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 SriLanka.

Complainant

CA/HCC/121/2017 **VS**

High Court of Panadura
Case No: HC/2539/09 Gamage Ranjani Perera alias
Manamala Badige Kulathunga Arachchi Ranjani

Accused

And now between

Gamage Ranjani Perera alias
Manamala Badige Kulathunga Arachchi Ranjani

Accused– Appellants

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Gayan Perera with Prabha Hemanthi Perera

for the accused-appellant

Riyaz Bary, SSC

for the respondent

ARGUED ON : 21/10/2021

DECIDED ON : 15/12/2021

R. Gurusinghe, J.

The accused-appellant (the appellant) was indited in the High Court of Panadura under Section 54 A(b) and 54 A(c) of the Poison Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for being in possession and trafficking 2.4 grams of heroin on or about the 11th of December 1999 at Piliyandala.

The Learned Trial Judge, by her judgment dated the 14th of June 2018, found the appellant guilty of charges and convicted and sentenced the appellant to life imprisonment on two counts. Being aggrieved by the said conviction and sentence, the appellant preferred this appeal.

The version of the prosecution was that on information received from a private informant by sub-Inspector Vijitha Perera (PW1) of Walana, a Special Vice Squad was arranged and a raid was conducted on the 11th of December 1999. The information was received a week prior to the date of the raid;

however, no reason was given as to why they waited a week and selected that particular day to conduct the raid. The police party was led by sub-inspector Vijitha Perera, including PC2395 Dayaratne, PC444 Wijesooriya, PC7659 Suraweera, PC3386 Pathirana, PC23743 Douglas, RPC 31944 Ekanayake, and PCD20002 Ratnayake. They were dressed in Civilian clothing except for Suraweera, who was in the Uniform.

All of them left Walana in a van bearing No. 250-6347 at 5.45am in morning and came upto Piliyandala within half an hour. They had stopped the van about twenty yards away from the appellant's house and had waited to see if any person or vehicle would come to the appellant's house. After about twenty minutes, as no one came, they went to inspect the appellant's house. Sub-inspector Vijitha Perera went to the house along with three other officers, including the one in the uniform. The front door of the appellant's house was opened. Sub-inspector Vijitha Perera and the officer in the uniform had entered the house. The appellant was seated at the table in the living area of the house and appeared to be doing something. She was wearing a nightgown. They approached the table and when they inspected it, they found many small packets on the table. PW1, from his experience, identified the substance in the packets as heroin. He had arrested the appellant at 7.30am. There was Rs. 6,800/= on the table. There were forty packets of heroin on the table, and another eighty packets were in a polythene bag, which was also on the table. In total, one hundred and twenty bags of heroin and the money was temporarily sealed. The thumb impression of the appellant was obtained. The police team was in the appellant's house for about one hour. At about 8.30am, the son of the appellant came to the house. He was arrested and when he was checked, there were four small packets of heroin in his trouser pocket. Then they left to the Piliyandala Police Station. On their way, they stopped at a jewellery shop called Matara Jewellers. They obtained permission from the jewellery shop

manager to weigh the heroin on an electronic weighing scale. First, they weighed a blank paper which was 3,000mg, then they placed the heroin on the paper, weighing 9,000mg. The weight of the heroin was 6,000mg.

After that, the production was sealed again. The production and the appellant was handed over to the Piliyandala police station. Productions consisted of four envelopes which they entered under PR receipt No.158/99. The production books were not available at the time of giving the evidence because termites had eaten them. PW1's notebook was also not available. According to PW1, only the appellant was there when they entered the appellant's house.

There were no notes regarding the times they went to the jewellery shop and left the place. PW1 further said the productions and the suspects were handed over to the Piliyandala police station at 9.30am. After that, they went back to their station at 12.30pm. There were no notes as to what they did from 9.00am to 12.30pm. As per the vehicle meter, they had traveled about 100 km. However, PW1 admitted that it was only 25 km up and down from their station to Piliyandala, where they carried out the raid.

After the prosecution case was closed, the appellant gave evidence from the witness stand and was subjected to cross-examination. She said that she resides in Dehiwela. She worked in the Middle East from 1983 to 1985, 1987 to 1989, and 1993 to 1995. When this incident happened, she was residing in Piliyandala. The incident took place between 6.30 and 7.00am. She was living in that house with her younger sister, her son, her elder brother's daughter, and the daughter's husband. She was on the bed in a room when her sister came and said that somebody had come. The son was also sleeping in another room. When she came out to the living area of the house, her sister was already made to sit on a chair. The police who came to her house had told her that they had received a petition and wanted to search the house. The front door

was closed at that time, and the people had entered the house from the rear door. They said they had found a small container in the son's room with heroin. Then she said that she would not believe it because her son was not taking heroin at that time. She also said that her son was a heroin addict, but she had taken treatment for him from a medical centre to get rid of this addiction.

She was taken to the police station. The police wanted the appellant to come in the night gown without allowing her to dress appropriately. The reason they said that was because they wanted to check whether she carried anything on herself. They did not find anything when they checked her. She said that she never had the alleged heroin. She also stated that they did not go to a jewellery shop nor weigh anything there. She was ordered to place her thumb impression on certain envelopes.

Further, she said that her husband was in the Middle East and used to send her money about Rs. 25000/- per month. As her son was a heroin addict, her husband asked her to rent a house from a distant place to avoid her son using heroin. That was the reason for them to rent a house at Piliyandala.

After the trial, she was convicted for both counts and sentenced to life imprisonment.

The grounds of appeal are as follows:

1) The Learned Trial Judge has totally ignored certain evidence which created a reasonable doubt as to the prosecution case, and the Learned Trial Judge has erred inlaw by failing to consider and evaluate those evidence which amounts to the discrepancies;

2) The Learned Trial Judge has totally ignored certain evidence which amounts to the credibility of the witnesses and failed to apply the test of probability and improbability;

3) The Learned Trial Judge has used defense evidence to corroborate the prosecution evidence;

4) The Learned Trial Judge has not properly evaluated the evidence of the defense;

5) It has to be carefully considered whether the presumption of innocence of the accused-appellant has been given its due importance by the Trial Judge.

PW1 conducted the raid. PW4 was in the uniform. There were six other officers in civilian clothing. PW1and PW4 were called as witnesses who participated in the raid. As per their evidence, they left their station at 5.45am and reached near the appellant's house at 6.15 am and waited there for about half an hour to see if somebody would come to the house. As nobody came, they entered the house. The front door was wide opened. As per PW4, they reached the appellant's house around 7.20am. Both witnesses accepted that the vehicle was stopped almost in front of the appellant's house. They entered the house from the front door. The appellant was seated at the table doing something. It is questionable whether the appellant if she in fact was a heroin trafficker as alleged by the prosecution, would keep the front door of the house open and pack heroin in the living room area of the house at 6.45 am. There was also money kept on the table. As opposed to the evidence of PW1 and PW4, she was still in bed when the police came. Her sister came and told her that somebody had come. The prosecution's story is that only the appellant was there at that time. The appellant says that she, her son, her brother's daughter, and the

daughter's husband were there. What the appellant says is more probable than the prosecution story in this regard.

As per the prosecution, Rs.6,800/- was on the table in the living area. The police searched the house, all the cupboards, and drawers. The appellant's counsel suggested to PW1 that the money was taken from a drawer of her almirah. What is the necessity for the appellant to keep the money on the table in the living area at 6.45 in the morning? I think the defense position is more probable in this regard. As per the prosecution, there were forty packets on the table together with another eighty packets in a bag, which was also on the table. When it was weighed, the paper was 3,000mg, and with the heroin, it was 9,000mg. The quantity of the heroin is 6,000mg. Can these all round figures be co-incidents.

According to the prosecution, they had weighed the production at a place called Matara Jewellery at Piliyandala. After weighing, all the 120 packets, they were sealed in the jewellery shop. It could have taken a considerable time. They arrested the appellant's son at 8.30am and handed over the productions and the accused, after weighing and resealing the production at 9.30am, to the Piliyandala police station. Their position is that the two suspects were taken to the jewellery shop separately on two occasions, and the productions were sealed separately. No statement was taken from the manager of that place. At least the name of the manager of the jewellery shop was not in the notes. The time was also inadequate for weighing all the productions, especially if the two suspects were taken to the shop separately. When comparing this evidence with the appellant's evidence that they had not gone to a jewellary shop, the appellant's position is probable.

The gross weight of the production with the wrapping as per the government analysis was 9,380mg. The weight difference was only 380mg, compared to

PW1. However, the heroin weight was 4,400mg, 1,600mg less. The weight of the paper had increased, and the heroin weight decreased. These discrepancies also raise doubt about the prosecution case.

PW1 says they went to Piliyandala at 6.15 am, but PW4 says it was 7.20 am when they arrived there. PW1 says productions were handed over to the Piliyandala police station at 9.30 am. However, PW7 says it was 9.55am when the production and the appellant were handed over. Counsel for the appellant argued that there was a twenty-five-minute gap between these two witnesses' positions and this twenty-five minutes is sufficient to tamper with the production. The prosecution did not explain these discrepancies, and the Learned Trial Judge has also overlooked them.

The prosecution's version of the story of the arrest of the son of the appellant is that, when they were about to leave the house at 8.30 am, the son came to the house with heroin in the pocket of his trouser. As per this narrative, he passed the parked vehicle in front of the house without any suspicion or hesitation, while carrying the heroin in his trouser pocket, even though PW4 was in the police uniform. As per the appellant's evidence, the son was also in the house when the police came. Both of them were taken to custody at the same time. I think the appellant's story is more probable in this regard.

When considering the judgment of the Learned Trial Judge, the misdirections on the part of the Learned Trial Judge are so grave, and the judgment cannot be allowed to stand. A substantial part of the judgment is devoted to discrediting the appellant's testimony. However, with regard to the prosecution's evidence, the Learned Trial Judge has readily accepted any explanation given by the prosecution, where similar explanations of the defence were rejected. The Learned Trial Judge states in her judgment (page 34 of the judgment) that the accused had failed to give the name and place where the

appellant said she had taken treatment for her son, to get out of the drug addict. Her evidence is the son was treated in the early part of 1999. How could she know that this type of question would arise after 16 years? Further, the Learned Trial Judge says that the appellant failed to produce documents in this regard. The Learned Trial Judge states that the appellant's position where Tsunami destroyed the documents was false because the appellant was residing during that time at Wijesekera Mawatha in Dehiwela, which was not a road near the seaside and could not have been affected by the Tsunami.

However, the appellant's evidence in this regard was different. The appellant clearly stated that after releasing her from remand custody (she has been in remand custody for two years), she had no place to live, so she went to stay with her sister. Her sister was living at Station Road, Dehiwela, which was on the seaside and was affected by the Tsunami, and most of her documents were destroyed (page 303 of the brief). On page 36 of the judgment, the Learned Trial Judge quoted section 101 and 106 of the Evidence Ordinance and said as per the provisions of section 106 of the Evidence Ordinance, when any fact is especially within the knowledge of any person, the burden of proving that fact is on him. She also quoted section 114F of the Evidence Ordinance, and it further says that the appellant had not produced such documents as these documents would be unfavourable to the appellant if produced. This should be considered along with the police evidence. They say that termites ate the production books. The Learned Trial Judge did not question that. PW1 says his pocket notebooks are now not available. That was readily accepted. The prosecution also failed to provide at least the name of the jewellery shop manager where they claimed to have weighed the heroin, nor did the prosecution provide any explanation as to the discrepancies in the time slots in their evidence. The Learned Judge has not questioned these either. However,

the Learned Trial Judge further says the appellant claims that she had about Rupees Five Hundred Thousand savings at that time. She had not stated that

fact in the police statement. Further, the Learned Trial Judge says that the appellant had given false evidence from the beginning and had not proved her innocence (3rd paragraph of Page 37 of the judgment). All these observations are made with regard to the appellant's evidence and not regarding the evidence of the prosecution.

The Learned Trial Judge has completely misdirected regarding the burden of proof in a criminal case.

The burden of proof in a criminal case is described in *Law of Evidence Woodroffe and Amir Ali 20th edition Vol 3*. Page 3292 and 3294 are as follows:

'It is well settled that the onus is on the prosecution to prove its case to the hilt and it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case. It is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case, that is sufficient to enable a court to reject prosecution version. In that case, the accused persons are entitled to the benefit of doubt. It is a well settled principle of law that the accused persons are under no obligation to substantiate their defence version.

It is the fundamental principle of criminal jurisprudence that when an accused is put up for trial, the burden to prove the offence to the hilt by legal and cogent evidence remains on the prosecution which never shifts. Only in exceptional cases where a special defence or plea is raised by the accused, the burden is to be discharged by him either by leading evidence or by demonstrating from the record that such special defence is made out.

In a criminal trial, the burden lies on the prosecution to establish its case beyond reasonable doubt. The prosecution cannot derive advantage from the weaknesses or infirmities in the defence evidence. This burden is neither neutralized nor shifted because the accused has taken a particular plea in defence. The burden which lies on the accused to establish his plea, however, is not the same as 'lies on' the prosecution. The accused is not required to establish his plea beyond reasonable doubt.

The prosecution cannot take advantage of the weakness of the defence. It must stand on its own legs.'

E.R.S.R Coomaraswamy, in his book *The Law of Evidence Ceylon* on Page 313 and 314, described as follows:

'Criminal cases stand on a different footing from civil cases, because in them generally the liberty of the subject is involved, and the prosecutor is generally the Crown. It is, therefore necessary that every safeguard should be observed in order to preserve that liberty unless it is clearly established that it should be interfered with in the greater interest of the public. Moreover, in a criminal case, the State is a party, and it is natural that there should be a gross inequality between the parties in regard to their position and opportunities. The law, therefore, favours the accused person as much as possible, and attempts to help him in every way, unless and until the prosecution establishes beyond all reasonable doubt that he is the guilty person. It is this consideration that prompted Lord Sankey's famous dictum in *Woolmington vs. Director* of Public Prosecutions. Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt.

The following rules may be laid down in this connection:

(1) A criminal charge must be established beyond all reasonable doubt. In this respect, there is a great difference between civil and criminal cases, because a civil issue has to be proved only by a preponderance of evidence. In a criminal case, a Judge has not merely to decide whether the prosecution story is the more probable, but whether or not there has been definite and convincing proof. But neither in civil nor in criminal matters can a Court act on remote probabilities.

2) The General Rule: The general rule is that the burden is on the prosecution in criminal cases to prove the prisoner guilty. This applies not only to the actus reus, or wrongful act, but also to the mens rea, or guilty mind. The accused is therefore entitled to maintain a sullen silence. It is not his duty to say anything unless he chooses or in any case the prosecution must prove their case, apart for the statement made by any other accused or any evidence tendered by him. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The prosecution cannot for example depend upon the absence or want of any explanation on the part of the accused himself. There are, ofcourse, exceptions to this rule to be noted presently.

This rule is based on the principle that every man is to be regarded as legally innocent, until the contrary is proved and criminality is never to be presumed. This presumption is so fundamental and strong that in order to rebut it, the crime must be brought home to the prisoner beyond a reasonable doubt. The graver the crime the great will be the degree of doubt that is reasonable.

Where there is prima facie satisfactory and extremely balanced evidence on either side, the proper course is to give the benefit of the doubt to the accused person.'

The law in regard to the burden of proof is in a criminal case in this country is reflected in the aforementioned passages from the said books. In this case, the Learned Trial Judge wants the appellant to prove her position by producing all relevant documents. Some of the documents she referred to have no direct bearing on the case, like where her son got treatments and how much money her husband had sent her. The view taken by the Judge in this regard is entirely against the principles of burden of proof in a criminal case.

Where in a case which any general or special exception is pleaded under the Penal Code, the accused have to satisfy the existence of the circumstances bringing the case with exceptions. *(King vs James Chandrasekera 44 NLR 97).* In this case, the appellant has not relied on any exceptions.

The burden of proof and the presumption of innocence has to be considered together. The misdirection regarding the burden of proof in the case cannot be regarded as mere irregularities. It is a grave error on the part of the Learned Trial Judge.

The evidence of the appellant was completely rejected for the reason that she denied the signature in the information book. In this regard, the Learned Trial Judge stated that as she falsely denied her signature, the appellant's creditability was completely destroyed (page 35 of the judgment).

It is to be noted that the appellant admitted that she had signed documents in the police station and the police have obtained her thumb impression to seal some substance also. She gave evidence after sixteen years of the incident and she was fifty years old at that time. She never disputed the EQD report. The appellant was cross-examined to a great length. Against this backdrop, she denied the signature. I am not sure whether she recognized what had been shown to her by the cross-examining counsel.

The appellant's evidence of the incidents that followed on the day of the raid is more probable than that of the prosecution. It is my view that the appellant's evidence creates a reasonable doubt in the prosecution case. The Learned Trial Judge has also disregarded many discrepancies and has erred in applying the principles of burden of proof and presumption of innocence.

In the circumstances, the charges against the appellant are not proved beyond reasonable doubt. For these reasons, I set aside the conviction and sentence imposed upon the appellant. The appellant is acquitted.

Appeal allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal