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

In the matter of a Petition of Appeal in terms of Section 331(1) of the Code of Criminal Procedure Act No.15/1979 of the Democratic Socialist Republic of Sri Lanka.

C.A.No.195/2015

H.C. Colombo No.6692/2013

Pathirage Kumara Sampath Dias.

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

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BEFORE	:	**HON. DEEPALI WIJESUNDERA, J.** **HON. ACHALA WENGAPPULI, J.**
COUNSEL	:	Thisara Harasgama (Assigned Counsel) for the Accused-Appellant. H.I. Peiris D.S.G. for the respondent
ARGUED ON	:	10th October, 2019
DECIDED ON	:	08th November, 2019

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HON. ACHALA WENGAPPULI, J.

The accused-appellant (hereinafter referred to as the "Appellant") was indicted by the Hon. Attorney General for illegal possession of 3.5 grams of heroin and also for trafficking in of the said quantity of heroin.

After trial he was convicted on both counts by the trial Court and was imprisoned for life in respect of each of these offences. Being aggrieved by the said conviction and sentence, the appellant seeks to have them set aside on the basis that;

a. the trial Court had failed to hold that the prosecution version of the detection of the prohibited drug from the possession of the appellant is clearly an improbable one,

b. the trial Court had erroneously shifted an evidentiary burden on the appellant,

c. the evidence is insufficient to sustain a conviction on trafficking in.

In support of the first ground of appeal, the appellant relied on the following factors to impress upon this Court as to the improbability of the prosecution case.

i. there was a detection of heroin on the previous day from the house of one *Thushara,* in front of which the appellant was claimed to be waiting for his buyer to turn up to complete the transaction while being in possession of a quantity of heroin,

ii. the likelihood of *Thushara's* wife permitting the appellant to use her house to engage in this illegal trade so soon after a detection which resulted in the arrest of her husband,

iii. the likelihood of the arrival of a buyer to a place where a raid was carried out in the day prior to the instant detection,

iv. the likelihood of the appellant waiting in front of the house, rather than waiting inside of it while waiting for the prospective buyer,

v. the failure of the officers of the Police Narcotics Bureau to conduct a search in house of the appellant, which was located only a short distance away from the place where the detection was made,

vi. the officers of the Police Narcotics Bureau have failed to arrest the prospective buyer who was to arrive at that place in order

to complete the transaction after they made the arrest of the appellant,

vii. PW11, being a member of the raiding party of the previous day, did not disclose that fact when he participate in the detection which resulted in the arrest of the appellant,

viii. the detecting officer claimed to have identified the prohibited substance merely on its appearance even without opening the packet which allegedly contained some brownish substance.

These factors had to be considered against the backdrop of the case that was presented before the trial Court by the prosecution, in order to determine the issue whether it erroneously decided to accept the prosecution version of events; since the evidence of the detecting officer fails to satisfy the test of probability, as the appellant claims before this Court.

It is the case for the prosecution that SI *Gayantha* of the PNB left his office at 12.15 p.m. to *Maradana* to conduct a raid upon information provided by a private informant of his. However, having waited near the Railway Station until 1.35 p.m., the witness learnt from his informant that the delivery of narcotics will not take place that day as expected. He then decided to abort the planned raid. At that point PC 49446 *Abeywickrama,* who acted as the driver of the vehicle, conveyed information about distribution of narcotics by a person called *Kumara* of *Angoda.* He had made an entry to that effect in his note book and left *Maradana* at 1.40 p.m.. According to information, the officers were to meet this informant at

Angoda junction who undertook to point out the person who was standing near *Tushara's* house with a packet of heroin, in anticipation of the arrival of his prospective buyer.

At 3.25 p.m. the police party had met the informant and had walked about 50 meters along *Himbutana* lane with him. Having reached a point where a person was standing by the road, the informant then made a gesture indicating the appellant. *Gayantha* then conducted a body search of the appellant who was standing by the side of that lane. This place was in front of *Thushara's* house. Search conducted on the person of the appellant resulted in the discovery of a parcel containing narcotics in his right trouser pocket. Having arrested the appellant, *Gayantha* had proceeded to question him. The witness had thereafter sent for his team who conducted a search of a house, which was located to the left of the place of detection on information he received during interrogation of the appellant. That search yielded nothing suspicious.

During cross-examination of the witness, it was elicited that the police party did not conduct a search of the appellant's house upon his questioning it was revealed that he resides in *Thushara's* house. When they searched the other house, it was apparent from the person of his personal belongings, that the appellant was living in that particular house as well. In addition, the police party conducted a search of *Thushara's* house as well. Only a woman and her two children were there.

In relation to the detection, the witness clarified that he did not open up the parcel containing narcotics to verify as to what it is, but merely by smelling he suspected that the parcel contained a narcotic substance.

Gayantha later came to know that officers of PNB had conducted a raid on that premises only on the previous day.

The trial Court, in its judgment had considered the prosecution evidence at length in the light of the various suggestions put to its witnesses by the appellant. It had also considered the position advanced by the appellant in his dock statement. Having considered the contents of the said dock statement the trial Court rejected the same on applying the tests of probability and consistency. It had then concluded that the prosecution has proved its case beyond reasonable doubt.

Learned Deputy Solicitor General, in meeting the contention of the appellant on the relative probabilities of the prosecution version, submitted that the appellant had in fact used the fact that *Tushara's* house was raided the previous day to his advantage by assuring his prospective buyer that there would not be a threat from PNB for their transaction because of the raid conducted on the previous day. He added that the decision to conduct search operations was taken according to the discretion of the detecting officer who is the best person to assess the ground situation and to decide whether to carry out such raids or not in the given set of circumstances. In this instance, learned DSG submitted that the police party had conducted searches of all relevant places.

In replying to the allegation that the officers did not wait until the transaction was over, the learned Deputy Solicitor General submitted that once they made the detection, as per the information received, there was no necessity to wait indefinitely for the arrival of this prospective buyer to the place of detection.

With these submissions of the parties, this Court could now consider the merits of the 1st ground of appeal as urged by the appellant.

His contention on this ground of appeal totally rests on the applicability of the test of probability in relation to the prosecution evidence. In the circumstances, it is indeed helpful if this Court devotes some time to examine the several considerations that are employed by the Courts in applying the test of probability and improbability, in determining testimonial trustworthiness of the witnesses.

The difficult task of assessing the relative probabilities of conflicting versions is noted by the House of Lords in the judgment of ***In Re B*** **[2008] UKHL 35.** ***Baroness Hale,*** after considering the indecision reached by the trial Judge upon the evidence, as indicative from the reproduction of the following quotation;

> *" ...on an approach founded on evidence and reasoning, and not on suspicion and/or concern, I am unable to conclude that there is no real possibility that Mr. B sexually abused R as she asserts or substantially as she asserts and I have therefore concluded that there is a real possibility that he did it,"*

had ventured to observe that:

> *"We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous*

documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability."

Her Ladyship then added the following observations on assessing relative probabilities :

"In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."

Lord *Hoffman* opted to express this position in pure mathematical terms as follows:

"The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as

not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

On the question of assessment of the relative probabilities conflicting versions, a relevant and important consideration is highlighted by the South African Appeal Court in ***ABSA Brokers (Pty) Ltd., v CCMA & Others*** (JA 45/03 of 26.05.2005) as it stated thus:

"It is an essential part of the administration of justice that a cross examiner must put as much of his case to a witness as concerns that witness. He has not only a right to cross examination, but, indeed, also a responsibility to cross examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness's attention must be first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation. A failure to cross examine may, in general, imply an acceptance of the witness's testimony ..."

In turning to local authorities, the judgment of ***Addaraarachchi v The State*** (2000) 3 Sri L.R. 393, by this Court was in relation to applying the test of probability on the evidence of a prosecutrix.

It is stated therein:

"... there is no other way to apply the test of probability and improbability except by considering the yardstick of accepted and expected behaviour of women in society. In other words, it is the

application of the test of normal human conduct. As Jayasuriya J. observed in the case of ***Wickramasuriya v. Dedoleena & others,***

" A judge in applying the test of probability and improbability relies heavily in 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 case it would appear that both the trial Judge and the learned Senior State Counsel who prosecuted (as observed from his written submissions) seem to have been imbibed with an erroneous notion that when applying the test of probability and improbability it is the subjective test and not the objective test that has to be resorted to, ..."

The trial Courts could draw reasonable inferences as to human behaviour as per the judgment of ***Ariyasinghe & Others v The Attorney General*** (2004) 2 Sri L.R. 357, where it is stated by this Court:

"... that the validity of any inference as to the existence of any facts, drawn from the proved facts, depends on the facts of the particular case. The broad general principle, couched in broad language giving a wide discretion to a trier of fact to be used, having regard to the common course of natural events, human conduct and public and private business in their relation to the facts of a particular case, cannot be curtailed of or restricted by reference to an illustration

provided to illustrate the application of the general principle laid down in section 114 of the Evidence Ordinance."

Returning to the instant appeal, it is noted by this Court that the challenge mounted by the appellant confines to the acceptance of the prosecution evidence by the trial Court as truthful and reliable account of the events that took place. His contention is that the version of the prosecution is an improbable one and the trial Court was in error when it decided to accept that evidence.

In fact, thereby the appellant is challenging the validity of the determination as to the testimonial trustworthiness of the prosecution witnesses. This is clearly a question of fact and the view formed by the said Court on the credibility of witnesses who gave evidence before it is entitled to a great weight, when an appeal against such an order is decided by an appellate Court.

Coomaraswamy in his treatise on Law of Evidence, Vol. II, Book 2, p.1053, adds a word of caution in applying the test of probability on a testimony of a witness.

Learned author states:

" ...in choosing between witnesses on the basis of probability, a Judge must bear in mind that the improbable account may nonetheless be the true one. The improbable is that which may happen and obvious injustice could result if a story told in evidence were too readily rejected simply because it was bizarre, surprising or unprecedented."

It is noted that the complaint by the appellant is that the prosecution version is teeming with improbabilities. The rejection of the defence case by the trial Court was not challenged, except to high light the complaint that the Court had shifted burden on him. Then, the resultant position would be that the appellant confines his challenge to the improbability of the version of events as spoken to by the prosecution witnesses.

Law of Evidence by *Monir* 6th Ed Vol. I at p. 756, had expressed the general approach of the appellate Courts, should adopt on this question, following the judgment of the Supreme Court of India in ***Madhusudan Das v Narayani Bai*** 1983 SC 114 in following terms :

> *"The rule is and it is nothing more than a rule of practice 'that when there is conflict of oral evidence of the parties on any matter in issue, and the decision hinges upon the credibility of the witness, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is sufficient balance of improbability to dispute his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact ... The duty of the appellate Court in such a case is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial Court arrived at or whether there is an element of improbability arising from proved circumstances which in the opinion of the Court outweigh such finding."*

It is already noted that the main thrust of the appellant's submission on this ground is on the probabilities of the prosecution claim that the appellant chose to sell narcotics near a place where a raid was conducted

by PNB merely a day ago. The appellant then poses the question when that episode was still fresh in mind, would the appellant select such a place to engage in his trade ?

Learned Deputy Solicitor General submitted that the appellant took the advantage of the situation as no one would expect the PNB officers to carry out raids on consecutive days over the same place.

When one peruses the relevant proceedings, facts revealed therein are slightly different to what the appellant contends. The evidence is that the appellant was seen "near" *Thushara's* residence and not in it or not in front of it. It is also relevant to note here that the place where the appellant disclosed to PNB officers as his usual place of abode is also near to that house. The appellant had yet another house which was located in the same neighbourhood. The prosecution evidence is that they received information that the appellant would deliver a package of narcotics "near" *Thushara's* house and not 'in' any of these houses.

In addition to the probability of the explanation of the learned DSG, it could also be that the appellant used the notoriety of *Thushara's* house as a narcotic den in the neighbourhood to direct his prospective buyer to arrive at their already agreed point of meeting without losing his way, in order to complete the transaction as it is an easily locatable place. It is a place where the appellant also felt comfortable with since his own accommodation was also located almost adjacent to that of *Thushara's*. Other probabilities that were connected to this aspect and highlighted by the appellant therefore assumes lesser significance, when viewed from this angle.

The alleged failure to conduct a search of the house of the appellant poses no challenge since that fact had been adequately explained by the witness. It is clear once the officers made a successful detection, they conducted searches of the two places where the appellant had access to. They searched *Thushara's* house and also searched the appellant's usual place of abode. Same is the position with the allegation that the prospective buyer was not arrested. Having made a successful detection and completed the task of searching the houses, the officers are justified in proceeding to the PNB office without waiting for the buyer of the appellant to turn up. Considering these circumstances objectively, it is very likely that if the officers were to wait until his arrival, it would have been an indefinite one, as by then the news that officers of PNB have made another detection near *Thushara's* house would have reached that prospective buyer, compelling him to change his plans to meet up with the appellant.

The ability of the witness to identify the narcotic substance by its mere smell was not challenged by the appellant, though he now wishes to challenge that claim by the witness. Given the expectance of the officer concerned, coupled with the fact that his claim of identifying heroin was not challenged before the trial Court, this would have no adverse impact on the prosecution evidence on probability.

Thus, the conclusion of the trial Court that the prosecution claim is a probable one could not be faulted as "*the evidence taken as a whole can reasonably justify the conclusion which the trial Court arrived at*". Therefore, it is the considered view of this Court that the first ground of the appellant is without any merit.

In relation to his second ground of appeal that the trial Court had erroneously shifted an evidentiary burden on the appellant, it was contended that when the trial Court concluded that the appellant had failed to discredit the prosecution evidence (" විත්තිය විසින් බිඳ හෙලා නැත."), it had imposed a burden on the appellant to disprove the prosecution. The appellant had relied on precedents where this Court had interfered with the conviction when it was apparent that the trial Court with the use of certain words may have shifted the burden on the appellant.

It is correct that the wording the trial Court had used being "විත්තිය විසින් බිඳ හෙලා නැත." gives the impression that the trial Court thought that it was up to the appellant to discredit the prosecution evidence and he had failed in that task. This is taking this particular sentence out of the context in which it was inserted in the judgment.

The trial Court had correctly applied the evidentiary burden on the prosecution and clearly stated in the judgment after the above quoted portion, it would consider the evidence of the prosecution to determine the issue whether the challenge mounted by the appellant results in creating a reasonable doubt in the prosecution case (" විත්තිකරුවකු විත්ති කුඩුවේ සිට කරනු ලබන ප්‍රකාශයක් ප්‍රතිඥා මත ලබා නොදෙන හරස් ප්‍රශ්ණ යඳහා යටත් නොවන ප්‍රකාශයක් වුවද එමහින් පැමිණිල්ලේ නඩුවට සැකයක් ඇතිවේ ද යන පදනම සලකා බැලිය යුතුය). It then reiterates this position in the penultimate paragraph of the judgment clearly as the trial Court was mindful that the appellant need not disprove the prosecution case and all what the Court needs to do is to consider whether a reasonable doubt has arisen in its mind. (මේ අනුව විත්තිකරු ඉදිරිපත් කළ සාක්ෂි මගින් පැමිණිල්ලේ නඩුව කෙරෙහි සැකයක් ඇති නොවන බව තීරණය කරමි.)

Thus, it is clear what the trial Court meant, when it said "විත්තිය විසින් බිඳ හෙලා නැත.", was not in relation to the burden of proof but in relation to the unsuccessful attempt of the appellant in cross- examining the prosecution witnesses to assail their credibility.

In the circumstances, this Court concludes that the second ground of appeal of the appellant too is without merit.

Lastly the third ground of appeal could be considered. The appellant contended that the evidence that had been placed before the trial Court by the prosecution is quite insufficient to sustain a conviction on trafficking in of a narcotic substance. Learned Counsel for the appellant drew attention of this Court to the definition to the term "trafficking" as found in section 54A of the Poisons, Opium and Dangerous Drugs Ordinance as emended.

The said section stated that "traffic" means;

a. to sell, give, procure, store, administer, transport, send, deliver or distribute; or
b. to offer to do anything mentioned in paragraph (a).

Other than the hearsay item of evidence that the appellant kept the prohibited substance in his possession to "sell/deliver/transport/ distribute" there was no other evidence that the appellant was engaged in any of the above mentioned activity at the time of detection.

Learned DSG, following the best traditions of the Attorney Generals Department, conceded to this point by stating to Court that the evidence is insufficient to sustain a conviction on the charge of trafficking in of heroin.

In view of the above considerations, this Court need not engage in a detailed analysis of evidence to conclude that the third ground of appeal of the appellant has merit. This Court therefore affirms the conviction and sentence imposed on the appellant in relation to the possession of heroin charge and acquit him of the trafficking charge by setting aside his conviction on the said charge and the sentence imposed on the appellant on that account.

Accordingly, the appeal of the appellant is partly allowed.

JUDGE OF THE COURT OF APPEAL

HON. DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL