

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

**In the matter of an appeal under and
in terms of section 331 of the
Criminal Procedure Code Act No. 15
of 1979.**

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

Complainant

**Court of Appeal
Case No. CA125-126/2010**

Vs,

1. Vithanage Sarath Kumara alias Shantha
2. Madduma Siripala
3. Ponnampereuma Arachchige Nandasena
4. Kurukulasuriyage Samarasinghe Perera

Accused

And Now Between

1. Madduma Siripala
(2nd Accused)
2. Ponnampereuma Arachchige Nandasena
(3rd Accused)

Accused-Appellant

**High Court
Case No. 1304/2003**

Vs,

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

Complainant-Respondent

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

**Counsel : Neranjan Jayasinghe for the Accused-Appellant
Rohantha Abeysuriya SDSG for the Complainant- Respondent**

Judgment on : 27th October 2017

Judgment

S.Thurairaja PC J

Four accused persons were indicted before the High Court of Colombo under case bearing number HC 1304/2003, for possession and trafficking of 53.9 grams of Heroin. During the trial the 1st Accused died and the trial proceeded against other three accused persons, after the trial the 4th Accused was acquitted and the other two were found guilty and sentenced to life imprisonment.

It will be appropriate to mention the charges preferred against all four accused persons at the High Court.

- a) First count against the 1st and 2nd accused persons for possession of 53.9 grams of Heroin punishable under Section 54a (d) of the Poison, Opium and Dangerous drugs act.
- b) Second count against the same people for trafficking punishable under Section 54a (b) of the said act.
- c) Third count against the 3rd accused for aiding and abetting the 1st and 2nd accused persons to possess the heroin, punishable under Section 54b of the said act.
- d) Fourth count against the third accused for aiding and abetting the same people for trafficking the said amount of heroin.
- e) Fifth count against the 4th accused for aiding and abetting the 1st and 2nd accused persons to possess the heroin above mentioned punishable under Section 54b.
- f) Sixth count is also against the 4th accused for aiding and abetting the 1st and 2nd accused persons for trafficking heroin, punishable under Section 54b.

At the trial before the High Court of Colombo, the prosecution had opted to call only two witnesses, one Police Officer and the Government Analyst. While the 2nd and the 4th accused persons made dock statements the 3rd accused gave evidence for the defence. The learned Judge of the High Court acquitted the 4th accused and convicted the 2nd and 3rd accused.

Both accused persons being aggrieved with the decision of the High Court preferred an appeal to this court and formulated the following grounds of appeal;

- i) The entire case relies on an uncorroborated evidence of evidence of a single witness.
- ii) Prosecution case fails on test of probability.
- iii) There is no specific charge of joint possession.

- iv) Contradiction per-se on the sole witness.
- v) The trial judge had relied and acted on hearsay evidence.
- vi) Not considering the evidence for the defence.

Considering all the grounds of appeal, I see most of these grounds are inter related and overlapping each other. Therefore, I wish to consider the grounds of appeal in the following manner;

- a) . Accepting uncorroborated, contradicting and unreliable evidence.
- b) Relying and acting on hearsay evidence.
- c) Not accepting or considering the evidence of the accused appellants.

There are 9 Police officers named as witnesses and the name of the Government Analyst is cited on the back of the indictment. The prosecution had opted called only the evidence of the chief investigating officer and the Government analyst to prove the case against the accused persons.

Section 134 of the Evidence Ordinance states as follows:

"No particular number of witnesses shall in any case be required for the proof of any fact."

With reference to the above-mentioned section, there is no requisite number of witnesses needed to be called to prove a fact. In fact, the evidence of a single witness is sufficient to prove a fact provided the evidence of the witness is **uncontradicted, truthful, independent** and **reliable** to the court.

In this case the only witness called by the prosecution was the Officer in Charge (OIC) of the Police station of Dematagoda (Head Quarters Inspector of Police), Chief Inspector Jayantha Liyanage. As per his evidence, he had done almost everything in this case. He had received an information on the morning of 27th October 1998, to the effect that 'Nande alias Nandasene is packing heroin at his home situated at 147/28, Kalipulle garden.' This witness being the OIC formed a team with 4 officers and went to the place at around 1145 hours and raided the house. According to his description this place is situated about 50 feet away from the main road and in a row of houses with 8-foot wall and an 8-foot gate. When they went, the gate was not locked so they were able to enter without any restrictions. When they entered in to the premises, they found two persons (3rd and the 4th Accused) were standing near the gate and he took them into custody. After that he and the team entered the house and he had seen two persons packing 'Heroin', one on the left had certain things (packing items) on the lap and the other on the right didn't have anything on his lap. These two were identified as the 1st and the 2nd

accused persons. The house was described as a tiny house with only one door and one room divided into two. The front door had only a thin curtain.

The 3rd accused gave evidence under oaths and described the house and the environment. He says that this is a shanty dwelling and he had come there on a relocation programme. He is working as a garbage collector at the Colombo Municipality (CMC) and as a part time plumber. He says this area has more than 2400 houses and thickly populated with a lot of nefarious activities around. This description seems more plausible than the Investigating Officer's evidence. It is questionable whether the police can enter this area in uniform is something the court should consider. The only witness could not give adequate information about the scene of crime. This definitely affects the rights of the accused.

The 3rd and 4th accused persons had been standing outside the house. Other than the fact the 3rd accused is the owner of the house how can they connect both the accused to the incident that had happened inside the house is a question the prosecution must explain and the trial judge should have considered.

When they entered the house the witness initially says the 2nd accused who stood on his right didn't have anything on his lap. Subsequently he contradicts his own version and says that when he got up things fell from his lap. This may not be a serious contradiction but not calling any other witnesses to explain the contradictions may cause a doubt to any person. This does not mean that many witness need to prove a fact, but given the circumstances in this case it causes a doubt in our mind. There is not much of description given about the scene of crime or the mode of the raid conducted.

After the raid the investigating officer had taken all of them to a Jewellery shop at Dematagoda town to weigh the substance, he weighed and found 216 grams. Witness says that he put all the 'heroin' in a tissue paper and sealed it with the left thumb impression of the 1st accused. The question that arose here is whether a shop owner will allow another person to operate a sensitive electronic weighing scale, further what is the experience that the police officer had to operate the scale. Further can the sealing be accepted by the other accused persons.

The most important factor here is that from the inception the Police Officer had identified the substance as 'HEROIN'. How he was able to identify the substance was not explained. There was no experience or field test conducted to confirm whether the substance was 'Heroin' or not. Until the Government Analyst report comes there is no evidence to say that the substance recovered was Diacetyl Morphine or commonly known as Heroin. The only evidence before the court is that the Government Analyst

had confirmed that the substance referred to him contained 53.9 grams of Diacetyl Morphine or heroin.

The Investigating Officer had recovered 216 grams as per the police witness, but the Government Analyst says it was 214 grams the difference was not explained. Further it is noted that the Trial Judge seems to have been confused with the gross and net weight. When the judge was passing the sentence, he said that 530 packets can be made out of 53.9 grams of heroin. Here the gross weight was 214 or 216 grams. The trial judge says that the accused persons had substance with more than 50% purity of heroin. This fact is confusing us because the substance recovered was about 214 grams and pure heroin found was 53.9 grams which is less than 25% of purity. This creates further doubt because the investigating officer had recovered materials used for packing. Considering the evidence, of the only witness, it appears he had not properly enlightened the trial judge on this issue.

The only prosecution witness who gave evidence had elicited that he received information to the effect that the 3rd accused is the owner of the house and he had given the house on rent to the 1st accused for Rs. 500 per month and he get an additional Rs. 200 on the days they packet the things. This incriminating evidence was a hearsay evidence and it was not corroborated by any other witnesses and this was not even put to the notice of the 3rd accused who gave evidence. The trial judge had taken this portion of evidence very seriously and considered it against the accused.

As per the indictment the 1st and the 2nd accused were charged with possession of heroin. Considering the evidence of the sole witness for the prosecution we have to presume that they were charged for 'joint possession'. We could not find any consideration of the concept of joint possession by the learned trial judge.

The witness for the prosecution says that when he entered the house he had seen the 1st accused who was seated on the left had things on the table and lap. The 2nd accused who was on the right was involved in packing. There is a contradiction of things falling from the lap which we have already discussed. Here again there is reasonable doubt regarding the involvement and exact possession of the things.

Considering all available evidence before us we could observe that there are serious doubts in the prosecution's case. It is noted with serious concern that the prosecution calling just one witness to prove the case against 4 persons for joint possession, trafficking, aiding and abetting for possession and aiding and abetting to trafficking of 53.9 grams of heroin.

After carefully considering the submissions of both counsels and their evidence before the High Court, we are of the view that the prosecution had not proved the case beyond reasonable doubt. Therefore, we set aside the conviction and sentence pronounced by the Learned Trial Judge in the High Court and find that the accused appellants not guilty and allow the appeal.

Both accused appellants are acquitted and appeal allowed.

JUDGE OF THE COURT OF APPEAL

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

JUDGE OF THE COURT OF APPEAL