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

In the matter of an Appeal in terms of Section 331 (1) Code of Criminal Procedure Act No 15 of 1979 and Section 11 of Provincial High Court (Special Provisions) Act No: 19 of 1990.

Democratic Socialist Republic of Sri Lanka.
COMPLAINANT

Vs

Muhammed Rohan Abdul Raheem
ACCUSED

Case No. CA 199/2017

HC (Colombo) Case No. HC 6206/12

AND NOW BETWEEN

Muhammed Rohan Abdul Raheem
ACCUSED – APPELLANT

Vs

The Hon. Attorney General
Attorney General's Department
Colombo 12.
COMPLAINANT - RESPONDENT

BEFORE	: Deepali Wijesundera J.
	: Achala Wengappuli J.
COUNSEL	: Rienzie Arseculeratne PC with Chamindri Arseculeratne and S. Manel for the Accused-Appellant
	A.R.A. Bavy for the Respondent.
ARGUED ON	: 11th June, 2018
DECIDED ON	: 06th July, 2018

Deepali Wijesundera J.

The appellant was indicted in the High Court of Colombo for possession of 26.22 grams of heroin punishable under sec. 54 a (3) of Act no. 13 of 1984. After trial he was found guilty and sentenced to life imprisonment.

Two witnesses who went on the raid had given evidence in the High Court and said they found the appellant in possession of 26.22 grams of heroin. They both have given evidence to state the place from where he was arrested. The argument of the appellant's counsel was that notes were not made and that there was no entry regarding the vehicles that went with the police team. Notes are kept and brought by the police witnesses to refresh their memories and if an officer can remember the

incident the notes are not required. The learned counsel for the respondent stated that there is a note entered to say that the vehicle assigned to the Keselwatte police was used to carry out the raid.

The learned President's Counsel for the appellant submitted that the learned High Court Judge who heard the case was not the Judge who delivered the judgment and that he has not adopted the evidence led before his predecessor as per section 48 of the Judicature Act. The addresses of the counsels were made before the Judge who delivered the judgment therefore one can not argue at this moment that the proceedings were not adopted. Though it has not been put on paper without the parties agreeing to do so the learned High Court Judge could not have heard the case.

The learned counsel further argued that the learned High Court Judge has failed to properly analyse the evidence and thereby the appellant was deprived of a fair trial. He also stated that the learned High Court Judge when there was no admission by the appellant has stated that the Government Analyst's Report marked X in terms of sec. 420 of Code of Criminal Procedure Act was admitted by the appellant.

He also argued that the inherent improbabilities of the prosecution case and the per se contradictions of prosecution witness number 1 and inter se contradictions of prosecution witness number 1 and number 2 were not considered by the learned High Court Judge. The appellant's counsel also stated that the judgment has been delivered seven months after the trial was concluded.

When considering the evidence led at the trial we decide that there is consistent evidence against the appellant which has to be properly recorded by the High Court. Therefore we decide that this case should be sent back to the High Court for a retrial.

On the question of retrial the learned President's Counselor for the appellant cited a number of judgments and argued that this should not go back for retrial. In **Queen vs Jayasinghe 69 NLR 318 and Ratnayake vs AG 2001 1 SLR 390** it was decided that re trial should not be orderd due to the length of time. In this case it is not so this is not a very old case.

In **Sujithlal vs AG CA 38/2006 on 20/10/2014** it was held that a retrial should not be ordered to cover up the failure of the learned High Court Judge. But in the instant case we are not ordering a retrial to cover

up the failures of the High Court but to record the consistent evidence against the appellant in the High Court which can not be done in the Court of Appeal. Since there is consistent evidence against the appellant the only remedy available is to send the case back to the High Court for a retrial.

We set aside the judgment dated 09/02/2017 and order the learned High Court Judge to have the case re tried.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL