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

In the matter of an appeal made in terms of Article 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal
Case No:CA HCC 42/20

The Democratic Socialist Republic of Sri Lanka.

Complainant

High Court Of Colombo
Case No: 7378/2014

VS.

Kulakulasuriya Malavige Dulip Prasad Silva
No: 101/01
Kelegedara
Kotadeniyawa.

Accused

AND NOW BETWEEN

Kulakulasuriya Malavige Dulip Prasad Silva
No: 101/01
Kelegedara
Kotadeniyawa.

Accused-Appellant

VS

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

Complainant- Respondent

Before	**:**	**Devika Abeyratne,J** **P.Kumararatnam,J**
Counsel	**:**	Neranjan Jayasinghe for the Accused-Appellant Maheshika Silva, SCC for the Respondent
Written Submissions On	**:**	08.02.2021 (by the Accused-Appellant) 01.03.2021 (by the Respondent)
Argued On	**:**	04.10.2021, 21.10.2021 and 26.10.2021
Decided On	**:**	24.11.2021

****

Devika Abeyratne,J

The Accused Appellant was indicted for being in possession and trafficking of 2.87 grams of Heroin which are offences under section 54A (d) and under section 54A (b) of the Poisons Opium and Dangerous Drugs Act No. 13 of 1984.

After trial, the High Court Judge of Colombo found him guilty for both counts and imposed life sentence.

Aggrieved by the said conviction and sentence the appellant has preferred his appeal to this Court on the following grounds of appeal.

1. The learned trial judge has not taken in to consideration the fact that the prosecution has failed to establish the chain of the case.

2. The learned trial judge has failed to consider the improbability of the prosecution story.

3. The learned trial judge has failed to consider the vital contradictions between the evidence of the prosecution witnesses.

4. The learned trial judge has not taken in to consideration the fact that the prosecution has failed to establish the chain of the case.

5. The learned trial judge has not given due prominence to the defence evidence.

It appears that the 1st and the 4th ground of appeal are the same.

The facts of the case *albeit* briefly are as follows;

Pursuant to information provided by an informant that a person carrying heroin was going towards *Sieble Avenue* in *Kirullapone*, PW 1 the officer in charge of the raid, after following the usual procedure had taken a team of officers and placed them on several points leading to and in close vicinity to *Siebel Avenue*. (page 60 of the brief)

It was in evidence that PC *Kumarasinghe* who spotted the appellant was positioned in a location where he was clearly seen by the other officers and was able to signal them if the suspect was sighted.

This position was vehemently argued by the Counsel for the appellant on the basis, that the locations where the various officers were alleged to be placed was not practically visible to each other.

However, according to the evidence of the main prosecution witnesses, it is PC *Kumarasinghe* who has given signal after identifying the accused appellant. According to PW 01 the appellant who was wearing a pair of yellow shorts and a red coloured T Shirt without a collar, had been searched and arrested by him with assistance from PS 49788 *Gamin*i PW 2 who had been there with him and heroin had been found on the accused appellant.

As per the grounds of appeal raised by the appellant it was contended that there were discrepancies in the evidence of PW 1 and PW 2 with regard to the description of the pair of shorts the accused appellant was wearing; the colour of some of the cellophane bags where the paper packets of heroin was found, whether some of the bags were pink or blue; from where the motor bicycle of the appellant was taken into custody etc.

However, the main ground of appeal at the argument before this Court was that although the defence admitted the contents of the Government Analyst Report, that the chain of production was not admitted, therefore, that the prosecution had failed to prove the chain of production.

This argument is based on the Government Analyst Report (P14) where it is stated that the plastic bag marked as A1 contained only 39 pieces of paper whereas according to the evidence of PW 1 there should have been 40 such pieces of paper.

This position has been raised for the first time at the appeal stage although the Government Analyst Report was marked and admitted without any challenge. There has been lengthy evidence of PW1 from pages 54 to 84,97 to 204 testifying about the arrest, detection, sealing of the production, handing over the production to the officers which eventually was taken to the Government Analyst Department with the seals intact according to P14. This procedure was not questioned or challenged by the defence.

From pages 73 of the brief to page 115, in the evidence in chief, the identification and the marking of various bags and cellophane bags are clearly set out. No questions have been directed challenging this evidence or of a missing piece of paper.

In page 102 of the brief PW 1 has referred to the 40 pieces of paper contained in A1.

ප්‍ර : මහත්මයා මේ අනන්‍යතා පත්‍ර සමඟ ඇතුලත් කරන ලද සුදු පැහැති ග්‍රොසරි බෑග් ඒ 1 සිට ඒ.5 දක්වා අඳුන ගන්න පුලුවන්ද?

උ : එහෙමයි

(ස්වාමිනි සාක්ෂිකරුට ඒ.1, ඒ.2, ඒ.3, ඒ.4, ඒ.5 වශයෙන් සඳහන්ව ඇති සුදු පැහැති

ග්‍රොසරි බෑග් 5ක් පෙන්වා සිටී.)

ප්‍ර : අඳුන ගන්න පුලුවන්ද බලන්න?

උ: අඳුන ගන්නවා ස්වාමිනි.

(ස්වාමිනි මේ අවස්ථාවේදී පැ.8 ඒ 1, පැ .8 ඒ.2, පැ.8 ඒ.3,පැ.8 ඒ.4, පැ.8.ඒ.5 වශයෙන් සාක්ෂිකරු විසින් අඳුන ගන්නා ලද අනන්‍යතාපත්‍ර 5 සහ ඒ තුල අන්තගර්තව ඇති ග්‍රොසරි බෑග් 5 ලකුණු කිරීමට අවසර පතනවා ස්වාමිනි)

ප්‍ර : මහත්මයා මේ සුදු පැහැති එක ග්‍රොසරි බෑග් එකක් තුල කුඩා පැකට් කීයක් අන්තගර්ත වෙලා තිබුනාද?

උ : **40ක්** ස්වාමිනී.

ප්‍ර : ඒ අනුව මේ පැකට් ඒ.1 සිට ඒ.5 තුළ පැකට් කීයක් අන්තගර්ත වෙලා තිබුනාද?

උ : පැකට් 200ක් අන්තගර්ත වෙලා තිබුනා.

ප්‍ර : එම පැකට් 200 දැක්කොත් අඳුන ගන්න පුලුවන්ද?

උ : පුළුවන් ස්වාමිනී.

(ස්වාමිනී මේ අවස්ථාවේදී සාක්ෂිකරුට පැ .8 ඒ. 1 සිට පැ.8 ඒ.5 දක්වා බෑග් 5 තුල අන්තගර්තව ඇති කොළ **කැබලි 200ක්** පෙන්වා සිටී,

(සාක්ෂිකරු එයින් කොළ කිහිපයක් එලියට ගෙන පරික්ෂා කරයි)

ප්‍ර : මේ කොළ කැබලි අඳුන ගන්න පුලුවන්ද?

උ : එහෙමයි ස්වාමිනී. මාගේ අත්සන තිබෙනවා ස්වාමිනී. ඒ අනුව අඳුන ගන්න පුළුවන්.

(ස්වාමිනී සාක්ෂිකරු විසින් හඳුනා ගන්නා ලද එම කොළ කැබලි 200 මේ අවස්ථාවේදී පැ .8 ඒ.එක්ස් වශයෙන් ලකුණු කිරීමට අවසර පතා සිටිනවා.)

Further in pages 73 and 74

ප්‍ර : මොන ආකාරයටද මුද්‍රා තැබුවේ, මොකද්ද දැම්මේ ?

උ: මෙම වෙලඳ සැලෙන් නිල් පාට සෙලෝපේන් බෑග් එකක් අරගෙන ඒ බෑග් එක පරික්ෂා කරලා බැලුවා. මුකුත් අපද්‍රව්‍ය එහෙම ගෑවිලා තිබෙනවාද කියලා. අපද්‍රව්‍ය තිබුනේ නැහැ. ඒ අනුව මා කිරාගත් සියලුම හෙරොයින් ප්‍රමාණය ඒ බෑග් තුලට දමා ගනු ලැබුවා. එම දමා ගත් නිල් පාට හෙරොයින් බෑග් ටික නවලා මා රැගෙන ගිය ලිපි කවරයකට දාලා සැකකරුගේ වම් මාපටගිලි සලකුණ සහ පොලිස් මුද්‍රාව තියලා මුද්‍රා කර ගත්තා. මෙම හෙරොයින් ඔතා තිබූ පැත්තක් ලා කොළ පාට පැත්තක් සුදු පාට කොළවල මගේ කෙටි අත්සන සහ දිනය යොදලා ඒ පැකට් **1000 A1** කියන පැකට් එකෙන් ගත්ත එකට A1 කියලා සටහන් කරලා ඒ **පැකට් 40** ත් A2 වශයෙන් E දක්වා ඒ ලබා ගත් බෑග් වල දාලා රෝස පාට බෑග් වලට දාලා මුද්‍රා කර ගත්තා.

ප්‍ර: මහත්මයා කියන ආකාරයට සුදු පාට එකක් තුල පිහියි කුඩා කොළවල ඔතන ලද

පැකට් 40 ට A2, A3, A4, A5 වශයෙන් එක රෝස පාට කවරයකත් ආදී වශයෙන්

සලකුණු කිරීම් යොදලා ඒ කොළ කැබලි සියල්ලගේම මහත්මයාගේ අත්සන් තැබුවා කියලද මහත්මයා කියන්නේ?

උ: එහෙමයි උතුමාණෙනි.

(emphasis is added)

The evidence how the substance was recovered starts with finding a black coloured *"Tulip"* bag which has been tucked to the stomach of the appellant . Inside the black tulip bag, 5 pink coloured cellophone bags which had contained 5 white coloured cellophane bags each have been found. And in each of these white cellophane bags, 40 small parcels each made of coloured paper have been found with some substance which was identified as heroin. Therefore, altogether 1000 pieces of small pieces of paper where heroin was wrapped in have been detected. The Gross Quantity of the recovered substance which was weighed at a_Jewellery shop called "*Palliyaguru Jewellers*" had been 20 grams and 223 mg of heroin.

The Government Analyst Report which was admitted under Section 420 of The Criminal Procedure Act gives the Gross Quantity of Heroin as 20.12 grams. Although the Counsel for the appellant argued about the discrepancy of the Gross Quantity, the learned trial judge has correctly observed that such a difference may occur as the scales of the Jewellery shop may not be as accurate as the calibrated scales used in the Government Analyst Department.

As stated earlier, the defence has not challenged the production that was sent to the Government Analyst Department. The Report referred to 39 pieces

of paper in A1. It is fair to assume that these are very small pieces of paper. The defence has failed to show the discrepancy and challenge the evidence during the course of the trial. It is very unfortunate that neither the prosecution nor the defence has brought it to the attention of the Court which is a lapse on their part. It appears from pages 277 and 278 of the brief, in the judgment that the unchallenged evidence and the admitted Report has been considered by the learned trial judge.

As the piece of paper which obviously is very small in size any thing could have happened to it. Or it could be a mistake when counting at the Government Analyst Department as there were 1000 such small pieces of paper to be counted. Whatever the reason, if the discrepancy was noted at the trial stage that position could have been easily clarified. Further, whatever the cause for the lapse on the part of the prosecution and the defence, in my considered view one missing piece of paper will not cause grave prejudice or result in a miscarriage of justice to the accused appellant.

In ***Gusthinggna Waduge Somasiri Vs. Attorney General,*** *SC (Appeal) 79/2009),decided on 11.07.2014*, the legal issue whether the Court of Appeal erred by applying the Proviso to Section 334 (1) of the Criminal Procedure Code and the other relevant Articles in the Constitution when there were serious misdirections or errors on fundamental matters of law.

Section 334(1) of the Criminal Procedure Code and its proviso read as follows;

Proviso to 334(1);

"The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on

the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before which the Appellant was convicted should be set aside on the ground of a wrong decision of any question of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;

Provided that the court may, not withstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

Proviso to Article 138(1) of the Constitution provides;

"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes , suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance:

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

In ***Somasiri's*** case (Supra) the Court of Appeal held that the approach adopted by the learned trial judge in evaluating the dock statement was erroneous, but nevertheless applied the proviso to section 334 of the Criminal

Procedure Code and dismissed the appeal. In the Supreme Court the Justices observed as follows;

"The Court of Appeal accepted the position that the honourable High Court Judge did not adopt the proper approach in evaluating the dock statement. However, the Court of Appeal applied the proviso to section 334(1) of the Criminal Procedure Code and the proviso to Article 138 of the Constitution and held that there was no miscarriage of justice. The Court of Appeal dismissed the appeal and affirmed the conviction and the sentence."

The Supreme Court after considering the decisions in *Shiela Sinharage* (1985) 1 SLR, *Moses vs State* 1999 -3 SLR 40, *Mannar Mannan vs The Republic* [1990] 1 SLR page 280 goes on to say;

"……..This is a general principle adopted by appellate courts setting aside judgments on the basis of unreasonableness or inadequacy of evidence. When there is a wrong decision on any question of law or miscarriage of justice it may be a ground to set aside the judgment. However before doing so the court should consider what effect the wrong decision or miscarriage of justice had on the judgment. If it has no impact on the judgment, the appellate court could disregard those factors and affirm the judgment. In cases though there was a wrong decision on a question of law or miscarriage of justice, the appellate court if satisfied that the prosecution case was proved beyond reasonable doubt it could affirm the judgment instead of ordering a retrial which entails delay and expense. There is 'no substantial miscarriage of justice' or 'which has not occasion a failure of justice' are the concepts adopted to justify this course of action.

For the reasons stated above I hold that the Court of Appeal correctly dismissed the Appeal as there was no substantial miscarriage of justice. There is credible and sufficient evidence to establish the case beyond reasonable doubt. Therefore I see no reason to disturb the findings of the High Court and the judgment of the Court of Appeal which affirmed the judgment of the High Court."

This position was reiterated in *Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya Vs. Attorney General, SC Appeal No: 115/2014* decided on 22.01.2020 where it was considered whether the conviction of the Accused Appellant should vitiate due to the non compliance of Section 196 of the Criminal Procedure Code. Justice *Aluvihare* held that, in page 5;

"The non-compliance with Section 196 of the CCPA alone by itself will not vitiate the conviction. If the conviction is to be vitiated, the Appellant is required to satisfy the court that such non-compliance has "caused prejudice to the substantial rights of the Accused" or has "occasioned a failure of justice" as stipulated in the proviso to Article 138(1) of the Constitution". further in page 10;

"The threshold to be satisfied to obtain relief from the Court of Appeal in Appeals;

21.With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the proviso to Article 138(1), which is placed under the heading "The Court of Appeal". The proviso to the said Article of the Constitution lays down that; "Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced

the substantial rights of the parties or occasioned a failure of justice". (Emphasis is mine.)" and in page 13

".....most of those judgements have not considered the threshold requirement to succeed in an appeal laid down in Article 138(1) of the Constitution. This requirement was considered by this Court in Sunil Jayarathna v. The Attorney General, SC 97/09 (SC Minutes of 29.07.2011) where it was observed that, "when considering the Proviso to Article 138(1) of the Constitution, it is evident that the judgment of the Learned High Court Judge need not be reversed or interfered on the account of any defect, error or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice". An Accused would therefore only be entitled to relief if it is shown that the irregularity complained of, had in fact prejudiced the substantial rights of the parties or has occasioned a failure of justice. A mere statement to that effect would certainly not be sufficient, but it must be shown as to how the failure of justice resulted, as in the case of Amaratunga (supra)....."

In the instant case the identity of the accused was not in issue. The accused appellant never denied placing his signature on the production. The prosecution witnesses established that the signatures and the seals on the production were observed by the relevant witnesses who received and removed the production from the police station to the Government Analyst, who has observed that the seals were intact. Therefore, prosecution has established the inward journey of the production to the satisfaction of court. The appellant can not now take up the position that as the Government Analyst has stated that there were only 39 pieces of paper in A1 that the chain of production has not been established.

Therefore, it is apparent that the appellant has not satisfied this Court that non production of one piece of paper has caused prejudice to his substantial rights nor that it has occasioned a miscarriage of Justice.

Ukkuwa v the Attorney General [2002] 3 SLR 279, is a case where Justice *S. Tilakawardana held* that matters of fact that could have been challenged and clarified at the trial Court are precluded being challenged at the Appellate Court in the following manner at page 282;

"Furthermore, there had been no questions under cross-examination relating either to the genuineness of document P14, nor to the authorship of such document which were the matters of contest that were brought up before this court. Nor was there any challenge raised even through cross-examination of the identity of this witness who claimed to have carried out the examination of the substance taken from the possession of the accused-appellant. This evidence given by the Senior Assistant Government Analyst, Mr. Sivarasa, has not been challenged in the proceedings before the original High Court, and is for the first time being challenged before this court. In this sense, court is mindful of the fact that having had the opportunity to cross-examine the witness before the original court and having failed or neglected to avail himself of the opportunity of such examination on these matters which could have been clarified, had such objections or cross-examination being raised in the original court, the counsel is precluded from challenging the veracity of such matters of fact before this court."

In the light of the above authorities, the ground of appeal that the prosecution failed to prove the chain of production fails.

Another ground of appeal is that the learned trial judge has failed to consider the vital contradictions between the evidence of the prosecution witnesses.

In *Devunderage Nihal Vs Attorney General, SC/Appeal 154/2010,*decided on 03.01.2019 it was held that there is no need to call for corroborative evidence in respect of the evidence of a police officer who conducted a raid. In the instant case the prosecution has called two witnesses, PW 1 who was in charge of the raid and PW 2 who was also engaged in the raid, the arrest, detection and sealing of the production. No material contradictions or omissions were marked in the evidence of these two witnesses. The discrepancies that were highlighted were regarding the description of the pair of shorts worn by the appellant, whether the shorts had stripes on it and what colour those stripes were. And also the colour of some of the cellophane bags that were marked whether they were pink or blue.

It is noted that PW 2 in his evidence in chief corroborating the evidence of PW 1 has stated about the pink coloured cellophane bag. However, subsequently he has referred it to be blue coloured. It is also noted that there is a blue coloured cellophane bag that was taken from the Jewellery shop. Therefore, there were pink and blue couloured bags. PW 2 was giving evidence approximately 10 years after the detection and one cannot expect a witness to have a photographic memory and remember exactly the colour of all the bags, specially when he was not the officer who entered the notes. As described earlier the heroin which was found wrapped in small pieces of paper were packed separately in different coloured bags.

These are lapses that can be expected from any human being when testifying after almost 10 years. The discrepancy is only in regard to the colour

of a bag and not in relation to the substance detected. It is apparent that these discrepancies cannot be considered as vital or material discrepancies and that they have not affected the credibility of the evidence of the prosecution witnesses. It is settled law that witnesses should not be disbelieved on account of trifling discrepancies or omissions. (*Dashiraj v The State* AIR (1964)Tri.54) Accordingly, that ground of appeal also necessarily fail.

Another ground of appeal is that the learned trial judge has not given due prominence to the defence evidence. The accused appellant and a person by the name of *Jayasekera Hetti arachchige Pradeep Kumara Perera* have given evidence for the defence. This witness Pradeep Kumara according to his evidence has been arrested together with the Appellant and he has pleaded guilty to the charge levelled against him.

The Appellant has admitted that he was arrested by 5 police officers but denied having a parcel of heroin with him. He has specifically stated that he was arrested on 08.11. 2010 and not on the 10.11.2010 as alleged by the prosecution witnesses. Further that PW 1 was not involved in his arrest and he saw him only at the police station. But both the above positions have not been put to PW 1 when he was cross examined.

On perusal of the evidence adduced on behalf of the defence, it is abundantly clear that the learned trial judge has concluded quite correctly that it has not created a reasonable doubt in the case for the prosecution.

At the argument before this Court it appeared that the Counsels were agreeable to the case to be sent back for a re trial, specially to get a clarification regarding the missing piece of paper.

The criteria and the principles when cases should be sent back for retrial has been considered at length in the following authorities.

After a study of several Indian authorities, in ***Nasib Singh V State of Punjab*** (2021 SCC online SC 924) Criminal Appeal No. 1051-1054 of 2021, decided on 8th October 2021 it is stated that;

(i) The Appellate Court may direct a retrial only in 'exceptional' circumstances to avert a miscarriage of justice;

(ii) Mere lapses in the investigation are not sufficient to warrant a direction for re-trial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed;

(iii) A determination of whether a 'shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;

(iv) It is not sufficient if the accused/ prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the Appellate Court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;

(v) If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and

(vi) The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice:

a) The trial court has proceeded with the trial in the absence of jurisdiction;

b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade.

In Nandana V Attorney General 2008 (1) SLR 51 Justice *Sarath De Abrew* held;

"I have perused the totality of the proceedings, the Information Book Extracts and the written submissions tendered by both parties. On a perusal of the judgment of the learned trial judge the following glaring misdirection of law as to the required burden of proof appear on the record which would necessarily vitiate the conviction and sentence. The learned Senior State Counsel too has conceded this fundamental error on the part of the learned trial judge which would have prejudiced the substantial rights of the appellant and occasioned a failure of justice under the proviso to Article 138 of the Constitution."

"It is now left to decide whether the nature of the evidence led in this case and the time duration that has elapsed would justify ordering a retrial to meet the ends of justice."

Further in page 57

"……Therefore a discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice, taking into consideration the nature of the evidence available, the time duration since the date of the offence, the period of incarceration the accused person had already suffered, and last but not the least, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime."

In ***Jagath Chandana Weerasinghe V Attorney General,*** *(2013) 1 SLR 359, by Ranjith Silva J* has referred to **Shony 19th edition page 4133** where the learned Author states under the heading ***'When retrial should not be ordered'*** it is chaptered as 69 - **Shony's Code of Criminal Procedure – 19th edition in 4 volumes and this particular volume is 'VI'**, I quote;

"An order of retrial of a criminal case is made in exceptional cases and not unless the Appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control prevented from leading or tendering evidence material to the charge and in the interest of justice, the Appellate Court deems it appropriate having regard to the circumstances of the case, that the accused should be put on his trial again,

an order of retrial wipes out from the record the earlier proceedings and exposes the person accused to another trial. In addition to this, a retrial should not be ordered when the Court finds that it would be superfluous for the reason that the evidence relied on by the prosecution will never be able to prove the charges beyond reasonable doubt and the like especially when the Court is of the opinion that the prosecution will be put at an advantage by allowing them to provide the gaps or what is wanting that resulted due to their own lapses."

In the instant case we do not see any reason to send the case back for re-trial for the reasons considered above in this judgment. Further on one hand as it is going to be a futile exercise trying to find out what happened to one piece of paper after all these years, that will not in any manner practically affect the outcome of the Report P14 that was admitted. On the other hand the appellant has failed to satisfy this Court that the failure to account to that piece of paper has caused prejudice to his substantial rights or that a miscarriage of justice has occurred. Further, the above quoted authorities and guidelines clearly reiterate that there is no justification to order a retrial.

On perusal of the judgment of the trial judge, this Court is of the view that the several grounds of appeal raised by the appellant are without merit and we see no reason to interfere with the judgment dated 14.01.2020. The conviction and the sentence are affirmed and the appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree **JUDGE OF THE COURT OF APPEAL**