

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

In the matter of an Appeal made in  
terms of Section 331 of the Criminal  
Procedure Code.

C.A.No. 275/2016  
H.C. Colombo No. 7640/2014

Amar Yusef Mahamud Al-Subehi  
Accused-Appellant

Vs.

Hon. Attorney General  
Republic of Sri Lanka

Respondent

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BEFORE : ACHALA WENGAPPULI J. &  
MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Hafeel Fariz with Lilani Ganegama for the  
Accused-Appellant

A.R.H. Bary SSC for the Respondent

ARGUED ON : 20-06-2018, 21-06-2018 & 22-06-2018

DECIDED ON : 31<sup>st</sup> July, 2018

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ACHALA WENGAPPULI J.

The accused-appellant was indicted before the High Court of Colombo for the commission of offences punishable under Section 54A(b) and 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended, in respect of 16.19 grams of Heroin. After trial, he was convicted by the High Court only on the count under Section 54A(d) and was accordingly sentenced to death.

The prosecution case is that the accused-appellant was arrested by Sub Inspector of Police, *Ruwan Kumara (PW1)* of the Police Narcotic Bureau, on 22.11.2012 at about 9.30 p.m. at *Kosgas Handiya* upon information provided to PC 73162 *Dinesh (PW2)* by one of his private informants. The information revealed that a foreign national would carry out a Heroin deal. Thereafter, **PW1** mobilized a team of officers to conduct a raid. The private informant has met the officers at the car park of the Suleiman Hospital and instructed them to await his call. When the informant contacted the officers after some time, **PW1** and **PW 2** proceeded to *Kosgas Handiya* in a three-wheeler, at which point the accused- appellant was pointed out by the informant. The accused-appellant had three "tablets" in his trouser pocket, in the size of large jack fruit seeds at the time of his arrest.

The accused-appellant is a foreign national and at the time of his arrest, he was with another foreigner who is a citizen of a neighbouring country to that of the accused-appellant. The accused-appellant has married a Sri Lankan woman, who was employed as his father's maid, in his country some time ago. They had one child from that marriage and he

has come to Sri Lanka to take his child back from his wife to his country as their marriage was not successful.

After the arrest of the accused-appellant, the officers found a key in his possession. Further investigations led the Police team to a three-storied house in School Lane, Maradana. The key did not open its front door. At that time the accused-appellant called a woman, who peeped through a window. She did not let the team in. Having waited outside for about 10 minutes, they broke into the house to prevent any contraband being destroyed. There were three foreign men inside the house who engaged a scuffle with the officers. PW1, having requested for reinforcements, has taken the two suspects back to his vehicle and kept them under its driver's supervision. Four Police officers from the local Police arrived at the scene but they offered no help to bring the situation under control. PW1, decided to return to the house, in order to manage the situation there.

Few minutes later, the driver rang up him to inform, that a person came in a vehicle belonged to a diplomatic mission, is trying to take the two suspects away. PW1 returned to his vehicle immediately and prevented the suspects being taken away and had arrested the person who came in the diplomatic vehicle and its Sri Lankan driver.

By this time, the reinforcements requested by PW1 from PNB also has arrived and with their assistance the accused-appellant, the other foreigner who was with him at the time of arrest, the seven inmates of Maradana House, including three men and three foreign women and a Sinhalese woman, the person who came in diplomatic vehicle and his

driver were brought to PNB office at about 2.30 a.m. in the following morning.

Whilst at the PNB office, the ambassador of the country of which the other suspect who was arrested with the accused-appellant is a citizen, too has arrived there. With his intervention and by claiming diplomatic immunity, the person who came in the embassy vehicle and its driver were released by the hierarchy of the PNB. The productions recovered from the possession of the accused-appellant was thereafter were sealed in the presence of the accused-appellant and was handed over to the reservist under PR No. 188/2012.

Further investigations conducted in the morning resulted in the discovery of another house in *Inguru Kade* Junction. The search of this house led to the discovery of Rs. 199,000.00 belonged to the other suspect who was arrested along with the accused-appellant. Both these suspects were kept in custody under Detention Orders and were later produced before *Maligkanda* Magistrate's Court.

After the investigations, the officers who sustained injuries during the previous night's scuffle with the group of foreigners, have got themselves admitted to National Hospital for treatment.

At the conclusion of the trial, during which the accused-appellant gave evidence under oath, the trial Court has acquitted him from the charge of trafficking of Heroin but convicted for its possession.

Being aggrieved by the said conviction and sentence, the accused-appellant sought his conviction and sentence set aside on the following grounds of appeal;

- i. the trial Court has failed to properly evaluate the evidence presented by the prosecution for its credibility,
- ii. the trial Court has failed to consider the chain of productions has not been proved by the prosecution,
- iii. the trial Court has failed to properly evaluate the evidence presented by the accused-appellant before it.

In support of his first ground of appeal, the accused-appellant made lengthy oral and written submissions pointing out several inconsistencies in the evidence of the prosecution witnesses as well as the improbability of the case presented by the prosecution to impress upon this Court of the fact that the trial Court has fallen into error in convicting him, on such unreliable evidence.

These inconsistencies highlighted by the accused-appellant, exists in the evidence of the prosecution witnesses in relation to a disparity in his name with the information received, involvement of persons of different nationalities, hospitalization of officers and the raid conducted in *Inguru Kade Junction*.

Improbabilities referred to by the accused-appellant includes that there is no clear evidence as to what the officers did at the car park of *Suleiman Hospital* awaiting for the informant's call, selection of raiding *Maradana house* whilst the house in *Inguru Kade Junction* is located closer

to the point of arrest, the failure to remember details of hospitalization by the prosecution witnesses by the driver of the Police vehicle and the release of other suspects arrested on the same night without prosecution.

The inconsistency highlighted by the accused-appellant is in relation to the evidence that PW1 who said that the information received was a foreign national was dealing in drugs in Grandpass area while the PW2 said that a foreign national called "Amar" was dealing in drugs in Grandpass area. The absence of the name "Amar" in the evidence of PW1 was highlighted by the accused-appellant as a significant inconsistency with the evidence of PW2. The accused-appellant also invited to the instances where the evidence in relation to his name has been presented differently.

In relation to the inconsistency of the different nationalities, the accused-appellant invited attention of Court that the nationality of the other foreigner who was arrested along with him has been described inconsistently. The decision to conduct further investigations on Maradana house, instead of *Inguru* Kade house, which located at a closer location to the plan where where the detection was made, was also highlighted by the accused- appellant in support of his claim of improbability of the prosecution version.

The record of the proceeding before the High Court is inclusive of the closing addresses made by the prosecution and the accused-appellant. Perusal of the submissions of the learned Counsel who represented the accused-appellant at the trial, revealed the fact that these inconsistencies and improbabilities were strenuously highlighted.

Learned trial Judge, who convicted the accused-appellant, has had the benefit of observing the demeanour and deportment of all the prosecution witnesses and the accused-appellant, except for the initial part of the examination in chief of the PW1, which he decided to formally adopt exercising his discretion under Section 48 of the Judicature Act No. 2 of 1979 as amended, before he continued with the trial.

Upon perusal of the judgment of the High Court, it is observed that the learned trial Judge was mindful of his responsibility of evaluating credibility of the witnesses, as he reproduced their evidence with the challenges put to them by the accused-appellant seeking to attack its credibility. The specific instances where the suggestions put across by the accused-appellant were admitted by the prosecution witnesses as well as the denials by them and the explanations provided by the prosecution witnesses are considered in the judgment.

In *Attorney General v Mary Theresa* (2011) 2 Sri L.R. 292, the Supreme Court, in spelling out the collective wisdom of several judgments it considered on this particular point, states thus;

*"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness' statement, it is well established that the Court must exercise its judgment on the nature, tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance. (Vide, Bhoginbhai Hirjibhai v. State of Gujarat).*

*Witnesses should not be disbelieved on account of trifling discrepancies and omissions (Vide, Dashiraj v. the State)*  
*When contradictions are marked, the judge should direct his attention to whether they are material or not and the witness should be given the opportunity of explaining that matter (Vide, State of UP v. Anthony; A.G. v. Visuvalingam)*  
*It is dangerous to presume or assume that because two witnesses contradict each other, one of them must be a false witness and reject the testimony in its entirety. The judge has a duty to probe into whether the discrepancy occurred due to a lack of observation or defective memory or a dishonest motive. (Vide, Colin Thome J in Bandaranaike v. Jagathsena )*

*In State of UP v. Anthony, the Indian Supreme Court stated that 'while appreciating the evidence of a witness, the approach must be whether the evidence... read as a whole appears to have a ring of truth'. The Court went on to elaborate further that 'Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole'."*

These considerations that could universally be applied to test the evidence of all witnesses in determining their truthfulness and reliability. In the appeal before us, the witnesses are trained Police officers who have experience in giving evidence and has had the advantage of refreshing their memories by referring to the notes of investigation. However, in



assessing their evidence and the weight to be attached to them, the apex Court made no distinction as they too are not immune to errors made owing to their human nature.

It was observed by the apex Court that;

*“Police officers are not infallible observers and may like any other witness make honest mistakes. However, they differ from eye witnesses generally in that their training and experience encourages them to be more observant and to focus on detail and there is no reason why this shouldn't be taken into account when assessing the reliability of their evidence (Vide, R u. Tyler). It is clear that the contradictions in the prosecution case are the product of human error and not due to any dishonest intent. Such slight discrepancies cannot be deemed to affect the probability of the Prosecution case in the totality of the probative value of the evidence presented on behalf of the prosecution.”*

It is observed by Jayasuriya J in *Wickremasuriya v Dedoleena and Others* (1996) 2 Sri L.R. 95 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 this instance, the learned trial Judge used his knowledge of men and matters in coming to the correct conclusion that the evidence of the witnesses relied upon by the prosecution are truthful and reliable, in spite of the trifling inconsistencies. It is clearly seen from the evidence that the

officers were confronted with totally an unexpected turn of events when they arrested the accused-appellant with the three "tablets". The raid conducted in Maradana house, the scuffle with the inmates which resulted in injuries to some of the officers, calling for reinforcements and then the intervention by a diplomat to free the two suspects would have surprised the officers. Almost all of the inconsistencies that were highlighted by the accused-appellant are on these subsequent events that took place after the detection. There was no significant inconsistency among any of the prosecution witnesses as to the events which led to the reception of information, events which took place just prior to the detection and the actual detection. This should be expected when the detection deviates from the anticipated course of events

It is correct that the accused-appellant suggested and claimed in his evidence that the PNB officers have acted in collusion with another Police officer of *Grandpass* Police Station to fabricate this allegation against him at his estrange wife's initiative. Learned trial Judge was mindful of this specific claim by the accused-appellant when he undertook the task of considering the evidence before him. Having considered the version of the prosecution and the claim of the accused-appellant, learned trial Judge concluded that the evidence of the prosecution has satisfied the required standard of proof and therefore found the accused-appellant guilty of possession of Heroin. The verdict of acquittal that has been entered in favour of the accused-appellant in respect of the trafficking charge is a clear indication that the trial Court has not mechanically considered the evidence placed before it by the prosecution.

In the light of these factors, it is our considered view that the inconsistencies that are highlighted by the accused-appellant in the evidence of the prosecution witnesses are due to these inherent weaknesses of human evidence as against the evidence mechanically or electronically retrieved and produced before Court. There is no dispute that the officers who were involved with the detection had no prior knowledge of the existence of the accused-appellant, until the detection. In fact, the accused-appellant himself in his evidence stated that these officers have first questioned his foreigner friend about him and he intervened into their conversation by introducing himself.

In challenging the prosecution case, the accused-appellant relied on the improbability of the version it presented when the witnesses stated that they have spent different time intervals at the car park, awaiting the informant's call. The accused-appellant also relied on the inconsistencies that exists in the evidence of the members of the raiding party in relation to their hospitalization after the scuffle at Maradana house, in support of his claim of improbability. The accused-appellant strenuously contended that none of the other persons arrested on the night was prosecuted except the accused-appellant and that supports his claim of framing him by the officers of PNB claiming Heroin was found in his possession. The evidence clearly indicates that the other suspects had no complicity to the charges leveled against the accused-appellant and therefore their release has no significance as to the truthfulness of the evidence.

The second ground of appeal relates to the complaint by the accused- appellant that the trial Court has failed to consider the chain of productions has not been proved by the prosecution. This complaint is based on the fact that **PW1** has admitted that the three "tablets" that were recovered from the possession of the accused appellant not kept with him during investigations. However, when one closely examines the evidence presented before the trial Court by the prosecution, it could clearly be seen that **PW1** has decided to temporary handover the custody of three "tablets" to his junior officer PC 63051 Jayawardane when the inmates of the Maradana house turned hostile towards the raiding party. **PW1** had thereafter taken charge of the "tablets" when they have reached the safety of their office and produced them to the reservist having completed the required procedure in relation to production items. Jayawardane was called as **PW6** and he supported his senior officer's evidence of handing over the productions to his temporary custody until it was taken by **PW1** at their office. He asserted that during this limited period he possessed the three "tablets" recovered from the accused-appellant.

This position advanced by the **PW1** is a probable one as it was his intention to ensure safety of the production items recovered from the accused- appellant. As the situation got tensed due to the scuffle, he had the presence of mind to temporary handover the three "tablets" to **PW6** for its safekeeping. The accused-appellant's complaint about the production "chain" confines to this segment of custody. He did not challenge the inward journey of these items to the Government Analyst's Department, where they were scientifically analyzed and weighed.

In this type of situations where the production items were sealed after the detection, not at the place of detection but at the Police station, the prosecution must rely on the oral testimony of the concerned witnesses to establish proper custody up to that point. Once these items are sealed and handed over to the reservists, then the prosecution will have documentary evidence to establish its proper custody. As a result, in establishing proper custody of the production items from the time of detection to the time of handing them over to the reservist, having followed the due procedure, would depend on the truthfulness and reliability of the oral evidence of the concerned official witnesses.

If the trial Court accepts their evidence, then the prosecution has established proper custody from the time of detection to the time of handing them over to the reservist. If, on the other hand, the trial Court decides not to act on that evidence, then the prosecution has failed to establish proper custody of the production items taken charge during the detection.

In relation to the appeal before us, the trial Court has opted to act on the evidence of the prosecution and therefore, the proper custody of the productions items from the time of its detection to handing over to reservist has been established to the required degree of burden of proof. Therefore, we are of the view that the second ground of appeal fails as it has no merit.

The third and the final ground of appeal that the trial Court has failed to properly evaluate the evidence presented by the accused-appellant before it is based clearly on an erroneous footing. The accused-

appellant contended that the trial Court rejected his evidence given under oath for only two reasons. Firstly it miscalculated the claim of the accused-appellant that the income he earned whilst in Sri Lanka, acting as a sub agent for an employment agency, is Rs. 3.7 Million. Secondly, the trial Court rejected his evidence on the basis that he could not describe the exact number of men in a platoon, although he claimed that he served as a captain in the Army of his native country.

In his evidence, the accused-appellant, in addition to his other claims, asserted that he placed his signature only once in a document. The other signatures that were shown to him in cross-examination, including the one that appears in his statement to PNB was denied by the accused-appellant. The prosecution has called rebuttal evidence of Examiner of Questioned Documents to challenge this assertion. After the evidence of rebuttal, the trial Court noted that the accused-appellant was lied before it in his evidence in relation to this issue. The accused-appellant, at the hearing of this appeal, did not challenge this conclusion. In addition, the trial Court has noted several other important inconsistencies and improbabilities in his evidence before it decided to reject them.

With regard to the recovery of Rs. 3.7 Million, the prosecution witnesses have already given evidence that they recovered Rs. 199,000.00 when they searched *Inguru Kade* Junction house and the other suspect who was arrested with the accused-appellant claimed it. The loss of Rs. 3.7 Million by the accused-appellant was first made after about one year and that too when the Government Analyst's report was made available. There was no challenge to this evidence by the accused-appellant.

The Supreme Court had the occasion to revisit the jurisdiction of an appellate Court on questions of facts in *Attorney General v Mary Theresa*(supra) when it observed that;

*“Appellate courts are generally slow to interfere with the decisions of inferior courts on questions of fact or oral testimony. The Privy Council has stated that appellate court should not ordinarily interfere with the trial court’s opinion as to the credibility of a witness as the trial judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility and whether after careful thought or with reckless glibness and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross examination (Vide, Valarshak Seth Apar v. Standard Coal Company Limited ). But where the matter is one of inference from evidence, and the evidence is not well balanced the appellate court will set aside the finding of the trial court if it is against the weight of evidence.”*

In view of the grounds of appeal which based on a request of reappraisal of the credibility of the prosecution witnesses by this Court, the apex Court also noted that;

*“There is simply no jurisdiction in an appellate court to upset trial findings of fact that have evidentiary support. A Court of Appeal improperly substitutes its view of the facts of a case when it seeks for whatever reason to replace those made by the trial judge. It is also to be noted that State is not obliged to*

disprove every speculative scenario consistent with the  
innocence of an accused” (emphasis added)

The trial Court having had the advantage of observing demeanour and deportment of the accused-appellant, decided to reject his evidence in considering all these factors. Testimonial trustworthiness of witnesses is a finding of fact. A finding of fact could not be substituted by an Appellate Court, if such finding of fact has “*evidentiary support*” and is not perverse. We are satisfied that the trial Court’s finding of fact to rely on the prosecution evidence is well supported by evidence placed before it. Accordingly, this ground of appeal necessarily fails as it is based on a totally wrong premise.

In view of the above reasons, we affirm the conviction and sentence of the High Court of Colombo dated 15.06.2016 and dismiss the appeal of the accused-appellant.

JUDGE OF THE COURT OF APPEAL

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE COURT OF APPEAL