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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC/283/2019 **VS**

High Court of Colombo
Case No: HC/322/2017 Kachchi Peilabdheen Jesmeer Rizwan

Accused

And now between

Kachchi Peilabdheen Jesmeer Rizwan

Accused– Appellants

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : U.R. de Silva, PC with Savithri Fernando, ALL and Ranga Kobbawaththa

for the accused-appellant

Sudharshana de Silva, DSG

for the respondent

ARGUED ON : 25/07/2022

DECIDED ON : 14/09/2022

R. Gurusinghe, J.

The accused-appellant (the appellant) was indicted in the High Court of Colombo for being in possession and trafficking 321.89 grams of heroin, offences punishable in terms of section 54 A of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984. After trial, the appellant was found guilty of both charges and sentenced to death.

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

Counsel for the appellant relied on the following grounds of appeal.

1. The Learned Trial Judge has erred in relation to the non-production of articles.

2. The Learned Trial Judge has erred in evaluating the evidence of the Government Analyst.

3. The Learned Trial Judge has erred in evaluating the defence case.

4. The Learned Trial Judge has misdirected himself in the evaluation of the prosecution case.

The prosecution case in brief:

A team of police officers of the Maligawatte police station left the police station at 8.05 a.m. on the 10th of January, 2016, for daily police investigations. One officer was in uniform, and the others were dressed in civilian clothing. Before leaving, the officers and the vehicle were searched. PW1, who led the police team, received information from a private informant around 10.00 a.m. that a person carrying heroin in a backpack was coming to the Maligawatte Cemetery. It was further informed that He was wearing a blue-coloured t-shirt and brown-coloured trousers.

In response to the above information, PW1 stayed at the cemetery for about 20 to 30 minutes expecting the appellant's arrival. He saw a person approaching towards the cemetery, wearing an attire that was similar to the one described by the informant. Upon seeing the person, PW1 directed PW2 Sub-Inspector Manoj and PW3 PC 66357 Ratnayake to join him. They stopped the appellant. PW1 then searched the appellant and found two mobile phones and his wallet. When his backpack was searched, PW1 found five cellophane bags. Four parcels out of five contained brown-coloured powder, and the other parcel contained a black-coloured sticky lump. PW1, from his experience, identified them as heroin. The appellant was arrested at 10.40 a.m., and the substance was temporarily sealed at 10.50 a.m. The police team went with the appellant

to the Police Narcotics Bureau and weighed the heroin. After examining the parcel, it had been identified as having contained heroin, and the total weight of the brown powder was measured as 1 kg and 51 grams, while the black lump weighed 125.61 grams.

The heroin was duly sealed and handed over to the person in charge of the productions in the police station and later handed over to the Government Analyst.

Defence case

The appellant made a dock statement. His position is that, he was arrested from his residence in Wattala on the 10th of January 2016 at 1.00 a.m. He made several telephone calls to his wife till 10.00 a.m., while he was under arrest. The appellant stated that the heroin produced in the court was not in his possession and was introduced to him by the police.

The defence called an officer from the mobile telephone service provider and marked the phone call details of the two phone numbers 0723143658 and 07222791901 as V1 and V2.

The prosecution called PW1 after the defence case was closed as evidence in rebuttal. PW1 stated that the appellant was arrested at 10.40 a.m., and the appellant's phones were handed over to the reserve police at 12.10p.m. as personnel items of the appellant. No telephone calls were initiated when it was in the custody of PW1.

The First ground of appeal is the non-production of the following items in evidence, namely, a *'tulip'* bag (PR 51), a temporarily sealed envelope (PR 52) and a red and black striped bag (PR 53).

PW1 Sub-Inspector Manjula stated that the items mentioned above were duly handed over to the reserve officer PW 9 Chandraratne, after entering them in the production register as PR 51, PR 52 and PR 53. Those three items are not essential to prove the prosecution case. The prosecution has produced the heroin detected from the appellant in court. PW 9 Chandraratne gave evidence before court and stated that the items PR 51, PR 52 and PR 53 were handed over to him by PW1, and he handed over the same to PW 10 Ranaweera. They were again handed over to PW9, and he then handed them over to PW 13 Rohana. PW9 received them back from PW 13 Rohana and handed them over to PW 14 Ratnayake.

PW9 was not cross-examined, and his evidence stands unchallenged. PW13 also gave evidence regarding the three items. PW 13 was not cross-examined, and his evidence also stands unchallenged.

PW 14 Ratnayake gave evidence in court and stated that he received PR 51, PR 52 and PR 53 from PW9 on the 12th of January 2016. He further stated that the three items were misplaced in the police station and could not be found. PW 14 was not cross-examined by the defence, and his evidence stands unchallenged.

In the case of *Gunasiri and Two others vs Republic of Sri Lanka [2009] 1 SRI LR 39,* Justice Sisira de Abrew, quoting from the Indian Judgment of Sarwan Singh vs State of Punjab, stated that,

In this connection, I would like to consider certain judicial decisions. In the case of Sarwan Singh vs State of Punjab, Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew vs State of Karnataka.

Considering the above facts and law, I hold that the first ground of appeal has no merit and I reject the same.

The second ground of appeal is based on the corrections made to the Government Analyst's report by the Government Analyst herself.

The Government Analyst's report was produced in evidence and marked P18. The Government Analyst stated that there was a mistake in the report to say that in paragraph 3 of the report, "instead of black coloured powder it should be a solid substance".

The learned High Court Judge allowed this correction, because it was a genuine mistake. The defence had the opportunity to challenge the report in cross-examination. The defence cross-examined the Government Analyst only in regard to the correction. It was revealed in the analysis that the solid substance contained 21.62 grams of heroin and the brown-coloured powder contained 300.25 grams of heroin. However, this was not challenged in the cross-examination. Instead, the defence counsel alleged that the Government Analyst gave evidence to support the version of the prosecution. It is to be noted that the Government Analyst herself gave evidence in court. She had come to the pinnacle of her career. She was the Government Analyst at the time the productions were handed over to the Government Analyst department. The learned Counsel for the respondent pointed out that the Government Analyst had nothing to achieve by supporting the prosecution case.

The learned High Court Judge has carefully evaluated the Government Analyst's report. In view of the above, I hold that this argument has no merit.

The next argument is that the learned High Court Judge had not evaluated the defence case. The position of the appellant is that he was arrested at his house in Wattala at about 1.00 a.m. and brought to the Maligawatte police station.

His position is that he had made several telephone calls to his wife while under arrest. The defence produced the call records of the appellant's mobile phone, taken on the 1st of October 2016. However, the position of the prosecution is that the appellant was arrested at the Maligawatte cemetery at 10.40 a.m. PW 1 handed over the appellant's phone to the reserve police of the Maligawatte police station at 12.10 p.m.. From10.40 a.m., to 12.10 p.m., there were no calls generated from the mobile phone of the appellant. It is difficult to believe that the police allowed the appellant to take calls from his phone six times, while he was under arrest. Furthermore, all the calls were generated in the area of Maligawatte. The learned High Court Judge has observed that no calls were generated from the Wattala area. Having carefully considered the call records and the evidence, the learned High Court Judge had come to the conclusion that the defence evidence did not create a reasonable doubt in the prosecution case. I see no reason to disagree with the findings of the learned Trial Judge.

The next point raised for the appellant is that the learned High Court Judge has misdirected himself in the evaluation of the prosecution case.

It is argued that the evidence of PW 1 and PW 2, with regard to what they had done from 8.05 a.m. to 10.00 a.m. varied from each other. This position was clearly dealt with by the learned High Court Judge in para 29 of the judgment. and observed that there were no contradictions. Therefore, this argument has no substance, and I reject the same.

The last point raised by the appellant is that the learned High Court Judge has come to the conclusion that the appellant was guilty before considering the defence evidence. This argument cannot be accepted.

Before a judgment is written, a judge thoroughly reads the whole case record and then comes to a conclusion regarding all issues.

If a Judge writes the conclusion first and then sets forth the reasons for doing so, no one can say that the Judge has put the cart before the horse; it does not vitiate a judgment. Everything need not be in chronological order.

There is no specific format for writing a judgment. What should be contained in a judgment of the High Court is specified in section 283 of the Code of Criminal Procedure Act.

Counsel for the respondent also pointed out that the witnesses had no animosity towards the appellant. Further, if the police introduced the drugs to the appellant, questions arise, as to why they should introduce 321.0 grams of heroin which is a large quantity and how the police could find such a huge amount of heroin. As per the provisions of the Poisons Opium and Dangerous Drugs Ordinance, if a person is found in possession of two grams or more of heroin, the prescribed punishment is the life sentence or death sentence. 321.0 grams of heroin can be considered as a huge amount compared to 2.0 grams. When considering the evidence as a whole, there is no reason to interfere with the judgment of the learned High Court Judge.

Accordingly, the conviction and the sentence imposed on the appellant is affirmed, and the appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal