# 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 and in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979

**C.A. Case No: 12/2013**
**H.C. Colombo Case No: 4818/2009**

Hon. Attorney General on behalf of the Democratic Socialist Republic of Sri Lanka

**Complainant**

**-Vs-**

Mohottige Ajith Anuruddha

**Accused**

**-And Now-**

Mohottige Ajith Anuruddha

**Accused-Appellant**

**-Vs-**

Hon. Attorney General

**Complainant-Respondent**

**Before** : **A.L. Shiran Gooneratne J.**

**&**

**N. Bandula Karunarathna J.**

**Counsel** : Rienzie Arseculeratne, PC with Chamindri Arseculeratne, Namal Karunaratna, Udara Muhandiramge for the Accused-Appellant.

Madhawa Tennakoon, SSC for the Respondent.

**Written Submissions:** By the Accused-Appellant on 22/02/2019

By the Complainant-Respondent on 05/06/2018

**Argued on** : 19/03/2019

**Judgment on** : **09/05/2019**

**A.L. Shiran Gooneratne J.**

The Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Colombo on 2 counts, namely, for being in unauthorized possession of 63.5 grams of heroin, an offence punishable under Section 45A(d) of the Poisons, Opium and Dangerous Drugs Act and illegally trafficking the said quantity of heroin, an offence punishable under Section 45A(b) of the said Act. Upon conviction on both counts, the Appellant was imposed a life imprisonment.

When this case was taken up for argument, the Learned President's Counsel for the Appellant was informed that in terms of Section 331 of the Code of Criminal Procedure Act (CCPA), a plain and concise statement of the grounds of Appeal has to be tendered to court and accordingly, the grounds of Appeal tendered by way of further written submissions were withdrawn and the following grounds of Appeal, were submitted in open court.

The learned trial judge,

(1) failed to take into account that the defence case is in line with what is alleged in part of the charge

(2) failed to consider the probability of the detection

(3) failed to consider the charge that the IB extracts pertaining to the meter reading of the vehicles used for the detection has been tampered with

(4) failed to consider that prosecution witness Liyanage, has taken 2 days to hand over the productions without a reasonable excuse.

(5) the Accused was not afforded a fair trial, as the evidence of the accused has been concluded on 19/08/2010 and the judgment delivered on 22/01/2013.

(6) a part of the evidence not available in the brief

(7) the prosecution has failed to prove the case beyond reasonable doubt

The 1st and the 2nd grounds of Appeal are based on the detection of the illegal substance and hence would be considered together.

The case for the prosecution is that, on information received by an informant, a detection was organized by the Police Narcotics Bureau (PNB), at Madampitiya road where the officers had gained access to the premises of the Appellant through a barbed wire fence. The officers entering the house had seen the Appellant throwing a parcel towards a closed door, from where he was seated. The parcel contained a substance which was later confirmed to be heroin. A cellophane parcel, a weighing scale, cellophane bags and five other parcels, found to be containing heroin were found in the possession of the Appellant at the time of arrest.

The learned counsel for the Appellant submits that according to the particulars of the indictment, the place of offence described in count 1 and count 2 refer to Madampitiya road, whereas, the particulars of the offence in relation to the possession and trafficking of heroin, led in evidence, was to the effect that it was found in the house of the accused, situated near the mosque along Madampitiya road.

In ***R v. Wallwork, 42 Cr. App.R. 153, CCA,*** it was held that:

> *"the lack of precision as to place in the particulars did not invalidate the indictment because the place of commission of the offence was not material to the charge."*

It was further contended by the Counsel that the defence version that heroin was found at Madampitiya road, is in line with the particulars of the charge which

states that the parcel of heroin was found at Madampitiya road. In support of the said contention, the learned counsel has referred to a question and an answer given by PW1 in cross-examination, where the witness had stated that the parcel containing heroin was left behind at the turn off to the house of the accused, which appear at page 160 of the brief. For purpose of clarity, I find it important to re-produce the said question and answer referred to by the learned counsel in its entirety, which reads as follows;

> *"ප්‍රශ්‍න: එම පුද්ගලයා නිවසට හැරෙන ස්ථානයේ පාරේ තමයි භාණ්ඩ දාල ගියේ?*
>
> *උ: අදාළ භාණ්ඩ මම සොයාගැනීමක් කළේ නෑ. පාරේ තිබුණ භාණ්ඩ සොයාගෙන පාර්සලයට අදාළ ග්‍රෑම් තුන්සිය ගණනක් තියෙන පාර්සලය මෙම පුද්ගලයාට ඉදිරිපත් කලා. එම පුද්ගලයාගේ කටඋත්තරය අනුව මෙම සැකකරු මෙම සැකකරු චෝදනාව යටතේ."*

Prior to this question been posed to PW1, the line of cross-examination of the witness was about an injury caused to the Appellant on the left ear as a result of a fall. It is observed that the said question posed to PW1 is not in line with the previous question to this witness. The answer given does not connect to any position previously taken by the witness nor does it provide an answer in the given context. It is also observed that the follow up question to the answer given by the witness does not conform to the line of cross-examination. Therefore, taking into consideration the totality of the evidence in cross-examination, the question and answer referred to above by the counsel for the Appellant does not connect to the

testimony given by the said witness. I find that the testimony of PW1 is consistent per se. and inter se. and therefore, the said evidence is safe to act upon.

The officers conducting the detection has entered the Appellants house by scaling a grill affixed to the rear entrance. The learned President's Counsel contends that the said version of the prosecution is not probable. PW1 in his evidence states that according to the information received the officers decided to gain entry to the house through its rear entrance, since the front entrance remained frequently padlocked. In the circumstances, PW1 had decided that the rear entrance was the most effective way to gain entrance to the house. Defence did not suggest to this witness that they could not gain entry through the said entrance. As in this case, where the issue of probability arises, the more likely version should be acted upon and the less likely, rejected. I find that the learned High Court Judge has evaluated the said evidence in its proper context when deciding to accept the version of PW1. I do not see any reason to hold differently.

3rd ground of Appeal

The 3rd ground of appeal is founded on the basis that the changes effected to the running charts pertaining to vehicles belonging to the PNB bearing No. HC 2317 and HC 2318, used for the detection, casts a serious doubt to the entirety of the raid.

According to the evidence of PW1, vehicle bearing number HC 2317 was used in the detection and vehicle number 2318 was used to produce the accused

before the Maligakanda Magistrate's Court. When questioned about the meter reading of the said vehicles as recorded in the IB extracts, the witness stated that the last 3 numerical numbers of the meter reading of vehicle bearing number HC 2317 and the last 2 numbers of vehicle bearing 2318 had been tampered with and substituted by different numbers, which cannot be clearly identified. The number indicated in the copy of the extracts pertaining to vehicle number 2317, obtained by the State Counsel reads as 44674. The return journey gives the meter reading, as 44688, which would indicate a total distance travelled as 14 kilometers. The meter reading of vehicle number 2318, cannot be identified accurately due to the said substitution over the existing number. The witness admits that at the commencement of the journey the meter reading was 44504, however, could not confirm that, at the end of the journey, the meter reading was 44588. The prosecution did not provide any explanation to the said discrepancy in the meter readings.

The Appellant in his statement from the dock states that, he was arrested at his house in Madampitiya road. The Appellant also admits that soon after his arrest, he was taken to the PNB office in a jeep and that on the next day, he was taken to the Maligakanda Magistrate's Court.

The contention of the Counsel for the Appellant is that such changes made to the running charts contrary to the departmental orders issued by the Inspector General of Police, casts a serious doubt to the entirety of the raid. Changes

effected to the running charts, by itself, would cause serious departmental concerns, no doubt. However, taking into consideration the accused stand on the arrest and the subsequent appearance, before the Magistrate's Court of Maligakanda, the day after his arrest, leaves no room for doubt regarding the place and date material to the arrest of the accused. Therefore, the said ground of Appeal is rejected.

4th ground of Appeal

The above ground of appeal is based on an alleged undue delay caused by PW1 to hand over the productions to Rajakaruna PW2. PW1 in his evidence states that, since the production officer was not available, the productions recovered on 09/04/2005, were listed and kept in the table drawer in his official room, padlocked and the key, in his custody. Witness further states that at 9.05 a.m. on 11/04/2005, he handed over the productions to PW2 and until such time the productions were kept in his custody (page 96 of the brief). PW2 in his evidence states that he did not report for duty on Saturday and Sunday, however, reported for duty on Monday. The witness could not re-call to state the exact dates. Rajakaruna PW2, in his evidence clearly states that he took custody of the productions on 11/04/2005, and handed over the said productions to the Government Analyst on the same date (page 254-255 of the brief). It is observed that PW1 had safe custody of the productions until the productions were handed

over to PW2. Therefore, we do not see any brake in the chain or a breach of safe custody of the productions while in the custody of PW1 or PW2.

5th ground of Appeal

The learned counsel for the Appellant contends that the evidence of the accused has been concluded on 19/08/2010, and the judgment delivered on 22/01/2013, and therefore the accused has not been afforded a fair trial. According to journal entry 48 dated 19/08/2010, the case was adjourned until the 14/12/2010, for concluding submissions by the respective counsel. According to proceedings dated 09/03/2011, due to the transfer of the presiding judge, his successor has sought suitable directions from His Lordship the Chief Justice to have his predecessor appointed to continue with this case. By nomination document dated 04/07/2011, the judge who concluded hearing evidence was nominated to conclude and deliver judgment. Concluding submissions were made by the respective counsel on 24/02/2012, and thereafter the judgment was reserved.

It is observed that intervening administrative adjustments which are imperative to the proper administration of the case, has caused a delay in the pronouncement of judgment. However, a trial judge should be mindful to minimize such delay, cause no failure or prejudice to the interests of justice or to the final outcome of the case.

*"The provision that the verdict should be delivered within 10 days is only directory and not mandatory."* ***(Siddick v. The Republic of Sri Lanka (2005) 1 SLR 383).***

*"The provisions of Section 203 of the Code are directory and not mandatory. This is a procedural obligation that has been imposed upon the court and its non-compliance would not affect the individual's rights unless such non-compliance occasions a failure of justice."* ***(Anura Shantha and another v. Attorney General (1999) 1 SLR 299).***

In the circumstances, I do not see any violation of a judicial right relating to delay which has occasioned a failure of justice to the Appellant, in pronouncing the Judgment, as noted above.

6th ground of Appeal

The Counsel for the Appellant also contends that a part of the evidence is not available in the brief. In this regard, the learned President's Counsel has drawn attention to the evidence of PW7 and PW8, at page 370 and 381, respectively. I observe that, according to the numbering of the pages in the brief, proceedings are complete. There is no question where proceedings available to one party were not available to the other. According to the numbering of the pages, a case brief containing the available proceedings were with both parties prior to argument. Therefore, I do not see any prejudice caused to either party.

7th ground of appeal

For the reasons stated in respect of each of the grounds of appeal discussed above and in consideration of the totality of the evidence led in this case, I find that the prosecution has proved the case beyond reasonable doubt and the learned High Court Judge has come to a correct finding that the accused is guilty as charged.

In the circumstances, I reject all grounds of appeal and affirm the conviction dated 22/01/2013, and the corresponding sentence, on both counts.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**N. Bandula Karunarathna, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**