IN THE COURT OF APPEAL OF THE DEMOCRATIC 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/0080/2020

High Court of Panadura

Case No: HC/3380/2016

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Weddikkarage Thusharika Priyadarshani Silva

ACCUSED

AND NOW BETWEEN

Weddikkarage Thusharika Priyadarshani Silva

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Neranjan Jayasinghe for the Accused Appellant

: Sudarshana De Silva, DSG for the Respondent

Argued on : 27-07-2022

Written Submissions : 19-03-2021 (By the Accused-Appellant)

: 04-05-2021 (By the Respondent)

Decided on : 05-09-2022

Sampath B Abayakoon, J.

This is an appeal by the accused-appellant (hereinafter referred to as the appellant) on being aggrieved by her conviction and the sentence by the learned High Court Judge of Panadura.

The appellant was indicted before the High Court of Panadura for having in her possession 1.38 grams of Diacetylmorphine, commonly known as Heroin on 5th August 2015, which is an offence punishable in terms of Poisons Opium and Dangerous Drugs (Amendment) Ordinance No. 13 of 1984.

She was also charged with trafficking the said quantity of Heroin which was also an offence punishable in terms of the same Ordinance.

After trial, the learned High Court Judge of Panadura found the appellant guilty as charged by his judgement dated 11th June 2020. Accordingly, she was sentenced to a 10-year rigorous imprisonment on each of the 2 counts, and on count one, she was ordered to pay a fine of Rs. 100,000/- and in default, to serve a rigorous imprisonment term of 1 year.

The 10-year prison term imposed on each of the counts was ordered to run concurrently.

Facts in brief.

PW-01 was the Officer-In-Charge (OIC) of the Angulana Police Station. Upon receiving an information on 5th August 2015 that a female wearing an orange-coloured skirt and a light green blouse would carry Heroin for the purpose of trafficking and she would be walking from Kaldemulla area and come to pass Dewata Road Bridge around round 7.30 in the morning. Accordingly, he has organized a raid.

The witness has received the said information at 6.40 a.m., and after assembling a team of four police officers in addition to himself, following the due procedure, he has left the police station in 5 minutes time at 6.45 a.m. The mentioned place of the trafficking was about 500-600 meters away from the police station. In his evidence-in-chief on 12-10-2017, PW-01 has stated that he went past the mentioned bridge and travelled about 150 meters in the gravel road, stopped the police vehicle and asked the driver to take the police jeep further away and walked back to a place near the bridge with the other officers and waited behind two three-wheelers parked in order to confront the suspect.

The suspect as described by the informant has walked passing the place where they were waiting around 7.35 a.m. After stopping and questioning her, the witness has found a pink-coloured cellophane bag in her right hand. Upon inspection, he has identified the contents of the bag as Heroin, and accordingly, she was arrested and taken to police the station.

It was his evidence that he returned to the station at 8.40 a.m. and took the necessary steps to weigh the Heroin found, and to seal the productions and also to hand over the productions to the police reserve. When weighed, he has found 22450 milligrams of Heroin.

However, later in his evidence, the witness has stated that he and his team of officers got down from their jeep near the location where they waited for the suspect to arrive and he ordered the driver of the jeep to take it away. The witness has identified the person arrested as the appellant. In his evidence the PW-01

has admitted that he entered detailed notes at 5.20 p.m. on that day, and has explained the delay, stating that since he had several other matters to attend as the OIC of the station, he could only do it in the afternoon.

PW-04, WPC 7630 Kumudini Damayanthi was the officer who assisted the PW-01 in the raid and the arrest of the appellant. It was her evidence that police reserve officer Nandapala informed her at 6.30 in the morning to get ready for a raid and report to the OIC, and she left the police station with the team of officers at 6.45 am and got down from the vehicle near the location where the detection was made. It was her evidence that when the OIC stopped the appellant and questioned her, she had in her right hand, a pink colour grocery bag which she was holding tightly in her palm and when inspected, Heroin was detected in the parcel. It has been revealed during the cross examination of the witness that she has entered the time she was informed to get ready as 6.20 in the morning in her notes.

At the trial, the prosecution has led evidence to establish the chain of the custody of productions and has led the evidence of the Government analyst to establish that the quantity sent for their analysis had a pure quantity of 1.38 grams of Heroin.

When called for a defence at the conclusion of the prosecution case, the appellant has given a dock statement and has called two witnesses on her behalf. It was her position that she was never arrested at the time and by the witnesses who claimed that they arrested her with Heroin. It was her statement that she was arrested around 2 p.m. on that day while walking past the location where witness number one claims. It was her position that she was arrested by two other male police officers and nothing was found in her possession, but was forcibly taken to the police station and Heroin was introduced to her. This has been her position when the prosecution witnesses gave evidence as well.

She has also explained that, when her son came home from school with an injury, she needed money to take medicine for him and as she had no money,

she went to meet a friend called Sanoja who lived about 3 km away from her home to borrow some money, but she could not obtain money and while returning home she was arrested by the police.

Sanoja mentioned by the appellant in her dock statement has given evidence under oath in this case. It was her evidence that, the appellant was a friend of her and she used to come and borrow money in her emergencies. On 5th August 2015, around 2 - 2.15 in the afternoon, she came to her house and requested some money from her, but she could not provide any, and the appellant left her house thereafter was her evidence. She has stated that around 3.30 pm, appellant's husband came looking for her and inquired whether his wife came and met her, and left after being informed that she came and left her house. After about 4 days, the witness had come to know that the appellant was arrested on her way back from her house, and it was her evidence that she took down the date on which the appellant came to her house in a book she maintains to record her lending of money to others. She has admitted that she was in the habit of lending money to others in order to earn an income.

The husband of the appellant has given evidence and has stated that since his wife who left the house in order to borrow some money from her friend did not return, he went and met the earlier mentioned Sanoja and he was informed that she came and left. Later he has come to know that her wife was arrested and taken to the Angulana police station where he found his wife.

The Grounds of Appeal

At the hearing of the appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

(1) The learned High Court Judge had failed to consider vital contradictions in the evidence of the prosecution witnesses and thereby reached an erroneous conclusion that the prosecution witnesses are credible.

(2) The learned High Court Judge had come to a wrong finding that the prosecution had proved the chain of productions.

(3) The learned High Court Judge failed to evaluate the dock statement and had rejected the same by applying wrong principles of law and had failed to give valid reasons for rejecting the evidence of the defence witnesses.

Consideration of the Grounds of Appeal

Although the learned Counsel for the appellant formulated the second ground of appeal in relation to the custody of the productions, it was later conceded by him that he has no basis for the said ground of appeal. Hence, it is the 1st and the 3rd grounds of appeal that will be considered in this judgement.

It was the contention of the learned Counsel for the appellant, that the learned High Court Judge failed to consider the vital *inter se* and *per se* contradictions of the evidence of the two main witnesses, namely, PW-01, the officer who led the raid, and PW-04 the female police officer who assisted him. He brings to the notice of the Court, the discrepancies in the two witnesses' evidence with regard to the time PW-04 was ordered to get ready for the raid and PW-01's evidence in relation to the time he received the information. He also points to the evidence of PW-01 where he has stated in his initial evidence-in-chief that he and his team went about 150 meters passing the location where the detection was made and returned on foot and also the time alleged to have been taken by PW-01 and his team to leave the police station after the receipt of the information. Another factor contended by the learned Counsel was the alterations appeared to have been made in the notes with regard to the mileage meter of the police jeep, to argue that if the distance to the place of detection was about 500-600 meters away from the police station, there was no reason for the police jeep to travel several kilometers before it returned to the station. He formulated this argument based on the appellant's statement that she was not arrested by PW-01 nor was she

taken in a jeep, but by two other male officers and taken to the station in a three-wheeler and the arrest was made around 2 p.m. in the evening.

In his judgement, the learned High Court Judge has in fact considered the differences of time mentioned by two main witnesses and the changes that has been made to the notes with regard to the mileage meter of the jeep, and has determined that those are minor deficiencies in the evidence and that has not created any doubt as to the evidence of the prosecution.

It is the settled law that a trial judge has to consider the evidence of the prosecution as well as that of the defence in its totality to find whether the prosecution has proven the charges against the appellant beyond reasonable doubt.

In the case of **James Silva Vs. The Republic of Sr Lanka (1980) 2 SLR 167,** it was stated that,

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters adduced before the Court whether by the prosecution or by the defence in its totality without compartmentalizing and asking himself, whether as a prudent man, in the circumstances of the particular case, he believed the accused guilty of the charge or not guilty."*

It is my view that the mentioned deficiencies in the evidence need to be considered in the light of the defence taken up by the appellant to determine whether the evidence was credible and truthful enough. In this regard, the determination whether the story of the prosecution was probable is also a matter that needs to be looked into.

The evidence of PW-01 was that he received an information at 6.40 in the morning regarding the trafficking of Heroin in the area mentioned by the informant. He was also informed of the dress that the trafficker would be wearing and her features. It was his evidence that, after he received the information, he entered the necessary notes, assembled a team of officers and collected the

necessary equipment for a raid of this nature, and left the police station after checking the other officers who took part in the raid and the police jeep to ensure that nothing unwarranted is carried by any member of the raiding party. His evidence was that all this took just 5 minutes and he and his team left the station at 6.45 in the morning.

The question here is whether it is possible for a reasonably prudent person to do all these things and leave in just 5 minutes after the information. When questioned in this regard, PW-01 has explained, saying that since it was important to take action immediately, he left the station within 5 minutes. However, the information he received had been that the trafficker would come around 7.30 in the morning to the location mentioned by the informant. That means PW-01 had over 50 minutes he only had to travel about 500-600 meters to reach the location. Therefore, it is not possible to believe the need for the PW-01 to act immediately as claimed. If the information was that the trafficker would come within 5-10 minutes, such an information can be treated as an information that needs very fast action. In such a scenario, even an officer leaving the station without following all the required procedures can be justified. Under the circumstances, I am of the view that the evidence of the PW-01 that he and his team after following all the due procedures, left the station within five minutes is not a piece of evidence that can be considered probable.

When it comes to the evidence of PW-04 the female police officer who assisted PW-01 in the detection, she has been informed by the officer who was in charge of the police reserve to get ready to go for a raid at 6.30 in the morning. Contrary to that, it has been brought to the notice of the Court that in her notes with regard to the time, she has mentioned that she was asked to get ready at 6.20 am. Her evidence with regard to the time cut across the evidence of PW-01 who says he received the information at 6.40 in the morning. If he received the information at that time, it was not probable for the PW-04 to be informed to get ready for the raid before the receiving of the information, which leads to the question whose evidence is to be believed in this regard. I am of the view that

such a doubt should be considered in favour of the appellant given her stand as to her time of arrest.

Apart from the above deficiencies as to the time, PW-01 in his evidence-in-chief has stated that he and his team travelled about 150 meters passing the location where the detection was made, stopped the jeep, and after informing the driver to take the jeep away, walked back to the place of detection where they waited little over half an hour having taken cover behind two three-wheelers parked there. However, later in his evidence, he has changed his position and has stated that he and his team got down at the location where the detection was made and the police jeep driver was asked to move on and stay away from the location. The reason for this change in the story appears to be the realization that the notes of the other officers do not match his earlier evidence in that regard.

It is my considered view that I am in no position to agree with learned High Court Judge's view that these are minor discrepancies and they do not create a doubt in the evidence of the prosecution. I am of the view that it was important for the learned High Court Judge to consider the evidence in its totality and come to a firm finding whether the prosecution has proved its case beyond reasonable doubt.

The third ground of appeal urged by the learned Counsel that the learned High Court Judge failed to evaluate the dock statement and the evidence of the defence witnesses in its correct perspective and rejected the same by applying wrong principles of law becomes relevant under the above-mentioned circumstances.

In this matter, the appellant has made a statement from the dock when she was called upon for her defence and had called two witnesses in support of her stand.

Throughout the trial, her stand has been that she was not arrested in the morning of that day in the manner stated by the witnesses but was arrested after 2 p.m. by two other male officers and no Heroin was found in her possession,

but she was taken to the police station and charged for having Heroin in her possession.

When called for a defence in a criminal case, our Courts have recognized the right of an accused to give evidence under oath and subject himself or herself to the test of cross-examination or elect to make an unsworn statement from the dock. Any unsworn statement made by an accused from the dock too has evidential value subjected to the infirmities that the said statement was not made under oath and not subjected to the test of cross- examination.

In the case of **Queen Vs. Kularatne (1968) 71 NLR 529**, it was held that while jurors must be informed that such a statement must be looked upon as evidence subjected however, to the infirmities that the accused's statement is not made under oath and not subjected to cross-examination.

Held further;

1. If the dock statement is believed, it must be acted upon to.
2. If it raised a reasonable doubt in their minds about the case of the prosecution, the defence must succeed. and;
3. It must not be used against another accused.

It was held in the case of **Don Samantha Jude Anthony Jayamaha Vs. The Attorney General, C.A. 303/2006,** decided on 11-07-2012 that,

> *"Whether the witness of the defence or the dock statement is sufficient to create a doubt cannot be decided in vacuum or in isolation, because it needs to be considered in the totality of evidence, that is in the light of the evidence for the prosecution as well as the defence."*

The learned High Court Judge in his judgment at page 14 (pages 303 and 304 of the appeal brief) has reasoned the appellant's dock statement in the following manner.

"චිත්තිකාරියට චිත්තිවාචකයක් ඉදිරිපත් කිරීමට නියම කලවිට ඇය චිත්තිකූඩුවේ සිට ප්‍රකාශයක් පමණක් කර ඇත. ඇය සාක්ෂි කූඩුවට පැමිණ සාක්ෂි දීම පැහැර හැර ඇත. එසේ හෙයින් පැමිණිල්ලට ඇය පොලිස් ස්ථානයට කර ප්‍රකාශය පිළිබඳව ප්‍රශ්න කිරීමට ලැබෙන අවස්තාව මගහැරී ඇත. ඒ අනුව ඇය සෑම අවස්වතාවකදීම එකම ස්ථාවරයක් ගත් බව පොලිස් ස්ථානයට කරන ලද ප්‍රකාශයෙන්ද එම ස්ථාවරයම ගත බවත් තහවුරු කිරීමට චුදිත කාන්තාවට ලැබී තිබුණු මහඟු අවස්තාව ඇය විසින් පැහැර හැර ඇත. ඇය සාක්ෂි කූඩුවට පැමිණ සාක්ෂි දුන්නේ නම් පැමිණිල්ලට ඇයගෙන් හරස් ප්‍රශ්න නගා චෝදනාව සම්බන්දයෙන් ඇයගේ ස්ථාවරය පිළිබඳව හරස් ප්‍රශ්න නැගීමට ඇති අවස්තාව ඇය එසේ නොකිරීමෙන් එම අවස්තාව පැමිණිල්ලට මගහැරී ඇත."

Although the learned High Court Judge has commented that he considered the dock statement in the above manner only to consider whether it creates a doubt in the evidence of the prosecution, I am unable to agree with the said comment considering the manner in which the learned High Court Judge has looked upon the dock statement. Even at page 17 of the judgement, the learned High Court Judge has commented that the appellant has avoided giving evidence and thereby failed to establish that she took the same stand when making the police statement.

It is therefore clear that the learned High Court Judge has failed to consider the dock statement in its correct perspective as pointed out by the learned Counsel for the appellant. I am not in a position to agree with the contention of the learned Deputy Solicitor General (DSG) in this regard. I am of the view that the learned High Court Judge has failed to consider whether the dock statement by the appellant has created a reasonable doubt in the evidence of the prosecution. He has dismissed the dock statement by applying the wrong principles of law which cannot be considered correct.

It was the contention of the learned DSG that the out and the in entry entered by the OIC in the Information Book clearly establishes the fact that the appellant had been arrested in the morning and not in the manner claimed by the appellant and her witnesses, and hence, there is no basis to interfere with the judgment. This argument may be considered correct, if the learned High Court

Judge evaluated the evidence in that manner, rather than brushing aside the evidence of the appellant in the manner it was rejected.

Apart from the above, the learned High Court Judge has rejected the evidence of the two witnesses called on behalf of the appellant on the basis that they are partisan witnesses. It needs to be emphasized that evidence given by a party cannot be considered partisan without a proper evaluation of the evidence. The evidence of a witness or witnesses cannot be rejected merely because they are relatives or close associates of an accused. The requirement is to evaluate the evidence be it by the prosecution or the defence in its correct perspective and to come to a finding whether the prosecution has proved the case beyond reasonable doubt.

I am unable to agree with the learned High Court Judge's conclusion that the defence of the appellant was an attempt to create a fanciful doubt and thereby rejection of the defence of the appellant without evaluating the dock statement and the evidence to find whether it has created a reasonable doubt as to the prosecution case.

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

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

In the Indian Supreme Court Case of **D.N. Panday Vs. State of Uttar Pradesh, AIR 1981, Supreme Court 911** it was 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, quit often they tell lies but so do the prosecution witnesses."*

At this juncture, I am also reminded of the judicial decision of **Martin Singho Vs. Queen 69 CLW 21** where it was held;

> *"Even if the jury decline 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."*

In the instant appeal, I am of the view that the considered failure by the learned High Court Judge has amounted to a denial of a fair trial towards the appellant, and of the view that allowing the conviction and the sentence to stand is not safe.

Accordingly, I set aside the conviction and the sentence of the appellant. I find no basis to order a retrial either, given the facts and the attendant circumstances.

Therefore, the appellant is acquitted of the charges preferred against her.

Appeal allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal