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/0248/16

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Chilaw

Case No: 04/2009

Karunapedige Dimuthu Roshan

ACCUSED

AND NOW BETWEEN

Karunapedige Dimuthu Roshan

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: Sampath B Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Amila Palliyage with Ms. S. Udugampola for the Accused-Appellant
	: Anoopa de Silva, SSC for the Respondent
Argued on	: 11-03-2022
Written Submissions	: 20-06-2018 (By the Accused-Appellant)
	: 11-10-2018 (By the Respondent)
Decided on	: 08-04-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred as the appellant) on being aggrieved by the conviction and the sentence imposed by the learned High Court Judge of Chilaw, whereupon he was sentenced to a term of imprisonment for life.

The appellant was indicted before the High Court of Chilaw for having in his possession 2.25 grams of Diacetylmorphine commonly known as Heroin on 11-12-2000, an offence punishable in terms of Poisons Opium and Dangerous Drugs Ordinance as amended by Act No 13 of 1984. He was also charged for trafficking the same quantity which was also an offence punishable in terms of the Poisons Opium and Dangerous Drugs Ordinance.

After trial, the appellant was found guilty only for the first count preferred against him, which was the count in relation to the possession of heroin. He was acquitted from the count where he was charged for trafficking. Accordingly, the learned High Court Judge imposed a term of life imprisonment on him.

At the hearing of this appeal, the learned Counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

1. The evidence presented by the prosecution was unreliable and not worthy of credit.
2. The learned High Court Judge rejected the evidence of the appellant on a wrong premise.
3. The learned High Court Judge misdirected himself by concluding that the evidence of the witness called for the defence only has a corroborative value with regard to the evidence of the appellant.

Facts in brief, as presented before the trial Court are as follows:

PW-01 inspector of police Upul Priyalal was a sub-inspector of police at the time relevant to this action and was the officer in charge Vice Prevention Unit of Chilaw police division. On the day in question, namely 11-12-2000, he, along with the other members of his squad has conducted about ten detections during the day and he and his team members were at Marawila Police Station to hand over some of the suspects arrested and productions detected. While there, one of the members of his squad, namely, police constable 14255 Milroy has received an information from a known informant that a person called Dimuthu Roshan (The appellant) is trafficking heroin and that he left for Colombo to bring heroin and is coming by bus in order to get down near Naththandiya bridge to go to his house.

Accordingly, PW-01 has organized a raid and has first gone to the house of the appellant at around 18.45 Hours to inquire whether he is at home. Finding that the house was closed, he and the other team members which included police sergeant 15553 Turin, police sergeant 6163 Rajapakse and police constable 14255 Milroy, the officer who provided the information has gone near the Naththandiya bridge and waited expecting the arrival of the person mentioned in the information.

According to the witness, the said Dimuthu Roshan was a person known to police constable Milroy. While waiting near the bridge, he has seen a person getting down from the back door of a slowing bus, and coming towards them. Constable

Milroy has identified him as Roshan. On his orders, sergeant Rajapakse and sergeant Turin have stopped the person. He has observed that he was shivering and sweating profusely when they approached and questioned him.

In Court, PW-01 has identified the said person as the appellant. The appellant has been searched by sergeant Rajapakse and a parcel has been recovered from the waist of the short he was wearing underneath of his sarong. The parcel had two pink coloured polythene covers. In one cover he has found 30 small folded aluminum foil wrappers and in the other cover 50 similar folded foil wrappers. When he opened one of the folded wrappers, he has observed brown coloured powder which he has identified as heroin through his long experience as a police officer.

After taking the production under his custody, he has arrested the appellant at 1900 Hours, after informing him of the charges against him. Subsequently, he has travelled to a jewellery shop near Marawila town mosque in order to weigh the quantity of heroin found in the custody of the appellant. After separating the aluminum foil wrappers, PW-01 has weighed the content using the electronic scale that was available at the jewellery store and has found the brown-coloured powder contained 4 grams and 390 milligrams. After taking steps to record a statement from the owner of the shop, the productions have been sealed using his personal seal and left-hand thumb impression of the appellant. Later, the productions and the appellant have been handed over to Marawila police for further investigations.

In his evidence, PW-01 has correctly explained the procedure he followed after the arrest and has identified the productions found in the possession of the appellant.

The stand of the appellant when the PW-01 gave his evidence had been that this was a false accusation against him and the witness was lying in that regard. However, the witness has denied that allegation.

It appears from the evidence that after taking the appellant to Marawila police the witness has entered notes in that regard at 1945 Hours. It was his evidence that after entering the relevant notes, the notes were handed over to Marawila police. However, the said notes had been pasted in the information book of the police only on 18-12-2000 which was about a week after the actual detection.

PW-03 was the police sergeant Rajapaksa, who has assisted PW-01 in the detection. It was his evidence that on an information received by police constable Milroy, this detection was carried out and after going to the house of the appellant the police party led by PW-01 came near the Nathandiya bridge and waited expecting the appellant to come. He has testified that when a bus coming from Colombo slowed down near the bridge, a person got down from the back door and police constable Milroy who knew the appellant previously, identified him.

After stopping the appellant, it was he who has searched him. It was his evidence that he found two parcels in the waist of the undergarment he was wearing and he has explained what was found in the parcels and the procedure they followed in weighing and handing over the productions to Marawila police. He has identified the productions in Court.

PW-08 who was the owner of the jewellery shop mentioned has given evidence and confirmed that police officers came on 11-09-2000 to his shop and weighed some packets using his electronic scale. However, he has stated that he is not in a position to say that the appellant was also brought with the officers as there were several people inside his shop when the police party came there.

In this matter, retired government analyst Kanapathipillai Sivaraja who conducted the analysis of the productions has given evidence and has confirmed that the productions he received for analysis contained a pure quantity of 2.25 grams of heroin. The chain of production has not been a contested matter at the trial.

At the conclusion of the prosecution case, when a defence was called by the learned High Court Judge, the appellant and his wife have given evidence under oath. It was the evidence of the appellant that he was a coconut picker by profession and on the day in question he left his home at about 5:00 p.m. to go to Nathandiya town wearing a sarong and a shirt. According to him it was police constable Milroy, who was also from his village that stopped him and searched, saying that he is in possession of drugs. It was his stand that although nothing was found in his possession, the said Milroy brought a grocery parcel from a road nearby and introduced it as heroin found in his custody. It was his evidence that after his arrest, he was kept in the police van and only at the Marawila police station he was asked to get down and a statement recorded thereafter. Under cross examination, it has been stated by him that he came to a place called Jayasiri hotel and he was detained at the hotel and searched later. He has maintained the position that this was a false charge initiated against him.

The wife of the appellant in her evidence has supported the version of her husband and has stated that while he was away, a police party came to their house and inquired about the appellant. It was her position that her husband never consumed or trafficked drugs.

Pronouncing his judgement on 23-11-2016, the learned High Court Judge has found that the first count against the appellant namely, possession of heroin has been proved beyond reasonable doubt and sentenced him accordingly. However, he has acquitted the appellant on the second count, namely, the charge of trafficking of heroin preferred against him due to lack of evidence with regards to trafficking.

The Grounds of Appeal

Although the learned Counsel for the appellant made his submissions separately with regard to the 1st ground of appeal and the 2nd and the 3rd grounds of appeal, I would now proceed to consider all the grounds of appeal together as they are interrelated.

Making submissions in support of his contention that the evidence adduced at the trial was unreliable and was not worthy of credit, it was the contention of the learned Counsel for the appellant that according to the evidence of PW-01, it was the police constable Milroy who has received the first information. However, evidence of PW-03, who is said to have assisted PW-01 in the detection was that it was PW-01 who received the information and informed constable Milroy. It was his contention that since constable Milroy, who was named as PW-05 in the indictment was not called to give evidence and explain as to who received the first information is a material fact and the witnesses have given contradictory evidence in that regard.

It was the position of the learned Counsel that the failure of the said Milroy to give evidence at the trial should be considered in favour of the appellant in terms of Section 114(f) of the Evidence Ordinance.

Referring to the evidence recorded at page 90 of the brief, it was the argument of the learned Counsel that the said evidence was suggestive that the informant also travelled with the raiding party and the prosecution has failed to explain what was the necessity for the informant to travel with them as the appellant was known to the police, according to the evidence.

The failure of the officer in charge who was PW-01of the action to make notes before he left for the raid as to the information received was also another point taken and the fact that the notes made by the officers have been pasted a week after the raid in the crime notebook of the Marawilla police was another factor taken up by the learned Counsel in order to challenge the credibility of the witnesses.

Making his submissions with regard to the second and third grounds of appeal raised, it was the position of the learned Counsel that there were no contradictions as to the evidence given by the appellant and his wife. It was his contention that the learned trial judge was wrong in deciding to disregard the

evidence given by the wife of the appellant as it was the duty of the trial judge to consider the totality of the evidence be it for the prosecution or the defence.

It was his argument that the evidence of the appellant and his wife has provided a reasonable explanation and has created a doubt with regard to the prosecution evidence which should have been considered by the learned High Court Judge. Arguing that the learned High Court Judge was misdirected as to the facts as well as the relevant law, it was his position that the judgement should stand vacated as it was a judgement not pronounced in accordance with law.

It was the contention of the learned SSC for the Attorney General that there are no contradictions as to the evidence of the prosecution witnesses, and if at all, they are of no material significance that affects the credibility of the witnesses. It was her position that constable Milroy was not a material witness as far as the prosecution was concerned in order to prove the charges against the appellant. It was contended by the learned SSC that the prosecution has proved the case beyond reasonable doubt against the appellant and the appellant has failed to create a reasonable doubt on the incriminating evidence against him or has failed to provide a reasonable explanation as to the evidence against him and the judgment of the learned High Court Judge needs no disturbance as it has been reached after careful consideration of the facts and the relevant law.

Consideration of the Grounds of Appeal

A trial judge needs to consider several factors in analyzing evidence in a criminal case which may vary given the facts and the circumstances of each case. When it comes to the appeal under consideration, it needs to look at the version of events as adduced by the prosecution to come to a finding whether they are probable and credible. I am unable to agree with the contention that the failure of PW-01 to enter notes in his notebook before he and his party left the Marawila police station is a matter that dents the credibility of the evidence of PW-01. He has given clear evidence as to under what circumstances they were at the Marawila police station when he was informed by police constable Milroy, who

was one of his subordinate officers about the information received by him. PW-01 has well explained the sequence of events that took place, which has been corroborated by the officer who assisted the PW-01 in the raid. The only position taken by the appellant when the two main witnesses were cross examined on behalf of him was that this was a concocted story. It was only when the appellant gave evidence in his defence, he has taken up the position that it was constable Milroy, who introduced heroin to him when he was searched by the police party who stopped him when he went to the town on the day of the incident.

I am unable to find any reason for the police to prepare 80 small packets of heroin in the manner it was found and introduce them to the appellant as the appellant was unknown to them except for constable Milroy who received the information in that regard.

Although it would have been better if Milroy who was listed as prosecution witness number 05 in the indictment was called to give evidence, I am unable to conclude that it in itself as a reason to have a vitiating effect of the evidence of the prosecution.

It is settled law that no number of witnesses are needed to prove a case beyond reasonable doubt before a Court of law. A trial judge can rely on a single witness if that witness can be relied upon.

Section 134 of the Evidence Ordinance reads as follows;

> **134. No particular number of witnesses shall in any case be required for the proof on any fact.**

In the case of **Walimunige John Vs. State 76 NLR 488, G.P.A.Silva, J.** held:

> *"The prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them to 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.

The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and were the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness is cumulative of the other would-be mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114(f) of the Evidence Ordinance."

In this matter, it is evident that it was constable Milroy who received the information that led to the detection, and it was he who pointed the appellant to PW-01. However, he was not the officer who accompanied PW-01 to stop the appellant and search him. PW-01 and PW-03 who actually searched him has given evidence in this action. Even if called as a witness, the evidence of constable Milroy would not have been any significant importance at the trial. Had there been an allegation that it was Milroy who introduced heroin to the appellant when the prosecution presented their evidence, one could argue that it was necessary for the prosecution to call him in order to repel any doubt as to the evidence relied on by the prosecution. I find that in this action, there had been no such allegation until the appellant gave evidence.

It may well be possible that since he was from the same area where the appellant lived and well known to the appellant, constable Milroy has decided not to actively participate in body checking of the appellant, which is understandable given the facts revealed in evidence.

In the case of **Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court iii 3652 at 3655,3656** it was stated thus;

> *"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."*

His Lordship **Sisra de Abrew, J.** in the case of **Pilippu Mandige Nalaka Krishantha Thisera Vs. The Attorney General, CA 87/2005 decided on 17-05-2007** held:

> *"….I hold whenever evidence is given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."*

I am unable to agree with the contention that there are contradictions *inter se* and *per se* between the evidence of PW-01 and PW-03. If one takes care to read the evidence of PW-03 as a whole, rather than limiting it to what he has told at page 188 of the brief, it becomes clear that the prosecuting State Counsel has posed the question wrongly. It is clear that it was Constable Milroy who has received the first information and not the PW-01.

When it comes to what has been stated by PW-01 in his evidence in chief at page 90 of the brief, which reads,

> "ඉර්දා සතියේ පොල තිබෙනවා. පොල ඇතුලේ වැන් රථය නතර කර පොලිස් සැරයන් 15553 ටියුරින් - උප පොලිස් සැරයන් 6163 රාජපක්ෂ සමග ඔත්තුකරු පොලිස් කොස්තාපල් 14255 මිල්රෝයි යන අය සමග පාලම අසලට පැමිණියා."

It is very much clear from the evidence of PW-01 that for all intended purposes he has considered constable Milroy as his informant because it was he who has given the information and shown the appellant when he arrived at the scene of the detection. It is therefore clear that in the above-mentioned passage of

evidence, the witness has referred to constable Milroy as the informant and not that the actual informant also travelled with them. I find that nowhere in this case the prosecution has taken up the position that it was with the informant they travelled as there was no necessity as such, since the police have had clear information as to the appellant and he was a known person to constable Milroy.

At this juncture, I would like to state that our Courts have consistently maintained that any inconsistency or contradictions in evidence given by witnesses in a case has to be material that affects the trustworthiness of the evidence and the facts in issue. Any such inconsistency that does not go into the root of the matter cannot be given much importance.

In the case of **State of Uttar Pradesh Vs. Anthony 1985 AIR SC 48,** the danger of disbelieving an otherwise truthful witness on account of a trifling contradictions have been spotlighted. It has been stated that;

> *"The witness should not be disbelieved on account of trivial discrepancies, especially where it is established that there is a substantial reproduction in the testimony of the witness in relation to his evidence before the Magistrate or in the session court and that minor variation in language used by witness should not justify the total rejection of his evidence."*

In the case of **Attorney General Vs. Sandanam Pitchi Mary Theresa (2011) 2 SLR 292 at page 303, Shirani Tilakawardane, J.** held that;

> *"…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 the tenor of the inconsistency or contradictions 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 much importance.* **(Vide- Bogmbhai Hirjibhai Vs. State of Gujarat AIR (1983) SC 753).**"

For the reasons adduced as above, I am of the view that the witnesses called by the prosecution in order to prove the charges against the appellant are trustworthy and credible and the failure to call the PW-05 at the trial by the prosecution has not created any doubt as to the evidence of the prosecution. Hence, no basis for the considered ground of appeal.

I am unable to agree with the contention that the learned High Court Judge has rejected the evidence of the appellant on a wrong premise and that he has come to a wrong conclusion as to the evidence given by the wife of the accused.

On the contrary, I find that the learned High Court Judge has well considered the evidence of the appellant with the view of finding whether it creates a reasonable doubt of the evidence adduced by the prosecution or whether it has offered a reasonable explanation as to the evidence. As discussed earlier, the appellant has failed to confront the material witnesses as to his version of events when they were cross-examined, other than suggesting that the appellant was arrested on a false charge. As observed correctly by the learned High Court Judge, the appellant's version of events narrated by him when he gave evidence appears to be an afterthought, given the fact that PW-05 Milroy was not called by the prosecution to give evidence.

It was under those circumstances the learned High Court judge has concluded that since the evidence of the appellant cannot be accepted for the reasons stated in the judgment, the evidence of his wife, who has been called to corroborate what the appellant said was of no value. I am not in a position to consider that observation as a wrong consideration of the defence evidence under any circumstances.

In the Privy Council judgement in **Jayasena Vs. The queen 72 NLR 313,** it was held:

> *"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, ask himself*

whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."

It was held in the case of **Don Samantha Jude Anthony Vs. The Attorney General, C.A. 303/2006 decided on 11-07-2012** that;

"Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of evidence, that is in the light of the evidence for the prosecution as well as the defence."

I find that in the instant action, the learned High Court Judge has considered the totality of the evidence placed before the Court in its correct perspective before coming to his finding of guilt of the appellant, which needs no interference from this Court.

The appeal therefore is dismissed, as the grounds of appeal urged are 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