

107/13

**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
Act No.15 of 1979 as amended.

Kalupahanage Jagath Kumara

Accused-Appellant

C.A Case No:- 107/13

H.C.Colombo Case No:-4769/09

V.

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

Respondent

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

**Counsel:-Amila Palliyage with Nihara Randeniya for the Accused-
Appellant**

Anoopa De Silva S.S.C. for the Respondent

Argued On:-05.08.2015

Written Submissions:-04.09.2015/21.09.2015

Decided On:-11.11.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Colombo for being in possession and trafficking of 1.056 grams of heroin punishable under section 54 (A) and 54 (B) of the Poisons, Opium and Dangerous Drugs Ordinance. After trial the learned trial Judge acquitted the accused-appellant on the 2nd count and convicted and sentenced the accused-appellant for a term of 4 years R I for the 1st count. Aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

In the appeal the Counsel for the accused-appellant relied mainly on two grounds of appeal.

1. The learned trial Judge has failed to consider that the version of the prosecution fails the test of probability.
2. The learned trial Judge has erred in law by failing to consider that The dock statement made by the accused-appellant create a reasonable doubt on the prosecution case.

The version of the prosecution was that on an information received from a private informant by P.C.Rohitha, I.P Ari Ruwan of the police Narcotic Bureau arranged and conducted a raid. The information was that of sale of heroin in the house of one 'Sweep Thushara' who was a lottery seller near the rail way tracks close to Kaluwapalama. I.P.Aruruwan had subsequent to the receipt of the said information reported to the office at 1900 hrs and having selected a team of officers which comprised of PC 35209 Rohitha who received the information, PC 38993 Kumara, SI Paul, together with PS 15066 Ariyawansa as the driver, IP Ari Ruwan had proceeded to search the said officers. All of the officers had been dressed

in civil including IP Ari Ruwan. They left the garage in the three wheeler and the motor cycle at 1945 hrs and reached the Petrol Shed at Peliyagoda at 21 hrs and met the informant who provided the information. Upon meeting the informant IP Ari Ruwan and PC Rohitha had proceeded to the place of raid on foot as led by the informant and passed a long line of shanties that had been located along the Kandy Biyagama road to an area which had been located under the railway line up to the place of raid, the residence where alleged sale of heroin was to take place, which had been located on the land area located under the first column pillar of the Kalu Palama which went over the Kelani river. The informant had led IP Ari Ruwan and PC Rohitha to the place of raid in an inconspicuous manner.

They were led to a shanty house about 10x15 feet in size, and the front door of the said house had been in half opened position. The shanty house of 'sweep Thushara' had been illuminated with lights inside the house and the light located in front of the house been lit.

IP Ari Ruwan had heard the sound of the TV, amidst the sound of children shouting coming from the said house. Witness Ari Ruwan had directed PC Rohitha to the rear side of the house. Having waited for a while to enable witness Rohitha to reach the rear side of the house, the said witness Ari Ruwan had walked in to the said house from the front door. The TV from which IP Ari Ruwan had previously managed to hear sounds had been located on the right side of the house. The TV had been switched on, the witness Ari Ruwan had seen a male and two females and three children inside the house one of which was an infant.

According to witness Ari Ruwan the male had been dressed in orange coloured striped sarong with a blue & white T shirt. The male had been in a seated position on a mat on the floor watching the TV. The two women and the two children had also been in a seated position on a mat

on the floor watching TV. The infant had been resting on a pillow. At this point the witness Ari Ruwan had observed the fist of the male in a clenched position. He had noticed the male clenching into something. Witness Ari Ruwan in his testimony had very clearly stated that at the point of entry the male was seen clenching on to something which was not visible from outside. The moment the witness had entered the house and had introduced himself to be from PNB the male had panicked and had looked frightened and the witness saw the male instantaneously place the clenched hand under the pillow the infant was resting and had further noticed the male poking something under the said pillow from the clenched fist. The conduct of the said male had aroused the suspicion of the witness Ari Ruwan and he had accordingly directed the female to take the infant in to her hands and had thereafter lifted the pillow and had spotted a grocery bag in the shape of a 'guliya'. It had been a yellow coloured grocery bag with the mouth of the said bag been tied up. Upon examination of the said yellow bag he identified the substance to be heroin, based on the smell, appearance, colour of the substance. The witness Ari Ruwan had thereafter taken the said male into custody and identified the accused-appellant as the person whom he had arrested on this particular day in the said house with heroin. PC Rohitha had walked in to the place of detection from the rear door of the house only at the point of arrest subsequent to the detection being made by the witness Ari Ruwan.

The said witness Ari Ruwan had stated that thereafter they went back to the Police Narcotic Bureau with the accused-appellant and that he had the said heroin 'guliya' in his left upper pocket. The net weight of the heroin was determined as 10.400 grams and the productions were duly sealed and handed over to the officer in charge of productions namely IP Rajakaruna.. The said items were positively identified by the prosecution witnesses at the trial. The inward journey and the outward journey of

the said productions to the Government Analyst department had not been challenged by the defense. The Senior Assistant Government Analyst K.P.Chandrani had given evidence in High Court and had positively identified the examined productions as 1.056 grams of pure heroin. The chief investigating officer IP Ari Ruwan's testimony had been corroborated by witness PC Rohitha and IP Rajakaruna.

It was suggested to the prosecution witness Ari Ruwan that no such parcel had been recovered from the possession of the accused-appellant. In his testimony IP Ari Ruwan makes it crystal clear that as he entered the house he had only observed the fist of the accused-appellant in a clenched position. Further he had stated that he noticed the accused-appellant clenching onto something, which was not visible from outside. It is this suspicious conduct of the accused-appellant which prompted him to ask the female to take the infant in to her hand and lift up the pillow with a view to ascertain as to what exactly the accused-appellant tucked under the pillow.

The Counsel for the accused-appellant had confined his argument mainly to the issue of probability of the prosecution story. The witness Ari Ruwan had clearly testified that on the information received by an informant they have proceeded with the help of the informant to the house of one 'Sweep Thushara'. It is not disputed that IP Ari Ruwan and PC Rohitha had arrived at the said house of 'Sweep Thushara'. It is the position of the witness Ari Ruwan that they did not find any other male inside the house except for the accused-appellant.

The accused-appellant had taken up the position that he was falsely implicated. It is highly improbable for the PNB officers to fix an unknown suspect against whom there was no motive alleged. There was no evidence that any of the officers had any motive to fabricate a case against the accused-appellant. The said two PNB officers had arrived at

the said house of the 'Sweep Thushara' on an information received by an informant to the effect that heroin being sold at the said premises of 'Sweep Thushara'. At the time of the arrest the said 'Sweep Thushara' has not been at home. But the PNB officer Ari Ruwan had seen the accused-appellant seated on the floor on a mat watching TV and had noticed the accused-appellant clenching on to something in his hand. This had aroused the suspicion of the witness Ari Ruwan and also had seen the accused-appellant tucking something under the pillow of an infant who was lying on the floor. It is apparent from the evidence led in this case the witness Ari Ruwan had got the impression that the accused-appellant was trying to hide something which he had at that time in his hand under the pillow and therefore had immediately got a female who was there to take the infant from the pillow and had examined under the said pillow where the said child was resting and had found the said parcel of heroin under the pillow. Therefore on careful examination of the evidence given by the said witness it very clear that the witness Ari Ruwan had recovered the said parcel containing heroin from the possession of the accused-appellant.

According to the dock statement of the accused-appellant it was admitted that he was arrested on the given date by the PNB officers at the said house of his sister but denied the fact that the recovery of heroin was made from his possession. As per his dock statement he had come there upon being heard that the heroin was found in the house in which he was temporarily residing and his sister was taken in to custody at the time he reached the house. He further stated that the PNB officers had asked the sister to produce the owner of heroin and he was asked to come with them until they surrender the real owner of the parcel. It was contended by the Counsel for the accused-appellant that the version of the accused-appellant is more probable in the light of the suggestions made to the prosecution witnesses. Therefore the rejection of the

position taken by the accused-appellant by the learned trial Judge is erroneous and that the learned trial Judge should have acted on the dock statement given by the accused-appellant as his defence.

I cannot agree with the submission made by the Counsel for the accused appellant that the learned trial Judge had not considered or had rejected the defence version for trivial reasons. The learned trial Judge had carefully evaluated the evidence of the accused-appellant. The learned trial Judge had rejected the evidence given by the accused-appellant stating that it is very difficult to believe and accept the evidence given by the accused-appellant as true. The learned trial Judge in this case had considered the totality of the evidence before he reached the conclusion to reject the evidence given by the accused-appellant is insufficient to create a reasonable doubt in the prosecution case. The prosecution in this case had led clear evidence to prove that the accused-appellant who was seated on the mat at that time tried to hide the said parcel of heroin which was in his hand under the pillow where an infant was resting.

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 in *Fradd V. Brown & Company.*, 20 NLR at page 282 held as follows:-

“It is rare that a decision of a Judge so express, so explicit upon a point of fact purely is overruled by a Court of Appeal, because the Courts of Appeals recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a judge of first instance.”

I find 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 recovered.

For the reasons set out in my judgment I affirm the conviction and the sentence dated 11.03.2013 by the learned trial Judge and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL