

**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. CA/25/2012

Vs,

Baminehannadige Nilmini Samanthi
Fernando Alia Niluka

Accused

And Now Between

Baminehannadige Nilmini Samanthi
Fernando Alia Niluka

Accused-Appellant

High Court of Colombo
Case No. HC 2378/2005

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 : Anil Sivala PC, with Sahan Kulatunga
for the Accused-Appellant
Azard Navavi SSC for the Complainant-Respondent

Judgment on : 20th February 2018

Judgment

S. Thurairaja PC. J

The Accused Appellant (hereinafter sometimes referred to as Appellant) was originally indicted before the High Court of Colombo for possession and Trafficking of 40.8 Grams of Heroin (Diacetyl Morphine) punishable under Section 54 a (d) and 54 a (b) of the Poison, Opium and Dangerous Drugs Act. After the trial Appellant was convicted on both counts and sentenced to death.

Being aggrieved with the said conviction and the sentence the appellant preferred this appeal to the Court of Appeal and submitted following grounds of appeal;

- i. Defect in adopting the evidence
- ii. Government Analyst evidence is unacceptable
- iii. Prosecution failed to prove the case beyond reasonable doubt
- iv. Learned Trial Judge unreasonably rejected the Dock Statement.

Prosecution lead the evidence of four witnesses, Chief Inspector Gabadage Upul Ariruwan, Sub Inspector Moses Rangajeewa Neomal and Chief Inspector Nanayakkara Nethsinghe Dharmasena Nanayakkara of Police Narcotics Bureau and Government Analyst Kanapathipillai Sivarajah. When the defence was called the Appellant opted to make a statement from the Dock and denied the involvement.

According to the Prosecution witnesses, on the 26th August 2003 at around 2255 hrs, Sub Inspector Rangajeewa received an information from his private informant that the appellant Nilu is going to Kanthi's house to pack Heroin. He informed it to his superior officer CI Ariruwan and a raid team consisting of 9 members, namely CI. Ariruwan, SI. Rangajeewa, SI. Paul, PS.Samarakoon, PC. Rohana, PC. Mahinda, WPS. Gunasekara, PC. Weerasinghe and PCD. Niroshan. The team went to Serpentine Road, Borella, on the way they picked up the informant at Punchi Borella and laid in ambush there for a while. When the appellant came there and tried to open the gate of Kanthi's house, having a bag in her hand, the team advanced and apprehended her. At that time there was another person who was walking behind the appellant started running away and SI. Rangajeewa chased behind him but couldn't arrest him. The bag of the appellant was searched and found 14 packets of powder suspected to be Heroin, glass pad, two knives and blades. The team called the vehicle and proceeded to the house of the appellant and searched the house there did not find anything incriminatory. She was taken to PNB office and the brown coloured powder was subjected to a field test and found positive for Heroin. Thereafter she was formally arrested and produced before the Magistrate. The substance was referred to the Government Analyst and found 40.8 grams of pure Diacetyl Morphine (Heroin).

The First ground of appeal is that there is a defect in adopting evidence. Perusing the brief, we find that part of the trial was taken up before a Judge and before the Prosecution closed the case a new Judge succeeded. New Judge referred this case to his Lordship the Chief Justice to consider to nominate the previous Judge to hear and conclude, but His Lordship the Chief Justice had nominated the New Judge and instructed the new Judge to continue with this case. When the case was taken up before the New Judge both parties agreed to adopt the evidence so far lead and to continue.

The complaint by the Counsel for the Appellant is that referring to Chief Justice is improper. Considering the procedures followed in this case, it was found that this case

was unable to be concluded before a single Judge. Most of the evidence were led before a Judge and before closing the case for the Prosecution the trial Judge was transferred. The relevant law is Section 48 of the Judicature Act, according to the said section a new judge can adopt and continue with the trial. In this case the learned Trial Judge followed a practice which is prevailing with our Judicial Officers that when substantive evidence is lead before a Judge, they try their best to have the same Judge to hear and conclude. In this case also the Judge did the same. Considering this act, I find, it is done to the betterment of the Accused Appellant, even though the Judicature act makes provision to directly adopt (Subject to conditions stated there). Considering the fact that both Counsels had properly adopted the evidence, the present complaint is an afterthought. Therefore, we do not see merit in the ground of appeal.

The Second ground of Appeal is that the evidence given by the Government Analyst is unacceptable. Facts of this case reveals that the productions were properly sealed and referred to the Government Analyst. The Appellant had not challenged the sealing and chain of production referred to the Government Analyst. Chain of custody of the production were well established, we do not see any loopholes there. When the substance reached the Government Analyst Department (GAD) it is acknowledged by a receipt bearing number CD 2366/03. According to the receipt the seals were intact. Productions were examined by Ms. Navaratne under the supervision of Mr.K.Sivarajah. Government Analyst Report, bearing number M/49/2004 (CD/2366/03) was issued under the signature of both officials.

Section 77A (3) of the Poisons, Opium and Dangerous Drugs Act says as follows;

(3) A report submitted to the police officer under subsection (2) shall be received in evidence in any inquiry, trial or other proceeding under this Ordinance.

According to the law, the report can be accepted without calling the Analyst.

The contention of the appellant is that the witness Mr. K. Sivaraja was not involved in the testing therefore he cannot give competent evidence. Witness who gave evidence was the Government Analyst. Unlike the other places this department adopts a different procedure in doing the analytical examination. When it comes to Drugs it is always a senior officer and a junior officer involved in examination. Each and every step were taken together. Therefore, both becomes competent to give evidence. In this case also the same procedures followed and we have no reason the question the competency of the witness, further the Appellant had admitted under section 420 of the Code of Criminal Procedure Act (CCPA), of the competency of the witness. Considering all we find this ground of appeal also fails in its own merits.

The third ground of appeal is that the Prosecution failed to prove the case beyond reasonable doubt. The following arguments were advanced in support of the above ground of appeal.

- The appellant was arrested in front of Kanthi's house and her house was not searched.
- Can these officers wait for more than one hour in that busy area (Serpentine Road)?
- Will the Appellant go to a place in the night leaving two children at home? Test of Probability.
- Appellant says she was arrested at her home and the productions were recovered near the wooden house subsequently it was introduced on her.

Two witnesses who were involved in the raid gave evidence at the trial and we did not find any material contradictions were marked on them.

Prosecution witnesses submitted that they had clear information about the Appellant taking Heroin to pack at Kanthi's place. When she arrived at the place before she enters the house of Kanthi she was apprehended by the PNB officials. Kanthi is not in the scene at any time, under this circumstance, I do not see any reason for the Police Officials to search the House of Kanthi. Considering the area in question it is Serpentine

Road at Wanathamulla, anyone who knows about Colombo and Borella will know this area. Knowing the Volatile situation of the area, it will not be prudent for the Narcotics Officials to involve in search of vast area. Both Witnesses explained why they did not search the house of Kanthi and they have searched the House of the Appellant which was situated little away from the place of arrest. The learned Trial Judge was convinced with the explanation given by the witnesses, we have no reason to interfere with findings of the Learned Judge of the High Court.

The next submission made by the Counsel was, can the witnesses wait in the said area for more than one hour. It is evidence before the Court that they left the PNB around 11.45 PM they picked up the informant at Punchi Borella and proceeded to the place waited for while and arrested the Appellant at around 12.55 midnight. Considering the time duration, it is much less than an hour. Anyhow it is evidence that only three officials namely Ariruwan, Rangajeewa and WPC Gunasekara and the informant got down from the vehicle. As witness explains they took undercover and stayed there until the appellant comes there. It should be mindful that these officials are trained to conduct raids so they know how to hide themselves in these areas. The learned trial Judge had extensively considered these facts and concluded that it is creating any doubt. Considering the evidence and the Judgment we have no reason to interfere with the said findings.

The question raised by the appellant is that will appellant being a mother leave her children and go to another place in the night. Leaving Children by a lady is a subjective matter, it depends on the person, circumstances, necessity and priority, it cannot be generalised. In this case it was the evidence of the witnesses that she came alone. There is no material before the court suggesting it was not. The only evidence by way of Dock Statement that she was arrested at her place. She did not say any other materials including the age and health conditions of the Children. Since it is a subjective issue test of probability does not apply.

The Appellant submits that the goods were recovered near the wooden house and it was introduced to her after her arrest at her home. The case for the prosecution is that they received an information that the Appellant was going to Kanthi's place to pack heroin. The PNB organised a raid and arrested her in front of Kanthi's house and recovered Heroin and equipment that can be used for packing. The Appellant says she was at her place and the Police came there and arrested her there. Productions recovered near the wooden house was introduced on her.

Considering the evidence available the following matters were discussed receives our attention. What is the need for PNB to introduce Such a huge quantity (Net weight of 40.8 grams) of Heroin on the Appellant. There is nothing suggested or advanced in the trial. Presuming the Police introduced will they introduce about 81 grams (Street weight) on her. The Law says if anyone possess more than 2 grams will be punished with Death or Life imprisonment. Under these circumstances if the PNB officials want to introduce will they do it with such huge quantity. Further the Appellant was not consistent with her defence in this connection. This does not mean that Accused should prove his innocence but the defence should be put to the prosecution.

Further the Learned Trial Judge had substantially discussed all these issues in his Judgment. We do not see any reason to interfere the judgment of the learned Judge of the High Court. After carefully considering all we find the conviction is warranted on the evidence available, hence we affirm the conviction and the sentence.

Appeal dismissed and conviction and sentence affirmed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree,

JUDGE OF THE COURT OF APPEAL