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/178/2010
H/C Colombo 2555/2005

Konganige Sarath Palitha

ACCUSED

And,

Konganige Sarath Palitha

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: Barana Gayan Perera for the Accused-Appellant
Ayesha Jinasena SDSG for the State

Argued on: 21.01.2016, 03.02.2016

Written Submissions on: 01.04.2016

Decided on: 23.02.2017

Order

Vijith K. Malalgoda PC J

The accused-appellant Konganige Sarath Palitha was indicted before the High Court of Colombo under section 54 A (c) for the Poisons Opium and Dangerous Drugs Ordinance for being in possession of 3.18 grams of Diacetyl Morphine. At the conclusion of the trial before the High Court Judge, the accused above named was convicted on the Indictment and was sentenced to life imprisonment. Being dissatisfied with the above conviction and sentence the accused had preferred the present appeal before this court.

During the argument before this court, the Learned Counsel for the accused-appellant had raised the following grounds of appeal,

a) Learned Trial Judge had erred in law by perusing the notes of the information book while delivering the judgment
b) Learned Trial Judge had erred in law when he failed to evaluate the omissions and contradiction per se and inter se of the prosecution witnesses
c) Learned Trial Judge had erred in law when he concluded that the accused –appellant had taken a defence of alibi and failing to afford the opportunity to place evidence before him.

As observed by us the detection referred to the case in hand been conducted by the officers attached to the Police Narcotic Bureau. At the trial before the High Court, the prosecution had relied on the evidence of witnesses, Inspector Moses Rangajeewa, Sub-Inspector Karunathilake, Sub Inspector Rajakaruna and Assistant Government Analyst Sandy Rajapakse and closed the prosecution case on

17.02.2010. At the conclusion of the prosecution case the accused was explained of his rights by court and thereafter the accused elected to give evidence from the witness box.

Since the 3rd ground of appeal was based on the evidence given by the accused and subsequent observation made by court, I would like to analyze the defence evidence at this point.

According to the evidence of Konganige Sarath Palitha the accused in the case in hand, on 2nd March 2004 he was arrested by the officers of Police Narcotic Bureau while he was at home around 3.30 pm and at the time of the said arrest he did not have any illegal substance with him. Subsequent to his arrest he was taken to the Police Narcotic Bureau and a statement was recorded from him. He was produced before the Magistrate's Court on the following day and prior to him being taken to the Magistrate's Court, he was asked to keep his thumb impression on a piece of paper. The accused had claimed, that apart from the said acts, nothing took place between them and submitted that no detection took place as claimed by the prosecution.

In this regard this court is mindful of the evidence of witnesses Rangajeewa and Karunathilake who conducted the raid at Seevali Lane off Baseline Road around 11.30 in the mid night. As observed by us the ground of appeal raised by the Learned Counsel for the accused-appellant refers to an observation made by the Learned Trial Judge at the conclusion of the evidence given by the accused-appellant. When the examination in chief and cross examination of the accused-appellant was concluded the Learned Trial Judge had made the following observation with regard to the evidence of the accused-appellant (at page 133)

"මේ අවස්ථාවේදී විත්තිකරු සාක්ෂි කුඩුවේ සිට කරනලද විත්තිවාවකය පරීක්ෂා කර බැලීමේදී අනවස්ථානිකභාවයෙන් විත්තිවාවකයක් ගන්නා බව පෙනේ. **2005** අංක **14** දරණ පනතට අනුව විත්තිවාවකයක් ගන්නා අවස්ථාවේදී ගතයුතු ක්‍රියාමාර්ග විත්තිකරු විසින් ගෙන නොමැතිබව සටහන් කර තබමි"

විත්තියේ නඩුව අවසන් කරයි

දේශන 2010.05.25"

In the said observation, the Learned Trial Judge had made a remark that the accused had failed to follow the provisions under Act No 14 of 2005 since he had taken a defence of alibi, by not giving proper notice.

However as observed by this court, the defence taken up by the accused-appellant cannot be considered as a defence of alibi since, what the accused had said was that, he was arrested by the officers of Police Narcotic Bureau around 3.30 pm at the house. In a defence of alibi the position the accused is expected to take is that he could not have committed the offence as alleged by the prosecution, since he was elsewhere at that time. That is a specific defence taken by an accused person and in such a situation the law requires him to give notice of such defence. But in the case in hand the accused did not deny the arrest but states that he was not arrested at 11.30 pm but was arrested 3.30 pm at the house, but at the time his arrest he did not possess anything illegal and therefore it appears to us that this is a defence of denial and not a defence of alibi.

However as further observed by us, by making the said observation no prejudice has been caused to the Accused Appellant for the following reasons,

a) After the said observation was recorded the defence had closed its case.
b) The said observation was made at the conclusion of the accused's evidence and he was not prevented by court of giving any evidence
c) In his judgment, the Leaned Trial Judge had not made any remarks with regard to the observation he made.

Even though we hold that the Learned Trial Judge was misdirected when he made an observation that the defence taken up by the accused is one of alibi, for the forgoing reasons we are not inclined to uphold the objection raised on behalf of the accused appellant.

As observed by us, the 1st and the 2nd grounds of appeal raised by the Accused Appellant are interwoven each other for the reason that both the said grounds deals with certain issues, as to how the Trial Judge had analyzed the prosecution evidence. When making the submissions on the 1st ground of appeal, the Learned Counsel for the Accused Appellant was critical of the conduct of the Learned Trial Judge when he decided to peruse the notes of the information book in his Judgment.

In this regard our attention was drawn to the following two paragraphs of the Judgment;

Page 147,

මෙහිදී රංගජීව සාක්ෂිකරු සුදු සරමක් හා කමිසයක් ඇඳ පැමිණිබව තම සාක්ෂියේ කියාඇති අතර කරුණාතිලක පෙන්වා දී ඇත්තේ සැකකරු කලිසමක් හා කමිසයක් ඇඳගෙන පැමිනි බවයි

විත්තියේ උගත් නීතීඥ මහතා තම දේශනයේදී මෙම කරුණ කෙරෙහි අධිකරණයේ අවධානය යොමුකොට ඇතිනමුත් රංගජීවගේ සටහන් පරීක්ෂාකර බැලීමේදී ඔහුද සැකකරු කලිසමක් හා කමිසයක් ඇඳගෙන පැමිනි පදනම සඳහන් කරඇති බැවින් විමර්ෂණ සටහන් සාක්ෂි නෙවන නමුත් එකී පරස්පර විරෝධතා නඩුවේ මූලයට බලපාන පරස්පර විරෝධතා ලෙස පිලිගතනොහැකිය

Page 149,

නමුත් රංගජීවගේ පිටවීමේ සටහන් පරීක්ෂාකර බැලීමේදී එම නිළධාරියාගේ අංකය පමනක් නොව නම පවා පිටවීමේ සටහනේ නැතිබව පෙනීයන අතර ඔහුගේ දීර්ඝ විමර්ෂණ සටහන් පරීක්ෂාකිරීමේදී පවා කා.පො.කො 500 සුනිලා නිලධාරිණියගේ නම සඳහන් නොවන බව පෙනේ

කරුණාතිලක තම සාක්ෂියේදී හා විමර්ෂණ සටහන්වල කා.පො.කො 500 සුනිලා නිලධාරිණියගේ නම සටහන් කරඇති අතර, සුනිලා විසින්ද විමර්ෂණ සටහන් යොදා ඇති බව පෙනීයයි.

The above conduct of the Learned Trial Judge will have to be analyzed with the relevant provisions of the Code of Criminal Procedure Act No 15 of 1979.

Section 110 (4) of the Code of Criminal Procedure Act No 15 of 1979 reads thus;

"Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial....."

The use of the above provisions in order to peruse the information book was widely discussed by our courts on several occasions.

In the case of ***Sheela Sinharage V. Attorney General (1985) 1 Sri LR 1*** Supreme Court held that section 110 (4) of the Code of Criminal Procedure Act No 15 of 1979 empowers the High Court Judge to use a statement made at a non-summary proceeding to aid him at the trial but it was further held that it cannot be used as evidence in the case.

The above position taken by the Supreme Court was discussed at length by Jayasuriya J in the case of ***Keerthi Bandara V. Attorney General (2000) 2 Sri LR 245*** and observed as follows;

"..... In Sinharage's case the Learned High Court Judge proceeded to peruse the evidence given at the non-summary inquiry by Dr. Wass in regard to a statement made by the deceased to him and the trial judge wrongly and illegally used the matter recorded at the non-summary inquiry as substantive evidence to arrive at his findings on the issue in the case and for his adjudication, without taking any steps to have such material placed before him as evidence. In those circumstances, Justice Ranasinghe very correctly held that the procedure that was adopted was wholly illegal and unjustifiable in law. The process that we are advocating is certainly not the use of the statements as substantive evidence. The evidence of a witness is assailed as being testimonially untrustworthy on an account of an alleged vital omission, the trial judge or the Court of Appeal merely looks into the statement, interprets that statement and thereafter decides whether there is a vital omission as urged by counsel? In indulging in such a process certainly both the trial judge and the Court of Appeal are not using the contents of the statements as substantive evidence to determine the issues arising in the case. Both courts are looking into the statements only to ascertain whether there is a vital omission.

When considering the observation made by the Leaned Trial Judge in page 147 of his Judgment, I would first like to consider the evidence given by the two witnesses Rangajeewa and Karunathilake with regard to the detection that took place on 02.03.2004. According to the evidence of witness Rangajeewa on the day in question around 11.20 he had left the Police Narcotic Bureau with a police party on an information received through PS 37732 Karunathilake to Wanathamulla area. When the police party reached Seevali lane on Baseline Rd closer to the Railway ground, the witness had got down from the vehicle with PS 37732 to meet the informant who was at the entrance to Seevali Lane. On his direction, the two officers followed him through Seevali Lane.

The next Question and Answer recorded in the proceedings reads as follows, (page 43)

ප්‍ර: කුමක්ද සිදුවුනේ?

උ: මෙසේ මෙම හන්දියෙන් ගමන් කරන විට වනාතමුල්ල දෙසට ඇති මාර්ගයෙන් මීටර් 2, 3ක් ගමන් කරන විට සුදු සරමක් සහ සුදු කමිසයක් ඇඳගත් පුද්ගලයෙක් දැක ඔහු ඉදිරියට යමින් ඔත්තුකරු ඔහුගේ හිස කසා ඉදිරියට ගියා ඒ අනුව මට හැඟීගියා මේ මත්ද්‍රව්‍ය ජාවාරම සඳහා පැමිණ සිටින වාලි විය යුතු බවට....

Page 44

ප්‍ර: තමා සාමාන්‍ය ශරීර පරීක්ෂාවක්ද කලේ? කුමන ආකාරයෙන් ද පරීක්ෂා කලේ?

උ: ඔහු ඇඳසිටි ඇඳුම්වල සාක්කු සහ ඉණ සාමාන්‍යයෙන් පරීක්ෂා කලා

ප්‍ර: යටට ඇඳසිටියේ මොකක්ද?

උ: සුදු සරමක්

ප්‍ර: උඩු කයට?

උ: සුදු කමිසයක්

ප්‍ර: මොකක්ද තමාට අනාවරණය වුණේ?

උ: ඔහු ඇඳසිටි සුදු කමිසයේ වමිපස සාක්කුවේ තිබී නිල් පාට සොලොෆේන් කවරය තිබුණා.....

When going through the said evidence of witness Rangajeewa, it is clear that the position taken by the witness with regard to the dress worn by the accused was a white sarong and a white shirt and the blue bag containing heroin was recovered from the left shirt pocket.

However, under cross examination the witness had taken up a deferent position and the answers given by him had been recorded as follows,

Page 61-62

ප්‍ර: පැමිණිමේ සටහනේ විත්තිකරු ඇඳගෙන සිටිය ඇඳුම සම්බන්ධයෙන් තිබේ ද?

උ: ඔව්

ප්‍ර: මොන පාට ඇඳුම්ද කියා තිබේ ද?

උ: පැමිණිමේ සටහනේ ඇඳුම්වල වර්ණය නැහැ කමිසයක් ඇඳසිටින බව තිබෙනවා

ප්‍ර: තමාගේ විභාග සටහනේ කොහොමද තිබෙන්නේ?

උ: සුදු කමිසයක් සහ දිග කලිසමක් ඇඳගන සිටින පුද්ගලයෙක් කියා

ප්‍ර: පැමිණිමේ සටහනේ ඔය කමිසයේ පාට සඳහන් කර නැහැ?

උ: නැහැ

ප්‍ර: ඇඳතිබුනේ කලිසමක් කියා නැහැ?

උ: නැහැ

ප්‍ර: විභාග සටහනේ තිබුණෙ කලිසමක් කියා?

උ: ඔව්

The above position taken by witness Rangajeewa under cross examination was further established by witness Karunathilake as follows,

Page 93,

ප්‍ර: දැන් ඒ පුද්ගලයා පෙන්වා දුන්නාට පසු ඔබලා දෙන්නා ගත්ත පියවර කුමක්ද?

උ: රංගජීව හැදුනුම්පතය පෙන්වා මත්දව්‍ය කාර්‍යාංශයෙන් බව දැනුවත්කලා ඒ අවස්ථාවේ ඔහු පිටුපසට පනින්න සූදානම්වුනා එය වලකා ආරක්ෂාවට හිටියා

ප්‍ර: ඔහු මොකක්ද ඇඳගෙන හිටියේ?

උ: කලිසමක් සහ කමිසයක්

In the said circumstances, it is observed that the position taken by witness Rangajeewa under cross examination was corroborated by witness Karunathilake and therefore the Learned Trial Judge when going through the notes of Rangajeewa had not used the notes of Rangajeewa as substantive evidence in this case but that was used to make sure whether there was in fact a contradiction in the evidence of witness Rangajeewa or not.

The observation made by the trial judge with regard to WPC Sunila, we observe that the failure by Rangajeewa to make notes with regard to Sunila in his notes, was clarified by the trial judge in order to consider the omission in the evidence of Rangajeewa. After going through the notes of Rangajeewa, Karunathilake and Sunila the court had concluded that the said omission does not go to route of the case. The Learned Trial Judge had not considered the notes of Karunathilake and Sunila as evidence in this case but only made use of it to consider the said omission only. The evidence that confirms Sunila's presence was established by the oral evidence of witness Rangajeewa and Karunathilake.

In these circumstances, we see no merit in the 1st Argument raised on behalf of the accused-appellant to the effect that the trial Judge erred in Law by perusing the Information Book Extracts when delivering the Judgment.

As the 2nd ground of appeal the learned Counsel once again drew our attention to the judgment and argued that the Learned Trial Judge had erred in law by failing to properly evaluate the omissions and contradictions observed in this case.

As observed above, the Learned Trial Judge was correct and was entitled under law to go through the Information Book Extracts in considering some of the contradictions and omissions in the case in

hand. In addition to the above contradictions and omissions our attention was drawn to the evidence given by the said witnesses with regard to the recovery of the production from the custody of the accused-appellant.

In this regard, we observe that witness Rangajeewa had referred to the recovery of productions in his evidence as follows;

Page 44,

ප්‍ර: මොකක්ද තමාට අනාවරනය වුනේ?

උ: ඔහු ඇඳසිටි සුදු කමිසයේ වම්පස සාක්කුවේ තිබී නිල්පාට සෙලෝෆේන් කවරයක් තිබුනා එහි ගුලියක් වැනි දෙයක් තිබුනා.....

but under cross examination, his evidence with regard to the recovery was recorded as follows;

ප්‍ර: මහත්තයාගේ සටහන් වල තිබෙනවාද කුඩු වශයෙන් කියන එක?

උ: මගේ සටහන් වල තිබෙනවා ඔහුගේ වම්පස කලිසම් සාක්කුවේ තිබී එම සෙලෝෆේන් බැගය ලිහා පරීක්ෂා කලා කියලා තිබෙනවා.....

Witness Karunathilake whilst giving evidence had referred to the recovery as follows;

Page 93,

ප්‍ර: පරීක්ෂා කරනවිට මොකක්ද අනාවරණ වුනේ?

උ: ඔහුගේ සාක්කුවේ තිබී නිල්පාට සෙලෝෆේන් බැගයක ගුලි හමුවුනා

ප්‍ර: ඒ සාක්කුව මොන පැත්තේද තිබුනේ?

උ: වම්පැත්තේ කමිසමේ උඩ සාක්කුවේ සෙලෝෆේන් බැගයක් තිබුනා

Page 101,

ප්‍ර: රංගජීව මහත්තයා පරීක්ෂා කරලා මෙම හෙරොයින් කොහෙ තිබිලද හොයා ගත්තේ?

උ: කමිසයේ උඩ සාක්කුවේ තිබිලා

ප්‍ර: රංගජීව මහත්තයා සාක්කු කීයක් පරීක්ෂා කලාද?

උ: ඒ අවස්ථාවේදී පුද්ගලයකු පරීක්ෂා කලයුතු ආකාරයට පරීක්ෂා කලා

ප්‍ර: සාක්කු කීයක් පරීක්ෂා කලාද?

උ: ඔහුගේ කලිසම් සාක්කුත් පරීක්ෂා කලා

Page 102,

ප්‍ර: කොහොමද කියන්නේ සාක්කුවද, සාක්කුද?

උ: කමිස සාක්කුවේ තිබි ඒ හාන්ඩ හොයා ගත් බව

.....

ප්‍ර: ඔබ අසත්‍ය ප්‍රකාශ කරන බවට යෝජනා කරනවා

උ: නැහැ

ප්‍ර: මම ඔබට යෝජනා කරනවා විත්තිකරුගේ කමිසයේ සාක්කුවේ තිබි ගත්තා කියන එක අමූලික අසත්‍යය

උ: නැහැ

Whilst referring to the above evidence with regard to the recovery of the productions, the appellant had argued before us that the learned trial judge had erred in law when he failed to evaluate the said evidence which is contradictory per se in the evidence of witness Rangajeewa and inter se with the evidence of Karunathilake.

However as observed by us, witness Rangajeewa in examination in chief, had taken up the position that the blue cellophane bag containing heroin was recovered from the left side shirt pocket but under cross examinations whilst referring to his notes had said, "මගේ සටහන්වල තිබෙනවා ඔහුගේ වම් පස කලිසම් සාක්කුවේ තිබි....." and if the said position is correct it should appear in the notes made by him during the investigation.

Even though the Learned Trial Judge had gone through the Information Book Extracts with regard to the notes made in respect of the dress worn by the accused and the participation of WPC Sunila, the trial judge had not made any observation with regard to the notes made in respected of the recovery.

As observed above, section 110 (4) of Code of Criminal Procedure Act No. 15 of 1979 provides, to use such statement or information not as evidence in the case, but to aid it in such inquiry or trial,

and in the case of ***Keerthi Bandara V. Attorney General (2000) 2 Sri LR 245 at page 259*** powers given to the trial judge or the Court of Appeal by the above provision was discussed by Jayasuriya (J) as follows;

"The evidence of a witness is assailed as being testimonially untrustworthy on an account of an alleged vital omission, the Trial Judge or the Court of Appeal merely looks into the statement, interprets that statement and thereafter decides whether there is a vital omission as urged by the counsel? In indulging in such a process certainly by both the trial judge and the Court of Appeal are not using the contents of the statements as substantive evidence to determine the issues arising the case. Both courts are looking into the statements only to ascertain whether there is a vital mission.

In the said circumstances, we observe that this court too is empowered by the said section to go through the Information Book Extracts, not as evidence but to aid it in the case before this court.

In this regard, what is necessary to consider by this court is that whether the contradiction per say with regard to the recovery of the production, goes to the route of the case or can be ignored by us. When going through the Information Book Extracts we observe that witness Rangajeewa had made two entries, one as the return entry and the other as the detailed arrest notes and in both those notes he had recorded that he recovered the blue colored cellophane bag from the left shirt pocket of the accused.

In these circumstances, it is observed by us that the failure by the trial judge to consider the said contradiction had not prejudice the defence case.

The Learned Counsel for the accused-appellant drew our attention to the evidence of witness Karunathilake recorded at page 93, to the effect,

ප්‍ර: ඒ සාක්කුව මොන පැත්තේද තිබුනේ?

උ: වම් පැත්තේ කමිසමේ උඩ සාක්කුවේ සෙලෝෆේන් බැගයක් තිබුනා

And argued that the term "කමිසමේ" referred to in the said answer was to be interpreted as a trouser but not as a shirt.

However, in this regard we observe that, witness Karunathilake was consistent in his evidence and had repeatedly said that the bag containing heroin was recovered from the shirt pocket and not from the trouser pocket. Even in the answer referred to above he referred to a "උඩ සාක්කුවට" (top pocket) which is only found in a shirt but not in a trouser and in these circumstances, we see no merit in the said argument raised on behalf of the accused-appellant.

For the forgoing reasons, we see no merit in any of the arguments raised on behalf of the accused-appellant before this court. We therefore dismiss the appeal and the affirm the conviction and sentence imposed on the accused-appellant.

Appeal dismissed. Conviction and sentence is affirmed.

President of the Court of Appeal

S. Devika De L. Tennakoon J

I agree,

Judge of the Court of Appeal