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

Kannangara Koralalage Jagath Kannangara.

Court of Appeal **Accused**
Case No. CA 09/2011 **Vs,**

And Now Between

Kannangara Koralalage Jagath Kannangara.

Accused-Appellants

High Court of Panadura
Case No. HC 3117/ 2006 **Vs,**

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Thurairaja PC, J &**
A.L. Shiran Gooneratne J

Counsel : Anil Silva PC for the Appellant.

Yasantha Kodagoda PC, ASG for the Respondent.

Written Submissions : Accused Appellant - 12th October 2017.

Complainant Respondent-not filed.

Argument on : 13th March, 6th June, 25th June and 2nd July 2018.

Judgment on : 20th July 2018

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JUDGMENT

S. Thurairaja, PC. J

Honourable Attorney General had preferred an Indictment against the Accused Appellant Kannangara Koralalage Jagath Kannangara (Hereinafter sometimes referred to as the Appellant) for possession and trafficking of 5129 grams of heroin. After the trial the Appellant found guilty and sentenced to life imprisonment. Being aggrieved with the said conviction and the sentence the Appellant submitted an appeal to the Court of Appeal and forwarded following grounds of appeal;

I. The identity of the Appellant was not established.

II. Perusing the notes of the Police officers by the High Court Judge is wrong.

Prosecution led the evidence of Inspector of Police Hapuarachchige Gunaratne, Assistant Government Analyst Kokawela Pathirage Chandrani, Police Constable 16187 Gamage Dhammika, Halgahawithanage Jagath Wasantha and Sub-Inspector of Police Owitagala Hewage Gamini.

According to the prosecution witnesses on the 4th of September 2004 Police Officers attached to Anguruwathota Police Station, PC 16187 Gamage, Reserve Police Constable 24133 Manoj and Civil Defence Officer 2199 Silva were detailed to manned road-blocks in the evening at around 1500 hours, they were stationed at Keselhenawa, Kottangas-handiya. At that time they were watching for suspicious movement of vehicles and people due to the prevailing security situation of the country at that time.

At around 1555 hours, PC Gamage had observed a three-wheeler had come, stopped it near a small kiosk which sells king-coconuts (thambili). The driver of the three-wheeler got down from the vehicle and started drinking a king-coconut. PC Gamage focused at the driver because he felt it was unusual. The driver also looking at the officers at the road-block. After a while, PC Gamage thought fit to inquire the driver and proceeded towards him. On seeing the Police Officer approaching, the Appellant throw the king-coconut, got into the three-wheeler and started proceeding towards Horana. Then PC Gamage alerted the other officers and they tried to apprehend the three-wheeler. Suddenly the driver diverted the three-wheeler into a small road. PC Manoj had a motor-cycle in which he and Civil Defence Officer Silva and him started chasing the three-wheeler, PC Gamage called the Officer In Charge (OIC) IP Gunaratne. At that time IP Gunaratne was proceeding to attend a meeting at the Hospital and was a few metres away from the check-point. On receiving the message on walkie-talkie he approached to the check-point took PC Gamage with him and chased the three-wheeler. It was within 2 to 3 minutes from the fleeing off on the three-wheeler.

When the three-wheeler reached to a hill, the driver stopped it and got out from the three-wheeler, looked behind and ran down the praecipes. All officers who gathered there, started chasing the driver. IP Gunaratne stood guard to the three-wheeler and checked for any other passenger or suspicious material. There he found a black coloured bag behind the seat rack. When he opened he found eleven parcels wrapped in cellophane bags. On smelling the bags he suspected of heroin. Thereafter the investigations were commenced.

The Appellant was absconds and he was never arrested by the Police. During the investigations, the police found out from the Registrar of Motor Vehicles (RMV) that the ownership of the three-wheeler was registered under the name of the appellant. The address given was Sapugahawaththa, Dodangoda. Police got the assistance of the Grama Sewaka (Village Officer) of that area and further investigated. There, they

found the house of the Appellant at No.24, Himbutuwilalanda, Wilpatha, Dodangoda. When they went to that house there, the house was locked. The Police Officers entered the house through the windows. PC Gamage had found a photo album on a teapoy (coffee-table). When he opened the album he found a photograph of the Appellant with a woman and a child. He spontaneously identified that is the person as whom he had seen from the road-block upto running away from the three-wheeler on the Hills.

The substance recovered from the three wheeler was referred to the Government analyst when it was found 10,984 grams of brown coloured powder on analysation the Government Analyst had found 5129 grams of dicetyl morphine/heroine.

Regarding the identity, Evidence before the court, is that during the period of terror in the country, as police officers who are manning a check point was more vigillant than the others. In this case two police officers and a civil defence force officer had seen the accused at a very close proximity, for a considerable period of time. The Appellant was behaving in a disturbed manner and running away from the place, also evidence, that the Appellant was driving the three-wheeler, stopped and looked at the police officers before he ran away. When the police officers said they had a clear look to identify the person, can be accepted. Immediately after the incident the police officer had seen the photograph at the residence of the Appellant and identified him as the person who ran away. The Grama-Sewaka and others had identified and connected the photograph and Appellant. In my view there is a clear identification of the accused-appellant by the witnesses, and it was established by the prosecution beyond reasonable doubt.

Subsequent conduct of the appellant leaving the place of residence, wife and his family and absconding for a considerable period create a doubt and warrants an explanation.

Regina vs. Turnbull [1976 3 All E.R. 549, Cr. Ap. Reports 132] guidelines are,

Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused – which the defence alleges to be mistaken – the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s). The judge should tell the jury that:

- caution is required to avoid the risk of injustice;
- a witness who is honest may be wrong even if they are convinced they are right;
- a witness who is convincing may still be wrong;
- more than one witness may be wrong;
- a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.

The judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include:

- the length of time the accused was observed by the witness;
- the distance the witness was from the accused;
- the state of the light;
- the length of time elapsed between the original observation and the subsequent identification to the police.

Purposely or accidently the appellant had surrendered at the Magistrate Court openly prevented to hold an identification parade. Therefore argument of failure to hold an identification parade by the prosecution and relying on the **Regina vs. Turnbull** is untenable.

In **Roshan vs. The Attorney General [2011 (1) SLR 364]** Per Sarath de Abrew J. in the case of **Regina vs. Turnbull [1976 3 All E.R. 549, Cr. Ap. Reports 132]** one of

the important guidelines set out was whether there was any material discrepancy between the description of the accused given to the Police by the witness when first seen by him and his actual appearance.

All the prosecution witnesses corroborate each other on their material evidence.

The Appellant had not challenged the chain of production, analysation of the substance and other related issues. The main contention of the argument is identity of the accused-appellant and the High Court Judge referring the Note Book.

Section 110(4) of the Criminal Procedure Code Act states as follows.

> "Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. save as otherwise provided for in section 444 neither the accused not his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of Evidence ordinance, section 161 or section 145, as the case may be shall apply:
>
> provided that where a preliminary inquiry under Chapter XV is being held in respect of any offence, such statements of witness as have up to then been recorded shall, on the application of the accused, we made available to him for his perusal in open court during the inquiry"

I refer to the reference made by the Learned Trial Judge in the relevant judgment.

> *"විමර්ශන සටහන් සාක්ෂි නොවන නමුත් අපරාධ නඩු විධාන සංග්‍රහය පණතේ 110(4) වගන්තිය යටතේ ගමගේ තබා ඇති සටහන් පරීක්ෂා කර බලමි*

ගමගේ කොට්ටන් ගස් හන්දියේ මාර්ග බාධක රාජකාරියේ යෙදී සිටින විට කළුතර දෙසට මීටර් 25ක් පමණ දුරින් තැඹිලි කඩය අසල විනාඩි 10ක් පමණ නවතා තබා තිබෙනු දුටු අතර ඒ පිළිබඳව සැක සිතුනු මා පයින් ත්‍රිරෝද රථය තිබූ ස්ථානයට ගමන් කරන විට ත්‍රිරෝද රථයේ ඇන්ජිම පණ ගන්වා ආපසු හරවා යාමට තැත් කර වෑන් රථයක් පැමිණ අවහිර වූ නිසා නැවත හොරණ දෙසට වේගයෙන් ගමන් කරන ලදී. යනුවෙන් සඳහන් කර ඇත. මෙහිදී නියමිතව සැකකරු රථයෙන් බැස සිටි බව විමර්ෂණ සටහන් වල සටහන් වී නොමැති නමුත් සිද්ධිය තත්පරයෙන් තත්පරය සටහන් කිරීමක් අධිකරණයට බලාපොරොත්තු විය නොහැකිය.

(The translation state as follows: inquiry notes are not admissible evidence under section 110 4 of the Criminal Procedure Code Act but I will refer those notes kept by Gamage in investigation.

Gamage had observed a three-wheeler had come from Kalutara side, stopped at about 25 metres away from the road block of Kottangas handiya, near a king-coconut kiosk at about ten minutes. I had a suspicion about the three-wheeler and I proceeded towards him. Then started the Three-Wheeler and tried to proceed but road has blocked by a van so proceed towards Horana. Here in this Note book, it didn't mentioned that whether the driver had got down from the three-wheeler or not and we never expect from the Police to describe the incident step by step in their inquiry notes.)

It is revealed that the Learned Trial Judge had referred only a relevant portion for the purpose stated and permitted in the Code of Criminal Procedure Act.

The Learned Counsel for the appellant even though mentioned this ground as the second ground of appeal he did not emphasized in this issue.

After carefully considering the submission and the relevant law, I am of the view that the Learned Trail Judge had acted within the ambit of the relevant law. Therefore I have no reason to interfere with the findings of the Learned Trial Judge.

On perusing the entire case record I find that there is no illegal or inappropriate evidence allowed in this case. The accused appellant had a fair trial and the Learned Trial Judge had given adequate reasons for findings the appellant guilty.

Therefore I found that, the first and second ground of appeal fails on its own merits accordingly the appeal fails on its own merits therefore I dismiss the appeal.

According to the Section 335(2) of the Code of Criminal Procedure Act No. 15 of 1979, which reads as follows.

> "*On an appeal against the sentence, whether passed after trial by jury or without jury, the Court of Appeal shall if it thinks that a different sentence should have been passed, quash the sentence, and pass other sentence warranted in law by the verdict whether more or less severe in substitution therefore as it thinks ought to have been passed....*"

Regarding the sentence this court invited both counsels to address. The counsel for the appellant submits that the accused is innocent. Therefore he moves for an acquittal and say question of sentencing will not arise. The Learned Additional Solicitor General submits that the quantity is very high therefore considering the society at large it will be reasonable to give maximum sentence.

In **King vs. Rankira (42 NLR 145)** held that,

> "*the Court of Appeal will not interfere with the judicial discretion of a judge in passing sentence unless that discretion has been exercised on a wrong principle.*"

In **AG vs. Mendis [1995 (1) SLR 138]** held that,

> " *In assessing a punishment, the Judge should consider the matter of sentence both from the point of view of the public and the offender. The Judge should first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other Statute under which the offender is charged. He should also regard the effect of the punishment, as deterrent act and consider in what extent it will be effective.*"

Poisons, Opium and Dangerous Drugs Act says, if any person posses more than 2 grams will be either punished by life imprisonment or Death Sentence. That shows the intention of the legislature is to protect the Society from the Drug menace. In this case the Learned Trial Judge had considered the submissions made by the Counsels and accepted that this is harmful to the society. He, specifically says the said quantity if it had distributed/released to the society it would have ruined the families and the society in extremely harmful manner.

But the Judge gives the reason that the Death Sentence are passed by the Courts, are not executed and only rests on the papers. I disagree with the said statement.

In **Dhananjay Chatterjee vs. State of West Bengal [1994 2 SCC 220]** it was held that,

> *"the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."*

In **Sevaka Perumal etc vs. State of Tamil Nadu (AIR 1991 SC 1463)**

> *"Undue sympathy to impose inadequate sentence would do harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured the injured would the resort to private vengeance. It is, therefore, the duty of every court to awards proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. "*

By observing all of those circumstances, I am of the view that the Learned Trial Judge should not have considered the duty of the executive. When the law provides a sentence it is for the Judge to decide within the framework of the law.

In this case the gross quantity was 10984 grams and the pure Dicetyl Morphine quantity was 5129 grams as the trial Judge observed, if it would have gone into the society would have caused irreparable damages, especially the youngsters, who are the backbone of the country.

Considering the law, I am of the view that sentences imposed are inadequate. Therefore I vacate the sentence imposed by the Learned High Court Judge on the first and second counts and impose Death sentence on each count. The High Court Judge of Colombo is hereby directed to follow section 280 of the Code of Criminal Procedure Act and to impose Death Sentence.

Appeal Dismissed.

Sentences enhanced.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL