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

In the matter of an Appeal in terms of section 331 (1) of the Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/133/2019

High Court of Colombo Case No:

HC/5333/2010

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Abdul Hameed Mohamed Lafeer

ACCUSED

AND NOW BETWEEN

Abdul Hameed Mohamed Lafeer

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J.
	: Sampath B Abayakoon, J.
Counsel	: Anura Laksiri for Accused-Appellant
	A Navavi D.S.G. for Respondent
Argued on	: 08-02-2021
Written Submissions	: 10-02-2020 (By the Accused-Appellant)
	: 03-02-2021 (By the Respondent)
Decided on	: 08-03-2021

Sampath B Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo for being in possession of 2.47 grams of heroin on or about 25th October 2008 and, thereby committing an offence punishable in terms of section 54(a) (d) of the Poisons Opium Dangerous Drugs Ordinance as amended by Act No 13 of 1984.

He was also charged with for having in possession 2.44 grams of Morphine, which is also a dangerous drug prohibited to possess under the provisions of the same Ordinance and thereby committing an offence punishable in terms of section 54(a) (d) of the Ordinance.

After trial, the appellant was found guilty as charged by the learned High Court Judge, and was sentenced for two separate terms of life imprisonment.

At the hearing of the appeal, it was the contention of the learned counsel for the appellant that the appellant was not afforded a fair trial by the learned High Court Judge. Pointing to the judgment dated 24th April 2019, it was his contention that the learned High Court Judge has made several alterations to

the evidence recorded previously, on the day the judgment was pronounced, without giving notice to either the prosecution or the defence, which in his view was a procedure not known to the law or practice. Arguing that this was a denial of a fair trial for the appellant which has caused prejudice to him, it was the plea of the learned counsel that the conviction against the appellant should stand vacated on this material defect.

It was observed by the Court that the learned High Court Judge has made several alterations and changes on the day of the judgment to the evidence recorded previously and made available to the parties. Although the learned High Court Judge has recorded that he made several corrections to the previous proceedings and has pronounced the judgment on that day, it is very much apparent that the learned trial judge has failed to bring to the notice of the parties the changes made to the said proceedings. This Court finds that even though some of the changes made are obvious corrections of errors, some of the changes are not, as they can be considered as corrections that goes into the root of the case and is of the view that this was not the way to correct proceedings in a trial.

Considering the submissions of the learned counsel for the appellant, it was the view of the learned Deputy Solicitor General representing the Attorney General that he is in no position to defend the conviction, given the material procedural defect mentioned, which amounts to a denial of a fair trial. However, it was his contention that the case should be sent for a retrial as there was evidence to conclude the likelihood of a conviction being obtained on a retrial and was of the view that the interests of justice should also be an overriding consideration.

Based on the above submissions and in consideration of the relevant legal principles, this Court finds no basis for the judgment and the conviction to be allowed to stand and hence, the judgment and the conviction dated 24th April 2019 is hereby set aside.

As a result of the judgment and the conviction being set aside, the next matter that has to be considered is whether the appellant should be acquitted of the charges against him or whether the matter should be referred back to the High Court for a retrial as submitted by the learned Deputy Solicitor General.

It is the view of this Court that the interests of justice should be a matter that has to be considered giving equal weight to the rights of both parties of a criminal or civil litigation.

It is true that the persons who are accused of serious crimes should not be allowed to go unpunished purely on a technical or procedural error by a trial judge. It is also true that the likelihood of a conviction at a retrial is a matter that needs consideration in such an instance.

However, this Court is of the view that the evidence presented by an accused in a trial in his defence should also needs consideration in determining whether or not to order a retrial. This is especially so since the appellant in this case has chosen to give evidence and faced the test of cross examination and has also called a witness on his behalf. Since it is the totality of the evidence that has to be considered in a criminal trial, I am of the view that it also becomes necessary to take into consideration of the duty cast on an accused in a criminal trial in considering whether a case should be sent for a retrial.

It was held in the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148** that;

> *"As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it's sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt."*

At this juncture, I would like to address my mind to the views expressed by Lord Diplock of the Privy Council in the case of **Au Pui-Kuen Vs. AG of Hong Kong (1980) AC 351** which reads thus;

"The strength of evidence adduced by the defendant in the previous trial is clearly one of the factors to be taken into consideration in determining whether or not to order a retrial."

In coming to the above conclusion, Lord Diplock quoted with approval a statement of Higgins JA made in delivering the judgment of the Court of Appeal of Hong Kong against which the appeal was preferred to the Privy Council.

"The true principle is that the Court will not order a new trial where a conviction is improbable or where a conviction will, assuming the same evidence is given, be unsafe or unsatisfactory. In any other case the Court will consider the strength of the evidence as just one of the factors relevant to the determination of what are the interests of justice. It is a factor which may assume greater importance than in others."

I am of the view that in certain instances several other factors also need consideration in ordering a retrial. The length of time that has elapsed from the time of the offence and the new trail, the prejudice that may cause to an accused due to the possible non-availability of evidence which was available to him at the first trial, to name some.

When it comes to the instant action, the appellant is said to have committed the offence on 25th October 2008. Since this is an action instituted based on a raid conducted by the Police Narcotic Bureau (PNB), I Find that it will amount to calling witnesses for a second time nearly 13 years after the actual event. It is also necessary to consider the fact that this was a prosecution based on an alleged planed raid by the officers of the Police Narcotic Bureau. Needless to say, that they are highly trained and experienced officers in giving evidence before a Court of law.

It is evident that the appellant suffered injuries during the raid. On perusal of the evidence as to how the appellant suffered the injuries, I find that the version presented by the appellant in giving evidence before the High Court was

more probable than that of the prosecution witnesses, which casts a shadow of doubt as to the truthfulness of the evidence on other facts as stated by them.

It was the argument of the learned Deputy Solicitor General that since all the evidence are on record, no attempt can be made to fill the gaps in evidence at a second trial. However, I am of the view that since the appellant has given evidence in this action at length, and his stand is now well known to the prosecution, there is a high probability of countering the defence of the appellant by the witnesses for the prosecution in detail than when they gave evidence at the first trial. There is also a high probability that since the witnesses are trained Police officers and since they have the advantage of going through their investigation notes beforehand, whatever the evidence they may give for a second time are going to be more perfect than the first.

Taking into account all these factors as a whole in deciding whether or not to refer the case back for a retrial, I am of the view that it would not be safe to order a retrial, as it may cause prejudice to the appellant for the reasons stated above.

Therefore, refusing the application for a retrial, I allow the appeal and acquit the appellant from the charges preferred against him.

Judge of the Court of Appeal

K. Priyantha Fernando, J.

I agree.

Judge of the Court of Appeal