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

In the matter of an appeal under section 154(p) of the Constitution read with Section 331 of the Criminal Procedure ACT No. 15 of 1979.

Court of Appeal Case No:
CA HCC 114/18

The Democratic Socialist Republic of Sri Lanka.

Complainant

High Court Of Colombo
Case No: HC 7613/2014

VS.

Abdul Rahuman Noordeen Mohomed Faizer

Accused

AND NOW BETWEEN

Abdul Rahuman Noordeen Mohomed Faizer
(Presently at Welikada Prison)

Accused-Appellant

VS

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

Respondent

Before : **Devika Abeyratne,J**

P.Kumararatnam,J

Counsel : Neranjan Jayasinghe for the Accused-Appellant

Suharshi Herath, SSC for the Respondent

Argued On : 05.05.2021 and 03.11.2021

Decided On : 02.12.2021

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Devika Abeyratne,J

The accused appellant was indicted in the High Court of *Colombo* for trafficking and for being in possession of 7.21 grams of Heroin which are offences punishable under section 54 A (a) and 54 A (d) of the Poisons, Opium and Dangerous Drugs Act No 13 of 1984.

After trial, the accused was acquitted on the charge of trafficking and was convicted for being in possession of 7.2 grams of Heroin and was sentenced to life imprisonment.

Aggrieved by the conviction, and sentence imposed by the learned High Court Judge of Colombo, the appellant has preferred this appeal to this Court on the following grounds of appeal.

i.) The evidence of the main two witnesses of the prosecution fails the test of credibility and probability.

ii.) Rejection of the evidence of the defence had been done on unreasonable grounds.

iii.) Prosecution had failed to prove the chain of productions.

According to the prosecution case, pursuant to information received by PC Bandara PW 2, from an informant that a person called *Faizal* from New Moor street is bringing some illicit drugs, after following the usual procedure, a team led by PW1 and five other officers including PW 2 had gone for the raid towards the *Maharoof* Water tank in a van and met the informant at about 15.10 hours on 23.3.2013. Thereafter, PW 1, PW 2 and the informant had walked about 20-25 meters away from the parked van. They were stationed near the water tank seated inside a three wheeler as requested by the informant who was standing outside on the road, close to it.

After being pointed out by the informant the accused appellant who was wearing a blue colour T shirt and a sarong was apprehended, searched and taken into custody at about 3.25 pm (15.25 hours) by PW 1 and PW 2 when a parcel of heroin which was in the knot of the sarong was detected. After returning to the Narcotic Bureau at 16.00 hours the production was sealed and kept in the personal locker of PW 1 until it was handed over to CI *Rajakaruna o*n 25.03.2013 who has taken it to the Government Analyst. The gross weight at the PNB is 25 grams and 500 mg. According to the Government Analyst the gross weight is 24 grams and 86 mg and the and the net weight of the pure heroin is 7.21 grams.

There were no contradictions or omissions highlighted in the evidence of PW 1 and PW 2.

The accused appellant denying the charges levelled against him opted to make a statement from the dock and called three witnesses, a friend, his nephew and a police officer for his defence.

According to the very long dock statement, on 23.3.2013 around 9.30 and 10.30 in the morning the appellant had gone to collect a News Paper for witness *Zaik Hussain* who has visited him at the Lodge the appellant owned. A person called *Baba* known to the Appellant had come in a three wheeler with another person and after querying whether he was the person, had forcibly taken him in the three wheeler to a parked van somewhere at *Centre road* and assaulted continuously questioning him about *'kudu'*. He was brought back to the lodge where his nephew witness *Akbar Ali* was present at that time. The lodge had been searched and thereafter he had been taken near a church(*palliya)* in *Kolonnawa* where he had been left in the vehicle with the driver for over one and a half to two hours and brought to the *Fort Police* station where the sealing of production had taken place. He had at first refused to sign the production, but after being threatened and assaulted he has done so. On the following day he had been remanded by a learned Magistrate.

According to defence witness *Zaid Hussain*, around 9.30 on the day of the incident, when the appellant had come to get a news paper for him, he has seen three people taking the appellant in a three wheeler. At first he had thought that the appellant was talking with a friend but word had spread that it was the police who took the appellant. Half an hour later the appellant was brought by two police officers in a van who searched the lodge and took the appellant away.

Akbar Ali the nephew of the appellant has testified that when witness *Zaid Hussain* came, the appellant had left the lodge with *Zaid* and he following the appellant out of the lodge. He had seen a parked three wheeler with some people

in army suits. (page 197 in red) The appellant who was talking in *tamil* to the three wheeler driver had got in with another person and then driven away. As the people on the road were discussing that it was the police who took the appellant away, he has gone in search of his uncle to *Wolfendhal Street* and *Dam Street* Police Stations without any success. When he returned to the lodge, the appellant in hand cuffs was brought by 6 people in a van and the lodge had been searched. Thereafter according to him a Police officer had taken his telephone number when he asked where they were taking his uncle . However, admitted that the family of the appellant had been informed that he would be produced to the *Maligakanda* Courts on the following day.

According to the prosecution witnesses the appellant was arrested in the afternoon on a one way street that branched off from *Armour* street and after the arrest he was straightaway taken to the PNB. They do not speak about a search of the Lodge.

According to the defence witnesses the appellant was taken in a three wheeler from the road near a saloon when he went to get a news paper. One witness has said he was seen talking to a three wheeler driver in *Tamil* and the other witness has testified about men in army suits near the three wheeler. However, it had been suggested by the Counsel for the appellant in page 79 that the appellant was arrested at the Lodge around 11.30 in the morning.

ප්‍ර : මම තමුන්ට යෝජනා කර සිටිනවා, මෙම චිත්තිකරුවා 201.03.23 වන දින උදේ 11.30 ට විතර මෙම නො. 198, අලුත්යෝන් විදිය ස්ථානයේ තිබෙන චිත්තිකරු විසින් පවත්වා ගෙන යන ලොජ් එකේදී තමුන්ගේ නිලධාරීන් එක්ක ගිහින් තවත් සිවිල් පුද්ගලයෙක් ගිහිල්ලා අල්ලා ගෙන ආවා කියලා යෝජනා කරනවා.

උ : ප්‍රතික්ෂේප කරනවා.

ප්‍ර : එතන ඉදන් තමුන් ත්‍රිරෝද රථයක රැගෙන ඇවිල්ලා මගට ගෙනල්ලා තමුන්ලාගේ

වැන් රථයට දා ගත්තා කියලා මම තමුන්ට යෝජනා කරනවා?

උ : ප්‍රතික්ෂේප කරනවා. කිසිම අවස්තාවක ත්‍රිරෝද රථයක් වැටලීම සඳහා යොදා ගත්තේ නැහැ.

ප්‍ර : ඒත් එක්කම තමුන්ට යෝජනා කර සිටිනවා එහෙම අල්ලා ගත්තාට පස්සේ නැවත මේ විත්තිකරුවා බිලුමැන්ඩල් ප්‍රදේශයට ගෙනිහිල්ලා ප්‍රශ්න කිරීමක් කළා කියලා මම තමුන්ට යෝජනා කරනවා?

උ : නැහැ

In page 107 of the brief it is stated that the birth certificate and the receipt relating to the Identification Card of the appellant was taken from the lodge when the police visited the second time. (page 107 bottom). Therefore, it appears that the position of the defence is that the Police visited the Lodge twice, which is rejected by the prosecution witnesses.

In page 151 of the Brief it had been suggested to PW 2 that the appellant was taken into custody at 11.30 at the Lodge which was denied by that witness.

Thus, it is clear that an issue is raised regarding the place and the time of arrest. There are no contradictory evidence of the prosecution witnesses regarding the place and the time of arrest.

The first ground of appeal is that the evidence of the two main witnesses fail the test of probability and credibility. Some of the improbable evidence referred to are as follows; it was submitted that when there was no evidence elicited to whom the three wheeler belonged, it was improbable that PW 1 and PW 2 to be seated inside the vehicle for ten to fifteen minutes without being questioned by the owner of the vehicle on such a busy street. It is in evidence that it was the informant who pointed out the three wheeler to the witnesses to be seated and he was waiting outside. No evidence elicited that the three wheeler did

not belong to or was in the possession of the informant. It is also a probable situation if someone queried, as they were Police officers in civil clothes, they could have easily identified themselves. In the above circumstances it cannot be considered as an improbability.

It is also submitted that there was no explanation given as to why the production was kept for two days without being handed over to CI *Rajakaruna.* PW 1 had explained that it was in his personal locker which is permitted by the authority.

According to the evidence given on behalf of the appellant from the OIC PNB CI *Kevin Christopher*, PW 1 had left for a raid with another team at 18.15 hours and returned at 22.05 hours on 23.03.2013. It is the position of the defence that it is an improbability based on the evidence of PW 1, where he has stated that the sealing of the production has commenced after returning to the PNB at 16 hours, and his testimony in page 108 of the brief that he entered notes at 18.20 hours at the PNB. Therefore, according to the defence it is improbable for PW 1 to have taken part in two raids which the trial judge has failed to consider.

According to officer *Christopher's* evidence in page 210 of the brief the officers who have left for the raid at 18.15 has been led by one SI *Lionel.* At page 211 of the brief, SI *Udara's* name together with the names of the other constables who took part in the raid are entered. It is also in evidence that *SI Udara* (PW 01) has left for a raid at 14.20 hours and that the appellant who was arrested in that raid has been handed over at 17 hours. The issue to be considered here is when PW1 says his entry notes are at 18.20 hours , whether he could have participated in the other raid where the officers left the PNB at 18.15 hours.

ප්‍ර : දැන් ඔය ඡේද 54/176 යටතේ යොදල තියෙන සටහන කීයටද යොදල තියෙන්නේ?

උ : මේක 18.15 ට යොදල තියෙන්නේ.

ප්‍ර : හවස 6.15 ට නේ?

උ : එහෙමයි.

ප්‍ර : ඒ සටහන යොදල තියෙන්නේ කවුද?

උ : මෙහි පිටවීමේ සටහනක් යොදල තියෙනවා උප පොලිස් පරීක්ෂක ලයනල් යන නිලධාරියා ස්වාමිනි මත්ද්‍රව්‍ය නාශක අංශයේ.

ප්‍ර : දැන් මහත්තයා ඔය 18.15 වේ සටහනේ ලයනල් නිලධාරියාගේ පිටවීමේ සටහනට අදාලව යම්කිසි නිලධාරීන්ගේ නම් සඳහන් වෙනවද?

උ : නම් සඳහන් වෙනවා ස්වාමිනි.

ප්‍ර : කවුද ඒ සඳහන් වෙන නම්?

උ : පො.කො..රි 4335, උප පොලිස පරීක්ෂක උදාර, පො.කො.. 1509 රාජපක්ෂ, පො.කො. 60980 රත්නායක, පො.කො. 70731 වීරසිංහ, කියන නිලධරින්ගේ නම් සඳහන් වෙනවා.

No evidence has been elicited that one officer cannot participate in two raids on one day. The defence has not put forward this position to PW 1 when he was cross examined. The evidence of PW 1 that he left for a raid at 14.20 hours and the person arrested, who is the appellant, was handed over to the PNB at 17 hours has been corroborated by the defence witness *Kevin Christopher*. As stated earlier PW 2 has corroborated the evidence of PW 1 regarding the arrest and the place of arrest.

Therefore, it appears that either the time of 18.20 hours given by PW 1 as the time of entering his notes or the time in the information book given as 18.15 hours as the time the officers left for the other raid is erroneous. In my view the said position should have been suggested to PW 1 at the trial. After failing to do so the Counsel has submitted that position only at the appeal stage.

In ***Edrick De Silva Vs Chandradasa De Silva*** *70 NLR at 170 Justice H.N.G. Fernando* observed that when there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross examination that is a special fact and feature in the case, it is a matter falling within the definition of the word "proof" in section 3 of the Evidence Ordinance and a trial judge or court must necessarily take fact in to consideration in adjudication the issue before it.

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."

It is noted that in page 233 of the brief, after correctly evaluating the evidence of both PW 1 and PW 2, the learned High Court Judge has concluded as follows;

"…..... එසේ නමුත් මෙහිදී අවධානය යොමු කල යුතු වන්නේ පැ.සා 01 ප්‍රකාශ කරන පරිදි මෙම නඩුවට අදාළ සටහන් ඔවින් විසින් යොදා ඇත්තේ මත්ද්‍රව්‍ය කායර්ංශයට පැමිණ පැය 18.20 ට වේ. පැ.සා 01 දෙවන වැටලීම සදහා හවස 6.15 ට පිටව ගොස් ආපසු පැමිණියේ රාත්‍රී 10.05 ට නම්, මෙම නඩුවට අදාළ වැටලීම් සටහන් පැය 18.20 ට එනම් සවස 6.20 ට යෙදීමට හැකියාවක් නැත. මේ අනුව මෙම නඩුවට අදාළ වැටලීමේ සටහන් යෙදූ වේලාව ගැන පැ.සා 01 ගේ සාක්ෂිය පිළිගත නොහැකිය. සටහන් යෙදීමේ වේලාව පිලිබඳව එම සාක්ෂිය පිලිගත නොහැකි වුවත් එනිසා මුළු වැටලීමට අදාල පැ.සා 01 ගේ සාක්ෂි පිළිගත නොහැකි තත්වයක් නැත. සටහන් යෙදීමේ කායර් සිදු කර ඇත්තේ සම්පුණර් වැටලීම සිදු කිරීමෙන් පසුවය. වැටලීම සම්බන්ධව ඉහත සදහන් කල පරිදි, පැ.සා 01 ගේ සාක්ෂිය විය හැකි භාවයෙන් යුක්ත වුවද පරස්පරතා සහ ඌනතා නොමැති වුවද සාක්ෂියකි. එය පැසා 02 ගේ සාක්ෂිය මගින් මනාව තහවුරු වෙයි. ඒ නිසා වැටලීමේ සත්‍යතාවය මෙම අධිකරණයට සාධාරණ සැකයෙන් තොරව පිළිගත හැකිය."

In ***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"

Considering the above reasons we reject the position of the appellant that it was improbable for PW 1 to participate in two raids, and affirm the conclusion of the trial judge on this point.

The second ground of appeal is that the learned Judge has rejected the evidence of the defence on unreasonable grounds. In pages 234 and 234 of the brief the trial judge has evaluated and analysed the evidence adduced on behalf

of the defence adequately. It is stated that the position taken in the Dock Statement, the alleged continuous assault he underwent in the hands of the arresting officers and the other positions he took up in the dock statement had not been put to the prosecution witnesses.

In *Sarwan Singh vs. State of Punjab AIR 2002 SC 3652*, Indian Supreme Court in the said case observed thus: " it is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted" this judgment was cited with approval in the case of *Bobby Mathew Vs. State of Karnataka 2004 3 Cri. L.J* page 3003.

On perusal of the defence evidence it is apparent that it has not raised a reasonable doubt in the prosecution case.

The next ground of appeal is that the prosecution failed to prove the chain of production. The Government Analyst who gave evidence in this case has confirmed the gross weight and that the production was in tact when it was received. The argument that there was a delay in handing over the production to *CI Rajakaruna* has been explained as it had been in the personal locker in the safe custody of PW 1.

In *Kamrudeen v AG (SC Appeal No. 90/2013* – Decided on 25.07.2019: (*Malalgoda J*) at page 13 and 14 has held "*The failure by the officers of the PNB to take the productions before the Magistrate and keeping the productions in police custody for 05 days were also raised by the President's Counsel…… , ….In the absence of any challenge with regard to the inward journey by the President's Counsel, I see no basis to uphold his objection."*

The prosecution witnesses have testified without any omissions or discrepancies being highlighted.

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. On evaluation of evidence of the prosecution witnesses in this case I do not see any reason to disbelieve them in the official duties that they have performed.

On consideration of the above facts, this Court is of the view that the several grounds of appeal raised by the appellant are without merit. Therefore, the judgment dated 05.07.2018 of the learned High Court Judge of *Colombo* is affirmed. The appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

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