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.

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

C.A. Case No.107/19 **Complainant**

High Court of Panadura

Case No. 3173/2014 **Vs.**

Ranasinghege Pushpakumara Perera

Accused

AND NOW BETWEEN

Ranasinghege Pushpakumara Perera

Accused –Appellant

Vs.

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

Respondent

BEFORE : K. PRIYANTHA FERNANDO, J (P/CA)
WICKUM A. KALUARACHCHI, J

COUNSEL : Mohan Sellapperuma for the Accused-Appellant

Chethiya Gunasekara, ASG for the Respondent

WRITTEN SUBMISSIONS

TENDERED ON : 22.05.2020 (On behalf of the Accused-Appellant)

27.05.2021 (On behalf of the Respondent)

ARGUED ON : 27.09.2022

DECIDED ON : 26.10.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Panadura for trafficking and possession of 2.56 grams of Heroin, on or about 01.02.2014, offences punishable under Section 54A(b) and 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984. After trial, the learned High Court Judge of Panadura convicted the accused-appellant on both counts by his judgment dated 02.05.2019 and imposed life imprisonment for both

counts. This appeal has been preferred against the said convictions and the sentences.

Prior to the hearing, written submissions were filed on behalf of both parties. The learned Counsel for the appellant and the learned Additional Solicitor General for the respondent made oral submissions at the hearing of the appeal.

In brief, this is the prosecution story:

On 01st February 2014, upon receiving information from a reliable informant about heroin is being packed for the purpose of trafficking, PW-1, OIC of the Panadura-North vise squad, organized a team of police officers for a raid and left the police station at 01.35 p.m., using a private van traveling on the road. The driver of the van had dropped the police officers about 25 meters away from "*Jana Udana Gammana*". Thereafter, they walked to the house where the raid was carried out. As per the information given by the informant, they have identified the wooden house where the heroin was being packed.

Thereafter, PW-1 had asked the other police officers to surround the house while he was observing inside the house through a hole in the wooden boards and had seen a person who was sitting on the bed packing something into cellophane bags. PW-1 asked one of the officers to knock at the door. However, the person who was inside got frightened and said that he is suffering from "tuberculosis." Thereafter, on the instructions of PW-1, PC Senarath (PW-3) pushed the door open, and both PW-1 and PW-3 went inside the house, examined the packets, and identified the substance in the packets as heroin. The accused- appellant had been arrested with 5 cellophane bags containing 200 heroine packets.

The learned counsel for the appellant based his arguments on three grounds of appeal.

1. The learned trial Judge has failed to realize that the prosecution has not proved its case beyond a reasonable doubt.
2. The learned trial Judge has failed to appreciate the fact that non-identification of the vehicle which was used for the raid and its driver.
3. The learned trial Judge erred in law by failing to consider *inter se* contradictions between the evidence of prosecution witnesses.

The learned counsel for the appellant contended that all the raids conducted by the police in Sri Lanka use vehicles belonging to the police department, and thus using a van that was traveling on the road for the raid is thoroughly unbelievable. I regret that I am unable to agree with that contention because there are instances where private vehicles are used for raids. In particular, when it is necessary not to reveal that the police officers are going to conduct a raid, private vehicles are used.

Next, I wish to consider the *inter se* contradiction shown by the learned counsel in respect of the officers who went to the place of the raid. He contended that the main investigating officer, PW-1, stated that four police officers went to the appellant's house, PW-3 stated that all the police officers went to the appellant's house but PW-5 took a contradictory position and stated in his evidence that he was inside the van during the raid.

PW-1 stated in his testimony that four police officers, including PW-5, went on the raid and that PC 67091-Chathuranga later joined the team. The van stopped 25 meters away from the house where the raid was carried out. So, it is apparent that PW-5 has also gone to the place of the raid with the other police officers. The only issue is

whether he got out of the van and joined the other police officers in conducting the raid. When they went there, PW-1 directed the police officers to surround the house, but PW-1 has not stated whether PW-5 was there with the other police officers at that time. When PW-3 was questioned whether all the officers got down from the van, his answer was that the driver was a civilian. (Page 130 of the appeal brief) So, PW-3 has also not given a direct answer to that question. Hence, there is no contradiction between PW-5's evidence and PW-1's evidence or between PW-5's evidence and PW-3's evidence. In the circumstances, PW-5's evidence that he remained in the van could be accepted without any problem because no doubt arises on the said fact due to the evidence of PW-1 or PW-3.

Be that as it may, when PW-5 was cross-examined, the defence counsel suggested in the following manner that PW-5 came for the raid, searched the garden, and since he did not make notes, he denied getting down of the van.

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(Page 200 of the appeal brief)

Therefore, even though the issue, whether PW-5 got down from the van or remained in the van is considered as a contradiction, the said contradiction has no effect because the appellant has admitted by making the aforesaid suggestion that a team of police officers came to his house and searched. In addition, the previous argument about the improbability of using a private vehicle for the raid is also immaterial because the vehicle they used to travel is relevant only to ensure whether they in fact came to the appellant's house for a raid. As the

appellant admits by the said suggestion that a team of police officers came to his house for a raid, the vehicle that was used to reach the place of the raid would not be an issue.

Another argument advanced by the learned counsel for the appellant was that there was a possibility of implicating the appellant for the heroin found in someone else's custody, especially because a body search was not done even on the driver of the private van to ensure that he did not possess any heroin. I regret that I am unable to accept that argument because the defence of implicating the appellant for heroin recovered from anybody else or introducing heroin to the appellant was not taken by the appellant at any stage of the trial. The learned counsel who appeared for the appellant in the High Court made no suggestion to any of the prosecution witnesses of introducing heroin or implicating the appellant for the heroin recovered from someone else. Even in his dock statement, the appellant has not stated that the heroin was introduced or that he was implicated for the heroin recovered from someone else. At the hearing of the appeal, the learned counsel for the appellant also admitted that the appellant had not taken the said defence in the High Court trial. In the circumstances, the learned High Court Judge was not obliged to consider the issue of implication. Also, in the absence of any such defence, I hold that the possibility of implication was not an issue to be considered by the learned High Court Judge.

When PW-1 looked inside the house from the space between the wooden boards, he saw the appellant sitting on the bed, packing heroin into cellophane bags. When one of the police officers knocked on the door, the appellant stated he was suffering from tuberculosis, and then PC Senarath pushed the door open and went inside the house. PW-1 stated that there were 5 cellophane bags containing 40 heroin packets each, when the police officers entered the house. The learned counsel for the appellant pointed out a contradiction that

packing of heroin had been completed when they entered the house according to PW-1, but according to PW-3, the appellant was putting heroin packets in the shopping bags when they pushed open the door and entered the house. In reply, the learned Additional Solicitor General contended that packing of heroin means putting small quantities of heroin in small bags and that packing was completed according to both witnesses when the police officers entered the house.

The said contradiction demonstrated by learned counsel for the appellant could not be considered as a major contradiction. However, there is a slight improbability in this story because, according to PW-3, they had told the appellant that they were from the police before entering the house. It is unlikely that the appellant was putting the small bags into bulk cellophane bags even after they informed him that they were from the police.

Charges against the appellant would not fail just because of the reason that there is a slight improbability in the prosecution case. It should be considered whether the said slight improbability casts reasonable doubt on the prosecution case. PW-1 and PW-3 have given evidence regarding the raid. Only one suggestion was made to PW-3 on behalf of the appellant. It has been suggested that "විත්තියෙන් යෝජනා කරන්නේ තමුන්ට තමුන් මේ තැනැත්තාගේ ගෙදර තිබිලා කිසිම මත් ද්‍රව්‍යයක් හෙරොයින් ප්‍රමාණයක් අත්අඩංගුවට ගත්තේ නැහැ කියලා" (Page 152 of the appeal brief). It was not even suggested to PW-3 that the appellant did not possess heroin or did not pack heroin. In fact, PW-3 specifically stated in his testimony that he did not take any items from the appellant's custody, and the chief investigating officer, PW-1, examined the heroin packets, took those packets and suspicious items into custody, and arrested the accused-appellant. So, obviously, PW-3 had not taken heroin into custody from the appellant's house.

PW-1 was the officer leading this raid. PW-1 took the heroin into custody and arrested the appellant. Therefore, if the appellant denies being arrested while he was packing heroin, the same has to be suggested to the PW-1. When PW-1 was cross-examined, only one suggestion was made on behalf of the appellant. The suggestion was that he witnessed the appellant packing heroin, is false.

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(Page 118 of the appeal brief)

It was not even suggested that the appellant did not pack heroin. Apart from that, there was no single suggestion made to PW-1 denying the way police officers entered the house, the fact that productions were recovered from the appellant's custody, or any other matter relating to the raid. Even in his brief dock statement, the appellant did not deny any allegation against him arising from the prosecution evidence. He did not even deny the prosecution evidence about heroin being packed in sachets. Hence, the prosecution evidence on the main elements of the charges is unchallenged. In addition, the learned defence counsel did not dispute the chain of production. The Indian judgment of Sarvan Singh v. State of Punjab (2002 AIR SC (iii) 3652) pages 3655 and 3656, was cited in the case of Ratnayake Mudiyanselage Premachandra v. The Hon. Attorney General - C.A Case No. 79/2011, decided on 04.04.2017 as follows:
“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.”

In the case of Himachal Pradesh v. Thakur Dass (1983) 2 Cri. L. J. 1694 at 1701 V.D Misra CJ held that “whenever a statement of fact

made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed. Similarly, in Motilal v. State of Madhya Pradesh (1990) Criminal Law Journal NOC 125 MP it was held that "Absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact." Therefore, in the instant action, the aforesaid slight improbability does not cast a reasonable doubt on the prosecution case.

When the entire prosecution evidence as well as the aforesaid facts impliedly admitted by the appellant are considered, I am of the view that the two charges against the appellant have been proved beyond a reasonable doubt. Hence, I hold that the learned High Court Judge is correct in convicting the appellant of the two counts.

Accordingly, the judgment dated 02.05.2019, the convictions, and the sentences are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)
I agree.

JUDGE OF THE COURT OF APPEAL