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/0116/2018

High Court of Colombo
Case No: HC/6913/2013

Sandar Thadeeswaran

Accused-Appellant

vs.

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

Complainant-Respondent

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

COUNSEL : **Rienzie Arseculeratne, P.C. with Eranga Yahandawala for the Appellant.**
Suharshi Herath, SSC for the Respondent.

ARGUED ON : **11/02/2022**

DECIDED ON : **29/03/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Colombo 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 of 8.93 grams of Heroin on 06th September 2011.

After trial, the Appellant was found guilty on the 2nd count and the Learned High Court Judge of Colombo has imposed life imprisonment on the said count on 05/04/2018. He was acquitted from the 1st count.

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. The Learned Trial Judge failed to consider the defence taken up by the Accused Appellant which is that heroin was in the possession of Mohamed Murshid Anwer and that he was released after his wife and others saw him at the PNB for alleged investigations.

2. The Learned High Court Judge misdirected himself on the law by allowing PW9 to base his testimony before Court on the notes made by PW4 without satisfying himself that the provisions of Section 159 of the Evidence Ordinance have been complied with.

3. The Learned Trial Judge who delivered the judgement misdirected himself on the law by adopting the evidence led before his predecessor under Section 48 of the Judicature Act No.2 of 1978, when the main witnesses for the prosecution had already testified and therefore knowing very well that he will be bereft of the opportunity of applying the legally recognised yardsticks of the law such as demeanour and deportment to assess the evidence of the main witnesses who testified on behalf of the prosecution.

4. The Learned Trial Judge misdirected himself on the law by using the testimony of PW9 to corroborate the testimony of PW1.

Background of the case.

On 06/09/2011 SI Manoj Gayantha attached to the Police Narcotic Bureau had received information from his private informant about the trafficking of Heroin by a person called Sandar Thadeeswaran. The informant had further revealed that the Appellant would show up near the Ruby Cinema Hall, Maradana in a three-wheeler with registration number QB 3133. Acting on that information PW1 had arranged a team comprising 07 officers attached to Police Narcotic Bureau and left the bureau at 16:50 hours. Before their departure the Officer-in-Charge of the Police Narcotic Bureau had been properly briefed and had obtained necessary instructions. At the same time all the officers who had been selected for the raid were fully searched to confirm that the said officers were not carrying any substance with them. The team had left the bureau in a van bearing No. HG 2727.

Having reached Jayantha Weerasekera Mawatha the vehicle was stopped 75 meters before the Ruby Cinema Hall. The informant had arrived there around 17:35 hours and met the PW1. The above-mentioned three-wheeler had come there at about 18:40 hours. Then PW1 and PW4 PC Asela had stopped the said three-wheeler and checked the persons travelling in the vehicle. The Appellant was in the driving seat while another person was seated in the rear seat. Upon checking in the right-side trouser pocket of the Appellant PW1 had found a grocery bag containing some white coloured substance. As it reacted for Heroin the Appellant was arrested immediately. The passenger identified as Mohammed Murshid Anwer was also subjected to a body check by PW4 but nothing was recovered from him. Although nothing had been recovered from Mahammed Murshid Anwer, he too had been arrested and both had been taken to the Police Narcotic Bureau around 20:45 hours. Before arriving at the bureau, the police team had gone to Maligawatta to check the boarding place of the Appellant but nothing was found there.

The substance contained in the parcel was weighed in front of the Appellant at the Police Narcotic Bureau and the weight had been recorded as 31.2 grams. After parcelling was over, the productions were kept in the personal locker of PW1 until it was handed over to PW7 IP Rajakaruna on 08/09/2011. The said production was marked as PR No.35/11. The three-wheeler was also taken in to custody and was handed over to the reserve police officer PC 50145 Priyankara under PR No.36/11.

PW7 IP Rajakaruna had handed over the production to the Government Analyst Department on 11/09/2011. According to the Government Analyst Report 8.93 grams of Heroin (diacetylmorphine) had been detected in the parcel. After close of the prosecution case, the defence was called and the Appellant had made a lengthy dock statement and closed his case. In his dock statement the Appellant had stated that nothing was recovered from him on that day. The recovery was done from Mohamed Murshid Anwer who had hired his three-wheeler to go up to Ruby Cinema Hall that day. He

further said that the family members of the Mohamed Murshid had visited the Police Narcotic Bureau while they were detained there for about seven days. On the seventh day Mohamed Murshid Anwer was discharged after producing him before Magistrate Court of Maligakanda. Thereafter only he had come to know that the Heroin detected on Mohamed Murshid Anwer had been introduced as if it was detected on him.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person and this burden never shifts. Hence an accused person has no burden to prove his case unless he pleads a general or a special exception in the Penal Code.

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...."*

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

> *"the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice".*

In the first ground of appeal the Appellant contends that the Learned Trial Judge had failed to consider that the defence taken up by the Accused Appellant that the heroin was in the possession of Mohamed Murshid Anwer

and he was released after his wife and others saw him at the PNB and thereafter he was taken out of the PNB for alleged investigations.

It is the contention of the Appellant that the alleged drug parcel was recovered from Mohamed Murshid Anwer and both had been arrested and detained under a detention order of the court. According to PW1 Mohamed Murshid Anwer was arrested on a charge of aiding and abetting along with the Appellant and detained at the Police Narcotic Bureau under the court order.

ඌ අසේල නිලධාරියා නවත්වා ගත්ත පුද්ගලයා මා පරීක්ෂාව සිදු කලා. ඒ පරීක්ෂාවේ දී ඔහු සතුව නීතිවිරෝධී කිසිම ද්‍රව්‍යක් තිබුනේ නැහැ. නමුත් ඔවුන්ගේ ප්‍රශ්න කිරීම් වලින් අනාවරණය වුණා මොවුන් දෙදෙනා එක්ව තමයි මත්ද්‍රව්‍ය අරන් පැමිණියේ කියලා. ඒ හින්දා මත්ද්‍රව්‍ය ජාවාරම් කිරීමේ ආධාර කිරීමේ වරදට 159/සී.3, ඇපල්වත්ත, මාලිගාවත්ත පෙදෙස, කොළඹ 10 පදිංචි මොහොමඩ් අන්වර් මොහොමඩ් කියන පුද්ගලයා පැය 18.50 ට ජයන්ත වීරසේකර මාවතේ ඕ.බී. සිනමා ශාලාව ඉදිරිපිටදී අත්අඩංගුවට ගත්තා. Page 78 of the brief.

Even though Mohamed Murshid Anwer was arrested on the charge of aiding and abetting along with the Appellant, the prosecution led no evidence as to what happened to him when the indictment was only preferred against the Appellant. PW1 in his evidence stated that as the investigation revealed that both the Appellant and Mohamed Murshid Anwer had been collectively involved in drug trafficking, only Mohamed Murshid Anwer was taken to a house addressed as No.139, Walpola, Batuwatte, Ragama in search of a person called Charith Asanka. Mahamed Murshid Anwer was also taken to Maradana, Rajagiriya, Malabe, Kadawatha and Biyagama for further investigations. Even the further investigation was related to this case and he was taken to several places, the PW1 had not been involved in the further investigations conducted against Mohamed Murshid Anwer. This is very strange conduct on the part of PW1.

Further not leading evidence pertaining to the exclusion of Mohamed Murshid Anwer who was arrested along with the Appellant on the charge of

aiding and abetting the Appellant, I consider it a very serious lapse occasioned on the part of the prosecution.

As the 2nd and 4th appeal grounds advanced by the Appellant pertain to the leading of evidence by PW9 in the trial, the said grounds will be considered in conjunction in this appeal.

PW1 has selected five officers from the bureau for the raid and they have been lined up as witnesses PW2-PW6 in the indictment. During the trial it was informed that PW4 Asela who had gone with PW1 to arrest the Appellant and Mohamed Murshid Anwer, had deserted the Police Narcotic Bureau due to unknown reasons. To corroborate PW1's evidence the prosecution had called the Officer-in Charge of the Raiding Unit of the Police Narcotic Bureau to give evidence upon the notes of PW4. To call the Officer-in-Charge of the Raiding Unit, The State Counsel made the application under Section 32(2) of the Evidence Ordinance. He has been named as PW9 in the indictment.

In the cross examination of PW9 the defence had highlighted that certain important materials which are essential to corroborate the evidence of PW1 had not been found in the notes of PW4. As a result, the evidence given by PW1 stands uncorroborated on material points.

Further the prosecution without calling the other officers who had gone for the raid, had called the Officer-in-Charge of the Raiding Unit of the Police Narcotic Bureau to give evidence upon the notes of the PW4. This is an unusual practice, which will certainly lead to a casting of doubt on the prosecution evidence.

Now I consider whether the conviction in this case can be upheld considering only the evidence of PW1. In support of this I consider the case of **Devundarage Nihal v. AG** SC. Appeal No.15 of 2010 decided on 12/05/201. In this case Sureschandra J held that:

> *"Therefore, it is quite clear that unlike in the case where an accomplice or a decoy is concerned in any other case there is no requirement in law*

that the evidence of a Police Officer who conducts an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars. However, caution must be exercised by a trial judge in evaluating such evidence and arriving at a conclusion against an offender. It cannot be stated as a rule of thumb that the evidence of a police witness in a drug related offence must be corroborated in material particulars where police officers are the key witnesses."

In the case of **Chacko Alias Aniyan Kunju & others v. State of Kerala**- [2004] INSC 87 (21st January 2004) held that:

"The provision clearly states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of a single witness if he is wholly reliable. Corroboration may be necessary when he is partially reliable. If the evidence is unblemished and beyond all possible criticism and the Court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained".

In this case PW1 is the key witness in this case. If his evidence is clear, cogent and unambiguous the court could without any hesitation rely on his evidence and convict the Appellant in the absence of any corroboration. But as discussed above the evidence given by PW1, in my view, has not passed the probability test. It is tainted with much ambiguity and uncertainty which definitely affect the root of the case.

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

"In considering whether evidence given by a witness should be accepted or not, the court has to examine whether he is, in fact, an interested witness and to inquire 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 the defendant's favour."*

In the case of **Sinniah Kalidasa v. The Hon. Attorney General** CA/ 128/2005 BASL Criminal Law 2010 Vol.111 page 31 in which Justice Ranjith Silva quotes E.R.S.R. Coomaraswamy in the Law of Evidence Volume 2 Book 1 at page 395 dealing with how police evidence in bribery cases should be considered;

> *"In the great many cases, the police are, as a rule unreliable witnesses. It is always in their interests to secure a conviction in the hope of getting a reward. Such evidence ought, therefore, to be received with great caution and should be closely scrutinized"*

Ranjith Silva J states;

> *"By the same token the same principles should apply and guide the judges in the assessment of the evidence of excise officers in narcotic cases. Judges must not rely on a non- existent presumption of truthfulness and regularity as regards the evidence of such trained police or excise officers".*

Guided by the above cited judgments and writing in this case the Learned High Court Judge should not have relied on PW1's evidence in this case. Hence this appeal ground has a very serious impact on the prosecution case.

Further even though the dock statement of an accused has less evidential value our courts never hesitated to accept the same when it creates a doubt on the prosecution case. In this case I consider it is very important to consider the dock statement of the Appellant.

Right to make an unsworn dock statement is recognized in several cases in our jurisdiction. Few of them are mentioned bellow.

In **Queen v. Buddharakkita Thero and others** 63 NLR 433 the court held that:

> *"the right of an accused person to make an unsworn statement from the dock is recognised in our law. That right would be of no value unless such a statement is treated as evidence on behalf of the accused, subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination."*

In **Kathubdeen v. Republic of Sri Lanka** [1998] 3 SLR 107 the court held that:

> *"It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt."*

In his dock statement the Appellant had stated that on the date of arrest his three-wheeler was hired by Mohamed Murshid Anwer to go towards Ruby Cinema Hall in Maligawatte. At that time Mohamed Murshid Anwer's daughter aged two and half years also came with them. When Mohamed Murshid Anwer directed the three-wheeler to be halted near the Ruby Theatre, two persons who introduced themselves as police officers had got in from the either side of the three-wheeler and demanded goods from Mohamed Murshid Anwer after assaulting him. Then Mohamed Mursid Anwer was taken out from the three-wheeler and searched. Thereafter he had heard the police officers saying that goods were found. As Mohamed Murshid Anwer's daughter started to cry, the police officers got into his three-wheeler along with Mohamed Murshid Anwer and went to his house to drop his daughter. The appellant was shifted into a police vehicle at that time. The police vehicle had proceeded to a lonely place on the Lake House

Road and the officers had inquired about his acquaintance with Mohamed Murshid Anwer. He had stated that it was the first time he went on a hire with Mohamed Murshid Anwer on that day. At that time the other police officers had arrived after dropping Mohamed Murshid Anwer's daughter. Both had been taken to Armour Street but only Mohamed Murshid Anwer had been made to accompany the officers on the house searches thereafter. Therefore, the appellant was not taken for the house searches at that time.

Thereafter they had been taken to Police Narcotic Bureau, his signature obtained on a white coloured paper and had been detained there for seven days in two separate cells. Mohamed Murshid Anwer's wife and family members had visited him during his detention almost every day and had maintained friendly chats with the officers at Police Narcotic Bureau. During this time Mohamed Murshid Anwer was taken out several times for further investigation. He was neither taken along with Mohamed Murshid Anwer nor has he been allowed visits from his family members. After his detention period was over, he was produced before the Magistrate and remanded for this case. After that only had he come to know that Mohamed Murshid Anwer had been discharged form this case. According to him he was remanded instead of Mohamed Murshid Anwer.

As discussed above, the conduct of PW1 after the arrest of the Appellant and Mohamed Murshid Anwer was very suspicious. Both had been taken to and detained at the Police Narcotic Bureau. But only the Appellant was taken to various places for further investigation not by the PW1 and his team but by a new team of the Police Narcotic Bureau. This position was admitted by PW1 in his evidence. The Appellant had never been taken out for the further investigations. Even though, as claimed by the police the Heroin pertaining to this case was detected from the Appellant, further investigation was not done as to clarify the method of transfer of Heroin to the Appellant. This lethargic conduct of the police creates a serious doubt in the prosecution case.

The third ground of appeal is devoid of any merit as the counsel for the Appellant on 24/05/2017 had expressed his willingness to admit the proceedings led before the former High Court Judge under Section 48 of the Judicature Act when the Learned High Court Judge continued the trial.

In this case evidence presented by the prosecution maintained complete silence regarding the arrest and discharge of Mohamed Murshid Anwer. Prosecution witnesses have deviated from their routine practice when providing evidence during trial. Hence a reasonable doubt has been created on the prosecution case. Hence, I consider this to be an appropriate case to award the benefit of the doubt to the Appellant.

Due to aforesaid reasons, I set aside the conviction and sentence imposed by the Learned High Court Judge of Colombo dated 05/04/2018 on the Appellant. Therefore, he is acquitted from the second charge.

Accordingly, the appeal is allowed.

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