

C.A.261/2013

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

In the matter of an appeal against the
Order of the High Court under section
331 of the Code of Criminal Procedure
Code Act No.15 of 1979 as amended.

Herath Mudiyanseelage Nilantha Thushara

Accused-Appellant

C.A.Case No:-261/2013

H.C.Colombo Case NO:-5604/2011

V.

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

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

K.K.Wickremasinghe, J.

**Counsel:-Anil Silva P.C with S.Jagodaarachchi for the Accused-Appellant
Shanaka Wijesinghe D.S.G for the Respondent.**

Argued On:-11.08.2015

Written Submissions:- -

Decided On:-26.10.2015

H.N.J.Perera, J

The accused-appellant was indicted before the High court of Colombo on four counts under Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984. Count one and two for being possession of grams 1.53 and 2.725 of heroin and count three and four for trafficking of grams 1.53 and 2.725 of heroin on or about 13.04.2009 at Peliyagoda punishable under section 54 A (b) and 54 A (g) Of the said Act. The learned High Court Judge by his judgment dated 17.12.2013 found the accused-appellant guilty of all four charges, convicted and sentenced the accused-appellant for 15 years R.I and also to a fine of Rs 300,000/-and in default for six months R.I for the 1st charge and also to a period of 7 years R.I for the 2nd charge. The accused-appellant was also sentenced to a 15 years R.I and to a fine of Rs.300,000/- and in default to six months R.I for the 3rd charge and to a term of 7 years R.I. for the 4th charge. The said sentences to run concurrently. 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 after an unsuccessful raid at the Magul Pokuna area in Ragama S.I. Ruwan kumar with seven other officers including a W.P.C was returning towards Peliyagoda on 13.04 2009 received an information from a private informant that heroin business is being carried out at a place close to Dutugemunu Mawatha, Peliyagoda, proceeded towards Welisara Mahabage in vehicle No.61-7448 and met the informant at the Mahabage Junction. Thereafter they stopped the vehicle near Dutugemunu Mawatha and S.I Ruwan Kumara, the informant and P.C Priyantha proceeded up to the turning point of the said Dutugemunu Mawatha and stayed for about one hour for the suspect to arrive. Thereafter the informant showed a person who came in a red colored boxer motor bike. The suspect went towards the Food City and U-turned the bicycle towards Negombo side and stopped.

Thereafter S.I.Ruwan Kumara with P.c Priyantha proceeded towards the said suspect without arousing suspicion and accosted the accused-appellant and discovered a red coloured grocery bag in the right hand side trouser pocket of the accused-appellant. They discovered yet another red bag inside the said bag which contained brown coloured powder and another brown coloured cellophane bag containing blackish substance and identified them to be heroin. Thereafter having taken the accused-appellant into custody they all went to the house of the sister of the accused-appellant in the Gal Borella area , searched the said house and found nothing. Thereafter the accused-appellant was taken to the Narcotic Bureau and the witness S.I.Ruwan Kumara testifies as to the sealing of productions and the witness P.C Priyantha also refers to the acts of the main investigation officer S.I.Ruwan Kumara with regard to the arrest, detection, sealing and handing over productions to witness I.P.Rajakaruna.

Prosecution led the evidence of two witnesses who participated in the raid in order to prove the case beyond reasonable doubt. The witness Priyantha's evidence is compatible with the evidence given by the witness S.I.Ruwan Kumara and this witness was not cross examined by the defence. In short the evidence given by the witness P.C Priyantha had not been challenged by the defence.

The defence case was that the accused-appellant was coming out of the house of his sister in the said motor bike when he was accosted by three persons. They questioned him about 'Chamara' his brother-in-law. His sister too informed them that her husband 'Charmara' is not at home and thereafter two of them entered the house and searched and one officer shouted that they have found the stuff from the kitchen. It was the accused-appellant position that they wanted his brother-in-law to come and surrender but they could not get at him and later he was taken to the Narcotic Bureau instead.

In this case the accused-appellant has not denied that the said officers from the Nacotic Bureau had arrived at his sister's place at Gal-Borella, Kelaniya. He also accept the fact that he was arrested by the officers of the Nacotic bureau on the said date. He admits the fact that the red coloured boxer bike belonged to him. The accused-appellant also does not dispute the fact that the officers of the Nacotic Bureau discovered heroin on the said day. This is not a case where allegation is made that the prosecution had introduced heroin in order to falsely implicate the accused-appellant in this case. The evidence of the prosecution was that nothing was detected and recovered from the house of the accused-appellant's sister.

The accused-appellant had admitted the arrest by the police officers and also the recovery of heroin. He also admits that the police officers arrived at his sister's place at Gal-Borella and searched her house too. He had not denied the fact that the police had discovered heroin on this particular date. The prosecution version is that after the arrest of the accused-appellant with heroin, accompanied the accused-appellant to his sister's house for further investigation 'and searched the said house and found nothing. The accused-appellant had denied that he was arrested at Peligoda and that he had possession of the said heroin in his possession. The learned trial Judge was satisfied with the evidence led by the prosecution and found the accused-appellant guilty and convicted him.

The learned trial Judge in his judgment has opined that the evidence of S.I.Ruwan Kumara was convincing. The defence has failed to mark a single contradiction in his evidence. In the instant case the main investigating officer S.I. Ruwan Kumara has been more than satisfactory and could be even acted without further corroboration. However, in this case his evidence is corroborated by witness Priyantha as well and that evidence is creditworthy. It is also seen that the defence had not

challenged the evidence given by the said witness Priyantha. He has not been cross-examined by the defence. There is no reason to disbelieve his evidence. No objection was taken by the Counsel for the accused-appellant on the question of inwards and outwards journey of the productions between the court and the Department of Government Analyst. In fact the defence had admitted the receipt marked X2 issued by the Government Analyst stating that the said Department had received the said productions in good condition and also the Government Analyst Report marked X under section 420 of the Criminal Procedure Code.

It is clearly seen from the judgment of the learned trial Judge that after analyzing the dock statement of the accused-appellant and the evidence of the witness Wijedasa who was summoned to give evidence on behalf of the accused-appellant, he has totally rejected the said evidence given by the accused-appellant. It cannot be said that the learned trial Judge had rejected the defence version for trivial reasons. The learned trial Judge had carefully evaluated the evidence of the prosecution as well as the evidence led on behalf of the accused-appellant.

A court of appeal will not lightly disturb the findings of a trial Judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong. *The Privy Council V. Fradd V Brown & Company Ltd.* 20 N.L.R 282.

In *King V. Musthapha Lebbe* 44 N.L.R 505 Court of Criminal Appeal held that:-

“The court of appeal will not interfere with the verdict of a Jury unless it has a real doubt as to the guilt of the accused or is of the opinion that on the whole it is safer that the conviction should not be allowed to stand.”

I find that there is no material before this court to support the defence proposition that the accused-appellant did not have the exclusive possession of the heroin discovered. On perusal and consideration of the learned High Court Judge's judgment and totality of the evidence led in the case we are of the considered view that he had come to a right decision in finding the accused-appellant guilty of all the charges.

In conclusion, for reasons stated above I hold that the accused-appellant had failed to satisfy this court on any ground urged on his behalf that a miscarriage of justice had occurred. Therefore I dismiss the appeal of the accused-appellant and affirm the conviction and sentence dated of the learned High Court Judge of Colombo.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

k.k.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL