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

In the matter of an Appeal under Section 331 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.

Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No.
CA/HCC/0190/2019

Complainant

High Court of Colombo Case No.
HC/416/2018

V.

David Brimoli Moses

Accused

AND NOW BETWEEN

David Brimoli Moses

Accused – Appellant

V.

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

Respondent

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

COUNSEL : K. Kugaraja for the Accused – Appellant.
Maheshika Silva, Senior State Counsel for the Respondent.

ARGUED ON : 07.03.2022

WRITTEN SUBMISSIONS
FILED ON : 18.10.2021 by the Accused – Appellant.
15.12.2021 by the Respondent.

JUDGMENT ON : 24.05.2022

****

K. PRIYANTHA FERNANDO, J.(P/CA)

1. The accused appellant (herein after referred to as the appellant) was indicted before the High Court of *Colombo* for having in possession and trafficking 38.65 grams of heroin, punishable in terms of section 54A (d) and 54A (b) of the Poisons Opium and Dangerous Drugs Ordinance respectively. Upon conviction on both counts after trial, the learned High Court Judge sentenced the appellant to death. Being aggrieved by the above conviction and the sentence, the appellant preferred the instant appeal. At the hearing of this appeal the learned Counsel for the appellant urged the following grounds of appeal.
   I. The learned trial Judge has erred in law by imposing additional burden of proof on the accused appellant.

2. **Facts in brief**
   According to the evidence led by the prosecution, a team of police officers led by PW1 have gone on foot patrol duty on the day of the incident at about 7:30 pm. When they were walking towards the *Grandpass* police post in front of the *Sulaiman* Hospital, they have observed a person wearing a t-shirt and a pair of shorts walking towards them. They have further noticed that person trying to avoid them upon seeing them. Therefore, on suspicion PW1 has stopped and searched him. The Police have found two parcels which contained heroine in his trouser pocket.

3. At the end of the prosecution case when the defence was called, the appellant has made an unsworn statement from the dock. According to the appellant, he has gone to buy some clothes from *Pettah* with his wife on his motorcycle. On their way back he has stopped the motorcycle near the pharmacy for the wife to go and

buy some medicine. When the wife was returning to the motorcycle from the pharmacy, two or three persons have come and asked them what they were doing. Upon identifying themselves as police officers and stating that they wanted to search them on suspicion, they were taken to the police post. Upon search, nothing suspicious has been found on them. The police have then released the wife and held back the appellant stating that they suspect him. Subsequently, upon taking him to the *Modara* Police Station they have filed this case against him.

4. The learned Counsel for the appellant submitted that the learned High Court Judge has imposed an additional burden on the appellant that is not obliged by law. It is the contention of the learned Counsel that no burden of proof can be placed on the appellant and therefore that the appellant was denied of a fair trial. In that the learned Counsel submitted that the learned trial Judge in his judgment at pages 24, 27 and 29 (pages 208, 211 and 213 of the brief) has commented on the failure of the appellant to call his wife as a witness whereby the learned trial Judge has clearly erred. The learned Counsel for the appellant further submitted that the learned trial Judge in his judgment has said that the defence taken by the accused in his dock statement was never put to the witnesses for the prosecution in cross examination. Whereas, the defence Counsel at the trial has clearly put their defence to the witnesses. The learned Senior State Counsel contended that the above mentioned comments made by the learned High Court Judge in his judgment should not be taken in isolation, however, the evidence of the case and the judgment of the learned trial Judge have to be considered in totality. When it is taken in totality, it is the submission of the Senior State Counsel that no other conclusion could have been arrived at by the learned trial Judge other than to convict the appellant.

5. While conceding that the appellant has suggested his defence to the witnesses, the learned Senior State Counsel submitted that a mere suggestion of the defence that is denied would not create a reasonable doubt in the case for the prosecution. In his judgment at page 24 (page 208 of the brief) the learned trial Judge has commented;

> "...එසේ මෙම විත්තිකරුව ඔහුගේ බිරිද සමග ෆාමසියට ගොස් සිටින අවස්ථාවේ දී අත් අඩංගුවට ගත්තේ නම්, විත්තිය

> වෙනුවෙන් ඔහුගේ බිරිදව සාක්ෂියට කැඳවීමට හැකියාව තිබුනි.
> ...”

Furthermore, at page 27 of the judgment (page 211 of the brief) the learned trial Judge has commented;

> “...තවද, විත්තිකරුව සිය බිරිද සමග සිටියදී අත් අඩංගුවට ගත්ත බවට විත්තිය වෙනුවෙන් පවසා සිටියද, එකී කරුණ ඔප්පු කිරීමට විත්තිය වෙනුවෙන් විත්තිකරුගේ බිරිදව හෝ සාක්ෂියට කැදවා නොමැත. ...”

At page 29 of the judgment (page 213 of the brief) the learned trial Judge has said;

> “...තමාගේ බිරිද සමග ෆාමසියට ගොස් සිටින අවස්ථාවේ දී ඔහුට මෙම භාණ්ඩ හදුන්වා දී ඔහුව අත් අඩංගුවට ගත් බවට විත්තිකරු විසින් කියා සිටිය ද, ඒ බව තහවුරු කිරීමට විත්තිකරුගේ බිරිදව හෝ සාක්ෂියට කැදවා නොමැති බවට අධිකරණය විසින් නඩු තින්දුවේ ඉහත දි අවධානයට යොමු කර ඇත. ඒ අනුව, පැමිණිල්ලේ සාක්ෂිකරුවන්ගේ සාක්ෂි වලට සැකයක් මතු කරන ආකාරයෙන් විත්තිකරුගේ විත්තිවාචකය ඉදිරිපත් වී නොමැති හේතුව මත විත්තිකරුගේ ප්‍රකාශය අධිකරණයට පිළිගත නොහැකි ප්‍රකාශයක් බවට තිරණය කරමින් එය ප්‍රතික්ෂේප කරමි. ”

6. Upon considering the above comments made by the learned trial Judge, it is evident that an additional burden has been placed on the appellant to prove his innocence whereby, the learned trial Judge has clearly erred. Thus, it is apparent from the judgment that the learned High Court Judge has rejected the defence version for the reason of the appellant being failed to call his wife as a witness.

7. In his judgment at page 27 (page 211 of the brief) the learned trial Judge has said that the defence taken up by the statement from the dock was never put to the witnesses for the prosecution in cross examination by the appellant. In that regard the learned High Court Judge has stated that it was never suggested to the police witnesses that he was taken to the *Modara* Police Station and the heroin was introduced. However, it is to be noted that when the main witness PW1 was cross examined, the defence has been clearly put to the witness in the following manner.

ප්‍ර "මා ඔබට යෝජනා කරනවා මේ විත්තිකරු බිරිඳ සමඟ සිටියදී තමයි ඔබ මේ අත්අඩංගුවට ගැනීම සිදු කලේ කියලා?"

උ "පිළිගන්නේ නැහැ ස්වාමීනී."

ප්‍ර "ඉන්පසු බිරිඳව මුදාහැර මේ පුද්ගලයාට හෙරොයින් හඳුන්වාදීමට ලක් කරලා තිබෙනවා කියලා මම ඔබට යෝජනා කරනවා?"

උ "පිළිගන්නේ නැහැ ස්වාමීනී."

(page 95 of the brief)

8. Further, the defence was clearly put to the PW2 as well in cross examination.

ප්‍ර "මම ඔබට යෝජනා කරනවා මේ පුද්ගලයාව ඔබ අත්අඩංගුවට ගත්තේ ඔහුගේ බිරිඳ සමඟ බයිසිකලයෙන් සිටින විටදී කියලා?"

උ "නැත ස්වාමීනි."

ප්‍ර "මම තවදුරටත් යෝජනා කරනවා, මෙම පුද්ගලයාව අත් අඩංගුවට ගෙන බිරිඳ මුදා හැරීමෙන් පසුව, ඔබලා විසින් හෙරොයින් හඳුන්වා දිමට කටයුතු කලා කියලා?"

උ "නැත ස්වාමිනි, මම ප්‍රතික්ෂේප කරනවා."

(pages 130 to 131 of the brief)

9. Therefore, it is clear that the learned High Court Judge has not only misdirected himself on the facts as mentioned above, but has also taken those wrong facts into consideration when rejecting the defence version and thereby coming to the conclusion that the prosecution has proved the case beyond reasonable doubt.

10. Now, I will turn to consider whether the respondent can take the benefit of the proviso to Article 138 of the constitution as submitted by the learned State Counsel.

Article 138

"138. (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [111][committed by the High Court, in the exercise of its appellate or original jurisdiction or by any

Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things [112][of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance:

Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. ...”
[Emphasis mine]

11. As mentioned before, the learned trial Judge has clearly erred when he imposed an additional burden of proof on the appellant.

12. Therefore, now it is for this court to consider whether that error has prejudiced the substantial rights of the parties or occasioned a failure of justice.

13. In the case of ***Nandana v Attorney-General [2008] 1 Sri L.R*** (page 51), placing the burden on the defence to rebut the prosecution evidence was discussed. It was held;

"The leaned trial judge had therefore sounded a death knell on the conviction and death sentence per se by imposing a burden on the accused to prove his innocence which is totally foreign to the accepted fundamental principles of our criminal law as to the presumption of innocence. Further at page 154 of the original record, the learned trial judge in her judgment, further ventures to state...There too she introduces a concept foreign to our Criminal Law that there is a burden on the defence to rebut the prosecution evidence. The above mis-statements of law by the learned trial judge would tantamount to a denial of a fundamental right of any accused person as enshrined in Article 13(5) of our Constitution which stipulates that "Every person shall be presumed innocent until he is proved guilty." In the case of M.A.S. de Alwist v G.P.A. de Silva S.P.J. held that a misdirection on the burden of proof is so 13c fundamental in a criminal trial that it cannot be condoned and would necessarily vitiate the conviction.”

14. Hence, it is clear that placing additional burden of proof to the appellant as mentioned above has prejudiced the substantial rights of the accused and has occasioned a failure of justice. Therefore, the conviction of the appellant should not be upheld. As I have mentioned before in this judgment, the learned trial Judge has been seriously misdirected on the facts as well when he rejected the defence version based on among other things, that the defence was not put to the prosecution witnesses. Thus, I find that this is not a fit case to be sent for retrial. Therefore, the conviction and the sentence imposed on the appellant by the learned High Court Judge are set aside. The accused is acquitted of the charges.

Appeal is allowed

PRESIDENT OF THE COURT OF APPEAL

WICKUM A. KALUARACHCHI, J.

I agree.

JUDGE OF THE COURT OF APPEAL