

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

In the matter of an Appeal in terms of
Section 331 of the Code of Criminal
Procedure Act.

The Hon. Attorney General

Complainant

C.A Appeal No: CA 49/2012

Vs.

1. Kanagsabey Selvaratnam
2. Abdul Salaam Azwar
3. Ussain Sahibu Mohammed Jawfer

High Court Puttalam

Accused

Case No: 27/2009

AND NOW BETWEEN

Ussain Sahibu Mohammed Jawfer

3rd Accused-Appellant

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

BEFORE : Deepali Wijesundera J.
L.U Jayasuriya J

COUNSEL : R. Arsekularatne P.C for the Accused-Appellant
Shanil Kularathna D.S.G for the A.G

ARGUED ON : 27th June, 2016

DECIDED ON : 4th August, 2017

L.U Jayasuriya J.

The 3rd Accused Appellant along with two others were indicted in the High Court of Puttalam for trafficking and illegal possession of heroin amounting to 889.5 grams.

The 3rd Accused Appellant and the 2nd Accused were tried in absentia when the trial commenced on 18.02.2010.

The 1st Accused was present through-out the trial and PW1 and PW2 have testified before the High-Court and the 1st Accused has given evidence on his behalf when his defence was called.

The Learned High Court Judge has fixed the case for judgment on 27.07.2011.

Journal entry dated 09.06.2011 shows that the 3rd Accused Appellant was arrested by Kekirawa Police.

On an application made by the Counsel for the Accused Appellant, the learned High Court Judge has allowed to tender PW1 and PW2 for cross-examination on 21.09.2011.

It appears from the proceedings that the counsel for the Appellant has not made an application to cross-examine the 1st Accused who implicated the Accused Appellant whilst giving evidence.

The 3rd Accused Appellant and the 2nd Accused were convicted on the 2nd charge and sentenced to death. This appeal is preferred by the 3rd Accused Appellant against the said conviction in the sentence.

The 1st Accused was acquitted on both charges on the basis that he was a Bonafide-Passenger (vide page 384 of the brief).

According to the prosecution, on or about 20.04.2007, a police team manning the Nagawilluwa check point has tried to stop a lorry, white in colour, on receipt of some information; around 9.30 in the night. According to the witness Senevirathna, they have flashed a torch and signaled to stop the lorry but the lorry has attempted to flee and two gunshots were fired into the air. Thereafter the lorry had stopped and three men have got down.

While the 1st Accused was being questioned, the other two have run away.

The Police party had searched the said lorry and found two parcels of heroin concealed behind the cassette player which was fixed to the dashboard of the said vehicle. They have found another parcel of heroin after removing a part fixed behind the steering wheel.

Learned President's Counsel for the Appellant argued that the witnesses didn't have sufficient time to identify the Accused Appellant and he was identified by an identity card which had been allegedly recovered from the Accused Appellant.

The Learned President's Counsel submitted that a vital contradiction inter-se has not been considered by the Learned High Court Judge wherein PW1 states that all three suspects travelled in the front seat of the vehicle and in the examination in-chief of the 2nd Witness was to the effect that the 1st Accused travelled in the rear of the vehicle. He further

submitted that under cross-examination the 2nd Witness changed this position and testified that all three suspects travelled in the front seat.

The Learned President's Counsel submitted that the Learned High Court Judge has doubted this item of evidence referring to page 382 of the brief but proceeded to convict the Accused Appellant.

The learned D.S.G for the respondent did not make a submission about this vital contradiction.

He submitted that the 1st Accused's evidence in which he stated that the Appellant traveled in the front seat of the lorry. He further argued that this position was not challenged by the Appellant in the trial court.

He cited the Judgments in case Nos CA 135/2002 decided on 10.06.2003, Rex V Ukkubanda 24 NLR 327, Iyer V Hendrik Appu 34 NLR 330, Queen V Mapuligama Buddharakkhitha Thero and two others 63 NLR 433 and submitted that evidence of a co-accused can be considered against another accused.

In CA 135/2003 it has been held that the evidence of a co-accused can be considered by a court of law provided that the evidence has been corroborated through independent evidence.

It was held in Rex V. Ukkubanda that "Where in a criminal trial the accused persons elect not to give evidence, but are content to rely either upon their statements in the Police Court or upon statements in the dock, the jury should be warned, where such a statement by one prisoner inculcates the other, that it should not be taken into account against him."

In the instant case, the evidence of the 1st Accused has been marked with ten contradictions by the prosecution which assails his credibility and therefore it is not safe to rely upon such evidence.

Further the 1st Accused has not stated in his evidence that the Appellant travelled in the lorry on the day in question.

The other matter that has to be considered is that while PW1 and PW2 state that the heroin was recovered concealed in the dash board of the vehicle, the 1st Accused stated that the heroin was recovered concealed underneath the seat of the lorry (page 263 of the brief).

I am of the view that the Learned High Court Judge has wrongly come to the conclusion without any evidence that the Accused Appellant had the knowledge that heroin was hidden in the vehicle.

Moreover the prosecution has failed to establish the identity of the Accused Appellant as prosecution witnesses have had only a few seconds to observe him who happened to be a stranger (vide pages 323 and 325 of the brief) and the Accused Appellant was identified in the dock seven years later which fact has not been considered in favour of the Accused Appellant.

For the afore-stated reasons, I set aside the conviction and the sentence of the Accused Appellant and allow the Appeal.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J. :

I Agree.

JUDGE OF THE COURT OF APPEAL