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

In the matter of an Appeal
Against an order of the High
Court under Sec. 331 of the
Code of Criminal Procedure
Act No. 15 of 1979 and in terms of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

The Hon. Attorney General

Attorney General's Department,
Colombo 12.

Complainant

Vs

Yakdehiralalage Sarath Kumara alias
Singithi

Accused

C. A. Case No. : 194 /2009

H. C. Colombo Case No. : 402 /2001

And Now between

Yakdehiralalage Sarath Kumara alias
Singithi

Accused-Appellant

Vs

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

Complainant Respondent

BEFORE : **M.M.A. Gaffoor J &**

K. K. Wickramasinghe, J

COUNSEL : AAL A. Premarathna with AAL G.L.Perera for the Accused-Appellant.

Haripriya Jayasundera DSG for the Attorney General.

ARGUED ON : 20th September 2016

DECIDED ON : 18th May 2017

K. K. WICKRAMASINGHE, J.

The Accused Appellant (herein after referred to as the Appellant) was indicted in the High Court of Colombo on the following counts:-

(1)On or about 18.08.2000 by keeping in possession 10.6 grams of heroin and thereby committing an offence punishable under section 54 A (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984.

(2) In the course of the same transaction by trafficking 10.6 grams of heroin and thereby committing an offence punishable under Section 54 A (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984.

At the conclusion of the trial, the Learned High Court Judge convicted the appellant on the above mentioned counts and accordingly sentenced him to life imprisonment on 28.05.2009.

The instant appeal is arising in pursuant to the conviction and the sentence of the Accused-Appellant.

During the course of the argument counsel for the Accused Appellant raised following grounds of Appeal:-

(1)The Learned High Court Judge failed to consider the glaring contradictions in the case of the prosecution.

(2) The Learned High Court Judge failed to consider the improbability of the evidence placed by the prosecution.

(3) The Learned Trial Judge has failed to consider that the evidence of the main investigating officer has not been led and thereby deprived the accused the opportunity to cross examine the said officer, which has deprived the accused the right to a fair trial.

(4) The Learned trial judge has failed to consider as required by law, the statement from the dock made by the accused.

(5) The learned trial judge has wrongly misinterpreted the version of the prosecution as opposed to the version presented by the defence.

Facts as born by the record as follows:-

A raid was conducted by a team of officers attached to the police Narcotic Bureau (PNB) led by SI Ravindra near Borella bus stand on a tip given by his private informant.

According to the evidence of the prosecution, PS Kapila Senaratne has received a tip off from a private informant to the effect that a person known as Sarath Kumara alias Singithi was coming to the bus stand in Borella with heroin. A team of police officers went to the place. PS Kapila Senaratne and SI ravindra approached the said person and had divulged their identity and searched him after taking him about 10 feet away. The Appellant was found to have been keeping brown colour powder (contained heroin) in a green colour cellophane bag in his right pocket of the pair of shorts and money in his left pocket. After Returning to the PNB a field test was conducted before the appellant and it was revealed that the brown colour powder (gross weight 51gms.) recovered from the appellant was heroin. The amount of money recovered from him was Rs.61, 000/=

At the stage of the trial SI Ravindra was abroad and PS Kapila Senaratne's evidence was led regarding the raid and productions were duly marked through him. It was revealed that instead of the red pair of shorts with pockets, green pair of shorts without pockets was replaced. Inquiry was held with regard to that and CID investigations were commenced.

PS categorically stated that the appellant was arrested at Borella bus stand with heroin in possession. The Appellant has challenged the place of arrest and claimed that the appellant was at home with his child and no heroin recovered from his possession. Chain of productions was not challenged by the defence.

The appellant in his doc statement sated that he was arrested at home on the 08.03.2000 at 6.45 a.m. while he was with his child. He denies the recovery of heroin either from home or from back yard. He further stated that he was assaulted by PNB when he refused to place his thumb impression and then he obliged under duress. The appellant's aunt was called as a defence witness and testified that he was taken into custody from his residence on the 8th.

When considering the 1st ground of appeal it appears that number of officers took part in the raid defer from one person. PC Ovitagala's evidence was not very specific and he has used the term 'about'6 but PS Kapila has stated that altogether 7 officers went. The learned trial judge has noticed that there were 7. Therefor it is evident that the difference of one person doesn't mean that the raid was false and that discrepancy does not go to the root of the case. During the course of the trial it was revealed that the shorts were replaced after the productions were handed over to the High Court. Having considered the evidence led before the trial judge and attendant circumstances, the learned trial judge has held that it has not created any reasonable doubt in the prosecution case. It is evident that switching of (replacing) the production was beyond the control of the prosecution. At the inquiry it was revealed that a third party has done it. The learned trial judge has observed that the appellant has not taken up the position that he was not wearing a pair of shorts underneath at the time of arrest.

The counsel for the Accused Appellant submitted that the investigating officer referred to the cellophane cover which contained brown powder as light pink instead of light green, but at the cross examination, witness had corrected it as light green cellophane bag. When someone examine the line of questioning it is very clear that the words 'light pink' are nothing but a typographical error. PS Kapila Senaratne in his evidence has categorically stated that a light green cellophane bag was recovered from the possession of the appellant containing a brown colour powder and later after the test, it was revealed to be heroin.

When considering evidence it is abundantly clear that it has been incorrectly typed 51 packets instead of 51grams, where the prosecution has failed to correct proceedings.

In **Karunaratne Vs AG (2005) 2 SLR 233 at page 240,** rejecting certain minor discrepancies raised by the learned counsel of the appellant, Balapatabendi J. cited the case of **UP Vs MK Anthony (1984 2 SCJ 236**) with approval which held that *"where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors"*.

The learned counsel for the appellant alleges that the manner in which the search was done was very improbable.

Considering the available evidence it is very clear that there is no reasonable doubt created in the manner in which the search was conducted.

Even with regard to the odometer the learned high court judge has observed that it is been used to note down the fuel consumption and mere discrepancy in the mileage does not amount to create a reasonable doubt in the prosecution case.

The main investigating officer was unable to give evidence due to his unavailability in the country and his return was not known but that position was not challenged by the defence under cross examination.

In the case of **Dedimuni Wimalasena and Dedimuni Indrasena Vs AG CA No. 135/2003 decided on 10.06.2008** Sisira de Abrew J. held that "whenever the evidence given by a witness on a material point is not challenged in cross examination it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that witness is a reliable witness".

In **Sunil Vs AG 99 S.L.R 191** *"the court observed solitary witness can be acted upon, provided that he is wholly reliable".*

Section 134 of the Evidence Ordinance clearly stipulates that *"No. particular number of witnesses shall in any case be required for the proof of any fact"*

In the case of **The State Vs Devundarage Nihal SC Appeal 154/2010 decided on 12th May 2011** it was held by R.K.S. Suresh Chandra J. that *".....there is no requirement in law that the evidence of a Police officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars".*

Therefor failure to call SI Raveendra has not caused any prejudice to the appellant, denying him a fair trial.

The learned trial judge has rejected the doc statement of the Appellant by giving reasons. When considering evidence, it is amply demonstrated that it is being considered by the trial judge and therefor there is no merit in the submission of the Counsel for the appellant, stating that the doc statement was not considered.

It is also been submitted by the counsel for the appellant that the appellant was taken into custody only on the 7th but defence witness Kanthi has stated that he was taken into custody on the 8th at his residence. When three police officers were testifying, all of them were subjected for cross examination, but the above mentioned position was not put to the witnesses by the defence.

As held in the above mentioned case, *"whenever the evidence given by a witness on a material point is not challenged in cross examination it has to be concluded that such evidence is not challenged in cross examination it has to be concluded that such evidence is not disputed and is*

accepted by the opponent subject of course to the qualification that the witness is a reliable witness".

Therefore considering above, we see no reason to interfere with the finding of the learned High Court Judge and thereby we affirm the conviction and the sentence imposed by the learned High Court Judge

Hereby the Appeal is dismissed.

Judge of the Court of Appeal

M.M.A.Gaffoor J.

I Agree

Judge of the Court of Appeal

Cases referred to:-

(1) Karunaratne Vs AG (2005) 2 SLR 233 at page 240
(2) UP Vs MK Anthony (1984 2 SCJ 236)
(3) Dedimuni Wimalasena and Dedimuni Indrasena Vs AG CA No. 135/2003 decided on 10.06.2008
(4) Sunil Vs AG 99 S.L.R 191 The State Vs Devundarage Nihal SC Appeal 154/2010 decided on 12th May 2011