

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 Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

Democratic Socialist Republic of Sri Lanka

CA/HCC/0050/2018

COMPLAINANT

Vs.

High Court of Colombo Case No:

Saruwe Liyanage Janaka Karunaratne

HC/7067/2013

ACCUSED

AND NOW BETWEEN

Saruwe Liyanage Janaka Karunaratne

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B Abayakoon, J.
: P. Kumararatnam, J.

Counsel :R. Arsekularatne, P.C. with Chamindi Arsekularatne,
and Thilina Punchihewa for the Accused Appellant
: Janaka Bandara D. S.C. for the Respondent

Argued on : 29-03-2022

Written Submissions : 15-10-2018 (By the Accused-Appellant)
: 14-01-2019 (By the Respondent)

Decided on : 26-05-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Colombo, where he was sentenced to life imprisonment.

The appellant was indicted before the High Court of Colombo on one count of trafficking of 6.6 grams of diacetylmorphine, commonly known as Heroin on 02nd April 2013, an offence punishable in terms of the Poisons Opium and Dangerous Drugs Ordinance as amended by Amendment Act No 13 of 1984.

He was also charged for having in his possession the same quantity of Heroin at the same time and at the same transaction, an offence punishable in terms of the same Ordinance.

After trial, he was found guilty for the offence of possession of Heroin, while he was acquitted of the charge of trafficking of Heroin preferred against him, and sentenced as above by the learned High Court Judge.

Facts in brief: -

Sub Inspector of Police Udara Premasiri (PW-01) has reported to duty at 8.00 a.m. at the Police Narcotic Bureau (PNB) on the day of the incident, namely, 02-04-2013. While on duty, he has been informed by one of his subordinate officers (PW-04, PC22836 Sandaruwan) that he received an information from one of his personal informants about trafficking of Heroin by a person.

Accordingly, he has organized a raid and had left the PNB at 6.30 p.m. with his team of officers including PC Sandaruwan. After reaching the place where the informant wanted them to come and meet him at 7.15 p.m., he has been informed that a person carrying Heroin will come from the direction of Wallampitiya in the motorbike No- WN-0802. While waiting in Kolonnawa-Gothatuwa junction with his team of officers expecting the arrival of the mentioned motorbike, it has arrived at 7.45 p.m. Upon searching appellant who came in the motorbike, the witness has found a parcel in his right trouser pocket, which he has identified as Heroin. The parcel weighed at 10 grams when it was weighed at the PNB. The witness has explained the procedure he followed in sealing the productions and handing over to the production officer of the PNB.

Under cross examination, it has been revealed that the same team of officers led by PW-01 has conducted two other raids during the day, before the raid which led to the arrest of the appellant. They have left the PNB at 11.00 a.m. and had arrested a person named Dharmasiri at Dematagoda with 500 grams of Heroin in his possession and returned to PNB at 1.40 p.m. They have left the PNB again at 3.00 p.m. and had arrested another person with Heroin at Maradana and had returned to the PNB at 5.00 p.m., and had left for the raid that led to the arrest of the appellant at 6.30 p.m. on that day. The witness has admitted that it was the same vehicle that was used for all the raids and it was the same officer who went wearing a police uniform. He has also stated that he received information from three different informants for the three detections. It was his position that when Dharmasiri was arrested he did not go to his house

and searched it, and has denied the suggestion by the learned Counsel for the appellant that he and his team went to the house of the said Dharmasiri.

It has been the position of the appellant that after getting to know of the mobile phone number of the appellant using the mobile phone of Dharmasiri, the appellant was asked to come to the house of Dharmasiri and was arrested there when he went to get money for his fish selling business, and the Heroin found in the possession of Dharmasiri was introduced to the appellant and the other person mentioned as the person arrested in the second raid. The witness has denied the position of the appellant stating that he has no reason for falsely implicate the appellant as he is unknown to him.

Under cross-examination, it has been further revealed that the witness has failed to mention in his out entry that he searched the officers who went with him in order to find whether they are carrying any unauthorized substance. It has been explained by the witness saying that it was his habit to mention that in his detailed notes and not in the out entry.

In response to the suggestion that it was not possible to conduct several raids in this manner, the witness has stated that these were not the only raids carried out by his team, but there was one unsuccessful raid previous to these three detections as well. According to the evidence of the witness, he and his team of officers have left the PNB at 10.40 a.m. on the previous day (01-04-2013) and had returned only at 10.35 a.m. on the day of these three raids, namely, 02-04-2013.

PW-04, PC 22836 Sandaruwan was the officer called by the prosecution to corroborate the evidence of the PW-01. He is also the person who has received the information about the trafficking of heroin from an informant. He has given similar evidence in relation to the raid and the arrest of the appellant. There has been no material contradictions and omissions in the evidence of PW-04 to that of PW-01. However, when questioned about the other two raids conducted

by the same team of officers on that day, he has claimed that he is not in a position to remember the details of those raids.

The prosecution has called other witnesses to prove the production chain in this case. The Government Analyst report is a matter that had been admitted by the defence.

At the closure of the prosecution case, and when a defence was called from the appellant, he has opted to make a statement from the dock. It was his position that he is a fishmonger by profession, and he went to the house of the earlier mentioned Dharmasiri at around 5.00-5.30 p.m. on the day of his arrest after he was informed by Dharmasiri by phone to come to collect the money he wanted as a loan from him for his fish business.

When he went to the house, he found Dharmasiri and a friend of him seated in the house and when he went inside, some police officers who were inside detained him and questioned as to the reason for coming. Although he explained, he was taken to the PNB along with the other two and implicated for the crime was his stand.

In his judgment, the learned High Court Judge has found the witnesses called for the prosecution as credible and consistent. It has been the observation of the learned High Court Judge that it was not improbable for PNB officers to conduct several raids in a day and the PW-01's failure to mention in his out entry that he examined other officers who took part in the raid does not affect the truthfulness of the evidence of the witness.

The learned High Court Judge has determined that the appellant has nothing to prove, and it was the duty of the prosecution to prove its case beyond reasonable doubt. Determining that the appellant has failed to offer a reasonable explanation against the evidence against him and that the appellant has taken different stances as to his arrest when PW-01 and PW-04 gave

evidence, it has been determined that the appellants stand cannot be accepted and it does not create any doubt as to the evidence of the prosecution.

Accordingly, the appellant has been convicted only for the possession of 6.6 grams of Heroin while he has been acquitted from the charge of trafficking the same amount.

The Grounds of Appeal: -

At the hearing of the appeal the learned President's Counsel for the appellant raised the following grounds of appeal for the consideration of the Court.

- (1) The learned High Court Judge failed to consider the probability of the evidence of the prosecution in its correct perspective.
- (2) The learned High Court Judge failed to consider the evidence favourable to the appellant in the judgment.
- (3) The learned High Court Judge misdirected himself in his analysis of the defence evidence.

It was the contention of the learned President's Counsel for the appellant that it was improbable for the same team of PNB officers to function continuously almost two days in the manner it has been stated in the evidence, which gives credence to the appellants stand as to the way he was arrested. Arguing that the probability of the evidence of the prosecution should have been considered by taking the evidence in its totality, it was the position of the learned President's Counsel that failure to search the house of Dharmasiri when he was arrested with 500 grams of heroin and the failure of the PW-01 to keep proper notes in his out entry are matters that should have been considered in favour of the appellant. Contending that the learned High Court Judge was not correct when he determined that the appellant has taken different stands when the two main witnesses gave evidence and the appellant was consistent in his defence, it was the position of the learned President's Counsel that the learned

High Court Judge, although he has stated that it was the prosecution who should prove its case beyond reasonable doubt, that burden has been shifted to the appellant in this case.

In reply, it was the position of the learned Deputy Solicitor General (DSG) for the respondent, that the learned High Court Judge has never shifted the burden of proof to the appellant and has rightly commented on the different stances taken by the appellant at the trial. Commenting that it was not unusual for a professional outfit like the PNB to work continuously due to the exigencies of work, it was the position of the learned DSG that the version of events as narrated by the witnesses are highly probable given the facts and the circumstances. Arguing that the learned High Court Judge has well considered the stand taken by the appellant in order to find whether it had created a doubt as to the case of the prosecution before finding the appellant guilty for the charge of possession of Heroin, it was the contention of the learned DSG that the judgment need no interference by this Court.

Consideration of the Grounds of Appeal

In view of the submissions made by the parties, all the grounds of appeal will be considered together as they are interrelated.

It is the settled law that a trial Court has to be extra careful in analyzing the evidence of trained police officers who engages in specialized duties in order to find out whether such evidence is credible and trustworthy, although such evidence has the same value as any other evidence.

In this action, the PW-01 has commenced his evidence giving the impression to the Court that as an officer of the PNB he reported to work at 8.00 a.m. in the morning as his normal practice and left for the raid where the appellant was arrested at 6.30 p.m. on the 2nd of April 2013.

However, under cross-examination, it has been revealed that in fact, it was not so. He had admitted that he and the same team of officers conducted two other

raids during the day before the arrest of the appellant in the raid relevant to this case. It has been revealed that the same team of officers led by PW-01 has left the PNB at 11.00 a.m. for the first raid for the day and had arrested a person called Dharmasiri with 500 grams of Heroin in his possession. When suggested that it was not probable for a same team of officers to conduct raids in that manner, the PW-01 has come out that in fact he and his team of same officers returned to the PNB only at 10.35 a.m., after leaving at 10.40 a.m. on the previous day, after an unsuccessful raid. Although this fact has been revealed by the witness to show that there can be several raids in a day, this also reveals that the team has left the PNB only 25 minutes from their return to the Bureau, after been out on duty for 24 hours.

Although it may be possible for a dedicated team of specially trained officers to work in this manner as argued correctly by the learned DSG, in my view, what needs to be considered is whether it may be the truth or any other assumption also possible given the facts and the circumstances of the case, after giving consideration to the totality of the evidence.

In that context, I find it was rather strange for the PW-01 to say that he reported to duty at 8.00 a.m. on the day of the incident, which was not correct according to his own evidence. I find it questionable as to why the PW-01 did not take steps to search the house of Dharmasiri when he was found with 500 grams of Heroin as it was the normal practice of the PNB to investigate further when a person is found with such a quantity of Heroin. I am of the view that there was a duty by the witness to explain as to why he did not follow the normal practice on this occasion. I find that the prosecution cannot get away from their responsibility of eliminating this type of reasonable doubts, as the defence of the appellant was that part of the Heroin found in the possession of Dharmasiri was introduced to him after getting him down to the house of Dharmasiri.

In the case of **Karunadasa Vs. Officer-in-Charge, Motor Traffic Division, Police Station Nittambuwa (1887) 1 SLR 155** it was stated by Perera, J. that;

“It is an imperative requirement in a criminal case that the prosecution must be convincing, no matter how weak the defence is, before the Court is entitled to convict on it. It is necessary to borne in mind that the general rule is that the burden is on the prosecution, to prove the guilt of the accused. The prosecution must prove their case apart from any statement made by the accused or any evidence tendered by him. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The rule is based on the principle that every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed.”

One of the main reasons why the learned High Court Judge has concluded that the appellants version of events has no credibility was that he has taken different stands when the two main witnesses gave evidence. It had been concluded that the position taken up by the appellant when PW-04 gave evidence as it appears in page 179 of the appeal brief was that

“ මහත්තයා යෝජනා කරනවා; මේ විත්තිකාරයා අත් අඩංගුවට ගත්තේ ඔයගොල්ලො ඒ දවසේ කල වැටලීමේදී මේ විත්තිකාරයා මේ මනුස්සයාගේ ගෙදර සිටියදී කියලා යෝජනා කරනවා ඕකයි ඇත්ත”

The learned High Court Judge has interpreted the said portion of evidence recorded to conclude that it was the stand of the appellant that he was arrested at his home and not in the way the witnesses claimed and it was contrary to the stand taken by the appellant when PW-01 gave evidence. However, I find that if considered in its totality rather than compartmentalizing the evidence, it is clear that it was the same stand taken by the appellant throughout the trial. This becomes so clear if one look at the way the learned State Counsel who prosecuted before the High Court has re-examined PW-04, which reads as follows;

“ ඔබට තව දුරටත් යොජනා කලා එදා දවසේ 2013.04.02 දින ඔබ වැටලීමකට සහභාගී වෙලා අත්අඩංගුවට ගත්ත තෙල් බාලා කියන පුද්ගලයාගේ ගෙදර මේ විත්තිකරු හිටපු හින්දා තමයි මේ විත්තිකරුට මෙම නඩුවට අදාල කුඩු හඳුන්වාදීමක් කලේ කියලා ඒක ඔබ පිළිගන්නවාද? ” (page 192 of the appeal brief)

It was held in the case of **Don Samantha Jude Anthony Jayamaha 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 the above conclusion of the learned High Court Judge was a misdirection as to the evidence as rightly pointed out by the learned Counsel for the prosecution. I am also unable to agree with the finding that it was not probable for the earlier mentioned Dharmasiri to have a reason to call the appellant. I am of the view that it is quite possible for a fishmonger to borrow money from others to carry out his vocation given the facts and the circumstances. Although it may not be very material under normal circumstances, I find that the PW-01’s claim that it was his habit to record that he searched the officers who take part in a raid of this nature in his detailed notes rather than in his out entry, too, as relevant under the context of whose version of events are more probable.

Basnayake, J. stated in the case of **Alim Vs. Wijesinghe 38 CLW 95** that where the same facts are capable of an inference in favour of the accused and also of an inference against him, the inference consistent with his innocence should be preferred. (See- The Law of Evidence Volume II (Book I) by E.R.S.R.Coomaraswamy at page 297)

At this juncture I am also reminded of the legal maxim known as Blackstone's Formulation which says that "It is better that ten guilty persons should escape than one innocent suffer", which is based on the essential principle of our criminal law that a criminal charge has to be established beyond reasonable doubt.

(See- Glanville Williams, Proof of Guilt, 3rd Edition, 186-190)

It is my considered view that if considered in the correct perspective, there was sufficient basis for the Court to conclude that the appellant has created a reasonable doubt with regard to the evidence adduced by the prosecution which should have been considered in favour of him.

For the reasons as stated above, I am unable to agree with the reasoning for the finding of the appellant guilty for the possession of Heroin by the learned High Court Judge. I am of the view that it was not safe to convict the appellant given the infirmities of the evidence of the prosecution.

Accordingly, I set aside the conviction and the sentence dated 26-04-2018, as it cannot be allowed to stand, and acquit the appellant of the charge for which he was found guilty.

Appeal allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal