[COURT OF CRIMINAL APPEAL]

1972 *Present :* **Alles, J. (President), Thamotheram, J., and Wimalaratne, J.**

K. M. J. FERNANDO and 3 others, Appellants, *and* THE STATE, Respondent

C. C. A. 105–108/71, WITH APPLICATIONS 142–145

S. C. 109/71—M. C. Panadura, 19100

Offensive Weapons Act No. 18 of 1966—Sections 2(1), 3, 15—"Offensive weapon"—Burden of proof—Weight of Government Analyst's evidence—Misdirection.

In a prosecution before the Supreme Court for using or possessing an offensive weapon in contravention of section 3 or section 2 (1) of the Offensive Weapons Act, the question whether the weapon used or possessed was an "offensive weapon" should be left to the jury to decide. It would be a misdirection in law to tell the jury that the evidence of the Government Analyst is conclusive on this question.

APPEALS against four convictions at a trial before the Supreme Court.

G. E. Chitty, Q.C., with *G. E. Chitty* (Jnr.) and (assigned) *W. J. Perera*, for the 1st and 4th accused-appellants.

M. A. Mansoor, with *S. J. Mohideen* and (assigned) *W. J. Perera*, for the 2nd and 3rd accused-appellants.

Sunil de Silva, for the State.

Cur. adv. vult.

May 24, 1972. ALLES, J.—

The four appellants were charged and convicted on an indictment containing four counts. On the first count the 1st appellant was convicted of throwing an explosive bomb at premises No. 14, Station Road, Moratuwa and causing damage to the property of Pahalamandadige Thomas Fernando, an offence punishable under Section 3 of the Offensive Weapons Act No. 18 of 1966. On the second count the 2nd, 3rd and 4th appellants were convicted of abetting the 1st appellant to commit the offence set out in count 1. On the 3rd count the 4th appellant was convicted of being in possession of an explosive bomb, without lawful authority, an offence punishable under Section 2 (1) of the Offensive Weapons Act and on the 4th count the 2nd and 3rd appellants were convicted of causing mischief under Section 410 of the Penal Code to motor car bearing registration No. EN. 4759, belonging to Thomas Fernando.

On these convictions the appellants were sentenced to varying terms of imprisonment.

At the conclusion of the argument in appeal we set aside the convictions of all the appellants and directed a retrial on the same charges. We now set down the reasons for our order.

The evidence accepted by the Jury established that the four appellants together with the discharged fourth accused came at about 5 p.m. to the orange barley boutique of P. T. Fernando and demanded "Kappan" at the rate of Rs. 50 per day. It transpired in evidence, that besides running this boutique, the complainant P. T. Fernando was also engaged in the lucrative business of accepting illegal bets and received a considerable sum of money daily, sometimes between Rs. 1,500 and Rs. 2,000 a day.

According to P. T. Fernando he refused to make any payments to the appellants. About 7 p.m. the same day while Fernando was inside his closed boutique, the appellants again arrived on the scene and the 1st appellant hurled an explosive about the size of a condensed milk tin at his front door causing damage to his boutique. The other appellants were present and Fernando saw an "explosive" in the hands of the 4th appellant. He concealed himself and peeped through the plank doors and saw the 2nd and 3rd appellants damaging his car by striking it with clubs. A second explosion occurred soon afterwards and the appellants then left the scene. His evidence was supported by that of Sunnie Fernando.

When Inspector Silva of the Moratuwa Police arrived on the scene some time later he found the lower portion of the middle shutter of the front door damaged and he got a strong smell of burnt sulphite. He also took charge of some shrapnel, nails, panel pins, stones and glass all of which he collected and produced in Court. He thereafter moved that these productions be forwarded to the Government Analyst for examination and report. Mr. Humzah, the Assistant Government Analyst, also visited the scene and gave a detailed account of his observations when he testified in Court.

An essential ingredient of the offences under the Offensive Weapons Act, which had to be proved beyond reasonable doubt by the prosecution, was whether the missile hurled by the first appellant and the article in the possession of the fourth appellant were "offensive weapons" within the meaning of the Act. The prosecution relied on the Government Analyst's report which was countersigned by Humzah and the evidence of Humzah to establish this fact. An "offensive weapon" under the Act has been defined as—

> "a bomb or grenade or any other device or contrivance made for a use or purpose similar to that of a bomb or grenade."

This being essentially a question of fact the burden of which lay on the prosecution, the prosecution sought to discharge this burden by producing the report P11 and leading the evidence of Humzah. The ultimate conclusions of the Analyst in P11 were to the following effect :—

> "Spent residues of mixture of potassium chlorate and arsenic sulphide were identified on—
>
> (i) panel pins and staples in P1,
>
> (ii) on the sweepings,
>
> (iii) on the stones and on some of the pieces of glass in P3, and
>
> (iv) on the pieces of plank in P5 and P6.
>
> The panel pins and the staples in P1, the stones and some of the pieces of glass in P3 constitute the *debris of a handbomb, which is an offensive weapon* as defined in the Offensive Weapons Act No. 18 of 1966."

This is evidence that can properly be given by an expert in a criminal proceeding and on which the jury were entitled to act. Humzah gave evidence in detail and was cross-examined at length by learned Counsel for the appellants. But however conclusive this evidence may appear to be, this is a question of fact for the jury and the cross-examination of Humzah which extended over eleven pages of typescript indicated that the defence challenged some parts of his evidence. Unfortunately the learned Commissioner in his charge withdrew from the consideration of the jury this essential question of fact and treated the expert evidence as evidence which the jury were bound in law to accept. Section 15 of the Act does permit the admission of a certificate of the Analyst as evidence on which the jury are entitled to act even in the absence of the Analyst as a witness. But even in such a case the Analyst may be called as a witness at the instance of either party. The law therefore does not treat the Analyst's evidence as being conclusive. In the course of the charge dealing with the expert evidence the learned Commissioner gave the following directions :—

> "So that a very essential and vital ingredient *has been proved* by the Analyst's evidence and by his report P11 . . . The evidence of the Assistant Government Analyst is what is called scientific evidence and in law that type of expert evidence is accepted as *infallible* . . . So that his evidence *cannot be challenged at all.* His evidence *has to be accepted* and his evidence is that the productions that were shown to him as having been collected from the scene of the offence were the debris of a handbomb."

This is clearly a misdirection in law because the defence did in fact challenge the Analyst's evidence. As a result of this misdirection the defence has been prejudiced because they were entitled in law to have this question of fact decided by the jury. It is no answer to this

misdirection to maintain that the evidence of the Analyst was of such a compelling nature that the jury would in all probability have unhesitatingly accepted his evidence.

The charge of mischief being so closely connected with the offences under the Offensive Weapons Act and depending as it does on the credibility of the prosecution witnesses we think the fairest course is to order a retrial on all the charges.

Case sent back for retrial.