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

In the mater of an application for appeal under and in terms of Section 331(1) of the Criminal Procedure Code Act No. 15 of 1979 read together with Article 138 of the Constitution.

The Democratic Socialist Republic of Sri Lanka

CA 51/2009

H.C. Colombo – HC: 189/2006

H.C. Welikada – HC: 2874/2006

Complainant

Vs.

Bulathsinghalage Chaminda

Accused

AND NOW BETWEEN

Bulathsinghalage Chaminda

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 – Saliya Peiris P.C. with Danushka Rahubadda and H. Corea** **Complainant – Respondent – SSC Madawa Thennekoon**
ARGUED ON	**01.11.2017**
WRITTEN SUBMISSIONS –	**Accused – Appellant – 18.09.2017 & 24.11.2017** **Complainant–Respondent – 12.02.2018**
DECIDED ON:	**28.02.2018**

S. DEVIKA DE LIVERA TENNEKOON J.

The Accused – Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Colombo on 09.12.2005 for having in possession 17.3 grams of Heroin on or about 28.07.2004, an offence punishable under Section 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance.

The case was subsequently transferred to the High Court of Colombo holden in Welikada and the trial commenced on 11.09.2006 after the Appellant pleaded not guilty to the said charge against him.

The evidence of Police Inspector Welagedara (PW1), Police Sargent Wimalarathna (PW7), Police Inspector Rajakaruna (PW3), Police Inspector Kumarasinghe (PW8), Assistant ZGovernment Analyst Kumuduni Rajapaksha

(PW6) and Police Constable Sanath (PW2) was led on behalf of the prosecution and the prosecution closed its case.

In brief the case for the prosecution was that the Appellant was arrested consequent to a raid conducted pursuant to information provided by a personal informant to PW2. He had received a tipoff that a drug transaction was to take place between 1800 – 1900 hours of the day in an area called 'Kimbulaela' and as such PW1 dispatched a team to conduct the raid. The said team had then apprehended the Appellant when he returned to the three-wheeler in which he arrived at the scene. When the Appellant was searched the team had recovered 102 grams of Heroin in his pocket.

The Appellant opted to make a dock statement on 08.12.2008 and took up the position that the Appellant was arrested in a raid intended originally for two other suspects. The Appellant stated that the Accused was at a bus stop in 'Kimbulaela' junction, when a group of officers arrested him for being acquainted with the two suspects who they originally came to arrest. The Appellant further stated that the Police failed to arrest the said suspects who fled away from the scene throwing away the drugs in their possession and since the Appellant was unable to provide information pertaining to those who fled away, the Police Officers had introduced the discarded drugs to the Appellant falsely implicating him.

The learned High Court Judge delivered judgment dated 24.03.2009 and found the Appellant guilty of the said charge and thereafter sentenced him to life imprisonment.

Being aggrieved by the said conviction and sentence the Appellant preferred the instant Appeal seeking to set aside the impugned judgment dated 24.03.2009 , mainly on the following grounds;

a) The learned High Court Judge has failed to appreciate that the serious infirmities in the investigation ought to have cast doubt on the case for the prosecution,

b) The learned High Court Judge has failed to offer due regard to the case of the Defence.

I shall now consider the first ground of Appeal urged by the learned Counsel for the Appellant.

The learned Counsel for the Appellant argues that the prosecution has failed to explain why the narcotics officers had apprehended the Appellant and thereafter proceeded to travel around 20km to search the Appellants house but have not done so as the lady of the house (the Appellants wife) was not at home.

It is prudent to note that as per the narration of the prosecution the informant had provided information to the effect that the Appellant should not be arrested upon arriving at the 'Kimbulaela' junction but after he has engaged in a drug transaction somewhere in the vicinity and only after he comes back to the three-wheeler on which he arrived (vide page 64 of the Appeal brief). As per the version of the prosecution the Appellant was apprehended by the Police team who thereafter proceeded to travel to the Appellant's house to search the premises. It is reasonable to question the rational of the decision taken by the Police Team to travel around 20 kilometers from the point of arrest and away

from the location where heroin was peddled,to search albeit unsuccessfully, the Appellants house.

The learned Senior State Counsel contends that in terms of Section 77(2) of the Poisons, Opium and Dangerous Drugs Ordinance No. 13 of 1984 in a situation where a search warrant cannot be obtained under Section 77(1) any Police Officer not below the rank of sergeant, without affording the offender an opportunity of escape or concealing evidence of the offence within 12 hours exercise all or any powers of conferred on him by subsection (1). The learned SSC submits that the fact that the Appellant was in Police custody at the time of the attempted search there was no chance of him escaping or concealing evidence and as such the Police could not have searched the house without a search warrant and therefore that the reason for not searching the house of the Appellant does not affect the credibility of the case for the prosecution.

In the case of **Wickremasuriya v. Dedoleena and others** 1996 (2) SLR 95 it was held that;

> "A Judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."

In the instant Appeal if the Appellant had allegedly purchased heroin from the 'Kimbulaela' junction area, would it not ensue that a thorough search of the vicinity would have been more productive than a futile attempt at searching the Appellants house? Further, if the Appellant had come to the 'Kimbulaela' junction to purchase heroin one can assume that the Appellant had no heroin at

his house, if so what did the Police hope to find at the Appellants house? This Court finds that the narration of the prosecution is improbable in this regard. This Court agrees with the submissions of the learned Counsel for the Appellant that the evidence does not reveal any attempt made by the officers to ascertain the source of the narcotics, neither does the evidence reveal whether the accused was even questioned as to the origin of the narcotics in question.

Further, another infirmity in the prosecution's case is the failure on part of the prosecution to call the three-wheel driver who had allegedly driven the Appellant to the 'Kimbulaela' junction who was also arrested by the Police team but was later released. Though it's not necessary for the prosecution to call a certain number of witnesses to prove a fact, in cases where an accused is charged with an offence punishable with death or life imprisonment Court must proceed with caution and must scrutinize the evidence diligently as a man's liberty is at stake.

In 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."

The second ground of Appeal urged by the leaned Counsel for the Appellant is that the learned Trial Judge has failed to give due regard to the case of the Defence. The learned Counsel submits that it seems that the learned High Court Judge was pre-determined from the very inception of the case.

The learned Counsel submits three material points in this regard;

a) The learned Trial Judge first found that the case for the defence was weak (vide page 185 of the Appeal brief) on the mere finding that the pocket note book of Sanath does not reflect what was suggested to the witness by the defence.

b) The learned Trial Judge has erroneously concluded that the Government Analyst has come to the conclusion that there was no sand in the sample when in fact the Government Analyst has testified that the test would not reveal whether there was sand in the sample.

c) Although the defence has not specifically taken up the position that the Accused has called the other two suspects by name which led to his subsequent arrest this had not deprived the Court of the opportunity to

know the stance of the prosecution with regard to such position by the defence.

With regard to the 1st and 2nd point above a perusal of the impugned judgment reveals that the contention of the learned Counsel for the Appellant stands true. As per the 3rd material point it is evident that the defence has consistently suggested to the prosecution witnesses that the arresting officers had realised that the Appellant was aquatinted to two other suspects who had heroin in their possession and since they had run away throwing the parcel of heroin on the ground the officers had thereafter introduced the said parcel to the Appellants possession and arrested him.

This Court finds that the infirmities in the case for the prosecution taken together with the dock statement made by the Appellant is sufficient to raise a reasonable doubt as to the culpability of the Appellant for the offence charged in which he has been sentenced to life.

In the circumstances as morefully discussed above this appeal is allowed and we set aside the conviction and sentence of the learned Trial Judge and the Accused – Appellant is hereby acquitted.

Appeal Allowed.

Judge of the Court of Appeal

S. THURAIRAJA, PC, J

I Agree.

Judge of the Court of Appeal