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/0208/2018

Hettiarachchige Hiruni Alas

High Court of Colombo
Case No: HC/7261/2014

Accused-Appellant

vs.

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

Complainant-Respondent

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

COUNSEL : **Gayan Perera with Prabha Perera and Panchali Ekanayake for the Appellant.**
Janaka Bandara, DSG for the Respondent.

ARGUED ON : **09/06/2022**

DECIDED ON : **02/08/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Colombo under Sections 54(A) (b) and 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking and Possession of 3.15 grams of Heroin (diacetylmorphine) on 20th January 2011.

After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed life imprisonment on the both counts on 11/07/2018.

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

The Appellant has intimated through the Prison Authority that she wants to be present in this Court in person for the hearing. Before the commencement of the argument, when this Court inquired from the Appellant via Zoom Platform regarding her earlier request, the Appellant had given her consent to argue this matter in her absence due to the Covid 19 pandemic. Hence, argument was taken up in her absence but was connected vis Zoom platform from prison.

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

1. The evidence against the Appellant has not been proved beyond reasonable grounds.
2. The Government Analyst Report was not properly marked at the trial.
3. The qualifications and expertise of the expert witness not proved.
4. The actual quantity of Heroin stated in the Government Analyst Report has not been proved.

Background of the case.

In this case the raid was conducted upon a specific information received by PW2.The raid was headed by PW1with team of police officers from the Borella Police Station. All had been named as witnesses in the indictment including the Government Analyst. The prosecution had called only PW1and closed the case after marking the Government Analyst Report as X.

When the defence was called, the Appellant made a dock statement and closed the case.

On 20/01/2011 CI/Anuruddha Bandaranayake attached to the Borella Police Station had received information through PW2 about the trafficking of Heroin by a lady called Hettiarachchige Hiruni Alas. According to PW2 his informant had revealed that the Appellant would show up near the Magazine Prison in a three-wheeler with registration number 203- 8200. Acting on that information PW1 had arranged a team comprising 06 officers attached to Borella Police Station and left the police station at 06:11 hours. Before the departure, all the officers who had been selected for the raid were fully searched to confirm that the said officers were not carrying any substance with them by PW1. The team had left the police station in a van bearing No. 61-7062.

As per the information they left the police and went towards Dematagoda and turned towards Borella at the railway crossing Dematagoda. The vehicle was turned left and stopped at Seelavali Lane in front of a house No.9/11/1.Adjusent to Seevali Lane Magazine Prison wall is situated. The above-mentioned three-wheeler had come there at about 11:25 hours. The three-wheeler had come from the 2nd Lane and attempted to turn to Seevali Lane when it was confronted by PW1 and PW2. Then the said three-wheeler was stopped and checked the persons travelling in the vehicle. The Appellant was seated in the rear seat and found a Tennis Ball was in the hands of the Appellant which confirmed the information received by PW2 regarding that the Heroin going to smuggle into the prison by using a Tennis Ball. When PW1 took the Tennis Ball in to his custody, he had felt unusual weight and when he observed the ball had found the cover of the ball had been freshly pasted. When he removed the cover of the ball, the ball was gone into two separate pieces. Further, two small parcels were packed in the two pieces of the ball and the parcels contained some brown coloured substance.

As it reacted for Heroin the Appellant was arrested immediately. The three-wheel driver was neither checked nor arrested at that time. After putting initial notes, the Appellant was taken to Deen Gold Jewellery House situated in Kotta Road Super Market to weigh the substance. The first parcel contained 26.970 grammes of substances and the second parcel contained 20.490 grammes of substances.

After weighing, PW1, his police team and the Appellant had left the place at 13.30 hours and again went to Baseline Road, Seevalipura and Shasrapura for further raid but was not successful. Thereafter, the police party had returned to police station at 15.25 hours.

After entering notes, PW1 had handed over the productions and the Appellant to reserve police officer P.S.28307 Salinda entering under production No.179/11.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person and this burden never shifts. Hence an accused person has no burden to prove his case unless he pleads a general or a special exception in the Penal Code.

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

> *"A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences in 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…."*

In **the Attorney-General v. Rawther** 25 NLR 385, Ennis, J. states thus: [1987} 1 SLR 155

> *"The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt".*

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court 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. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice".*

In the first ground of appeal the Appellant contends that the evidence against the Appellant has not been proved beyond reasonable grounds.

According to PW1, the information received in this case is very specific and he and his team said to have acted on this information. Even though all necessary witnesses are listed in the indictment only PW1 had given evidence regarding the raid. PW2, who had received the important information was not called to give evidence in this case. According to PW1, PW2 had received information pertains to this case on the day of the incident. According to that information a lady was coming in a three-wheeler bearing No.203-8200 to traffic drugs in to Magazine Prison using a tennis ball.

At the examination-in-chief PW1 did not mention whether the accused is a male or a female. But in the cross examination at page 90 of the brief mentioned that PW2 had mentioned that a lady was coming with a tennis ball.

PW2, not only received the information but also actively participated in the raid and sealed the production using his signature. As the information received, participated in the raid and sealed the productions using his signature clearly demonstrates his active involvement in this case. He is an important witness in this case. No plausible reason had been given for not calling his evidence which certainly affect the credibility of the evidence given by PW1 as PW1 had solely relied on the information received by PW2.

It is trite law that it is not necessary to call a certain number of witnesses to prove a fact. However, if court is not impressed with the cogency and the convincing character of the evidence of the sole testimony of the witness, it is incumbent on the prosecution to corroborate the evidence.

In **Walimunige John and Another v. The State** 76 NLR 488 the court held that:

> *"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be*

drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetitive of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114(f) of the Evidence Ordinance."

In this case had the prosecution called PW2, his evidence could have corroborated the important material evidence of PW1.PW2's evidence is not mere repetition of the narrative of PW1 it could have thrown much weight on the whole episode of this case. As PW2 had been a witness to many of the events connected with the receiving information and raid conducted, it is incomprehensible as to why he was not called as witness in this case.

Hence, failure to call PW2, I consider it creates a serious doubt on prosecution case and also give rise to the presumption under Section 114(f) of the Evidence Ordinance.

PW1 in his evidence admitted that the three-wheeler driver was not questioned nor checked his documents even though PW2 had specifically received information that the trafficker was coming in a three-wheeler with bearing No.203-8200.According to PW1, the Appellant was holding a tennis ball in her hand when the three-wheeler was stopped. Had the three-wheeler driver been called as witness, his evidence would have been independent and could have been thrown weight on the prosecution case. This is, I consider a serious lapse on the prosecution.

In **Beddewithana v. Attorney General** [1990] 1 SLR 275 the court held that:

"that it would be unsafe to permit the conviction of the accused appellant in this case, to stand in the absence of any corroborative evidence to support the evidence of the virtual complainant Cader Ibrahim, in regard to the purpose for which the money was accepted as set out in the indictment. On the examination of the totality of the evidence of this case,

it is clear, that there is no independent corroboration of the evidence of the virtual complainant, either in respect of the allegation that the accused appellant accepted a sum of Rs.5 as an inducement or a reward to perform an official act,…."

PW1 under cross examination admitted that after the arrest of the Appellant, they had gone to Deen Jewellery, Borella and thereafter, the team had gone for further investigation along Baseline Road, Seevalipura and Shasrapura and returned to Borella Police Station at 15.25 hours. When the police team departed the station, the reading of the ODO meter of the vehicle was 386107.When they returned to police the ODO meter reading was 386135. For the entire investigation and further investigation, the vehicle had run 28 KM, which the defence contends is a false mileage considering the places the vehicle had run.

Considering the places, the police team had gone for initial and post investigations between 6.11 hours and 15.25 hours, running 28 KM create a serious doubt and ambiguity on the evidence presented regarding happening of the events as described by PW1.

Now I consider whether the conviction in this case can be upheld considering only the evidence of PW1. In support of this I consider the case of **Devundarage Nihal v. AG** SC. Appeal No.15 of 2010 decided on 12/05/2011. In this case Sureschandra J held that:

"Therefore, it is quite clear that unlike in the case where an accomplice or a decoy is concerned in any other case there is no requirement in law that the evidence of a Police Officer who conducts an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars. However, caution must be exercised by a trial judge in evaluating such evidence and arriving at a conclusion against an offender. It cannot be stated as a rule of thumb that the evidence of a

police witness in a drug related offence must be corroborated in material particulars where police officers are the key witnesses."

In the case of **Chacko Alias Aniyan Kunju & others v. State of Kerala**- [2004] INSC 87 (21st January 2004) held that:

> *"The provision clearly states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of a single witness if he is wholly reliable. Corroboration may be necessary when he is partially reliable. If the evidence is unblemished and beyond all possible criticism and the Court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained".*

In **The Attorney General v. Devunderage Nihal** SC/Appeal/145/2010 decided on 03/01/2019 Aluvihare, J. had held that:

a) *"An accused can be convicted on a single witness in a prosecution based on a police detection, if the judge forms the view that the evidence of such witness can, with caution, be relied upon, after probing the testimony.*
b) *Corroboration is not sine qua non for a conviction in a police detection case, if the judge, after probing, is of the opinion that the witness is credible and the evidence can be acted upon without hesitation".*

In the above-mentioned case, the information was received by PW1, a Sub Inspector attached to Habaraduwa Police station. The information also revealed the location of the accused. When the police team arrived the location, the accused took his heel and PW2 who was not called to give evidence managed to apprehend the accused. But the prosecution had led evidence of another member of the team.

But in the case in hand, the specific information was received by PW2 with the number of the three-wheeler in which the Appellant had come.

Although the Learned Trial Judge had considered the Section 134 of the Evidence Ordinance but she failed to assess whether the prosecution had presented cogent and impressive evidence to act under Section 134.This a very serious laps on the Trial Judge which occasioned a failure of justice in this case. The Learned Trial Judge should have taken all necessary precautions before analysing the evidence of this case as she did not had the benefit of observing the demeanour and deportment of the one and only prosecution witness's evidence which had been led before her predecessor.

The Appellant in her dock statement took up the position that on the date of the incident when she was travelling in a three-wheeler, at Borella the cited witness PW2 Perera and PC 77413 Lahiru had come on a motor bike, stopped the three-wheeler, PW2 got into the three-wheeler after inquiring whether she is the wife of Manoj, taken her to Borella Police Station and kept in a room. She further said that the evidence given by PW1 is utter falsehood as she was never checked by PW1.

Further even though the dock statement of an accused has less evidential value our courts never hesitated to accept the same when it creates a doubt on the prosecution case. In this case I consider it is very important to consider the dock statement of the Appellant.

In **Don Samantha Jude Anthony Jayamaha v. The Attorney General** CA/303/2006 decided on 11/07/2012 the court held 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 the evidence that is in the light of the evidence for the prosecution as well as the defence."*

In **Kathubdeen v. Republic of Sri Lanka** [1998] 3 SLR 107 the court held that:

> *"It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement*

creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt."

The position of the Appellant that she was not arrested by PW1 but was arrested by PW2 and another police officer, even though he was a member of the raiding team was not cited in the witness list of the indictment. The evasive conduct of the prosecution by not calling PW2 to give evidence strengthened the defence version perfectly.

In **Karuppiah Punkody v.The Attorney General** CA/11/2005 decided on 26/08/2014,A.W.A.Salam J (P/CA) considering a similar situation stated that:

"There are two matters that arises for consideration from the failure of the prosecution to call Basnayake. Firstly, it has to be inferred that the evidence of Basnayeke SI, which could have been led without any impediment was not placed before court as it would be unfavourable to the prosecution. Moreover, viewing to call him as a witness on a realistic basis, it had resulted in serious deficiency in the proof of the prosecution case".

Therefore, the prosecution case has failed to pass the probability test in this case. Had the Learned Trial Judge looked in to the evidence presented in its correct perspective, she should have accepted the explanation given by the Appellant.

The rest of three grounds of appeal the Appellant are in respect the admission of the Government Analyst Report in the trial. In nutshell, the Appellant argues that the Government Analyst Report is not properly admitted as evidence in this case.

The proceeding dated 11/12/2015 is reproduced bellow:

මෙම නඩුවේ පැ. සා. 01 පො. ප. අනුරුද්ධ බණ්ඩාරනායක භාරයට පත් වූ නඩු භාණ්ඩ මුද, යහපත් තත්ත්වයේ තිබියදී රස පරීක්ෂක දක්වා රැගෙන යාමත්, රස පරීක්ෂක විසින් එම නඩු භාණ්ඩ

විශ්ලේෂණය කර බලා 2011.05.18 දිනැති අංක N/4019/11 (CD/459/11) දරණ වාර්තාව සකස් කර ඇති බවත් අපරාධ නඩු විධාන සංග්‍රහය පනතේ 420 වගන්තිය යටතේ පිලිගන්නා බැවින් එකී පිලිගැනීම් සටහන් කර තබමි.

රස පරීක්ෂක වාර්තාව පැ.X වශයෙන් ලකුණු කර ඉදිරිපත් කරයි.

At Page 143-144 of the brief.

As per the proceedings mentioned above, it was recorded that the production chain and the preparation of Government Analyst Report upon the production sent to Government Analyst Department had been admitted.

Therefore, the Government Analyst Report sought to be marked as X.

Upon examining the above-mentioned proceedings, it is not clear who made the application to mark the Government Analyst Report as X. Further, according to the said proceedings it is not clear whether both parties agreed to admit the Government Analyst Report under Section 420 of the Code of Criminal Procedure Act No.15 of 1979.

In absence of clear evidence that the Appellant had admitted the Government Analyst Report under Section 420 of CPC, the proceedings cannot be considered as conclusive proof that the Appellant had admitted the same. The court cannot unilaterally enter admissions in which the rights of the parties are not properly reflected. The admissions should be properly worded to reflect the court acted on the maxim, audi alteram partem.

As the recording of the admission of the Government Analyst Report under Section 420 of CPC and it marking in the trial is not clear and tainted with ambiguity, I conclude that all the grounds of appeal considered above have merits.

In this case PW1 is the key witness in this case. If his evidence is clear, cogent and unambiguous the court could without any hesitation rely on his evidence and convict the Appellant in the absence of any corroboration. But as discussed above the evidence given by PW1, in my view, has not passed

the probability test. It is tainted with much ambiguity and uncertainty which definitely affect the root of the case.

Guided by the above cited judicial decisions, I conclude that in this case the Learned High Court Judge should not have solely relied on PW1's evidence in this case. Hence, the appeal grounds advanced by the Appellant have a very serious impact on the prosecution case.

As the prosecution had failed its duty to prove this case beyond reasonable doubt, I set aside the conviction and sentence imposed by the Learned High Court Judge of Colombo dated 11/07/2018 on the Appellant. Therefore, she is acquitted from this case.

Accordingly, the appeal is allowed.

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