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

In the matter of an appeal under Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

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

Complainant

Court of Appeal Case No. HCC/022/19

High Court of Balapitiya Case No. 1823/15

Vs.

Daulkarage Dhanushika Lakmali

Accused

AND NOW BETWEEN

Daulkarage Dhanushika Lakmali

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	**:**	Suranga Bandara for the Accused-Appellant Janaka Bandara, SSC for the Respondent

WRITTEN SUBMISSION

TENDERED ON	**:**	23.08.2019 (On behalf of the Accused-Appellant) 08.11.2019 (On behalf of the Respondent)
ARGUED ON	**:**	11.03.2022
DECIDED ON	**:**	07.04.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Balapitiya on the counts of trafficking and possessing 4.90 grams of Heroin, offences punishable under Section 54A(d) and 54A(b) of Poisons, Opium and Dangerous Drugs Ordinance, respectively.

After the trial, the learned High Court Judge delivered her judgment on 29.03.2019 convicting the appellant for both counts and sentencing her to Life Imprisonment. This appeal has been preferred against the said conviction and sentence. Prior to the hearing of the appeal, written submissions have been filed on behalf of both parties. At the hearing, the learned Counsel for the appellant and the learned Senior State Counsel for the respondent made oral submissions.

The learned counsel for the appellant informed at the hearing of the appeal that he does not pursue with the 2nd ground stated in his written submission. Accordingly, grounds of appeal are as follows:

I. Failed to prove the chain of productions.
II. The inconsistencies and contradictions have not been taken into account.
III. Judgment was entered on wrong observations.
IV. The learned Judge has failed to apply the test of probability.
V. The learned Judge has failed to evaluate and give due consideration to the evidence of the accused.

Failed to prove of the chain of productions

With regard to the chain of productions, the learned counsel for the appellant contended that the production keeper of the Magistrate's Court has not been called to give evidence. The learned counsel contended further that in several judicial authorities, it has been held that identity of the productions and chain of productions must be strictly proved in proving charges under Poisons, Opium and Dangerous Drugs Ordinance.

It is a recognized principle that in drug-related cases the prosecution must prove the chain relating to the inward journey as decided in the case of Witharana Doli Nona V. The Republic of Sri Lanka – C.A. 19/99. Also, in Perera V. Attorney General – (1998)1 Sri L.R. 378 it was held that "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". However, in the instant action, necessity has not been arisen to call the production keeper of the Balapitiya Magistrate Court in evidence to establish the chain of productions. PW14, PS 28259 Mahinda has given evidence and stated that he handed over the productions on 08.08.2014 to the production

clerk of the Balapitiya Magistrate Court. He, himself has taken back the productions from the Magistrate Court on 02.09.2014 to hand over the same to the Government Analyst Department. It should be noted that not a single question has been asked from PW14 challenging the fact that the same productions handed over to the Magistrate Court were taken back from the Magistrate Court. Therefore, his evidence that he has taken back from the Magistrate Court the same production that he handed over to the Magistrate Court is unchallenged. In addition, document P16 is the memorandum issued by the Government Analyst Department certifying the receiving of productions. In P16, it is stated that PS 28259 Mahinda has handed over the productions to the Government Analyst on 02.09.2014.

The necessity of proving the chain of productions in these cases is to ensure that the same productions taken from the custody of the accused have been handed over to the Government Analyst without tampering. In the said case of Witharana Doli Nona V. The Republic of Sri Lanka, it has been held further that "The purpose of this principle is to establish that the productions have not been tampered with. The prosecution must prove that the production taken from the accused-appellant was examined by the Government Analyst". In the instant action, PW14 testifies that the same productions that he handed over to the Balapitiya Magistrate Court have been taken back and handed over to the Government Analyst Department. Therefore, it has been proved in the instant action that the production taken from the accused-appellant had been examined by the Government Analyst. So, there is no necessity to call the production clerk or the production keeper of the Magistrate Court in evidence to repeat the same thing. Hence, I hold that there is no merit on that ground.

In addition, the learned counsel for the appellant raised a new argument. He contended, although PW7 has searched the body of the appellant and found the Heroin, the said production has not been

produced to her to identify. The learned Senior State Counsel contended in reply that as PW1, PW4 and PW5 have identified the said production, not producing the same to be identified by PW7 does not cause any prejudice to the prosecution case.

