

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

In the matter of a petition of appeal in
terms of section 331 (1) of the Code of
Criminal Procedure Act No 15 of 1979 in
the Democratic Socialist Republic of Sri
Lanka.

C.A. Case No.179/2013

The Democratic Socialist Republic of Sri
Lanka.

H.C. (Colombo)

Case No. 1157/2013

Complainant

Vs.

Hettiarachchige Asoka,
No. 22/G7, Sedawatte,
Wallampitiya.

Accused

And

Hettiarachchige Asoka,
No. 22/G7, Sedawatte,
Wallampitiya.

Accused Appellant

Vs.

1. Narcotic Bureau,

Police Headquarters,

Colombo.

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant Respondent

COUNSEL

: Ananda Hettiarachchi with
Wimukthi Jayasinghe for the
Accused Appellant.
Dilan Ratnayake SSC for
the Respondent.

ARGUED ON

: 06.02.2015

DECIDED ON

: 24.07.2015

P.W.D.C. Jayathilake, J

Sub Inspector Tennakoon had left the Narcotic Bureau at 9.20 a.m and reached Peliyagoda bus halt and was at the Kelani bridge between 10.15 and 10.20 a.m, and arrested a woman named Asoka around at 10.25 a.m there. There was a parcel in the bag carried by her which contained 75g and 400mg of heron. Sub Inspector Tennakoon was accompanied by police constable Pushpakumara and woman police constable Shyama, Sub Inspector Tennakoon's private spy too was there. The Police Team came by the police jeep, the jeep stopped near the Peliyagoda Kovil and three of them and the spy walked to the said bus halt leaving another 4 constables in the jeep. Sub Inspector Tennakoon and his two assistants were in civil dress.

Hettiarachchige Asoka, the Accused Appellant was indicted for having in her possession 20.4g of heroin under Sec. 54 of " Poisons, opium and Dangerous Drugs (Amendment) ACT, No.13 of 1984". She was convicted and sentenced to life term imprisonment after trial. Being dissatisfied with the conviction and sentence, the Accused Appellant preferred this Appeal to this court.

The Police Constable Pushpakumara and woman Police Constable Shyama gave evidence at the trial, but Sub Inspector Tennakoon had not been a witness as he was not available for the trial.

The evidence of Pushpakumara and Shyama was that they had seen Sub Inspector Tennakoon who was with the spy taking the bag from the Accused Appellant and searching it. W.P.C. Shyama had searched the Accused Appellant only after coming back to the Narcotic Bureau. The defence suggested to the prosecution witnesses that this sort of arrest had not taken place at the said place and it was a fabricated story. The Accused Appellant in her dock statement has stated the following.

"I was bathing my daughter's child around 9.00 a.m. Then, three officers arrived. A woman, of course, did not come. Sub Inspector Tennakoon asked who Asoka was. Then I said, it was me. He asked me to come to get a statement from me. The police jeep was near the guard room. Renuka was in that place. Leaving her there, I was taken away, saying that a statement be taken from me. But I knew nothing."

The learned counsel for the Appellant alleged that an irreparable damage has been caused to the Appellant by the failure of the prosecution to lead evidence of Sub Inspector Tennakoon who was the chief investigating officer who led the raid. The Appellant was convicted on the hearsay evidence, hence witness

No. 2 Pushpakumara or witness No.3 Shyama couldn't answer in respect of the vital facts of the raid because they had not made investigation notes.

It has been held in the case, **"The state Vs Nihal"** (2011 BLR 273) that

"Unlike in the case where an accomplice or a decoy is concerned in any other case there is no requirement in law that the evidence of a police officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars".

His Lordship Justice Suresh Chandra, in this statement, has referred to the police officer who conducted the investigation or the raid. There, His Lordship has further emphasized, *"However caution must be exercised by a trial judge in evaluating such evidence and arriving at a conclusion against an offender"*

The learned Senior State Counsel in replying to the counsel for the Appellant submitted that though the prosecution listed Sub Inspector Tennakoon as witness No.1, he was not called because he had migrated from the island. He further submitted that this had deprived the prosecution of the opportunity to call the best evidence in this case. According to the learned Senior State Counsel witness No.2 had participated in the raid and had observed every aspect of the arrest of the Appellant, the sealing of the productions and the handing over of them. But, Senaka Pushpakumara, witness No.2 of the

indictment, in his evidence, has admitted that he did not make notes about the raid. Therefore, it is obvious that he has given evidence after nearly seven years of the raid by perusing the notes made by Sub Inspector Tennakoon.

The court condones that a police witness testifying in court perusing notes of another police officer is not a healthy practice in criminal proceedings in my opinion.

The woman police constable Shyama is not a credible witness, says the counsel for the Appellant as she did not answer some vital questions and always stated that she did not remember. For instance, Shyama did not remember the clothes worn by the Appellant, didn't know the place of detection, couldn't say whether the informant spoke with Sub Inspector Tennakoon, did not know where the bus stop was situated, couldn't state from which direction the Appellant came to the bus stop. It appears that an opinion occurs to anyone who peruse the evidence of Shyama, that she may not have participated in the raid.

But, the argument of the Senior State Counsel is that the learned trial judge in this case had had the advantage of hearing all the witnesses before him prior to the judgment being considered. He states that this allowed the trial judge to observe the demenour and deportment of all witnesses including the Accused and the defence witnesses whereby the trial judge was well placed to decide

on whether the prosecution of the case was tenable or whether the defence version causes a doubt in the prosecution case.

When considering this point, the matter raised by counsel for the Appellant regarding an arrest of a woman called Renuka by Sub Inspector Tennakoon comes into play. The learned counsel alleged that learned state counsel who conducted the prosecution case in the trial court did not draw the learned trial judge's attention in respect of the entries made by Sub Inspector Tennakoon relating to Renuka. He has cited the case **Kapila Ratnayaka Vs. A.G** (Court of Appeal 70/2006). In the said case, it has been held that it is the duty of the prosecution to present all facts against as well as in favour of the Accused. If not there would not be a fair trial.

The learned trial judge has rejected the dock statement of the Accused Appellant giving two reasons. One is the fact that she was bathing a child when the police team arrived at her place, has not been suggested to the prosecution witness. The other is the inability of the police team to reach the Accused Appellant's place by 9.00 O' clock in the morning. But the learned trial judge has not paid any attention to the matter referred to, by the Accused Appellant about a woman called Renuka.

Suspects are always helpless before police officers. Therefore, court should also be considerate about what suspects state without being attentive only to what police officers state.

When considering the facts revealed in evidence, I am of the opinion that prejudice has been caused to the Accused Appellant on the failure of calling the main witness, namely, Sub Inspector Tennakoon who had organized and conducted the raid and arrested the Accused Appellant. Therefore, the conviction of the Accused Appellant shall not stand as many reasons exist for doubt about the prosecution case. In the circumstances, I set aside the conviction and the sentence passed by the trial court and acquit the Accused Appellant.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA, J

I agree

JUDGE OF THE COURT OF APPEAL