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 269/2016

Vs.

High Court of Colombo
Case No: HC 6996/2013

1) Samson Perumal Justin *alias* Bambara

Accused

And Now Between

1) Samson Perumal Justin *alias* Bambara

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 Samarawickrama

for the Accused-Appellant

R, Bary, DSG

for the Respondent

ARGUED ON : 10/03/2022

DECIDED ON : 25/05/2022

R. Gurusinghe, J.

The Accused Appellant was indicted in the High Court of Colombo for being in possession and trafficking of 8.64 grams of Heroin, an offence punishable under section 54 A of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984.

After trial, the learned Trial Judge convicted the appellant for both charges and imposed life imprisonment upon him.

Being aggrieved by the said conviction and the sentence, the appellant appealed to this Court.

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

1. The conviction is wholly unsafe in view of the un-corroborated and unsatisfactory nature of the evidence of the main witness PW1, led by the prosecution.

2. The learned Trial Judge failed to consider the rules governing the test of probability to the prosecution version.

3. The prosecution failed to establish the chain as to the passage of production from the police station to the government analyst.

4. The learned Trial Judge has considered only the prosecution evidence and failed seriously to evaluate the evidence given by the defence.

5. The learned Trial Judge erred in law by rejecting the dock statement made by the appellant with reversing the burden of proof.

6. The learned Trial Judge has misdirected himself and thereby erred in law and the facts of the case, causing grave prejudice to the appellant.

The prosecution version

PW2 received information from an informant on the 29th of February 2012 at 3.55 p.m., that a person known as Bambara would come to the Maligawatte filling station with heroin. If the police could come immediately, the informant said that he could show the suspect to the police. PW1 Sub Inspector - Samantha arranged a raid which consisted of 8 police officers, including PW1, PW2 Police Constable Ratnasiri, and a Woman Police Constable (WPC). The police team proceeded to the roundabout on Sangaraja Mawatha at about 4.55 p.m., precisely one hour after receiving the information. All of them were in civil clothes. They stopped their vehicle on the left side of the road, near the filling station. Then PW2 left the vehicle and proceeded to meet the so-called informant.

After meeting the informant, PW2 came back to the vehicle. Then PW1, together with PW2, left the vehicle while the other police officers remained in the vehicle. PW1 and PW2 crossed the road and went towards Maligawatte. The informant went ahead of PW2. They went about 150 meters and came to a bus stop near the Maligawatte filling station where PW1, PW2 and the informant waited for the appellant for about five minutes. Within that five minutes time, the appellant appeared from the direction of the roundabout wearing a blue trouser and a red t-shirt. The informant then showed them the appellant (Bambara) and said that he was sure that the appellant had heroin in his possession at that time. When the appellant came towards PW1 and PW2 they clutched the appellant's hands. On searching him, they had found a parcel containing 41.6 grams of substance in his right-hand side trouser pocket, which on subsequent analysis by the Government Analyst, had revealed the presence of 8.64 grams of heroin.

The version of the defence is that the appellant is a three-wheeler driver. When he was waiting for hires, a person who came in the guise of a passenger wanting to take a hire, led the way to the appellant's house. He was assaulted by a team of police officers who were in civil clothes and asked for a person called Kanna. The appellant was wearing shorts at that time. He was asked to change the shorts and wear trousers which he did. The three-wheeler was handed over to his mother.

The prosecution has called only PW1 to prove the raid. PW2, who allegedly received the information, was not called to give evidence. A good deal of hearsay evidence was led regarding the information received and the communication between the so-called informant.

Though the informant wanted the police to come immediately, the police team went to the alleged place of detection precisely an hour later. However, the position of PW 1 is that, within 5 minutes from their arrival at the bus stop near the Maligawatta filling station, the appellant had emerged from the

direction of the roundabout and had come towards them. The appellant was wearing a red T-shirt and blue trousers, which can be regarded as easily recognizable colours. Everything had happened the way the police wished. Even though they had reached there an hour later, the appellant had come in five minutes without keeping them waiting so long. The police vehicle stopped at the first filling station at 4.55 pm. They arrested the appellant at 5.10 pm. It took only 15 minutes for them to execute everything, including the meeting of the informant at the first filling station, walking with the informant to the next filling station, waiting for the appellant at the bus stand and arresting the suspect. However, PW1 had not spoken a single word with the informant on these occasions. It is very doubtful that a prudent, reasonable man would believe this as a probable story.

As per the evidence of the appellant's sister, the appellant was a three-wheeler driver. A group of people assaulted him while inquiring about another person. They had searched the entire house and asked him to change his shorts and wear a trouser. The keys to the three-wheeler was given to his mother and they took her brother with them. She also stated that her brother had returned only after two years.

The learned High Court Judge has rejected the evidence of the defence on the basis that the position of the defence was not put to PW1. However, this observation of the learned High Court Judge is factually incorrect. The following questions were put to PW1 by the defence counsel.

(On page 114 of the appeal brief)

ප්‍ර: මාලිගාවත්ත ෂෙඩ් එක ගාවදි මේ විත්තිකරු අත් අඩංගුවට ගත්තා කියන එක සම්පූර්ණ අසත්‍යයක් කියලා යෝජනා කරනවා?

උ: ප්‍රතික්ෂේප කරනවා.

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ප්‍ර: මේ විත්තිකරු අත් අඩංගුවට ගත්තේ මරදාන පාර, කොළඹ 10, කියන මේ විත්තිකරුගේ නිවස අසලදි ඔහු හයර් යන්න නතර කරගෙන සිටියදි කියලා යෝජනා කරනවා?

උ: පිළිගන්නේ නැහැ.

ප්‍ර: තමුන්ලා විත්තිකරු නිවසට අරන් ගිහිල්ලා, ත්‍රුවීල් රථය ගෙදරට බාරදිලා, ඔහු ඇද සිටි කොට කලිසම ගලවලා දිග කලිසමක් ඇදගන්න කියලා තමන්ලා ඉල්ලිමක් කලා?

උ: එහෙම ඉල්ලිමක් කලේ නැහැ.

ප්‍ර: මෙම විත්තිකරු අත් අඩංගුවට ගන්න කොට ඔහු ඇදගෙන සිටියේ කොට කලිසමක් කියලා යෝජනා කරනවා?

උ: නැහැ දිග කලිසමක්.

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ප්‍ර: තමාට යෝජනා කරනවා තමා මේ ගරු අධිකරණයේ අසත්‍යය සාක්ෂියක් දිවුරලා ප්‍රකාෂ කරන්නේ කියලා?

උ: මම පිලිගන්නේ නැහැ.

The position of the defence was completely put to the witness. Therefore, the observation by the learned Trial Judge that the defence version was not put to PW1 was incorrect. The only thing that was not put to PW1 was the fact that

the appellant was assaulted, which, however, does not affect the credibility of the defence.

The evidence of the appellant's sister is that the police had brought the appellant to his house, asked him to remove the shorts and wear trousers, handed over the keys of the three-wheeler to his mother, and the police searched the entire house, standing un-contradicted and un-challenged. The prosecution has not challenged the above facts by cross-examining the appellant's sister and has not even suggested that her evidence was not true.

Other than the heroin, among the things that the police had recovered from the appellant were his driving licence, Rs. 2048/-, his national identity card, his mobile phone with the sim and a white colour wallet. All these items are compatible with the position that the appellant was waiting to receive hires in his three-wheeler. The fact that the three-wheeler was handed over to his mother, was not challenged at all by the prosecution. PW1 never referred to a three-wheeler in his evidence. The undisputed evidence of the defence proved the following facts:

1. After arresting the appellant, he was taken to his house (the place of arrest was in dispute).

2. The police searched the house of the appellant.

3. They have found nothing illegal in the house of the appellant.

4. The three-wheeler was handed over to the mother of the appellant.

   This also proves the fact that he was arrested with the three-wheeler.

5. The appellant was ordered to change his shorts and wear trousers.

Though the dock statement is not subjected to cross-examination and is made without an oath, the dock statement of the appellant was completely

corroborated by the evidence, sworn by his sister. From the defence evidence, it is clear that the story of PW1 did not happen the way he described it.

In the Supreme Court appeal 154/10, decided on 03.01.2019 *Attorney General vs Devinduruge Nihal case,* the Supreme Court held that "an accused can be convicted on a single witness in prosecution, based on the police detection, if the Judge forms the view that the evidence of such witness can be cautioned and be relied upon after probing the testimony."

It is settled in law that the evidence of an official witness is not to be disbelieved or discarded merely because they are official witnesses.

However, before basing conviction on the evidence of a police officer, strict scrutiny with care and caution is required. If the evidence of a police witness is found compelling, reliable and credible, the conviction can be based on such evidence.

However, in this case, the evidence of PW1 is not so convincing and not corroborated by calling any other officer who participated in the detection. On the other hand, the dock statement of the appellant was corroborated by the evidence of his sister. Therefore, the defence evidence stands un-challenged.

In the case of *Hettiarachige Amila Pathum vs Attorney General CA 204/2008* decided on 27.02.2013, Sisira de Abrew J. held, quoting the case of the *Queen vs Kularatne 71 NLR 529,* that;

(1) If the dock statement is believed, it must be acted upon.

(2) If the dock statement raised a reasonable doubt in their minds about the prosecution case, the defence must succeed.

(3) Dock statement, one accused should not be used against the other accused.

The learned High Court Judge has brushed aside the whole defence evidence on the footing that the position was not put to PW 1. However, I have pointed out that the position of the defence was put to PW1. The learned High Court Judge has not evaluated the defence evidence by applying the test of probability with due care. Furthermore, almost all the evidence of the defence stands unchallenged by the prosecution. Thus, the learned High Court Judge erred in rejecting the defence evidence.

In the above circumstances, I am of the view that it is not safe to allow the conviction of the appellant to stand.

Therefore, the conviction is set aside, and the appellant is acquitted of the charges.

The appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal