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

C. A. Sisira Bandula alias Mahathun

ACCUSED-APPELLANT

C.A. 122/2006
H.C. Welikada 309/2006

Vs.

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

COMPLAINANT-RESPONDNET

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: R. Arsekularatne P.C. for the Accused-Appellant

Dappula de Livera A.S.G. for the Complainant-Respondent

ARGUED ON: 17.06.2014 & 20.06.2014

DECIDED ON: 09.10.2014

GOONERATNE J.

Accused-Appellant was indicted in the High Court of Colombo in terms of the provisions of Poisons, Opium and Dangerous Drugs Ordinance as Amended, for possession of 91.2 grams of Heroin on or about 24.6.1999 as described in the said indictment. In brief the prosecution case is as follows:

The evidence of witness No. (1) for the prosecution, Inspector of Police, Priyantha Perera of the Narcotics Bureau testified that information was received from a private informant, by a Constable of the Narcotics Bureau called Senaratne P.C. 30762, and he had recorded the information in his pocket note book. Thereafter a police party of seven were organized, and they proceeded for the raid in vehicle No. 61-7584. Prior to proceeding for the raid, it is in evidence that the said witness inspected the vehicle and satisfied himself that there were no dangerous substance or drugs in the vehicle, and that he took all necessary steps and collected the required material to proceed on the raid.

The witness Priyantha Perera was seated in front and witness Senaratne who received the information was seated behind with others in the vehicle. They proceeded towards Reclamation Road, Modera Aluth Mawatha and Madampitiya Road and came near the Muslim burial grounds, and P.C. Senaratne and Inspector Perera got down from the vehicle and P.C. Senaratne went to the opposite side of the road and met the informant. The informant provided them with details of information pertaining to drugs and with the informant the police party came near the 'Thotalanga' roundabout. Thereafter the police team proceeded on foot and came to a place called 'pansalwatte'. It was 6.30 a.m. Informant then had informed the police party that the person concerned (Accused) was coming from the direction of the roundabout. As shown by the informant two persons, one dressed in a pair of shorts and a T-shirt and the other in a sarong with a t-shirt had been identified. The one wearing a pair of shorts was identified as 'Mahatun' the Accused-Appellant. Witness Priyantha Perera accosted the Accused-appellant who had with him a bag in his band. On searching the bag which the Accused-Appellant had with him, they detected three heroin parcels. At the time the police party accosted them and the two of them attempted to run or flee but the police team was

able to bring them under control. The other person who was wearing a sarong who was with the Accused-Appellant is known as 'Tarzan'. Both were taken in to custody, and Tarzan also had drugs in his possession. Having taken the Accused-Appellant to custody the police party also went to the house of Accused-Appellant which was situated in close proximity. House was searched and the time was about 6.55/7.00 a.m. His wife was in the house and she had cried. No drugs were found in the house. Thereafter the Accused-Appellant was taken to the Narcotics Bureau and from that point all necessary official steps up to the point of dispatch of parcel to the Government Analyst had been led in evidence by the prosecution.

The above seems to be the basic version of the main prosecution witness. Learned President's Counsel and the learned Additional Solicitor General made lengthy submissions. However before I refer to them and deal with it I would in a gist consider the points elicited in cross-examination of the main witness for the prosecution.

In cross-examination of the main witness the following matters inter alia were elicited.

(1) P.C., Senaratne received information from the informant.

(2) All officers need to maintain notes and filed in a separate file.

(3) Reported for work at 5.20 a.m. and was making preparation for the raid, but no specific instructions received about the raid. It is better explained by the witness as "ඒ ආකාරයට දැන ගැනීමක් තිබුනේ නැහැ. වැටලීම් අංශයේ රාජකාරි කර අවසානයේ ඔත්තුකරුවන් සම්බන්ධයෙන් තමයි බලා සිටියේ. යම් යම් දිනයන් වල වැටලීම් කිරීමට සොයා ගතහැකිද යන්න. අප කාර්යාලයට පැමිණිලා රැඳි සිටින්නේ ඔවුන්ගෙන් තොරතුරක් ලබාගෙන වැටලීම් කිරීම සඳහා මෙවැනි කාරණා සම්බන්ධයෙන්".

(4) Receipt of information and raid

(5) Admits that on 23rd there was a special duty to go on a raid.

(6) Reject the position that evidence is given to suit the notes made by witness.

(7) Rejects that received information about several persons involved in this incident, and that several involved in packeting heroin.

(8) Received information about the Accused that he had collected heroin and to take him into custody within one hour.

(9) Accosted the Accused near Pansalwatta and Accused was so excited when he was caught. He was caught near a small two storied house.

(10)When the Accused was taken to his house a very excited state of affairs prevailed. "කලබලකාරී තත්ත්වයක් ඇත් වුනා.

(11) Tarzan was also taken into custody. Nothing detected in the house.

(12) No heroin detected from Accused's house

(13) About the difficulties faced in going for raids.

(14) Suggestion rejected by witness

This court wish to observe that the cross-examination of the main witness does not seem to have taken the defence case to an acceptable position to absolve the Accused party, though court should not finally decide until the defence case is considered and analysed.

However in view of the position taken by the learned President's Counsel, I wish to observe that once cross-examination of a witness had been closed by the defence, re-examination of the witness need to commence to explain matters in cross-examination which could leave the story of a witness partly heard unless re-examined. These are provisions relating to the law of evidence, as law permits the full account of the witness could be fathomed only at the close of the re-examination. Since the Accused-Appellant's attempt to demonstrate that the main witness contradicts his own evidence. It is necessary to look at the position whether heroin was in the possession of Tarzan and not the Accused? I will incorporate in this Judgment part of the re-examination to understand the point in a better way.

ප්‍ර: උගත් නීතිඥ මහතා තමාට යෝජනා කලා, 'ටාසන්' ලග තිබී මත් ද්‍රව්‍ය සොයා ගත්තා කියා?

උ: ඔව්

ප්‍ර: ඒ මත් ද්‍රව්‍ය ප්‍රමාණය තිබුනේ මේ නඩු කටයුත්තට අදාළ මත් ද්‍රව්‍යට පරිබාහිරව?

උ: ඔව්

ප්‍ර: එය මේ නඩුවට සම්බන්ධ කර තිබෙනවාද?

උ: නැත

එම මත් ද්‍රව්‍ය ත්බුනේ පො: සැ: 30762 සේනරත්න භාරයේයි. මේ විත්තිකරුගෙන් ලබා ගත් හෙරොයිනි තිබුනේ මා භාරයේයි. ටාසන් යන පුද්ගලයාගෙන් සොයා ගත් භාන්ඩ සේනාරත්න භාරයේ ත්බුනා.

ප්‍ර: ටාසන් ලග පැකට් කියක් තිබුනාද?

උ: එකයි

ප්‍ර: මේ විත්තිකරුගේන් ලබා ගත් භාණ්ඩ තිබුනේ බැග් එකක දමායි?

උ: ඔව්

ප්‍ර: මුදා තබන විට ටාසන්ගේ භාරයෙන් ගත් ඒවා මේ කඩු කටයුත්තට සම්බන්ධ කලාද?

උ: නැත

The above material seems to fill in the gaps if at all if correctly understood which makes the position somewhat different from way the defence argues. Therefore I cannot fault the trial Judge's views as regards above.

However let me now refer to the other submissions and points raised by learned President's counsel, as follows:

It was submitted that the trial in this case commenced on or about November 2001 and the Judgment was delivered on December 2006. The trial Judge who delivered the Judgment never heard any evidence, and at least four Judges heard this case other than the trial Judge who delivered the Judgment. Defence case commenced on 27.10.2005. Learned President's counsel refer to the order of the learned High Court Judge dated 07.07.2006 (pg. 371). No proper consent recorded at folio 373. No proper adoption of evidence. Section 48 of the Judicature Act not considered correctly. The demeanor and deportment of witness is in question, since the trial Judge who delivered the judgment had no opportunity to consider the demeanor and deportment of witness. The learned trial Judge's ought not to have adopted the evidence. The adoption of proceedings alone would not be sufficient according to learned President's Counsel. He added that the discretion under Section 48 of the said Act must be applied reasonably. He also argued that the requirement as per Section 203 of the Criminal Procedure Code to pass Judgment has been flouted. It was argued that the word 'forthwith' would mean within a reasonable time or as soon as practicable. 65 NLR 499. In this regard the case reported in 1999(1) SLR 299 would be of importance. The provisions of Section 203 of the Code are directory and not mandatory. This is a procedural

obligation that has been imposed upon the court and its non compliance would not affect the individuals' rights unless such non compliance occasions a failure of Justice.

In view of the above learned President's Counsel argue that his client has not had a fair trial.

Learned President's Counsel inter alia also referred to the evidence that transpired from the main witness at folios 148/149 to demonstrate that the receipt of information was false. It is not recorded that information would be provided the next day. Attention of court also drawn to the contents of folios 203 & 204. It was also suggested that the defence case has not been correctly evaluated. Learned High Court Judge has misdirected himself on facts. Witness Tarzan's evidence not correctly analysed. He adds that the learned High Court Judge rejected 'Tarzan's' evidence without a basis (pgs. 420, 424 & 425).

In reply the learned Additional Solicitor General emphasized inter alia that there had been no challenge to the prosecution case by the defence. There was no attack by the defence as regards the evidence led by the prosecution's main official witnesses, or any attempt to doubt their testimonial trustworthiness. In other words the defence case has not been put

or suggested to the prosecution witness. Perusal of the evidence of the prosecution witnesses I find that the position in this regard submitted to court by learned Additional Solicitor General is correct, to a very great extent. Learned Additional Solicitor General suggested the failure of the defence to contest the following items of evidence.

(a) Entry in pocket note book. Nothing unusual.
(b) Information of informant not challenged.
(c) Subsequently, the raid
(d) Defence case i.e not a word about 'Bakery Malli' and his role/records heroin in a tin buried etc.
(e) False implication not suggested.
(f) Identity not challenged of production/parcels
(g) Chain of events and its custody form recovery up to handing over to Government Analyst.

The learned Additional Solicitor General also referred to the suggestions of the defence (pg. 166) being denied by the official witness. He argued that the conduct of the police raid party is normal and consistent. As such it is legitimate, in the circumstances of the case. Then as regards the proceedings at 155/156 last question? Misjoiner/disjoinder of the of the question? There is no error in the proceedings and invited court to the next question. පු: මොහු ප්‍රධාන ගෝලයා. It was emphasized by learned Additional

Solicitor General that the answer cannot be considered as Tarzan had heroin, which is out of context, based on entirety of the evidence.

As regards the defence case it was argued, by learned Additional Solicitor General that the dock statement does not contemplate of any assault or injury to him. There are contradiction in the dock statement and that of the evidence of Accused's wife (pg. 299). Witness is Tarzan, an untrustworthy witness who is a drug addict for over 15 years, and consumes drugs daily (twice a day).

This court having heard both the learned counsel who are experienced in the law and privileged to be President's Counsel, argued each others' case vociferously. However before I express my views on the verdict of the trial Judge and evidence led, there is a very fundamental issue that has to be given very serious thought. Based on my views, the parties could decide to reject such views, and it is still open to canvass same before the Apex Court. Was the Accused-Appellant afforded a fair trial?

There is no doubt that the trial Judge who delivered the Judgment; never had the opportunity to hear the evidence led before the High Court. The trial Judge who delivered the Judgment only had the opportunity to hear oral submissions of counsel on either side at the close of the defence case. The

proceedings of 21.7.2006 and thereafter confirm this position. The proceedings of 21.7.2006 also state that the defence is willing and had consented to adopt the evidence and proceed with the case to the very end before the trial Judge who delivered the Judgment. Perusal of the proceedings I find that as and when a Judge took over the hearing of this case the Accused party and the prosecution agreed and consented to proceed with the trial and adopt the evidence already led.

On the other hand the Accused party highlighted before this court the delay in the delivery of the Judgment (over one year) and the loss of opportunity as regards demeanor and deportment for the trial Judge who delivered the Judgment. Thereby argued that the Accused-Appellant did not have a fair trial. The right to a fair trial is a fundamental right. It cannot be denied. Article 13(3) of the constitution guarantees this right in no uncertain terms. This is a worldwide, accepted concept (vide article 10 of the Universal Declaration of Human Rights; Article 14(1) of the International Covenant on Civil and Political Rights). Apart from the above it is a matter of interest and I wish to quote the following passage.

Mr. Justice James Cecil Walter Pereira Q.C., one of Sri Lanka's greatest Jurists said: A Ceylon Court of Justice is a British Court of Justice. Re. Vanny Aiyar (1915) 18 NLR 181. During Two Centuries, the Court of Sri Lanka have closely adhered to the principles laid down by the English Court, to achieve fairness in the Administration of Justice. But, as it has been shown, some of those principles had been recognized and applied in Sri Lanka long before the arrival of British in that country (A.R.B Amarasinghe. The Legal Heritage of Sri Lanka Chapter IX (1999). Indeed some of the principles followed by the English Courts have roots way beyond the depths of its indigenous legal system; for instance, there is the principle that the law must be open, and there is the principle that the other party must be heard *(pg. 780 Judicial Conduct Ethics and Responsibilities – Dr. A.R.B. Amarasighe).*

The provisions contained in Section 48 of the Judicature Act, read thus:

> "In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trail or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh:

Provided that in any such case, except on an inquiry preliminary to committal for trial, either party may demand that the witnesses be re-summoned and re-heard, in which case the trial shall commence afresh.

The power to continue the trial from the point it was stopped or to re-summon witness and commence the proceedings afresh is vested with the trial Judge. The Proviso to the above section enables the parties to demand that the witnesses be re-summoned and re-heard. Nevertheless the discretion of the Judge cannot be interfered with under any of the circumstances as contemplated by the said section. I wish to add that the discretion recognized by the said section is however not absolute. The yardstick of fairness and reasonableness would be the deciding factor which always has to be kept in mind, by any Judicial mind. This is the point at which the trial Judge who takes over the case need to decide that by his decision as per Section 48 of the said Act, would meet the ends of justice, and not a mere mechanical exercise. He or she should decide to do justice to the case in hand and in this context an adoption of proceedings alone may not suffice, notwithstanding this being a individual and a sole decision of a Judge and discretion of the presiding trial Judge. All Judges need to be learned in the law and at the same breath there should be efficient case management and be conscious of court

surroundings/proceedings, no doubt are equally important in the Administration of Justice. I refer to the earlier view on this problem reported in *Samaraweera Vs. Jayawardena 4 NLR 106.*

> In this connection it is submitted that Bonser C.J presiding over the Supreme Court of Sri Lanka in the case of Samaraweera v Jayawardena 4 N.L.R 106 has held "In a case where the decision depends altogether upon the credit to be given to the plaintiff and his witnesses, it is not proper for a judge who has not heard the plaintiff and his witnesses to decide on their veracity and trustworthiness, when he has the means in his power of judging for himself by calling and examining them".

Let me also refer to a somewhat recent case where Judgment was delivered by *Justice Sallam CA (PHC) APN 46/03*.

Held: "the duty of the Judge to make up his mind with regard to three alternative courses embodied in Section 48 cannot always be entrusted or surrendered to the parties to decide, Even if the parties are willing to adopt the evidence (as is usually done) the discretion is exclusively within the powers of the succeeding Judge".

In so far as the instant matter is concerned, as the case for the prosecution had been closed, when the succeeding Judge took over the matter, taking into consideration the seriousness of the charges leveled against the accused-respondents, the number of witnesses who had already testified (among them were eyewitnesses and those who gave circumstantial evidence) it would have been much beneficial to both sides (even though the Judge of the High Court was empowered to act on the evidence partly recorded by the predecessor and partly and partly recorded by her and then deliver the judgment) had the Judge succeeded in office, exercised the discretion under (3) above, namely to have formed the opinion that it is fit to re-summon the witnesses and commence the proceedings afresh, despite the fact that the parties were prepared to adopt the evidence. Had it been done, it

would have been rather unlikely that the case would have reached the end that in fact reached. This should not be misconstrued as my having expressed anything to convey directly or otherwise, that the evidence led at the trial warrants a conviction of the accused-respondents. All what I have endeavored at best, is to justify my view that there has been a miscarriage of Justice by reason of the learned High Court Judge not having heard the witnesses for the prosecution and observe their demeanor and deportment whether in favour of them or against, as she has done in the case of the accused-respondents, one of whom has given evidence before her and others made dock statements. Here one could see a clear discrimination that had occasioned by reason of the prosecution case having been heard before another judge. I must emphasis that it always may not happen in every case. But the application of Section 48 may vary depending on the facts and the circumstances of each case. Since it is a discretion vested in court, it should have been exercised diligently for it is said that a person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so he must in the exercise of his discretion do not what he likes but what he ought . In other words, he must, by use of his reason, ascertain and follow the course which reasons direct. He must act reasonably (Roberts v. Hopwood 1925 A.C 578 at 613)".

The proceedings at 07.07.2006 and 21.07.2006 indicates that the only request the parties, both defence and prosecution made was to allow them to again address court. The defence never made any attempt to apply to court to re hear the case. In terms of the provisions in Section 48 of the above Act the Accused party has a right to demand and request court, to rehear. This attitude of Accused party no doubt had an impact on the Judge's mind and

thereafter parties made oral submission. However it is a matter for the succeeding trial Judge to give serious thought to the requirement of Section 48 and also consider whether Accused ought to be afforded to be given a fair trial and thereby call upon the witnesses to be re-heard. The two orders delivered to continue with the case, but gives no indication as to whether the trial Judge really exercised his discretion. This court cannot substitute its views since Section 48 is left to the discretion of the trial Judge, and the Appellate Court will be slow to interfere unless it has occasioned a miscarriage of justice. The way the defence handled the prosecution case, in the absence of intervening at the cross examination stage and to put the defence case at the correct stage would entitle the trial court to draw certain inferences. This court would not unnecessarily interfere with questions of fact. Appeal court will and should not disturb findings of primary facts. 1993 (1) SLR 119. But on the other hand even so, trial Judge is bound to consider and analyse the defence case.

Therefore we find that the Accused-Appellant had not been denied of a fair hearing, in the circumstances of the case in hand. My views on this aspect of the case cannot be the rule but need to be decided on a case by case basis.

On the question of application of Section 203 of the Code, courts have held that provisions contained in the said section are directory and not mandatory. Delays tend to cause injustice to a p arty and a judgment delivered with inordinate delay is worthless but in the case in hand from the point of concluding the oral submission on 05.09.2006, the trial Judge delivered the Judgment on 12.12.2006. There cannot be a serious complaint since within ¾ months judgment was pronounced, and in today's contest it is somewhat a laudable for the trial Judge to do so, who would have to peruse the entirety of the evidence having heard the oral submissions only. However it is important to keep in mind the dicta in the case of Dabare Vs. Republic of Sri Lanka 2009 (1) SLR 92

Held:

The provisions of Section 203 are directory and not mandatory. This is a procedural obligation that has been imposed upon the Court and its non compliance would not affect the individuals rights unless such non compliance occasions a failure of justice.

Per Sisira de Abrew J.

> "Courts below cannot use this judgment as an authority to refrain from delivering the judgments within the time period in Section 203, one should not forget that after the close of the defence case, the accused is generally remanded till the delivery of judgment. Thus when the judgment reserved is put off without reasons the accused would continue to be in the custody of remand without reasons. It is the duty of the trial

judge to deliver his judgment within the time period stipulated in Section 203 – failure to comply with Section 203 or postponing judgments without reasonable grounds would lead to erosion of public confidence in the judicial system and would lead to laws delay".

The case of the prosecution had been proved beyond reasonable doubt according to the trial Judge. But that alone would not bring the desired result. Defence led evidence, and does the defence case create a reasonable doubt in the prosecution case? If a reasonable doubt could be created the Accused-Appellant need to be acquitted. However prior to all above, there was a point raised as regard the dates of receipt of information. Defence argue that the prosecution witness does not disclose the truth to court as the information was received not on the 24th but on 23rd, since the others in the raid party namely Bandara and Kumarasiri were told to come early on 24th morning. Though there was much argument on the date and time of receipt of information the answers given by the witness has to be accepted as recorded. These items of evidence cannot be a ground to consider, whether prosecution witnesses are untrustworthy? This does not really demonstrate untruthfulness, but may raise some suspicion which cannot assist court to give a benefit to the defence?

It is an error by the trial Judge to state that the dock statement of Accused should be corroborated by evidence of other witnesses of the defence. Let me consider the dock statement of the Accused. The following points are urged.

(1) Sleeping in the house at the relevant time.
(2) Arrest by the officers of the Narcotics Bureau in the house.
(3) Not arrested on the road. It is false, statement by the prosecution that Accused was arrested on the road.
(4) Officers of the Narcotics, Bureau came with 'Tarzan' to the house.
(5) No drugs detected in house and Accused not in possession of drugs.

There could be instances where Accused only makes a dock statement. Based solely on the dock statement if a reasonable doubt is created the Accused has to be acquitted. There is no principle that the dock statement need to be corroborated. It is a misdirection by the trial Judge to state that the dock statement has not been corroborated. In fact Tarzan's evidence corroborates the version of the Accused to the extent that the Accused was arrested at the house and not on the road as submitted by the prosecution. The other fact that Tarzan came with the officers of the Narcotics Bureau to Accused's house is also an item of corroboration of Accused's evidence. This is

the trial Judge's failure and lapse of not being able to identify items of evidence led at the trial.

I find a total misdirection of the trial Judge at folios 420/419 where 'Tarzan's' testimonial trustworthiness had been analysed and rejected. The basis of rejection has been summarized by the trial Judge, as regards 'Tarzan'. It is stated that witness 'Tarzan' is a drug peddler. He has consumed drugs for over 15 years. He daily consumes drugs. (Twice a day). Tarzan has been convicted by court of law for possession and trafficking etc. These are items of evidence admitted in the evidence of 'Tarzan'. It is a misdirection of law to conclude that he is an untruthful witness on account of above. There is no denial by 'Tarzan' of above. Trial Judge states that a person in the caliber of 'Tarzan', who is a drug addict and such evidence is untrustworthy of credit when he is called upon to give evidence on behalf of another drug trafficker, or drug peddler (pg. 420). Trial Judge's view is that Tarzan has a distorted mind is on one hand unsupported by medical evidence. Trial Judge has failed to analyse Tarzan's evidence in an unbiased manner and without importing personal knowledge of the witness and as such it cannot be a ground to reject his testimony in court. A witness can be rich, poor, disabled, person convicted of an offence, suffer mental disability during lucid periods (certified by Doctor)

person of young age etc. What is important is not the character/position but the evidence that transpires in court is trustworthy or has credence or not. Whatever the person is, can the court rely on the evidence led in court, and not based on his position in life?

Another error of the trial Judge is as follows, 'Tarzan' need not in evidence explain as to why the officers of the Narcotics Bureau did not arrest 'Bakery Malli' (බේකරි මල්ලි) as Tarzan's evidence was that the drugs belongs to 'Bakery Malli'. Nor should 'Tarzan' explain as to why the officers arrested the Accused as his position was that he was not in possession of drugs. I observe that the trial Judge has misdirected himself in this regard (pg. 424). Further the State has not been able to contradict the testimony of Tarzan at any point. I also cannot find a suggestion made to witness Tarzan to demolish his creditworthiness, or suggest he is a liar?

As regards witness Tarzan's failure to explain I prefer to include trial Judge's views (422) ..... මෙම නවමුනි සක්ෂිකරු (Tarzan) ප්‍රකාශ කර ඇත්තේ මෙම මත්ද්‍රව්‍ය වල අයිතිකරු බේකරි මල්ලිගේ බව කිහිප වරක් ප්‍රකාශ කලත් ඔවුන් බේකරි මල්ලිව අත්අඩංගුවට ගැනීමට කටයුතු නොකල බවයි. එහෙත් මෙම මත්ද්‍රව්‍ය බේකරි මල්ලිගේ බව ප්‍රකාශ කර ඔහු සිටින බව ප්‍රකාශ කල මහතුන්ව (Accused) අත්අඩංගුවට ගැනීමට හේතුව මෙම සක්ෂිකරු අධිකරණයට පැහැදිලි කර නැත.

Such an explanation is not required in law by the witness. It is a matter for the police raid team, to provide evidence.

It is very unfortunate that this court has to observe that the trial Judge has not considered and given his mind to the defence case properly. If there were contradictions, it is the duty of the trial Judge to deal with them in the same manner he dealt with the prosecution case and decide as to whether such infirmities go to the root of the defence case. The prime duty of the trial Judge is to weigh the evidence correctly and decide whether the defence case is capable of creating a reasonable doubt in the prosecution case. Instead he has allowed himself to be influenced by importing his personal knowledge. However good or bad the witness or whether he has a bad track record should be forgotten and not the deciding factor. Trial Judge should only concentrate on the evidence before court.

Let us give our mind to the evidence of the wife of the Accused Kumudini Perera. She woke up at about 6.00 a.m. and kept water to boil to prepare tea and went to the toilet. She, her husband and their small children slept on a mat. Husband was also put up by her and he was not sleeping thereafter, but just lying on the mat. When the wife was preparing tea somebody knocked on the door saying " යළිවරක් යළිවරක්" . Accused's

husband told her to see and she opened the door and saw 'Tarzan' handcuffed with three others. She calls the others, මහත්වරු. She works at 'Little Lion' (Maliban), and usually leaves home by 6.45/or 10 to 15 minutes before 7.00 a.m. It is her husband the Accused who takes her to the place of work by his three wheeler. It is in evidence-in-chief that the officer who came to the house assaulted the husband එයාට ගැහැව්වා පාරවල් දෙකක් තුනක්. The officer searched the house but could not find anything. In cross-examination it was put to this witness that the Accused was arrested on the road and not in the house but the witness rejected that position. She was also asked that the Accused at the time of arrest had a bag in his possession but that position was rejected. She was also questioned as to whether she complained about her husband being taken into custody. Her answer was in the negative.

The learned trial Judge's views on the above witness Kumudini Perera seems to suggest that certain trivial aspects which are also factually incorrect and not supported by precise evidence had been considered, to arrive at a conclusion on the testimonial trustworthiness of the witness. I note;

(a) Trial Judge takes the view that the Accused was sleeping by 6.30 a.m. , when the officers of the Narcotic Bureau arrived, and witness was to leave for work by 6.45 a.m. being unacceptable. This court observes that which happens in any household in the morning of the day is being

described by witness. It is incorrect for the Judge to state that Accused had been sleeping at 6.30 a.m. The Accused was lying on the mat but not asleep. The time at which the witness leaves the house for work is immaterial and not so relevant at all. There is absolutely nothing very significant to disbelieve the witness on trivial matters. This is a perverse finding and a total misdirection.

(b) Then on the question as to who tapped on the door. Witness Kumudini has stated that a person tapped on the door saying " යාළුවෙක් යාළුවෙක්". 'Tarzan' in evidence said he tapped on the door and said he is 'මම ටාසන්' . The main point to be considered is that there was a tap on the door. Whether it was a friend or 'Tarzan' cannot throw much light on the issue since uncontradicted evidence suggested that when the door was opened witness saw 'Tarzan' handcuffed with the officers of the Narcotics Bureau. Tapping on the door and opening the door and 'Tarzan' appearing near the door with officers remains un-contradicted. This is another highly trivial aspect. It cannot be considered to be a contradiction as in cross-examination 'Tarzan' said when somebody inquired who is it he said 'මම ටාසන්'. It appears that the trial Judge had been hunting for discrepancies without accepting the evidence in the context it was uttered. What is essential in a trial is to ascertain whether the witness is speaking the truth.

Open mind of the Judge should be maintained to consider the evidence that transpired in court. In evaluating evidence of a witness a court or tribunal is not entitled to reject testimony and arrive at an adverse finding in regard to testimonial trustworthiness and credibility on the mere proof of contradiction or the existence of a discrepancy. Court must weigh and evaluate the discrepancy and ascertain whether the discrepancy does go to the root of the matter. If not such a discrepancy cannot be given too much importance. Witnesses should not be disbelieved merely on trivial discrepancies. Entirety and totality of the matter should be carefully considered, vide Best Footwear (Pvt.) Ltd. and two others Vs. Aboosally former Minister of Labour 1997(2) SLR 138. The above equally apply to the prosecution as well as the defence case.

In all the facts and circumstances of the case in hand, this court observe that in this type of cases filed in terms of the provisions of Poisons, Opium and Dangerous Drugs Ordinance and the like cases pertaining to Dangerous Drugs, prosecution leads very systematic type of Evidence and police witnesses maintain records and produce them in court if the need arises. It may not be an easy task for the defence to get a breakthrough in the prosecution case. As observed above the Accused-Appellants case had also not been put properly to the prosecution witnesses to an extent, at the trial.

Nevertheless defence led evidence and the Accused-Appellant made a dock statement which is evidence in the case. Whether it be the evidence of the prosecution or defence, it has to be evaluated correctly and analysed.

We have highlighted in this Judgment certain lapses and misdirections of the learned trial Judge. It is our view that rejection of the defence case is highly unreasonable and unacceptable in view of the evidence led on behalf of the Accused-Appellant. The dock statement and the evidence of the defence witnesses remain uncontradicted in very many important aspects. The place of 'arrest' is an important item of evidence. Accused-appellant, and the two supporting witnesses maintained that the Accused-Appellant was accosted and arrested in the house of the Accused. 'Tarzan' took the police to the house. It is uncontradicted evidence provided by the Accused party and Accused not being in possession of Dangerous Drugs in his house. Prosecution story is different on this aspect. As such the defence case on this aspect creates a reasonable doubt.

Evidence of the prosecution was that nothing was detected and recovered from the house of the Accused. Merely because witness 'Tarzan' had a bad track record of being a drug peddler and a drug addict would not be a ground to reject his testimony in court since witness 'Tarzan' admitted to

that fact. To add to this, evidence of the Accused's wife provide details of what happens in a household in the early hours of the day in question. It is quite natural and normal for the wife to conduct and act in that way from the time she woke up at about 6.00 a.m., until her husband was arrested by the police. This is the usual behavior of a wife. All three inclusive of the Accused provided details of arrest and place of arrest which was never contradicted, by the prosecution, or made to look improbable. What the law requires is only to prove a reasonable doubt, and that had been accomplished. Some minor details have been projected by the trial Judge and on that alone to reject the defence version is unjustified in the context of the case. We are satisfied that a reasonable doubt is created and the trial Judge's views to reject the defence case is not plausible and it is improper to reject the defence case.

I would not hesitate to extend the dicta to the defence case guided by the Judgment of the Indian Supreme Court in Bhoginbhai Hirjibhai Vs State of Gujarat (1983) A.I.R. S.C. 753. At page 755 Indian Supreme Court held thus: "By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time

span. A witness is liable to get confused, or mixed-up when interrogated later on. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another".

Therefore we are not inclined to hold with the views of the learned High Court Judge. As such we set aside the conviction and sentence and acquit the Accused-Appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL