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

In the matter of an appeal under and in terms of the Section 331 of the Code of Criminal Procedure Act No.15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal
Case No. CA/227/2011

Vs,

Aloysius Marie Silva.
No. 391/13, Madampitiya Road,
Colombo 14

Accused

And Now Between

Aloysius Marie Silva.
No. 391/13, Madampitiya Road,
Colombo 14

Accused-Appellant

High Court of Colombo
Case No. HC 1014/2002

Vs,

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Respondent

Before : **S. Devika de L. Tennekoon, J &**
S. Thurairaja PC, J

Counsel : Saliya Pieris, PC with V. de Saram for the Accused-Appellant
H.I. Peiris DSG for the Respondent

Argued on :**01st August 2017**
Written Submissions on :**30th August 2017**
Judgment on :**15th September 2017**

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Judgment

S. Thurairaja PC, J

The Accused appellant Aloysius Marie Silva was indicted by the Attorney General at the High Court of Colombo under the case number of HC. 1014/2002, on two counts, as follows:

1. On or about 31st July 2001 at Thotalanga, trafficked 114.4 grams of Diacetyl Morphine (Heroin).
2. On the same date, place and in the same course of transaction possessed 114.4 grams of Diacetyl Morphine (Heroin).

Prosecution led evidence of 6 witnesses including the Government Analyst and closed the case for the Prosecution, the Accused appellant made a dock statement and closed the case for the defence. The learned Trial Judge after giving reasons found the Accused Appellant guilty for both charges levelled against her, Convicted and sentenced her for life imprisonment.

The Accused Appellant being aggrieved with the said conviction preferred an appeal to this Court on following grounds;

a. Prosecution failed to call the main Investigating officer as a witness.
b. Break in the chain of production being sent to the Government Analyst.
c. Discrepancy in the identity of the production.
d. There is no proper investigation specifically the house of the accused was not searched.
e. Dock Statement was rejected without giving reasons.
f. The trial judge casted unnecessary burden on the accused.

The Counsel for the Appellant submits, that the investigation was conducted by Sub Inspector Thennakoon attached to the Police Narcotics Bureau (PNB). At the Trial, he did not give evidence, further the productions were in his possession, therefore by not calling him the prosecution failed to prove exclusive custody of the production.

Deputy Solicitor General who appeared for the Respondent Attorney General responded and filed written submission.

Considering the facts as submitted by the prosecution witnesses at the trial, on the 31st July 2001, PW2 Police Sergeant Senaratna who was attached to PNB, received a confidential information from his personal informant at around 1035hrs that, a woman called "Marie" will come to the bus stand at Thotalanga with heroin. He immediately informed it to SI Thennakoon (PW1) and he in turn organized a raid. A

team of officers including WPC Kusumalatha went to the place, laid ambush for the arrival of the accused when she came she was arrested and was found with 248g of suspected narcotics substance in her possession. She was taken to PNB and productions were sealed. She was produced at the magistrate court and the productions were sent to Government Analysts and found 114.4g of Diacetyl Morphine (Heroin). On the indictment preferred by the Attorney General on the accused, trial held at High Court of Colombo. There she was found guilty and sentenced to life.

First ground of appeal raised by accused appellant, was that, the main investigating officer who took the production into custody was not called and the prosecution had not submitted reasons for not calling him. Further by not calling the witness there is a break in the chain of custody.

This ground of appeal has two parts. Firstly, prosecution not giving reasons for not calling him. Secondly, break in the chain of custody. I wish to discuss chain of custody together with another ground of appeal, later.

Perusing the case record including the journal entries and the evidence the witnesses had submitted, SI Thennakoon had left the country and presently resides in Switzerland. He had been served with vacation of post (VOP). The police witnesses with certainty had submitted that the said witness SI Thennakoon cannot be brought to court. I find that the prosecution had given a reasonable explanation for not bringing the prosecution witness no.1 namely SI Thennakoon. Further the prosecution had not made an application under Section 32 of the Evidence Ordinance. Therefore, the prosecution is not required to fulfil the requirement under as per the section above mentioned.

Now, I consider grounds of appeal as mentioned in b, c, d above.

On receiving information on the 31st July 2001 at 1035hrs, PS Senaratna informed it, to SI Thennakoon. He formed a team including PS Senaratna, WPC Kusumalatha and others. Formalities including book entries, body search were done and the private informant was picked up at the PNB car park and proceeded to Thotalanga. There, SI Thennakoon and the informant stood on one side; PS Senaratna stood little away from the bus stand. WPC Kusumalatha (PW3) stood 15ft away. Other team members took position at different places. It should be noted that except one member all of them were clad in civvies. All others stood away from the scene but with coordinated contact. The accused was seen coming towards the bus stand, the informant identified and gave the tip off to the investigating team and left the scene. SI Thennakoon and PS Senaratna waited for the arrival of the accused. When the accused came, SI Thennakoon identified himself as an officer of PNB and wanted her to show the bag in hand. WPC Kusumalatha who was in the same vicinity was

signalled to approach and she took the bag and searched, there, they found brown colour powder kept in a pink colour cellophane bag. WPC Kusumalatha gave the bag and the substance to SI Thennakoon and took control of the accused appellant. Since the bus stand was very busy at 1205hrs, all of them immediately left to PNB. There the substance was subject to preliminary investigations and found positive of heroin. It was weighed and found to be of 248 grams. There the accused was explained of the charge of trafficking and possession of heroin and arrested. In the presence of the accused PS Seneratna, WPC Kusumalatha and SI Thennakoon sealed the parcel with sealing wax. He placed his own stamp and the accused placed her thumb impression. PS Seneratna made entries on the parcels and at the Production Register both PS Seneratna and WPC Kusumalatha gave uncontradicted evidence, that from the time of apprehension at Thotalanga up to the point of sealing the production, SI Thennakoon, PS Seneratna and WPC Kusumalatha were together.

Regarding the chain of production, the evidence is that the production was recovered from the accused on the 31st July 2001. It was given to SI Thennakoon by WPC Kusumalatha in the presence of PS Seneratna and the accused. It was sealed by SI Thennakoon in the presence of the accused, PS Seneratna and WPC Kusumalatha. On the same day the productions were handed over to reserve PC Priyantha. It was in his personal custody (safe) and the same was handed over to SI Sunil Perera at 1745hrs on 31st July 2001. Since then it was in his personal custody. On the 8th August 2001, it was handed over to SI Nalaka. He kept it in his personal custody and taken it to the government analyst on the 9th August 2001 and handed over to the assistant Government Analyst Ms. Rajapaksha. She received the parcel and observed that all seals were intact and she issued a receipt. She weighed the substance before examination and found that it had a weight of 247.8 grams of brown colour substance. She did the chemical test, analysed and found pure Diacetyl Morphine (Heroin) weighing 114.4 grams. After the examination, she returned the production to court with proper seals.

It is noted, that the Assistant Government Analyst had professional acquaintance with the signature and seal of SI Thennakoon hence she identified the parcel had his seal and signature. Considering the evidence of PS Seneratna, WPC Kusumalatha, PC Priyantha, SI Sunil Perera, SI Nalaka and Assistant Government Analyst Rajapaksa, I do not find that the accused appellant had marked any material contradictions. Further, I find that the witnesses properly corroborated each other. Therefore, the break in the chain of evidence and misidentification of production fail in its own merits.

The appellant submits that the learned High Court Judge has not brought to his mind that the house of the accused was not searched or raided by the police officer.

The appellant relies on **M.H. Priyani alias Chooty and another Vs Attorney General CA 10-11/2010** decided on 07/02/2014, referred the investigation officers as Police officers attached to Police Narcotics Bureau, in fact those officers were attached to the Excise Department and I find that the reference made by the Counsel was incorrect. Carefully considering the facts of the case, I conclude that the present case is much different from the above case.

The modus operandi of an operation is decided by the main investigation officer after considering the environment, person involved, quantity, facilities available and many other things. In this case PS Seneratna says that he had a specific information regarding that, the accused was carrying narcotic substance. There is no information about her house. Considering the scene of crime as explained by the witnesses, it was noon time, a bus stand at Thotalanga and a woman carrying substantially high quantity of heroin, will a prudent officer with experience in the narcotics raid take a risk of going to another place, specially the residence of the accused which is situated in a crowded area (slum).

The accused appellant submits that her dock statement was rejected and an unnecessary burden was casted on her. The learned trial judge had found the accused guilty after giving considered reasons. There he had analysed the evidence and found that the accused was guilty of the offence. The question posed should not be read separately. It has to be read with the following paragraphs. There it gives a clear explanation stating that there is no necessity for the police to frame a false allegation against the accused who was a lady selling beetle nuts.

For the purpose of completeness, I reproduce the dock statement:

> " මට බොරු නඩුවක් ගෙනැල්ලා පැටලුවේ. මහත්වරු කිව්වා මම බස් නැවතුම් පොල ලඟ ඉන්න කොට අල්ලා ගත්ත බවට. ඒ වුනාට මාව අල්ලා ගත්තේ දොරකඩ ලඟ පයිප්පයක් තිබෙනවා එතන මම වලන් පිඟන් සෝදමින් සිටියේ. අනෙක් එක මගේ අම්මා තාත්තා නැහැ මම පොඩි කාලේ නැති වුනේ. මම අක්කා ලඟ සිටියේ. අක්කා තමයි මාව බලන්නේ. අපි දුවක් කපලා ජීවත් වුනේ. කීමට තිබෙන්නේ එපමණය. "

In **M.H. Priyani alias Chooty and another Vs Attorney General CA 10-11/2010** Sisira J. de Abrew, J laid down the following guidelines,

1. If the evidence of the accused's (sic) is believed, it must be acted upon,
2. If the evidence of the accused creates a reasonable doubt in the prosecution's case defence of the accused must succeed.

The accused was present from the inception; she observed the court proceedings and was represented by a senior counsel. When one reads the dock statement they

can observe that she says, that, she was entangled into a false case. The gentlemen said she was arrested near the bus stand but in fact she was arrested while she was washing dishes near the pipe which is situated at the door step. Further, she says that she lost her parents when she was young, she was with her elder sister who looked after her. We cut beetle nut, that's all to say.

Carefully scrutinising her dock statement, she did not expressly say that she is denying the charge. Even for a moment, I do not say that she has a burden to accept or deny the charges but the available material shows that she had not denied the charges.

Considering the entire trial proceedings and the reasons given by the trial judge, I do not find that the accused appellant was burdened with proving her innocence. It is further proved that the learned trial judge was very lenient in imposing the sentence. He had imposed the minimum mandatory sentence.

We should be mindful, that she possessed 248 grams of brown powder which had 114.4 grams of pure heroin, which shows she had high quality heroin in her possession. Our legislations were set in the background where anybody who was possessing more than 2 grams shall be punishable with death or life imprisonment.

For the aforesaid reasons, I find that the accused appellant is not successful in convincing this court, that the conviction cannot be reached with the available evidence before the trial court. Therefore, I dismiss the appeal and affirm the conviction and the sentence.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J
I agree,

JUDGE OF THE COURT OF APPEAL