

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

1. M.H. Priyani alias Chooty
2. M.A Geethika Damayanthi alias Menike

Accused-Appellants

Vs.

The Attorney General,

Respondent

C.A. 10-11/2010

H.C. Colombo Case No: 1153/2002

Before : Sisira J. de Abrew,J. (Acting P/CA) &  
P.W.D.C. Jayathilaka,J.

Counsel : Saliya Pieris for the Accused-Appellant.  
Haripriya Jayasundera DSG. for the respondent.

Argued &

Decided on : 07.02.2014

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Sisira J. de Abrew,J.(Acting P/CA)

Heard both counsel in support of their respective cases. The 1<sup>st</sup> accused in this case was convicted for being in possession of 4.89 grams of heroin. The 1<sup>st</sup> and the 2<sup>nd</sup> accused were convicted for trafficking the said amount. The 1<sup>st</sup> accused on the 1<sup>st</sup> Count was visited with Life

Imprisonment. The learned trial Judge imposed Life Imprisonment on 1<sup>st</sup> and 2<sup>nd</sup> accused on the 2<sup>nd</sup> Count. Being aggrieved by the said convictions and the sentences they have appealed to this Court. Facts of this case may be briefly summerized as follows:

Kuruppu who was attached to the Excise Department, on information received by him, went and met the 2<sup>nd</sup> accused in this case in a house around 10.00 O'clock on 24.05.2001. He posed as a hotel employee and told the 2<sup>nd</sup> accused that he wanted to buy heroin. Again around 3.30 p.m. on the same day he met the 2<sup>nd</sup> accused in her house and discussed the business of heroin. On the instructions of the 2<sup>nd</sup> accused, Kuruppu went to Ratmalana Railway Station. Thereafter both the 1<sup>st</sup> and the 2<sup>nd</sup> accused came and met Kuruppu at Ratmalana Railway Station. At this time Kuruppu introduced Edna Silva another officer attached to the Excise Department as one of his sisters. Kuruppu and Edna Silva wanted to buy 15 grams of heroin. Both the 1<sup>st</sup> and the 2<sup>nd</sup> accused instructed Kuruppu and Edna Silva to go to Buddha statue<sup>e</sup> junction at Ratmalana . The time was around 6.30 p.m. The 1<sup>st</sup> accused thereafter gave a parcel of heroin to Kuruppu and said that they had only 12 grams of heroin. At this time both Kuruppu and Edna Silva introducing themselves as officers from the Excise Department arrested both accused appellants.

The 1st accused –appellant gave evidence and denied the charge. Her evidence may be briefly summerized as follows. The 1st accused, in her evidence, admitted that her husband was a heroin addict and he had two cases. She infact admitted that on this day she was returning from the prison after visiting her husband. According to the 1st accused’s evidence, both of them ( 1st and the 2nd accused) had gone to see the husband of the 1st accused in the Prison. When they returned to Ratmalana they went to a boutique at Buddha statue<sup>e</sup> junction in Ratmalana and started taking some cool beverages. When they were finishing, male Excise Officers arrested them. The 1st accused says that, at this time, the 2nd accused was with her and they did not have heroin. The learned trial Judge rejected the evidence of the 1st accused. The 2nd accused, in her dock statement, almost confirmed what the 1st accused stated in her evidence . The learned trial Judge rejected the evidence of the 1st accused and the dock statement of the 2nd accused. I will later deal the basis on which the learned trial Judge rejected the evidence of the 1st accused. Before I deal with the rejection of the evidence of the 1st accused by the learned trial Judge, I would like to consider certain discrepancies that had taken place after the accused appellants were arrested. Kuruppu says that the productions in this case were handed over to O.I.C. Rohana Wijeratne on 24.05.2001 around 10.00 p.m. This was the date of detection. Kuruppu further says that on 25.05. 2001 productions and both accused were taken to the Magistrate Court. Kuruppu further says that productions were handed over to the Magistrate Court on 25.05.2001. Vide page 106 and 107 of the brief. But Edna Silva surprisingly takes up a different

stand on this point. Edna Silva, in her evidence, states that on 25.5.2001 productions were taken to the Magistrate's Court but were not handed over to the Magistrate Court. According to Edna Silva the productions were taken back to the Excise Department on 25.05.2001. Thus it appears according to Kuruppu, the productions were handed over to the Magistrate's Court on 25.5.2001. But Edna Silva who went with Kuruppu says that productions were not handed over on 25.5.2001 to the Magistrate Court. This is a vital contradiction in the prosecution case. Although Kuruppu and Edna Silva say, in their evidence, that productions were taken out from the Excise Department on 25.5.2001, O.I.C Rohana Wijeratne does not support this version. According to O.I.C Rohana Wijeratne productions were handed over to him on 24.5.2001 and he deposited the productions in the safe. According to him thereafter the productions were taken to be handed over to the Magistrate Court only on 07.06.2001. But according to Kuruppu and Edna Silva productions were taken on the 25.5.2001. This evidence is very clearly contradicted by O.I.C. Rohana Wijeratne. If the productions were taken out from the Excise Department on 25.5.2001 and not handed over to the Magistrate's Court, what happened to the productions ? Did anybody tamper with the production? I do not find answers to these questions. If productions were handed over to the Magistrate's Court, as claimed by Kuruppu on 25.05.2001, how could O.I.C Wijeratne say that the productions were in the safe till 07.06.2001? There is no answer to this question. Edna Silva has filed an affidavit in the Magistrate's Court stating that the seal on the productions was the seal of the O.I.C Rohana Wijeratne (page 231). But in Court, Edna Silva takes up the position that it was Edna

Silva's seal that was placed on the productions. Although Kuruppu and Edna Silva arrested both the accused-appellants, when the 1<sup>st</sup> accused handed over the parcel of heroin, they did not decide to search the house of the accused-appellants. According to the evidence, both accused-appellants lived in one house. The accused-appellants were charged with trafficking of heroin. According to the evidence of Edna Silva and Kuruppu both accused were engaged in the business of heroin. Then the question arises as to why they did not search the house of accused-appellants. Prosecution has failed to provide an answer to this question. When we consider all these matters, we feel that there are several reasonable doubts in the prosecution case. According to the law, the benefit of reasonable doubt must always be given to the accused. The learned trial Judge has failed to consider the above matters.

I now deal with the rejection of the evidence of the 1<sup>st</sup> accused by the learned trial Judge. The learned trial Judge rejected the evidence of the 1<sup>st</sup> accused-appellant on the basis that the stand taken up by the 1<sup>st</sup> accused that is to say that both accused-appellants were arrested at a hotel (tea boutique) at Buddha Statute<sup>e</sup> junction at Ratmalana had not been suggested to 1<sup>st</sup> and 2<sup>nd</sup> prosecution witnesses. (vide page 391 of the judgment of the learned trial Judge). But this observation by the learned trial Judge factually is incorrect. At page 253 the learned Defence Counsel who appeared for the accused-appellant suggested to Edna Silva that both accused were arrested at Suhada Hotel at Ratmalana when they were having

tea. Thus the learned trial Judge's rejection of the 1<sup>st</sup> accused's evidence was on a wrong basis. We have considered the evidence of the 1<sup>st</sup> accused and note that the prosecuting Crown Counsel had failed to legally mark any contradictions or omissions. Learned trial Judge has failed to consider this matter. Learned DSG upholding the best traditions of the Attorney General's Department submits that she too cannot find a reason to reject the evidence of the 1<sup>st</sup> accused. We are pleased with this submission. We have perused the evidence of the 1<sup>st</sup> accused-appellant and find no reason to reject her evidence. How does a trial Judge evaluate the evidence of an accused person ? For the benefit of the trial Judges and the legal practitioners of this country, I would like to set down the following guide lines.

- 1) If the evidence of the accused's is believed, it must be acted upon.
- 2) If the evidence of the accused creates a reasonable doubt in the prosecution case, defence of the accused must succeed.

This view is supported by the following judicial decisions.

His Lord ship Justice T.S. Fernando in **Ariyadasa Vs. Queen 68 NLR 66** and 68 CLW page 97 set down the following guidelines:-

1. If the jury believed the accused's evidence he is entitled to be acquitted.
2. Accused is also entitled to be acquitted even if his evidence, though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt.

In **Kularatne Vs. Queen 71 NLR page 529** Their Lordships analysing the dock statement gave the following guide lines:

1. If the dock statement is believed it must be acted upon.
2. The dock statement creates a reasonable doubt in the prosecution case, defence of the accused must succeed.

The learned trial Judge has failed to consider the guide lines set out by His Lordships Justice T.S.Fernando in Queen Vs.Ariyadasa. The Judges in deciding criminal cases must not look at the evidence of an accused person with a squint eye. This view is supported by judgment of the Indian Supreme Court in **D.N. Pandey Vs. State of Uththara Predesh AIR 1981 Supreme Court 911**. Their Lordships in the said judgment held thus “*Defence witnesses are entitled to equal treatment with those of the prosecution and Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses.*” As I pointed out earlier, there are reasonable doubts in the prosecution case. But the learned trial Judge without considering them, has even gone up to the extent of rejecting the accused’s evidence. Prosecution case falls on the evidence of the prosecution itself. We have earlier stated that there are no reasons to reject the evidence of the 1<sup>st</sup> accused. If the evidence of the 1<sup>st</sup> accused is believed, then the position taken up by the 2<sup>nd</sup> accused too has to be believed. Further, if the evidence

of the 1<sup>st</sup> accused is believed, the 1<sup>st</sup> and the 2<sup>nd</sup> accused are also entitled to be acquitted. When we consider all these matters, we hold the view that the prosecution has not proved its case beyond reasonable doubt. We therefore set aside both convictions and life imprisonment imposed on the accused-appellants and acquit them of the charges with which they were convicted.

Both accused are acquitted.

*Appeal allowed.*

Acting President of the Court of Appeal

P.W.D.C. Jayathilake, J.

I agree.

Judge of the Court of Appeal

Jmr/-