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/480-482/2017

High Court of Colombo
Case No: HC/2184/2004

1. Nanayakkara Wasam Hiniduwa Liyanage Piyadasa
2. Jayasinghe Archchige Chaminda Kumara
3. Warnakulasuriyage Mahesh Suranga Perera

Accused-Appellants

vs.

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

Complainant-Respondent

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

COUNSEL : **Neranjan Jayasinghe for the 1st and 3rd Appellants.**
Amila Palliyage with Duminda De Alwis, R.Doralagoda and Savani Udugampola for the 2nd Appellant.
Azard Navavi DSG for the Respondent.

ARGUED ON : **28/01/2022**

DECIDED ON : **16/03/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred as the Appellants) were indicted by the Attorney General in the High Court of Colombo under Sections 54(A) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for the Possession and Trafficking respectively of 10.2 grams of Heroin (Diacetylmorphine) on 06th February 2003.

After trial, the Appellants were found guilty on both counts and the Learned High Court Judge of Colombo has imposed a sentence of life imprisonment on the 27th of October 2017.

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

The Learned Counsel for the Appellant informed this court that the Appellants have given consent to argue this matter in their absence due to the Covid 19 pandemic. During the argument they have been connected via Zoom platform from prison.

Six grounds of appeal have been raised on behalf of the 1st and 3rd Appellants. For the 2nd Appellant five grounds are raised. As 1st to 5th grounds of appeal raised by all Appellants are identical, the said grounds will be considered collectively in this judgment. As the fourth and sixth grounds of appeal raised by the 1st and 3rd Appellants are pertaining to the productions of this case the said two grounds also will be considered together. Hence, for all the Appellants the following appeal grounds will be considered in this appeal.

1. The entire case relies on uncorroborated evidence of witnesses and the trial judge has failed to consider the vital contradictions of the prosecution witnesses.
2. The learned trial judge has not correctly applied the test of probability and improbability in order to determine the creditworthiness of the witnesses.
3. The learned trial judge has failed to consider the legal principle of joint possession.
4. The learned trial judge has failed to consider the fact that the prosecution has failed to establish the production chain of the case.
5. The learned trial judge has not properly considered the dock statement.

Background of the case

On 05.02.2003 around 9.45 p.m. Excise Officer (EO)800 Dissanayake attached to The Excise Narcotic Bureau had received information from his personal informer about the plans for trafficking narcotics in the early hours on the following day. He has intimated this information to his superior officers to organize a raid on the following day.

PW01 Excise Inspector Sunil Gunatunga attached to the Excise Narcotic Bureau acting on this information organized the raid in this case. He had selected nine Excise Officers including PW02 EO 800 Dissanayake. On the following day at 6.30 a.m. the team left for Peliyagoda as per the information. Before leaving the bureau PW01 had examined and ensured that no officers had carried any suspicious items with them.

The team had reached the given location at 6.30 a.m. and except two officers, the rest had walked up to the suspect's house as per the information provided by the informant. As the house was surrounded by a parapet wall of different heights, the officers had entered the house by scaling over a wall.

When the officers entered the house, they had witnessed three people sitting around a glass pad facing each other and packeting something. When checked it was found that the persons seated around the table were engaged in packeting what appeared to be Heroin. The officers had observed that the 1st Appellant was packing the smaller packets in to a larger bag and the 2nd and 3rd Appellants were also engaged in packaging and wrapping the substance that was on the glass pad. Two blades which had been used to package Heroin were also recovered from the glass pad.

As the recovered substance reacted for Heroin, the officers had arrested all three Appellants and recovered all the items mentioned above from the place of incident. Upon further investigation a bundle of cash amounting to Rs.196150/= was recovered under a mattress from a room close to the place where they were seated. After taking the three Appellants into custody along

with all the items recovered, the group left the house around 8.00 a.m. In the meantime, others had gone to the house for further investigation and came to the place where the vehicles were parked around 9.00 a.m. When they reached the office, the time was around 9.45 a.m.

At the raid, the officers had recovered 1380 small packets. The substance in those packets were put in to one paper and weighed at the bureau. The suspected Heroin sample weighed 51.450 grams. Considerable time was spent to unwrap 1380 metal foils one by one. After sealing the production was kept under the custody of the Officer-in-Charge of the Excise Narcotic Bureau until it was taken to the Magistrate Court in Maligakanda.

PW1 Excise Inspector Sunil Gunatunga had vividly explained how the raid was planned and executed and identified the productions accurately. His evidence was very well corroborated by PW2 EO 800 Dissanayake. The productions were taken to Government Analyst by PW2 EO 800 Dissanayake on 13/02/2003.

The Retd. Government Analyst PW7 Mr. Sivaraja had given evidence, confirming that the Government Analyst Department had received the parcel pertaining to this case from PW2 on 13/02/2003.This witness further stated that upon analysis 10.2 grams of pure Heroin was found in the parcel.

After the close of the prosecution case, the defence was called and all Appellants had made dock statements and closed their cases.

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 inward journey of the production has not been disturbed at all-material points.

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 in 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. A prosecutor should take pains to ensure that the chain of events pertaining to the productions that had been taken charge from the Appellant from the time it was taken into custody to the time it reaches the Government Analyst and comes back to the court should be established".*

In **Witharana Doli Nona v. The Republic of Sri Lanka** CA/19/99 it was held that:

> *"It is a recognised 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. To prove this, the prosecution must prove all the links of the chain from the time it was taken from the possession of the accused appellant to the government Analyst's Department".*

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

> *"It is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the Analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the*

production till they reach the Analyst. Therefore, it is correct to state that the most important journey is the inward journey because the final analyst report will depend on that. The outward journey does not attract the same importance".

In **Mahasarukkalige Chandani v. Attorney General** CA/213/2009 decided on 30/06/2016 His Lordship Justice Malalgoda held that:

"As observed above, that Government Analyst Report which is the principal evidence in a drug offence entirely depends on the inward journey of the production chain and therefore, there is a duty cast on the prosecution to establish the inward journey of the production with reliable evidence. In this regard it is important to note that, calling a witness who was at a police reserve to establish he was functioning as reserve officer during a particular time is not sufficient to establish a production chain but, he has to give evidence confirming that the productions referred to the said case was properly received by him and properly handed over by him in good condition".

In **Albert Deny Kunja v. The Attorney General** CA/92/2007 decided on 06/07/2018 the court held that:

"However, upon perusal of the proceedings of the trial it is evident that the prosecution witness Jayamanne had handed over the production to one K.P.Chandrani at the Government Analyst Department and the Assistant Government Analyst had acquired production from said K.P. Chandrani....We find that one K.P.Chandrani had handled production at a subsequent stage of the inward journey and she had not been called to give evidence. Therefore, the prosecution had failed to establish the chain of custody of production beyond reasonable doubt".

In this case I am of the opinion that it is very appropriate to consider the second and the fourth grounds of appeal first as the Appellant contends that the learned trial judge has failed to consider that the prosecution has failed to establish the production chain of the case and the learned trial judge has not correctly applied the test of probability and improbability in order to determine the creditworthiness of the witnesses respectively.

As cited above, judicial precedents very forcefully endorse one unique point that the inward journey of the production in drug related offences should not be disturbed until it reaches for analysis. If any disturbance occurs during the inward journey, an adverse outcome with regards to the prosecution case is inevitable.

Further I consider it is very appropriate to mention what **Justice Mackenna in "Discretion", The Irish Jurist**, Vol.IX (new series), 1 at page10 has stated;

> *"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 the defendant's favour."*

In this case the Learned High Court Judge in his judgment at the 3rd paragraph of page 444 had made an adverse comment regarding the inward journey of the production in this case. According to the comment the Judge states:

> "It is evident that the production in this case was in the custody of the Officer-in-Charge from 7.00 p.m. on 06/02/2003 to 3.35 p.m. on 07/02/2003.But the Officer-in-Charge was neither mentioned in the indictment as a witness or called by the prosecution as a witness. Hence there is break in the outward journey up to it reaching the Government Analyst Department".

According to PW01 Gunatunga after the sealing process was over the production marked as P1-P8 were handed over to the Officer-in-Charge of the Excise Narcotic Bureau on 06/02/2003 at about 7.00 p.m. According to pages 137-138 of the proceedings, he had taken the said productions from the Officer-in-Charge on the following day at about 3.35 p.m. with seals intact. He had confirmed this position after going through his pocket note book.

At the same time, he confirms that the Appellants were produced along with the productions on 07/02/2003 to Maligakanda Magistrate Court at 7.25 p.m. It is impossible to produce suspects at 7.25 p.m. to court on 07/02/2003.As this position was not clarified during the trial it leaves an ambiguity of the evidence of PW1 and fails the test of probability.

Further, PW1 confirms that he handed over the production to the Officer-in-Charge of the Excise Narcotic Bureau. But the said Officer-in-Charge was not called to give evidence. Further his name was not mentioned in the indictment. Not calling the Officer-in-Charge to give evidence regarding the production and its status when he received and handed it back to PW1, is a fatal error which affects the root of the case. The above-mentioned ambiguity in PW1's evidence could have been solved had the Officer-in-Charge been called to give evidence by the prosecution. This break in the chain of custody, I consider it creates a serious doubt on the prosecution case.

Now I am going to consider the remaining appeal grounds advanced by the Appellants.

In the first ground of appeal the Appellants contend that the entire case relies on uncorroborated evidence of witnesses and that the trial judge has failed to consider the vital contradictions of the prosecution witnesses. The prosecution had called PW1 first and he had given evidence regarding the raid conducted in this case. To corroborate his evidence PW2 was called by

the prosecution. Hence, it is not correct to say that the entire case relies on uncorroborated evidence.

But contradictory evidence has been led regarding the height and the entry to the house by PW1 and PW2. According to PW1 the height of the surrounding wall is between 3-4 feet and they entered the premises by jumping over the wall. He denied the suggestion that the back wall is 10 feet in height.

But, PW2 in his evidence has said that the height of the back wall of the house is about 10 feet and it is difficult to jump over the wall without a ladder. As witnesses in this case had given evidence as per their notes, contradiction with regard to the height of the wall cannot occur in this case. I conclude that this contradiction would go to the root of the case and not awarding the benefit of the doubt to the Appellants in such a case is unjustifiable.

In **Mahasarukkalige Chandani v. Attorney General** (Supra)the court further held that:

> *"Since the court is not inclined to act on the evidence placed by the prosecution in establishing the inward journey as safe, it is not necessary for this court to consider the other grounds of the appeal raised by the Learned counsel during the argument before us".*

As the grounds of appeal considered above have merits which certainly disturb the judgment of the Learned High Court Judge, it is not necessary to address the remaining grounds in this appeal.

In this case the prosecution has failed to establish the custody of the production chain beyond reasonable doubt. As this is a substantial fact, this ground alone is sufficient to vitiate the conviction in this case. Further the

failure of the witnesses to pass the test of probability and the vital contradiction highlighted are the other two factors which support a judgment in favour of the defence.

Due to aforesaid reasons, we set aside the conviction and sentence imposed by the Learned High Court Judge of Colombo dated 27/10/2017 on the Appellants. Therefore, they are acquitted from both charges.

Accordingly, the appeal is allowed.

The Registrar is directed to send a copy of this judgment to 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