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

In the matter of an Appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs,

Abdul Cader Mohamed Salim

ACCUSED

CA/286/2006
H.C Colombo Case No 523/2001

And,

Abdul Cader Mohamed Salim

ACCUSED-APPELLANT

Vs,

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT- RESPONDENT

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

H. C. J. Madawala J

Counsel: Dr. Ranjith Fernando with Samanthi Rajapakshe for the Accused-Appellant

Harippriya Jayasundera DSG for the AG

Argued On: 17.09.2015

Written Submissions on: 13.10.2015

Order On: 25.01.2016

Order

Vijith K. Malalgoda PC J (P/CA)

The Accused-Appellant Abdul Cader Mohamed Salim was indicted before the High Court of Colombo for possession of 7.79 grams of Heroin at Madampitiya on 18th August 2000 an offence punishable under section 54A (d) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

After trial the Accused-Appellant was convicted and sentenced to Life Imprisonment by the Learned High Court Judge and being dissatisfied with the said conviction and sentence, the Accused-Appellant had preferred this appeal. Summary of the evidence for the prosecution led at the trial can be summarized as follows,

On a tip off received from a private informant of PS 841 Upali, IP Kumaratunga along with a team of officers attached to Police Narcotic Bureau had conducted this raid near a bus halt in Totalanga Area.

According to the evidence of IP Kumaratunga, on the day in question around 7.45 hour he left the Police Narcotic Bureau with a team of officers including SI Tennakoon, PC Senarathne and several other officers.

Having dropped SI Tennakoon, PC Senarathne and the informant around 8.10 A.M, near the Negambo bound bus halt in Totalanga, he remained inside the vehicle with the other officers near a tea packing factory. At 8.35 A.M he received a massage from SI Tennakoon over the communication set that the relevant person was shown by the informant. Having instructed SI Tennakoon to release the informant, he advised the two officers to detain the suspect, and rushed to the bus halt within 1-1 ½ minutes. When he tried to search the suspect, the suspect obstructed search by spitting at him. Witness had to use the minimum force to control the suspect and thereafter searched him. Upon searching the suspect he recovered a cellophane bag containing some powder from his trouser pocket. Having questioned the suspect, the police party visited the house of the Accused-Appellant and searched the place but nothing incriminatory was recovered from his house. Thereafter the police party return to the Police Narcotic Bureau along with the suspect and after identification and weighing, the productions were sealed and entered in the Production Register under PR 33 and duly handed over to the production officer by 10.40 hours.

According to SI Tennakoon, on the instructions of IP Kumaratunga he took part in this raid along with PC Senarathne and several other police officers. When they left Police Narcotic Bureau, PS 841 Upali's informant was also with them. On the instructions he received from IP Kumaratunga he got down at Totalanga with PC Senarathne and the informant and walked up to a bus stand. At that time the informant pointed out the suspect who was standing inside a bus stand on the other side of the road. After informing this to IP Kumaratunga, on his instructions witness first released the informant, and crossed the road along with PC Senarathne and walked up to the suspect. When the witness tried to arrest the suspect after informing him that the witness is from Police Narcotic Bureau, the suspect protested by throwing sand at the witness but he manage to detain the suspect until IP Kumaratunga reached the bus stand. However when IP Kumaratunga tried to search him the suspect spitted at the IP Kumaratunga and obstructed the search. After using minimum force to

control the suspect, IP Kumaratunga has recovered a cellophane bag containing some powder from his trouser pocket.

When considering the evidence of the main witnesses, as referred above, it appears that the two witnesses have corroborated each other and no major contradictions were observed in their evidence.

The counsel for the Accused-Appellant raised the following grounds during the arguments before us.

1. The Learned Trial Judge has taken an erroneous approach regarding burden of proof
2. The Learned Trial Judge has not rejected the evidence given on oath
3. No significance was attached or addressed to material infirmities in the prosecution case.

The Learned Trial Judge has taken an erroneous approach regarding burden of proof.

The counsel for the Accused-Appellant drew our attention to the following passage of the Judgment "එබැවින් මෙම කරුණ සමස්ථයක් ලෙස බලනවිට පැමිණිල්ලේ සාක්ෂි මත කිසිදු සැකයක් මතු කිරීමට පැමිණිල්ලේ සාක්ෂි විභාගයේදී විත්තිය අසමත් වී ඇති අතර, පැමිණිල්ල අධිවෝදනා පත්‍රයේ සඳහන් චෝදනාව සැකයෙන් තොරව ඔප්පු කර ඇත."

Whilst referring to the said paragraph the position taken up by the Learned Counsel was that the Learned Trial Judge without considering the defence evidence has come to the conclusion that the case against the Appellant is proved beyond reasonable doubt, and the said approach followed by the Learned Trial Judge is erroneous.

In this regard I observe that the Learned Counsel had considered the said paragraph in isolation but, it is my view that the said paragraph should not consider in isolation but consider with the rest of his judgment.

The learned Trial Judge after considering the evidence led by the prosecution up to page 15 of his judgment (page 296 of the brief) evaluated the said evidence along with the position taken up by the Accused during the prosecution case.

After considering the said evidence, up to page 17 of his judgment (page 298 of the brief) he had recorded the impugned paragraph before considering the defence evidence. Immediately thereafter the Learned Trial Judge considered the defence evidence as follows,

"මේ අනුව විත්තියෙන් ඉදිරිපත් කරනු ලැබූ සාක්ෂි මගින් පැමිණිල්ලේ සාක්ෂි මත සැකයක් මතු වේද යන්න බව සලකා බලමි. විත්තකරු සාක්ෂි කුඩුවට පැමිණ සාක්ෂි දෙමින් සඳහන් කලේ ....."(page 18 of his judgment – page 299 of the brief).

When considering the flow of events followed by the Learned Trial Judge, what is important is whether the Learned Trial Judge was mindful and given due consideration to the defence case before coming to a conclusion. The terminology he used is not important at this stage, but it is very much clear, from the flow of events followed by the Learned Trial Judge that, what he meant at that stage was that the "prosecution has made out a prima fascia case." Otherwise there is no necessacity for him to consider the defence case immediately thereafter before arriving at the conclusion. Therefore I see no merit in the said argument.

The Learned Trial Judge has not rejected the evidence given on oath.

Once again the Learned Counsel for the Accused-Appellant had relied upon another paragraph of the judgment in isolation and based his argument solely on the said paragraph.

Counsel has drawn our attention to the following passage and argued that the Learned Trial Judge had not rejected the defence case.

"මෙම විත්තියේ සාක්ෂි සමස්ථයක් ලෙස ගෙන බලනවිට විත්තියේ සාක්ෂි කිසිවක් පැමිණිල්ලේ සාක්ෂිවල සැකයක් මතු කිරීමට ප්‍රමාණවත් වීනොමැත. විත්තියේ එකම ස්ථාවරය

වූයේ ලොක්කා නැමැති පුද්ගලයකුගේ මත්ද්‍රව්‍ය විත්තකරුට ආදේශ කල බවය. නමුත් මෙවැනි ආදේශ කිරීමකින් විත්තකරුට චෝදනා කලබවට කිසිදු සැකයක් මතු කරගැනීමට විත්තියේ සාක්ෂි ප්‍රමාණවත් නොමැත. එබැවින් විත්තියේ සාක්ෂි මගින් පැමිණිල්ලේ සාක්ෂි මත සැකයක් මත කිසිදු සැකයක් ඇතිවී නොමැති බවට මම නිගමනය කරමි." (page 25 of the judgment, page 306 of the brief)

However the Learned Counsel has not considered the judgment from pages 18-25 when placing the said argument before this court. I observe that the Learned Trial Judge had carefully analyzed the defence evidence, i.e. the evidence of the Accused-Appellant, his wife Fathima Shafid, Dr. Buddika Weerasundera and considered the evidentially value of each witness and rejected the positions taken up by the lay witnesses by giving reasons and also considered the extent to which the medical evidence can be accepted, when considering the same with the evidence of the Accused-Appellant, before concluding that the defence had failed to create a doubt on the prosecution case during the defence case.

Therefore I observe that the Learned Counsel had once again challenged the terminology used by the trial judge in this instance without giving due consideration to the trouble the trial judge had taken to consider each aspect of the defence case in his judgment. I therefore reject the second argument raised by the Learned Counsel for the Accused-Appellant.

No significance was attached or addressed to material infirmities in the prosecution case,

As the third ground of appeal the Learned Counsel for the Accused-Appellant raised several infirmities in the judgment. Firstly he argued that the Learned Trial Judge had failed to give due consideration to the mistake admitted by witness Kumaratunga in his evidence with regard to his notes. During the evidence the said witness admitted that by mistake he has recorded that the information he received was from an informant of SI Tennakoon instead of PS Upali but submitted that he had corrected that fact in his detailed note. I observe that this fact is further corroborated by

SI Tennakoon when he is giving evidence. In his evidence he has categorically said that the informant who provided the information is an informant of PS Upali therefore I see no reason for the trial judge to make specific reference to the above fact in his judgment.

The Counsel further argued that, it was evident during the trial that, the police team took weighing and sealing equipment with them but did not use them during the raid and instead weighing and sealing was done at the Police Narcotic Bureau.

As proved before court by leading the evidence of two members of the raiding party without single omission or contradiction, that the raid took place at a busy place, inside a bus halt at Totalanga in spite of the protest of the Accused, it is not reasonable to expect the police party to engage in weighing and sealing, when they can easily come back to Police Narcotic Bureau with the Accused within a reasonable time. As admitted in court, the arrest took place around 8.45 A.M and the productions were handed over to the productions officer after weighing and sealing at 10.40 A.M.

The Learned Counsel for the Accused-Appellant further doubted the hand writing appeared on the sealed parcel and argued that the trial judge should have rejected the evidence of witness Kumaratunga based on the said evidence since the witness failed to identify the hand writing under cross examination. Following questions were put to the witness by the defence,

ප්‍ර: දැන් ඔබ ගරු අධිකරණයේ කව්වා මෙම මුද්‍ර අත් අඩංගුවට ගත් පාර්සලය එක්ස් 1 වශයෙන් ලකුණු කලා කියලා.

උ: ඔව්, එක්ස් 1 වශයෙන් ලකුණු කර තියනවා.

ප්‍ර: මහත්මයා මෙම කවරයේ සඳහන් වන්නේ කාගේ අත් අකුරුද?

උ: (පැ 2 පෙන්වා සිටී) මගේ උපදෙස් පරිදි වැටලීමට සහභාගීවුන නිලධාරියෙක්ගේ අත් අකුරින් ලියලා තියන්නේ.

ප්‍ර: කවුද ඒ නිලධාරියා?

උ: මගේ විශ්වාසයේ හැටියට පො.කො 3062 විය යුතුයි.

ප්‍ර: නිශ්චිතවම කියන්න බැහැ?

උ: බැහැ. මගේ උපදෙස් පරිදි ලියලා තියන්නේ.

ප්‍ර: ඔබ විසින් නිලධාරියෙකුට මේ පිලිබඳව උපදෙස් දුන්නද?

උ: එය මා ඉදිරියේ සඳහන් කරන්නේ. එසේ කලේ මගේ අත් අකුරු අපැහැදිලි නිසා තමයි. එය පැහැදිලි අත් අකුරින් ලිවිය යුතු නිසා.

When clear evidence was led with regard to producing the production at the station, weighing and sealing before the Accused and the investigating officer, and when the investigating officer gives an explanation as to why a different person from the raiding party was instructed to write the envelop, and the productions were duly handed over to the production officer within hours, this court does not see any significance in the said argument raised on behalf of the Accused-Appellant.

The next argument raised by the Accused-Appellant cuts across his own argument with regard to place and the way the Accused-Appellant got arrested on the day in question. The Learned Counsel argued that it is wrong to conclude by the Learned Trial Judge that PW 1 and PW 2 had no reason to falsely implicate the Accused-Appellant since both witness in their evidence admitted that the Accused-Appellant had spat on them and threw sand at them when tried to arrest him and the said facts are more than sufficient to falsely implicate him.

In contrary, the position took up by the Accused was that the said officers arrested him at his house for no reason and the drugs were introduced to him. If this position is accepted, question of spitting and/or throwing sand will not arise as the arrest did not take place at the bus halt as submitted by the prosecution. Therefore I see no merit in the said argument.

The Learned Counsel lastly argued that the Learned Trial Judge was biased against the Accused – Appellant when he considered character – evidence, by referring to a previous conviction of the

Accused –Appellant. In this regard I observe a mere reference to a previous conviction which transpired during the cross examination of the Accused-Appellant. However when going through the judgment carefully I observe that this reference only limits to a narration of his evidence in the judgment but the Learned Trial Judge had not taken that into consideration when evaluating the evidence.

In the case of ***Perera V. Hasheed (Sri Kantha Law Report Volume I 133)*** *G.P.S. de Silva J* (as he then was) made the observation that it must be remembered that a judicial officer is one with a trained legal mind and that it is a serious matter to allege bias against a Judicial Officer and that this court would not lightly entertain such an allegation.

Even though the said observation was made under different circumstance, what is important is that, one cannot forget the fact that the person who made the said remark in the judgment is a person with a trained legal mind, and therefore it is wrong to argue that he was bias over the said reference unless there is proof that he was prejudiced over the said matter. In the absence of such material before this court, I cannot agree with the Learned Counsel for the Accused-Appellant of this argument.

For the reasons set out above I see no reason to inter fear with the findings of the Learned High Court Judge. I therefore up holding the judgment, conviction and the Sentence of the Learned Trial Judge dismiss the appeal as devoid of merit.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL