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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal No.
CA/HCC/ 0296/2017

High Court of Panadura
Case No. HC/ 2550/2009

Muthuthanthrige Nilmini Reshani Fernando alias Rosy

Accused-Appellant

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

Complainant-Respondent

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **W. M. Samadara P. Kumari Jayasinghe for Appellant.**
Dileepa Peiris, SDSG for the Respondent.

ARGUED ON : **17/05/2022**

DECIDED ON : **16/06/2022**

JUDGMENT

P.Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General under Sections 54(A) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession and Trafficking respectively of 2.9 grams of Heroin on 25th May 2003 in the High Court of Panadura.

After trial the Appellant was found guilty on both counts and the Learned High Court Judge of Panadura has imposed a sentence of life imprisonment on her on the 08th of September 2017.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument she was connected via Zoom platform from prison.

On behalf of the Appellant two Grounds of Appeal are raised.

1. In the first ground of appeal the Appellant contends that the prosecution has failed to prove that the production was sealed after following accepted sealing procedure and failed to prove its movement until it reached the Government Analyst Department.
2. There is inter se contradictions between the prosecution witnesses.

Facts of the case *albeit* **briefly are as follows.**

PW1 SI/Perera attached to the Moratuwa Police Station was on night patrol duty along with a team of police officers on 25/05/2003. While they were at Alwis Mawatha, Katubedde around 10.00 p.m., the Appellant was seen walking towards the police officers but suddenly changed direction by turning towards the Saman Place. PW1 having observed the change of movement of the Appellant which he thought was suspicious, rushed at her and stopped her to check. He had then observed a red coloured cloth, a part of which was visible under her right-hand armpit. When PW1 pulled it out, he had found a blue coloured grocery bag wrapped inside. A large number of small packets packed in printed paper was found when the grocery bag was opened. When PW1 opened a packet, he had found some substance in it which reacted for Heroin. Then the Appellant was arrested immediately and brought to the Moratuwa Police Station. At the police station the parcel was opened and about 400 packets containing heroin were found to be held within. After collecting all the Heroin on to a tissue paper it had been weighed using an electronic scale. The weight has been recorded as 12000 milligrams. The weight was noted including the tissue paper. The production was properly sealed and sent to the Government Analyst Department for analysis. According to the Government Analyst Report 2.9 grams of pure Heroin (Diacetylmorphine) had been detected in the parcel.

The evidence given by PW1 has been properly corroborated by the other police witnesses called by the prosecution.

After the closure of the prosecution case, the defence was called as the Learned High Court Judge had observed that the prosecution had presented a prima facie case against the Appellant and the Appellant had opted to give evidence from the witness box and had proceeded to call witnesses.

In the first ground of appeal the Appellant contends that the prosecution has failed to prove that the production was sealed after following accepted sealing

procedure and that the prosecution has failed to prove its movement until it reached the Government Analyst Department.

In several judicial decisions delivered both by the Apex Court and the Court of Appeal of our jurisdiction, one salient point stressed frequently is that the inward journey of the productions in drugs related cases plays a decisive role in the final outcome of the matter. If the inward journey evidence creates a doubt, the failure of the prosecution case is inevitable. Hence, the chain of the inward journey of the production plays a major role in matters related to drugs. The inward journey begins with the detection, sealing, custody and the conclusion by reaching the Government Analyst Department.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person. In a case of this nature the prosecution does not only need to prove the case beyond reasonable doubt but also ensure, with cogent evidence that the inward journey of the production has not been disturbed at the all-material point.

In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 the court held:

> *"A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions where the identity of the good analysis for examination has to be proved beyond reasonable doubt. A prosecutor should take pains to ensure that the chain of events pertaining to the productions that had been taken charge from the Appellant from the time it was taken into custody to the time it reaches the Government Analyst and comes back to the court should be established".*

According to PW1, the detection was done without any information received beforehand. The reason for the arrest of the Appellant was due to her sudden

suspicious movement as observed by PW1 and his team. The Heroin was recovered from under her right armpit. After recovering the substance, the Appellant was taken to Moratuwa Police Station for further investigations. Until such time the production was in the custody of PW1. After coming to the police station PW1 had collected all the substances from the packets on to a tissue paper and weighed the same using an electronic scale. The total weight including the tissue paper showed 12000 milligrams. The Appellant was searched with the assistance of a female police officer to ensure that she does not have any more substances in her possession. The weighing and sealing were done in front of the Appellant. PW1 had used his personal seal to seal the production and also obtained the fingerprint of the Appellant to seal the production. The sealed productions were handed over to the reserve police officer PC 6040 Lalith marked as (PR 57/03).

The Appellant was produced before the Learned Magistrate of Moratuwa on 26/05/2003. The production was taken to the Government Analyst Department by PS 11038 Jayatilake on 05/06/2003.

PW2 Sgt/12085 Sirisena, had corroborated the evidence given by PW1 without any contradiction or omission. In his evidence he admitted that the investigation revealed that the Appellant was a market vendor at Katubedde Public Market.

The prosecution led evidence that production PR 57/03 was duly kept under the care of reserve police officers until it reached the Government Analyst Department. All reserve officers were called to give evidence to confirm that the production pertaining to this case had reached the Government Analyst Department without any break in the chain of production.

PW8 Assistant Government Analyst, Chandrani confirmed that the production pertaining to this case had reached her department with all seals intact. Government Analyst Sivaraja who was called as a defence witness too

confirmed that the seals of the production were intact when it reached his department.

Proving detection, sealing and chain of custody are a very important task entrusted to the prosecution in a drug related case. If investigating officers do not do their duty properly, detection, sealing and chain of custody can be successfully challenged during trial. This is because the prosecution always relies on evidence gathered by police officers in cases of this nature.

In **Perera V. Attorney General** [1998] 1 Sri.L.R 378 it was held:

> *"…the most important journey is the inward journey because the final analyst report will depend on that".*

In **Witharana Doli Nona v. The Republic of Sri Lanka** CA/19/99 His Lordship Justice Abrew remarked thus;

> *"It is a recognized principle that in drug related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. Prosecution must prove that the productions taken from the accused Appellant was examined by the Government Analyst"*

In this case, although the Appellant contends that the productions were not sealed according to the accepted procedure by the police, all prosecution witnesses vividly explained without any contradictions or omissions that the production which reached the Government Analyst Department had been properly sealed. Hence the argument advanced by the Appellant under the first ground of appeal has no merit.

In the second ground of appeal the Appellant argues that there is inter se contradictions between the prosecution witnesses.

The Appellant in her evidence admitted that she was arrested on 25/05/2003 and brought to the Moratuwa Police Station and that her fingerprint was obtained on to an envelope. But she denied that she

possessed Heroin at the time of arrest as claimed by the prosecution. During her evidence a number of questions had been asked from her by her Attorney-at-Law with regard to the personal seal of PW1.

Although the Appellant was subjected to numerous questions with regard to the personal seal of PW1, the defence failed to direct those questions to the most relevant person, PW1. Further the appellant in her evidence complaints that she was subjected to torture and duress while at the Moratuwa Police Station, but she had failed to lodge a complaint to the appropriate authority, including the Learned Magistrate before whom she was produced several times before being indicted in the High Court of Panadura.

Defence witness No.2, the Registrar of the High Court of Panadura was summoned by the defence to prove that the sending of production pertaining to this case to the Government Analyst Department and receiving of the receipt and the Government Analyst report.

PW8 Chandrani, the Assistant Government Analyst in her evidence stated that the production pertaining to this case was directly received from the police. As a routine practice she had checked the seals with the specimen seal and accepted the production and issued a receipt which had been marked as P10.

According to her the covering letter sent by the Officer-in-Charge of Moratuwa Police Station had mentioned that the weight of the Heroin was 12000 milligrams (12 grammes). When the parcel was first weighed as it is, it showed 12.84 grammes. The defence did not ask any question regarding this discrepancy in weight. (0.84 grammes) The brown coloured substances weighed about 9.8 grammes. After the analysis of the brown coloured substances the Government Analyst had extracted 2.9 grammes of pure Heroin. The prosecution had proved the Government Analyst Report without any contradiction.

The defence witness PW3, who was the Government Analyst and co-signed the report had corroborated the evidence of PW8.

As the evidence presented by the prosecution with regard to the detection, sealing and forwarding for analysis sans any contradiction or ambiguity, I conclude that the appellant is not successful in his second ground of appeal too.

In this case evidence pertaining to the detection of Heroin from the appellant is clear, cogent and without any contradiction or omission. The evidence presented by the prosecution is not challenged at any material point. Hence no fault had occurred at any stage of the trial.

The Court of Appeal in **Bandara v. The State** C.A. 27/99 held that:

> *"…when there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross-examination that is a special fact and feature in the case, it is a matter falling within the definition of the word "proof" in section 3 of the Evidence Ordinance and a trial judge or court must necessarily take the fact in to consideration in adjudicating the issue before it."*

In **Ukkuwa v. The Attorney General** *[2002] 3 SLR 279*, is a case where Justice S. Tilakawardene held that matters of fact that could have been challenged and clarified at the Trial Court are precluded from being challenged at the Appellate Court in the following manner at page 282;

> *"… court is mindful of the fact that having had the opportunity to cross-examine the witness before the original court and having failed or neglected to avail himself of the opportunity of such examination on these matters which could have been clarified, had such objections or cross-examination being raised in the original court, the counsel is*

precluded from challenging so the veracity of such matters of fact before this court."

The Learned High Court Judge had accurately analysed and considered the evidence presented by both parties and arrived at a proper finding.

Considering all the evidence presented during the trial, I conclude that the prosecution has proved the case beyond reasonable doubt. I further conclude that this is not an appropriate case in which to interfere with the decision of the Learned High Court judge of Panadura dated 08/09/2017.

Hence, the appeal is dismissed.

The Registrar is directed to send a copy of this judgment to the High Court of Panadura along with the original case record.

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL