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

In the matter of an Appeal under and in terms of 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/104-105/19

High Court of Colombo
Case No. 6846/13

Vs.

1. Dewaneththi Chathuranga Kumara Silva
2. Sonia Anne Francis

Accused

AND NOW BETWEEN

1. Dewaneththi Chathuranga Kumara Silva
2. Sonia Anne Francis

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 : Shavindra Fernando, PC with Umayangi Indatissa, Tharani Mayadunne and Anika Arawwawala for the 1st Accused-Appellant

Anuja Premaratna, PC with Tarangee Mutucumarana, Senal Matugama for the 2nd Accused-Appellant

Shaminda Wickrema, SC for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 21.01.2020 (On behalf of the 1st Accused-Appellant)
21.01.2020 (On behalf of the 2nd Accused-Appellant)

14.03.2022 (On behalf of the Respondent)

ARGUED ON : 15.03.2022

DECIDED ON : 05.05.2022

WICKUM A. KALUARACHCHI, J.

The 1st accused-appellant was indicted in the High Court of Colombo on 2 counts of trafficking and possessing 5.11 grams of Heroin. The 2nd accused-appellant was indicted on 2 counts of trafficking the Heroin and aiding and abetting the 1st accused-appellant to possess Heroin. After the trial, the learned High Court Judge convicted both appellants for the charges against them. This appeal has been preferred against the said convictions and sentences.

The learned President's Counsel for the 1st appellant, the learned President's Counsel for the 2nd appellant and the learned State Counsel for the respondent made oral submissions at the hearing.

The main complaint of the learned President's Counsel for both appellants was that the appellants were denied a fair trial by not allowing them to call the defence witness that they wanted to call to substantiate the defence version. The learned State Counsel submitted that for the reasons stated by the learned High Court Judge in her order dated 26.09.2018, and for the purpose of preventing unnecessary delay, the application to call the last witness for the defence was disallowed and there is nothing wrong in the said order. The learned State Counsel contended further, anyhow, that it is not a reason to vitiate the convictions.

It is to be noted first that Section 4(d) of the "*International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007* " states that "a person charged of a criminal offence under any written law shall be entitled to examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him".

However, the learned High Court Judge has not given the aforesaid right to the appellants of this case. Now, it is important to see why the said right was not given by the learned Judge. Reasons are stated in her judgment. The learned Judge has come to the conclusion that the evidence relating to the misconduct of PW1 is not required in this case. If the appellants wanted to question the acts of misconduct of PW1, the learned Judge was of the view that those questions could have been asked when the PW1 was cross-examined. Stating these reasons, the learned Judge refused the application to call the OIC of the Police Narcotic Bureau as a defence witness.

In perusing the aforesaid order, it appears that the learned High Court Judge has pre-determined what the defence witness would state if he was called in evidence. By pre-determining so, the learned Judge decided that his evidence is not necessary. I am of the view that this is not only a denial of a fair trial but also an observation that should not be made by the learned Judge in adjudicating the case impartially.

In addition, it is to be noted that not only the learned Judge, but even the party who calls the witness cannot say what the witness would say when he is giving evidence. The party who calls the witness can say for what purpose the witness would be called, but the party cannot say what evidence the witness would give. Only when the witness testifies, the court could know what his evidence is.

In addition, the learned Judge could not be presumed whether the acts of misconduct of PW1 that are to be elicited by that witness would be relevant to this case. Whether that evidence is irrelevant to the case or whether the said evidence is useful to adjudicate the case has to be decided only after the witness gives evidence. Therefore, undoubtedly, not giving an opportunity for the appellants to call the said witness denies a fair trial for the appellants.

Delaying the case unnecessarily by attempting to call this witness is not a reason stated in the said order of the leaned High Court Judge. But this court has considered whether there was an unnecessary delay as the learned State Counsel contended.

