In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

CA 11/2005 HC Colombo 39/00

Karuppiah Punkody

Accused-Appellant

Vs

Hon The Attorney-General

Complainant-Respondent

Before: A W A Salam, J (P/CA) H N J Perera, J and Sunil Rajapakse,J

Cousel: R Arasacularatna PC with T Koralage for the Accused-appellant and S Thurairaja DSG for the Complainant-Respondent.

Argued on: 22.07.2014.

Decided on : 26.08.2014

A W A Salam, J (P/CA)

This is an appeal by the accused-appellant from her conviction and the sentence of life imprisonment. She was convicted on 9 June 2005 for being in unauthorized possession of 45.3 grams of heroin on 17 December 1998, an offence punishable under Section 54 (D) of the Poisons, Opium and Dangerous Drugs Act as amended by act No 13 of 1984.

We regret our inability to have this appeal disposed of earlier than this. The delay in the disposal of this appeal had resulted in the accused (a lady with 2 small children at that time) having to be in incarceration for nearly 9 years awaiting the outcome of her appeal. If she had elected to serve the sentence, probably she might have served the sentence and found her way out of the prison. This clearly shows the shortcoming of our system of administration, particularly in regard to the disposal of criminal appeals, which undoubtedly has had the effect of undermining the liberty of the subjects and the right of citizens to have justice meted out without delay. This is a classic case to illustrate the legal maxim that justice delayed is justice denied.

The meaning of the maxim is that that if legal redress is available for a party who has suffered some injury, but is not forthcoming in an expeditious manner, it is effectively the same as having no redress at all. This principle is the basis for the right to a speedy trial, because it is unfair for a party to have sustained an injury and await the resolution with little or no hope.

Nevertheless, it is my fervent hope that the accused will find solace in the fact that she was instrumental in contributing to the thought at the expense of her liberty, to have at least two divisions to deal with criminal appeals in this Court. In my own small way to contribute towards the elimination of such a recurrence, as the President of the Court of Appeal, I have with the fullest cooperation of other Judges decided to constitute another division in this court to hear and dispose of the criminal appeals preferred against the decisions of the High

Courts exercising original criminal jurisdiction, and that court had started functioning from yesterday.

Turning to the appeal preferred, at the trial two witnesses gave evidence against the accused. They were Priyantha Liyanage, I.P and his subordinate, a police Sergeant by the name Senaratna. According to the prosecution witnesses, upon receipt of information of trafficking of heroin in a house, through a private informant of R.I.P Basnayaka of the Police Narcotics Bureau, on 17 December 1998 IP Liyanage and his team had proceeded to a place called Kimbulaela.

The version of the two main prosecution witnesses is that they visited the area in question and upon the informant pointing out a house they went up to the same. They observed that there was only one female in the house who was seated at the rear door. The testimony of the prosecution witnesses in summary was that upon their arrival at that house, the lady who was seated got up and went into a room and thereafter attempted to walk away with a silver colour box containing heroin and she was arrested and taken to the police.

One of the grounds of appeal urged was the failure on the part of the learned Judge of the High Court to consider the improbabilities of the version of the prosecution. It is pertinent at this stage to consider the chain of events that had taken place prior to the arrest of the accused. According to the prosecution, the information has been received with regard to the trafficking of heroin at a place called Kimbulaela. The informant had been employed by a reserve police sub inspector by the

name Basnayaka. A Police team led by Inspector of Police Liyanage consisting of 19 officers including 3 police drivers had travelled 5 kilometers or more to reach the house of the accused in 3 vehicles. The informant had pointed out a particular house painted with pink colour and left the place. The 2 witnesses had gone to the house as pointed out by the informant while the other police officers and the vehicles were faraway.

When the witnesses approached the house of the accused, she was seated on the floor and having seen them went into a room, and thereafter was trying to escape with a nickel coloured box in which the prosecution claimed there was heroin. The story of the prosecution is in many ways improbable. In the first instance, taking the evidence of the prosecution as a whole, the testimony with regard to the raid conducted does not inspire confidence. Though the legal proposition points to such evidence not strictly requires corroboration, in the singular facts and circumstances of the present case, having regard to the quality of the version of the prosecution about the incident, it cannot be safely relied upon to sustain the conviction against the accused for multifaceted reasons.

Initially, it is highly improbable to have left out Basnayaka SI who had received the information through his personal informer from taking part at the raid. The informant had only pointed out a particular house in a row of houses and whether the police officers had in fact went into that particular house is not confirmed as the informant had immediately left having pointed out the house and before the police officers could reach that house. In any event the informant did not testify at the trial.

The defence suggested that the police officers went in search of a person by the name Wije and took the accused into custody as Wije who is the husband of the accused was away. As a matter of fact, if the informant had given information regarding trafficking of heroin at a grand scale, the police would have undoubtedly questioned him as to the names of the persons involved. It is very unlikely that a person who is employed as an informant would have furnished information without naming the person/s really involved in the commission of the offence. The reason why the police team consisted of such a large number of men, although explained to be the unpleasant experience the Police had in the past having to face the opposition from the villages, does not appear to be credible. The fact that the police team consisting of a large number of men and 3 vehicles having been used for the raid is suggestive of the prior information they may have received concerning someone involved in the business of heroin at a large-scale. The police had decided to make use of such a team keeping in mind the necessity to resist any unforeseen opposition.

It was emphatically contended on behalf of the accused-appellant that the case of the prosecution is even otherwise highly improbable as it is wholly unacceptable that a village woman who was engaged in making preparation for some green leaves to be cooked for the household to rise up from being seated on the floor, then walk into a room, take a box containing heroin and try to leave the home knowing very well that policemen are outside the house.

The inbuilt improbabilities in the version of the prosecution which will go to show that no conviction could be possible even if the evidence of the witnesses are taken on their face value, warrant a court dealing with a criminal appeal not to shut its eyes particularly when the criminal proceedings set in motion against the appellant appear to be a probable case of abuse of process of Court to put the appellant's liberty in jeopardy.

The manner in which the raid had taken place and circumstances under which the accused has been arrested red-handed as claimed by the prosecution, while the accused lady walking into a trap knowing very well that she was to be trapped, demonstrate the absence of prima facie case for an offence particularly under section 54 (D) of the Poisons, Opium And Dangerous Drugs Act. It is common knowledge that a person extensively dealing with such prohibited items for financial gain knowing very well the consequences would never have acted in the manner the prosecution claimed that she did act. These inbuilt improbabilities dealt above and the cumulative effect of all the discrepancies undoubtedly lead to a reasonable doubt that the police may have taken the accused into custody so as to get at Wije in an indirect manner.

The information with regard to the commission of the offence relating to this case has been received by S.I Basnayaka. The informant is personal to him. The Information he received has been noted in his notebook. He has accompanied IP Liyanage to Kimbulaela. There has been successful raid carried out on earlier occasions on the information of the same informer. Yet the prosecution has neither listed SI

Basnayaka as a witness nor did they take any other steps subsequently to call him as a witness. The learned President's Counsel has submitted that this should be taken as a factor favourable to the accused.

There are two matters that arise for consideration from the failure of the prosecution to call Basnayaka. Firstly, it has to be inferred that the evidence of Basnayaka S I, which could have been led without any impediment was not placed before court as it would be unfavourable to the prosecution. Moreover, viewing the failure to call him as a witness on a realistic basis, it had resulted in serious deficiency in the proof of the prosecution case.

On a perusal of the impugned judgment, with all respect to the learned Judge, it appears to me as it lacks lucidity. The evidence of the 2 witnesses for the prosecution has not been analyzed in the judgment in the correct perspective to ascertain their creditworthiness. The concept of proof of a criminal charge beyond reasonable doubt has not been properly applied to the evidence unfolded by the prosecution in a critical approach. The learned High Court judge has failed to discuss adequately and apply the concept of reasonable doubt to the evidence adduced at the trial.

Inasmuch as the learned trial Judge had said that the evidence of the prosecution witnesses had not been contradicted, she has failed to apply the same yardstick with regard to the uncontradicted testimony of the accused and her witnesses. Undoubtedly, as between the evidence of the accused and her witnesses hardly any material

contradictions had been suggested or adverted to by the prosecution. In this respect it could be argued that the learned High Court Judge may have forgotten to apply and give effect to the idiomatic expression that what is sauce for the goose must be sauce for the gander as well. If the same yardstick that was applied to the evidence of the prosecution with regard to the absence of contradictions is equally applied to the evidence adduced by the defence, the learned High Court Judge would have had no alternative but to conclude that in the least degree that a reasonable doubt had arisen with regard to the prosecution version in the light of the evidence of the defence.

Taking into consideration, all these circumstances, I am of the view that the conviction of the accused cannot be allowed to stand as the prosecution had failed to prove the case beyond all reasonable doubts. Appeal is allowed and the conviction quashed.

President/Court of Appeal

H N J Perera, J

I agree.

Judge of the Court of Appeal

Sunil Rajapakse, J

I agree

Judge of the Court of Appeal

KRL/-