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

In the matter of an Appeal under Section 331 of the Criminal Procedure Act. No 15 of the 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
CA HCC 0001/19

High Court of Colombo
Case No.8238/2016

Vidanapathiranage Jayanthi

Accused-Appellant

V.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

BEFORE : **K. Priyantha Fernando, J. (P/CA)**

Sampath B. Abayakoon, J.

COUNSEL: Neranjan Jayasinghe with Anusha Rathnayake for the Accused- Appellant.

Riyaz Bari SSC for the AG.

ARGUED ON : 08.07.2021

WRITTEN SUBMISSIONS

FILED ON: 03.09.2019 by the Accused Appellant.

12.07.2021 by the Respondent.

JUDGMENT ON : 16.09.2021

K. Priyantha Fernando, J. (P/CA)

1. The accused appellant was indicted in the High Court of Colombo for trafficking and having in possession of 2.78 grams of Heroin in terms of Sections 54A(b) and 54A(d) of the Poisons Opium and Dangerous Drugs Ordinance respectively. Upon conviction on both counts after trial, the learned High Court Judge sentenced the appellant for life imprisonment for both counts. Being aggrieved by the said conviction and sentence, the appellant has preferred the instant appeal on the following grounds;

    1) The learned Trial Judge had failed to consider the improbability of the prosecution story
    2) The learned Trial Judge had unreasonably refused the defence evidence.
    3) The learned Trial Judge has shifted the burden of proof on the defence.

2. At the hearing of the appeal, the learned counsel for the appellant mainly relied on the 2nd and 3rd grounds of appeal. All three grounds of appeal will be discussed together.

3. Brief facts as elicited from the evidence for the prosecution are that on 26th May 2015, when witness *Mahendra Ranasingha* (PW1) was the Officer in Charge of the Western Province Vice Squad, at about 15.55 had received an information that one *Jayanthi* from *Sinna Dupatha* will be carrying heroin. Accordingly, he had organized the raid. He also had

got all the officers in the team searched and got satisfied that none of them had any illegal substance with them. He also had searched the white van that they were to travel and had left the station at 16.00 hrs. PW1 had got down from the van with some officers and rest of the officers were asked to be at a different place with the van.

4. Upon receiving the information over the telephone from his informant, PW1 had stopped the appellant who was walking towards him. The woman police officer had searched the appellant. They have found a cellophane bag that contained heroin inside the right-hand side pocket of the frock the appellant was wearing.

5. When the defence was called after the case for the prosecution was closed, the appellant had given sworn evidence and also had called two witnesses to substantiate her position. The appellant's evidence was that she was running a small boutique close to her house. When she was in the shop, she had wanted money to pay a bill for biscuits and had gone to aunty *Kusuma*'s house to lend Rs.3000/-. *Kusuma* did not have the money to give her. When she was coming back, she was searched by the police and nothing was found, she had testified. She had been taken to *Kusuma*'s house. She had been searched again and then also *Kusuma* was searched. She was then taken back to her house. As the key to the house was with the daughter who was in the shop, she was then taken to the shop to get the key. Then her house also was searched, but nothing was found, she had said. She had then been taken to the police. The appellant had also called the said *Kusuma* and her daughter to give evidence on her behalf to substantiate her position.

6. It is the contention of the learned counsel for the appellant that it was highly unreasonable to reject the evidence of the appellant, *Kusuma* and the appellant's daughter and their evidence was consistent and no contradictions were shown between their evidence. It is also submitted that the learned High Court Judge has failed to give due consideration to the evidence adduced by the defence.

7. It is the contention of the learned DSG for the respondent that the defence is riddled with inconsistencies. It is submitted that according to the

appellant, she was arrested on her return from *Kusuma's* residence and however, the daughter's evidence was that her mother took about 45 minutes to return from *Kusuma*'s house to the shop.

8. In *James Silva V. The Republic of Sri Lanka [1980] 2 Sri L.R. 167 at P 176 following the Privy Council case of Jayasena V. The Queen 72 NLR 313*it was stated;

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

Indian Supreme Court in case of ***D.N.Pandey V. State of Uttarapradesh AIR 1981SC 911*** *held thus;*

> *"Defence witnesses are entitled to equal treatment with those of the prosecution and, Court ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses."*

9. The learned High Court Judge in his judgment at page 43 (page 455 of the brief) has said that there is a confusion as to why the appellant was taken to *Kusuma's* house if she was arrested at her house. The appellant has given clear evidence without any confusion as to the sequence of events that took place that led to her arrest. Appellant's evidence is well substantiated by the evidence of *Kusuma* and the daughter. Position of the defence right throughout had been that the appellant who was in her house was arrested and the heroin was introduced. As to how the arrest was made has been explained by the appellant in her evidence. Learned DSG submitted that according to the daughter, it has taken about 45 minutes for her mother to come back to the boutique. It does not contradict, but substantiates the version of the appellant. A witness however, cannot be expected to give the exact time in minutes or seconds

when giving evidence years after the incident. Lay witnesses do not keep notes as police officers who conduct raids. In that event, the evidence of the police witness PW1 who has kept his notes is more improbable than of the appellant's daughter on the time. PW1 has received the information at 15.55. He has left for the raid within 5 minutes at 16.00 hrs. Within those five minutes he had contacted the team of about ten officers, informed all officers about the information, got the officers searched, arranged the vehicle, got the vehicle searched, which is highly improbable to do all that in five minutes. The position of the defence is that the story of receiving the information is a farce.

10. The learned High Court Judge has misdirected himself of the fact, when he said at page 38 (page 450 of the brief) of his judgment that the appellant has not taken up the position that no heroin was found in her possession. Therefore, it is clear that the learned High Court Judge has failed to give due consideration to the defence evidence and has rejected the defence evidence on wrong premise.

11. In his judgment at page 44 (page 456 of the brief) the learned High Court Judge has said that the appellant could have listed and called witness *Fonseka* to substantiate the position that she was arrested by *Fonseka*. *Fonseka* is the witness No.2 in the indictment. In his evidence PW1 said that *Fonseka* participated in the raid. The evidence of the appellant was that she was stopped and taken to *Kusuma's* house by *Fonseka*. However, it was her evidence that she was searched by woman police officer *Anusha*. (Page 238 of the brief). The learned High Court Judge has clearly misdirected himself when he expected the prosecution witness *Fonseka* to be called by the defence, when in fact it was the evidence for the prosecution that *Fonseka* participated in the raid. Appellant never said that she was searched by *Fonseka*. She had been searched by *Anusha*.

12. Hence, I hold that there is merit in the grounds of appeal raised by the appellant and accordingly appeal should succeed.

13.Appeal is allowed. Appellant is acquitted of both counts.

PRESIDENT OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL