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

In the matter of an Appeal against
an order of the High Court under
Sec. 331 of the Code of Criminal
Procedure Act No. 15 of 1979.

Krishnamurthi Ravishanker.

Accused-appellant

C. A. No : 29/2013

H. C. Colombo No : 3016/2006

V.

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

Respondent

BEFORE : **H. N. J. Perera, J. &**
K. K. Wickremasinghe, J

COUNSEL : AAL Darshana Kuruppu for the accused-appellant.
SSC Dilan Rathnayake for the Attorney General.

ARGUED ON : 18th June 2015

DECIDED ON : 14th August 2015

K. K. WICKREMASINGHE, J.

The accused-appellant in this case was indicted in the High Court of Colombo on two charges for trafficking and for being in possession of 41 Grams of heroin which is an offence punishable under section 54A.(b) and 54A.(d) respectively of the Poisons, Opium and Dangerous Drugs Ordinance.

After trial and conclusion of both prosecution and defence, on 18.01.2013 the learned Trial Judge had convicted the appellant for both charges and imposed a sentence of life imprisonment on each charge to run concurrently.

The Accused-Appellant preferred this appeal against the aforesaid conviction and the sentence.

At the trial, the prosecution had led evidence of six witnesses to prove the prosecution case. According to the prosecution, the incident happened as follows:

The Accused-Appellant Krishnamurthi Ravishanker (herein after referred to as the appellant) resided in Magazine road, Borella, and was a labourer in the Manning Market of Colombo. Two police officers: S.I. Upeka Gajabahu Kalansooriya and S.I.

Upali Bandara (named Witnesses PW1 and PW2 respectively) dressed in civilians clothing met an informant as per the instructions of the OIC of the Borella police station: Amarasiri Daluwatte. The informant revealed the necessary information of the appellant including the fact that the appellant was in possession of illegal drugs. Then the police officers and the informant travelled to a nearby junction and waited for the appellant near a common well. Once the appellant arrived, the informant identified the appellant and informed the officers and left whilst the police officers shortly made the arrest of the appellant upon discovering drugs in a bag the appellant was carrying.

According to the Learned Counsel for the appellant, the grounds for appeal are as follows;

1. The Learned Trial Judge has failed to consider the inherent improbability of the prosecution version;
2. The Learned Trial Judge has failed to take into account the failure on the part of the Prosecution to list and call as a witness OIC Amarasiri Daluwatte of the Borella Police;
3. The Learned Trial Judge has not adequately analysed the evidence led at the trial;
4. The Learned Trial Judge has failed to consider the bad character of the main investigation officer Upeka Gajabahu Kalansooriya and come to a conclusion that this case had been fabricated against the Appellant; and
5. The Learned High Court Judge has failed to consider the case of the defence.

Considering the first ground of appeal regarding the contention that the Learned Trial Judge has failed to consider the inherent improbability of the prosecution version; the Learned Counsel for the Appellant argues that according to the facts presented by the prosecution the informant who was known only to the OIC, had waited for the police officers (S.I. Upeka Gajabahu Kalansooriya and S.I. Upali Bandara, named PW1 and PW2, who were unknown to the informant.) Further it was stated that the said officers waited near a common well at the village for about half an hour. (Pg. 79 of the brief) The Learned Counsel for the Appellant contests that the facts seem improbable as no informant would have waited to meet an

unknown officer and the officers could not have gone unnoticed in such a crowded area of the village, such as the one in this case.

The Learned Counsel for the Respondent argues in turn that there are no marked contradictions or material omissions which would lead us to question the credibility of the witnesses and the narration of their facts. The Learned Counsel for the Respondent also drew attention to the fact that the officers in question are trained police officers and thus have managed to conceal the fact that they were police officers.

Considering the argument of the Learned Counsel for the Appellant that the police officers did not search the home of the accused, the Learned Counsel for the Respondent submits that as the heroine was found from the appellant and thus the police officers took the appellant into custody and immediately took the productions to PNB. This reveals that having discovered the drugs from the appellant, the police officers were foremost concerned about arresting the appellant.

Considering the contention that the Prosecution has failed to list and call OIC Amarasiri Daluwatte of the Borella Police as a witness, the Learned Counsel for the Appellant argues that as a result of such a failure of the Prosecution that the Counsel for the Appellant could not cross examine the OIC. The Respondent in turn argues that the only participation of the OIC in the raid was providing information about the informant whom the raiding party had to first meet. Upon meeting the informant and receiving information regarding the appellant, the informant then pointed out the appellant to the raiding party, consisting of witnesses named PW1 and PW2 who then arrests the appellant. The Learned Counsel for the Respondent argues that the OIC is thus not an essential witness to disclose the events that took place.

The Learned Counsel for the Appellant also argues that the involvement of the police officer, S.I. Upeka Gajabahu Kalansooriya, witness named as PW1, in the pending bribery trial against him and his remand in custody for 99 days makes him an unreliable witness who most likely fabricated a case against the appellant. The

Learned Counsel for the Respondent argues that as the trial is pending it has no effect on the police officers character.

Further the Learned Counsel for the Appellant argues that the appellant was arrested due to the animosity between the appellant and an individual named "Prassana." The Learned Counsel for the Respondent rejects such a claim as no evidence was brought forth to prove this claim.

Considering the ground of appeal regarding the failure to call the OIC as a witness, the Learned Counsel for the Appellant submitted the case of **Karuppaiya Punkody Vs. A.G. CA 11/2005**. The facts of that case differs from the present case, as the officer in question in the case of **Karupaiya Punkody Vs. A.G.** participated in the raid, whereas in the present case, the OIC did not. We too agree that since the OIC's role in the raid was very limited (in only asking the informant to assist the officers who conducted the raid: witnesses' names PW1 and PW2) as seen in the proceedings of pages 45, 46 and 109 of the brief, there was no special need for the OIC to be called as a witness.

In the case of **Walimunige Johnn Vs. The State 76 NLR 488** it was held that *"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witnesses constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witnesses evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to the presumption under section 114(f) of the Evidence Ordinance."* And thus the absence of evidence of the OIC, does not cause a missing link in the Prosecution's case.

Considering the credibility of the police officers who arrested the appellant and the probability of the events that were narrated, we find no reason to disagree with the analysis of the trial judge. (Pg. 203 and 205 of the brief) In the case of **A.G Vs. Devundarage Nihal 2011 1 SLLR 409**, it was held that *"There is no material 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. However caution must be exercised by a trial judge in evaluating such evidence and arriving at a conclusion against an offender. It cannot be stated as a rule of thumb that the evidence of a police witness in a drug related offence must be corroborated in material particulars where the police officers are the key witnesses. If such a proposition were to be accepted it would impose an added burden on the prosecution to call more than one witness on the back of the indictment to prove its case in a drug related offence however satisfactory the evidence of the main witness would be." As decided in the above mentioned case, the testimony of witness PW1 is therefore not in question and is further corroborated by PW2.

Considering the argument of the Learned Counsel for the Appellant regarding the involvement of the police officer, S.I. Upeka Gajabahu Kalansooriya, (witness PW1) in the pending bribery trial against him and his remand in custody for 99 days, the Learned Counsel for the Respondent argues that as the trial is pending, it cannot be of substantial evidence to suggest that Officer Kalansooriya's testimony is invalid. This contention is further strengthened by the fact that the testimonies of both officers corroborate substantially.

The Learned High Court Judge's judgement (pg. 208 – 210) reveal the reasoning of the Learned High Court Judge's decision and thus it is clear that the case of the appellant and the dock statement have been duly considered by the Learned High Court Judge. Considering the argument of the Learned Counsel for the Appellant regarding one "Prasanna," there is no evidence to suggest this is true, except for the dock statement made by the appellant. (pg. 183 of the brief) Thus the trial judge had rejected the appellants dock statement after due consideration.

The fact that the appellant has not successfully been able to rebut the prosecution's case has also been taken into account. In ***Sumanasena Vs. Attorney General 1999 3 SLR page 137***, His Lordship Justice Jayasuriya, held thus "*When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the*

highly incriminating circumstances established against him." This is especially relevant to the accusation made against one "Prasanna."

Further in the case of ***Baddewithana Vs. The Attorney General 1990 1 SLR 275*** His Lordship Justice P.R.P. Perera held that *"From the failure of an accused to offer evidence when a prima facie case has been made out by the prosecution and the accused is in a position to offer an explanation, an adverse inference may be drawn under S. 114 (f) of the Evidence Ordinance."*

Similarly in the case of ***Boby Mathew Vs. State of Karnataka 2004 Cr. L.J. Vol. III page 3003*** the body of the deceased person was found tied to a cot in the accused-appellant's room. But the accused-appellant did not offer any explanation to the evidence led by the prosecution. Indian Supreme Court held that the accused was bound to offer an explanation to the evidence led by the prosecution. His conviction of murder was affirmed by the High Court of India.

Considering the above judicial decisions and the evidence produced by the Prosecution and the lack of evidence adduced by the Appellant, we find no reason to disturb the findings of the trial judge in the present case. Thus we affirm the conviction and the sentence.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1. Karuppaiya Punkody Vs. The Attorney General CA 11/2005
2. Walimunige Johnn Vs. The State 76 NLR 488
3. A.G Vs. Devundarage Nihal 2011 1 SLLR 409
4. Sumanasena Vs. The Attorney General 1999 3 SLR page 137
5. Baddewithana Vs. The Attorney General 1990 1 SLR 275
6. Bobby Mathew Vs. The State of Karnataka 2004 Cr. L.J. Vol. III page 3003