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

In the matter of Appeal in terms of section 331(1) of the code of Criminal Procedure Act No 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs,

Mohamed Nawas Mohamed Siras alias Jan

ACCUSED

CA/179/2010
(High Court Case No 2298/05)

And,

Mohamed Nawas Mohamed Siras alias Jan

ACCUSED-APPELLANT

Vs,

The Democratic Socialist Republic of Sri Lanka

RESPONDENT

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

Counsel : **Neranjan Jayasinghe for the accused appellant**
Shanaka Wijesinghe DSG for the A.G.

Argued on : 07 /08 /2015

Judgment Date : 11 /09 /2015

H. C. J. Madawala J

This is a case where the Accused Appellant was indicted under section 54A (d) of the Poisons Opium and Dangerous Drugs Act as Amended, for having in possession of 5 grams of Heroin. After trial the accused appellant was convicted for the above offence and was sentenced to life imprisonment.

Aggrieved by the said convictions and sentence the accused appellant has preferred this appeal to this court. The learned counsel for the accused appellant urged the grounds of appeal as militating against the maintenance of the conviction, as stated in paragraph 6 of the petition of appeal.

We heard the submissions of both parties and have considered same. According to the evidence led in this case the version of the prosecution was that information was been received by a private informant by Police Sub inspector Rangajeewa who informed the main witness sub inspector Paul Fernando the said information, that a person named "Jan" is selling Heroin near the house of Dhammi. According to the tip off received from the informant inspector Paul Fernando arrange a raid and conducted and took all necessary step to search the members of the raid team and proceeded in the vehicle with the said team to the house of Dhammi. This team had met the informant near the state printing corporation at Baseline road, Borella at 19.05 and at that time the informant had informed that Jan is still selling Heroin at the same place. Only Paul Fernando and Rangajeewa got down from the vehicle and they came near the Magazine road where the informant showed and pointed out the suspect. Paul Fernando and Rangajeewa proceeded about 200 meters in the Magazine road and turn to his right and walked about 100 meters and from there on another narrow road for 5 meters. Then he saw the accused appellant who had in his hand a bag with money amounting Rs.37730/=and was searched on the road and found a parcel of Heroin in his right

trouser pocket. That was a green coloured bag and there was a knot in it. They also found a key of the house of Dhammi from the custody of the accused and entered the house using the said key, which was an upstairs house. According to the evidence led in the trial the said house had been used by the Heroin users. The accused appellant had temporary occupied the ground floor of this house.

On being informed by the informant, SI Paul Fernando together with SI Rangajeewa arrested and searched the accused and there after having found the bag with money and the heroin parcel the accused was produced to the Police Narcotics Bureau and the productions were sealed in the presence of the appellant.

Accused Appellant in his dock statement took up the position that, he was taken in to custody by the police at about 6 O'clock at the Borella Junction. As he has lost his job two years ago, one of his uncle has requested to him to meet him at 10 O'clock in the following morning. When he was walking along the Magazine Road in order to buy a cigarette, a person has come and held him by his T shirt and has asked whether he was Shantha. The said person questioned "ධම්මිකා කියන ගැනිගේ බඩු විකුණන්නේ උඹ නේද?" He has replied that he does not know and was going to meet his girlfriend. There after the two officers had assaulted him and took him to a three storied house. The door behind the house was opened and the two officers had said "උඩ බඩු තියන තැනින් අරන් දීපන් නැත්නම් හොයල ගන්නවා.." He has said that he doesn't know and that he is not a resident. There after three or four officers came to the kitchen and searched the pantry cupboards and there after searched the tiles on the floor. However they did not find anything there. There after they took him upstairs and went in to a room where they found a bed and two pillows. The said persons searched the pillow and the mattress and whilst they were searching the pillow they found some money inside the pillow case. There was also wooden stair case and the officers tapped and broke open the stair case and found a parcel. He said that he did not know anything and that he was not Shantha and he was a Muslim named "Jass".

On a perusal of the written submissions tendered to court the main contention of the accused appellant was that the learned High Court Judge perused the I.B. extracts and came to a conclusion at the time of preparing the Judgement without putting it to the witness that the notes that were

entered by both officers are similar. It was contended by the defence that no opportunity was given to cross examine the witness as to the contents that were in the I.B. and the substantive evidence given in Court had been rejected on the strength of the I.B. notes. It was submitted that the Learned Trial Judge in his Judgement at page 5 has stated as follows,

"රංගජීව තම විමර්ශන සටහන් වල සාක්ෂි දන්වන ආකාරයට සටහන් තබා ඇති පදනම පෙනී යන අතර පෝල් ප්‍රනාන්දුගේ විමර්ශන සටහනේ ද ඒ අකාරයට රංගජීවගේ සාක්ෂියට ගැලපෙන බව පෙනී යයි."

If he had not adopted the contents of the I.B. as evidence Learned High Court Judge could not have stated what was said in Court by Rangajeewa is not correct. The Learned High Court Judge who adopted the contents of the I.B. as evidence and rejected the evidence given at the trial and comes to a conclusion that according to I.B. notes there is no difference regarding the distance. In this situation Learned High Court Judge was refusing the substantive evidence on the strength of the entries in the I.B.

We find that the Learned High Court Judge has taken into account information books notes in some instances to reject the evidence in the case. We find this is a clear misdirection. In the case of **Peiris vs. Eliathamby 44 NLR 207 Hearne J. held**: "Entries in a Police Information book cannot be used as evidence for the purpose of testing the credibility of a witness". In the case of **Inspector of Police Gampaha vs. Perera 33 NLR 69** : Where, examining the complaint and his witness, the Magistrate cited the Police to produce extracts from the information book for his perusal, before issuing process. Held," that the use of information book was irregular". It was further decided that applying the principles laid down in the above judicial decisions that in Criminal Trial Judges are not entitled to use statements of Police and not produced in evidence to discredit witness. Accordingly we hold that in the present case the trial Judge was wrong when he rejected the dock statement of the accused appellant without giving any reasons for same.

Section 110 (4) Code of Criminal Procedure Act No. 15 of 1979 read as follows,

"Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Save as otherwise provided for in section 444 neither the accused not his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely

because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply:"

The court observes that section 110(3) of the Criminal Procedure Act lays much emphasis on statement made to the Police in the course of investigations to be used according to the provisions of the evidence ordinance are subject to limitations there in Thereafter the next subsection section 110(4) contemplates to give the trial Judge assistance in the conduct of the trial or inquiry and permit the judge to peruse the statement only to assist him at such trial or inquiry The strict limitation placed under the said section is to prevent the Judge using such material as evidence. The section used in contemplates merely to assist the Judge but evidence to be led or which surface cannot be made use of by the trial judge and if the judge decides after perusing the statement to use it as evidence in any form would be a total prohibition which results in a miscarriage of justice. However a mere perusal by the trial Judge of I.B. extracts for purpose of clarification would not be objectionable as per se section 110(4) of the Code of Limitation if at all under section 110(4) is not to use of as evidence .

Sheela Sinharage Vs. The Attorney General (1985) 1 SLR 1: Held –

Section 110 (4) of the code of Criminal Procedure Act. No. 15 of 1979 empowers the High Court Judge to use a statement made at a non-summary proceeding to aid him at the trial but it cannot be used as evidence in the case. Under section 33 of the evidence Ordinance given by a witness in a judicial proceeding can be proved at the later stage of the trial in accordance with the provisions of the laws of evidence and criminal procedure. But here the High Court Judge perused the evidence given at the non-summary inquiry of the deceased's statement to Dr. Wass and used material contained in it for the purpose of his judgment without having taken any steps to have such material placed before him in evidence. This procedure is illegal and cannot be justified.

Keerthi Bandara vs. Attorney General:

Quare : (4) It is for the Judge to peruse the information book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial.

We observe that in the present case before us the said I.B. notes have been perused by the learned High Court Judge not at the trial or Inquiry but at the time he wrote the judgement. Although a trial judge is permitted to peruse the I.B. notes for clarification he should peruse same at the trial or inquiry giving an opportunity for the defence counsel to examine same and granting him an opportunity to cross examine if necessary . As such we find that the learned trial Judge perusing the I.B. notes at the time he is writing the judgement is not permitted. As such we hold that the learned High Court Judge has erred in this regards.

Further we find that the net quantity according to Narcotic Bureau 15 gram and 200 mg. According to Government Analyst the quantity they received was 13.4 grams no evidence had been obtained from the Government Analyst as to the reason for the discrepancy. The Learned High Court Judge has failed to address his mind for the above issue.

For reason set out above I hold that the Trial Judge had failed to ensure a fair trial to the Accused Appellant and there for decides to order a fresh trial.
Appeal partly allowed Re-trial ordered.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J (P/CA)

I agree.

PRESIDENT OF THE COURT OF APPEAL