

**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/295/2013

VS

High Court of Colombo
Case No: HC 4828/2009

Modarage Raneesha

Accused

And now between

Modarage Raneesha

Accused- Appellants

VS

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant -Respondent

BEFORE : N. Bandula Karunaratna, J.

: R. Gurusinghe, J.

COUNSEL : Rienzie Arsecularatne PC, with

Thilina Punchihewa

for the accused-appellant

Shanil Kularatne SDSG

for the Respondent

ARGUED ON : 15/09/2022

DECIDED ON : 20/10/2022

R. Gurusinghe, J.

The Honorable Attorney-General indicted the accused-appellant (hereinafter referred to as the appellant) for being in possession of 5.4 grams of heroin, an offence punishable under Section 54 of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984.

After trial, the learned High Court Judge convicted the appellant as indicted and sentenced her to death. The appellant preferred an appeal against the said conviction and sentence.

Prosecution version

Upon receiving information from a private informant, PW1 Police Inspector Vipula Nandana Wimalasiri, who was an investigator at the Police Narcotics Bureau (the PNB), left the PNB along with nine other officers on the 16th of January 2007. The police team consisted of Sub-Inspector Sampath, Woman Police Sergeant Shama,(PW9), PC 50149 Sanath, PC 13158 Niroshan, PC 12784 Weerasinghe, PC 33158 Wickramasinghe(PW6), PC 33295 Asoka, PC 14868 Somasiri, and PC driver 34644.

All officers were in civilian clothes. They came to Borella and parked their vehicle near the Cycle Bazaar at Borella at about 11.00 a.m. and waited there till 12.15 p.m. They came to Colombo Fort and then proceeded to the Ratmalana railway station. They reached the Ratmalana railway station at 14.05 and had lunch at a nearby restaurant. After lunch, they left for the PNB. On their way, PW6 PC33158 Wickramasinghe received a telephone call from a private informant at 15.44. As per his information, the informant was near the Dehiwela railway station and wanted them to meet him soon. They came near the railway station in Dehiwela at 16.15. PW1 and PW6 went to meet the informant. The informant said that a woman would be coming from the direction of Galle Road towards the railway station, between 4.00 and 5.00 p.m. The informant said that he could show her to the police. The police team was stationed near a Christian church at 4.30 p.m.

PW1, PW6, PW9, the woman police sergeant Shama and the informant stayed near the church at 4.30 p.m. At 4.40 p.m., a woman came from the direction of the Dehiwela junction, who was clad in a pink-coloured blouse and a pink, yellow and grey mixed long skirt. The informant showed the woman, about 100 meters away, to the police and left the place. PW1 stopped the woman when she approached towards them and introduced them as officers of the PNB.

PW1 instructed the van to be taken to that place. As the van was with tinted privacy glasses, the inside of the vehicle was not visible to the outside. The woman was taken into the van. PW9 searched the woman and found a polythene bag wrapped in a women's handkerchief. As per PW9, it was in between the breasts of the woman (the appellant). PW1 took the parcel and identified the substance that was inside the bag as heroin, and the appellant was arrested at 16.55. They returned to the PNB at 18.05. The substance was weighed by an electronic weighing scale, and the weight of the heroin was 22grams and 300milligrams. The heroin was duly sealed by 7.00 p.m. The heroin was kept in a private locker of PW1, and the keys were with him. The heroin was handed over to the Reserve Police Officer on the following day at 2.00 p.m. The heroin was sent to the Government Analyst, and the report confirmed that there was 5.4 grams of heroin.

The appellant's position is that on the 16th of January 2016, in the evening, when she was coming from the Dehiwela market after buying vegetables and some provisions, a woman she called Shiromi Akka was there with some people and showed the appellant to them. Then PW1 came to her and introduced them as the officers from the PNB. IP Nandana told her that they had received information that she was engaged in Narcotics trafficking. She was then taken into the van which was parked nearby. There were no lady police officers in the police team. She only had her handbag; inside the bag was a mobile phone, some cash and another provision bag. The police questioned her and took her to the PNB. At the PNB, PW1 asked a lady police officer to check the appellant's bags. The woman police officer searched the bag and said that there was a parcel inside the bag. The appellant told them that when they checked the bag at the time of the arrest, there was no such parcel in the bag. The police officers had abused her in filthy language and forced her to put her thumb impression on an envelope. The woman who showed the appellant to the police was a known person to the appellant. She is known as Shiromi Akka from whom the appellant had taken a loan on interest. The appellant was not

able to repay it as agreed. There was an exchange of words about the repayment of the loan between Shirom Akka and the appellant. Shirom Akka then told the appellant that she would teach her a good lesson. The appellant stated that she did not possess heroin. There was no single lady police officer, nor was there heroin found in her bag that was searched by the police team at the time of her arrest. At the PNB, the police officers had falsely charged her, saying that there was a parcel of heroin in her handbag. The lady officer was seen for the first time when IP Nandana asked her to search the appellant's bag.

