IN THE COURT OF APPEAL OF THE DEMOCRETIC 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:

CA/HCC/0406/2017

High Court of Chilaw

Case No: HC/223/2005

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Abdul Gaffoor Nawsin

ACCUSED

AND NOW BETWEEN

Abdul Gaffoor Nawsin

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Amila Palliyage with I.B.S. Harshana and Ruwanthi De Doralugoda for the Accused Appellant
	: Janaka Bandara, D.S.G. for the Respondent
Argued on	: 26-05-2022
Written Submissions	: 05-09-2018 (By the Accused-Appellant)
	: 29-10-2018 (By the Respondent)
Decided on	: 20-07-2022

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 Chilaw.

The appellant was indicted before the High Court of Chilaw for having in his possession 51.40 grams of diacetylmorphine, commonly known as Heroin, on 3rd August 2004, an offence punishable in terms of Poisons Opium and Dangerous Drugs Ordinance.

After trial, he was convicted as charged by the learned High Court Judge of Chilaw and was sentenced to imprisonment for life.

The facts that led to the conviction, in brief, are as follows.

PW-01 was a Chief Inspector of Police attached to the Police Narcotic Bureau (PNB) at the time relevant to this action. On 3rd August 2004 at around 6.30 p.m., Police Inspector Nimal Perera who was another police officer attached to the PNB has informed him that he received an information from one of his personal informants about trafficking of Heroin that is due to happen around

10-11 in the night, at Chilaw. Based on the information, PW-01 has organized a raid and along with IP Nimal Perera and several other officers has left the PNB in a van belonging to them in order to conduct the raid. All of them had been clad in civilian clothes. Leaving the police garage at 19.55 hours, they have reached Chilaw and had stopped their vehicle near Suhada Pharmacy which was situated on the main road. The informant of IP Perera had been there, and after taking him into the vehicle, PW-01 has taken further information from him. He has been informed that the person who is dealing in Heroin will come near the Suhada Pharmacy and that he is in a position to point out the person to him. As the vehicle had darkened glasses the informant has remained inside the vehicle. After about 20 minutes of waiting, the informant had pointed to a person coming towards the direction of the vehicle about 75-80 feet away, who was carrying something in his hand. And has informed that he was the person concerned.

After informing IP Perera to lead the informant away, PW-01 along with PS 30762 Senaratne has approached the person who was coming towards them. After reaching him, PW-01 has revealed his identity and has informed that he needs to search what he was carrying. The moment PW-01 identified himself, the said person had panicked. However, after detaining him with the help of other officers who arrived later, PW-01 has inspected the parcel he was carrying. It was a polythene bag, and inside he has found a parcel wrapped in newspaper covers. When opened, he has found a parcel covered in two cellophane covers. Opening that he has discovered a brown-coloured powder. Through his experience as a police officer PW-01 has identified the brown coloured powder as Heroin. Later the appellant had been arrested at 22.15 hours after informing him of the possible charges. After taking the Heroin recovered from the possession of the appellant into his custody, PW-01 and his team has travelled to the Chilaw police station and after informing his superior officers of the raid conducted by him and his team, he has returned to the PNB at 12.30 in the midnight.

At the trial, PW-01 has identified the appellant as the person who was arrested by him. When weighed at the PNB, the brown-coloured powder had 234 grams and when subjected to a field test it has confirmed that in fact the substance was Heroin. Later PW-01 has taken due steps to seal the productions and to produce the productions and the appellant to the relevant officers of the PNB. PW-01 has identified and marked the relevant productions at the trial. It was his evidence that further investigations into the matter was carried out by the PNB and he came to know that the appellant was produced before the Chilaw Magistrate.

In the cross examination, the position taken up on behalf of the appellant by his counsel has been that at the time of the arrest the appellant along with some others were travelling in a van in the Chilaw area. It was his position that the police party came and blocked their vehicle and searched it. Despite the fact that nothing was found in the possession of the appellant nor in the vehicle, the appellant and the other occupants of the van were taken to the Chilaw police station and from there, brought to Colombo and this parcel was introduced, was the position taken. It was also the position of the appellant that he was unaware how this parcel was found and he had no knowledge of it and further, he was never arrested in front of the Suhada Pharmacy as claimed by PW-01. Counting this position, PW-01 has stated that if he arrested a van and several other persons as claimed by the appellant, he would have taken steps to produce the vehicle and others at the police station and the arrest was made in front of the Suhada Pharmacy and he had no reason to frame the appellant for a charge of this nature.

In support of the evidence of PW-01, Sub-Inspector of Police Kapila Senaratne (PW-02) who was then attached to PNB as PS 30762 has given evidence. His evidence has been similar to that of PW-01 and he has identified the appellant as the person who was arrested in front of the Suhada Pharmacy in Chilaw with a parcel of Heroin. He too has identified the productions at the trial and

under cross-examination, has denied the stand taken by the appellant that he was not arrested near the Suhada Pharmacy nor he had any Heroin in his possession.

In this matter, Senior Assistant Government Analyst Kokawila Pathiranage Chandrani (PW 5) has given evidence and has confirmed that the productions received by the Government Analyst Department from the Chilaw Magistrate Court under Case No. B588/04 was analyzed by her. When weighed under laboratory conditions she has found that the total quantity of the substance was 234 grams. After subjecting the contents to the necessary tests, the Government Analyst has found 51.49 grams of pure Heroin in the substance analyzed by her. Under cross-examination, she has explained in detail the procedure adopted by the Government Analyst Department in accepting, analyzing and reporting on this type of productions to the relevant Court.

When the Prosecution case was closed and when the appellant was called upon to present his defence by the Learned High Court Judge, the appellant has chosen to give evidence under oath and to call a witness on his behalf.

It was his stand that at the time of his arrest, he was working in Vavuniya at a clothing store belonging to his uncle. On the day of his arrest, he was at his home in Puttalam and when he came to the town to have his meals, he met one Isadeen Ismail, who was known to him and at his request, went with him to Madurankuliya, Sinnapaadu, because Ismail wanted him to accompany him to pay the salaries of his workers. He has claimed that they went to a house belong to one Kelum, finding he's not at home, they met one Ajith who lived nearby and after being informed that Kelum is at a restaurant near the Mundalama clock tower, met up with him. After having their meals, all of them went to Chilaw and reached a place near Chilaw beach. By that time, there had been six others in the van of whom only earlier mentioned Isadeen was known to him. It was around 3 p.m. at that time. After waiting till about 6.30 p.m. for the person to whom Isadeen wanted to pay his salary they left the beach as he

did not come and travelled for about 8 km to a restaurant, had their meals and while returning, a van came and blocked their path was his position. It was his evidence that persons who came including the witnesses who gave evidence in Court identified themselves as police officers and checked the vehicle where nothing was found, but taken to the Chilaw police station at around 9 p.m. At the police station they were asked to get down and was questioned. While being questioned near the van, one officer who brought a parcel from inside the police station questioned whether it belongs to him for which he denied the ownership. It was his evidence that he was assaulted and later arrested and taken to the police station and on the following day produced before the Court. It was his position that he was never arrested near the Suhada Pharmacy as claimed and nothing was recovered in his possession and he was framed for the crime by the police officers.

The appellant has called the earlier mentioned Isadeen to give evidence on his behalf. It was his evidence that the appellant is well known to him over a period of time and the appellant accompanied him on the day of the incident to travel to Sinnapaadu upon his invitation. It was his position that he invited the appellant to travel with him because he wanted him to be a witness for the money he wanted to give to one Kelum for a business dealing. It was his evidence that they went to Mundalama area and met up with Kelum around 11 a.m., and the money due to him was handed over. According to him, after concluding that deal, both of them accompanied the said Kelum and several other persons traveled to Chilaw in a van because earlier mentioned Kelum wanted to hand over some money to another person. After reaching Chilaw around 6-7 in the night, they have reached the Chilaw beach and after spending about an hour, went back to the town and had their dinner. While on their way back their vehicle was blocked by some person travelling in another van and after identifying them as police officers, all the persons who were in the van were taken to a police station which was about 2 km away from where they were stopped. At the police station, all the persons who were in the van

was asked to get down and all were searched and subsequently, after detaining the appellant, he and the rest of them were released was the position taken up by the witness.

After the conclusion of the defence evidence, both the prosecution and the defence Counsels have been afforded an opportunity to present their respective cases before the Learned High Court Judge. As mentioned earlier, by his judgement dated 13-12-2017 the learned High Court Judge found the appellant guilty as charged and he was sentenced accordingly.

The Ground of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following ground of appeal for the consideration of the court.

1. The Learned High Court Judge erred in law in rejecting the defence evidence on a wrong premise.

    (a) The Learned High Court Judge rejected uncontradicted evidence led by the appellant.

    (b) The Learned High Court Judge has admitted that the evidence of the appellant at the trial has been corroborated by the evidence of the defence witness called on his behalf. However, he has rejected the evidence of the said witness on the basis that he has not made a statement to the police, or has lodged a complaint to the Police Headquarters or to an institution like the Human Rights Commission etc. and thereby imposing an additional burden to the defence.

    (c) The Learned High Court Judge failed to consider the test of reasonable doubt.

    (d) The Learned High Court Judge failed to consider the test of probability and spontaneousness of the defence witness.

From the ground of appeal formulated by the learned Counsel on behalf of the appellant, it is clear that he is challenging the judgement on the basis that the Learned High Court Judge failed to give due consideration to the case put forward by the appellant in his defence.

Therefore, what is necessary to consider in this appeal is the relevant law with regard to a defence put forward by an accused in relation to the charge or charges preferred against him and whether the Learned High Court Judge has applied the relevant legal principles in the correct perspective when he found the appellant guilty to the charge preferred against him.

It was the contention of the learned Counsel that the appellant was very consistent in his defence throughout the trial as to the fact that he was never arrested as claimed by the prosecution witnesses and had no Heroin in his possession. It was his position that as soon as a defence was called from him, he took necessary steps to file a list of witnesses as required and followed the due procedure in that regard. It was submitted that the conclusion with regard to the evidence of the defence witness Isadeen by the Learned High Court Judge as appeared in page 13 of the judgement, (page 454 of the appeal brief) where the Learned High Court Judge has concluded that not making a statement to the investigation officers before he gave evidence in the Court and his failure to be present in the Court when summoned for the 1st time and coming and giving evidence after some time, and also the fact that there was a possibility for the appellant to discuss the evidence led before the Court with the witness, are matters that needed the attention of the Court are wrong conclusion and something unknown to the law.

It was his position that the prosecution has not challenged the defence witness on such a basis. It was his position that the Learned High Court Judge had no basis to reject the defence witness and the evidence of the appellant as there were no contradictions or omissions among the evidence of the witnesses.

He also brought to the attention of the Court, the provisions of Section 4(d) of the **International Covenant on Civil and Political Rights (ICCPR) Act**. It was his submission that the rejection of the defence evidence on a wrong premise has caused immense prejudice to the appellant which amounts to a denial of a fair trial.

It was the position of the learned Deputy Solicitor General (DSG) on behalf of the Attorney General that the evidence of the prosecution witnesses was consistent where there have been no contradictions or omissions in relation to the material points relevant to the charge. It was his contention that although the appellant had given evidence and called a witness in support of his stand, what needs to be looked at is whether the position taken up by the appellant has created a reasonable doubt as to the evidence of the prosecution or whether it has provided a reasonable explanation as to the charge against the appellant. It was his position that the evidence of the appellant and the witness called on behalf of him are not consistent with each other and has not created any doubt as to the evidence of the prosecution.

Under the circumstances, it was his view that the appellant has failed to establish sufficient grounds to succeed in his appeal and the appeal should stand dismissed.

Consideration of the Ground of Appeal

I am in total agreement with the learned DSG in his submissions as to what needs to be looked at by a trial judge in a criminal trial in relation to the evidence adduced by an accused person. However, the question here is whether the learned High Court Judge has applied the same tests with regard the defence evidence and the stand taken by the appellant to find whether it has created a reasonable doubt as to the case of the prosecution or whether, it provided a reasonable explanation.

It is well established law that the defence witnesses are entitled to the same treatment as those of the prosecution. In this action, the appellant has given evidence under oath and called a witness on his behalf, rather than making a statement from the dock. He and his witness has faced the test of cross examination, same as the prosecution witnesses.

Therefore, it was the duty of the learned High Court Judge to use the same yardstick when considering the defence evidence having in his mind the relevant legal principles in relation to the expected stranded of proof by an accused person when called for a defence.

Sisira de Abrew, J. in the case of **Don Ranasuriya Arachchige Rohana Kithsiri Vs. The Attorney General- C.A. 214/2008 decided on 11-02-2014** expressed the view that;

> *"…in evaluating evidence, should not look at the evidence of an accused person with a squint eye."*

The Indian Supreme Court in the case of **D.N. Pandey Vs. State of Uttar Pradesh, AIR 1981, Supreme Court 911** held thus;

> "*Defence witnesses are entitled to equal treatment with those of the prosecution, and Courts ought to overcome their traditional instinctive disbelief in defence witnesses, quite often they tell lies but so do the prosecution witnesses."*

As the ground of appeal urged in this matter is that the learned High Court Judge rejected the defence evidence on a wrong premise, I find it necessary to draw my attention to the following decided cases of our Superior Courts as well.

In the case of **Ariyadasa Vs. The Queen 68 NLR 66,** it was held by **T.S. Fernando, J.** that;'

(1) If the jury believed the accused appellant, he was entitled to be acquitted.

(2) Accused is also entitled to be acquitted even if his evidence though not believed was such that it caused the jury to entertain a reasonable doubt in regard to his guilt."

In the judicial decision of **Martin Singho Vs. Queen 69 CLW 21,** it was held:

"Even if the jury declined to believe the appellant's version, he was yet entitled to be acquitted on the charge if his version raised in their mind a reasonable doubt as to the truth of the prosecution case."

I am unable to agree with the contention that the learned High Court Judge has decided that the evidence of the appellant has been corroborated by the evidence of Isadeen.

It is clear what the learned High Court Judge meant when he said that the appellant has called a person called Isadeen to corroborate his evidence at page 10 of the judgement, (page 451 of the brief) was not that the evidence of the appellant has been corroborated, as the learned High Court Judge has not proceeded to consider the evidence of the defence in the manner necessary to come to such a conclusion. I find that it was a statement to denote that the appellant has called a witness in order to corroborate his evidence and nothing else.

In the judgement, the learned High Court Judge, after summarizing the evidence of the prosecution as well as that of the defence, has come to the conclusion that the evidence of PW-01 and PW-03 are cogent and trustworthy.

I would like to reproduce the reasons given by the learned High Court Judge in the judgement to reject the evidence of the appellant and the witness called on his behalf, as I find it relevant to understand this judgement.

චුදිත සාක්ෂි දෙමින් දන්වා ඇති පරිදි හෙරොයින් හඳුනා දීමක් සිදු වූයේ නම් චුදිතට බලවත් අසාධාරණයක් වී ඇත. අසාධාරණයක් වූවද චුදිත ඒ සම්බන්ධයෙන් පොලිස් දෙපාර්තුමේන්තුවේ ඉහල නිලධාරීන්ට පැමිණිලි කර නැත. මානව හිමිකම් කොමිෂම වැනි සභාවකට පැමිණිලි කිරීමට පියවර ගෙන නැත. චුදිතව සැකකරුවෙකු ලෙසට හලාවත මහේස්ත්‍රාත් අධිකරණයේ උගත් මහේස්ත්‍රාත්තුමා වෙත ඉදිරිපත් කල විට උද්දේශිත සිදුව තිබුනා යැයි කියන අසාධාරණය ගැන උගත් මහේස්ත්‍රාත්තුමාට දැනුම් දී නැත. එවැනි පියවරයක් නොගැනීමට හේතු පැහැදිලි කර නැත. අසාධාරණයකට මුහුණ දෙන ලද පුද්ගලයෙකු සාමාන්‍ය කටයුතු අතරදී ක්‍රියා කරන ආකාරයට කටයුතු නොකර වසර 05 කට වැඩි කාලයක් රිමාන්ඩ් ගතව සිටීමට පෙළඹී ඇත. ඉන් අනතුරුව මෙම අධිකරණය ඉදිරියේ සාක්ෂි දෙමින් ප්‍රමාදයකට පසුව චුදිත සම්බන්ධයෙන් හෙරොයින් හඳුන්වා දීමක් සම්බන්ධයෙන් ප්‍රකාශ කර ඇත.

චුදිතගේ සාක්ෂිය තහවුරු කිරීමට ඉසදීන් නැමැත්තෙකු සාක්ෂියට කැඳවා ඇත. එම සාක්ෂිකරු ලබා දී ඇති සාක්ෂිය සම්බන්ධයෙන් පරීක්ෂණ නිලධාරීන්ට පෙර අවස්ථාවකදී ප්‍රකාශයක් ලබා දී නැත. එම සාක්ෂිකරුට 2017.10.02 දින අධිකරණයේ පෙනී සිටීමට සිතාසි නිකුත් කර ඇත. එදින සාක්ෂිකරු අධිකරණයේ පෙනී සිට නැත. අනතුරුව නැවත සිතාසි නිකුත් කල පසුව 2017.11.13 දින මෙම අධිකරණයේ පෙනී සිට ඇත. චුදිත පාර්ශවය වෙනුවෙන් කැඳවා ඇති එම අතිරේක සාක්ෂිකරු කාලයක් ගත වීමෙන් අනතුරුව අධිකරණය ඉදිරියේ පෙනී සිට ඇති කල එම සාක්ෂිකරුට චුදිත ලබා දුන් සාක්ෂියේ අන්තර්ගත කාරණා සම්බන්ධයෙන් චුදිත සමග සාකච්ඡා කර දැන ගැනීමට තිබූ අවස්ථාව කෙරෙහි අධිකරණයේ අවධානය යොමු වී ඇත.

After stating as above, it has been concluded that the defence has failed the tests of spontaneousness and probability in rejecting the evidence of the defence witness.

It is my considered view that the grounds stated by the learned High Court Judge to reject the defence evidence are not the grounds that should have been considered relevant in a criminal trial.

As stated, the appellant has spent more than five years in remand custody before he was granted bail in this action. Although all are supposed to know

the law and their rights, as judicial officers, we should know very well that the ground realities are not that. Once ability to make a prompt complaint to higher officers of the Police Department or to an institution like the Human Rights Commission depends on the education levels of an accused and his or her family members, their financial and social standing, and several other factors. It is the same when a person is produced before a Magistrate in my view. The fear factor of having to face the consequences of making such a compliant may also will be in the minds of the family members of a person faced with such a situation.

This is a detection that has been made on 3rd August 2004. The indictment in that regard has been filed before the High Court of Chilaw by the Attorney General on 20th December 2005. However, the trial has commenced on the 31-10-2011. The appellant has been granted bail on 17-08-2009 by the High Court and the judgement has been pronounced only on the 13-12-2017.

Although I am not in a position to attribute this kind of inordinate delays we often find in our system to any particular institution or a person, but to the system in general, I find that it should not be a reason that should be held against an accused person.

I find that there was no basis for the learned High Court judge to comment that the appellant has enticed (ඵපළඹී) to be in remand for over five years rather than acting as a person who would naturally react in such a situation. I find that it was not the appellant's own choice but the fault of the system. If the learned Judge decided to consider that as relevant in order to reject the stand of the appellant that the Heroin was introduced to him, it was the duty of the learned High Court Judge to consider the delays in the part of the prosecution and other relevant factors as well, which has not happened.

I find that the learned High Court Judge was wrong in the manner he decided to reject the evidence of the witness called on his behalf as well. Defence

witnesses are not expected to make prior statements to investigation officers before they come and give evidence on behalf of an accused. An accused is only required to decide whether he needs to call witnesses depending on the evidence led by the prosecution in an action. The learned High Court Judge has found fault with the witness for not been present when he was issued with summons to present before the Court for the first time, and appearing one month thereafter on the second day. It has been determined that because of the long delay the witness may have had the opportunity of discussing matters with the appellant.

First of all, there was no delay in appearing before the Court by the witness. There is no material to conclude whether the witness was served with summons for him to appear before the Court on the first day, hence no basis to conclude it was a delay on the part of the witness.

The conclusion that the witness had the opportunity of discussing matters with the appellant is not a matter that can be held against him either. If that is the case, all the police officers who give evidence before a Court of law have the same opportunity of discussing the evidence before they give evidence. Besides that, they also have the opportunity of going through their notes before giving evidence, which should also be a matter that needed the attention of the learned High Court Judge.

It is trite law that a trial judge is duty bound to consider all the evidence, be it by the prosecution or defence in the equal footing before arriving at a decision.

In the Privy Council judgement in **Jayasena Vs. Queen 72 NLR 313 (PC)** it was held:

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself*

whether a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."

There may be inconsistencies in the stand taken up by the appellant when the prosecution witnesses gave evidence and the version of events as narrated by him in his evidence and in the evidence of the witness called on his behalf. However, I find that such matters should have been looked at by the learned trial judge in its correct perspective in order to find whether a reasonable doubt has been created in the case of the prosecution, rather than rejecting the evidence presented by the defence in the manner it was rejected.

For the reason as stated above, I am in agreement with the learned Counsel for the appellant that the learned High Court Judge was misdirected as to the manner he rejected the defence evidence. I find that this has created a situation where the appellant has not been granted a fair trial.

Under the circumstances, I have no option but to set aside the conviction and the sentence imposed on the appellant, as it cannot be allowed to stand. I therefore set aside the conviction and the sentence.

The next matter to be considered is whether this is a fit and proper case to send for a retrial.

In the case of **Nandana Vs. Attorney General (2008) 1 SLR 51,** it was held:

"A discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice taking into consideration the nature of the evidence available, the time duration since the date of the appeal, the period of incarceration the accused had already suffered, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime, should be considered."

This is a detection that is said to have been made on the 3rd of August 2004 nearly eighteen years ago. The appellant has been in remand custody for over five years before he was released on bail in the year 2009. He has been in prison custody pending his appeal from the date of his conviction on the 13th of December 2017, for four and half years. If he is subjected to a second trial, some eighteen years after the actual event, that will be for no fault on his part.

Moreover, traumatic effect on a second trial for the appellant and his family members so long after the event will also need the attention in such a consideration.

It is my considered view that this is not a fit and proper case where a retrial should be ordered for the reasons considered as above. The appellant is therefore acquitted of the charge preferred against him.

Appeal allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal