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

In the matter of an Appeal made under 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:
CA/HCC/0118/2020

High Court of Colombo
Case No: HC/7519/2014

Muniyandi Upul Chaminda alias Konda Chaminda

Accused-Appellant

vs.

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

Complainant-Respondent

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

COUNSEL : **Kalinga Indatissa, P.C, with R. Indatissa and R. Salih for the Appellant.**
Anoopa De Silva, DSG for the Respondent.

ARGUED ON : **08/06/2022**

DECIDED ON : **20/07/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred as the Appellant) was indicted by the Attorney General in the High Court of Colombo under Sections 54A (d) and 54A (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984 for the Trafficking and Possession of respectively 3.29 grams of Heroin (Diacetylmorphine) on 14th November 2013.

After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed a sentence of life imprisonment on the 14th of October 2020.

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 he has been connected via Zoom platform from prison.

The Learned President's Counsel, even though he raised 09 grounds of appeals in his written submissions restricted his argument to the following 04 grounds of appeal.

1. That the learned trial Judge has not considered the failure on the part of the prosecution to prove the charge under Section 54A (b) (Trafficking) and the lack of corroborative evidence to support such a charge.
2. That the learned trial Judge had failed to appreciate the inconsistency between the evidence provided by PW1 and PW2 as to how they discovered the identity and/ or alias of the Appellant.
3. That the learned trial Judge has failed to properly evaluate the dock statement and the evidence put forward by the Defence in accordance with legal principles.
4. That the Learned Trial Judge has failed to consider that the chain of custody had not been proved beyond reasonable grounds.

At the trial, PW1 IP/Chandana, PW2 IP/Wasantha Kumara, PW9 PC 47316/Jansz, PW10 PS 27675/Ramyakumara and PW11 Government Analyst Mrs. Jayasekera were called by the prosecution to give evidence. The Appellant made a dock statement and called his mother as defence witness.

Background of the case

According to PW1, he was the Officer-In-Charge of the Western Province Anti-Corruption Unit which functioned under the Colombo Crime Division. On 14/11/2013, while he was engaged in his usual daily official duties, he had gone to Maligawatte with a team of police officers to detect illegal substances and to raid brothel houses functioning in that area. He had used a white coloured van for this purpose. They had gone to Kettarama and parked their vehicle in front of the R. Premadasa Cricket Stadium.

PW1 who was clad in police uniform and was seated at the front had noticed a person approaching them whilst glancing backwards. As his movement seemed to be suspicious, PW1 had apprehended the person before he could pass the front of the vehicle where he was seated. With the assistance of the other officers the person was searched and a pink coloured cellophane bag was recovered from the right-side pocket of the pants worn by the said person.

When the cellophane bag was checked by PW1 some brown coloured substance was found which he identified as Heroin relying on his experience in dealing with narcotics. The Appellant was taken into custody immediately for further investigation.

During inquiry, the person's name was found to be Muniyandi Upul Chandima alias Konda Chaminda from Kettarama area. He is the Appellant in this case.

The recovered substance was taken for weighing to the Dedigama Pawning Centre, Dematagoda. The weight of the substance with the cellophane bag had been 15.21 grammes. PW1 had sealed the production and handed it over to the reserve police officer PW9 PC 47316 Jansz at 1600 hrs.

According to the Government Analyst Report 3.29 grammes of pure Heroin (diacetylmorphine) had been detected from the substance which was subjected for analysis.

When the prosecution had closed the case after leading the prosecution witnesses mentioned above, the defence was called, and the Appellant had made a dock statement and called his mother as his witness.

Considering the grounds of appeal advanced by the Appellant, I regard it appropriate to consider the second ground of appeal first.

In the second ground of appeal the Appellant contends that the learned Trial Judge had failed to appreciate the inconsistency between the evidence given by PW1 and PW2 as to how they discovered the identity and or alias of the Appellant.

According to PW1 the appellant was arrested randomly without any prior information. In his evidence he has categorically stated that the identity of the appellant was revealed only after his arrest. Hence, it was the position of PW1 that the Appellant is a stranger to him at the time of the arrest.

On this point, upon examination of the evidence given by PW2, he had stated that the identity with alias name of the Appellant was intimated to the police team by PW1 IP/Chandana who had headed the team. This is a very contradictory position taken by PW1 and PW2.

In the cross examination PW2 has given evidence as follows:

ප්‍ර : ඔය අනුවර්ථන නාමයකුත් මහත්මයාලා දැන ගත්තද ඒ අත් අඩංගුවට ගත්ත වෙලාවේ?

උ : නොහොත් කොන්ඩ චමින්ද කියලා පො. ප චන්දන මහතා විසින් කිව්වා ගරු උතුමාණනි.

ප්‍ර : නැහැ කිව්වා නෙමෙයි මහත්මයා ළඟ ඉන්න කොටනේ අල්ලා ගත්තේ?

උ : එහෙමයි උතුමාණනි.

ප්‍ර : අනන්‍යතාවය මහත්මයාලා දැන ගන්න ඇතිනේ ගෙදරට ගියෙත් නැහැ නේ හොයලා බලන්න මේ මනුස්සයා කියන ඒවා ඇත්තද බොරුද කියලා බලන්න මහත්මයාලා ගෙදරට ගියාද?

උ : නැහැ ගරු උතුමාණනි.

ප්‍ර : ඒක තමයි මම අහන්නේ, චන්දන මහත්මයා මේ විත්තිකාරයාගේ නම මුණියන්ඩි චමින්ද නොහොත් කොන්ඩ චමින්ද කියලා කොහොමද දැන ගත්තේ?

උ : පො. ප චන්දන මහතා තමයි මේ පුද්ගලයා සම්බන්ධව අපිට කිව්වේ.

ප්‍ර : දැන් මහත්මයා කිව්වේ කියන්නේ, මහත්මයා ඉන්න තැනනේ තමයි ඔක්කොම අරගෙන අත් අඩංගුවට ගත්තේ මහත්මයාගේ ඉස්සරහානේ?

උ : එහෙමයි උතුමාණනි.

ප්‍ර : ඒක තමයි ඔය පුද්ගලයාගෙන් කොහොමද ඔය නම දැන ගත්තේ?

උ : පො. ප චන්දන මහතා තමයි ඔහුගෙන් නම දැන ගත්තේ.

ප්‍ර : නම මොකක් කියලාද විත්තිකාරයා කිව්වේ?

උ : උපුල් චමින්ද කියලා කිව්වා උතුමාණනි. පො. ප චන්දන මහතා කිව්වා මොහුට කොන්ඩ චමින්දත් කියලා කියනවා කියලා.

ප්‍ර : ඒ කියන්නේ ඒ පුද්ගලයා කිව්වාද කොන්ඩ චමින්ද කියලා කියනවා කියලා මට?

උ : එහෙම මතකයක් නැහැ උතුමාණනි.

ප්‍ර : ඒ පුද්ගලයා කිව්වාද මුණියන්ඩි උපුල් චමින්ද කියලා මගේ නම කියලා කිව්වාද ඒ පුද්ගලයා?

උ : නම කිව්වා උතුමාණනි.

ප්‍ර : ඉතිං මහත්මයා ඒක ඇහුණා නම් මහත්මයා ඔය කොන්ඩ චමින්ද කියන නම මහත්මයාට ඇහුණේ නැද්ද?

උ : පො. ප චන්දන මහතා තමයි අපිට එම පුද්ගලයාට කොන්ඩ චමින්ද කියන බවට පවසා සිටියේ.

ප්‍ර : ඒ කියන්නේ චන්දන මහත්මයා මේ පුද්ගලයා කලින් අඳුරනවා කියලා කිව්වාද?

උ : නැහැ ගරු උතුමාණනි.

ප්‍ර : ඒක තමයි මම අහන්නේ මහත්මයාට මේ පුද්ගලයාගේ නම මුණියන්ඩි උපුල් චමින්ද කියලා නම ඇහුණා නම් ඔය කොන්ඩ චමින්ද කියන නම ඔය පුද්ගලයා කිව්වාද කියලා පැහැදිලිව අහන්නේ?

උ : ගරු උතුමාණනි එම පුද්ගලයා කිව්වේ නැහැ පො.ප චන්දන මහතා තමයි අපිට මේ පුද්ගලයාට කොන්ඩ චමින්ද කියලා කියනවා කියලා එම අවස්ථාවේදී කිව්වේ.

(Cross examination of PW 2 IP/ Vasantha Kumara at Pages 167 to 168 of the Appeal Brief)

The last answer of PW2 mentioned above is very clear that the Appellant had not mentioned his name but it was intimated to PW2 only by PW1. Hence, as rightly claimed by the Learned President's Counsel this contradictory position with regard to the identity of the Appellant creates a serious doubt in this case.

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 needs to not only prove the case beyond reasonable doubt with cogent and believable evidence sans any contradictions or omissions but should also ensure that the arrest, detection, weighing and sending the substance for analysis is conducted with accordance to due process which will otherwise affect the root of the case.

In **Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 His Lordship held that;

> *"In considering the question as to whether evidence given by the witness should be accepted or not, the court has, no doubt, to examine whether the witness is, an interested witness and to enquire whether the story deposed to by him is probable and whether it has been*

shaken in cross-examination. That is whether there is a ring of truth surrounding his testimony."

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 Denning J in the Kings Bench held that:

"The evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability"

In this case although PW1 claimed that he did not possess any prior knowledge regarding the identity of the Appellant, PW2 in his evidence very clearly stated that the Appellant's name and alias name was intimated to him by PW1. This is a very serious inter se contradiction between important prosecution witnesses. Further, this inter se contradiction raises very serious questions as to the credibility of the so-called detection.

The effect of a valid and serious contradiction in a criminal trial has been discussed in several judicial decisions. A Contradiction which affects the root of the case will certainly overturn the original decision pronounced by the trial court. The appellate court will not encourage the provision of a second chance to the prosecution to rectify the ambiguity created by the police investigators in a case of this nature.

In **Udagama v. AG** [2000] 2 SLR 103 the court held that;

"Material questions and contradictions go to the very root of the prosecution case".

In the **Attorney General v. Sandanam Pitchi Mary Theresa** [2011] 2 SLR 292 the court held that:

> *"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are material to the fact in issue".*

The Learned High Court Judge had not properly evaluated this inter se contradiction in his judgment. The Learned President's Counsel has pointed out that the Learned Trial Judge in his judgment had addressed the inconsistency in paragraph 20 of the judgment as follows:

> "පොලිස් අත් අඩංගුවට පත් වී ප්‍රශ්න කිරීමේ දී චූදිතගේ අන්වර්ථ නාමය දැන ගැනීම ද විය හැකිය."
>
> (Paragraph 20 of the Judgment-page 227-228 of the brief)

This clearly shows, as contended by the Learned President's Counsel that the Learned High Court has gone beyond evaluating the evidence that had been led before him and has arrived at his own conclusion which is not supported by the evidence that was led in the trial. It shows that he arrived at the decision on his assumption.

When the appellant satisfactorily proves that an inter se contradiction affects the root of the prosecution case, the court has no option but to award the benefit of that doubt to the Appellant. Therefore, I conclude that this ground of appeal has merit and afford the benefit of the doubt to the Appellant accordingly.

Next, I will consider the third ground of appeal advanced by the Appellant. In that ground the Appellant complains that the learned trial Judge has failed to properly evaluate the dock statement and the evidence put forward by the Defence in accordance with legal principles.

The Appellant had denied that he was arrested outside the main gate of the R. Premadasa International Stadium in Maligawatte, and had contended that he was arrested at his residence which is situated 50-70 meters away from the stadium by PW1 and another officer. When he was taken under their arrest, they had inquired about "Sri Prabha" who is the brother-in-law of the Appellant. At that time his mother had also been at home.

When he replied that he was unaware of the whereabouts of his brother-in-law, his house was searched and he was taken to the Kotahena Police Station to obtain his recorded statement. After keeping him there till 3.00 p.m. on 14/11/2013, he was taken to Colombo Crime Division and a false case had been instituted upon planting a package of Heroin on him. This position had been put to PW1 in his cross examination by the defence counsel during the trial.

In **Samantha Jayamaha v. Attorney General** CA Appeal 303/2006 and C.A.L.A. 321/2006 decided on 11/07/2012 the court held that:

> *"Even if the dock statement is rejected the burden always remains on the prosecution of proving the case against the accused, beyond reasonable doubt... 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 the evidence that is in the light of the evidence for the prosecution as well as the defence... Finally, having considered the case for the prosecution as well as the dock statement it is only then the learned*

Judge can decide whether or not the dock statement is sufficient to create a doubt in the case for the prosecution."

In **Udagama v. AG** [2000] 2 SLR 103 the court held that:

> *(1) "Evidence is infirm, unsafe and unreliable to act upon considering the following,*
> *…*
> *(iii) failure to evaluate and consider the dock statement of accused.*

Test of reasonable doubt plays a wide role when evaluation of the defence evidence. The evidence of the Appellant may be not so convincing yet it may be capable of creating a reasonable doubt in the prosecution case.

Hence, I agree that the failure to properly consider the dock statement of the Appellant as argued by the learned President's Counsel raises a reasonable doubt on the prosecution story.

The Appellant's mother Leelawathie giving evidence on behalf of the defence confirmed that the police officers had come to her house on the date of arrest of the Appellant, searched the house and taken the Appellant to the Colombo Crime Division to record a statement. According to her the Appellant was wearing only a sarong when the police apprehended him and he did not have anything in his possession when he was taken away by the police. Her evidence was not subjected to cross examination by the prosecution.

In **Indrasena & Wimalasena v. Attorney General** [2008] CA No. 135/2003 decided on 10.06.2008 Sisira de Abrew J. held that;

> *"Whenever the evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent".*

In **Sarwan Singh v. State of Punjab** [2002] Appeal (crl.) 480 of 2001 decided on 07/10/2002 the Indian Supreme Court held that:

> *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted."*

As the defence witness's evidence has not been challenged or rebutted, the only conclusion the court should arrive at is that the stance taken by the Appellant in his dock statement had been properly corroborated through his witness.

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial.

When the defence evidence creates a reasonable doubt on the prosecution case, the benefit of the same should be given to the Appellant. Hence, this ground of appeal also has merit.

As the considered grounds of appeal two and three have merits which certainly disturb the judgment of the learned High Court Judge, it is not necessary to address the remaining grounds in this appeal.

The failure of the witnesses to pass the test of probability and the inter se contradictions of the prosecution witnesses are substantial enough to vitiate the conviction.

Due to the aforesaid reasons, I set aside the conviction and the sentence dated 14/10/2020 imposed on the Appellant by the learned High Court Judge of Colombo. Therefore, he is acquitted from both charges.

Accordingly, the appeal is allowed.

I greatly appreciate and thank both the counsels for assisting this court by filing comprehensive and helpful written submissions.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL