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

Thalagalagallegedara Michael
MudiyanselageKarunayake
Bandara alias Suji

C.A.No.03/2009 **Accused-Appellant.**

Colombo HC 242/2006 **Vs.**

Attorney General

Respondent.

Before : M.M.A.Gaffoor,J. and
K.K. Wickramasinghe, J.

Counsel : Suranga Bandara for the Accused-Appellant.
Dappula de Livera ASG for A.G.

Argued on : 28.04.2016

Decided on : 09.02.2017.

M.M.A.Gaffoor,J.

The appellate jurisdiction of this Court had been invoked by the |Accused- Appellant to set aside the conviction and sentence on several grounds. Namely contradictions as to the statements made by the prosecution Witness 1 and 2 in relation to the number of officers involved in the raid the time the relevant officers left the Police Narcotics Bureau, the manner the suspects were gathered at the time of raid and the manner the suspects attempted to escape.

The relevant facts of the case are as follows:-

The prosecution witness -1 (PW1) in lieu of receipt of information regarding the suspect trafficking heroin, formed a raid party and proceed to the location where the suspect was said to be at by the informant. Upon the arrival of point the officers of the Police Narcotics Bureau raided the house and arrested the suspect along with the two others, one of whom was found to be in possession of heroin addition to the suspect himself.

On the 7th July. 1995 the suspect pleaded not guilty and was served with the indictment by the Attorney General for the possession of 2.5g of heroin, and offence Punishable under Section 54A (c) of Poisons, Opium and Dangerous Drugs Ordinance Act No13 of 1884.

During the course of the trial, the suspect gave evidence under oath. Upon the conclusion of the trial it was found by the High Court Judge that the accused was guilty for the possession of heroin and was convicted and sentenced to life imprisonment on 8th July, 2009.

The matter proceeded on appeal to this Court for consideration of conviction and sentence based on several grounds for which submissions has been made at length.

When considering the said grounds of appeal, it is of importance to analyze if such grounds are in fact capable of reversing the conviction and sentence awarded at the conclusion of the trial at High Court – Welikada.

The accused-appellant states that contradictory evidence submitted by the prosecution witnesses 1 and 2 which formed the above grounds of appeal.

Therefore, this Court will consider the matters separately in order to reach an overall verdict.

The discrepancy as to the time the officers left police Narcotics Bureau is not of significant difference which affect the core of this case and thus, is not material. This due to the fact that, if the time recorded was in fact the very opposite in relation to one another (a.m. p.m. etc.) then it would suffice as aground or appeal and thus, would qualify as material to reconsider the case itself, however, mere discrepancy as to 30 minutes or so, of the time does not affect the root of the case established by the prosecution, for if it was instance where one stated 8.00 a.m. while another stated 8.30 p.m., then such discrepancy would entail doubt as to the accuracy and truthfulness of the evidence. As such doubt has not arisen, the ground of appeal cannot withstand the justification.

The ground of appeal as to the number of officers who were part of the particular raid according to prosecution witness 1, 7 officers were part of the raid where as prosecution witness 2- stated five officers were involved. However, by the analysis of the

statements provided it is vital to note that even though there is a discrepancy. The discrepancy itself is not capable of shocking the conscience of this court . This is due to the fact that PW 2 had been required to **"roughly estimate"** the number of officers who took part in the raid in 1995. The statement of PW2 was not made affirmatively but rather on an assumption. Thus an assumption does not superseded the documentary evidence present at hand found information books. This is because there exists sufficient evidence to prove that in fact 7 officers were part of the raid with reference to the officer number. Thus, an assumption is not capable of altering the obvious evidence present.

Lastly, the ground of appeal based up-on the contradictory manner the suspect and two others were gathered and attempted to escape cannot be found to be of material essence to affect the conviction reach by the trial judge. During the course of committing an offence by a person with knowledge of such being an offence, would function cautiously in order to avoid any form of inconvenience. Therefore, the sight of Police officers raiding the premises would naturally course a suspect to flee as part of human

instinct, for an innocent man would not necessarily flee unless there is a reason behind such behavior.

Furthermore, the manner of escape can be perceived by different persons in a different manner given the view point of such person. Moreover, the exact specification as to the manner the suspect and others attempted escape can be phrased differently by the persons involved in the raid. Thus , while one would perceive the attempted escape from one view point another is capable of witnessing the event from different angle itself. As a result, the statement of evidence as to the direction would vary based on the viewpoint of each prosecution witness.

However, such variation as to the viewpoint is not a sufficient ground of appeal unless it concerned a serious issue as to a witness who was not part of the raid gave evidence at the trial, which would entail an offence on its own.

In addition to the above grounds of appeal, the accused-appellant states that the learned High Court Judge had made reference to the information books of the officers who were part of

the raid. It must be borne in mind that, if the Judge has reached the conviction based on the material found in information books, it will be deemed prejudicial to the accused-appellant. However, by analyzing the judgment of the said High Court Judge it is evident that, the learned High Court Judge had made a *remark* as to the observations made by the officers and not otherwise. Hence, the conviction had not been driven by consideration of such material found in information books.

Further, Accused-Appellant states in his appeal that " un contradictory evidence" was submitted at time of trial and such evidence was not taken into consideration by the trial Judge. It must be heavily stressed that, for evidence to amount as " un contradictory" it must be such that there exists no contradictions as to the evidence whatsoever. However, the accused-appellant did not produce a witness supporting the stance held by the Accused-appellant himself. In such circumstances, the accused-appellant cannot state that the evidence provided at the trial was un contradictory, When it was not compelling evidence as a whole for consideration.

The Accused-Appellant further states that, the High Court Judge has shifted the burden of proof unto the Accused-Appellant to provide a reasonable explanation as to the reason for the officers of the raid to implicate the Accused-Appellant in relation to possession of heroin. It is vital to note that the Accused-Appellant had been given the opportunity to provide evidence to prove his innocence and non- involvement in possession of heroin. Such award of fair opportunities cannot be seen as a shortcoming in the law, for one will be deemed innocent until proven guilty and such opportunity was given to the Accused-Appellant.

At the argument of this appeal learned Counsel for the appellant strenuously contended that the learned trial judge has erred in law by perusing the notes of the information book while delivering the judgment. Learned Counsel relied strongly on the following judicial decisions :-

Sheela Sinharage Vs. The Attorney General 1885 (1) SLR

Banda and Others Vs .Attorney General 1998 (3) SLR 168

Keerthibanda Vs. Attorney General 2002 (4) SLR 245.

I have given my mind to the rule of law enunciated in the above judicial decisions. I hold that the decision in the above case has no application whatsoever to the issue which arises in the instant case.

The rule of law enunciated in the above judicial decisions is that a trial Judge cannot use the matters recorded at the non-summary inquiry or matters recorded in a police statement as substantive evidence. In the instant case, the learned trial Judge has not used the notes of the information book as substantive evidence.

Therefore, it is with responsibility this Court can state that the grounds of appeal of the Accused-appellant is baseless and lack sufficient reasons. Further, the Learned

High Court Judge has given the benefit of the doubt to the accused-appellant to prove his innocence and failure to do so does not amount to prejudice caused by the trial Judge in reaching the verdict. Moreover, the trial had been fair form the inception. Thus, this court will dismiss the appeal and impose the conviction and sentence awarded by the High Court Judge accordingly.

JUDGE OF THE COURT OF APPEAL.

K.K. WICKRAMASINGHE, J.

I agree.

JUDGE OF THE COURT OF APPEAL.