The grounds of appeal urged by the appellant are as follows:

1. The indictment was amended after two witnesses had completed their evidence. The amendment was not read out to the appellant, nor it was handed over to her. This is an imperative provision as per the Code of Criminal Procedure Act. Further, the learned High Court Judge signed the amendment in the indictment. That is not a function of the Judge, and that should have been done by an officer from the Attorney General's Department.
2. The second ground of appeal is that the learned High Court Judge has failed to take into account the contradictions of the testimonies of the prosecution witnesses *per-se* and *inter-se*.
3. The learned High Court Judge had decided that the prosecution had proved its case beyond reasonable doubt, before considering the defence witnesses.
4. The dock statement of the appellant was rejected without adequately evaluating it.

The appellant concedes the fact that she was arrested near the railway station at Dehiwela and then taken to the PNB. There are two main differences between the prosecution version and the defence version. The defence position is that the appellant did not have heroin in her possession, and there was no female officer at the time of her arrest.

I will first consider the prosecution case and the defence case, comparing the evidence of both parties.

As per the prosecution, PW9 WPS404 Shama did the physical search of the appellant inside the van at the place of arrest. The evidence of PW9 was mainly confined to what had been recorded in the information book. Some of the answers given by PW9 raised a doubt about her participation in the raid. At pages 147, and 148 of the original case record, PW9 has answered as follows:

On Page 147

ප්‍ර: මහත්මියලා කොහේටද ගියේ?

On Page 148

උ: දෙහිවල ක්‍රිස්තියානි පල්ලිය අසලට.

ප්‍ර: දැන් මහත් මිය දෙහිවල ක්‍රිස්තියානි පල්ලිය අසලටයන විට ඔබලාගේ කණ්ඩායමේ ගිය පොලීස් නිලධාරීන් හැරෙන්නට වෙන කවුද සිටියේ?

උ: එම ස්ථානයේ පො.කො. 33158 වික්‍රමසිංහ නිලධාරියාගේ පුද්ගලික ඔත්තුකරු සිටියා.

ප්‍ර: දැන් මහත්මිය මෙම පුද්ගලික ඔත්තුකරු සමග ඔය ස්ථානයේ කොපමණ වෙලාවක් රුදි සිටියාද?

උ: මද වෙලාවක් රුදි සිටියා.

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ප්‍ර: දැන් මහත්මිය ක්‍රිස්තියානි පල්ලියපිහිටා තිබෙන්නේ මොනවගේ වටපිටාවක ද මොන පාරට ලංවද තිබෙන්නේ?

උ: දුම්රිය ස්ථානයට ලංව.

ප්‍ර: දැන් මහත්මිය දුම්රිය ස්ථානය කිව්වාම, දෙහිවල හන්දියේ සිට බලනවා නම් කොහෙද ඔය ස්ථානය තිබෙන්නේ?

උ: ක්‍රිස්තියානි පල්ලිය අසල.

The prosecuting counsel dropped that line of questioning at that time.

At page 161, PW9 answered as follows:

Page 161

ප්‍ර: ඒ කොහේට යනවා කියල ද කිව්වේ?

උ: බොරැල්ලට

Page 162

ප්‍ර: බොරැල්ලේ කොහේද?

උ: සයිකල් බසාර් එක ළඟට.

ප්‍ර: ඔබලා බොරැල්ලේ සයිකල් බසාර් එක ළඟට ගියා ද?

උ: එහෙමයි ස්වාමිනි

ප්‍ර: වාහනය නතර කලේ කීයටද කියන්න?

උ: පැය 11.10ට

ප්‍ර: ඒ සයිකල් බසාර් එක ළඟ වාහනය නතර කලාට පසු වාහනයෙන් කවුරු හරි බැස ගියා ද?

උ: නැහැ ස්වාමිනි.

ප්‍ර: නිලධාරීන් සියලු දෙනා වාහනයතුළ සිටියා?

උ: එහෙම යිස්වාමිනි.

ප්‍ර: එම ස්ථානයෙන් පිට වුනේ කීයටද?

උ: පැය 12.15ට.

ප්‍ර: ඔය කාලය තුළ කිසිම නිලධාරියෙක් වාහනයෙන් බැස ගියේ නැහැ?

උ: නැහැ ස්වාමිනි

ප්‍ර: ඔබලා මොකක් ද කලේ එම ස්ථානයේ?

උ: වාහනයේ සිටියා ස්වාමිනි

ප්‍ර: වැටලීමක් කලේ නැහැ?

උ: නැහැ ස්වාමිනි

ප්‍ර: අනතුරුව මහත්මියලා කොහේටද ගියේ?

උ: ගල්කිස්ස රත්මලාන දුම්රිය පොලපාරට ආවා.

It is also strange that they were kept inside a vehicle for more than one hour without getting down or doing anything. After that, they went back to Pettah and then they went to Ratmalana along the Galle Road, without going to the PNB. If they were to go to Dehiwela, they could have gone straight away to Bambalapitiya and then to Ratmalana without going back to Pettah.

On Page 165

ප්‍ර: මහත්මිය ඔය සයිකල් බසාර් එක ලග වාහනය නැවැත්තුවේ මොන පාරේ ද?

උ: සයිකල් බසාර් එක අසල.

ප්‍ර: මහත්මිය වාහනය නවත්තපු පාරේ නම දන්නවාද?

උ: සයිකල් බසාර් එක අසල

ප්‍ර: මහත්මිය එහෙම පාරක් නැහැනේ, බේස්ලයින් පාරෙද වාහනය නතර කලේ, නැත්නම් බේස්ලයින් පාරෙන් ඇතුලට විහිදෙන අතුරු පාරකද වාහනය නතර කලේ?

උ: නම නම් මතක නැහැ. බොරැල්ල සයිකල් බසාර් එක අසල වාහනය නතර කළේ.

This is the evidence from a person who claims to have been waiting in the van for more than one hour from 11.10 a.m. The Cycle Bazaar is on the left side of the Baseline Road, if you go from the direction of Dematagoda to Borella.

From that place the Borella junction and the Super Market building can be seen. A question arises as to why did the police officers refer to this place. I think it is a prominent place and well known to the police officers. This is an officer who served for 26 years at the Colombo PNB. It is not reasonable to believe that PW9 does not know the Baseline Road. This is probably an attempt not to contradict with other witnesses, not knowing what they had stated about the road. If she waited for more than one hour on the Baseline Road, she must have known that it was the Baseline Road.

On Page 168

ප්‍ර: මහත්මිය ඔය ක්‍රිස්තියානි පල්ලියලග රැදී සිටින කොට කාන්තාවක් නිරීක්ෂණය කළ බව කීව්වා

උ: ඔව්

ප්‍ර: ඒ කාන්තාව මහත්මිය නිරීක්ෂණය කලේ කොහොමද, කාන්තාව කොහොමද සිටියේ?

උ: රෝසපාට හැට්ටයක් සහ රෝස, කහ මිශ්‍ර දිග සායක් ඇදලා සිටියා.

ප්‍ර: ඒ කාන්තාව මොනව හෝ අරගෙන ආවද?

උ: නැහැ

ප්‍ර: මහත්මියට බාහිරින් නිරීක්ෂණ යවන ආකාරයේ කිසිම දෙයක් කාන්තාව ලග තිබුණේ නැහැ?

උ: නැහැ

However, the evidence of the appellant was that she had a handbag and inside her handbag, there was her mobile phone and also, she had a vegetable bag.

PW1, the main investigating officer, answered as follows on page 75 of the case record.

On Page 75

ප්‍ර: ඊට අමතරව වෙනත් නඩු භාණ්ඩ මුදා තැබීමක් සිදුකලාද?

උ: නැහැ

ප්‍ර: මෙම සැකකාරිය භාරයේ තිබූ භාණ්ඩ සම්බන්ධයෙන් පසුව කුමක්ද කලේ?

උ: එම සැකකාරියගේ දේපල වශයෙන් මුදා කරපු භාණ්ඩ උප සේවයට බාර දීමක් සිදු කලාග

ප්‍ර: මොකක්ද සැකකාරිය භාරයේ තිබුණේ?

උ: කලු සුදු ඉරි සහිත කාන්තා අත් බෑගයක්, පෙන්ඩන්තයක් සහිත රත්රං පාට මාලයක්, කරාබු යුගල දෙකක්, මුදු දෙකක්, රු. 420/=, අඩංගු කවරයක් තිබුණා, සැමුසුන් වාඳගයේ ඡංගම දුරකථනයක් තිබුණා.

ප්‍ර: මෙම අදාල නඩු භාණ්ඩ කවර දේපල කුච්ඡාන්තියකට ද ඇතුළත් කලේ?

උ: දේපල කුච්ඡාන්තිය 34/07 ට ඇතුළත් කලා.

PW9 is the person who claimed to have searched the appellant at the time of her arrest. If PW9 had seen the appellant coming from a distance of 100 meters and waited until she approached them, how come PW9 had never seen the handbag in her hand or any other bag? As per the evidence, only PW1, PW6 and PW9 were together. The first thing they should have done was to check her handbag before searching between her breasts. PW9 had not even seen a bag. PW1 or PW6 did not say that they checked the appellant's bag.

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ප්‍ර: දුරකථන ඇමතුම ලැබුණට පසුව වාහනය නතර කළේ කොහේද?

උ: දෙහිවල දුම්රියපළ අසල.

ප්‍ර: දුරකථන පණිවිඩය ලැබුණු ගමන් වාහනය කොහේ හරි නතර කළාද?

උ: ඒ සම්බන්ධයෙන් සටහන් යොදා නැහැ

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ප්‍ර: මහත්මිය දිවා ආහාරය හෝටලයකින් ලබාගත්තබව කිව්වා?

උ: ඔව්

ප්‍ර: එම දිවා ආහාරය ලබා ගැනීම සඳහා මුදල් ගෙවීමක් කලා ද?

උ: මුදල් ගෙවීමේ සම්බන්ධයෙන් සටහන් යොදල නැහැ

ප්‍ර: මහත්මියට කියන්න බැරිද අඩුමවශයෙන් දිවා ආහාරය ලබා ගැනීම සඳහා මුදල් ගෙවුවද නැද්ද කියල?

උ: මුදල් ගෙව්වා, ඒ සම්බන්ධයෙන් සටහන් යොදා නැහැ

ප්‍ර: කවිද ගෙවුවේ කියල මහත්මියට කියන්න පුලුවන්ද?

උ: ඒ සම්බන්ධයෙන් මට මතක නැහැ

The cumulative effect of the unsatisfactory nature of the above answers, creates a doubt in her testimony. In the case of Wijeratne v Republic of Sri Lanka,⁷⁸ NLR 49, it was stated as follows:

“When the accused was facing a capital charge it was essential that every point in favour of the accused, though it may seem trivial, should be placed before the Jury. It may well be that all such matters if so placed before the Jury may create a reasonable doubt the benefit of which the accused is entitled to. When however, the circumstances against the accused are emphasized and the Trial Judge expresses his opinion as to the adverse inferences that could be drawn from the circumstances and fails to place the circumstances and inferences in favour of the accused before the Jury, the accused is deprived of the substance of a fair trial.”

This witness narrates only what has been written down in the notes. She could not answer to any question asked, in addition to what was recorded in the notes. Regarding the payments for lunch, PW1 stated that each person paid for their lunch. PW6 said that PW1 had paid for all of them. PW9 says that she has not recorded it and cannot remember. As per their notes, they have done nothing at Borella. Nothing has been recorded with regard to the investigation done at Borella.

Considering the above infirmities and contradictions, the prosecution version cannot be believed beyond reasonable doubt. The evidence of PW9 is crucial in deciding the liability of the appellant as she was the only lady police officer to join the raid and the only person who could search the appellant to find out whether she possessed anything illegal. However, the evidence of PW9 creates a serious doubt about her participation in the raid. The analysis of the learned High Court Judge has not gone into the infirmities and contradictions of the prosecution evidence, which makes the prosecution story doubtful.

Considering the aforementioned infirmities and contradictions, it is not prudent and safe to send an accused person to the gallows. She has been in the prison for 7 years now.

As the prosecution has failed to prove the case beyond reasonable doubt, I will not consider the rest of the grounds of appeal.

For the foregoing reasons, I set aside the convictions and the sentence imposed on the appellant.

The appellant is acquitted.

Appeal allowed.

Judge of the Court of Appeal

N. Bandula Karunaratna, J.

I agree.

Judge of the Court of Appeal