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

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

CA 290/2009

H.C. Colombo – HC:2358/2005

Sudesh Ramanayake

Accused

AND NOW BETWEEN

Sudesh Ramanayake

Accused – Appellant

Vs.

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

Complainant – Respondent

BEFORE: **S. DEVIKA DE LIVERA TENNEKOON J.**

S. THURAIRAJA, PC, J.

COUNSEL:	**Accused – Appellant – Neranjan Jayasinghe**
	Complainant – Respondent – DSG Thusith Mudalige
ARGUED ON -	**29.09.2017**
WRITTEN SUBMISSIONS –	**Defendant – Appellant – 12.09.2017 & 12.10.2017**
	Complainant–Respondent – 02.08.2012
DECIDED ON:	**17.11.2017**

S. DEVIKA DE LIVERA TENNEKOON J.

The Accused Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Colombo for the offence of the possessing a 3 grams of heroin and for trafficking of same. Upon the conclusion of the trial the Appellant was convicted on both counts and sentenced to life imprisonment.

The prosecution led the evidence of IP G. Ariruwan (PW1), IP N. Rangajeewa (PW2), Government Analyst K.P. Sivaraj (PW13), IP A. Jayamana (PW3)
The case for the Prosecution in brief was that on 24.06.2003 PW2 had received information that a person by the name of Sudesh was selling heroine in front of the house of one Irene at 'Garagewatte' in the Thotalanga area. Thereafter, PW2 together with PW1 and 6 other police constables had conducted a raid to arrest this person and left the Police Narcotic Bureau (PNB) at 2225 hours and

reached the area and halted at a Race-by-Race centre on top of the road in question. Then both PW1 & PW2 had proceeded on foot towards the house of the said Irene and they both testified that they saw the Appellant standing close to a dog cage in front of the said house. PW1 had introduced himself and inquired from the Appellant who he was and the Appellant had answered that he as 'Sanjaya'. Thereafter the Appellant's shirt and trouser pocket was searched but since nothing illegal was found. PW1 and PW2 had taken the Appellant near a wall of the said house and searched further. They had then detected a bag hidden in the underwear of the Appellant with about 200 pieces of metal foils all of which contained heroine. Thereafter the Appellant was arrested and taken to his home in Singharamulla in Kelaniya. This search however did not reveal anything. The Appellant was then taken to the PNB where the testing, weighing and sealing was done. It was stated in evidence that the sealed articles were handed over to the production officer PW3 only on the following day since it the raid was conducted late in the night.

The Appellant proceeded to make a statement from the dock denying the charges levelled against him and stated that on the day in question he had gone to the area to collect certain leaves from one Kusumawathie whose home was near the said Irene's house. These leaves were allegedly required for the treatment of his father who had been suffering from paralysis. The Appellant states that around 6.30 – 7.00 pm as he was climbing the steps leading to the said Kusumawathie's house and officer had taken him into the house and assaulted him inquiring about drugs. The said officers had not believed the reason given by the Appellant as to why he was present at that location and had told the Appellant that he had come to buy drugs. They had then put him into the Jeep and asked him whether the drugs belonged to one Bandu. They had

taken him around and taken him finally to head office and introduced heroine to his person.

The Counsel for the Accused Appellant raised 3 grounds of Appeal. Namely;

1. Whether the learned Trial Judge had adequately considered the discrepancies of the evidence of the main prosecution witness.
2. Whether the learned Trial Judge had adequately considered the probability of the raid.
3. Whether the learned Trial Judge misdirected himself in evaluating the dock statement.

On the first ground of Appeal the learned Counsel for the Appellant has pointed out 4 discrepancies in the evidence of the prosecution witnesses. That;

a) PW1 and PW2 are at variance with regard to the crowd in the vicinity of the raid,
b) PW1 and PW2 are at variance as to the moment they first witnessed the Appellant,
c) PW1 and PW2 are at variance as to where the Appellant was searched,
d) PW1 and PW2 have given different accounts about the time at which they reached PNB.

This Court finds that the first three discrepancies highlighted by the learned Counsel for the Appellant are minor in nature as a witness cannot be expected to recall every detail of an incident with photographic precision and the said discrepancies may be assumed to be minor variations in the interpretations of

events and / or the way in which one narrates the version of events as they unfold. The forth discrepancy however, warrants careful scrutiny of this Court.

As per PW1 once the arrest was made the Appellant was brought to the PNB around 1.40 a.m. the following day i.e. 25.06.2006 (vide page 49 of the appeal brief) He specifically states that it was 1.40 in the morning. As per PW2 they had returned at about 4.00am. (vide page 111 of the appeal brief) This was stated by the said witnesses in evidence in chief. The learned Counsel submits on behalf of the State that the said discrepancy was due to a typographical error which is evident since a similar error had been made when PW2 was asked in cross examination about the time at which they returned to PNB it had been recorded as 11.40 (vide page 143) and not as 1.40.

The learned Counsel further submits on behalf of the State that the time of arrival is not a serious contradiction since the defence had not questioned the prosecution witness at length on same. However, when considering this discrepancy with the other discrepancy highlighted by the learned Counsel for the Appellant it seems to be of more concern.

According to the evidence of the prosecution they had gone to the area from which they arrested the Appellant and then proceeded to the residence of the Appellant in the Sinharamulla Kelaniya area and returned to the PNB. As per PW1 the running meter of the vehicle used in the raid indicates that they had travelled for about 60 k.m in the night in question. However, when questioned, PW2 denies having travelled such a distance and it is apparent that PW1 has given vague answers about the distance travelled.

The learned Trial Judge has addressed his mind to this variation in the narrative but had concluded that there is room for a driver of a vehicle to indicate a higher millage to save fuel for personal use and as such the distance of 60 km allegedly travelled to conduct the raid does not challenge whether the raid was actually conducted. This assumption however, is not based on evidence led during the trial and as such is an erroneous assumption made by the learned Trial Judge to the detriment of the Appellant.

This Court therefore, cannot hold with the leaned Trial Judge as both these discrepancies when taken together i.e. the time of arriving at PNB and the distance that the Officers have travelled on the raid raise a doubt in the version of the prosecutions of the events that unfolded on the night in question. The benefit of which must accrue in favour of the accused.

The learned Counsel for the Appellant raises another point which requires serious consideration. After the Appellant was taken to the PNB and after the weighing of the seized substance was concluded the said productions were sealed using the seal of IP Paul who was not a member of the party which conducted the raid. When questioned, PW1 states in evidence that he did so since his personal seal was sent for repairs and since IP Paul was at the PNB office at the time. When questioned why IP Paul's seal was used PW2 has stated in evidence that the question should be put to PW1. PW2 states further that he was never requested to place his seal on the production although he possessed his personal seal.

In the case of Perera vs. AG 1998 (1) SLR 378 it was held *inter alia* in realtion to productions that "the most important journey is the inwards journey because the final Analyst Report will depend on that." In a case in which charges have

been preferred under the provisions of the Poisons, Opium and Dangerous Drugs Act, No. 13 of 1984 and especially where the Appellant argues that the substance in question had been subsequently introduced to the Appellant it is fundamental that the chain of production be established beyond reasonable doubt. The purpose of sealing a production and the procedure insisted upon by Court to re-seal a production after it has been produced in evidence stresses on the importance of preserving the item of evidence through the trial process in a manner in which it cannot be tampered with. It is only after the trial process that an item of evidence maybe dispensed with. In this case it seems that from the inception an officer who was not part of the team which conducted the raid had been used to seal the said production raising a serious doubt. This seems to be a highly irregular practice which cannot be acknowledged as good procedure as it may lead to an abuse of the process. The fact that the said IP Paul was not called to give evidence is seen as a lapse on the part of the prosecution in proving the chain of production also in proving the case beyond reasonable doubt.

The learned Counsel for the Appellant submits the case of Sinnaiya Kalidasa Vs. The Hon . Attorney General CA 128 / 2005 BASL Criminal Law 2010 Vol. 111 page 31 in which Ranjith Silva J quotes E.S.R. Coomaraswamy in the Law of Evidence Volume 2 Book 1 at page 395 dealing with how police evidence in bribery cases should be considered;

> " In the great many cases, the police are, as a rule unreliable witnesses. It is all ways in their interests to secure a conviction in the hope of getting a reward. Such evidence ought, therefore, to be received with great caution and should be closely scrutinized."

Ranjith Silva J states;

> "By the same token the same principles should apply and guide the judges in the assessment of the evidence of excise officers in narcotic cases. Judges must not rely on a non – existent presumption of truthfulness and regularity as regards the evidence of such trained Police or excise officers."

Further, as contended by the learned Counsel for the Appellant it seems that the learned Trial Judge has misdirected himself in evaluating the dock statement. In his dock statement the Appellant has referred to an incident which has taken place on the 24th of July 2003 when in fact the raid had taken place on the 24th of June 2003. The learned Trial Judge has arrived at the conclusion that the incident referred to by the Appellant is not related to the raid in question and therefore has rejected the said statement. The learned Counsel for the Appellant submits that this is most probably due to a typographical error since in Sinhalese the pronunciation for 'June' and 'July' are similar. He further contends that the Appellant was in remand in July after been arrested in June and as such the Appellant was no doubt referring to the raid in question.

The learned Counsel on behalf of the State submits that 'one cannot come to a conclusion that the date had been recorded by mistake' since the Defence Counsel had not rectified the said typographical error when the proceedings were corrected. However, the learned Counsel on behalf of the State heavily relies on a purported admission made by the Appellant in his dock statement in which the Appellant states that the "police asked me if the drugs were Bandu's". The learned Counsel on behalf of the State submits that this tantamount to an admission as the said question could only be asked after recovering the contraband from the Appellant.

However, it seems that the learned Trial Judge has rejected the Dock Statement on the basis that it relates to a separate incident. This Court finds that such a conclusion is unsubstantiated and a wrong finding of fact especially since the Appellant was giving his version of the incident he has been charged with and also since the Appellant could not have referred to any other incident other than the raid in question.

In light of the circumstances discussed above this Court finds that the prosecution has failed to prove the charges against the Appellant beyond reasonable doubt and as such the impugned Judgment of the learned Trial Judge dated 17.09.2009 is hereby set aside and the Appellant is acquitted from the chargers levelled against him.

Appeal Allowed.

Judge of the Court of Appeal

S. THURAIRAJA, PC, J.

I Agree.

Judge of the Court of Appeal