

320/2012

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

Maileen Arachchige Suramya

Damayanthi Perera,

**Accused-Appellant**

**C.A.Case No:-320/2012**

**H.C.Colombo Case No:-237/01**

**V.**

Hon.Attorney General

Attorney General's Department,

Colombo 12.

**Before:-H.N.J.Perera, J . &**

**A.H.M.D.Nawaz, J.**

**Counsel:-Neranjana Jayasinghe for the Accused-Appellant.**

Shanaka Wijesinghe D.S.G for the Respondent

**Argued On:-10.02.2015**

**Written Submissions:-26.02.2015**

**Decided On:-08.05.2015**

**H.N.J.Perera, J.**

The accused appellant was indicted in the High Court of Colombo under section 54 A(d) & 54 A(b) of the Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for being in possession

and trafficking 9 grams of heroin on or about 29.09.1999 at Mattakkuliya. The learned High Court Judge by his judgment dated 27.07.2012 found the accused-appellant guilty of the charges, convicted and sentenced the accused-appellant to Life imprisonment on each count. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

The version of the prosecution was that on an information received from a private informant by S.I.Basnayake of the Police Nacotic Bureau arranged and conducted a raid. I.P.Nihal Perera with a police party which included S.I.Basnayake P.C. 19427 P.S.17859 Wickremasinghe, P.C. 30762 Senaratne, P.C.19427 Gamini, P.C.6486 Chaminda, P.C. 3024 Bandara, P.C. 25141 Guneratne and W.P.C.Priyani . They were all dressed in civil except for P.C.Gamini who was in the uniform. All of them including the informant left towards Mattakkuliya Samagipura in the vehicle No. 61-7856 at 14.45 and came up to the police post Mattakkuliya.

According to the evidence of I.P.Perera thereafter S.I Basnayake and WPC Priyani with the informant proceeded towards Wickremasinghe road on foot. Thereafter the informant proceeded alone towards Wickemasinghe pura and came back in a little while and informed I.P.Perera that the said woman was seen near the Budu Medura of the Housing scheme wearing a flowered dress and to go and search her. Thereafter I.P.Perera with S.I.Basnayake and W.P.C.Priyani proceeded on foot towards the said Housing scheme and saw a woman wearing a flowered dress near the Budu Medura. Witness Perera accosted the accused-appellant and discovered a rose coloured celephane bag in her right hand with heroin. Having taken the accused-appellant into custody the accused-appellant was taken to the Nacotic Bureau and the witness I.P.Perera testifies as to the sealing of productions and the witness WPC Priyani also refers to the

acts of the main investigation officer IP Perera with regard to the arrest, detection, sealing, and handing over productions to witness Sunil Perera .

Prosecution led the evidence of two witnesses who participated in the raid in order to prove the case beyond reasonable ground.

The learned High Court Judge in his judgment came to a conclusion that there are no vital contradictions in the evidence of the two witnesses either inter se or per say.

The defence case was that the accused-appellant was at home she heard someone knocking at her door. She opened the door and saw Wimal Perera and a group of persons in front of her door. They questioned her about the whereabouts of her husband and she said that he has gone to work. Thereafter they took her to custody stating that they were in fact looking out for her and that her name also appears in the list.

It is contended by the Counsel for the accused appellant that the learned trial Judge has arrived at the said conclusion without taking into consideration the following contradictions.

- (1)According to SI Nihal Perera P.C Gamini was in uniform and according to witness WPC Priyani all the officers were in civil.
- (2)According to SI Nihal Perera the informant was present from the time they left the Nacotic Bureau. And according to witness WPC Priyani the informant joined them on their way.
- (3)According to SI Nihal Perera they had gone to Mattakkuliya area and the vehicle had been stopped near the police check point at Mattakkuliya. And according to him with him IP Basnayake ,WPC Priyani and the informant had got off the vehicle and four of them had walked about 75 meters in a wide

road named Sri Wickema Road and reached a small road to their left side which is between two lines of houses. It was the evidence of IP Nihal Perera that police officers stopped near the entrance to the narrow road and the informant walked in to the lane and came back in five minutes and told that the accused-appellant is coming out from her house wearing a frock. According to the said witness Perera having given the information the informant left and that he with the witness Basnayake and WPC Priyani went in and took the accused-appellant into the custody near the Budu Medura. According to WPC Priyani the vehicle proceeded in Sri Wickema road passing the police check point and stopped in a place in between two lines of houses. According to this witness she remained in the vehicle and the informant got off the vehicle and walked into the narrow road and she was taken by Witness Nihal Perera only after the informant came back and gave the information of the accused-appellant to Witness Nihal Perera.

The WPC Priyani had categorically stated that the accused-appellant who was coming out of the house was shown to witness Nihal Perera by the informant.

The learned trial Judge after analysing the evidence of the two main witnesses for the prosecution has come to the conclusion that the evidence given by the said witnesses are inconsistent.

Section 134 of the Evidence Ordinance reads as follows:-

No particular number of witnesses shall in any case be required for the proof of any fact.

In fact as a matter of inveterate practice, more than cautiousness, especially in drug related offences, where raids are conducted by

trained police officers, it is fair to require corroboration. It is only then the defence will have the opportunity to challenge the veracity or the credibility of the prosecution witnesses and get an opportunity to contradict the said witnesses. To mark contradictions per se, where trained and experienced police officers give evidence in seemingly impossible. In this type of cases it is the evidence of the police officers who are trained officers of state are the main witnesses. Therefore the courts are duty bound to be careful in accepting and acting on the evidence on face value.

E.S.S.R.Coomaraswamy in *The Law of Evidence Volume 2 Book 1* at page 395 dealing how the police evidence in bribery cases should be considered has stated as follows:-

“In the great many cases, the police agents are, as a rule unreliable witnesses. It is all ways in their interest to secure a conviction in the hope of getting a reward. Such evidence ought, therefore, to be received with great caution and should be closely scrutinized. Particularly where their evidence is the only corroborating evidence of the evidence of the accomplice”.

R.K.W.Goonasekera in his book “*Bribery*” at page 93 commented on this fact as follows:-

“More than once the Supreme Court has been disturbed by the tendency of trial judges to treat the evidence of prosecution witnesses in bribery cases with particular sanctity. In *Mohamed Saleem’s* case the court observed that the evidence of prosecution witnesses does not carry any presumption of truth and should not be given undue weightage. In *Siriwardene V. The Attorney General* the Chief Justice cautioned trial judges against proceeding upon an irrebuttable presumption that police officers engaged in the bribery

commission's Department always speak the absolute truth as this would be to deny the accused the opportunity of a fair trial."

By the same token the same principles should apply and guide the judges in the assessment of evidence of excise officers in narcotic cases. In this case the prosecution has led the evidence of two witnesses who took part in the raid. The SI Perera's evidence is contradicted by the evidence of WPC Priyani in many aspects. There is a doubt as to who was speaking the truth whether it was SI Perera or the WPC Priyani. It is also not very clear whether at the time she gave evidence she had the notes before her or whether she gave evidence from her memory. There is no clear evidence that the police received any information about a woman suspect at that time. When the evidence of the two witnesses is taken together their evidence contradicts each other. The learned trial Judge too has arrived at the conclusion that the evidence of the two main witnesses is inconsistent. There is a doubt as to whether the witness WPC Priyani was in fact present at the time of the arrest of the accused-appellant.

The evidence led by the prosecution indicates that the accused-appellant had been taken into custody near her house. But strangely the police had not cared to search the house of the accused-appellant. The accused-appellant has denied the fact that WPC Priyani ever arrested her or searched her. She has categorically stated that no WPC was present at that time. The accused-appellant has mentioned that Wimal Perera has come to her house, obviously referring to SI Nimal Perera. It is very clear that the trial judge has rejected the evidence of the accused-appellant for trivial reasons.

The function of an appellate court in dealing with a judgment mainly on the facts from court which saw and heard witnesses has been

specified as follows by Macdonnell C.J.in the King V. Guneratne 14 Ceylon Law Recorder 174:-

“I have to apply these tests as they seem to be, which a court of appeal must apply to an appeal coming to it on questions of fact:

- (1) Was the verdict of the judge unreasonably against the weight of the evidence,
- (2) Was there misdirection either on the law or the evidence;
- (3) Has the court of trial drawn the wrong inferences from the matters in evidence.

Similarly Wijewardene, J, stated in Martin Fernando V. Inspector of police, Minuwangoda 46 N.L.R.210, that:-

“An appellate court is not absolved from duty of testing the evidence extrinsically as well as intrinsically” although “the decision of a magistrate on questions of fact based on demeanour and credibility of witnesses carries great weight “Where “a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt.”

For the aforesaid reasons I find that it is unsafe to allow the conviction to stand. Accordingly I set aside the conviction and the sentence dated 27.07.2012.

Appeal allowed.

**JUDGE OF THE COURT OF APPEAL**

**A.H.M.D.Nawaz, J**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**