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

**C.A. No. 46/2008**

High Court Vavuniya

No. 1946/2007

1. Veerachcham Sivadasan
2. Veerachcham Pavadasan

Accused-Appellants

-Vs-

The Attorney-General,

Attorney-General's Department,

Colombo-12

Respondent.

**Before:** **W.L.R. Silva, J &**

**H.N.J.Perera, J**

Counsel Anil Silva PC with Nandana Perera for the 1st and 2nd Accused-Appellants.

A.Jinasena DSG for the Respondent.

Argued on: 24.01.2012

Written submissions

Tendered on: 24.02.2012 ( by the Accused-Appellants)

27.03.2012 ( by the State)

**Judgment on: 13.07.2012**

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**Ranjith Silva, J**

The accused-appellants hereinafter referred to as the appellants were indicted in the High Court of Vavuniya under sections 54A(b) and 54 A (c) of the Poisons, Opium and Dangerous Drugs Act as amended by Act No. 13 of 1984.

At the conclusion of the case after trial the learned trial Judge by his judgment dated 22.07.2008 found both accused guilty of the charges, convicted and sentenced each of them to life imprisonment. Aggrieved by the said convictions and the sentences the appellants have preferred this joint appeal to this Court.

The appellants in their evidence admitted that they were arrested on 16.08.2004 but denied the commission of the offence. Counsel for the accused-appellants urged the following grounds of appeal.

1st ground of appeal:- the Trial Judge did not analyze the evidence led by the prosecution with caution, resulting in a miscarriage of justice.

The 2nd and 3rd grounds of appeal:- that the evidence of I.P.Welagedera with regard to the raid is scanty and is not credible.

The 4th ground of appeal:- the contradictions in the evidence and the probability or the improbability of the prosecution version have not been properly evaluated by the learned judge.

The 5th ground of appeal:- in any case there was no evidence whatsoever against the 2nd accused-appellant and therefore the conviction of the 2nd accused-appellant was wrong.

It appears that the appellants in the 1st to 4th grounds of appeal urged, are canvassing the judgment of the learned trial Judge with regard to the decision he reached as to the credibility of the witnesses. First and foremost it has to be clearly laid down that the Court of Appeal will not lightly interfere with the findings of facts of a trial judge. Especially so, with regard to the credibility of witnesses.. In this regard, I would like to refer to the decisions in ***Wickramasuriya Vs Dedolina 1996(2) SLR 95, Alwis Vs Piyasena Fernando 1993 (1) SLR 119 at 122 and Fraud vs Brown and Company limited 20 NLR at 282.***

In this case although the witnesses were subjected to cross examination at length there were no contradictions marked at the trial . The Defence merely tried to show that I.P. Welegedera in his evidence has not mentioned about the 2nd accused grabbing him by his neck and trying to resist the arrest of the 1st accused, whereas the 2nd witness S.I Dayani Gamage in her evidence had narrated how the 2nd accused grabbed the 1st witness firmly by his neck and how the 2nd witness managed to bite his hand and rescue the entrapped 1st witness and how she arrested the 2nd accused-appellant. In this regard the learned High Court Judge has vividly described how certain witnesses may observe certain things the others may not.

A witness may not observe and remember better than another the manner in which the incident took place especially when he was the person who was attempting to subdue an over power a criminal in order to apprehend him with the contraband, rather than a witness who observes the incident. The person really involved may sometimes

be oblivious to the blows he received and the injuries suffered or how and the manner in which he received and suffered, his primary concern being the arrest of the accused, come what may . Dayani Gamage who observed that the 1st accused and the 2nd accused trying to resist arrest and the 2nd accused grabbing the 1st witness from behind by his neck had the opportunity to see the incident clearly.

It is at that point that Dayani Gamage witness No. 2 went to the rescue of I.P. Welegedera witness No. 1 and arrested the 2nd accused-appellant .

The learned Judge has also stated that when things occurred in rapid succession it would be not possible for some witnesses to observe as well as certain other witnesses, the sequence and the things that happened. In this regard I would like to quote the judgment of Justice

Thakkar in Boginbai Harijibai Vs The State of Gujrat -S.C. 753- 1983 Criminal Law Journal 1096.

Learned Deputy Solicitor General for the State in her written submissions has referred to several authorities in order to explain the concept of possession and trafficking. I have studied them very carefully . In this regard I would to like to refer to some of the case law she had quoted Archbold at page 2012 ( 27-54) , Warner Vs Metropolitan Police Commissioner ( 1969) 2 A.C 256 ,. R Vs McNamara 87 Cr App. R, 246, but I find that none of these cases is applicable to the facts and circumstances of this case. She had also referred to a statement made by Lord Pearce reviewing the popular and wide meaning of possession describing what the concept of possession is . She had also referred to the Judgment of Lord Morris at page 289 delivered in the aforementioned cases describing the concept of possession. Again I must say that, I find these judgments or quotations

in applicable to the facts and circumstances in this case. I say so because I find that the evidence fall short of proving anything with regard to the mental element or the physical control of the 2nd accused-appellant in respect of the parcel of heroine that was taken into custody by the police officers. The evidence fell short of proving beyond reasonable doubt that the 2nd accused-appellant had the knowledge of the contents of the parcel and that he deliberately attempted to rescue the 1st accused-appellant and the parcel of heroine. The evidence falls very short of proving beyond reasonable doubt that the accused had been engaged or attempting to traffic heroine.

It is true that both accused-appellants gave evidence and called witness to give evidence in their behalf. In considering the totality of the evidence, we find that the Judge cannot be faulted for his conclusions and findings with regard to the 1st accused-appellant. There was no reason suggested by the accused-appellants as to the motive or a very

good reason to foist such a large quantity of heroin on the 1st accused and then arrest the 1st and the 2nd accused-appellants. There was no enmity and the evidence clearly showed that the informant had come with the police officers in the same vehicle up to the Kovil and had pointed out both appellants when they were coming out of the Kovil and thereafter the informant had left. This is a case where the informant had come to the spot and pointed out the accused to witness No. 1 and 2. The initial information had been received by witness No. 2 Dayani Gamage. The decision of the learned High Court Judge cannot be branded as perverse or unreasonable. There was ample evidence to convict the 1st accused-appellant on the charges leveled against him .

With regard to the 2nd accused-appellant I must emphasize that although he was coming out of the Kovil with the 1st accused-appellant. He was not in possession of the parcel of heroine. On the

other hand Kovil was a public place and the 2nd accused-appellant was the brother of the 1st accused –appellant . Therefore they had a right to be together and there was nothing unusual about that. The police clad in civil although they announced that they were police officers when they tried to grab the parcel that was in the hands of the 1st accused-appellant and arrest him natural instinct might have driven the 2nd accused-appellant to come to his rescue. Being the brother of the 1st accused-appellant, I cannot see anything unusual in that although it may be highly suspicious that the 2nd accused-appellant too had the knowledge and was trying to assist the 1st accused-appellant . But I must emphasize that suspicion however great will not constitute evidence. The mere fact that he was with the 1st accused-appellant and that he tried to prevent the 1st accused-appellant from being arrested or the fact that he tried to snatch away the parcel, the police officers were trying to take into their custody , are not in my opinion sufficient to prove the charges leveled against the 2nd accused-appellant beyond reasonable doubt.

Therefore I affirm the conviction of the 1st accused –appellant and the sentence imposed on the 1st accused-appellant. With regard to the appeal of the 1st accused-appellant , we dismiss that appeal but with regard to the 2nd accused-appellant we allow the appeal, set aside the conviction and the sentence and acquit and discharge him .

**JUDGE OF THE COURT OF APPEAL**

**H.N.J.Perera, J**

I agree.

**JUDGE OF THE COURT OF APPEAL**

Kpm/-