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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979

CA 74/2020
HC/ COLOMBO/7165/2014

Thuwan Nisam Sahabdeen Saman alias Baba

Accused-Appellant

vs.

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

Complainant-Respondent

BEFORE : **Devika Abeyratne J**
P. Kumararatnam J

COUNSEL : **Mr.Chamara Wannisekara with Mr.Dineth Kaushalya and Ms.Sashika Wijeratne for the Appellant.**
Ms.Maheshika Silva SSC for the Respondent.

ARGUED ON : **19/11/2021**

DECIDED ON : **08/12/2021**

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JUDGMENT

P. Kumararatnam J

The above-named Accused-Appellant (hereinafter after referred to as the Appellant) was indicted by the Attorney General under Sections 54(A) (b) and 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking and Possession respectively of 14.76 grams of Heroin on 18th November 2012 in the High Court of Colombo.

After the trial the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed life imprisonment on both counts on 25th of June, 2020.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom from prison.

On behalf of the Appellant following Grounds of Appeal are raised.

1. The Learned High Court Judge has failed to satisfy the test of credibility by analysing the consistency of the testimony of witnesses and therefore the Learned High Court judge erred in law by convicting the appellant on the evidence of the prosecution.
2. The Learned High Court Judge had not adequately considered the probability of the raid.

3. The trial judge has incorrectly rejected the accused's version.

Background of the case.

On 18/11/2010 PW01 SI Udara Chaturanga Premasiri attached to Police Narcotic Bureau had received information from PC 38993 Padmakumara about trafficking of Heroin near Cargills Food City in Maradana through a green coloured three-wheeler bearing No.YE 5361 by a person called Baba. He had left for the raid accompanied by 07 other police officers attached to Police Narcotic Bureau after completing all necessary formalities. The team had left the bureau at 8.55 am and reached the Maradana Bus Halt around 9.20 am as per the information.

The team had waited near the Maradana Bus Halt and the informant had come there around 9.30 am and had met PW02 PS38993 Padmakumara and had re-confirmed that the Appellant was planning to traffic drugs on that day. After taking the informant into the vehicle the police party had positioned themselves near Maradana Cargills Food City and waited about 15 minutes. At that time as per the information that particular three-wheeler had arrived and parked after passing the police vehicle. PW01 along with PW02 had gone up to the three-wheeler, displayed their official identity cards to confirm their identities and directed the Appellant to alight from the three-wheeler. The Appellant who was wearing a white colour shirt and a black trouser had anxiously alighted from the vehicle. When he was subjected to a body check PW01 had found a parcel wrapped in a grocery bag from his right trouser pocket which contained a substance like Heroin. In his left pocket a mobile phone and some documents were found by the police. On a field examination the substance found in the possession had reacted for Diacetyl Morphine alias Heroin. Hence the Appellant was arrested for possession of Heroin around 9.50 am. The police party had then concluded their investigation and returned to the Bureau at 10.30 am.

At the Police Narcotic Bureau, the Heroin was properly weighed and sealed after obtaining the thumb impression of the Appellant. The parcel weighed about 60 grams and was marked as production number 61/2012. The witness had handed over the parcel to the reserve police officer IP Rajakaruna. At the trial he had properly identified the production and the Appellant.

PW02 PC Padmakumara who had received the information and participated in the raid along with PW01 could not give evidence as he was subjected to an acid attack when he was in the course of arresting a suspect at Warakapola. Due to the acid attack, he had lost sight in both the eyes when this case was taken up for trial. Due to his absence PW03 PC 15109 Rajapaksha who was a member of the raiding team had given evidence.

PW06 IP Rajakaruna to whom the productions were handed over by PW01 had given evidence and confirmed that he handed over the same to the Government Analyst on 21/11/2012 and identified the production and the Government Analyst Receipt which had been marked as P8 in the trial. In the receipt the Government Analyst had confirmed that the productions pertaining to this case had been handed over by PW06 IP Rajakaruna with the seals intact.

PW07 Assistant Government Analyst Mrs.Kodithuwakku had given evidence and confirmed that the parcel marked as PR 61/2012 had contained 14.76 grams of pure Heroin. The Government Analyst Report was marked as P8 at the trial. Her qualifications and expertise in the field of narcotics have been admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979 by the defence.

After the close of the prosecution case defence was called and the Appellant had made a lengthy dock statement and denied the charges.

In the 1st ground of appeal the Appellant contends that the Learned High Court Judge has failed to satisfy the test of credibility by analysing the

consistency of the testimony of witnesses and therefore the Learned High Court judge erred in law by convicting the appellant on the evidence of the prosecution.

In this case PW01 had given very clear evidence regarding the raid and the arrest of the Appellant. The prosecution was unable to call PW02 who received the information and went along with PW01 to arrest the Appellant. PW02 PC 38993 Padmakumara was subjected to an acid attack when he went to arrest an accused while serving at Warakapola Police station. As both his eyes were damaged rendering him blind due to the said attack, he could not come to court to give evidence in this case. But the prosecution had called PW03 PC 15109 Rajapaksha who was also part of the team during the raid.

According to PW03 when PW01 and PW02 went to arrest the Appellant he was seated in the vehicle which was parked 20 meters away from the place of arrest and had observed them through the window of the vehicle. He had clearly witnessed that the Appellant was checked inside and outside of the three-wheeler by PW01 and PW02.

According to section 134 of the Evidence Ordinance:

> "No particular number of witnesses shall in any case be required for the proof of any fact"

In **The Attorney General v Devunderage Nihal** S.C Appeal 154/10 dated 12/05/2011 the Court held that:

> "It is a well-established principle that the prosecution is not required to lead the evidence of a number of witnesses to prove its case. In a similar case as the present instance, Jayasuriya J in A.G. v Mohamed Saheeb Mohamed Ismath C.A.87/97 decided on 13.7.1999 stated that "There is no requirement in law that evidence of a Police Officer who has conducted an investigation into a charge of illegal possession of heroin, should be corroborated in regard to material particulars emanating

from an independent source. Section 134 of Evidence Ordinance states that “No particular number of witnesses shall in any case be required for the proof of any fact. The principle has been applied in the Indian Supreme Court where the conviction rested solely on the evidence of a solitary witness who gave circumstantial evidence in regard to the accused’s liability. The Privy Council upheld the conviction entered by the trial judge and adopted the judgment of the Supreme Court in Muulluwa v State of Madhya Pradesh AIR 1976 S.C.198. This principle has been adopted with approval and applied in the judgment of G.P.S.Silva J. in Wallimunige John v The State 76 NLR 488. King v N.SA. Fernando 46 NLR 255. The principle affirmed is that testimony must be weighed and not counted. Justice Vaithylingam dealing with a bribery charge laid down for the future legal fraternity the principle that even in a bribery case, that there is no legal requirement for a sole witness’s evidence to be corroborated. No evidence even of a police officer who conducted a raid upon a bribery charge is required by law to be corroborated. Gunasekara v A.G. 79 NLR 348”.

Considering above mentioned judgment a single witness’s evidence is sufficient to prove a case beyond reasonable doubt against an accused in a criminal trial. In this case the prosecution even though they could have led only PW01’s evidence, called PW03 as well to corroborate the evidence of PW01 with regards to the raid.

The counsel for the Appellant argues that the PW03 had given contradictory evidence against PW01’s evidence which affect the root of the case. In this case PW03 had not given contradictory evidence but he had given evidence based on what he had witnessed while he was seated inside the police vehicle. Both PW01 and PW03 mentioned in their evidence that the Appellant was searched in and out of the three-wheeler in which the Appellant arrived. Hence no contradictory evidence is adduced by the prosecution in this case.

In the second ground of appeal the Appellant argued that the Learned High Court Judge had not adequately considered the probability of the raid.

PW01 had vividly explained to the court as to how this raid was conducted and the Appellant was arrested. Whatever the productions necessary to prove the case were produced and marked in court. The police had conducted further investigation regarding the Appellant's involvement in any other drug dealings. That investigation had been carried out by a separate police team after obtaining a 07 days detention order from the relevant court. As further investigation has nothing to do with the present case those evidence with other productions is not marked and produced in this case. Hence the prosecution case will not fail the test of probability.

In the case of **Wickremasuriya v. Dedoleena and others** 1996 [2] SLR 95 Jayasuriya J held that;

> "A judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate"

His Lordship further held that;

> "If the contradiction is not of that character the Court ought to accept the evidence of witnesses whose evidence is otherwise cogent having regard to the Test of Probability and Improbability and having regard to the demeanour and deportment manifested by witnesses. Trivial contradictions which do not touch the core of a party's case should not be given much significance, especially when the probabilities factors echo in favour of the version narrated by an applicant"

In **Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 His Lordship held that;

> "In considering the question as to whether evidence given by the witness should be accepted or not, the court has, no doubt, to examine whether the witness is, an interested witness and to enquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is whether there is a ring of truth surrounding his testimony."

Justice Mackenna in "Discretion", The Irish Jurist, Vol.IX (new series), 1 at 10 has said;

> "When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to me the more probable, the plaintiff's or the defendants, and If I cannot say which, I decide the case, as the law requires me to do in defendant's favour."

Guided by the above cited judgments I conclude that the learned High Court Judge had adequately applied the probability test and come to a correct finding. Hence it is incorrect to say that the Learned High Court Judge had not adequately considered the probability of the raid.

Finally, the Appellant contends that the trial judge has incorrectly rejected the accused's version.

Learned High Court Judge in his judgment adequately considered the dock statement of the Appellant and had given reasons as to why he disbelieves the same. The position taken by the Appellant had been put to PW01 and he had vehemently denied all such suggestions. Hence the defence had failed to create any doubt in the prosecution case.

In this case the investigating officers had received specific information that the Appellant was travelling with Heroin in a green coloured three-wheeler bearing No.YE 5361. Accordingly, the raid was arranged and the Appellant was taken into custody along with the Heroin he was carrying. Considering this evidence there is no improbability occasioned. Their evidence pertaining to the raid was clear, cogent and without any contradiction or ambiguity. Considering all the circumstances their action cannot be faulted at any stage of the raid. Hence the appeal grounds advanced by the Appellant are devoid of merit due to aforesaid reasons.

Accordingly, we affirm the conviction and the sentence imposed and dismiss the appeal.

Appeal dismissed.

The Registrar is directed to send a copy of this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J

I agree.

JUDGE OF THE COURT OF APPEAL