The prosecution case was closed on 07.01.2016. The next trial date was 09.02.2016. On that day, the 2nd appellant was not present in court and a medical certificate was produced on 23.03.2016 to prove why she was not present on 09.02.2016. Thereafter, the further trial was fixed on 23.03.2016, 21.06.2016, 23.09.2016, 30.11.2016, 17.02.2017, 21.06.2017, 26.09.2017, 09.01.2018, 22.05.2018 but the case was not

taken up for further trial on any of these days. The further trial has been postponed for more than two years due to lack of time and for some other reasons but defence witnesses were ready on all those trial dates.

On 04.09.2018, the 1st and the 2nd accused-appellants made dock statements. On the next trial date, 26.09.2018, a witness was called on behalf of the defence and the evidence of the said witness was concluded. On the same day, an application was made to call the last witness for the defence. It is the application that was rejected. It is apparent from the aforesaid circumstances that the delay occurred due to various reasons but not because of the faults of the appellants.

In addition to the Section 4(d) of the ICCPR Act, the Supreme Court of India, held in the case of Dudh Nath Pandey vs The State Of U.P, decided on 11th February 1981, reported in 1981 AIR 911, 1981 SCR (2) 771 that "defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses".

In the instant action, I see no reasonable cause for the learned High Court Judge to not to grant one more date to call the defence witness, when the case had been postponed more than two years for various reasons without the defence case being heard. The convictions entered without giving a fair opportunity to present the defence case, could not be allowed to stand, I hold. Therefore, the convictions and the sentences have to be set aside.

The next issue to be considered is whether this case should be sent for re-trial or a decision could be made by this court.

The learned President's Counsel for the 1st appellant contended that the learned High Court Judge has acted upon the vague evidence of PW1, casting the liability on the appellants to prove their version acting upon Section 114(f) and thus, convicted the appellants on an erroneous legal basis.

The learned President's Counsel for the 2nd appellant contended that there was no basis to charge the 2nd appellant either for trafficking the Heroin or for aiding and abetting to possess the Heroin. He contended that there is no evidence of how the 2nd appellant aided and abetted to possess Heroin. Also, the learned President's Counsel contended that there is no evidence of how the 2nd appellant trafficked the Heroin that was in the possession of the 1st appellant. Accordingly, he contended that the convictions against the 2nd appellant have to be quashed.

The learned State Counsel for the respondent contended that the learned High Court Judge has correctly evaluated the cogent evidence of PW1 and the unreliable evidence of the defence and has correctly come to her conclusions.

This is a case where six police officers including PW1 had gone for the raid upon information received. PW1 and PC 60485 Mataraarachchi were there at the time of recovering Heroin according to PW1. However, only the evidence of PW1 has been led in this case. Although there was no difficulty in calling PC Mataraarachchi in evidence, he was not called as a witness. The contention of the learned State Counsel was that PW1's evidence is sufficient to prove the case beyond a reasonable doubt.

Apart from the dock statements of the appellants, the daughter of the 2nd appellant was called to give evidence on behalf of the defence. It appears that the learned trial Judge did not draw her attention to Section 114(f) of the Evidence Ordinance, when the prosecution did not

call PC Mataraarachchi in evidence to corroborate the evidence of PW1. However, it is strange to see that the learned trial Judge has applied Section 114(f) of the Evidence Ordinance to defence case and stated in her judgment that none of the adults were called to corroborate the evidence of the 2nd appellant's daughter.

Whatever evidence has been given on behalf of the defence, if the evidence of the sole witness of the prosecution could not be believed beyond a reasonable doubt, the appellants could not be convicted. It is also strange to see that the learned Judge who did not allow to call the defence witness who was intended to be called to challenge the sole prosecution witness's evidence, was of the view that witnesses should have been called to corroborate defence witness's evidence. In the circumstances, the standard of proof adopted by the learned trial Judge is in serious question.

In the case of the Attorney General V. Devunderage Nihal – S.C. Appeal: 154/10, decided on 12th May 2011 it was held that "there is no requirement in law that the evidence of a police officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars." It was held further that "if such a proposition were to be accepted, it would impose an added burden on the prosecution to call more than one witness on the back of the indictment to prove its case in a drug-related offence, however satisfactory the evidence of the main police witness would be."

The crux of the above observation is that when the sole witness's evidence is very satisfactory, there is no need for corroboration. Hence, it has to be considered whether PW1's evidence is very satisfactory. However, even if PW1's evidence is very satisfactory, there is no necessity to corroborate defence evidence because the appellants have no burden to prove their case beyond a reasonable doubt or even on the balance of probabilities. Creating a reasonable doubt on the

prosecution case by the dock statements and the evidence of the defence witness is sufficient to get an acquittal.

Now, I proceed to consider whether PW1's evidence is cogent to prove the charges beyond a reasonable doubt without corroborative evidence. According to the PW1, he received the information. The information received is vital to consider whether the raid described by him was carried out according to the way that he testified. PW1 has stated in cross-examination that a person called "Kumara" is coming with Heroin on a motorcycle to hand over the Heroin to some other person. The said question and the answer appear as follows:

ප්‍ර: මොකක්ද ලැබුණ තොරතුර?

උ: කුමාර කියලා පුද්ගලයෙක් හෙරොයින් රැගෙන WPVP 0407 දරණ යතුරු පැදියෙන් තවත් පුද්ගලයෙකුට දෙන්න රත්මලාන, ගාලුපාරට එනවා කියලා.

(Page 115 of the appeal brief)

However, after a short while when he was asked whether the informant had told him that "Soniya Anne Francis" is coming with another person, he answered, he was told that she is coming with another person; coming with the person called "Kumara". The relevant questions and answers appear as follows:

ප්‍ර: තොරතුරුකරු තමුන්ට කිව්වාද සෝනියා ඇන් ෆ්‍රැන්සිස් තවත් පුද්ගලයෙක් සමග එනවා කියලා?

උ: ඇයත් සමග තවත් පුද්ගලයෙක් එනවා, කුමාර කියන පුද්ගලයා සමග එනවා කියලා කිව්වා.

(Page 115 and 116 of the appeal brief)

When he described the information received, he clearly stated that only "Kumara" is coming to hand over Heroin to some other person. But after a short while, PW1 says that "Kumara" is coming with "Soniya". Earlier, only Kumara is coming. Subsequently, Kumara is coming with Soniya. Another question arises from the latter contradictory answer, if a woman was also coming with "Kumara", why PW1 did not take a woman

police officer for the raid. Probably because of the difficulty in dealing with that question, PW1 changed his position again and stated that the informant did not tell him that a woman and another person is coming. The said question and answer appear on page 118 of the appeal brief as follow:

ප්‍ර: තමාට තොරතුරුකරුගෙන් දැනගන්න ලැබුනේ කාන්තාවක් තවත් පුද්ගලයෙක් සමග එනවා කියලද?

උ: නැහැ.

Although the learned State Counsel attempted to show it as a mistake, when the question was put to him with the name of the woman "Soniya", mistakenly he would not say that he was informed that "Kumara" is coming with "Soniya". Certainly, it is not a mistake. The doubt creates by these contradictions goes to the root of the case because the 2nd appellant stated in her dock statement that she was arrested when she was at home. Her daughter corroborates this position. When considering the 2nd appellant's version with the aforesaid contradiction, an inference could be drawn that there could be a truth in the 2nd appellant's version. If it is so, a reasonable doubt creates on the raid described by PW1.

It is to be noted at this stage that the police witnesses have the advantage of giving evidence by going through their notes. Therefore, even two police witnesses were called to give evidence regarding the raid, it is very difficult to mark contradictions. In the instant action, there is no way of marking any contradiction because only PW1 has given evidence regarding the raid. The learned trial Judge observed and made a remark under Section 273(4) of the Code of Criminal Procedure Act that PW1 testifies word to word, the same thing that was in his notes. The learned Judge's observation appears as follows:

"මේ අවස්ථාවේදී සාක්ෂිකරු විමර්ශන සටහන් තබා ඇති ආකාරයට වචනයෙන් වචනයට ගලපමින් සාක්ෂි දෙන බව නිරීක්ෂණය කරමි".

(Page 87 and 88 of the appeal brief)

Even under those circumstances, there are the above contradictions that affect the credibility of the evidence of PW1. A case does not fail merely because there are some infirmities and inconsistencies. If the other police officer who went for the raid was called in evidence, the court could have examined whether this is a true story and whether the infirmities or inconsistencies affect the credibility of the prosecution case. Since the prosecution has decided that the case could be proved beyond a reasonable doubt with the evidence of one witness, that opportunity has been lost. The above contradictions go to the root of the case because the raid has been organized on the said questionable information received. The aforesaid major contradictions regarding the information affect the truthfulness of the prosecution story. In the circumstances, the PW1's evidence could not be considered as cogent evidence. Therefore, I am of the view that the learned High Court Judge's finding that the evidence of PW1 is cogent is not correct.

There is another issue regarding the probability of the prosecution case. According to the PW1, the police team went in a vehicle. However, the vehicle was stopped somewhere and PW1 and PC Mataraarachchi have reached the appellants without a vehicle. They came in a three-wheeler to the place where the detection was done and the three-wheeler was sent off. Two appellants came on a motorcycle. They stopped the motorcycle but did not get off the motorcycle. At that time, PW1 has disclosed their identity. At that moment, PW1 says that the 2nd appellant told the 1st appellant "කුමාර ඔය පාර්සලය වීසි කරන්න කියලා". (Page 88 of the appeal brief) When both appellants were in the motorcycle and the police officers had no vehicle, they could have easily run away in the motorcycle without trying to throw the parcel. So, the prosecution story about the most important moment of the raid casts a doubt on the probability of the prosecution story.

In addition, no acceptable reason has been stated in the impugned judgment, why the dock statements of the appellant and the defence

evidence have been rejected. Deciding that PW1's evidence is sufficient to prove the charges beyond reasonable doubt and expecting the defence to call some other witnesses to corroborate defence witness's evidence are not in accordance with the fundamental principles of criminal law according to my view.

It also appears that the learned Judge has not even evaluated the defence evidence impartially. Analyzing the evidence of 2nd appellant's daughter, the learned judge stated that she has not stated that the police officers assaulted her mother (page 37 of the judgment). However, she has clearly stated in her evidence in chief that her mother was assaulted and she heard her mother shouting. The said answer of the defence witness appears on page 195 of the appeal brief as follows:
"මට ඇහුනා ලොකු සද්දයක් වගේ. අම්මා කෑ ගහනවා සද්දයක්, අම්මාට ගැහුවා, මට ඇහුනේ." I state with regret that this kind of wrong observations have been used to reject the defence version.

At this juncture, it is pertinent to note that in the case of James Silva V. The Republic of Sri Lanka – (1980) 2 Sri L.R. 167 it was held that "it is a grave error for a trial judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence".

In summarizing, uncorroborated evidence of PW1 is not cogent. There is a doubt regarding the probability of the prosecution story. There are no justifiable reasons to reject defence evidence and act upon the evidence of the sole prosecution witness regarding the raid. In the circumstances, the conclusion that could be arrived is that the charges have not been proved beyond a reasonable doubt. Hence, there is no necessity to direct a re-trial. For the aforesaid reasons, I hold that the

charges against the appellants have not been proved beyond a reasonable doubt.

Accordingly, the convictions and the sentences imposed on the 1st and the 2nd appellants are set aside. Both appellants are acquitted of the charges against them.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL