IN THE COURT OF APPEAL OF THE DEMOCRATIC 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 Article138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 125/2018
High Court of Colombo
Case No: HC 6359/2012

Vs.

1) Mirissage Sampath Silva

Accused

And Now Between

1) Mirissage Sampath Silva

Accused-Appellant

Vs.

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Rasika de Silva,

for the Accused-Appellant

Janaka Bandara, SSC

for the Respondent

ARGUED ON : 08/03/2022

DECIDED ON : 07/04/2022

R. Gurusinghe, J.

The accused-appellant (the appellant) was indicted in the High Court of Colombo for (1) being in his possession of 4.378 grams of heroin, (2) trafficking 4.378 grams of heroin, (3) being in possession of 1.77 grams of heroin, and (4) trafficking 1.77 grams of heroin; offences, that are punishable in terms of **section 54 A of the Poisons, Opium and Dangerous Drugs Ordinance,** as amended by Act No 13 of 1984.

Having pleaded not guilty to the charges, the case proceeded for trial.

The learned Trial Judge, found the appellant guilty on all four charges and imposed life imprisonment for the first two counts and seven years of rigorous imprisonment each, for the third and fourth counts, to run concurrently.

Being aggrieved by the said conviction and sentence, the appellant preferred this appeal, seeking to set aside the said judgment and the sentence.

The grounds of appeal, relied on by the appellant are as follows:

1. The evidence of PW1 is not credible enough to prove the case beyond reasonable doubt.

2. The learned Trial Judge has failed to give due consideration to the improbabilities of the evidence of PW1

3. The prosecution has failed to prove the exclusive possession of the articles detected, according to the statement of the appellant, from a house that belonged to some other person.

4. The failure of the prosecution to call the officer who had received the information or other witnesses to affirm the position of the prosecution, has curtailed the ability of the defense to attack the veracity of the witnesses and thereby denied a fair trial.

The appellant made a dock statement on his behalf.

At the High Court trial, the prosecution had led the evidence of the following witnesses:

1. PW1 – I.P. Sarath Samarawickrema

2. PW3 - PS 26878 Obeysekera

3. PW4 - Assistant Government Analyst.

According to the evidence given by PW1, the raid was arranged by him following a tip-off received by PW2(PS8595 Weerasooriya), a police officer attached to the Police Narcotic Bureau (PNB) via a telephone call from the informant. The police team went to Wadullawatte in the Orugodawatte area by two three-wheelers attached to the PNB. All police officers were in an undercover police operation at that time. They alighted at Orugodawatte, and

PW2 showed the informant to PW1. They thereafter followed the informant. In about 10 to 15 minutes, the informant pointed out the appellant to PW1 and left the place. The appellant was there under a lamp post looking in the other lamp post direction. The officers approached the appellant, divulged to him their identity and searched the appellant. He had in his possession, a polythene bag consisting of three other small packets inside it, which he was clenching in his fist. As he was an experienced officer, PW1 guessed the contents to be heroin. The appellant was arrested, and the bag was taken into custody after informing him of the charge of being suspected of possessing illicit drugs.

After that, the appellant was questioned, and a statement was recorded. The appellant revealed to the police the place where some money and heroin was hidden. The police then went to a house that belonged to a person called Asthambi. The doors of the house were opened, and nobody was there at that time when the appellant and the police entered the house. The appellant had shown the place under the cupboard, where a parcel with heroin and the money was hidden. PW1 knelt down and projected his hand under the cupboard and found the parcel, which contained money to the value of Rs. 318,520.00 and a small bag of heroin.

After examining the parcel that contained the other three packets, which was allegedly in the appellant's hand, it had been identified as having contained heroin. The whole weight of each parcel had been measured as 10.4grams, 10.2grams, and 4.9grams, respectively. The three bags were sealed and named A, B, and C and were put into another bag, sealed and named S1. The whole weight of the bag found under the cupboard in Asthambi's house was measured at 10 grams. It was sealed and named as S2.

As per the evidence given by PW4, the government analyst, confirmed that the parcel named as S1 had been identified as having contained heroin after

examination, which weighed 4.378 grams whilst the parcel named as S2 weighed 1.77 grams of heroin.

I first consider the 4th ground of appeal.

The failure of the prosecution to call the person who received the information had curtailed the ability of the defence to attack the veracity of the witnesses and thereby denied a fair trial.

In the case of the *State vs Devunderage Nihal SC.* Appeal 154/2 2010 decided on 3.1.2019, *Aluvihare J.* stated as follows:

"I am of the view that the court of Appeal erred when it held that the "defence should be provided with the opportunity to contradict the witnesses." As such I answer the 3rd question of law also in the affirmative. For the reasons set out above I hold that;

(a) An accused can be convicted on a single witness in a prosecution based on a police detection if the judge forms the view that the evidence of such witness can, with caution, be relied upon after probing the testimony.

(b) Corroboration is not sine qua non for a conviction in a police detection case, if the judge, after probing, is of the opinion that the witness is credible and the evidence can be acted upon without hesitation.

(c) There is no burden on the prosecution to provide an accused with the opportunity to contradict the prosecution witnesses."

In the case of *King vs Chalo Singho,* 42 NLR 269, Justice Soertsz stated;

"It must, therefore, be regarded as well-established law, that a prosecutor is not bound to call all the witnesses on the indictment or to tender them for cross-examination. That is a matter in his discretion, but in exceptional circumstances, a judge might interfere to ask him to call a witness or to call a witness as a

witness of the court. It must, however, be said to the credit of prosecuting Counsel today, that if they err at all in this matter, they err on the side of fairness."

In the case of *Walimunige John vs State* 76 NLR 488, Justice G. P. A. Silva held that;

"The prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross-examination. Further, it is not incumbent on the trial Judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114 (f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all.

As per the provisions of section 134 of the evidence ordinance, "no particular number of witnesses shall in any case be required for the proof of any fact".

The argument that the failure of the prosecution to adduce evidence of Weerasooriya PW2, or other witnesses, curtailed the ability of the defence to attack the veracity of the witnesses and thereby denied a fair trial, is identical to the argument that had been rejected by the Supreme Court in the *State vs Devunderage Nihal SC.* Appeal 154/2 2010 decided on 3.1.2019.

When I consider this argument with the applicable law and in light of the aforesaid judicial pronouncements, I would like to reject the contention of the learned Counsel.

Now I deal with the second and fourth counts regarding trafficking.

If somebody is in possession of dangerous drugs and sells them or intends them to be sold, it could be considered as trafficking. The definition of trafficking in section 54 of the ordinance is thus,

"traffick" means (a) to sell, give, procure, store, administer, transport, send, deliver or distribute; or (b) to offer to do anything mentioned in paragraph (a).

In the case of *Mohomed Iqbal Mohomed Saddath vs Honorable Attorney General SC,* appeal 110/15 decided on 14/12/2020, ***Aluvihare J***. held as follows:

"41. As far as the mental element is concerned, I am of the view that the offence of [drug] trafficking is similar to possession since it requires to be established that 16 the perpetrator knowingly possessed or had control over a dangerous drug. Thus, one cannot engage in drug trafficking while being unaware that he or she is in possession of a drug, or if he or she reasonably but mistakenly believes that the substance is legal. ***The offence of drug trafficking, however, also requires that the Prosecution establish that the perpetrator was involved in the selling, procuring, storing, administering, transporting, delivering or distributing of such drugs, or had offered to do anything referred to above [Definition of the term "traffic" in section 54 A of the Ordinance]. It is this additional requirement [of an act] that transforms the status of the offence [of possession] to trafficking****.*

42. Since possession and trafficking can look the same at first glance, Prosecution for drug trafficking typically requires producing additional circumstantial evidence to indicate that the Accused was in possession of drugs not for personal use but for commercial purposes. The quantity of the drug detected would be a good indicator to decide whether the perpetrator is a user [an addict] or is trading in drugs. This would be a question of fact. It is in this context, it was stated at the commencement of this judgement that the 4th question of law raised by the State, on which special leave was granted, does not contain a question of law, thus, this court will not endeavour to answer that question."

