

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal made in terms of Article 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

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

Court of Appeal Case No.

HCC/003/19

High Court of Colombo

Case No. 7522/14

Complainant

Vs.

Thenuwara Anhendrige Sanjeewa
Udaya Kumara

Accused

AND NOW BETWEEN

Thenuwara Anhendrige Sanjeewa
Udaya Kumara

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**
WICKUM A. KALUARACHCHI, J

COUNSEL : Neranjan Jayasinghe for the Accused-Appellant
Suharshi Herath, SSC for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 30.08.2019 (On behalf of the Accused-Appellant)
23.09.2019 (On behalf of the Respondent)

ARGUED ON : 04.03.2022

DECIDED ON : 05.04.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was convicted for the offences punishable under Section 54A(b) and 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended, for trafficking and possessing 24.89 grams of Heroin and was sentenced to death by the learned High Court Judge of Colombo. This appeal has been preferred against the said conviction and the sentence.

The learned Counsel for the appellant and the learned Senior State Counsel for the respondent made oral submissions at the hearing of this appeal. Prior to the hearing, written submissions have been filed on behalf of both parties.

Prosecution case may be briefly summarized as follows:

On 20.05.2013, a team of police officers of the Police Narcotics Bureau reached the “Food City” supermarket at Maradana around 6.45 a.m.

They met the informant who had given information to PW 6. Leaving the rest of the team near the supermarket, PW 1 and PW 6 together with the informant left in the informant's three-wheeler towards Jalashaya Road. When the accused-appellant was coming, the informant was sent away and two police officers went close to the appellant, searched him and found a parcel of Heroin in his right trouser pocket. Thereafter, police officers went to search the appellant's house but found nothing.

When the defence was called by the learned High Court Judge, the appellant made a dock statement. Apart from that, the wife of the appellant, an officer from the Surveyor General Department and the Grama Niladari of the area were called to give evidence on behalf of the appellant.

Seven grounds of appeal have been set out in the written submission of the appellant. The 1st ground is that the evidence of the main prosecution witness, PW 1 is untrustworthy and contradictory. The 2nd and 4th grounds are that the learned High Court Judge had shifted the burden of proof to the accused and had come to the conclusion on assumptions. Grounds 3, 6 and 7 are based on the fact that defence evidence has not been properly analyzed. The 5th ground is that the learned Judge had arrived at a conclusion that the defence had not challenged the prosecution evidence whereas the defence had clearly challenged the evidence of PW 1 and PW 6.

I agree with the learned counsel for the appellant that some observations of the learned High Court Judge are not perfectly correct in law. The learned Judge has stated in his judgment that apart from presenting the defence version, it had not been even suggested on behalf of the appellant, a reason for the police officers to falsely implicate the appellant for a serious charge like this. Also, the learned Judge observed that the appellant had failed to prove that the notes of the police officers are false. It is my view that the learned Judge should

not have made these observations because our law does not expect from an accused in a criminal case to prove anything. Creating a reasonable doubt on the prosecution case is sufficient for an accused to get an acquittal. In addition, the learned High Court Judge's observations that the appellant had failed to prove that he was not arrested on the Jalashaya Road is also incorrect. The burden of proving the fact that he was arrested on the Jalashaya Road or in any other place is entirely on the prosecution. Further, the learned Judge's observation that the defence has not challenged the evidence of the prosecution witnesses is also incorrect. The appellant has challenged their evidence. Whether the above challenge casts a reasonable doubt on the prosecution case is another matter to consider.

This Court should consider whether the aforesaid defective observations in the judgment may have influenced the final decision of the learned Judge. Although the said observations are defective as explained previously, there is no reason to revise or set aside the judgment, if those observations have no impact on the findings of the learned High Court Judge. Therefore, this court decided to consider the arguments of the learned counsel for the appellant independently to see whether the learned High Court Judge's conclusion is correct.

It appears that all grounds of appeal are evolved on one main argument advanced by the learned counsel for the appellant. His contention was that the place of the arrest described by the PW 1 and PW 6 is wrong. The learned counsel stressed the fact that Vidyodaya Pirivena is not located near the junction where the Jalashaya Road and the Sri Vajiragnana Mawatha joints. The defence version was PW 1 Ruwan Kumara had arrested the appellant previously for a similar offence on 07.03.2011 and 18.05.2013, he came to the house of the appellant and threatened to plead guilty for the previous offence. Since the appellant had refused to do that, he was brought to Narcotic Bureau and introduced Heroin, according to the appellant. Pointing out that the

location described by the witnesses about the place where the appellant was allegedly arrested is not correct, the learned counsel for the appellant contended that the prosecution witnesses could not describe the place of the arrest accurately because they have arrested the appellant in his house and not in the place where they described. In the said circumstances, the learned counsel contended that the learned High Court Judge has erred in rejecting the defence version.

The contention of the learned Senior State Counsel was that although the witnesses were not sure about the name of the road for which they have called "Sri Vajiragnana Mawatha", both witnesses have clearly given evidence regarding the place of the arrest. In addition, the learned Senior State Counsel pointed out that the suggestions made to the prosecution witnesses and the position taken by the appellant in presenting the defence case are contradictory and thus defence version has to be rejected.

Now, I proceed to consider the aforesaid central issues of this appeal. The learned counsel for the appellant contended that according to PW 1 and PW 6, the appellant was taken into custody at the junction where the Jalashaya Road and Sri Vajiragnana Mawatha meet. The learned counsel pointed out further that the said witnesses had stated that the Vidyodaya Pirivena was near the said junction. However, the learned counsel contended that the defence witness from the Surveyor General Department and the Grama Niladari of that area who gave evidence on behalf of the defence has proved that the Vidyodaya Pirivena was about 500 meters away from the junction where Jalashaya Road and Sri Vajiragnana Mawatha meet. Accordingly, the learned counsel for the appellant advanced an argument that the prosecution witnesses could not explain the said place correctly because they have arrested the appellant when he was at home.

On the careful perusal of the evidence of both prosecution witnesses, it is apparent that both of them have said that the name “Vajiragnana Mawatha” may be wrong and they were not sure of the name of the road but it is the road leading towards Maligakanda Court right next to Ananda College. Also, it is apparent that both witnesses have clearly stated that the appellant was arrested at the junction where the Jalashaya Road meets the road runs near the Ananda College and the Vidyodaya Pirivena was also located near that junction. It was not challenged in any manner that Vidyodaya Pirivena was not located near the junction where Jalashaya Road meets the road runs near the Ananda College. Therefore, there is no any uncertainty about the place of the arrest and both police witnesses have clearly described the place of the arrest. Hence, the mistake done in mentioning the name of the road which is near Ananda College has no impact on the credibility of the witnesses and does not create any reasonable doubt about the place of the arrest.

The only other matter left to be considered is whether the learned High Court Judge is correct in rejecting the defence version. In this case, the defence did not have one version. There were two defence versions. One version has been suggested to the prosecution witnesses. The other version has been disclosed when the defence case was presented.

It was suggested to PW 1 and PW 6 that Heroin had been introduced to the appellant because of the animosity he had with the informant. (Page 123 and 193 of the appeal brief) When the appellant made the dock statement, his position was that PW 1 came to the house of the appellant and threatened to plead guilty for the previous case instituted by PW 1 against the appellant for a similar offence. As he refused to plead guilty, the Heroin was introduced to the appellant according to him. It is vital to be mentioned that the said position taken up at the stage of the defence case being presented had not been even suggested to PW 1 or PW 6 when they were cross-examined. No single question

has been asked from PW 1 or PW 6 in respect of the aforesaid defence position. In the Indian Judgment of Sarvan Singh V. State of Punjab – (2002 AIR SC (iii) 3652 at 3655 and 3656) it was held that “*it is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted*”.

In the instant action, the appellant has put his case in cross-examination but it was totally contrary to the case presented by the appellant, when the defence was called after the prosecution case had been closed. What was put to PW 1 and PW 6 is that Heroin was introduced because of the animosity the appellant had with the informant. That was the appellant’s case when the evidence was led on behalf of the prosecution. However, when the defence case was presented, there was no single word uttered regarding the animosity between the appellant and the informant. The appellant came with a new contradictory version and stated that PW 1 had come to his house and threatened to plead guilty for the previous case. This version has never been put to PW 1 when he was cross-examined.

It is to be noted that there is nothing wrong in taking two positions as the defence. However, there cannot be two different defence versions. Especially, in the instant action, one version has been put to the prosecution witnesses and another version has been taken when the defence case was presented. In addition, the position taken up in the defence case has not been put to the prosecution witnesses and the position that was suggested to the prosecution witnesses has never been taken up, when the defence case was presented. Taking two different positions at two different stages of the trial confirms that the appellant did not have a probable and acceptable version. In these circumstances, the learned High Court Judge is perfectly correct in rejecting unacceptable, contradictory two versions of the appellant.

Furthermore, no contradictions were marked or omissions were highlighted in the evidence of PW 1 and PW 6. The evidence of the prosecution witnesses is corroborated by each other as described by the learned High Court Judge. There is no acceptable defence version. Accordingly, I hold that the decision of the learned High Court Judge to convict the appellant for both counts is correct. The learned High Court Judge has imposed the sentence considering the quantity of Heroin.

For the foregoing reasons, the Judgment dated 31.01.2019, the conviction and the sentence are affirmed and the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL