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/0021/2019

High Court of Negombo Case No:

HC/114/2005

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Siddhadhura Michel Mendis

ACCUSED

AND NOW BETWEEN

Siddhadhura Michel Mendis

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J.
	: Sampath B Abayakoon, J.
Counsel	: Tirantha Walaliyadde, P.C. with Hirandi Cooray and Sarith Pathirana for Accused-Appellant
	: A, Navavi D.S.G. for the Respondent
Argued on	: 01-04-2021(By way of written Submissions)
Written Submissions	: 30-06-2020 (By the Accused-Appellant)
	: 07-07-2020 (By the Respondent)
Decided on	: 30-04-2021

Sampath B Abayakoon, J.

This is an appeal by the Accused-Appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Negombo.

The appellant was indicted before the High Court of Negombo for two counts in terms of section 54A(d) and 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance for having in his possession 2.4 grams of Heroin, which is a prohibited substance under the provisions of the Ordinance and at the same time trafficking the same.

After trial, the learned High Court Judge of Negombo by his judgment dated 29-01-2019 found the appellant guilty as charged and sentenced him to life imprisonment on both counts.

At the hearing of the appeal, the learned President's Counsel for the appellant as well as the learned Deputy Solicitor General for the Respondent Attorney

General, invited the Court to pronounce the judgment based on the written submissions by the parties.

In his written submissions, the learned President's Counsel for the appellant has urged the following four grounds of appeal for the consideration of the Court.

(a) Break in the chain of productions being sent to the Government Analyst

(b) Discrepancy in the identity of the productions.

(c) Dock statement was rejected based on unreasonable grounds.

(d) The trial Judge casted unnecessary burden on the accused.

Before considering the grounds of appeal in detail, I would now briefly summarize the facts relevant to the grounds of appeal as presented to the High Court by way of evidence.

This is an action instituted based on a raid conducted by the officers of the Excise Department upon an information received by Excise Guard 744 Ashoka (PW-07), from one of his personal informants about an illegal Heroin transaction, and conveyed to PW-02, namely Excise Sgt. Major Kandawattage Dayarathna Ranwala. The information received was of a person called Magulpokune Michel, who is dealing in Heroin he obtains from a house situated in Oliyamulla and that he travels to the said place early morning of every other day, and the informant will be in a position to point out the person.

According to the evidence of PW-02, after receiving the information, the raiding party led by Excise Inspector Sunil (PW-01) had left for Oliyamulla area of Wattala in the early morning of 22-05-2002. After meeting the informant on their way, the raiding party along with the informant had travelled to the bus stand near the Oliyamulla area gravel road, and had waited there in anticipation of the arrival of the suspect. Later, the informant had pointed out

a person who got down from a bus at 6.45 am as Michel. Since it was informed that he was on his way to obtain Heroin, the raiding party waited near the bus stand until his return which happened at 8.45 am. Upon revealing his identity, PW-02 questioned and searched the suspect to find three parcels wrapped in blue coloured shopping bags in his trouser pocket. On search of the bags, PW-02 had discovered 120 small packets in total with a powder like brown colour substance packed 40 each to each of the three parcels, which the PW-02 identified as Heroin through his experience as an Excise Officer.

After arresting the suspect and temporarily sealing the productions using his personal seal and the left thumb impression of the suspect, the productions has been subsequently weighed in front of the suspect at the Excise office in Colombo to discover that the substance had a total weight of 5600 milligrams. In his evidence the witness has described the procedure he followed to reseal the productions after the weighing.

It was his evidence that although he took the productions along with the suspect to the Wattala Magistrate Court to be handed over to the Court, he could not do so as the permanent Magistrate was not available. After producing the suspect before the acting Magistrate at his house, he had to return to his station with the productions.

PW-02 had kept the productions in his personal locker until around 8 am. the following day, and has handed over the productions to the Officer in Charge (OIC) of the Excise Station who was in charge of the production room as well. Although PW-02 has not kept a note as to the time he handed over the productions, evidence of PW-10 Rohan Wijeratne who was the OIC of the Excise Station clearly establishes the fact that it was handed over at the time stated by PW-02 in his evidence.

Confirming the evidence of PW-02, PW-10 has given clear evidence that the productions were handed over to him at 8.05 am. on 23rd May 2002. After safe keeping the productions in the safe deposit room under PW-10's care until 04-

06-2002, the productions have been handed over by PW-10 to Excise Guard 774 Ashoka at 7.05 am. to be taken to Wattala Magistrate Court.

With the above relevant facts in mind, I now proceed to consider the grounds of appeal urged by the learned counsel for the appellant.

(a) Break in the chain of productions being sent to the Government Analyst:

In the written submissions the learned counsel has urged two grounds to formulate his argument that the production chain was not proved, namely;

(1) The officer who handed over the productions to the Analyst is dead and as such his evidence was not available.

(2) The productions were in PW-02's personal custody and he had the free access to the productions.

The Excise Guard 774 Ashoka (PW-07 named in the indictment) was dead at the time the case was taken up for trial. However, during the trial, on 07-11-2017 (at page 283 of the brief) and again on 07-09-2018 (at page 308 of the brief) the defence has specifically admitted the following facts under section 420 of the Criminal Procedure Code.

(i) The handing over of the productions by PW-10 to Excise Guard 774 Ashoka to be handed over to the Magistrate Court of Wattala and that it was properly handed over.

(ii) The fact that from there, the productions were taken to the Government Analyst department, and after the analysis, the same productions were brought back to the Wattala Magistrate Court,

It is very much apparent that because of the above admissions, there had been no necessity for the prosecution to act under section 32(2) of the Evidence Ordinance in producing the relevant notes kept in his ordinary course of professional duty by Excise Guard 774 Ashoka.

It was held in **Perera Vs. Attorney General (1998) 1 SLR 378** that;

> *"An admission could be recorded at any stage of a trial, before the case for the prosecution is closed. The purpose of recording an admission is to dispense with the burden of proving that fact at the trial."*

Therefore, I find that after admitting the chain of custody from the handing over of the productions by PW-10 to Excise Guard Ashoka and the chain of custody thereafter, the learned counsel for the appellant is now estopped from arguing that the officer who handed over the productions was not available to give evidence. I am of the view that the appellant can only challenge the chain of possession of the productions from the taking over of the productions by PW-02 and up to the handing over of the same by him to PW-10, as the rest of the production chain has been admitted.

It is settled law that it was up to the prosecution to prove the uninterrupted chain of production custody in an action of this nature.

In **Perera Vs. Attorney General (Supra)** it was held that;

> *"The most important journey is the inward journey because the final analyst report will depend on that."*

In the case of **Faiza Hanoon Yoosuf Vs. The Attorney General, CA Appeal No-121/2002, HC Negombo Case No-139/93** it was stated by **Ranjith Silva, J.**

> *"There is no rule of law or practice that in a drug case the prosecution must establish the nexus between the heroin detected and what was produced in Court. In the ordinary cause of events the predominant or the essential feature being the nexus of the heroin detected and the heroin that was subjected to the analysis by the Government Analyst, the prosecution must establish an unbroken chain of custody of the production from the time the production was taken into custody till the time the productions*

were subjected to analysis by the Analyst. Thus, even if the production gets destroyed after the same were subjected to analysis, the prosecution could succeed if they could establish unbroken custody from the time of detection up to the time of analysis by the Government Analyst."

When it comes to the argument that PW-02 had free access to the productions as it was his personal custody, I find that the productions have been in the personal custody of PW-02 from the moment the detection was made on 22-05-2002 and up until the morning of 23-05-2002 where he handed over the same to his OIC PW-10.

What is important here is whether the PW-02 had any opportunity to tamper with the productions during the said period. It was his evidence that after taking into his custody the brown colour substance from the possession of the appellant, he temporarily sealed the productions by putting the same in an envelope. PW-02 has done so by placing the left thumb impression of the appellant and his personal seal on the sealed envelope and also by writing down the appellant's name and word Oliyamulla. (the production marked P-12A at the trial).

The contention of the defence is that PW-02's admitted failure to mention in his pocket notebook that he is carrying sealing equipment with him and his not placing the signature of the appellant on the envelope used to temporarily seal the substance (P-12A) amounts to a failure to prove beyond reasonable doubt the unbroken production chain.

Although PW-02 has not noted in his pocket notebook that he is carrying sealing equipment with him, it is clear from the envelope used by PW-02 to temporarily seal the productions until it was taken to the Excise Station for the purpose of weighing, that in fact, he had the sealing equipment with him. The trial Court has observed the left thumb impressions of the appellant and the personal seal of PW-02 on the envelope marked P-12A, which was clearly a temporary measure taken by PW-02 to ensure the safety of the productions

until it was weighed at the Excise Station. Soon after the weighing of the productions the same has been placed in another envelope (P-05) and all the necessary steps have been taken to reseal in order to ensure the safety and the identification of the productions.

After resealing the productions, PW-02 has taken immediate steps to produce the appellant before the Magistrate and also to hand over the productions to Court. PW-02 has clearly explained as to why he could not hand over the productions to the Magistrate Court on the day of the raid itself, although the appellant was produced before the Acting Magistrate at his house. Upon the return to the Excise Station with the productions, PW-02 has placed the productions in his personal locker and has handed over the same to his OIC the following morning, which goes on the establish that the witness has followed the due procedure throughout.

Hence, I am unable to agree with the argument that there was a break in the chain of productions. I find that the prosecution has proved beyond reasonable doubt the chain of custody of productions, and the mentioned ground of appeal should necessarily fail.

(b) Discrepancy in the identity of productions:

As discussed earlier, I am unable to agree that not placing PW-02's and the appellant's signatures in the envelope used to temporarily seal the productions is a discrepancy in the identity of the productions. The envelope used to temporarily seal the productions has been produced in Court and marked as P-12A in order to establish the procedure adopted in that regard. PW-02 has given clear evidence as to the procedure adopted and the steps taken to reseal the productions after the weighing of the same. I am unable to find any basis to doubt the evidence of PW-02 in that regard and that he had any opportunity to tamper the productions.

When weighed at the Excise Station using equipment available at the Station, the brown-coloured substance the PW-02 suspected to be heroin has recorded a weight of 5.6 grams. However, when weighed by the Government Analyst under laboratory conditions the weight of the substance had been 5.4 grams, out of which the Government Analyst found 2.4 grams of pure heroin. It is correct to say that the prosecution has failed to obtain an explanation regarding the 0.2-gram difference in weight from the Government Analyst (PW-08) when the analyst gave evidence at the trial. However, it is clear from the evidence that what the Government Analyst weighed was what was received as productions under proper sealing from the Wattala Magistrate Court.

I find that although the learned State Counsel who prosecuted the trial before the High Court has sought permission of Court to re-examine the Government Analyst in order to explain the difference in weight, it has been refused. I am of the view the learned trial judge should have allowed the prosecution to explain the reasons for the difference of weight as it would have served the interest of justice for either party.

However, I am unable to find any material prejudice that has been caused to the appellant due to this non explanation. It is common knowledge that weighing a small quantity like the quantity weighed under normal weighing conditions using standard weighing equipment available in a place like Excise Office and weighing the same quantity under a laboratory environment using highly sensitive weighing equipment can result in a difference in weight of this kind of a small magnitude.

There can be a basis for an argument that a prejudice was caused to an accused in a case if the weight mentioned as the weight of the productions sent to the Government Analyst by the Court was less than the real weight obtained by the Government Analyst under laboratory conditions and if not explained the possible reasons for such a discrepancy.

However, the weight obtained by the Government Analyst was 0.2 grams less than the weight mentioned as the weight of the productions sent by the Court. I find that if the real weight was 5.6 grams as mentioned by the Magistrate Court, the pure heroin quantity may also be more than the analyzed 2.4 grams.

I find that the non-explanation of the small difference of weight as mentioned before, has not caused any prejudice to the accused and hence the ground of appeal is devoid of merit.

(c) Dock statement was rejected based on unreasonable grounds:

It is the argument of the learned President's Counsel that the learned High Court judge failed to adopt the correct approach in evaluating the dock statement of the appellant by rejecting the statement as false.

When called for a defence in a criminal case, our Courts have recognized the right of an accused to either give evidence from the witness box and subject himself to the test of cross examination or elect to make an unsworn statement from the dock.

In **Queen Vs. Kularatne (1968) 71 NLR 529,** it was held that while jurors must be informed that such a statement must be looked upon as evidence, subject, however, to the infirmities that the accused statement is not made under oath and not subject to cross examination.

Held further;

1. If the dock statement is believed it must be acted upon.
2. If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and;
3. It must not be used against another accused.

Although the other commonwealth jurisdictions which previously recognized the right of an accused to make an unsworn statement from the dock has already abolished that right, our courts still follow this legal principle which is now embedded in our law.

However, I am of the view that although such a statement has some evidential value subjected to the infirmities of not been made under oath and not subjected to cross examination, such a statement needs to be considered not in its isolation but in the context of the totality of the evidence.

It was held in the case of **Don Samantha Jude Anthony Jayamaha Vs. The Attorney General, C.A. 303/2006 decided on 11-07-2012** that;

> "Whether the evidence of the defence or the dock statement is sufficient *to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of evidence that is in the light of the evidence for the prosecution as well as the defence."*

In his dock statement, the appellant has admitted that he was arrested on the 22 of May 2002 but has denied that he had any heroin in his possession. Other than making a general statement of denial, the appellant has failed to give any reasonable explanation as to the evidence placed before the Court against him. Although the learned President's Counsel has argued that the learned trial judge has failed to evaluate the dock statement in its correct perspective, I find that the learned trial judge has well evaluated the dock statement. The learned trial judge has found that although the appellant had the opportunity to confront the prosecution witnesses with his stand when they gave evidence, he has failed to do so and also has failed to explain any reasons for the failure. It appears that the learned counsel for the appellant is relying on one sentence of the judgment to argue that the dock statement was not properly evaluated, I am in no position to agree. The learned High Court judge has considered the totality of the evidence as he should have, to come to the finding that the dock

statement cannot be acted upon. For the reasons mentioned above, I find no merit in the ground of appeal urged.

(d) The trial judge casted unnecessary burden on the accused:

I am unable to find any basis for the argument that the learned High Court judge has casted an unnecessary burden on the accused. It is well settled law that in a criminal trial, an accused person has no burden of proof and it is the persecution that should prove its case beyond reasonable doubt.

It is apparent from the judgment that the learned High Court judge was mindful of the relevant legal principles that governs a criminal trial when he considered the evidence made available. He has considered each of the prosecution witnesses evidence *inter se* and *per se* and also the probability factor. He has also considered the mentioned omissions by the PW-02 in making his notes to come to a finding whether the said omissions create a reasonable doubt as to the prosecution's version of events. The learned trial judge has rejected the dock statement of the appellant after considering the evidence in its totality, which cannot be considered as casting an unnecessary burden on the accused.

Apart from the above considered grounds of appeal, the learned President's Counsel in his written submissions has drawn the attention of the Court to the trial proceedings of 07-09-2017 (page 307 of the brief) where the learned trial judge has decided to read over the charges from the amended indictment to the appellant on the basis that although the amended indictment has been served on the appellant and read over to him, it was not clear on the record.

It was the contention of the learned President's Counsel that if the entry dated 07-09-2017 is correct all the proceedings prior to that are void and has no effect for any verdict.

The original indictment in this action has been filed on 28th February 2005 and the amended indictment on 29th November 2007. I find that the trial of this

action has commenced on 02-04-2014. After the conclusion of the evidence of PW-02 who was the main witness of the case, the learned High Court Judge who heard the case then has found that although the amended indictment has been served on the accused, it has not been read to him. Accordingly, the learned High Court judge has proceeded to read over the amended indictment to the accused who is the appellant, for which he has pleaded not guilty. Because of the said procedural correction, the learned High Court judge has decided to hold the trial *de novo* by recalling PW-02 and proceeding therefrom. (page 131 of the brief)

It appears that due to an inadvertent oversight the learned High Court judge has made the contentious entry and taken steps, which has caused no prejudice to the appellant as the amended indictment has clearly been read over to him previously and the evidence taken afresh.

For the foregoing reasons, I find no merit in the appeal. The appeal therefore is dismissed. The conviction and the sentence is affirmed.

Judge of the Court of Appeal

K Priyantha Fernando, J.

I agree.

Judge of the Court of Appeal