The prosecution has not provided additional evidence to show that the appellant was in possession of drugs not only for personal use but for

commercial purposes. The police has not found any money in possession of the appellant before going to Asthambi's house. No evidence adduced to say that the amount of heroin involved in this case is excessive than the amount that can usually be found in possession of an ordinary drug addict. Therefore, the court has no ground to say that the appellant was keeping the heroin for trafficking. Therefore, I am of the view that the prosecution has failed to prove the second count in the indictment and therefore, the appellant should be acquitted from the same.

The next argument is that the prosecution has failed to prove exclusive possession regarding the money and the heroin found in the house of Asthambi.

When the police went to the house of Asthambi, the doors were opened and there was nobody inside at that time. However, it is apparent that though the house belonged to Asthambi, some other people had also lived there. Besides, the police failed to record a statement from Asthambi regarding the parcel and the money found in his house. The heroin and money was not in possession of the appellant at that time. The only fact proved by the evidence is that the appellant knew the place where the heroin and money was located. The parcel was not in his sole custody. In such a scenario, to prove the liability of the accused, the prosecution must lead additional evidence to show that the appellant had the ability to control the said dangerous drugs and that he had the intention to exercise control over them. The prosecution has failed to prove that the appellant had the power and intention to control the place where the second parcel was found. Therefore, I hold that the third and fourth charges have not been proved beyond reasonable doubt.

I now consider the first and second grounds of appeal together, that is the evidence of PW1 is not credible enough to prove the case beyond reasonable doubt and the learned Trial Judge has failed to give due consideration to the improbabilities of the evidence of PW1.

As per the evidence of PW1, the informant had shown the appellant from a distance of 40 meters. The appellant was looking at the other direction so that he could not see the police personal approaching him. I think it is not probable that the appellant allegedly being a drug seller, who are generally said to be vigilant about what is happening around them, did not turn to the other side until the three police officers had covered that 40 meters on foot.

As per the evidence of PW1, the appellant was standing in front of his house. It is not normal behaviour for a person to sell illicit substance in front of his house. It is also unusual that the appellant was clenching (**අත මිට මොලවගෙන සිටියා**) the heroin in his fist for such a long time until the police took it into their custody. The police had searched the appellant's house. The appellant's wife and the mother-in-law was there. The police team had not found any illegal substance in the house of the appellant. At the time when the appellant was arrested, he did not have any money in his possession. As per the evidence of PW1, within a few minutes after the arrest of the appellant, the appellant had divulged that there was a parcel with money and heroin in a house about 10 meters away from the appellant's house. The police team went to that house with the appellant. The doors of the house was opened. However, nobody was there in the house. They entered the living room and then to another room where, under a cupboard the police found a bag with 1.77grams of heroin and Rs. 318,520.00. The police team did not bother to record a statement from the owner of the house or from any inmate of the house.

A part of the evidence of PW1 relevant to this are as follows:

ප්‍ර: **නිවස පරික්ෂා කලා කව්වා නේද?**

උ: **එහෙමයි**

ප්‍ර: **නිවස කොහේද තිබෙන්නේ?**

උ: **විත්තිකරුගේ නිවසේ සිට මීටර් 10ක් පමණ විය හැකියි පසු කර ගියාම තිබෙනවා**

ප්‍ර: නිවස ද පසු කර යන්න ඕනේද?

උ: එහෙමයි

ප්‍ර: ආපස්සට යන්න ඕනේද?

උ: මම ක්‍රිවිල් එක නතර කර ආව ස්ථානයේ සිට නැවත මීටර් **10**ක් ඉස්සරහාට යන කොට හන්දියක් තිබෙනවා. එතැනින් දකුණට හැරෙනවාත් එක්කම නිවස වම් පැත්තේ තිබෙනවා.

ප්‍ර: මෙම නිවසේ ඉඳන් පේනවාද?

උ: පේනවා. ගෙවල් තිබෙන ප්‍රදේශයක් එම නිවසේ සිට මේ නිවස පේනවා

ප්‍ර: ඒ නිවසට යනකොට දොර ඇරලාද තිබුනේ?

උ: අපි යන අවස්ථාවේදි දොර ඇරලා තිබුනා.

ප්‍ර: කවුරුවත් සිටියේ නැහැ?

උ: නැහැ

ප්‍ර: මොනවාද දැනුනේ දොර ගැන?

උ: මට මොනවත් දැනුනේ නැහැ. විත්තිකරු විසින් පෙන්වා සිටියා ඔහු ඇතුල් වුනා ඔහු සමඟ නිවසට ඇතුල් වුනා. ඔහු පෙන්වා සිටියා පාර්සලයක්.

(අධිකරණයෙන්:

ප්‍ර: යකඩ කබඹ එක විතරද තිබුනේ තවත් බඩු තිබුනාද?

උ: බඩු තිබුනා. මිනිස්සු පදිංචි ස්ථානයක් පුටු මේස තිබුනා.)

ප්‍ර: නිවසේ කවුරුවත් සිටියේ නැහැ?

උ: නැහැ මම යනකොට සිටියේ නැහැ

ප්‍ර: ගියාට පස්සේ ආවාද?

උ: කවුරුවත් ආවේ නැහැ

(අධිකරණයෙන්:

ප්‍ර: විත්තිකරු එක්ක එලියට එනකොට දොර ඇරලද ආවේ?

උ: එහෙමයි

ප්‍ර: වහලා ආවේ නැද්ද ගෙදර බඩු තිබුනා කේව?

උ: කවුරුවත් සිටියේ නැහැ.)

PW1 also stated that there were household goods and that shows that some people were living there in the house at the time of the incident. Yet they did not even bother to close the doors when they were leaving the place. It is amounting to trespassing the house. The police officers were not in their uniforms. Even at a later stage of the investigation, the police had not informed the owner of the house that they had entered the house, while they were in an under cover police operation and took a bag with money and heroin, which was kept under a cupboard in his house. This behavior of the police was not natural and unbelievable. They should have asked from the owner of the house at least what he had to say about the recovery of money and heroin. That was a place where the residents of the house had access to and it is also possible that what had been recovered belonged to one of the residents of the house. The above circumstances create a reasonable doubt of the whole prosecution version. It is not reasonable to rely on such evidence to convict a person for an offence, to which the only punishment prescribed by law is death or life imprisonment.

None of the witnesses had given evidence before the learned High Court Judge who wrote the judgment. The prosecution's case was closed on 8th February 2016 and the defence case was closed on 10th March 2016, before the previous High Court Judge. Therefore, the learned High Court Judge who wrote the judgment did not have the opportunity to observe evidence including the demeanor and deportment of the witnesses. The judgment was delivered on 25th July 2018.

In the case of the *State vs Devunderage Nihal* SC. Appeal 154/2 2010 decided on 3.1.2019 Aluvihare J. stated that: *"It is the trial judge who would have the*

benefit of observing the manner in which a witness faces the cross-examination. Hence, in the absence of any other infirmities, having considered all these matters, if the trial judge forms the opinion that the witness is credible, I do not think the trial judge has any other option other than to accept the evidence and to act on it."

However, the above observation of the Supreme Court cannot be applied to this case, as there are a number of infirmities in the evidence and the Judge who wrote the judgment did not have the opportunity to see any of the witnesses in this case.

Evidence of PW1, taken as a whole cannot be concluded as cogent and reliable.

In the case of *Martin Fernando v Inspector of Police,Minuwangoda 46 NLR 210* Wijewardena, J redefined the role of the Appellate Court. It is as follows;

"An Appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically although the decision of the Judge on question of facts based on demeanour and credibility of witnesses carries great weight. Where a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt"

In the case of Munasinghe v Vidanage 69 NLR 97 The Privy Council made the following observation :

" If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as

infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." — per Viscount Simon in Watt or Thomas v. Thomas (1947 A. C. 484 at pp. 485-0).

Whether the evidence is sufficient to support a particular conclusion is a question of law that can be considered by the Appellate Court.

In these circumstances, I am of the view that the charges against the appellant are not proved beyond reasonable doubt. Therefore I set aside the judgment of High Court dated 25th July 2018. The conviction and the sentence is quashed.

The appellant is acquitted of all four charges.

The appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal