

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

Pitchai Iresha Kumudini
Female Section/Welikada Prison

ACCUSED-APPELLANT

C.A. 64/2011

H.C. Colombo 399/2001

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Dr. Ranjith Fernando for the Accused-Appellant

Hiranjana Peiris S.S.C for the Complainant-Respondent

ARGUED ON: 16.05.2014

DECIDED ON: 28.07.2014

GOONERATNE J.

The Accused-Appellant was indicted in the High Court of Colombo on two counts in terms of the provisions of the Poisons, Opium and Dangerous Drugs Ordinance as amended, for possession and trafficking of 142.4 grams of heroin, on 7.1.1999. Accused-Appellant was found guilty and sentenced to life imprisonment since the Accused was pregnant at the time of conviction. The case of the prosecution is as follows.

Witness No. (1) Liyanage, an Inspector of the Narcotics Bureau in his evidence testified that information was received by P.C. Senaratne of the Narcotics Bureau on the day in question, from a private informant about trafficking of Heroin by a person called 'Mahatun' and his wife, in the Madampitiya area. Having received such information the police party had been organized by him and proceeded on the raid with about 13 Police Constables and Sergeants inclusive of a woman Police Constable who was in the raid team. They went to the place as suggested by the informant in a police jeep and a three wheeler. The informant also travelled with the police

team who had been dressed in civil except, for one Constable who was in his uniform. The vehicles in which the police party travelled was parked about 300 meters away from the Thotalange round- about. Thereafter about 4 from the police party and the informant proceeded on foot towards the round-about and came along the Sedewatte road. It was a crowded place and the police team came to a certain point and waited in one place for about 10 minutes. After sometime the informant showed a woman walking in the direction of the police party from premises No. 75 in the vicinity. The woman was identified as Mahatun's wife, according to the informant. I.P. Liyanage stopped the woman who was carrying a bag which had vegetables on top of it and 8 cellophane packets containing heroin at the bottom of the bag. House of the Accused which was in the vicinity was searched but nothing was found. Thereafter the usual official duties commenced by arresting the Accused, testing the powder, weighing, and sealing the packets and the handing over of productions.

The above would be the very basic position of the prosecution version, which includes the usual systematic type of evidence from the officials of the Police Narcotics Bureau. I would refer to the position of the Accused-

Appellant in the manner submissions were made to this court by learned counsel for Appellant and also on the material contained in the synopsis of submissions made on behalf of the Accused.

- (1) Cross-examination of the prosecution witness on the out entry with reference to the particular time and the late entries made in the books of the police (3.00 p.m).
- (2) Keeping the Accused in the police station until the arrival of Mahatun the husband and a person called 'Aja'. The reason for the late entry was that the police expected two of them or one of them to arrive, being the real culprits, to enable the police to release the suspect.
- (3) Woman Police Constable's name entered later on in the books. In fact she never participated in the raid though she was one among the raid team.
- (4) Equipment not taken for the raid, e.g weigh scale etc.
- (5) Bags containing vegetables and drug packets not sent to Government Analyst.
- (6) No cogent reasons to arrest Accused who was more or less implicated as the main culprits could not be apprehended i.e Mahatun and 'Aja'.
- (7) Out entry does not indicate that police party left with informant.
- (8) Arrest at 10.55 a.m. Accused maintain it was about 9.30 a.m. or official witness says on oath the out entry made at 3.00 p.m.
- (9) Suggested to witness, that it was in fact Mahatun and one 'Aja' who were involved.

(10) Discrepancy in the number of bags/packers^{rs} sent to Government Analyst. Government Analyst not been able to identify any of the production in court.

(11) P.C. Senaratne failure to record notes or record the events. It was Senaratne who received the information of possession and trafficking of drugs. Evidence vague and facilitating.

It is also important to consider the case of the Accused who gave evidence on oath since that would be evidence in the case for court to either reject or accept. Having considered the case of the Accused, if a doubt could be established in the prosecution case the Accused is no doubt entitled to be acquitted. Accused was married to Mahatun. They have a daughter by the marriage and was involved in a vegetable stall. It is her case that two three wheelers came armed with police officers at about 9.20 a.m. The police had threatened the Accused and asked for Aja's goods. 'Aja' was a notorious drug peddler. Mahatung was not at home. It is also her case that the police had slapped her and searched the ^{house} home. Police found a key of three wheeler (adjoining land). Police went over to the adjoining lane^d and returned with a parcel in Inspector Liyanage's hand. Accused told to accompany the police as goods had been found. Accused would be released only after the arrival of

Mahatun or 'Aja' in the police station. In short the Accused's position was that she had nothing do with any drugs and it was 'Aja' who was wanted by the police and she was kept in the police till 'Aja' surrendered and she is punished because of 'Aja'.

The learned Senior State Counsel whilst supporting the prosecution case drew the attention of this court to pgs. 125-127, where the position of the Accused had been suggested in cross-examination. The prosecution witness rejected all these positions. Mere suggestion cannot amount to evidence since the prosecution rejects all those positions with explanation.

The evidence led on behalf of the prosecution no doubt is the usual type of evidence of trained police officers who narrated the several items of evidence from the time of receiving information. In the process records have to be maintained in the books of the police, out/in entry. The time at which these entries are made is reflected in the notes. It is difficult for a court to be suspicious of such entries merely because the person which received the message enters the message in the book, but the leader of the team may not do so contemporaneously. In the case in hand there is some evidence to the effect that the leader of the police team Liyanage who was very much involved

in the arrest compared to I.P.Senaratne, made the relevant entries later in the day. There could be a slight difference on certain points between the evidence of the two official witness. That cannot give rise to a serious doubt or suspicion like a forgery or an interpolation in the books maintained by the police.

The next important matter is the case of the Accused-Appellant. It is not the role of the trial Judge to compare the case of the prosecution and the defence and arrive at a conclusion. If that has taken place one could successfully argue that the burden of proof is incorrectly shifted. Defence position in certain respects had been put to the prosecution witness, but they denied and made certain explanation in the best way they could do so to maintain the prosecution case. However the leader of the police team as stated by the Accused assaulted or slapped the Accused-Appellant. That position had not been elicited or suggested either directly or indirectly from prosecution witnesses. More and more probing of the prosecution witness connecting the time and items of evidence placed ~~at the scene of arrest~~ ^{before the court} before court, might have brought a different complexion to the entire case, if the defence case was somewhat reliable. What should have been done at the trial cannot be done in the appeal. The other position of the Accused-Appellant

held till the arrival of the real culprit had also not shown results since the prosecution witness rejected such position with somewhat acceptable explanation. The item of evidence that surfaced on the detection of heroin from the Accused person and in her possession had been placed before the trial court by the two official witnesses. This item of evidence remains intact in the absence of a reasonable doubt thrown on the prosecution version.

I will now turn to the judgment to consider whether a harmful misdirection could be considered which would enable this court take a different view. There is some reference to demeanor and deportment. As observed above this being a case where trained police officers testify in court somewhat systematic evidence transpire ^{Down} ~~from~~ the point of receiving information up to the point of handing over the productions to the Government Analyst. I agree that demeanor and deportment of an experienced police officer would have no probative value. In the judgment of the trial Judge evidence of each witness had been narrated and thereafter that evidence had been evaluated by the trial Judge.

At pgs. 355 to 364 I find that the trial Judge has once again narrated the evidence of witness Liyanage, though the sub heading at 358 state evaluation. But the question asked by the defence and the answers and

explanation of the witness had been stated. It is the explanation of the witness that is being projected by the trial Judge to many questions of the Accused-Appellant. It is in this way that greater part of the evidence had been evaluated. At pgs. 365 & 366 would be the material aspect where the trial Judge observes the position of the witness could not be altered by the cross-examination. As such it is consistent and proved beyond reasonable doubt.

This court cannot interfere with the many questions of fact, unless such acceptance of fact by the trial Judge appear to be highly unreasonable. It is however not in order for the trial Judge to state that no harm would be done to the evidence of witness Liyanage since the Judge has decided to reject the evidence of the Accused. The method adopted by the trial Judge to convey this is not acceptable. The lapses if it could be described in that way in the evidence of witness Liyanage are question of fact where the trial Judge considered same not to be harmful to the prosecution case. As such I am unable to conclude that it is unsafe to act upon the evidence of Liyanage merely on the lapses which are explained by the witness. No doubt the witness had admitted some questions posed by the defence but explanation of witness seems to be acceptable in the context of the case i.e notes entered by witness after some time and entered on the raid itself, weighing instruments etc.

The other witness Senaratne who received the information has taken down notes in the pocket note book to a point only but the entire episode had not been recorded. It is emphasized that the signal given by previous witness Liyanage was not noticed or seen. Did not see the direction of Accused coming. No notes kept as regards checking of Accused on the identification marks on the heroin packets. This witness admits that he had not kept any ^{notes} marks, but it was witness Liyanage. There is some question as regards certain aspect of the case and I find that this witness had not provided a full or said he forgets. ^{and complete answers} However ^{place} their positions and the evidence of witness Liyanage. ^{is taken to the defence and}

I do find that the entirety of the prosecution version narrated by witness No. 1 had not been corroborated by witness Senaratne^{he}. But witness Liyanage had provided answers which cannot be doubted. Some answers are not perfect but cannot create a doubt in the prosecution case. ^{But no material contradictions appear in the evidence of the witness.}

In all the facts and circumstances of the case in hand, we cannot find serious errors in the judgment of the ^{trial} Judge, though the defence is justified in ^{commenting} ~~communicating~~ as above on ~~the~~ corroboration (not entirely) and trial Judge's observations of rejecting the defence case as stated by the Judge in the way described in the judgment, may not be in order of writing a judgment. Judges may have and adopt their own style of writing judgments. As

long as the findings are acceptable and stated in unambiguous terms, trial Judge having analysed the evidence ^{and} find the case has been proved beyond reasonable doubt, Appellate Court need not intervene, and interfere with the findings, unless a very grave unreasonable error could be detected even on facts, it may not be desirable to intervene in case of this nature. Therefore we affirm the conviction and sentence and dismiss this appeal

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL