

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 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Complainant

V.

Kulakulasuriya Sachalakkarage Asanka Fernando
Alias Sajee

Accused

AND NOW BETWEEN

Kulakulasuriya Sachalakkarage Asanka Fernando
Alias Sajee
No. 75/28 Ferguson Road,
Colombo 14.

Accused-Appellant

V.

Democratic Socialist Republic of Sri Lanka

Complainant- Respondent

Court of Appeal Case No.
HCC/0050/19

High Court of Colombo
Case No. HC/7788/2015

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

COUNSEL : Neranjan Jayasinghe with Isansi Dantanarayana
for the Accused-Appellant.
A. Navavi, DSG for the AG.

ARGUED ON : 09.07.2021

WRITTEN SUBMISSIONS

FILED ON : 09.12.2019 by the Accused Appellant.
07.07.2021 by the Respondent.

JUDGMENT ON : 16.09.2021

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

1. The accused appellant (hereinafter called as appellant) was indicted in the High Court of Colombo on one count of trafficking 9.64 grams of Heroin, punishable under section 54 (a) (b) of the Poisons Opium and Dangerous Drugs Act No. 13 of 1984, and one count of having in possession the said amount of Heroin, punishable in terms of section 54 (a) (d) of the said Act. Upon conviction after trial, the learned High Court Judge sentenced the appellant for life imprisonment for both counts. The appellant has preferred this appeal against the said conviction and sentence by the High Court on the following grounds.

- (a) 1) The learned High Court Judge has shifted the burden of proof to the defence.
- 2) The learned High Court Judge has treated the evidence of the prosecution with a special sanctity.
- 3) Learned High Court Judge has misdirected himself on the facts of the case.
- (b) Evidence of the prosecution witnesses fail the test of Credibility.
- (c) The benefit of the doubt created from the evidence of the defence had not been given to accused appellant. The solid evidence of the defence witnesses in respect of the arrest of Cader makes the evidence of the prosecution highly improbable and untrustworthy regarding time on which the accused was taken to his house at *Enderamulla*.
- (d) The learned High Court Judge has failed to take into Consideration the infirmities in the evidence of the prosecution witnesses.
- (e) The learned High Court Judge has rejected the evidence of the defence on wrong grounds and wrong principles.

Facts in Brief

- 2. As per the evidence of the main prosecution witnesses who were the police officers attached to the Police Narcotics Bureau (PNB) who conducted the raid, Sub Inspector *Handunneththige* (PW1) has led the team of the police officers. Upon receiving the information that one *Sajee* alias *Asanka* is waiting near the *Mahawatta* clock tower to hand over drugs to another person, the team of officers had gone to the place. The team had left by 9.45 am and reached the place by 9.50 am where they met the informant. The informant had pointed to the suspect (appellant) and the officers have stopped the appellant. When the officers identified themselves as from the Narcotics Bureau, the appellant had tried to run. When searched upon arrest, the officers have found a cellophane bag that contained heroin in the appellant's trouser pocket.

3. Thereafter, the team of officers had gone to search the appellants house in *Endaramulla* with the appellant. They have reached *Enderamulla* by 11.25 am and searched the appellants house till about 12.05 pm. No suspicious or illegal items had been found. The team had then come back with the appellant to the Bureau at about 13.10 pm. The substance that was recovered from the possession of appellant had weighed to be 50 grams.
4. All grounds of appeal urged by the appellant will be discussed together.
5. The position taken by the defence right throughout the case had been that the appellant was never arrested on the road as testified by the police witnesses, but from the appellants house at *Enderamulla* in the morning.
6. The appellant has made a statement from the dock. According to him, the police officers arrested him on 25.04.2013 early morning. They had assaulted him at various places and had taken him to Cader's place where he was assaulted again. He was taken to Narcotics Bureau along with Cader.
7. It is pertinent to note that when the police officers PW1 and PW2 were questioned on going to Cader's place in the morning they were evasive in answering the questions posted by the defence counsel stating that it was a different raid. However, both PW1 and PW2 denied going to Cader's place in the morning. The position finally taken by the police witnesses for the prosecution was that they raided Cader's place in the evening. After coming back to the Bureau with Appellant, they had left the Bureau for *Wellampitiya* to Cader's house only at 02.05 hrs.
8. Although the police witnesses for the prosecution clearly denied going to Carder's house in the morning, defence called independent police witnesses to show that officers from the Narcotics Bureau had raided Cader's house in the morning by 11.30 am. It was the evidence of the police officer PC *Dissanayake* who was called by the defence, that on 25.04.2013 when he was on duty at *Wellampitiya* police station he received a message from 118 center at 11.30 am that some persons had entered Cader's house and assaulted Cader. He had referred it to PC 49687 *Jayasuriya*.

9. The said PC 49687 *Jayasuriya* also has been called to testify by the defence. On receiving the said message, he had gone to Cader's house to find that the officers from the Narcotics Bureau had come to Cader's house. He had gone to the extent of checking the identity card of an officer to confirm that they were from Narcotics Bureau. Although the two independent police officers called by the defence were cross examined by the state counsel for the prosecution, their testimony was unchallenged. Thus, it is clear that officers of the Narcotics Bureau had gone to Cader's house in the morning by 11.30 am, although PW1 and PW2 denied any officer from the Bureau going there in the morning. The learned High Court Judge in his judgment has said that the defence witnesses had failed to state whether Cader was there when DW 2 *Jayasuriya* went to Cader's house. The learned High Court Judge has failed to consider the defence evidence in the right perspective. The fact remains that the officers from the Narcotics Bureau had gone to Cader's house although PW1 and PW2 both denied they went there in the morning. Therefore, the evidence of PW1 and PW2 cannot be considered credible and it is unsafe to convict the appellant on their evidence.

10. In case of *Dharmasiri V. Republic of Sri Lanka [2010] 2 Sri L.R. 241*, it was said;

“Credibility of a witness is mainly a matter for the trial Judge. Court of Appeal will not lightly disturb the findings of trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness”

11. I bear in mind that credibility is mainly a matter for the trial Judge. However, in this case the trial Judge has failed to consider the fact that the two prosecution police witnesses who conducted the raid has not been truthful as to how the raid was conducted as mentioned before and that affects their credibility.

12. The learned DSG at the argument conceded that the learned High Court Judge has failed to consider the evidence given by the two defence witnesses. The evidence of the two police officers who were called by the defence has created a clear doubt on the version of the prosecution whether

the raid was conducted the way the PW1 and PW2 testified or whether the appellant was arrested at home and taken to Cader's house as stated in the dock statement by the appellant.

13. Hence, the appeal succeeds. Conviction of the appellant on both counts is set aside. The appellant is acquitted of both counts.

PRESIDENT OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL