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

In the matter of an Appeal in terms of Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No: **CA 92/2007**

H.C. Welikada case No**: HC 49/06**

(H.C. Colombo Case No: **HC 2348/05)**

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Albert Deny Kunja

Accused

AND NOW BETWEEN

Albert Deny Kunja

Accused-Appellant

Vs.

Hon. Attorney General

Attorney-General's Department,

Colombo 12.

Respondent

BEFORE	:	M.M.A. Gaffoor, J. K. K. Wickremasinghe, J.
ARGUED ON	:	18.03.2016, 02.08.2016 and 15.05.2017
COUNSEL	:	AAL E. Thambiah for the Accused-Appellant Sarath Jayamanne, DSG and Ayesha Jinasena, SDSG for the Respondent
WRITTEN SUBMISSIONS	:	The Accused-Appellant – on 08.12.2017
DECIDED ON	:	06.07.2018

K.K. WICKREMASINGHE, J.

This appeal was filed by the Accused-Appellant seeking to set aside the conviction and sentence imposed by the Learned High Court Judge of Welikada, in the case of HC 49/06. The Respondent has informed that they do not wish to file written submissions.

Facts of the case:

The Accused-Appellant (hereinafter referred to as the Appellant) was arrested on or about 17.10.2003 along with another who was an Indian National, for possession of heroin 142.3g. Thereafter, both suspects were produced before the Learned Magistrate of Maligakanda and were ordered to be remanded. The Indian National was released from the case on the advice of the Hon. Attorney General, and the Appellant was continued to be in remand. Subsequently, the Appellant was indicted in the High Court of Colombo on two counts under sections 54A (c) and 54A (b) of the Poison, Opium and Dangerous Drugs Ordinance as amended by the Act No. 13 of 1984. The Appellant pleaded not guilty to the said charges and

commenced the trial against him. The prosecution had led 4 witnesses and the defence had led one witness and the Appellant had made a dock statement. On 19.06.2007, the Learned High Court Judge delivered the Judgment convicting the Appellant and imposed death sentence.

Being aggrieved by the said Judgment, the Appellant filed this appeal seeking to set aside both the conviction and the sentence.

The Counsel for the Appellant submitted following grounds of Appeal:

1. The chain of the custody of the production (inwards and outward journey) was not established by the Prosecution,
2. Identity of the production was not proved,
3. Material discrepancies and inaccuracies in the prosecution case.

Numerous discrepancies have been specified by the Counsel for the Appellant. Accordingly the date of committing the offence in the indictment was 17.10.2003. As per the evidence of PW 01-Chiran Buddhika, the date on rubber seal of the Government Analyst's Department on the cover of production was 20.02.2003 (page 82 of the brief). According to the evidence of the Assistant Government Analyst, the production was handed over to the Government Analyst's Department on 20.10.2003 (Receipt No: CD/2901/03). However to the contrary, the Analyst's Report marked as 'P11' stated that the request letter by the OIC of Police Narcotic Bureau (PNB) was sent on 29.10.2003. (Page 10 of the brief)

In the evidence of the Assistant Government Analyst, she had identified and marked two packets of production as T1 and T2 (page 169 and 170 of the brief), whereas the Government Analyst's report had indicated those as P1 and P2.

We observe that the chain of custody of the production from the Government Analyst's Department to Court was not challenged by the defence and accordingly marked as an admission under section 420 of the Code of Criminal Procedure Act No. 15 of 1979.

In the case of **Perera v Attorney General (1998) 1 Sri. LR 378** it was held that,

> *"The most important journey is the inwards journey because the final Analyst Report will depend on that.*
>
> *As the Defendant had admitted the correctness of the procedure adopted by the prosecution in sending the production to the Analyst Department he is estopped from contesting the validity of the correctness of the Analyst Report even if the prosecution had not led in evidence the receipt of acceptance of the productions by the Analyst Department..."*

The Counsel for the Appellant submitted that the production sent from the PNB was taken over by one K.P. Chandrani at the Government Analyst's Department and she had not been called to testify.

In the Judgment dated 19.06.2007, the Learned High Court Judge has stated as follows;

> **"එසේ පොලිස් පරීක්ෂක ජයමාන්න විසින් ඒ අනුව තමන්ට නිසි පරිදි මුද්‍රා තබා භාණ්ඩ භාර දුන් බව සහකාර රස පරීක්ෂකවරිය විසින් සාක්ෂි දී ඇත... (Page 24 of the Judgment/ page 211 of the brief)"**

However, upon perusing the proceedings of the trial it is evident that the prosecution witness Jayamanne had handed over the production to one K.P. Chandrani at the Government Analyst's Department and the Assistant Government

Analyst had acquired production from said K.P. Chandrani (Page 154 and 167 of the brief).

In the case of **Mohammed Kaldeen Mohammed Nilam v. Attorney General [CA 98/2002 (unreported)],** it was held that,

> *"...the prosecution cannot escape from the responsibility of proving the inward journey of the production beyond any reasonable doubt and establish the inward journey in order to show that the productions were never tampered with at any stage of the inward journey which is much more significant and relevant than the outward journey..."*

We find that one K.P. Chandrani had handled production at a subsequent stage of inward journey and she had not been called to give evidence. Therefore the Prosecution had failed to establish the chain of the custody of production beyond reasonable doubt.

Further we observe that there was a difference between the total weights of the two packets of heroin as per the evidence of the police officer who conducted the raid and the Government Analyst's report. According to the evidence of Chiran Buddhika, IP, the total weight of two packets was 504g (page 82 of the brief) while the evidence of the Assistant Government Analyst indicated the total weight as 142.03g (Page 170 of the brief). However, it is understood that the Assistant Government Analyst was referring to the weight of pure heroin (nett weight) after conducting the HPLC test (page 169 of the brief), and the Police officer was referring to the gross weight of packets without removing polythene cover (Page 75 of the brief).

"...මෙම පාර්සල් දෙක එය ඉස්සරවෙලා තිබූ ආකාරයට විනිවිද පෙනෙන පොලිතින් ආවරණයෙන් ඉවත් නොකර බර කිරීම සිදු කරනු ලැබුවා (PW 01 at page 75 of the brief)

In the case of **Van Der Hultes v. Attorney General (1989) 1 Sri. LR 204,** it was held that,

> *"Discrepancies in the weight of the heroin at the time of detection and at the time of analysis and in the size of the packings are insufficient to cast doubt on the evidence of the identity..."*

It is pertinent to note that the Learned High Court Judge, in the Judgment dated 19.06.2007, had stated that the Police raid was done on 22.11.2000.

> "(1) 2000.11.22 වෙනි දින කරන ලද මෙම නඩුවේ අධි චෝදනාවට අදාල වැටලීමේදී අත් අඩංගුවට ගන්නා ලද්දේ..." (Page 10 of the judgment/ page 197 of the brief)

We observe that the said date mentioned by the Learned High Court Judge is manifestly erroneous since the date of commission of offence as per the indictment was 17.10.2003.

Further, the Learned High Court Judge has stated in the Judgment that Jayamanne(PW) had delivered production to the Government Analyst's Department on 27.10.2003 while said Jayamanne had testified that he delivered production to the Department on 20.10.2003. (Page 154 and 205 of the brief)

The position of the Respondent with regard to these discrepancies and inaccuracies was that those were typographical mistakes of stenographers of the High Court, but we are of the view that the Learned State Counsel who conducted the trial had

ample opportunity to rectify those mistakes before the Learned High Court Judge and that was his/her duty.

Further, when there are discrepancies and errors in the proceedings which go to the root of the case, the trial judge should have considered and got them corrected before pronouncing the Judgment. But the Learned High Court Judge had blatantly disregarded the important contradictions. Therefore we find that the Learned High Court Judge has misdirected himself in certain instances as mentioned above.

Under these circumstances, we are of the view that it is unsafe to stand the conviction against the Appellant without rectifying the discrepancies and shortcomings of the prosecution case. The date of conviction was far back in 2007 and the Appellant has been in the remand prison for over 10 years.

Therefore considering above mentioned circumstances, we set aside the conviction and the death sentence imposed by the Learned High Court Judge of Welikada under case No. 49/06.

Accordingly, the Appeal is allowed.

Registrar is directed to send a copy of the Judgment to the relevant High Court and inform prison authorities to produce the Appellant before the Learned High Court Judge when pronouncing the Judgment.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor, J.

I agree,

JUDGE OF THE COURT OF APPEA

Cases referred to:

01. Perera v. Attorney General (1998) 1 Sri.LR 378

02. Mohammed Kaldeen Mohammed Nilam v. Attorney General [CA 98/2002 (unreported)]

03. Van Der Hultes v. Attorney General (1989) 1 Sri.LR 204