

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

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

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/213/2009

H/C Trincomalee

case No. HCEP 2008/01(T)

Mahasarukkalige Chandani

ACCUSED

And,

Mahasarukkalige Chandani

ACCUSED-APPELLANT

Vs,

Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

**Before: Vijith K. Malalgoda PC J (P/CA) &
S. Devika De L. Tennakoon J**

**Counsel: Ranjith Fernando for the Accused-Appellant
S. Thureirajah DSG, for the Attorney General**

Argued on: 15.12.2015, 28.01.2016

Written Submissions on: 26.04.2016

Judgment on: 30.09.2016

Order

Vijith K. Malalgoda PC J

The accused–appellant Mahasarukkalige Chandani was indicted before the High Court of Trincomalee for being in possession of 2.22 grams of Diacetyl-morphine (Heroin) on or around 23.08.1999 an offence punishable under section 54 A (d) of the Poisons Opium an Dangerous Drugs Ordinance as amended by Act No 13 of 1984.

At the conclusion of the trial before the said High Court of Trincomalee, the accused-appellant was found guilty of the said charge and was sentenced to life imprisonment.

Being aggrieved by the said conviction and sentence the accused-appellant had preferred the present appeal before the Court of Appeal.

During the argument before this court the Learned Counsel who represented the accused-appellant had raised the following grounds of appeal before this court.

- a) Learned Trial Judge failed to address a grave doubt arising re-probability factor
- b) Learned Trail Judge failed to attach any significance to the break in the link in the production chain (inward journey)
- c) Learned Trail Judge failed to address the effect of the infirmity in receipts issued by the Government Analyst
- a) Learned Trial Judge erred to apply the correct legal principles when rejecting the defence on oath.

Before considering the grounds of appeal raised by the Learned Counsel for the accused-appellant referred to above, this court will now proceed to analyze the case for the prosecution as revealed before the High Court from the prosecution witnesses.

As revealed by the evidence placed before the High Court, this incident referred to a detection conducted by the officers attached to the Uppuweli Police Station on a tip off received by an informant. The said detection has been conducted by Inspector of Police Wijerathne of Uppuweli Police Station.

According to the evidence of IP Wijerathne, after receiving an information to the effect that a woman is selling heroin, he had left the police station with a police party consist of four police officers in a Police Jeep accompanied by the informant. When the police party reached the area called Palai Yootu near the rail track, the informant showed a woman on the rail track and after showing her, he got down from the Jeep. After moving few meters ahead, the Jeep was stopped and witness Wijerathne who got down from the Jeep had walked up to the woman and asked her to give heroin if she possessed. At that stage she gave him a long envelop canceled in her blouse. When opened the said envelop he observed six small Polythene Packets and inside those packets a substance which was suspected as heroin was found. After the said recovery the woman was arrested and taken her to the Jeep.

According to witness Wijerathne on seeing him reaching towards her, he observed that the accused was shaken and shocked and therefore did not try to do anything. After the arrest of the suspect the party went direct to the nearby Government Dispensary in order to weigh the productions, but the dispensary was closed since it was around 5.00 pm. Thereafter they went to Modern Jewellers at N.C. Road and the production was weighed in the presence of the suspect. The brown powder recovered was five grams and it was sealed at the same time.

When they returned to the police station the suspect was further searched through WPC Lalini but nothing discriminatory was found from her.

The production which was in the custody of IP Wijerathne was handed over to PC Karunaratne who was on reserve after entering it under PR 47/99 at 18.30 hours.

PS 20009 Piyasena who accompanied the previous witness had corroborated the evidence given by him with regard to the recovery of the production, he took up the position that, the recovery was made by witness Wijerathne and he could remember accompanying IP Wijerathne with another officer.

It is this witness who had handed over the productions to the Magistrate's Court Trincomalee on 07.09.1999 after receiving the productions from PC 32170 Wijerathne. He has taken charge of the production around 9-30 am from the police station and handed over to the courts around 14.45 hours.

In order to corroborate the above detection witnesses L. Sumathipala, and K.M Karunadasa were also called by the prosecution and they too had corroborated the prosecution version. With regard to the evidence of the above witnesses it is observed that no contradictions were marked in their evidence during the High Court trial.

In addition to the above witnesses, the prosecution had called witnesses PS. 56199 Podinilame, PS 32216 Dayarathne, PS 32170 Wijerathne in order to establish the production chain but one important witness in the production chain PC 19753 Karunaratne was not called as a witness since he was dead at that time.

The next witness the prosecution had relied was Mrs. Sriyani Sakunthala Tennakoon the Deputy Government Analyst.

According to her evidence the production was received by M. Sivarajah on 01.10.1999 through Police Constable Lanthewela of Uppuweli Police. She speaks of some alterations in the original receipt

issued by Mr. M. Sivarajah with regard to Reference Number and the Case Number referred to in the said receipt but confirms that the copy of the same receipt is found in the Magistrate's Court Record of the present case. She further confirms the fact that Magistrate's seal found on the receipt was available on the parcel received and the said seal was intact. Witness had further referred to another seal found on the envelop marked P-1A.

According to the evidence of the Government Analyst Ms. Tennakoon 2.22 grams of Diacetyl-Morphine (Heroin) was identified from the said production.

As observed above, in addition to other witnesses, the prosecution had called four witnesses to confirm the detection which took place on 23.08.1999 and no contradiction were marked between their evidence. The only contradiction marked during the High Court trial was the contradiction which was marked as A-1 from the evidence of witness Wijerathne per say.

In his evidence before the High Court he had said that, when he went up to the woman, the others were waiting at the jeep but in cross examination he took up the position that three others came with him. This fact was later corroborated by the other police officers who accompanied him for the detection and no contradictions were marked from their evidence.

As observed by this court the Learned Trial Judge was mindful of this contradiction and had analyzed it in his judgment and correctly concluded that the said contradiction does not go to the root of the case and decide to ignore the said contradiction.

When considering the four grounds of appeal raised by the Learned Counsel for the accused-appellant it is observed that the said grounds are based on two main factors, namely the probability factor and the inward journey of the production chain.

Out of these two main factors on which the Learned Counsel had based his grounds of appeal. I would first like to consider the second factor i.e. the inward journey of the production chain.

The importance of the inward journey of the production chain was discussed in the case of *Perera V. Attorney General 1998 (1) Sri LR 378* by J.A.N. de Silva J (as he was then) as follows, “ it is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the analyst. Therefore it is correct to state that the most important journey is the inward journey because the final analyst report will be depends on that. The out ward journey does not attract the same importance.

As observed above, that Government Analyst Report which is the principle evidence in a drug offence is entirely depend on the inward journey of the production chain and therefore, there is a duty cast on the prosecution to establish the inward journey of the production with reliable evidence. In this regard it is important to note that, calling a witness who was at a police reserve to establish that he was functioning as reserve officer during a particular time is not sufficient to establish a production chain but, he has to give evidence confirming that the productions referred to the said case was properly received by him and properly handed over by him in good condition. In this regard it is also important to establish the seal used when sealing the productions and the condition of the said seals at the time the seals were opened.

It is revealed from the evidence of IP Wijerathne who sealed the productions after weighing them at the Gold Jeweller that he separated the brown powder and the six bags in which the brown powder contained and sealed them separately. He had used the official stamp of the police station, left hand thumb impression of the suspect and his short signature to seal them. This method of sealing he used twice with regard to brown powder, first on the paper packet and thereafter on the envelop. His evidence in this regard read as follows,

Page 46,

Q: how did you weigh the substance?

A: "I weighed the substance by using the scale for weighting gold Jewellery. That scale was inside a glass cubical placed on the table. First I weighed a piece of paper and then I put the Heroin on it and weighed. The weight of the Heroin was five grams.

After that at the same place I obtained the left hand finger print of the suspect. Then placing the official stamp of the police station, my usual short signature with the date and then putting it inside another envelop and again placing the official stamp of the police station and left hand finger print of the suspect I sealed it. After that the drug that was wrapped in a polythene bag was put inside another envelop. Then getting the fingerprint of the suspect I placed the official stamp of the police station."

As observed by this court the officer who sealed the production had done it properly and thereafter handed over the said two parcels under PR 47/99 to PC 19753 Karunaratne the reserve officer.

It was further transpired that the production was with the reserve until 07.09.1999 nearly 15 days until it was sent to the Magistrate's Court Trincomalee. In this regard the Prosecution has led the evidence of,

PC 5199 Denagama Vithanalage Podinilame

PS 32216 Dayarathne

PS 32170 Wijerathne

PS 20009 Piyasena,

who were responsible for the reserve duty during this period but, it is further revealed that one of the important reserve officer, PS 19753 Karunaratne was not available to give evidence since he was dead at the time this case was taken up for trial.

As revealed from the evidence of IP Wijerathne the investigating officer, the two sealed parcels were handed over to the reserve for the first time on 23.08.1999 at 18.30 hours to PS Karunaratne.

The productions were finally handed over to the Trincomalee Magistrate's Court on 07.09.1999 by PS 20009 Piyasena and according to him, he received the parcels from PS Wijerathne. However according to the evidence of PS 32216 Dayarathne it is he who handed over the parcel to PS Piyasena. PS Wijerathne does not speak to this fact.

With all these discrepancies we further observe that none of the officers attached to reserve duty refers to the condition of the parcels when they received the parcel and handed over the parcel to the next officer.

PS 20009 Piyasena has removed the productions to Magistrate's Court on 07.09.2009 and even at that time he has not observed the condition of the parcel before handing it over to the Magistrate's Court. Except for IP Wijerathne who sealed the production, none of the officers who had the custody of the production until it was removed to the Magistrate's Court had observed the seals placed on the two parcels and referred to them in their evidence.

As observed by this court it is important for the reserve officer to make this observation and at least the officer who initially received the production and the officer who finally dispatched the production should check the production and make his observations when they are giving evidence before the trial court. In the absence of the receiving officer the prosecution has failed at least to establish this fact with the officer who finally dispatched the production to the Magistrate's Court.

When the productions leave the Magistrate's Court to be handed over to the Government Analyst, it is again put into another cover and sealed with the Magistrate's Court seal. This fact was revealed from the evidence of the Government Analyst and according to her evidence, the seals of the parcel received from the Magistrate's Court were intact and tallied with the specimen seal of the

Magistrate's Court but, she has failed to refer to any seals on the parcel submitted by the police. With regard to this parcel the Government Analyst had said,

Page 209,

A: I have stated that in the second envelop as I mentioned before there was another envelop. This envelop has been sealed. When it was opened a brown colour powder was in it, mentioned as D 1465/99. I find my short signature and the date on it.

The seals referred to above were not revealed during the evidence of the Government Analyst. However when the same envelop was shown to IP Wijerathne at the trial he too had a difficulty to identify the said envelop. When the envelop was shown to him, his response was as follows,

Page 52,

Q: While witness, you stated that you sealed the envelop that contained Heroin?

A: Yes

Q: Can you show that seal now?

A: It is hard to search?

Q: Can you state, what seal is there on the rear side of the envelop?

A: I am unable to state

The following discrepancy was also observed with regard to handing over the production to the Government Analyst. Even though this discrepancy can be ignored by this court since the seals found on the Magistrate's Court letter and the parcel were intact, it is our duty to refer to them, since it shows the negligent manner the prosecution has placed the evidence before the trial court.

According to the evidence of PS 20009 Piyasena it is sub police constable 185 Perera who took and brought back the production from the Government Analyst.

However according to the evidence of the Government Analyst Ms. Tennakoon, PC 1725 Lanthewela attached to Uppuweli Police Station had handed over the production to the Government Analyst. When PC 1725 Lanthewela gave evidence with regard to the detection, he was questioned by the prosecution as follows,

Q: Apart from the particular round up activity, were you engaged yourself in any other duty regarding this incident?

A: Not on the same day

Q: After that did you perform in any duty?

A: No I did not

As observed by this court the inward journey of a production in a case where the charges are mainly based on the identity and the quantity of productions recovered from the custody of the suspect, the prosecution has a responsibility to establish this aspect of the case without leaving any gaps before the trial court. In this regard the seals said to have been placed on the production at the time the production was handed over to the reserve has a significance. The said seals have to be intact at the every point of time the custody is charged and finally it should be observed by the person who breaks such seals in order to commence his investigation. If it can be established at least, that the said seals were observed by the receiving officer and the removing officer who removed the production from the police station as intact and by the Government Analyst that he observed the same seal intact, when parcel was opened, that could have been considered as sufficient for this court to conclude that the prosecution has established the inward journey to the satisfaction of court.

However as observed above, the prosecution in the case in hand had failed to establish the inward journey of the production on to the above minimum standard expected by this court.

Since this court is not inclined to act on the evidence placed by the prosecution in establishing the inward journey as safe, it is not necessary for this court to consider the other grounds of appeal raised by the Learned Counsel during the arguments before us.

For the aforesaid reasons we set aside the conviction and sentence imposed on the accused-appellant by the High Court of Trincomalee on 18.11.2009 and Acquit and Discharge the accused-appellant.

Appeal is allowed.

Accused-appellant acquitted.

PRESIDENT OF THE COURT OF APPEAL

S. Devika De L. Tennakoon J

I agree,

JUDGE OF THE COURT OF APPEAL