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

In the matter of an appeal from the High Court in terms of Section 331 of the Code of Criminal Procedure Act.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA. No. 183/2018

High Court of

Avissawella

Case No.43/2009

Vs.

Abdul Rahuman Illyas Alias Bai

Accused

And Between

Abdul Rahuman Illyas Alias Bai

Accused-Appellant

Vs.

The Honourable Attorney General,

Attorney General's Department,

Colombo 12

Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Shanaka Ranasinghe PC., with Nirashan Mihidu Kulasuriya for the Accused-Appellant.

Sudharshana de Silva DSG., for the Respondent.

ARGUED ON : 16.02.2021 & 22.02.2021

DECIDED ON : 02.11.2021

R. Gurusinghe, J.

The Accused-Appellant was indicted in the High Court of Avissawella for trafficking and possession of 0.709 and 7.8 grams of heroin in terms of Section 52 (A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13/1984.

After the trial, the learned Trial Judge of the High Court convicted the appellant and sentenced accordingly.

Aggrieved by the aforesaid judgment and the conviction appellant preferred this appeal.

The grounds of appeal against the conviction are that:

1. The learned High Court Judge failed to consider the inconsistency of the evidence of PW1 and PW2 pertinent to the first information.

2. the contradiction between PW1 and PW4 regarding the bag that contained the heroin.

3. the contradictory nature of the Government Analyst's evidence.

4. the wrong date contained in the Government Analyst's Report.

5. the contradiction of the identification of productions.

6. the credibility of the evidence of PW3.

7. the credibility of the evidence of PW5.

8. the credibility of the evidence of PW6.

9. The learned High Court Judge further failed to consider the contradictions of the prosecution witnesses.

The Prosecution led the evidence of PW1 to PW6 and marked productions P1 to P8. The appellant also testified before Court and called two other witnesses in support of the defence.

Prosecution case:

PW2 had received information from a reliable informant around 10.45 a.m. on the 5th November 2006. He then had conveyed this information to PW1 who was the principal investigating officer. After that, a group of police officers had left Police Narcotic Bureau (PNB) and reached Battaramulla at about 12.10.p.m. where PW2 had met the informant. The informant had shown the appellant coming out of his house walking at the road to PW1 and PW2. The informant had then left the place. At that time, the appellant had a mobile phone and something in his left hand. PW1 and PW2 ran towards the appellant to search him. At that moment, the appellant had dropped the parcel. PW1 had instructed PW2 to take the parcel, and PW1 had arrested the appellant. PW2 handed over the parcel to PW1. The parcel contained heroin. The police team searched the house of the appellant. The parcel and the appellant were

brought to the PNB. The productions were weighed, and there were 155.3 grams of heroin. The production was sealed before the appellant and kept in the locker of PW1, and it was handed over to PW3 on the following day. PW3 had handed over the production to the Government Analyst on 7th November 2006. PW5 had recorded the statement of the appellant. PW6 had taken the production back from the Government Analyst to Court.

Defence

The appellant, his wife, and one other witness gave evidence for the defence. The appellant's position was that he was arrested inside his house, and the production was introduced to him.

The learned High Court Judge considering the evidence for the prosecution and that for the defence, had come to the conclusion that the Prosecution had proved his case beyond reasonable doubt and the evidence of the witnesses for the defence did not create a reasonable doubt of the prosecution case.

All the grounds of appeal are based on alleged inconsistencies of the evidence of Prosecution and the credibility of that evidence.

The first ground of appeal is that PW2 had received information from an informant that a person residing at Thotalanga area was coming with a large quantity of heroin. However, PW1 had not mentioned anything about a person of Thotalanga area in his evidence. The informant was not a witness and cannot be called as a witness. What had been stated by the informant would therefore become hearsay and cannot be lead as evidence**.** PW2 had said that the informant informed a person coming from Thotalanga was dealing with heroin. It does not mention that a person residing at Thotalanga was dealing with heroin. Therefore, saying

the name of a person coming from Thotalanga area is not an inconsistency, and this argument has no merit.

The second ground of appeal is that PW4, a witness from Government Analyst Department, had not mentioned anything about a blue colour bag that contained the heroin. PW4 had given evidence that the production was handed over to the Government Analyst by PW3 and identified the production marked P3, which bore her signature. The issue is whether the Government Analyst had examined the same production taken from the appellant. PW1 stated that the heroin was contained in a blue-coloured polythene bag which was then put into another sealable bag.

All the identification tags that PW1 had placed were there. PW1 and PW2 identified P-3. PW4 also referred to those identification tags. The defence has not taken up that there was no blue colour bag, and therefore, the production examined by the Government Analyst was not the same production that was sent to the Government Analyst for this case. No question was put to the Government Analyst that the production examined by the Analyst was not the same.

At page 272 of the appeal brief, PW 4, Assistant Government Analyst stated as follows:

ප්‍ර: ඔබතුමියට සදහන් කරන්න පුලුවන්ද ඒ කවරයේ පිටත තිබුනේ කුමන සටහනක් ද කියලා?

උ: එහි දිනය **2006.11.05.** CCR **109/2006**, PR 117/ **2**006, IIB 2**30/57**

හෙරොයින් ග්‍රෑම් 155.3 ක් අඩංගු නිල් පැහැති සෙලෝප්ලේන් කවරයේ බහා මුද්‍රා තබන ලද ලිපි කවරය කඩුවෙල මහේස්ත්‍රාත් උසාවි නඩු අංක B/**1108/6**, PNB/ **03445/6**,

සැකකරු අබ්දුල් රහුමාන් පිල්ලෙයාර් අංක **28/1**, ප්‍රධාන වීදිය , බත්තරමුල්ල යනුවෙන් සටහන් යොදා තිබුණා.

ප්‍ර: එම කවරය තුල මොනවාද තිබුණේ?

උ: කවරය තුල පොලිතීන් සීලරයෙන් සීල් කරන ලද පොලිතීන් පැකැට්ටුවක් අන්තර් ගත වුනා. එම පොලිතීන් පැකැට්ටුව තුල ප්ලාස්ටික් බෑගයක් සහ ලේබලයක් අන්තර්ගත වුනා. එම ප්ලාස්ටික් බෑගය තුල කලු පැහැයට හුරු යම් ද්‍රව්‍යක් අන්තර් ගත වුනා.

The Government Analyst had stated that there was a polythene bag; the only thing that she had not mentioned is the colour. However, that bag was available for inspection of the defence. The defence had not challenged the evidence of the Assistant Government Analyst on the basis that the productions analyzed by her were not relevant to this case.

As such, this argument is rejected.

The third and fourth grounds of appeal are that the evidence of the PW4 was contradictory as to whether the production was sent to the Government Analyst through the Magistrate's Court of Kaduwela or directly by the PNB.

PW4 had explained as follows at page 298 of the brief:

ප්‍ර: කලින් නඩු භාණ්ඩ මහේස්ත්‍රාත් අධිකරණයේ යොමු කරලා තිබුණා කියලා මහත්මිය සඳහන් කලානේද?

උ: නැහැ. මා සඳහන් කලේ විශ්ලේෂණ කටයුතු අවසන් වුනාට පසු නඩු භාණ්ඩයේ පිටත කඩුවෙල මහේස්ත්‍රාත් අධිකරණයේ නඩු අංකය කියලා එකයි යොමු කරන්නේ. විශ්ලේෂණ කටයුතු අවසන් වූ පසු, මෙම නඩු භාණ්ඩයේ කඩුවෙල මහේස්ත්‍රාත් අධිකරණයේ B/**1008/2006** ට අදාල නඩු භණ්ඩ නිසා පිටත කවරයේ කඩුවෙල මහේස්ත්‍රාත් අධිකරණයේ

ලිපිනයේ සඳහන් කරනවා කියලා. ඒක තමයි මම කිව්වේ. පොලිස් මත්ද්‍රව්‍ය කාර්යාංශයෙන් නඩු භාණ්ඩ රැගෙන විත් තිබෙන්නේ.

There were two P5s that were marked; that is heroin and CD 3187/6. The correct number is CD 3188/6(page 356 and 359.) The same stenographer had recorded this evidence. The Government Analyst's report has the same number.

The document is available (at page 20 of the MC Kaduwela original case record which is a part of the High Court case record.) for inspection of the Court. It has been marked as P 5 dated 2014/09/10 and initialled by the Judge. The document speaks for itself. It was a typographical error that should have been corrected. However, since the document is available, discrepancy does not create doubt. There was an error in the date. The witness PW4 had explained that the letter was received on 7th November 2006, and it was wrongly typed as 7/1/2006. The learned High Court Judge had considered all these discrepancies.

The fifth ground is that PW1 and PW4 stated that the productions number was PR 117/2006. However, PW2 stated that it was PR 110/2006. It could be either PW2 wrongly stated the number, or the stenographer wrongly recorded it. The learned High Court Judge has considered this discrepancy. However, this was not something that the defence has cross-examined. Therefore, there is no merit in this ground.

The sixth ground is that PW3 had handed over the Government Analyst slip to Gangodawila Magistrate's Court. The slip is available in the case record, and it is clear that it was handed over to the Magistrate's Court of Kaduwela. Therefore, the statement is clearly a mistake. No question was put to PW2 in this regard. When the document is available, no oral evidence is necessary to prove the same. Therefore, this argument has no merit.

The seventh ground is that whether the statement of the appellant was recorded at the PNB or at the appellant's house. The learned High Court Judge has considered this discrepancy and observed that no questions were put to clarify it. However, she also observed that PW3 recorded the appellant's statement, and the appellant had refused to sign it.

The eighth ground is that PW6 had taken six hours to go to the Government Analyst Department from the PNB. However, PW6 had explained that he had not taken six hours to go to the Government Analyst Department. However, he had to wait until 14.28 to hand over the production to the Assistant Government Analyst, Mrs. Umagaliya. (Pages 364 and 365 of the appeal brief). Therefore, this argument cannot be accepted.

The ninth ground is that contradiction between PW1 and PW2 has not been considered. What had been pointed out as contradictions were not on the essential points. One point raised as a contradiction is about the stuff the police team had taken with them. PW1 and PW2 had not been cross-examined as to any difference between their evidence.

The registration number of the vehicle is also shown as a contradiction. PW1 said that the vehicle number was 32 Sri 7485. PW2 stated that the vehicle number was 32 Sri 3485. There is a difference of one digit. This is probably a typographical error. However, this is not a contradiction that would create a reasonable doubt of the prosecution case.

The learned High Court Judge has considered every point raised by the defence and concluded that there were no contradictions that would shake the prosecution case. PW1 and PW5 had clearly stated that only PW5 was in the uniform. PW2 had said that all of them were in civil attire. The learned High Court Judge has considered this difference.

Another point raised for the appellant is that the position of PW 1 was that the appellant had come out of his house to by the road 3-4 times and as per the evidence of PW 2 at the first occasion he was coming out they arrested him. This is not correct; PW2 had said (at 226 of the appeal brief) that the appellant had come out to the road 2-3 times. Hence there is no inconsistency as alleged by the appellant.

The prosecution version was consistent and believed by the learned High Court Judge. The learned trial Judge has considered and evaluated the evidence for the defence as well; there is no complaint in that regard.

It is not fair to come to an adverse finding on contradictions or omissions that were not brought to the notice of the Trial Court and witnesses who had not been allowed to explain the purported omissions. (See *Dharmasiri Vs. Republic of Sri Lanka 2010 2 Sri LR 241*) The 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.

In the case of *Fradd Vs. Brown and Co. Ltd 20 NLR 282*, Privy Council held thus:

> *"It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because the Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will overrule a Judge of first instance."*

In *Alwis Vs. Piyasena Fernando 1992 1 Sri LR 119* His Lordship's GPS. De Silva CJ. Stated thus:

> *"It is well established that findings of primary facts by a Trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."*

All the grounds of appeal are based on questions of facts of the case and the credibility of witnesses. No questions of law were raised in the appeal. In this case, the same Judge had heard the entirety of the evidence. The Trial Judge had seen the demeanour and deportment of all witnesses.

For the reasons set out above, I hold that the Trial Judge, after due consideration of the evidence led at the trial, has correctly found the appellant guilty of the charges, and as such, no reason to interfere with the Judgment. The appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal