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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0066/2015

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Kandy

Case No: 239/2011

Chet Bahadur Thapa

ACCUSED

AND NOW BETWEEN

Chet Bahadur Thapa

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: Sampath B Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Tenny Fernando for the Accused-Appellant
	: Rohantha Abeysuriya, ASG for the Respondent
Argued on	: 31-01-2022
Written Submissions	: 10-10-2018 (By the Accused-Appellant)
	: 10-12-2018 (By the Respondent)
Decided on	: 21-03-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Kandy, where he was sentenced to death.

The appellant was indicted before the High Court of Kandy on two counts of possession and trafficking of 79.84 grams of diacetylmorphine commonly known as Heroin on 9th September 2010, punishable in terms of sections 54(d) and 54(b) of the Poisons, Opium, and Dangerous Drugs Ordinance as amended by Act No 13 of 1984.

After trial, the appellant was found guilty for the possession of Heroin, which was the first count against him and sentenced as above. He was acquitted of the charge of trafficking of heroin, which was the 2nd count preferred against him.

At the hearing of the appeal, although several other grounds of appeal have been urged in the written submissions, the learned Counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

(1) The learned High Court Judge failed to consider the contradictions *inter se* and *per se* of the witnesses for the prosecution, which are contradictions that goes into the root of the case.

(2) The dock statement of the appellant was not considered in its correct perspective.

(3) The improbability of the prosecution version of events was not considered correctly.

(4) The learned High Court Judge's judgment is not in conformity with section 283 of the Code of Criminal Procedure Act, hence, not a valid judgment.

Facts in brief: -

On an information provided by an informant, Inspector of Police Rangajeewa (PW-01) of the Police Narcotics Bureau (PNB) along with other officers who accompanied him lay in wait near the front entrance of the Queens Hotel in Kandy. The information he received was that a Nepalese national is bringing a white heroin parcel to a place near the Queens Hotel between 14.00 hours and 16.00 hours and the informant can show him to the police.

After instructing the other officers to wait in the vehicle nearby, PW-01 along with PW-02 and the informant waited nearly thirty minutes in front of the Queens Hotel expecting the arrival of the suspect. After identifying the suspect who came from the lake side of the road and crossed the road towards the Queens Hotel side, he was stopped. At that time, he was wearing a white-coloured short sleeved shirt and a gray-coloured trouser and was holding a black bag under his armpit. After identifying who he is and upon inspection of the bag he was carrying, the PW-01 has found a large number of capsules like white-coloured balls.

Upon further inspecting the balls he has discovered an off white-coloured powder inside, which he identified as heroin through his long years of experience as an officer well acquainted with narcotics.

Later, the appellant was identified and arrested at around 1530 hours and taken to the hotel where he was staying in Kandy. No other substances were found in the room where he was staying. PW-01 has counted 60 capsules in the possession of the appellant. After the inspection of the hotel room, the police party led by PW-01 has returned to PNB in Colombo with the appellant while having the heroin found under his possession. Upon weighing at the PNB, it has been found that the total weight of the substance was 386 grams and 450 milligrams.

PW-02 was the officer who accompanied PW-01 at the time the appellant was arrested and he has well explained what happened at the time and the procedure followed by the PW-01.

PW-04 was the Assistant Government Analyst who tested the off white-coloured substance received through the Court. Marking the Report of the Government Analyst dated 29-04-2011 in that regard as P-41, She has confirmed that the substance tested had a pure heroin quantity of 79.84 grams.

After leading the evidence of the manager of the hotel (PW-09) where the appellant was staying in Kandy and the relevant witnesses to prove the chain of custody of the productions, the prosecution's case has been closed.

When the appellant was asked to present his defence, he has chosen to make a dock statement and had opted not to give evidence under oath or to call any witnesses on behalf of him.

Making his dock statement in English he has stated that he came to Kandy as a Buddhist pilgrim and was arrested at the Kandy City Centre shopping complex, taken to the hotel where he was staying and thereafter brought to Colombo. After keeping him for two days in Colombo he was again taken to Kandy and brought back to Colombo where he was forced to sign a blank white coloured paper. He has alleged that he was not allowed to meet a lawyer or to communicate with anybody through the phone while in the police custody until

he was produced in Court. He has denied that he had in his possession any illegal substance nor he brought any such thing into the country and has claimed that he is a victim and not guilty of the charges levelled against him.

1st, 2nd, and the 3rd Grounds of Appeal: -

As the above three grounds of appeal are interrelated, I will now proceed to consider them together.

The learned Counsel for the appellant contended that the following segments of evidence of PW-01 and PW-02 are contradictory;

(a) As to the time of arrest, PW-01 in his evidence has stated that the arrest was made at around 1530 hours and according to PW-02 the arrest was made at around 1500 hours. It was also pointed out that PW-02 has also stated that they went near the Queens hotel entrance at around 1330 hours and waited about half an hour before the arrest was made (At page 110 of the appeal brief). Which was a major contradiction as to the time of arrest.

(b) PW-01 has never said in his evidence that he carried a knife used to pierce one of the capsules among his instruments taken for the raid, then how can he possess such a knife unless it was untrue.

(c) According to the evidence, the other members of the police team who accompanied them have taken 30 minutes to reach the place of arrest once they were informed to come from the place where they were stationed. If the purpose of their presence was to give assistance if needed, this evidence was highly improbable.

(d) Police witnesses said that the productions were sealed at the hotel room and a statement of the hotel manager was recorded. However, the manger in her evidence has stated that no statement was recorded

and two days after the arrest also some officers came and yet no statement was recorded.

(e) PW-01 admitted that he made several alterations to his notes he made in his crime note pad, but has failed to countersign the alterations.

(f) PW-01 has stated that the 60 heroin balls were counted for the first time in the room of the appellant, but when confronted with his previous evidence where he has stated that the count was done before the arrest, it was his position that it was a mistake. However, PW-02 has stated that the count was taken at the point of arrest.

(g) The way the evidence has been given, there is doubt as to whether the items taken were in the form of balls or capsules.

(h) Although PW-01 says that he questioned the appellant at the point of arrest, there are no notes to that effect.

(i) Although PW-01 in his evidence has stated that when inspected, the capsule like balls he felt the faeces smell in them, he has failed to make any notes of that fact, and had there was such a smell, the productions should have been sent to the Government Analyst to check on that, which would have been conclusive evidence.

Apart from the above, it was the contention of the learned Counsel for the appellant that at page 81 of the judgment (page 929 of the brief) the learned trial judge has commented that the appellant has brought the 60 capsules concealed in his stomach by swallowing the same and has passed it with his faeces, a fact not supported by evidence, hence a misdirection which vitiate the conviction.

When it comes to the dock statement of the appellant, it was the argument of the learned Counsel that the learned High Court Judge has only considered the part of the statement where the appellant said that he came to Kandy as a

Buddhist pilgrim and has wrongly rejected it without considering any material relevant to the defence of the appellant. He contended that this failure on the part of the learned High Court Judge has caused prejudice to the appellant.

It was the contention of the learned Additional Solicitor General for the Respondent that the appellant was arrested within 24 hours of his arrival in Sri Lanka and there was no reason for the officials of PNB to arrest a foreigner in Kandy without a valid reason. It was his view that although there are some differences in the evidence of PW-01 and PW-02 with regard to some factual matters, they do not go into the root of the matter. He pointed out that when the evidence taken as a whole, the prosecution has proved the case beyond reasonable doubt against the appellant.

This being a criminal prosecution the onus is always with the prosecution to prove the charge or the charges against the appellant beyond reasonable doubt. In a criminal matter an accused has to prove nothing. When analyzing the evidence, a trial judge has to always bear in mind that the presumption of innocence is always with an accused.

It was held in the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148** that;

> *"As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it's sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt."*

The learned counsel for the appellant brought to the notice of the Court several instances of the evidence of PW-01 and PW-02 who were the main witnesses for the prosecution as stated before, which he termed as major contradictions which should have been considered in favor of the appellant.

In the case of **The Attorney General Vs. Sanadnam Pitchi Theresa (2011) 2 SLR 292 at page 303, Shirani Tilakawardane,J.** stated:

> *"…that whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature and tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies, which do not go to the root of the matter and assail the basic version of the witness, cannot be given too much importance.* ***(Vide-Bogm Bhai Hirji Bhai Vs. State of Gujarat, AIR (1983) SC 753)"***

With the above-mentioned legal principles in mind, I will now consider whether the earlier cited alleged inconsistencies and contradictions are relevant to create a doubt with regard to the prosecution version of events and the guilt of the appellant to the charges preferred against him.

It is correct to say that there is a slight discrepancy as to the time of arrest in the evidence of the two arresting officers. However, the appellant in his dock statement has admitted that he was arrested and taken to the hotel he was staying. The only difference being that it was the stand of the appellant that he was arrested in the KCC Shopping Centre, which is a place of about 100 meters away from the place where the witnesses say that the arrest was made.

As observed correctly by the learned trial judge, the appellant has not challenged the date of the arrest.

I find that the evidence of PW-09 who was the manager of the hotel concerned is of paramount importance in this regard. She, in her evidence has confirmed that the appellant was brought to the hotel by narcotic officials around 4.30, 5.00 or 5.30 in the evening of the 9th of September 2010, which was also the day he arrived at the hotel. It was also her evidence that the officials informed her that he was arrested with drugs at the lake round. It was her evidence that

the room the appellant stayed was booked by a local who appeared to be that he did not know the name of the person who was going to occupy the room. I find no reason whatsoever for the hotel manager to state something that did not happen, as she was not an interested witness.

This goes on to show that the witnesses were speaking the truth as to the arrest of the appellant and the subsequent events.

Under the circumstances, I find that the alleged delay in the backup police team to reach the place of arrest or the alleged time difference as to the time of arrest are not matters that dent the credibility of the witnesses.

The PW-01 may not have made notes that he questioned that appellant at the place of arrest. But the fact that after the arrest the appellant was taken to the hotel where he was staying shows that in fact the appellant has been questioned, as it was not within the knowledge of the officers of PNB where the appellant was staying in Kandy.

As an experienced officer of the PNB, there wouldn't have been any difficulty for PW-01 to conclude as to the method of carry, because of the way the drugs were found packed in ball like capsules. There was no need for the substance to be sent to the Government Analyst to substantiate the possible method of carry as the appellant was detected with the drugs. Similarly, I find that where the capsules were counted for the first time is not a matter that affect the credibility of the witnesses for the prosecution.

PW-01 in his evidence has admitted that he made several alterations to his crime note book by cutting what was written by a single line before making the alterations so that it can be visible. Although one can term that as a failure to follow the rules to the letter due to the failure of the witness to countersign the alterations, it does not mean that the witness has changed his notes to fix the appellant, as there is no basis to come to such a conclusion.

For the reasons adduced as above, I am of the view that when taken cumulatively, the alleged discrepancies do not lower the trustworthiness and the credibility of the witnesses for the prosecution.

I am in no position to agree with the contention that the learned High Court Judge has failed to consider the appellant's dock statement in the correct perspective.

The defendant has only chosen to make a dock statement when he was afforded the opportunity of presenting his defence.

It is the accepted law in this country that even a dock statement of an accused can be considered as evidence subject to the infirmities that it was not made under oath and not subjected to the test of cross examination. In my view, such a statement is of little value as against the evidence of witnesses who were subjected to a lengthy cross examination which failed to breach the test of credibility.

In **Queen Vs. Kularatne (1968) 71 NLR 529,** it was held that while jurors must be informed that such a statement must be looked upon as evidence, subject, however, to the infirmities that the accused statement is not made under oath and not subject to cross examination.

Held further;

1. If the dock statement is believed it must be acted upon.
2. If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and;
3. It must not be used against another accused.

As observed rightly by the learned trial judge, the claim made by the appellant in his dock statement has no basis. It has been claimed that after the arrest,

he was taken to several places over several days before being produced before the Magistrate.

However, the case record bear testimony that the appellant has been produced before the Magistrate of Kandy within the stipulated time frame after the arrest on 10th September 2010 at 4.00 pm. After producing him before the Magistrate a detention order has been obtained valid until 15-09-2010 to detain him at the PNB in Colombo for further investigations. The order has been duly obtained under the provisions of section 82(3) of the **Poisons, Opium, and Dangerous Drugs Ordinance** (The Ordinance) .

This explains the statement of the appellant that he was detained in the custody of the police for several days after the arrest, and was taken to several places. However, I find that it has been done legally under the powers vested with police in situations like this, after having obtained the relevant authorization as provided for in the Ordinance.

I find that the learned trial judge has specifically rejected the claim made by the appellant in his dock statement that he came on a pilgrimage to Kandy as a Buddhist to worship the temple of the sacred tooth relic of the Lord Buddha as there was no evidence to support such a claim and since he has failed to put that proposition to the witnesses when they gave evidence. I find no basis to consider that finding as a matter which amounts to not considering the dock statement in its correct perspective.

I find that the learned trial judge has well considered the dock statement, given the importance that can be attached to a dock statement before deciding that it creates no doubt as to the case of the prosecution.

For the reasons adduced, I find no merit in the considered grounds of appeal.

4th Ground of Appeal: -

It was the argument of the learned Counsel for the appellant that the judgment of the learned High Court Judge is not in conformity with the provisions of section 283(1) of the Code of Criminal Procedure Act, as the learned High Court Judge has failed to properly analyze the evidence other than summarizing the evidence in detail. He also points to the misdirection of facts by the learned trial judge as mentioned earlier with regard to his conclusion that the drugs discovered has been brought by the appellant by swallowing the capsules.

Section 283(1) and (2) which provided for what should contain in a judgment reads as follows;

> **(1) The judgment shall be written by the judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point of points for determination, the decision thereon, and the reasons for the decision.**
>
> **(2) It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.**

Although the learned trial judge has summarized the evidence in great detail in his judgment, that is not a reason to find fault with a trial judge, as each judge has his or her own style of writing a judgment.

After summarizing the evidence of the prosecution as well as the dock statement of the appellant, the learned trial judge, at page 73 of his judgment (Page 921 of the brief) has commenced the analyzing of the evidence being well aware of the task before him. He has concluded that he has to determine that whether the crime has been committed in the manner the prosecution presented its case and whether it can be concluded that it was the appellant who committed the alleged crime.

I find that this was the correct approach in analyzing evidence in a criminal case. Being a well experienced judge, I find that the learned High Court Judge was well possessed of the legal principles that he should be mindful in a matter of this nature.

In the case of **James Silva Vs. The Republic of Sri Lanka (1980)2 SLR 167,** it was stated that;

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and asking himself, whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge on not guilty."*

The learned trial judge has considered the evidence as to the arrival of the appellant in Sri Lanka and reaching Kandy and the way his hotel reservation had been made. The fact that the appellant was out of the hotel on the day of the incident and the fact that he was taken to the hotel by the police officials has been considered to conclude that the factual matters surrounding the arrest of the appellant have been proved. The learned trial judge has considered the evidence as to the actual detection of the heroin in the possession of the appellant and has come to a firm finding with reasons that the evidence in that regard is credible and trustworthy. I find no reasons to disagree with his findings. The evidence as to the chain of productions and the evidence of the Government Analyst who identified a pure quantity of 79.84 grams of diacetylmorphine commonly known as heroin has been considered in the judgment before considering the defence of the appellant. It clearly appears that by doing so the learned trial judge has considered whether the reasonable doubt as to the case of the prosecution.

I find that the learned High Court Judge has come to the finding that the appellant is guilty only for the charge of possession of heroin and not for the trafficking with good reasoning.

I am of the view that the learned High Court Judge was misdirected as to the facts when he determined that the appellant has brought the quantity of heroin found in his possession concealing them in his stomach, and recovered it by discharging it with his faeces, when there was no such evidence to support such a contention.

However, for that matter to be considered relevant to have the effect of vitiating the judgment, it should have the effect of causing material prejudice to the appellant.

The proviso of Article 138 of the Constitution of the Republic, which confers the appellate jurisdiction on the Court of Appeal reads as follows;

> **"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

In **Mannar Mannan Vs. The Republic of Sri Lanka (1990) 1 SLR 280**

> **Held:**
>
> *The enacting part of sub-section (1) of section 334 mandates the Court to allow the appeal where-*
>
> *(a) The verdict is unreasonable or cannot be supported having regard to the evidence; or*
>
> *(b) There is a wrong decision on any question of law; or*
>
> *(c) There is a miscarriage of justice on any ground.*
>
> *The proviso vests discretion in the Court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant for the view*

that the Court is precluded from applying the proviso in any particular category of wrong decision or misdirection on questions of law as for instance, burden of proof. There is no hard and fast rule that the proviso is inapplicable where there is non-direction amounting to misdirection in regard to the burden of proof. What is important is that each case falls to be decided on the consideration of

(a) The nature and intent of the non-direction amounting to a misdirection on the burden of proof

(b) All facts and circumstances of the case, the quality of evidence adduced and the weight to be attached to it.

In the case of **Lafeer Vs. Queen 74 NLR 246,** H.N.G.Fernando, C.J. stated;

"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."

Both the above mentioned are cases where the trial at the High Court was before a jury, and decided in appeal under section 334 of the Code of Criminal Procedure Act, which has similar provisions to Article 138 of the Constitution in the section itself.

I find that the principles discussed in the said appeals are of equal relevance to a determination of an appeal under the provisions of section 335 of the Code of Criminal Procedure Act of a trial held without a jury before the High Court in view of the Proviso to Article 138 of the Constitution.

It is my considered view that the contended misdirection has not prejudiced the substantial rights of the appellant nor has it occasioned a failure of justice, as

even without such a misdirection, the appellant would in any way found guilty on the evidence proven beyond reasonable doubt.

For the reasons considered as above, I find no merit in the 4th ground of appeal either.

The appeal therefore is dismissed, as it is devoid of merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal

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