

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

**In the matter of an Appeal in terms of
Section 331 of the Criminal Procedure Act
No. 15 of 1979.**

**The Democratic Socialist Republic of Sri
Lanka.**

COMPLAINANT

Vs,

Mohomad Haneefa Noor Mohomad,
Meda Pathana, Silvia Road,
Bora gasa,
Badulla.

C.A No 280/2009

ACCUSED

H/C Colombo Case No.2599/2005

And,

Mohomad Haneefa Noor Mohomad,
Meda Pathana, Silvia Road,
Bora gasa,
Badulla.

ACCUSED-APPELLANT

Vs,

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

Respondent

Before : **Vijith K. Malalgoda PC J (P/CA) &**
H.C.J. Madawala J

Counsel : **Amila Palliyage for the Accused –Appellant,**
Shanaka Wijesinghe DSG for the Respondent.

Argued On: 26.03.2015

Decided On: 03.07.2015

Order

Vijith K. Malalgoda PC J

The Accused Appellant was indicted before the High Court of Colombo for possession and Trafficking of 168.4 grams of Heroin, offences punishable under *section 54A(d)* and *54A(b)* of the Poisons Opium and Dangerous Drugs Ordinance as amended by *Act No 13 of 1984*.

After trial the accused was found guilty of both counts against him and sentenced for life by the High Court on **14.12.2009**. Being dissatisfied with the above conviction and sentence the accused had preferred this appeal to the Court of Appeal.

During the Argument before this court counsel for the Accused -Appellant raised four grounds of Appeal.

- 1) Learned Trial Judge seriously misdirected himself with regard to the defence taken up by the Accused Appellant and there by denied a fair trial
- 2) Learned Trial Judge failed to ensure a fair trial by not facilitating the assigned counsel for the preparation of his case
- 3) Learned Trial Judge erred in Law by perusing the notes of the investigating officer and also considering the same as substantive evidence in the case
- 4) Learned Trial Judge failed to consider the defence version which is more probable than the prosecution version

The prosecution version of this case can be summarized as follows;

Officers attached to Colombo Crimes Division led by P.S Galappaththi was engaged in petrol duty on the day in question i.e. on **25.10.2004** and on a tip off received from an private informant, arranged a road block near Wellawatte Railway Station on the sea avenue. At 12.13 pm they stopped a Three-wheeler at the road block, bearing Reg. No.203-3739 and searched the vehicle. There were two passengers in the rear seat and out of them, 35 packets containing suspected brown powder were recovered from a bag carried by one Mohamad Haniffa. Out of 35 packets recovered, 34 packets were in the range of 4 - 4.5 cm and one packet was around 7 cm. The bag carried by Haniffa contained some cloths and the said packets were recovered from the bottom of the bag.

The suspect and productions were produced at the station around 14.05 pm and there after recorded a statement from him at 15.10 pm.

With regard to the 1st ground of appeal, counsel brought to the notice of this court the following observations by the Learned Trial Judge. At page 14 of his Judgment, the Learned Trial Judge has observed that the Accused had taken a defence of alibi and since the Accused had failed to follow the provisions of *section 126 (1) of the Criminal Procedure Code*, the said defence should be rejected. However the Learned Trial Judge has thereafter proceeded to considered the defence to ascertain whether the said defence creates a doubt on the prosecution case.

The Accused had decided to make a dock statement when he was explained of his rights by the High Court at the conclusion of the prosecution case. In his dock statement the accused had said that, on the day in question he had gone to Lakmal Hotel in Bambalapitiya to meet a Pakistani National who is known to him for some time. This person used to bring cloths from Pakistan. When he was talking to the Pakistani National in his room, Pakistani National went out to answer a telephone call. Few minutes later 4 Police Officers entered the room, waited for few minutes, when he informed the Police Officers that the Pakistani National who occupied the room had gone out, but since he didn't return, the accused was brought to the Police Station with two bags they recovered from the room. He denied the fact that he was arrested at Wellawatte as described by the prosecution.

The Learned Trial Judge concluded that this is a defence of Alibi since the suspect denies the fact that he was arrested at Wellawatte around 1.00 pm, but the accused admits the fact that he was arrested by Police around the same time at a different place.

In a defence of alibi, the position taken up by the Accused is that, since he was elsewhere at that time, he couldn't have committed the offence as explained by the prosecution.

In the present case the position taken up by the Accused is quite different. He denies the fact that he was arrested at Wellawatte around 1.00 pm but states that he was arrested around the same time by the same officers at Bambalapitiya inside a hotel. We cannot agree with the contention of the Learned High Court Judge, that the Accused had taken up a defence of Alibi.

On the other hand Learned High Court Judge was of the view that proper notice of alibi had not been given by the defence. Even if this court concludes that, the defence taken up by the accused is an alibi, I observe that the accused had taken up this defence throughout the case and in fact made several suggestions to witness to the effect that the arrest took place in Bambalapitiya and not in Wellawatte. However we find that no prejudice has caused to the Accused by the position taken up by the Learned Trial Judge since he has proceeded to consider the merits of the defence and come to a conclusion based on its merits.

Learned defence counsel brings to the notice of this Court the proceeding of **12th May 2009** recorded at page 159 of the brief. It is recorded on that day "Accused Present, it is informed that Attorney-at-Law Lakshman Perera is appearing for him but there is no appearance for the accused. Attorney-at-Law Amila Udayangani is assigned for the Accused, will be taken up later."

At page 160 it is recorded that on the same day i.e. on **12.05.2009**, the accused is present Attorney-at-Law Amila Udayangani appear for him and Government Analyst Kokawala Pathiranage Chandrani's, Evidence had been recorded on that day. Cross examination of the defence commenced at page 182 and concluded at page 184. It appears that the entire evidence of the Government Analyst was concluded on that day. Counsel for the appellant further brings to the notice of court, that the counsel who appeared for the Accused prior to **12.05.2009** had continued to appear for the accused on the next day i.e. on **05.06.2009**. He further submits that, there is no indication on the proceeding of **12.05.2009** that the copies of necessary documents

including Copy of the Indictment, Government Analyst Report etc. had been handed over to the assigned counsel on that day.

Article 13 (3) of the constitution reads as follows;

“Any person charged with an offence shall be entitled to be heard, in person or **by an Attorney –at- Law at a fair trial** by a competent court.”

Section 4 (1) (b) of the ICCPR Act No 56 of 2007 reads as follows;

4 (1) A person charged of a Criminal Offence under any written Law, shall be entitled-
b). to defend himself in person or through legal **assistance of his own choosing** and
where he does not have any such assistance, to be informed of that right-

From the material placed before this court, we observed that the counsel retained by the accused, or in other words the counsel of his own choosing had appeared the day prior to **12.05.2009** and also continued to appear after **12.05.2009**. However on **12.05.2009** the court had assigned a counsel to appear for him and thereafter proceed on the same day to lead the evidence of the Government Analyst and concluded the evidence by completing the cross examination on the same day. As pointed out by the Learned Counsel for the Accused- Appellant the court record does not indicate whether the copy of the Indictment and the copy of the Government Analyst’s Report were handed over to the counsel on that day.

Article 13 (3) guarantees the right of an accused person to be heard in person or by an Attorney-at –Law **at a fair trial**. **Section 4 (1) (d) of the ICCPR Act** assures every person charged of a criminal offence to defend himself in person or **through legal assistance of his own choosing**.”

Even though the Trial Judge had decided to assign a counsel to appear for the Accused – Appellant on **12.05.2009**, the counsel so assigned should have a reasonable opportunity to defend his case. As evident from the case record we cannot satisfy that the Trial Judge had afforded an opportunity to the counsel assigned by court to prepare for the case for the Accused. At the same time we are mindful of the provisions in ICCPR Act and of the view that by assigning a counsel to appear only for the **12th May 2009**, the Accused –Appellant was denied legal assistance of his own choosing.

Learned counsel for the Accused-Appellant further brings to the notice of this court the following passage from the Judgment of the Learned Trial Judge.

“නමුත් ඔහුගේ සටහන් පරික්ෂා කිරීමේදී ඔහු පොලීස් ස්ථානයෙන් පිටත් වූ ස්ථානයක් සඳහන් කර නොමැති අතර පැය 11.05 ට පත්සල පාර ධුජලිකේෂන් හන්දියේදී අනෙකුත් නිලධාරීන් සමඟ මාර්ග බාධක රාජකාරියේ යෙදී සිටින විට පුද්ගලයකු පැමිණ පො.සැ. 3404 ගලප්පත්ති සමඟ කතා කරමින් සිට පිටව ගිය පදනම පෙන්වා දී ඇත.

මෙම විමර්ශන සටහන් අනුව ප්‍රියන්ත සවස 6 සිට පැය 14 ක් දක්වා මෙහෙයුම් රාජකාරියේ යෙදුනා යැයි සඳහන් කිරීම සහ පො.සැ. ගලප්පත්ති කාර්යාලයෙන් පැය 5.45 ට පිටත්ව ගියා යනුවෙන් සඳහන් කිරීම සඳහා කැරුවත් දෙදෙනාගේ සාක්ෂි අතර මෙම නඩුවේ මූලයටම බලපාන පරස්පරතාවක් ලෙස නොසලකමි.”

Whilst bringing the notice of this court the above paragraph of the Judgment, Counsel for the Accused –Appellant submitted that the conduct of the Learned Trial Judge was violation of **section 110 (4) of the Criminal Procedure Cade** since he had considered the notes made by Police Officers as substantive evidence in this case.

The court observes that the Learned Trial Judge had gone through the investigation notes of witness Priyantha for him to clarify whether there was contradiction between the evidence of Police Constable Priyantha and P.S Galappaththi. After going through the investigation Notes he has arrived at a conclusion that there is no contradiction between the evidence of Priyantha and Galappaththi. **Section 110 (4) of the Code of Criminal Procedures Act 15 of 1979** only permits a **criminal court to use statements or information not as evidence in the case, but to aid it in such inquiry or trial.**

The question of, the extent to which a statement or information can be used has been discussed by the Supreme Court and Court of Appeal on numerous occasions and it was repeatedly confirmed that it cannot be used as evidence or in other words to corroborate the evidence.

On this issued I am mindful of the decision by this court and Supreme Court including **Keerthi Bandara V. Attorney General 2002 (4) Sri LR 245, Sheela Sinharage V, Attorney General 1985 (1) Sri LR 1, Bandara and other V. Attorney General 1999 Sri LR (3) 168** and several other decisions.

In the present case, we observe that the Learned Trial Judge after observing a discrepancy with regard to the time referred to by the police witnesses Priyantha and Galappaththi, had decided to go through the notes made by the said two officers. He has not used the notes of Priyantha as evidence in the case but used it to clarify certain factual position.

In support of his 4th Ground of Appeal, counsel for the Accused-Appellant submitted that the Learned Trial Judge had failed to evaluate his defence with the prosecution version to assess what version was more probable. According to the dock statement of the Accused as well as the position taken up by him during cross examination of prosecution witnesses, was that, he was arrested at Bambalapitiya when he went to meet a Pakistani national. Appellant further submitted the fact that recovery of 12 similar packets at Hotel Lakmali on the same day confirms the above position.

However the position taken up by the Learned Deputy Solicitor General was that, a second detection was carried out on the same day at 16.00 pm at Hotel Lakmali by a police team led by SI Kalupahana, where Police Constable Galappaththi was only a member and twelve similar packets were recovered at that time was unchallenged. He brought to the notice of this court, that when SI Kalupahana was summoned by the prosecution to lead evidence with regard to sealing of productions etc, no questions were put to him with regard to the detection at Lakmali Hotel on that day and the fact that a second detection was carried out by police at Lakmali Hotel was unchallenged and therefore the contention of the Appellant that the version of the Appellant was more probable was not correct. In fact the Learned Trial Judge had considered this aspect at page 11 of his Judgment.

When considering all these issues I find that there is no merit in the 3rd and 4th grounds raised by the Learned Counsel for the Accused-Appellant. However with regard to the 1st ground of Appeal. I am of the view that the Learned High Court Judge had misdirected himself with regard to the defence taken up by the Accused-Appellant, but, I concluded that no prejudice had been caused to the Accused-Appellant from the above misdirection for the reason that the Learned High Court Judge after concluding that the Accused-Appellant had taken up a defence of alibi had proceeded to evaluate the dock statement and subsequently come to a conclusion on different reasons.

However as pointed out by me earlier, Learned Trial Judge has failed to afford an opportunity for the assigned counsel to get ready for the case on **12.05.2009** the day on which the Government Analyst had given evidence. It is further concluded that by assigning a counsel to appear for the Accused only for one day, the court had denied legal assistance of his own choosing which is a violation under ***section 4 (1) (b) of the ICCPR Act.***

For the reasons set out above I conclude that the Learned Trial Judge had failed to ensure a fair trial to the Accused –Appellant and there for decides to order a fresh trial.

Appeal allowed Re- Trial ordered.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. MADAWALA,

I agree,

JUDGE OF THE CUORT OF APPEAL