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/0422/17

High Court of Negombo

Case No: HC/169/2009

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Thelge Upananda

ACCUSED

AND NOW BETWEEN

Thelge Upananda

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anuja Premaratne, P.C. with Imasha Senadeera and Bandula Dissanayake for the Accused Appellant

: Madhawa Tennakoon, DSG for the Respondent

Argued on : 20-09-2022

Written Submissions : 06-05-2022, 02-10-2018 (By the Accused-Appellant)

: 11-02-2019 (By the Respondent)

Decided on : 28-10-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Negombo on following counts.

1. Through the Bandaranayake International Airport at Katunayake, he imported 92.4 grams of Diacetylmorphine, commonly known as Heroin, On 28th September 2007, a dangerous drug prohibited by the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 and thereby committed an offence punishable in terms of the said Ordinance.
2. At the same time and at the same transaction, trafficked the said quantity of Heroin and thereby committed an offence punishable in terms of the same Ordinance.
3. At the same time and at the same transaction, he had in his possession, the earlier mentioned quantity of Heroin and thereby committed an offence punishable in terms of the Poisons, Opium and Dangerous Drugs Ordinance as mentioned before.

After trial, the learned High Court Judge of Negombo found the appellant guilty as charged by the judgement dated 05-12-2017, and he was sentenced to life imprisonment.

Being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

The Facts in Brief

This was a raid conducted by the officers of the Police Narcotic Bureau (PNB) attached to the Katunayake Bandaranayake International Airport. This detection has taken place on 28-09-2007. According to the evidence of PW-01, the officer who has led the team of officers in this detection, the officer-in-charge (OIC) of the PNB Unit in Katunayake has received an information through the Director of the PNB that three persons will be travelling on that day from India in flight UL-162 with prohibited drugs. They have received the names of them and upon investigation had the photographs of the said passengers in their possession. They also had the information that two males and a female will carry the drugs.

Accordingly, after the arrival of the relevant flight, they have identified the two males and the female they were looking for, and had kept surveilling on them through the airport. After coming to the baggage clearance line 02, the two males had put three bags into one trolley and the female has put another two bags into a separate trolley. They have come out through the green channel of the airport, which can be used by the passengers who have nothing to declare.

At that point, PW-01 has confronted the appellant and the other person as well as the female mentioned, and has taken steps to identify the baggage belonging to each of them. The appellant has had two bags with him, and the other male passenger had one. The female passenger was carrying two bags separately in another trolley. PW-01 has identified the bags through the baggage tags available with the appellant.

After taking all three of them into custody on suspicion of carrying dangerous drugs, they have been taken to the PNB office at the Airport and PW-01 has first body-checked the appellant where he could not find any prohibited substance with him. Thereafter, the two bags carried by the appellant had been checked and there was no prohibited substance found in the 1st bag. However, in the 2nd bag, PW-01 has observed a false bottom through his years of experience as a PNB officer. When cut opened, he has found a parcel about quarter of an inch thick that has been spread across the bottom of the bag underneath the false bottom. It had been covered with gum tape. After checking the substance for Heroin, he has identified the substance which was inside the parcel as Heroin.

When weighed at the PNB office, it had 978 grams of Heroin. Accordingly, PW-01 has arrested the appellant after informing him of the charges and had taken steps to seal the productions. He has also taken steps to subject the appellant for an X-RAY in order to find whether he is carrying any more prohibited substance concealed in his body.

Similarly, when checked, there was nothing in the possession of the 2nd person taken into questioning, but PW-01 has detected another similarly hidden parcel in one of the bags carried by the female identified as Shamalee.

After taking the due procedural steps with regard to the drugs found, PW-01 has taken steps to take them to the PNB for further investigations. At the PNB, PW-01 has handed over the productions to the relevant production officers for safe keeping and further necessary steps.

PW-02, Mudiyanselage Thilak Pushpakumara was the officer who assisted PW-01 in this detection. His evidence had been similar to that of the PW-01.

Production chain custody was a matter that has been admitted in terms of section 420 of the Code of Criminal Procedure Act in this action.

It needs to be noted that due to the unavailability of some of the productions taken into custody and produced before the Magistrate Court of Negombo, other

than the drugs found, this action has been delayed over several years. It appears that some of the clothes and other things found in the bags taken into custody and produced before the Magistrate Court have not been produced at the High Court trial.

It appears that the stand taken by the appellant when the prosecution witnesses gave evidence was that part of the Heroin found in the possession of the female called Shamalee was introduced to him and he had nothing in his possession.

When called for a defence at the conclusion of the prosecution case, the appellant had made a dock statement. In his dock statement, he has admitted that the officers of the PNB stopped him while leaving the airport and checked him, and has stated nothing was found in his possession or in the bags he was carrying. Thereafter, he was taken for an X-RAY examination where nothing was discovered on his body as well. It had been his position that he was taken back to the airport after the X-RAY and the three bags he was carrying was in a separate place, and later he was assaulted and a separate bag was shown to him as his. It had been his position that he did not do anything wrong and that he has no connection with the trafficking or importation of Heroin.

Grounds of Appeal

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

1. The learned High Court Judge failed to consider the infirmities in the case of the prosecution.
2. The learned High Court Judge failed to consider the contradictions and improbabilities of the evidence of the prosecution witnesses.
3. The learned High Court Judge did not give due consideration to the dock statement made by the appellant.

It was the position of the learned President's Counsel that although PW-01 has claimed that the PNB had this information of trafficking of Heroin ten days before

the detection, PW-01 has failed to enter a single note of the information and according to the evidence, the photographs of the suspected persons supposed to have been obtained from the immigration authorities on 10-08-2007, some ten days after the arrest. It was his position that this discrepancy and the failure on the part of PW-01, should provide sufficient basis to disbelieve the witness in this regard.

It was also his position that although the PW-01 has supposed to have identified the two bags belonging to the appellant using the baggage tags available with the appellant, evidence adduced before the Court was confusing at its best, and relying on such evidence was dangerous. The learned President's Counsel also pointed out that most of the other items found in the bag claimed to have been taken into custody from the appellant was not available as productions at the trial, and out of the two baggage tags spoken of by the witness, only one tag has been produced in Court and the learned High Court Judge has failed to give due weightage to the said discrepancies in the evidence in his judgement.

Citing the Court of Appeal judgement of **Weerasinghe Vs. The Commission to Investigate Allegations of Bribery of Corruption (2013) 1 SLR 365**, it was the contention of the learned President's Counsel that the evidence of trained police officers has to be carefully analyzed and should not be solely relied upon in cases of this nature. He further asserted that when considering the totality of the evidence and the position taken up by the appellant, the prosecution has failed to prove the charges beyond reasonable doubt, and the learned High Court Judge has failed to give due considerations to the infirmities in the evidence in finding the appellant guilty.

It was the submission of the learned Deputy Solicitor General (DSG) on behalf of the respondent that the arguments by the learned President's Counsel revolves around two issues, namely, the information received by the PNB and the identification of the bags belonging to the appellant.

It was his position that there was unchallenged evidence at the High Court trial that, apart from identifying the bags belonging to the appellant, the bag which was found with a false bottom and the drugs hidden had a combination lock and a key was in the possession of the appellant, and it was the appellant who opened the bags using the combination.

He also pointed out the defence taken up by the appellant when the witnesses gave evidence, which was that a part of the Heroin found in the possession of the female called Shamalee was introduced to him, and the position of the appellant in his dock statement where his contention appeared to be that PNB officers introduced another bag upon the appellant and he was falsely implicated.

The learned DSG also made submissions regarding the issues which led to the non-production of some of the items taken into custody from the bag of the appellant due to them being mixed up and misplaced at the Magistrate Court. He also explained the issue that came up with regard to the baggage tag where it was found to be attached with a pin to other documents. He also points out that the appellant has never challenged at the trial that the bag produced in the courts was not his.

The learned DSG was also of the view that this was an information regard to the trafficking of Heroin received by the Director of PNB, which has been passed on to the OIC of the Katunayake Unit of the PNB and PW-01 has acted only on his instructions. It was his position that not making separate notes on the information received was not a matter that can create any doubt, given the facts and the circumstances.

Considerations of the Grounds of Appeal

I will now consider the 1st and the 2nd ground of appeal together as they are interrelated.

It is settled law that for any infirmity, contradiction or an omission becomes relevant in a trial only if that matter goes into the root of the case and if such an infirmity has no bearing on the evidence when taken as a whole, it cannot be said that a conviction was bad in law.

In the case of **The Attorney General Vs. Sanadnam Pitchi Theresa (2011) 2 SLR 292 at page 303, Shirani Tilakawardane,J.** stated:

> *"…that whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature and tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies, which do not go to the root of the matter and assail the basic version of the witness, cannot be given too much importance.* ***(Vide-Bogm Bhai Hirji Bhai Vs. State of Gujarat, AIR (1983) SC 753)"***

In the case of **Mahathun and others Vs. The Attorney General (2015) 1 SLR 74** it was held:

(1) When faced with contradictions in a witness testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness.
(2) Too grate a significance cannot be attached to minor discrepancies, or contradictions.
(3) What is important is whether the witness is telling the truth on the material matters concerned with the event.
(4) Where evidence is generally reliable much importance should not be attached to the minor discrepancies and technical errors.
(5) The Court of Appeal will not lightly disturb the findings of a trial judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong.

I am unable to agree with the contention of the learned President's Counsel that the failure of PW-01 to make a note of the information he received before he

conducted the raid was a material deficiency in the prosecution evidence. It is clear from the evidence of PW-01 that it was the Director of the PNB who has received the specific information in relation to the three passengers travelling from India and that they are carrying dangerous drugs. The Director has passed that information to the officer-in-charge of the Katunayake Unit of the PNB and PW-01 has acted on the instructions of the OIC. I do not find anything sinister in the actions of PW-01 and his officers to pursue the information further and to arrest the appellant and two others who accompanied him on suspicion. In fact, the appellant has never denied that he was stopped and arrested while leaving the airport as stated by PW-01.

Similarly, the challenge to the evidence of PW-01 where he has stated that he and his officers had the photographs and other details of the appellant and the other two passengers which enabled them to identify the appellant at the airport is not a matter that can be doubted. It is very much probable that the PNB officers have obtained the assistance of the immigration authorities since they were possessed of this information well in advance, and had obtained the relevant details for their investigations beforehand. If one reads the evidence of PW-01 and 02, it becomes clear that they had the relevant information before the arrest was made.

Although there is a reference by PW-01 at page 486 of the brief that the witness obtained the photographs of the appellant from the Department of Immigration and Emigration on 08th October 2007, that is ten days after the raid, it is clear that he was referring to the photographs he had in his hand when giving evidence in Court. It becomes clear that those photographs are photographs that had been taken subsequently by the PNB and not the photographs used by PW-01 for his raid. PW-01 and 02 have given clear evidence as to how they identified the two bags belonging to the appellant out of the three bags the appellant and the other person was taken in the trolley. At nowhere in this case the appellant has challenged the identification of the bags when the relevant witnesses gave evidence.

Although the appellant has taken up a position in his dock statement, which appears to be a stand that a separate bag was introduced to him at the Katunayake PNB office, the witnesses have not been confronted in any manner when the appellant had the opportunity of putting across that position to the witnesses.

PW-01 has given evidence and stated that other than the baggage tags, the appellant had a key of the bag which contained the Heroin and also there was a combination lock and it was the appellant who opened the bag. That evidence has gone unchallenged at the trial.

It is the well settled law of this country that whatever the position taken up by an accused person against the evidence of the prosecution witnesses, such position has to be put to the relevant witnesses and confront the witnesses at the first available opportunity.

In **Sarwan Singh Vs State of Punjab 2002 AIR Supreme Court iii 3652 at 36755,3656,** it was observed;

> *"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 case was cited with approval in the case of **Boby Mathew Vs State of Karnataka 2004 3 Cri. L. J.3003**

His Lordship Sisira de Abrew, J stated in **Pilippu Mandige Nalaka Krishantha Kumara Thisera Vs A.G CA 87/2005 decided on 17-05-2007** that;

> *"….I hold that whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."*

In the appeal under consideration, I find that the appellant has taken up the position that a part of the Heroin found in the possession of the female called

Shamalee was introduced to him by the officers of the PNB. However, the position he has taken when he was called upon for a defence was that a bag was introduced to him and nothing was found in his possession.

Although an accused person has nothing to prove in a criminal case and it was up to the prosecution to prove its case beyond reasonable doubt, it is my considered view that an accused person's stand in relation to the charges preferred against him must be consistent so that it creates a reasonable doubt as to the evidence of the prosecution or at least offers a reasonable explanation as to the facts and the circumstances elicited at a trial.

The learned President's Counsel relied on the judgement pronounced in the Court of Appeal in **Jagath Chandana Weerasinghe Vs. The Commission To Investigate Allegations Of Bribery Or Corruption (supra)**, where it was stated by **Ranjith Silva, J.** after considering several legal principles that;

> *" By the same token the same principle should apply and guide the judges in the assessment of the evidence of the excise officers in narcotic cases. Judges must not rely on a non-existent presumption of truthfulness and regularity as regards the evidence of such trained police or excise officers.*
>
> *I would also like to refer to the book entitled The Law of Evidence Volume 2 Book 1 at page 395 by E.R.S.R. Coomaraswamy dealing with how the police evidence in bribery cases should be considered. It states as follows; 'In the great many cases, the police agents are, as a rule unreliable witnesses. It is always in their interest to secure a conviction in the hope of getting a reward. Such evidence ought, therefore, to be received with great caution and should be closely scrutinized. Particularly where their evidence is the only corroborating evidence of the evidence of the accomplice.' "*

However, I am also privy to the judgement pronounced by **Buweneka Aluvihare, J.** in the Supreme Court in **SC/Appeal 154/2010 decided on 03-01-2019**, where it was held that merely because the witnesses are police officers and only one witness has given evidence to prove a charge against an accused, that alone

is not a reason to doubt such evidence and even a single witness, if cogent and trustworthy as in any other case, would be sufficient to prove a charge against an accused.

When it comes to the facts relevant to this action and the judgement of the learned High Court Judge, it is abundantly clear that the learned High Court Judge has very cautiously considered the evidence of the PW-01 and PW-02 who are the main officers involved in this detection, in order to find whether their evidence can be believed and trustworthy. He has also well considered the probability factor of the evidence and has determined that their evidence is very much probable given the facts and the circumstances. He has considered all the possibilities in relation to the evidence and in relation to the arguments put forward by the learned Counsel for the appellant in challenging the evidence, for which I find no reasons to disagree.

Accordingly, I find no merit in the first two grounds of appeal urged by the learned President's Counsel.

I find no basis to agree with the contention that the learned High Court Judge has failed to consider the defence of the appellant in its correct perspective either. It is very much clear that the learned High Court Judge has considered the defence in view of determining whether it has created a reasonable doubt on the evidence of the prosecution or at least it provides for a reasonable explanation in relation to the incriminating evidence against the appellant.

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 evidence of the defence or the dock statement is sufficient *to create a doubt cannot be decided in a 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."*

As I have determined earlier, the appellant has taken different stands when the relevant witnesses gave evidence and when he was called upon for a defence. The appellant has failed to challenge the material points in the evidence as considered earlier. The learned High Court Judge has well considered the defence of the appellant in rejecting it, as he should have.

For the reasons mentioned above, I find no merit in the appeal preferred by the appellant.

Accordingly, the appeal is dismissed, and the conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal