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

In the matter of an application in terms of Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979 read together with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Appeal No: **CA 12 / 2015**

High Court Colombo
Case No: HC 6153/2012

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

Arumugam Sebestian

Accused

And Now

Arumugam Sebestian

Accused – Appellant

Vs.

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

Complainant – Respondent

BEFORE: **W.M.M. MALINIE GUNARATNE J**
S. DEVIKA DE LIVERA TENNEKOON J

ARGUED ON: 26.02.2016

DECIDED ON: 06.06.2016

COUNSEL: **Amila Palliyage for the Accused Appellant**
Dilan Rathnayake SSC for the Respondent

S. DEVIKA DE LIVERA TENNEKOON J

Arumugam Sebestian the Accused – Appellant (hereinafter sometimes referred to as the Appellant) was indicted on two counts under the provisions of the Poisons Opium and Dangerous Drugs Ordinance. The first count was under Section 54(a) (d) of the Act, for the possession of 2.42 grams of Heroin and the second count was under Section 54(a) (b) for trafficking. The Learned Trial Judge by his judgment dated 09.03.2015 convicted the Appellant after trial and sentenced him to life imprisonment. The Appellant preferred the instant appeal against the said conviction and sentence.

The sole ground of this appeal relied by the Counsel for the Appellant in his argument was that the failure of the Learned Trial Judge to give due consideration to the defense taken up by the Appellant in the original Court. The Learned Counsel confined his argument to a preliminary issue i.e whether the Learned Trial Judge has failed to apply the test of reasonable doubt on the evidence adduced by the Defense and thereby deny a fair trial to the Appellant. The Learned Counsel for the Appellant has emphasized that the trial judge has rejected the defense evidence on the basis that the Appellant has failed to suggest the position taken up in his evidence in the trial Court to the prosecution witnesses during the trial.

The Learned Counsel relied on an Indian Supreme Court decision in Dudh Nath Pandey vs State of Uttar Pradesh (1981 AIR 911) in which it was

stated that "defense witnesses are entitled to equal treatment with those of the prosecution and Courts ought to overcome their traditional instinctive disbelief in defense witnesses, quite often, they tell lies but so do the prosecution witnesses."

In the instant case the Police Inspector Rangajeewa (PW2) attached to the narcotic bureau, arranged a police team for a raid on a tip off he received on the 23rd of June 2010, that a person called Sebastian was getting ready to go to Rajagiriya Bandaranayakepura to prepare Heroin packets for trafficking. For the purpose of the raid PW2 arranged a police team with two vehicles of which one was a police jeep and the other was a three-wheeler. As per evidence led at the trail it was revealed that the jeep stopped on Sri Jayawardenapura road at around 15.20 hours and Inspector Rangajeewa (PW2) with two police sergeants namely, Fernando and Ajith proceeded about 100M /150 M further in the three-wheeler and turned to Sarana Mawatha and stopped in front of the Election Commissioners Office so that the intersection was clearly visible. The prosecution witness then contemplated Sebastian, who was known to Inspector Rangajeewa, to go to Bandaranayakepura through Arunodaya Mawatha.

At 6.25 p.m. PW2 had spotted that Sebastian was coming towards the police officers. As Sebastian came closer to the three-wheeler IP Rangajeewa had got off and held him. Sebastian was clenching the fingers in his right hand when IP Rangajeewa made Sebastian unfold his fingers and searched out a light

pink cellophane bag which had been tied and found in his hand. Inspector Rangajeewa (PW2) identified the brown color powder which was in the cellophane bag as heroine thereafter arrested the accused Sebastian for having heroin in his possession.

While denying the version of Inspector Rangajeewa (PW2) the defense Counsel in the trial Court suggested that the arrest of the accused was made at the Nawala Junction when the accused came there consequent to a telephone call given by PW2 requesting him to come. But the accused at the trial in his evidence has stated that when he was at home the police officers had taken him near the Nawala Caterers and told him to show a person called "Chutti" who sells heroine and since the Appellant could not assist the Police he was arrested. Thereafter he had been taken to the police station and asked to sign a statement.

Welu Ramani, the wife of the Appellant who had been a defense witness at the trial had stated that her husband was arrested when he was at home by Inspector Rangajeewa (PW2) on the 22nd of May 2010.

Having considered the evidence of the Appellant and his wife the Learned Trial Judge has rejected their evidence for two reasons. One being that the position taken up in the defense evidence has not been suggested to the prosecution witnesses and the other is that in contrast to the evidence of the

prosecution witnesses, which the Learned Trial Judge goes so far as to say has no contradictions, the defense evidence ought to be rejected.

The Learned Senior State Counsel in his written submissions submits that the Learned Trial Judge had very correctly analyzed the evidence in this case and had given cogent reasons as to why the prosecution's evidence was relied on and why the defense evidence was rejected. He further submits that the Supreme Court in Alwis Vs. Piyasena Fernando 1993 [1] SLR 119 has held that "it was well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal."

In the case of The Attorney General Vs. Sandanam Pitchi Mary Theresa 2011 [2] SLR 292 at 307 Shiranee Thilakawardena J citing R vs. Paul states that "There is simply no jurisdiction in an appellate Court to upset trial findings of fact that have evidentiary support. A Court of Appeal improperly substitutes its view of the facts of a case when it seeks for whatever reason to replace those made by the trail judge. It is also to be noted that the state is not obliged to disapprove every speculative scenario consistent with the innocence of an accused". Her Ladyship further observed that "In view of the facts elicited by the prosecution and indeed the real evidence discovered by the officers conducting the investigation, it cannot be said that the factual conclusion drawn by the trial judge is either unsupported or unreasonable."

In considering the credibility of a witness it was further observed in above case by Her Ladyship that "a key test of credibility is whether the witness is an interested or a disinterested witness. Rajarathnam J in Tudor Perera Vs. AG observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be preffered to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive and reliablility have all to be weighed (Vide, Halsbury Laws of England 4th Edition para 29) Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness (vide Hasker Vs. Summers – Australia; Leefunteum Vs. Beaudoin- Canada). "

In Gunasiri & 2 others Vs. The Republic of Sri Lanka 2009 [1] SLR 39 His Lordship Sisira de Abrew J has stated that it is a rule of essential justice that whenever the opponent has declined to avoid himself of the opportunity to put his case in cross – examination it must follow that the evidence tendered on that issue ought to be accepted. The failure to suggest the defense of alibi to the prosecution witnesses, who implicated the accused, indicated that it was a false one.

In the instant case it is clear that the contention which was taken up in the defense case is significantly different to the contention suggested to the prosecution witnesses by the defense Counsel at the time of trial.

Considering the relationship between the witness and the Appellant and the probability of her version being true in light of the independent evidence presented to Court on the facts of this case, I am of the opinion that the Learned Trial Judge had no alternative other than rejecting the evidence of the Defense.

Therefore, I see no reason to interfere with the decision of the Learned Trial Judge.

As such this Court dismisses the instant Appeal and affirms the conviction and the sentence imposed by the Learned Trial Judge.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

MALINIE GUNARATHNE J

I agree.

JUDGE OF THE COURT OF APPEAL