As the PW7 had recovered production from the possession of the appellant, it is better if she had also identified the production. However, PW7 has not examined the contents that were in the pink colour bag she found. So even if the productions are presented to her for identification, she can only identify that it was the pink colour bag that was on the outside of the parcel. PW1, PW4 and PW5 were there at the time of recovering the productions. Those 3 witnesses have identified that the pink colour bag which was produced in court was the bag recovered from the possession of the appellant in which Heroin was found inside subsequently. Therefore, not identifying the pink colour bag by PW7 has not caused any prejudice to the prosecution case.

In the instant action, the learned counsel appeared for the accused-appellant in the High Court has informed that the appellant does not admit the chain of productions. At least, the learned counsel did not admit the Government Analyst Report without calling an officer from the Government Analyst Department in evidence. Therefore, the prosecution had to call the retired Government Analyst to give evidence. However, neither her evidence nor the contents of the Government Analyst report were challenged when she was cross-examined. Only six questions have been asked in cross-examination. Those questions are also relevant to the percentage of the weight of the Heroin. Therefore, it is precisely clear that the Government Analyst Report was not challenged in any manner and the said report could have been easily admitted without calling the retired Government Analyst to the courts.

At this stage, it is pertinent to note that trial Judges do not make use of amended Section 414 of the Code of Criminal Procedure Act. Section

414 provides room to admit the report of the Government Analyst and the reports of the other government officers specified in the section as evidence without such persons being called as witnesses.

Before the amendment, proviso to the Section 414(6) was as follows:

> *Provided that if in any case, the court of trial is of the opinion that it is necessary or expedient that, or either party to the case request that the Government medical officer or other medical witness or the Government Analyst or Government Examiner of Questioned Documents or Registrar of Finger Prints or Government Radiologist or the Magistrate or Justice of the Peace or the interpreter or any other witness referred to in the preceding subsections should be present to give evidence at any particular trial to which the deposition or report may refer,* ***such officers shall be summoned as witnesses*** *for the purpose of giving evidence in the same manner as the other witnesses for the prosecution* (emphasis added).

Before the amendment also, it was not compulsory to call those official witnesses to give evidence but if either party requests, the Government Analyst or any other officer had to be summoned to give evidence. The court had no discretion in deciding whether the witness should be summoned or not.

The aforesaid sub-section has been amended by Act No. 11 of 1988. Proviso to sub-section (6) of section 414 has been substituted and the said substituted proviso reads as follows:

> *"Provided that if any case* ***the court of trial is of the opinion*** *on the application of any party or otherwise and for reason to be recorded that it is necessary that the Government Medical Officer or other medical witness or the Government Analyst or Government Examiner of Questioned Documents or the Registrar of Finger Prints of Examiner of Motor Vehicles or Government Radiologist or*

the Magistrate or Justice of the Peace or the interpreter or any other witness referred to in the preceding subsections should be present to give evidence at any particular trail to which the deposition or report may refer, such officers shall be summoned as witnesses for the purpose of giving evidence in the same manner as the other witnesses for the prosecution".

So, before the amendment, expressing an opinion of the trial court was limited to summoning an official witness by the court. If a party requests to call a witness, the court could not express its opinion but the witness has to be summoned to give evidence. However, after the amendment, the party could make an application to call an official witness but only on the opinion of the trial court, the said witness shall be summoned to give evidence.

The learned Judges of the trial court should realize the remarkable difference between the previous sub-section and the amended sub-section. Before the amendment, if either party to the case requests to call the government officer in evidence, such an officer shall be summoned as a witness. Therefore, the court did not have the discretion to summon or not to summon that witness. After the amendment, the government officer shall be summoned as a witness only if the court of trial is of the opinion that it is necessary that the Government Analyst, the Government Medical Officer or other government officers specified in the section should be present to give evidence. This amendment has been introduced to minimize the delay in disposing of criminal cases. In the instant action also, the retired Government Analyst was called to give evidence unnecessarily. On one hand, the case gets delayed, evidence that is not necessary to adjudicate the case comes to the case record and on the other hand, this retired government officer has to come from his private residence to the courts spending her time and travel expenses. Therefore, the

learned trial judges must be mindful to use this legal provision to fulfill the intention of the legislature.

The inconsistencies and contradictions have not been taken into account

The learned counsel for the appellant has set out in his written submissions, the contradictions that he relies upon. The learned counsel has pointed out contradictions such as; whether there were children at home at the time of the arrest; discrepancies in the evidence regarding weather condition of that day; from what area of the body of the appellant, the productions were found; how many rounds of search were carried out. It was revealed from the evidence that children who were there ran away at the time of the raid. PW1 said that the production was found from the upper body of the appellant. PW4 said that the production was detected from the top garment of the appellant. So, it is obvious that the top garment is on the upper body of the appellant. The weather condition of the day and other matters that were pointed out as contradictions are also immaterial because the appellant herself admits in her evidence that police officers came to her house on that day, searched and a parcel of Heroin was found on the top of the fan in the room. Therefore, it is apparent that there is no inconsistency or contradiction which affects the credibility of the witnesses or the credibility of the prosecution story.

Judgment was entered on wrong observations

In supporting this ground, the learned counsel for the appellant pointed out that on page 23 of the Judgment, the learned Judge has observed that it was not directly suggested to PW1 that Heroin was recovered from the top of the fan which was in the living room. Also, the learned Judge observed that it was not suggested that Heroin was not found inside the appellant's brazier. The learned counsel contended that in

fact, those suggestions were made to the prosecution witnesses and the learned Judge's aforesaid observations are wrong.

The learned Senior State Counsel for the respondent contended that it was suggested to PW1 that Heroin was found on the top of the fan but it was not suggested that it is the fan that was in the living room and thus there is nothing wrong with the observation of the learned Judge.

The learned Judge has failed to apply the test of probability

For this ground, what the learned counsel for the appellant contended was that the accused-appellant being a mother of an infant, can it be believed the fact that she had worn a brassiere a few minutes after she wakes up from the bed because usually, women do not wear brassieres during the time of sleeping.

What we have to consider is not the usual position but the position that the evidence reveals. In the instant action, there is no reason to disbelieve the prosecution witnesses' evidence that has been corroborated by each other. Anyhow, the aforesaid fact pointed out by the learned counsel for the appellant is not an improbability.

The learned Judge has failed to evaluate and give due consideration to the evidence of the accused

It is incorrect to say that the learned Judge has failed to evaluate and give due consideration to the evidence of the accused. In perusing the impugned judgment, it is apparent that the learned Judge has evaluated the evidence of the appellant and stated reasons in her judgment why the accused's evidence cannot be believed.

The learned counsel for the appellant drew the attention of this court that the learned Judge has found that even though the parcel of Heroin

was on the top of the fan as described by the appellant, it cannot be assumed that the Heroin was in the possession of some other person because only the appellant occupied the said house at the time of the raid. (Page 30 of the Judgment) What the learned counsel attempted to point out was that it appears from the said observation that the learned Judge has not completely rejected the defence version.

The learned Senior State Counsel contended that the learned Judge has not accepted defence version in any manner but what the learned Judge meant by this observation is that even according to the defence version, the appellant's exclusive possession would be proved. At the same time, the learned Senior State Counsel admitted that this observation is really unnecessary. I agree that the aforesaid observation of the learned High Court Judge is unnecessary because once the defence version is rejected, it is not necessary to analyzed whether exclusive possession would be proved, if the defence version is accepted. However, the said observation has not affected the learned Judge's findings in any manner, since the said observation does not indicate that the learned Judge had not rejected the defence version, as submitted by the learned Senior State Counsel.

As stated above, the learned High Court Judge found with reasons that the appellant's version could not be accepted. The learned Judge observed that the appellant kept room for any changes to be made subsequently when suggestions are made to the prosecution witnesses in cross-examination. In addition, the learned Judge observed the infirmities and inconsistencies in the appellant's version. Therefore, the learned High Court Judge has found that a reasonable doubt would not be arisen due to the appellant's version because the appellant's version could not be believed. In considering the entirety of the evidence, I am of the view that the learned judge is correct in deciding that a reasonable doubt would not be created on the prosecution case because of the evidence of the appellant.

For the foregoing reasons, I hold that there is no merit on the grounds of appeal urged by the learned counsel for the appellant. Accordingly, the Judgment dated 29.03.2019, the conviction and the sentence are affirmed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL