temporary Provisions) Act No. 48 of 1979 and the Public Security Act read with the Emergency Regulations.

The proceedings of 26.1.93 indicate that the accused-appellant was served with the indictment on that day. According to the proceedings of 27.5.94 objection to the legality of the charges had been raised by the counsel who appeared for the accused-appellant in the High Court. This objection and impugnment of the indictment had been raised not before the trial Judge who tried the case but before his predecessor. The impugnment and objection had been raised at a stage prior to pleading to the indictment. At that point of time the learned High Court Judge who heard the submissions in regard to the impugnment had before him the indictment, which contained the charges against the accused-appellant, the list of productions and the list of documents. Among the list of productions as item No. 1 was a reference to a confession made to a Superintendent of Police by the accused-appellant which was admissible in terms of Section 16 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. A copy of this confesion was attached to the indictment to be perused by the Judge. Having examined and considered the charges in the indictment and the annexures which manifested the nature of the material that the prosecution is proceeding to rely upon at the trial the learned High Court Judge over-ruled the objection raised by the defence. The contents of the attached confession clearly established that this prosecution fell within the ambit of the preamble to the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended and the Public Security Act no. 28 of 1988 as amended read with the Emergency Regulations No. 1 of 1989. (Vide the proceedings and order dated 27.5.94.) At the trial it was the unfettered discretion of the prosecuting State Counsel to decide upon the witnesses, and the material that he was intending to call or produce before Court.

The point of time at which such an objection and impugment should be decided and determined was considered by Canekeratne, J in *Weerakutty v. Pullenayagam*[1]. He referred to the judgment in *Choughhani v. King Emperor*[2] where it was held that the relevant point of time at which such objection to a charge should be considered is that of accusation and not the eventual result. In the circumstances, we hold that the contention of the learned counsel for the accused-appellant that the relevant point of time is the eventual result and that the confession had to be marked in evidence and produced at the trial is wholly untenable in law.

The second point urged by the learned counsel was that the learned trial Judge has failed to consider the fact that there was no proof before Court to establish that the Emergency Regulations and the Prevention of Terrorism (Temporary Provisions) Act under which the accused-appellant was charged with, was in operation at the relevant time in the relevant area. The learned Senior State Counsel countered the point urged by the learned counsel for the accused-appellant by submitting that the learned High Court Judge had taken judicial notice of this fact. In this regard it is pertinent to refer to Section 57 of the Evidence Ordinance and Section 2 of the Interpretation Ordinance. Section 57 (1) of the Evidence Ordinance states:

> "That the Court shall take judicial notice of all laws, or rules having the force of law, or heretofore in force or hereafter to be in force in any part of Sri Lanka".

In Section 2 sub-section (kk) of the Interpretation Ordinance the term "written law" is interpreted in the following terms:

> "written law" shall mean and include all Ordinances, Laws and Acts of the Legislature of Ceylon or Sri Lanka and all orders, proclamations rules, by-laws, regulations, warrants and process of every kind made or issued by and body or person having authority under any statutory or other enactment to make or issue the same in and for Ceylon or Sri Lanka or any part thereof, the Minutes on Pensions, and the Ceylon (Parliamentary Elections) Order-in-Council 1946".
>
> Section 56 of the Evidence Ordinance.

sets out:

> "That no fact of which the Court will take judicial notice need be proved".

On a perusal of the judgment we find that in fact the learned trial Judge had taken judicial notice of the operation of the Emergency Regulations and the Prevention of Terrorism (Temporary Provisions) Act. He has referred to *Sivasampu v. Juan Appu* [3] where it is laid down that where a charge is laid under a statutory rule, regulation or by-law which is required by law to be published in the government gazette, the prosecution is not bound to produce the gazette in which the rule or regulation or by-law appears in proof thereof in order to establish the charge. There would be sufficient compliance with the requirement of law if in the complaint or report to Court there is a reference to the gazette in which the rule is set forth. The production of the gazette containing the Emergency Regulation in question is UNNESSARY – Vide – *Arumugam v. Range, Forest Officer*[4] *Gunananda Thero v. Atukorale & others*[5] *Edirisinghe v. Cassim*[6] *Cassiere v. Edirisinghe*[7]. *Jayakody v. Paul Silva &* Another[8]; In the circumstances we reject the submissions of learned counsel for the accused-appellant as it is bereft of any legal foundation.

Further, the learned counsel submitted that the learned trial Judge had put certain leading questions to witness Madduma Bandara which is not warranted in law. The question and answer he referred to is as follows:

ප්‍ර: පොලීසිය විසින් අල්ලා ගෙන තිබුණු තැනැත්තා මංකොල්ලයට ආව කෙනෙක්ද?

උ: ඔව්.

In this regard it is necessary to stress the powers given to a trial Judge to put questions to a witness in terms of section 165 of the Evidence Ordinance. The trial Judge in order to discover or to obtain proper proof of relevant facts may ask **any question** at any time of any witness or of any person about any fact relevant or **irrelevant**. Thus it is manifestly clear that the learned trial Judge had questioned witness Madduma Bandara exercising the legal powers conferred on him under the Statute. Besides there is sufficient evidence elicited *aliunde* on this point. Hence the learned counsel's submission is bereft of any substances and merit.

The learned counsel for the accused-appellant queried in the course of his argument as to why the Government Analyst's report relating to the gun in question was not produced at the trial. According to Madudma Bandara, Piyasena and Sudu Banda at the time they saw the accused-appellant he was standing at a higher elevation. He carried a gun. According to Madduma Bandara he had seen the accused-appellant shooting at Sudu Banda and the gun shot alighting on Sudu Banda's body. Sudu Banda himself had testified that he saw the accused-appellant armed with a gun aiming the gun at him. Even though at the time of arrest of the accused-appellant by the police (four hours later) he had a pistol with him the evidence in the case revealed that at the time of the incident the accused-appellant was armed with a gun. The significant fact to be emphasised is that the **police had not recovered the gun.** Thus the complaint that the prosecution has failed to produce the Government Analyst's report is groundless because the law doew not expect one to do what is impossible as expressed in the phrase *lex non cogit ad impossibilia.*

Finallly, the learned counsel contended that in order to prove that the accused-appellant was in possession of a gun as alleged in count 3 of the indictment the report of the Government Analyst should have been produced at the trial. The trial Judge who had observed the demeanour and the deportment of the prosecution witnesses Madduma Bandara, Piyasena and Sudu Banda who were teachers was satisfied with the overwhelming nature of their evidence and has arrived at a favourable finding in regard to their testimonial trustworthiness. Their evidence had established the fact that the accused-appellant did carry a gun at the time of the incident. This evidence would be sufficient to establish count 3 of the indictment in the attendant circumstances of this prosecution.

On a perusal and consideration of the learned High Court Judge's judgment and the totality of the evidence led in the case we are of the considered view that he had come to a right decision in finding the accused-appellant guilty of all the charges. In the result, the appeal is dismissed.

JAYASURIYA, J. – I agree.

Appeal dismissed.