
**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

**Court of Appeal No:
CA/HCC/420/2017**

**High Court of Colombo
Case No: HC/4810/2009**

Godakandage Nihal Perera alias
Paul

Accused-Appellant

vs.

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

Complainant-Respondent

BEFORE : **Sampath B. Abayakoon, J.
P. Kumararatnam, J.**

COUNSEL : **T.M.A. Mutaliph for the Appellant.
Janaka Bandara SSC for the Respondent.**

ARGUED ON : **25/01/2022**

DECIDED ON : **11/03/2022**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter after referred to as the Appellant) was indicted by the Attorney General before the High Court of Colombo under Section 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession of 2.45 grams of Heroin on 02nd November, 2004.

After the trial the Appellant was found guilty on the count and the Learned High Court Judge of Colombo has imposed a sentence of life imprisonment on the 8th of September, 2017.

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 the following Grounds of Appeal are raised.

1. Irregularity in the production.
2. Irregularity in the raid.
3. Contradiction between witnesses.
4. Contradiction with regard to the place of incident.

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5. Contradiction with regard to the colour of the bag.
 6. Alteration of the Government Analyst Report.

Originally the Appellant was found guilty to the charge and the learned High Court Judge sentenced him to life imprisonment on 17/12/2009. During the first trial when the defence was called the Appellant while giving evidence from the witness box took up the defence of alibi but this was disallowed by the learned High Court Judge on the basis that the Appellant had not followed the proper procedure laid down in Section 126A of the Code of Criminal Procedure Act. Hence the Appellant went back to the dock and made a dock statement.

In the Appeal No.CA/293/2009, filed against the 1st conviction, the Court of Appeal after considering the submissions made on behalf of the Appellant held that the rejection of leading evidence for the defence of alibi in the trial was inaccurate. Further His Lordships of the Court of Appeal had sent the case back to the High Court for a re-trial before a new judge.

This appeal is filed against the conviction and the sentence passed in the re-trial. The re-trial was commenced on 24/02/2014 after more than 09 years of the offence.

Back ground of the case.

On 02/11/2004 PW1 IP Ariyaruwan attached to the Police Narcotic Bureau had received information from PW8 RPC 38120 Lal Kumara about a person engaged in trafficking Heroin in Modera Kimbula Ela area. Along with 09 other police officers attached to the Police Narcotic Bureau, he had left for the raid after completing all necessary formalities. The team had left the bureau around 7.45 a.m. and reached the destination around 8.05 a.m. as per the information.

PW1 IP Ariyaruwan and PW8 RPC 38120 Lal Kumara had walked up to a boutique belonging to a Muslim gentleman situated on Madampitiya road. The other team members were positioned near a convenient point. The informant had met PW2 RPC 38120 Lal Kumara near the boutique and exchanged the necessary information. PW2 RPC 38120 Lal Kumara had told that the Appellant was coming towards the cross road which leads to a public bathing well. When both officers were walking towards the bathing well, a person had arrived according to the information received but he got panicked after seeing these two officers. When he tried to run back the two officers had apprehended the Appellant and recovered a parcel wrapped in a pink coloured grocery bag from his trouser pocket. A powder like substances was observed to be contained in the parcel. As the substances in that parcel reacted indicating the presence of Heroin he was arrested and the team members were summoned to that place immediately. After his arrest his house was searched by the police team but nothing was recovered.

At the Police Narcotic Bureau, the Heroin was properly weighed and sealed after obtaining the thumb impression of the Appellant. The parcel was weighed about 101.7grams and was marked as production number N.1. The 'tulip' bag which had been used to carry the parcel was also sealed and marked as N.2. At 11.16 am on 02/11/2004 IP Ariyaruwan had handed over the parcels to the reserve police officer IP Rajakaruna after marking as production No.29/04 and 30/04 respectively. At the trial he had identified the production and the Appellant properly.

PW2 RPC 38120 Lal Kumara who had received the information and participated in the raid along with PW01 had properly corroborated the evidence of PW01 without any contradictions or omissions.

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 03/11/2004 and identified the production and the Government Analyst Receipt which had been marked as Z.2 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 seals intact.

PW10 Government Analyst Mrs.Rajapaksha had given evidence and confirmed that the parcel marked as N.1 (PR 29/04) had contained 2.45 grams of pure Heroin. The Government Analyst Report was marked as Z.1 in 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.

In the Government Analyst Report which had been marked as Z.1 the witness had mistakenly mentioned that “Heroin (diacetylmorphine) **was not** identified in the black coloured plastic bag”. (Emphasis added).

But while giving evidence she had said that she had mistakenly added the word “not” and she cut the said word and placed her counter sign. Hence, she had corrected the mistake and the court awarded the opportunity to the defence to cross examine her regarding that mistake which was corrected. The court also directed several questions on that particular point and directed the witness to file a copy of her notes to this case. No copy of her notes filed in the record nor Learned High Court has commented in his judgement regarding this.

After the close of the prosecution the defence was called and the Appellant gave evidence from the witness box and proceeded to call witnesses. In his evidence he had taken up the position that he was arrested at home and nothing was found in his possession.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person. In a case of this nature the prosecution not only need to prove the case beyond reasonable doubt but also ensure, with cogent evidence that the Appellant had committed the offence.

In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 held:

“A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions where the identity of the good analysis for examination has to be proved beyond reasonable doubt”.

In **Perera V. Attorney General** [1998] 1 Sri.L.R 378 it was held:

“the most important journey is the inward journey because the final analyst report will depend on that”.

In **Witharana Doli Nona v.The Republic of Sri Lanka** CA/19/99 His Lordship Justice de Abrew remarked thus;

“It is a recognized principle that in drug related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. Prosecution must prove that the productions taken from the accused Appellant was examined by the Government Analyst”

Therefore, proving the chain of custody is a very important task for the prosecution in a drug related case. If investigating officers do not do their duty properly, the chain of custody can be successfully challenged in the trial. This is because the prosecution always relies on evidence gathered by police officers in cases of this nature.

In the first ground of appeal the Appellant takes up the position that the alleged Heroin was in PW01's personal locker from 9.30 a.m. to 11.16 a.m. thus creates a serious doubt as to the integrity of the production. Thereby the learned counsel for the Appellant argues that the conviction is unsafe.

According to chief investigation officer IP Ariyakumara, after coming to the Police Narcotic Bureau the substance found in the possession of the Appellant was weighed and sealed properly and handed over to PW02 IP Rajakaruna. The handing over of the production has been done at 11.16 a.m. as PW02 was not in the Police Narcotic Bureau when the party returned. Therefore, the said production was kept in the personal custody of PW01 who headed the raid on that day. PW01 in his evidence properly explained why he kept the production till 11.16 a.m. in his personal locker. This point need not be considered as there is no any ambiguity or doubt occasioned about the evidence of PW01. He had clearly and correctly explained to the court that he had taken all precautions and due care to ensure the production is properly handed over to the reserve officer of the Police Narcotic Bureau. Hence integrity/chain of custody of the production had not been disturbed as claimed by the counsel for the Appellant.

Under this same ground the counsel for the Appellant further argues that PW01 had failed to identify a piece of paper in which he had placed his official seal and obtained the signature of the Appellant.

Justice Thakkar in **Bharwada Bhoginbhai Hirjigibhai v State of Gujarat** 1983 AIR SC 753 stated:

“By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen”.

PW01 in his evidence reiterated that he marked the production including the white paper as N-1. According to him he had marked all the production shown to him during the re-trial. At this point the prosecution brought to the notice of the court that the said piece of paper was marked as P06 during the 1st trial. As more than 09 years had elapsed following the incident the said paper had been pasted with other production. Hence it is very difficult to separate the same for identification. As this point also has no bearing on the outcome of the case, the learned High Court Judge has not considered this point in his judgment. Hence the Appellant is not successful in his first ground of appeal.

In his second ground the counsel for the Appellant contends that it raises a serious doubt as to whether PW01 IP Ariyaruwan introduced/planted the Heroin on the Appellant as PW01 was not checked before he left for the raid, unlike the other officers.

According to PW01 he had received information about the trafficking of Heroin through an informant of PW08 Lal Kumara. Accordingly, the raid was organised. When this information was received by PW08 it was brought to the notice of the Officer-in-Charge of the Narcotic Bureau by this witness. After receiving necessary instructions from the OIC, PW01 had organised the raid. As he headed the raiding team, he had received all instructions from the OIC of the Bureau. Hence PW01 was under direct supervision of the OIC of the Bureau at all the times.

As per the evidence of PW01 the Appellant is a stranger to him. No enmity was reported against the Appellant. PW01 had only seen him at the raid. There was no evidence of a necessity to plant/introduce Heroin against the Appellant. As the argument advanced by the Appellant under this ground is very vague this ground too has no merit.

As the third and fourth appeal grounds are interconnected, the said grounds of appeal have been considered conjointly. Under these grounds the counsel

for the Appellant contends that there are contradiction and inconsistencies in the evidence of PW01 Ariyaruwan and PW8 RPC Lal Kumara as to the place of arrest of the Appellant. The counsel submits that although PW01 had stated that the Appellant was walking along the untarred road, but the corroborating witness PW08 Lal Kumara had said that the Appellant was standing at the beginning of the said road. According to the evidence of PW01 the Appellant was arrested somewhere along the untarred road when he tried to flee after seeing PW01 and PW08.

This position was very well corroborated by PW08 in his evidence at page 295-296 of the appeal brief. Hence the stance taken by PW01 and PW08 that the Appellant was arrested on an untarred road and that the Appellant's house is within walking distance from the place of arrest is very well established even after 09 years of the incident. Even the Learned High Court Judge had made an observation regarding the name of the road on which the Appellant was arrested along with the Heroin.

In support of this ground the Appellant had marked a plan as V3 in the trial. The said plan was drawn by the defence witness No.02 S. Rasappa who is a licenced surveyor. According to this defence witness he had prepared V3 on 22/05/2015. The arrest was taken place on 02/11/2004. Hence the plan was drawn after ten and a half years of the incident. What he has drawn was the geographical appearance of the place of incident on that day i.e., 22/05/2015. Hence, he was unable to capture the exact geographical appearance as at 02/11/2004. As such the said V3 has less evidential value. Even though it has less evidential value, the Learned High Court Judge had adequately considered the said evidence in his judgment. Hence, the evidence of PW01 and PW08 were not contradicted anywhere in the trial with regard to the place of arrest.

The counsel for the Appellant further contended that the Learned High Court Judge had not properly considered the defence witnesses in his judgment. Defence witnesses 1 and 2 had given evidence after about 13 years of the

incident. The Learned High Court Judge had considered the evidence of the said witnesses and applying the necessary tests, had very accurately arrived at the conclusion that the evidence of defence witnesses had failed to create a doubt in the evidence of the prosecution witnesses.

Under this same ground the counsel for the Appellant contends that the police party had failed to record the evidence of the defence witness No.02 Premalatha who is the sister of the Appellant. Premalatha's contention was that the Appellant was arrested at his own residence and not on the untarred road as claimed by the prosecution. The Appellant further argues that although in his evidence PW08 RPC Lal Kumara had said that he had recorded a statement from a woman aged 35 years old on that day, but in the evidence given by him in the 1st trial he had testified that the said statement was recorded by PC 30204 Bandara. Hence, he argues that this a very serious contradiction.

This contention cannot be considered as a serious contradiction as PW08 did not deny that the police recorded a statement from defence witness No.02. His position was that her statement had been recorded at the Appellant's house. He was unable to state as to who recorded her statement as he too had given evidence after nearly 10 years of the incident. Due to this reason this contention cannot be a serious one in this case. Hence this ground too has no merit.

In the fifth ground the Appellant contends that PW01 and PW08 had given contradictory evidence with regard to the colour of bag in which the Heroin was detected.

In the evidence of PW01 at pages 226-227 of the brief it is stated that a black coloured 'tulip' bag was recovered from the Appellant's trouser pocket. Upon further examination of the said bag a pink coloured bag with some brown coloured substance inside was recovered. As per page 245 of the brief, the said pink coloured bag was marked as P5 through this witness.

Even though PW08 had mentioned the colour of P5 as green as noted on page 313 of the brief, the defence had admitted the marking P1-P8 under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979. Hence, it is a futile exercise to bring an argument regarding colour of P5 under this ground.

In the final ground of appeal the counsel for the Appellant contends that the alteration made to the Government Analyst Report is highly irregular and that it creates a reasonable doubt in the prosecution case.

PW10 Mrs. Rajapaksha, the Senior Deputy Government Analyst who had submitted the report which had been marked as Z-1 stated that she has done a correction in open court when this case was heard first on 16/02/2009. According to her it was originally mentioned that Heroin (diacetylmorphine) was not identified in the black coloured plastic bag in the last paragraph of the report. As she wrongly entered the word **“not”** in her report, with the permission of the court the word **“not”** was cut off and her counter sign was placed at the end of the line. As she was the one who analysed the production and submitted the report and corrected it in open court, she only placed her counter signature in the report. (Emphasis added)

Upon perusal of the court proceedings, it is abundantly clear that the correction had been done to the Government Analyst Report in open court with the approval of the court. Hence it is incorrect to argue that this an irregular procedure. The court had given permission to alter the report after examining her personal notes. The defence was awarded the opportunity to cross examine her on her personal notes. As such relying on the Government Analyst Report would not occasion a failure of justice. This ground of appeal too is therefore, devoid of any merit.

Further the defence had admitted the inward journey of the production under Section 420 of the Code of Criminal Procedure Act.

We have scrutinised the evidence and the judgment of the Learned High Court Judge and are satisfied that the Appellant has been rightly convicted of the offence that has been levelled against him.

Due to the aforesaid reasons, we are not inclined to interfere with the judgment of the Learned High Court Judge dated 08/09/2017. Hence, we dismiss the appeal and affirm the conviction and the sentence imposed on the Appellant.

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

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL