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/0206/2017

High Court of Puttalam
Case No: HC/04/2014

Jude Washington Fernando

Accused-Appellant

vs.

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

Complainant-Respondent

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Mahinda Jayawardena for the Appellant.** **Azard Navavi, DSG for the Respondent.**

ARGUED ON : **04/08/2022**

DECIDED ON : **31/08/2022**

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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 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 the Trafficking and Possession of 385.2 grams of Heroin (Diacetylmorphine) on 08th February 2012 in the High Court of Puttalam.

At the conclusion of the trial, the Appellant was found guilty on both counts and the learned High Court Judge of Puttalam has imposed a sentence of life imprisonment for both counts on 21st of June, 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 for this matter to be argued in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom platform from prison.

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

1. The prosecution has solely relied on the evidence given by PW1 as it failed to call other witnesses who had participated in the raid.
2. PW1 had not disclosed the best evidence to the court even though he had the information.
3. There are contradictions on the evidence given by PW1.
4. Judgment is not in conformity with Section 283 of the Code of Criminal Procedure Act No.15 of 1979.

Back ground of the case

On 07/02/2012 PW1 IP/Hiriyadeniya attached to the Police Narcotic Bureau had received information from ASP/SriLal also attached to the Police Narcotic Bureau about the trafficking of Heroin in the Kalpitiya area. Originally the information was received by SI/Abeysinghe attached to the Special Bureau of Kalpitiya Police Station. The PW1 had left for the raid along with 08 other police officers attached to the Police Narcotic Bureau after completing all necessary formalities. The team had left the Bureau around 17:00 hours. First the team had gone to the Katunayake Police Station to accompany ASP/Srilal. The ASP had travelled in his car along with PW1 and PC 50142. Meanwhile IP/ Bogamuwa with other police officers travelled in a van belonging to the Police Narcotic Bureau.

First the team had gone to the Kalpitiya Buddhist Temple where they had met SI/Abeysinghe with his informant. Through him they had spoken to the informant Sadha regarding the purchase of heroin without revealing their identity as police officers. Thereafter Sadha had come to meet the police team. After convincing, Sadha had agreed to assist the police in the raid. As the informant Sadha told PW1 that the trafficker only sells drugs during the early hours on the following day, it was decided that the witness and their team would return the following day to make a deal. But the team had decided to remain there until the culprits were apprehended. PW1,

ASP, the informant Sadha and PC 50124 had remained in the car while other members remained in the police van. After some time, Sadha had left the vehicle. At 3.30 a.m. on 08/02/2012 the group of police officers had moved towards Kalpitiya and stopped near a circuit bungalow belonging to the Coast Conservation Department. The informant Sadha after speaking to a person over the phone, had remained with them until the execution of the raid. As the battery of the phone used by Sadha had run out, PW1 had given his phone to Sadha to continue the deal. They had to wait about nearly five hours to complete their mission. As Sadha was not aware that PW1 and his team were police officers, PW1 had discreetly disclosed their identity to Sadha. After persuasion, Sadha had agreed to help them to apprehend the Appellant.

After contacting the other team, PW1 and another had proceeded to Mohaththuwaram for the final raid. At about 1.00 p.m. the Appellant was arrested at Mohaththuwaram with the contraband. Upon a field check, the contraband carried by the Appellant had reacted for Heroin (Diacetylmorphine).

The production was in the custody of PW1 until it reached the Police Narcotic Bureau. Upon interrogation, the Appellant had revealed that the contraband seized from him belongs to a person called Delington Leema from Kalpitiya. PW1 and his team thereafter had gone to arrest the said Leema who was said to be a three-wheeler driver. He was arrested along with his three-wheeler. Thereafter, all had proceeded to the Police Narcotic Bureau and reached there around 12.00 midnight. Productions had been sealed thereafter and the process had taken up until 2.00 a.m. on 09/02/2012. As such the sealed productions which had been marked as PR 46-47/2012 were kept in PW1's custody until it was handed over to IP/Rajakaruna on 10/02/2012 at 17:30 hours.

The person known as Delington Leema had been properly interrogated by the Police Narcotic Bureau before his release from this case.

Following the evidence of PW2, IP/Bogamuwa, PW4, IP/Rajakaruna and PW5 Government Analyst the prosecution had closed case.

Defence was called and the Appellant had made a dock statement and denied the charges.

In all criminal cases, the burden is on the prosecution to produce sufficient evidence of each element of the alleged offense at trial. To prove beyond a reasonable doubt that the accused committed the alleged drug offence, the prosecution must have strong evidence. The accused has the right to present his own evidence and rebut the prosecution's evidence, but is not required to do either to avoid a conviction.

The Judge, or the members of the jury if there is one, cannot find the person guilty if they have a reasonable doubt about the accused person's guilt. To convict, the Judge or the jury must believe that the only sensible explanation, considering all the evidence, is that the accused person committed the crime. After considering all the evidence presented before the court, If the judge or the members of the jury are unsure whether the accused actually committed the offence, the benefit of the doubt be awarded to the accused.

In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 decided on 24/05/1995 held that:

> *"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 where the identity of the good analysis for examination has to be proved beyond reasonable doubt".*

In the first ground of appeal the Appellant argues that the prosecution has solely relied on the evidence given by PW1 as it failed to call other witnesses who had participated in the raid.

According to Section 134 of the Evidence Ordinance, "No particular number of witnesses shall in any case be required for the proof of any fact".

This section of the Evidence Ordinance clearly lays down that no particular number of witnesses are required to prove or disprove the facts of the case. This section applies to both civil and criminal cases. This section is based on the popular maxim that evidence is to be weighed and not counted. There is no rule of law that the unsubstantiated testimony cannot be accepted. The rule is of prudence and whether it is to be adopted or not depends on the circumstances of each case. When the Courts are ascertaining the truth, the number of witnesses is not considered, but the quality of the evidence is taken into serious consideration.

In this case PW1 had organised the raid after receiving the information from a police officer attached to the Special Investigation Bureau of Kalpitiya Police Station. Initially, the group of police officers travelled in a van up to Katunayake and the team split into two thereafter. PW1 had travelled in the official car of ASP/Srilal from Katunayake and PW2 IP/Bogamuwa took charge of the remaining group in the van. Hence, two vehicles had been used to conduct the raid in the present case.

Firstly, PW1 had met the informant who had given information to the officer at Kalpitiya Police Station. Through him they were introduced to the second informer Sadha and the raid was conducted upon the information provided by Sadha. Following the information provided by Sadha PW1 had decided to proceed to Mohaththuwaram in the car. Hence, the police party under the command of PW2 was stationed near the bungalow of the Coast Conservation Department Circuit. After a successful raid all of them had met near the Coast Conservation Department Circuit Bungalow again and PW2 had assisted PW1 to conduct further investigations.

After the conclusion of the evidence of PW1, the prosecution had led the evidence of PW2.

Calling witnesses in a trial is the entire prerogative of the prosecution.

In **AG v. Mohamed Saheeb Mohamed Ismath** CA/87/1997 decided on 13/07/1999 Jayasuriya J. stated that:

> *"There is no requirement in law that evidence of a Police Officer who has conducted an investigation into a charge of illegal possession of heroin, should be corroborated in regard to material particulars emanating from an independent source.".*

In **King v. Chalo Singho** 42 NLR 269 the Court held that:

> *"It must, therefore, be regarded well-established now, that a prosecutor is not bound to call all the witnesses on the indictment, or to render them for cross-examination. That is a matter in his discretion, but in exceptional circumstances, a judge might interfere to ask him to call a witness, or to call witness as a witness of the court".*

In **The Attorney General v. Devunderage Nihal** decided on 12/05/2011 R. K. S. Suresh Chandra, J stated that:

> *"Therefore, it is quite clear that unlike in the case where an accomplice or a decoy is concerned in any case there is no requirement in law that the evidence of a Police Officer who conducted 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. If such a proposition were to be accepted it would impose an added burden on the prosecution to call more than one witness on the back on the indictment to prove its case in a drug related offence however satisfactory the evidence of the main police witness would be".*

In **The Attorney General v. Devunderage Nihal** decided on 03/01/2019 Aluwihare, PC J., 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".*

In this instant appeal, the prosecution had led the evidence of PW1 and PW2 to show how the police team prepared, gathered necessary information, acted on that information and arrested the Appellant with Heroin on 08/02/2012 at Mohaththuwaram, Kalpitiya. The learned High Court Judge had accurately analysed the evidence presented by both parties to arrive to his conclusion. Hence, it is incorrect to say that the learned High Court Judge had only relied upon the evidence of PW1 to come to his conclusion. Therefore, this ground of appeal has no merit.

The second ground of appeal is that PW1 had not disclosed the best evidence to the court even though he had the information.

Following the best evidence rule is very important in criminal trials, as the criminal justice system considers that an accused to be innocent until proven guilty and the guilt of the accused has to be proved beyond reasonable doubt and not on a mere prevalence of probabilities, thus imposing upon the prosecution the obligation to adduce the best possible evidence to prove the guilt of the accused.

Therefore, in proving the guilt of an accused, the investigating officers are duty bound to collect the best possible evidence and the public prosecutor is bound to present the best possible evidence to prove an alleged fact or circumstance leading to the commission of the offence. A failure to lead the best evidence thus makes the prosecution vulnerable to an adverse

inference being drawn against it, as such failure amounts to suppression of the best evidence.

Under this ground the Counsel for the Appellant argues that the prosecution had withheld the evidence of the informant Sadha in breach of the best evidence rule. He further argues that the failure to call Sadha creates a serious doubt on the prosecution case and also give rise to the presumption under Section 114(f) of the Evidence Ordinance.

Section 125 of the Evidence Ordinance reads:

> "No Magistrate or Police Officer shall be compelled to say whence he got the information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue or the excise laws."

E. R. S. R. Coomaraswamy refers to the case of **Weston v. Peary Mohan Dass** [1912] 40 Cal.898 at 920 in his much-acclaimed academic work by the name of **'The Law of Evidence'** Volume II (Book 2) as mentioned below:

> *"Section 125 is based on the principle that the public interest in the detection and combating of crime demands that those persons who are the channel by means of which the detection is made, should not be unnecessarily disclosed. If objection is taken under this section, it cannot be made the ground of adverse inferences against the witnesses".*

Maintaining the confidentiality of an informant's identity is a well-recognized fact of great importance in the resolution of crimes pertaining to drugs. The police remain to gain information and leads from these informants that they may not be able to obtain from other sources. If police reveal the identity of an informant, they may not be able to obtain any further information from that person, and others may be afraid to serve as

informants due to the risk involved which often includes threats to life. In cases of this nature, preserving the identity of an informant is of utmost important for his safety as well as the best option for successful future investigations. PW1 in his evidence clearly explained to the court how such information is important in the detection of the trafficking of drugs.

උ : මත් ද්‍රව්‍ය ජාවාරමින් අනාවරණය කරන කරුණු මත විමර්ශණ පිළිබඳ විවෘත අධිකරණයේ පැහැදිලි කිරීමට හැකියාව නැහැ. රහසින් කළ විමර්ශණ තිබෙනවා. එම වාර්තා විවෘත කිරීමට හැකියාවක් නැහැ. යම් යම් පුද්ගලයින්ගේ තොරතුරු සහ මත් ද්‍රව්‍ය සම්බන්ධයෙන් දීර්ඝ විමර්ශණ පවත්වා මාස 6,7 වසර 2,3 ගිහින් අත්අඩංගුවට ගෙන තිබෙනවා.

(Page 160 of the brief.)

Hence, not calling informant Sadha to give evidence on behalf of the prosecution has not caused any prejudice to the Appellant as PW1 had vividly explained to court how the raid was conducted with the information they had received from Sadha. Hence, this ground of appeal is also sans any merit.

In the third ground of appeal the Counsel for the Appellant contends that there are contradictions on the evidence given by PW1.

In his dock statement the Appellant took up the position that the Heroin detected did not belong to him. While he was waiting to obtain money from a person called Delington Leema he had been surreptitiously implicated in this case.

According to PW1, Delington Leema was arrested along with his three-wheeler and taken to the Police Narcotic Bureau where the officers had conducted a fair investigation and Delington Leema had been released upon the confirmation of his innocence.

The Counsel for the Appellant advanced an argument that PW1 had kept the production in his personal locker for a considerable period of time

before it was handed over to PW4 and therefore, this raises a serious doubt over the productions of the case.

According to PW1, after a successful raid they had reached the Police Narcotic Bureau and the productions had been properly sealed in the presence of the Appellant. The sealing process had gone up till 2.00 a.m. on 09/02/2012. Thereafter the said productions were kept in his personal locker and the same was handed over to PW4/IP Rajakaruna on 10/02/2012 at 5.30 p.m. In his evidence he had very clearly explained to court the circumstances and the reasons as to why he had kept the productions under his personal locker till it was handed over to IP/Rajakaruna. The evidence given by PW1 on this point is re-produced below:

ප්‍ර : ඔබ පැය තිස් ගනනක් ඔබගේ පුද්ගලික ලොකරයේ මෙම හොරෝයින් ලග තබා ගත්තාය කියන එක යම්කිසි කාර්යය පටිපාටියට පටහැනි ක්‍රියාවක් ?

උ : විශ්වාසය හා ආරක්ෂාව තමයි නඩු භාණ්ඩයක වැදගත් වන්නේ. නඩු භාණ්ඩ දැම්මේ ආරක්ෂා කර ගැනීමට. ඒ නඩු භාණ්ඩයේ මුද්‍රා තැබීමෙන් පසු වගකිව යුතු නිලධාරියාට භාර දී තිබෙනවා.

ප්‍ර : මුද්‍රා තබා ඔබ කටයුතු අවසන් කර ස්ථානයෙන් බැහැර යනවා නම් එය උප සේවයට හෝ අදාල නිලධාරියාට කොපමණ නිදිමත හෝ වෙහෙසක් තිබුනා වුනත් වෙනත් නිලධාරියෙකුගේ භාරයට භාර දී නිසි පරිදි මුද්‍රා තබා පියවර ගත්තා කියන එක ඒ ආකාරයෙන් වුනේ නැහැ?

උ : වෙනත් නිලධාරියෙකුට භාර දෙනවාට වඩා මගේ ලොකරයේ තබන එක විශ්වාසයි.

ප්‍ර : ඔබ කිව්වා 2012.02.09 වන දින පාන්දර 02.00ට පුද්ගලික ලොකරයේ සීල් තබා ගෙදර ගොස් 2012.02.10 වන දින පැය 17.30 ට ඒ කියන්නේ සවස 5.30ට රාජකරුණා මහතාට භාර දුන්නා කියා ද?

උ : ඔව්.

ප්‍ර : මේ වෙලාව ඇතුලත හොරෝයින් පාර්සලය පුද්ගලික ලොකරයේ දමා තිබෙන බව ඔබ ලිඛිතව දැනුවත් කර තිබුනා කිව්වා ?

උ : මම සටහන් යොදා තිබෙනවා පොලිස් ස්ථානයේ තිබෙන අයි.අයි.බී. පොතේ 2012.01.06 වන දින සිට 2012.02.13 වන දින දක්වා පාවිච්චි කරන ලද අයි.අයි.බී. පොතේ. එම පොතේ පැමිණිමේ සටහන් යොදා තිබෙන සටහන් ආරම්භ වන්නේ 358 වන පිටුවේ 90 ඡේදයේ සිට පැය 2.00ට. අවසන් වන්නේ 366 පිටුවෙන්. එය අවසානයේ දී මෙම නඩු භාණ්ඩ පො.ප. රාජකරුණා මහතාට භාර දෙනකම් මා භාරයේ තිබෙන බවට විවෘත සටහන් යොදා තිබෙනවා. මේ දැන්වීමෙන් පසුව ස්ථානාධිපති වරයා කැදෙව්වා බලන්න. පැහැදිලිව තිබෙනවා.

ප්‍ර : එහෙම නම් ස්ථානාධිපති වරයා උපදෙස් දුන්නා ඔබගේ පුද්ගලික ලොකරයේ මේ වැනි අවස්ථාවල භාණ්ඩ තබන්න ?

උ : මත්ද්‍රව්‍ය කාර්යාංශයේ දී මට පැහැදිලිව කියන්න පුළුවන් රාජකරුණා මහතා කාර්යාලයේ සිටියා කියා. මට උපදෙස් දුන්න ආකාරය තමයි නඩු භාණ්ඩ භාර නිලධාරී වෙත භාර දෙනවා හැර වෙනත් නිලධාරියෙකුට භාර දෙන්නේ නැහැ කියා. සමහරවිට රාජකරුණා නිලධාරියා කාර්යාලයේ නැතිව නඩු භාණ්ඩ භාර දෙන අවස්ථා තිබෙනවා. ඔහු වෙනත් රාජකාරියක් සඳහා ගොස් සිටිනවා නම් පැය 17.30ට දීලා තිබෙනවා. සමහරවිට වෙනත් රාජකාරියකට ගොස් පැමිණි වෙලාව විය හැකියි.

ප්‍ර : පළපුරුදු නිලධාරියෙක් ලෙස විශ්වාස කරන්නේ හොරෝයින් වැටලීමකදී අත්අඩංගුවට ගත් නඩු භාණ්ඩ කාර්යාලයෙන් මුදා තබා සටහන් යොදා අවසන් වූ පසුව මහත්මයාගෙන් පසුව තවත් නිලධාරියෙකුට භාර දෙනකම් පෞද්ගලික ලොකරයේ තබා ගැනීම නීත්‍යානුකූල එකක් කියාද ?

උ : ඔව් නඩු භාණ්ඩ නිලධාරියාට දෙන ලෙසට. 1995 සිට අවස්ථා තුනකදි මත්ද්‍රව්‍ය කාර්යාංශයේ රාජකාරි කලා. මෙතෙක් මා විසින් අත්අඩංගුවට ගත් අවස්ථාවලදි මා පුද්ගලිකව භාර දී තිබෙනවා. උප සේවයට නොවේ නඩු භාණ්ඩ භාර නිලධාරියාට.

ප්‍ර : පැය 30 ක් පමා වෙනකම් පුද්ගලික ලොකරයේ ඒවා තබා ගැනීමට අදාලව වෙනත් නිලධාරියෙකුට ඇතුල් වෙන්න බැරිද?

උ : පුද්ගලික ලොකරයට වෙනත් නිලධාරියෙකුට ඇතුල් වීමට බැහැ.

ප්‍ර : වෙනත් ආකාරයකින් එන්න පුළුවන්ද බැරිද කියන එකෙන් යතුර මහත්තයා ගෙදර ගෙන යනවා ?

උ : ඔව් මගේ භාරයේ තිබෙන්නේ.

ප්‍ර : වහන්න අරින්න පුළුවන් ?

උ : ඔව් නීත්‍යානුකූලව උසස් නිලධාරියෙක් දැනුවත් කරන ක්‍රියාවක්. කාර්යාංශයේ ස්ථාවර නියෝගවලින් අනුමත කර තිබෙනවා.

ප්‍ර : පො.ප රාජකරුණා මහතාට ඔබ දුන්නේ පුද්ගලික ලොකරයෙන් අරගෙන කියා සටහන් යොදා තිබෙනවද ?

උ : ඔව්. මෙහෙම මගේ භාරයේ තිබෙන ඒවා භාර දෙනවා කියා ආරක්ෂිතව තිබෙනවා කියා සටහන් යොදා තිබෙනවා.

(Pages166-168 of the brief.)

The evidence given by PW1 is clear and cogent and the defence could not mark a single contradiction upon his evidence. Furthermore, he was subjected to a lengthy cross examination. PW1 had vividly explained how this raid was initiated and concluded successfully. As the evidence given by PW1 was not tainted with contradictions, omissions and ambiguity, the Learned Trial Judge had accurately accepted the evidence of PW1 as credible. Hence, this ground of appeal also fails on its own merit.

In the final ground of appeal, the counsel for the Appellant contends that the judgment is not in conformity with Section 283 of the Code of Criminal Procedure Act No.15 of 1979.

Upon perusal of the Judgment, the learned High Court Judge had discussed all the evidence presented before him in his judgment. He had properly analysed and arrived at a correct finding. The judgment is in conformity with Section 283 of the Code of Criminal Procedure Act No.15 of 1979. In this case the learned High Court Judge had the priceless advantage of observing the demeanour and the deportment of the witnesses led before him. Hence, this ground of appeal is also devoid of merit.

I have scrutinised the evidence and the judgment of the learned High Court Judge and I am satisfied that the Appellant has been rightly convicted of the offence that was levelled against him.

Due to the aforesaid reasons, I am not inclined to interfere with the judgment of the Learned High Court Judge dated 21/06/2017. Hence, I dismiss the appeal and affirm the conviction and the sentence imposed on the Appellant.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL