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

In the matter of an Appeal made under 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/0050/2020
High Court of Colombo
Case No: HC/8171/2016

Devage Thusitha Chamara alias Thilan

Accused-Appellant

vs.

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

Complainant-Respondent

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Kapila Waidyaratna, PC, with Nipuna Jagodarachchi, Anoj Hettiarachchi and Akkila Jayasundara for the Appellant.**
Janaka Bandara, DSG for the Respondent.

ARGUED ON : **12/09/2022, 16/09/2022, 21/09/2022 22/09/2022.**

DECIDED ON : **01/11/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred as the Appellant) being aggrieved by the conviction and the sentence imposed on him on 18/06/2020 by the Learned High Court Judge of Colombo, preferred this appeal to this Court well within time.

The Appellant was indicted by the Attorney General in the High Court of Colombo under Sections 54A (b) and 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984 for Trafficking and Possession of respectively 274.68 grams of Heroin (Diacetylmorphine) on 14th November 2013.

After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed a sentence of life imprisonment.

The Learned President's Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom platform from prison.

The Learned President's Counsel, on behalf of the Appellant had raised following appeal grounds.

1. That the conviction is contrary to law and against the weight of the evidence led in the case.
2. The Learned Trial Judge has failed to appreciate and take into consideration the unrealistic and improbable evidence of the prosecution witnesses.
3. The Learned Trial Judge has failed to properly analyse and evaluate the totality of evidence and thereby had prevented the Appellant a fair trial.
4. The Learned Trial Judge had completely disregarded the inter se and per se contradictions of the evidence of the two main prosecution witnesses, thereby had erroneously misdirected himself.
5. The prosecution has placed inadmissible evidence acting on confessionary statements allegedly made by the Appellant in violation of the Section 25 of the Evidence Ordinance. Further had allowed the prosecution to lead bad character evidence under Section 54 of the Evidence Ordinance. The Learned Trial Judge acting on that evidence had erroneously misdirected himself.
6. The Learned Trial Judge has failed to give due consideration on the discrepancies in the inward journey of production from the point of detection to the office of the Police Narcotics Bureau and from the Police Narcotics Bureau to the office of the Government Analyst.
7. The Learned Trial Judge has misdirected himself by accepting the prosecution evidence of the police officers' version as true while rejecting the defence version, despite the fact that there is a visible conflict of evidence on the face of the record and thereby had failed to apply his judicial mind to come to a finding that the prosecution has proven its' case beyond reasonable doubt.
8. The Learned Trial Judge has failed to give due consideration to the defence including the evidence of the Appellant and his witnesses,

therefore the defence had been wrongly and improperly rejected. Thereby the conviction is bad in law.

9. The Learned Trial Judge has misdirected himself in examining the information book entries challenged by the defence while not providing an opportunity to the defence to have access to the same. Thereby, the Learned Trial Judge had deprived the Appellant of a fair trial.
10. The Learned Trial Judge had been prejudiced prior to the final determination as he appeared to have arrived at a decision even before a complete evaluation and analysis of the evidence. Thereby, the Learned Trial Judge had denied the Appellant a fair trial guaranteed by the Constitution.

At the trial, PW1 IP/Stanley Perera, PW2 SI/Udara Chaturanga, PW09 CI/Rajakaruna, PW11 Government Analyst, PW12 SI Gayan Rathnayake, PW13 Prison Commissioner Pallegama, and PW14 CI/Jayantha were called by the prosecution to give evidence on behalf of the prosecution. Further, the prosecution had marked productions P1-P38. The Appellant had given evidence from witness box and called nine witnesses on his behalf. The prosecution had marked contradictions and documents PT-1 to PT-27 on the defence witnesses.

Finally, the prosecution had called 08 witnesses in rebuttal.

Background of the case

According to PW1, he was the Officer-In-Charge of the Drugs Detection Unit-02 of the Police Narcotics Bureau. On 20/06/2014, while he was engaged in his usual daily official duties, PW2 SI/Udara had provided an information about drug trafficking, conveyed to him by an informant. According to the information a person called "Thilan" who involved in large scale drug trafficking, was at his sister's place packeting heroin in kilos. The informant had requested the officers from Narcotics Bureau to come to Muththettuwegoda Road, Thalangama where the DSI Stores is situated. The

informant had assured that he would show off once the officers arrive at the given location. Having perused the information of PW2, PW1 had given instructions to his own team of Unit-02 to prepare for the raid. Having selected eight officers had left the Bureau at about 10.35 hours after completing all formalities. Six of them had travelled in a double cab of the Bureau and two had followed them in a motor bike.

After arriving at the location, the informant was called to the location and he had guided three officers to the house where the Appellant was expected to be.

According to PW1, the house was located at a by-road, namely 5th Lane and the distances was 400 meters from the place where they had met the informant. The informant had left the place after showing the 3rd house on the lane to them. PW1, PW2 and PW4 had entered the premises of the house through a partly opened small gate and remained there until an inmate to open the door. After about nearly two hours, a person identified as Mahesh, who is the brother-in-law of the Appellant had opened the door and he was promptly apprehended by the trio and inquired about "Thilan" as per the information. As Mahesh had informed that the Appellant was in the upper floor, PW1 and PW2 had rushed upstairs and entered into a partly opened room. Upon entering the room, they had noticed a person who was seated in front of a dressing table. On the dressing table they had observed three cellophane covered parcels, an electronic scale and six more cellophane covers. As one of the parcels was opened, PW1 had examined the substance contained in the parcel. From its colour and the odour, he had decided that the said parcel contained Heroin. The Appellant was arrested and the items on the table were taken in to their custody including a vehicle key.

In the meantime, they had also observed a woman who was sleeping on a bed and several others including the sister of the Appellant who was also present in that house at that time. Their statements were recorded several days after the arrest of the Appellant.

After the arrest, the Appellant was subjected to brief interrogation under the custody of PW1 and PW2. As a result, PW1 had instructed the Appellant to use his mobile phone to contact another person named Chaminda Dilruk alias Paravi Sudu and directed the Appellant to request from Chaminda alias Paravi Sudu to provide him with a quantity of Heroin. But this was not materializing.

In the course of the same transaction, another person named Suranga was arrested at Borella at about 20.00 hours for possession and trafficking of Heroin. Both the Appellant and Suranga and the Heroin detected from them were kept in the custody of the Police Narcotics Bureau officials until they returned to the Bureau. Further a group of officers had gone in search of a person named Sri Lal, who had escaped during the second raid.

As an extension of second raid, the officers had gone towards Colombo Mortuary at Punchi Borella and recovered a three-wheeler which had been abandoned there.

The raiding team had returned to the Police Narcotics Bureau at 1.50 hours on the next day. The productions recovered from the Appellant were kept in the custody of PW2 and he had handed over them to PW1 at the Police Narcotics Bureau. Three parcels and the weighing machine which had been put in to a black coloured Tulip Bag was taken into personal custody of PW1. Productions had been sealed at the Police Narcotics Bureau using the seal of PW2.

The Substances which were recovered during the raid were kept in the personal locker of PW1 until it was handed over to the Police Narcotics Bureau's production officer PW IP/Rajakaruna on 21/06/2014 at 15.20 hours, after 14 hours of the detection. Six empty cellophane covers and the key of the vehicle recovered at the time of arrest of the Appellant were handed over to reserve police officer, PW PS/27706 Kumarasinghe at the Police Narcotics Bureau.

PW2 SI/Udara had corroborated the evidence given by PW1 Stanley.

The productions alleged to have been recovered from the Appellant and another person had been sent together in one parcel to the Government Analyst. According to the Government Analyst's Report the total weight of pure Heroin (diacetylmorphine) detected from the brown coloured powder was 933.15 Grams.

Before closing, the prosecution also led the evidence of PW13, Pallegama, the Former Commissioner General of Prisons, PW SI/Gayan attached to Airport Terrorist Investigation Division Unit and PW CI/ Dharmakeerthi attached to the Colombo Crime Division.

When the prosecution had closed the case after leading the prosecution witnesses mentioned above, the defence was called and the Appellant had given evidence from the witness box and called nine witnesses for his defence and marked 18 documents. The Appellant had admitted the arrest by officers of the Police Narcotics Bureau on 20/06/2014, but categorically denies recovering Heroin from his possession as claimed by the prosecution.

Considering the grounds of appeal advanced by the Appellant, I regard it appropriate to consider the fifth ground of appeal first.

The Learned President's Counsel under fifth ground of appeal, strenuously argued that the inadmissible confessionary items of evidence had been allowed to creep into the proceedings thereby prejudicing the mind of the Trial Judge.

In terms Section 25 of the Evidence Ordinance, confessions made to a police officer is irrelevant and inadmissible. Hence, if an accused has made a confessionary statement in the course of the police investigations and where such statement is recorded under Section 110 of the Code of Criminal Procedure Act, there is an absolute restriction to use such confession as evidence at the trial.

Section 25 of the Evidence Ordinance states:

> *"25(1) No confession made to a police officer shall be proved as against a person accused of any offence."*

In **R v. Martin Singho 66 NLR 391** the court held that:

> *"Any evidence, which, if accepted, would lead to the inference that the accused made a confession to a police officer is inadmissible."*

Similarly, in **Queen v. Ramasamy 64 NLR 433** the court held that:

> *"(1) That the statement 'I am prepared to point out the place where the gun and the cartridges are buried' came within the prohibition in section 122(3) of the Criminal Procedure Code and should not have admitted in evidence".*

Further, in **Queen v. Sumanatissa Thero (1962) 61 CLW 97** it was held that:

> *"It is illegal to use statements made by an accused in the course of an investigation for any purposes other than those provided in section 122(3) [corresponding section to the current section 110(3)] and such a statement would only become relevant for the purpose of impeaching a credit of the witness."*

In this case, PW1 admitted that a confessionary statement was made by the Appellant while he was under their custody. The Appellant had admitted that a person called Chaminda Dilruk alias Paravi Sudu is the supplier of Heroin to him. The relevant portions of the evidence of PW1 are re-produced below:

(Page 1339 of the brief.)

ප්‍ර : දැන් වෙනත් කිසිදු නීති විරෝධී දෙයක් ගේ ඇතුලේ නැහැ කිව්වට පස්සේ ඔබ ප්‍රධාන වැටලීම් නිලධාරියා හැටියට ඊලඟට මොකක්ද ගතයුතු පියවර හැටියට තීරණය කළේ ?

උ : ඉන්පසු මෙම හෙරෝයින් තිලාන් යන අයට ලැබෙන මාර්ගය මොකක්ද කියලා තිලාන්ගෙන් ප්‍රශ්න කළා.

ප්‍ර : ප්‍රශ්න කිරීමේදී චූදිතගෙන් මොකක් හරි අනාවරණය වුණාද ?

උ : එහෙමයි.

ප්‍ර : මොකක්ද අනාවරණය වුනේ ?

උ : වනාත ප්‍රදේශයේ පදිංචි චමින්ද දිල්රුක් හෙවත් පරෙවි සුදු විසින් ඔහුට මෙම බඩු ලබාදෙන බව කියා සිටියා.

(Pages 1340-1341 of the brief.)

ප්‍ර : අධ්‍යක්ෂකතුමාට දැනුම් දීලා ඊලඟට මොකක් ඔබ ගත්ත ක්‍රියාමාර්ගය ?

උ : ඉන්පසු තිලාන් යන අය දැනුම් දීමක් කළා නැවත එයාගේ බඩු අවසන් වෙලා තියෙනවා කියලා දුරකථන ඇමතුමක් අරන් නැවත බඩු ඉල්ලන්න කියලා දැනුම් දීමක් කළා ස්වාමීනී.

ප්‍ර : පැහැදිලි නැහැ. දැන් ඔබ අධ්‍යක්ෂකතුමාට කිව්වා දෙවන වැටලීමකට යනවා කියලා ?

උ : එහෙමයි.

ප්‍ර : එහෙම කිව්වට පස්සේ ඔබ මොකක් ඊලඟට ගත්ත ක්‍රියාමාර්ගය ?

උ : තිලාන්ගෙන් ප්‍රශ්න කළා.

ප්‍ර : ප්‍රශ්න කිරීමේ දී මොකක් ද මහත්මයට අනාවරණය වුණේ ?

උ : වනාත ප්‍රදේශයේ දී පදිංචි චමින්ද දිල්රුක් හෙවත් පරෙවි සුදු විසින් තමයි මේ බඩු ලබාදෙන්නේ කියලා.

(Page 1341 of the brief.)

ප්‍ර : ඒ වැටලීම සංවිධානයේ පියවරක් හැටියට මහත්මයා මුලින්ම ගත්ත ක්‍රියාමාර්ගය මොකක්ද ?

උ : තිලාන් යන අයට දැනුම් දුන්නා පරෙවි සුදුට දුරකථන ඇමතුමක් ලබා ගන්න කියලා ස්වාමීනී.

ප්‍ර : මොකක්ද කියලද ඔබ මේ විත්තිකරුට දුරකථන ඇමතුම ගන්න කිව්වේ ?

උ : ඔහුගේ බඩු අවසන් වෙලා තියෙනවා කියලා නැවත බඩු ඉල්ලනන් කියලා.

ප්‍ර : බඩු කියලා කියන්නේ මොනාද ?

උ : හෙරෝයින්.

(Page 1342 of the brief.)

ප්‍ර : මොකක්ද අනාවරණය වුණේ ?

උ : හරී මල්ලි හවස් වෙනකොට තමයි දෙන්න වෙන්නේ. වැඩේ සෙට් කරලා කෝල් එකක් දෙන්නම් කියලා කිව්වා.

ප්‍ර : කවුද එහෙම කිවව්වේ ?

උ : පරෙවි සුදු යන අය.

ප්‍ර : කාටද කිව්වේ ?

උ : තිලාන් යන අයට.

(Page 1343-1344 of the brief.)

උ : මල්ලි රෑ හත අට වෙනකොට තමයි බඩු ටික දෙන්න වෙනනේ කියා. වෙනද එන කොල්ලම තමයි එන්නේ මල්ලි. ඔයා එන්නේ වෙනද එන සුදු පීප් එකෙන්ද ?

ප්‍ර : ඔයා එන්නේ වෙනද එන පීප් එකෙන්ද, ඔය ටික විත්තිකාරයට කිව්වේ කවුද ?

උ : පරෙවි සුදු විසින්.

ප්‍ර : විත්තිකාරයාට එහෙම කිව්වට පස්සේ විත්තිකාරයගේ ප්‍රතිචාරය වුණේ මොකක්ද ?

උ : තිලාන් එය ස්ථිර කලා.

The above cited portions of evidence given by PW1 clearly indicate that the Appellant had made confessionary statement to assist PW1 to continue his detection.

The Learned High Court Judge in his judgment at para 25 stated that after the arrest and under interrogation, the Appellant had revealed that he receives Heroin from Chaminda Dilruk alias Paravi Sudu.

Although in paragraph 26 of his judgement the Learned High Court Judge had stated that he completely disregards this confessionary evidence from his findings, he had stated that information which had been received about Paravi Sudu by PW1 had been corroborated in the evidence given by PW2.

(Paragraph 38 of the judgment. Page 2396 of the brief.)

ඉන්පසුව "පරෙවි සුදු" යන අය පිළිබඳ තොරතුරක් දැනගෙන ගත් පියවර සම්බන්ධව පැ.සා.1 ගේ සාක්ෂි තහවුරු කරමින් පැ. සා. 2 ද සාක්ෂි දී තිබේ.

In the same ground, the Learned President's Counsel contended that the Learned High Court Judge had allowed the prosecution to lead bad character evidence under Section 54 of the Evidence Ordinance thereby acting on those evidence and had erroneously misdirected himself.

Section 54 of the Evidence Ordinance states:

> In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1.- This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.- A previous conviction is relevant as evidence of bad character in such case.

As a result, the fact that the person charged is of good character is always relevant in criminal proceedings. However, the fact that he has a bad character is generally irrelevant. Hence, the prosecution should be mindful not to lead character evidence of the accused, unless evidence has been given that he has a good character. The trial judge also has a responsibility to ensure that bad character evidence of the accused does not creep into the court proceedings.

In **R.G.Moses v. The Queen 75 NLR 121** the Court held:

> *" that the conviction of the Appellant must be quashed on the ground that the evidence of the previous conviction, which was inadmissible according to Section 54 of the Evidence Ordinance, had been taken into account in the trial judge's judgment and was in a high degree prejudicial to the Appellant. In such a case the substantial question is whether or not the accused has been deprived a fair trial".*

In **L.C. Fernando v. The Republic of Sri Lanka 79(II) NLR 313** the court held (Wijesundera, J. dissenting) that:

> *"(a) that the evidence of 'T' was both irrelevant and inadmissible and in view of the express prohibition against the admission of such evidence in section 54 of the Evidence Ordinance and its highly prejudicial nature, such evidence should have been excluded by the trial judge; the improper reception of such evidence had resulted in the accused's chance of having a fair trial being prejudiced and in a failure of justice".*

In **Makin v. Attorney General for New South Wales [1894] A.C 57** Lord Herschell held that:

> *"It is not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that he is likely, from his criminal conduct or character to have committed the offence, for which he is tried".*

The prosecution had called PW13, Pallegama, former Commissioner General of Prisons, PW12, SI/Rathnayake attached to the Airport Terrorists Investigation Unit and PW14, CI/Dharmakeerthi of Colombo Crime Division to place evidence pertaining to the escape of the Appellant while he was placed in prison hospital and in remand custody.

Upon a complaint to the Inspector General of Police by PW13, an investigation was conducted and the Appellant was arrested at the Bandaranayake International Airport by PW12, while he tried to escape the country providing a false name.

This evidence, with no doubt, clearly indicates that the prosecution had placed bad character evidence, whereas, the Appellant had not presented good character evidence. Leading this evidence, accidently or purposefully, the prosecution had paved the way for the character evidence to creep into the proceedings. Ironically, the Learned High Court Judge had considered this evidence in his judgment under paragraphs 33,34 and 35 of the judgment. Thus, the Appellant had been denied a fair trial.

The Learned High Court Judge, before he could analyse the entire evidence presented by both parties, relying on the evidence given by PW1 and PW2, concluded at paragraph 43 of the judgment that the arrest and recovery of Heroin from the Appellant could be accepted beyond reasonable doubt. This approach of the Learned High Court Judge clearly demonstrates that he had

been greatly influenced by the confessionary statement and the bad character evidence which had creeped into the court proceedings. The prosecution should not have led evidence which contained confessionary statement and bad character evidence of the Appellant. This leads to a denial of a fair trial.

In the case of **Shiv Kumar v. Hukam Chand and Anr [1999] 7 SCC 104** the court observed that:

> "*The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the Court if it comes to his knowledge"*

Hence, I conclude this ground of appeal has merit.

Next, I take into account the sixth ground of appeal of the Appellant. The Learned President's Counsel contends that the Learned Trial Judge has failed to give due consideration on the discrepancies in the inward journey of production from the point of detection to the office of the Police Narcotics Bureau and from the Police Narcotics Bureau to the office of the Government Analyst.

Chain of custody issues are very important in cases involving drugs. To prove chain of custody, the prosecution must present cogent testimonial and documentary evidence to establish that the items presented is the same item that had been recovered from the possession of an accused person.

The defence can challenge the chain of custody evidence by questioning whether the evidence presented at trial is the same evidence as what was collected from an accused person. If there is any discrepancy in the chain of custody of a production and the prosecution is unable to prove who had the custody of production until it reached the analyst, the chain of custody stands broken.

The Appellant takes up the position that the amount of Heroin which had been mentioned in the indictment was not recovered from him. The said amount was recovered from another person and he was implicated in this case due to an existing dispute between him and the police. He had complained to Geneva Human Rights Commission regarding an attempt to shoot him by officers of the Police Narcotic Bureau.

According to PW1, the Heroin recovered from the Appellant at his sister's place was kept in his custody before he went for the second raid. He admitted that the Heroin recovered from the Appellant was not sealed but was put in to a Black Coloured Tulip bag. Further, he admitted that he was aware, according to C 73 of Police Departmental Orders, that recovered productions should be sealed as soon as possible. But he had not done so, as the team failed to take sealing equipment when they left the Police Narcotic Bureau. But he had taken the field test equipment in a Tulip bag. This Tulip bag was used to put the three parcels of Heroin allegedly recovered allegedly from the Appellant.

PW1, went on to say that the tulip bag which contained the Heroin recovered from the Appellant was given to PW2, when he got down from the Appellant's vehicle to conduct the second raid.

After the second raid, PW1 was in possessing of the Heroin which was recovered from another person and brought to the Police Narcotic Bureau in the same vehicle. On both occasions the productions recovered from the Appellant and the other person were not sealed until it reached the Police

Narcotic Bureau. After weighing the productions, the parcels recovered from the Appellant and the person had been handed over to PW9.

The chain of custody is the most important of evidence in a drug related trial. The prosecution has a paramount duty to prove that it is the same production recovered at the time of detection. The main reason is to establish that the evidence which is related to the alleged crime, was collected from the accused and was in its original condition rather than having been tempered with or planted deceitfully to make someone else guilty. Handling of production evidence is a lengthy process but the court need it for the adjudication of the case. This proves the integrity of production which had been recovered and it reach to the Government Analyst Department.

In **the Attorney-General v. Rawther 25 NLR 385**, Ennis, J. states thus: [1987] 1 SLR 155

> *"The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt".*

In the case of **Mohamed Nimnaz v. Attorney General CA/95/94** decided on 24/05/1995 the court held that:

> *"A prosecutor should take pains to ensure that the chain of events pertaining to the productions that had been taken charge from the Appellant from the time it was taken into custody to the time it reaches the Government Analyst and comes back to the court should be established".*

In **Witharana Doli Nona v. The Republic of Sri Lanka CA/19/99** His Lordship Justice de Abrew remarked thus:

> *"It is a recognized principle that in drug related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. Prosecution must prove that the productions taken from the accused Appellant was examined by the Government Analyst"*

The above cited judgments clearly shows that the inward journey in a drug related matter plays a major role. The onus is on the prosecution to prove that the inward journey was not disturbed until it reached the Analyst's Department.

According to PW1, after the arrest of the Appellant, he had taken the three cellophane bags with illegal substance into his custody. Thereafter, acting upon the information through the confessionary statement of the Appellant, the team had gone for the second raid. Before he could go for the second raid, he had put the three parcels recovered from the Appellant in to a tulip bag in which they had brought the field test kit for the raid. As they had not brought sealing equipment, the productions alleged to have recovered from the Appellant were not sealed at that time. The relevant portion is re-produced below:

(Page 1496 of the brief.)

ප්‍ර : තමුන් තාවකාලික මුද්‍රාවක්වත් යොදන්න අදහස් කරේ නෑ ?

උ : තාවකාලික මුද්‍රා යෙදුවේ නැහැ. නිවසින් පිටත් වන අවස්ථාවේ නඩු භාණ්ඩ සුරක්ෂිතව තබා ගැනීම සඳහා ක්ෂේත්‍ර පරීක්ෂණ කට්ටලය අරන් ගිය ටියුලිප් බෑග් එකේ නඩු භාණ්ඩ දාගෙන තමයි අරන් ගියේ.

It also noteworthy to mention that the alleged Heroin recovered from the second person was also not sealed at that time. The relevant portion of evidence given by PW1 is re-produced below:

(Page 1499 of the brief.)

ප්‍ර : දැන් අනිත් සැකකරු සන්තකයේ තිබ්බලා මොන හරි අත් අඩංගුවට ගත්තද ?

උ : 2 වන සැකකරු සන්තකයේ තිබ්බලා හෙරොයින් අත් අඩංගුවට ගත්තා.

ප්‍ර : දැන් දෙවන සැකකරු සන්තකයේ තිබ්බ තමුන් ප්‍රකාශ කරන පරිදි අත් අඩංගුවට ගන්නා ලද කිසිවක් තමුන් මුද්‍රා කිරීමට ක්‍රියා කරේ නෑ ?

උ : නැහැ.

PW1 further admitted that the Heroin recovered from the second accused was also kept in his custody without sealing. After the raid the team had spent considerable time and reached the Police Narcotic Bureau at 1.30 a.m. on the following day.

According to PW2, he had the custody of the tulip bag until it had been handed over to PW1 at the Police Narcotics Bureau. Thereafter the sealing process had taken place. The productions pertaining to this case were sealed using personal seal of PW2, as the personal seal of PW1 was gone missing.

The alleged productions had been recovered from the Appellant were sealed at the Police Narcotics Bureau and was entered as T1, T2 and T3 under PR No.136/14.

The Heroin purportedly discovered in the second raid had been marked as S01 and S02.

Further the Heroin alleged to have recovered from the Appellant and the second person had been sent to the Government Analyst Department under same Magistrate Court No. MC/Kaduwella-B/7574/14. The Government Analyst also considered and issued the results in one report which had been marked as P37 in the trial.

The Appellant giving evidence from the witness box admitted that he was arrested by officers from Police Narcotics Bureau on 20/06/2014 at his

sister's place. He vehemently denies being in possession of any dangerous drugs as claimed by the PNB officers in their evidence. His position was that a case has been fabricated against him due to an animosity he had with police officers previously. Though the PNB officers said that a warrant had been issued against him by the Magistrate Court of Maligawatte, he was not shown any of such warrant. But he was produced in the Magistrate Court Kaduwela instead of MC Maligawatte.

According to PW1, after the arrest of the Appellant the Heroin said to have been recovered from the Appellant was put in to a black coloured tulip bag, which had been used to carry field test equipment. This said to be the demarcation of the production from the second raid, as no temporary sealing was taken place. Hence, the tulip bag plays an important role with regard to the integrity of the productions recovered from the Appellant. In the evidence of both PW1 and PW2 failed to mention as to what happened to the tulip bag. It was not being sent to Government Analyst either.

This creates a serious doubt as two raids were conducted one after the other. In a situation of this nature demarcation of the production is very much important as the Appellant had taken up the position that this is a fabricated case against him. Had the prosecution produced the tulip bag along with the substance recovered from the Appellant, that evidence would certainly have strengthened the prosecution's case. This missing link created a serious doubt on the prosecution case.

It is the duty of the prosecution to prove that proper sealing of the seized articles and complete elimination of tempering with such articles during its retention by the officers of the Police Narcotics Bureau. In absence of such evidence, a reasonable doubt would arise as to the reliability of the production. In this case no plausible evidence led by the prosecution as to why the tulip bag was not produced in the trial. I consider, this as a serious shortcoming from the prosecution's case which certainly strengthens the defence case. Hence, I consider this ground has merit too.

Following that, I would further consider the 9th ground of appeal advanced by the Appellant. In the said ground of appeal, the Appellant contends that the Learned Trial Judge has misdirected himself in examining the information book entries challenged by the defence while not providing an opportunity to the defence to have access to the same. Thereby, the Learned Trial Judge had deprived the Appellant of a fair trial.

The Learned Trial Judge in his judgment at paragraphs 11.0 and 12.0 has stated that he examined the Police Information Book to verify certain issues raised by the defence with regards to entry and exist time of the police personnel. Despite the fact the Learned High Court Judge indicated that he chose to read the Police Information Book to do the justice to the Appellant, he had strengthened the police evidence without allowing the defence to see the Police Information Book. The relevant portions are re-produced below:

(Pages 2382-2383 of the brief.)

11.0 පැ.සා. 1 ගේ සාක්ෂි අනුව පිටවීමේ සටහන 21.06.2014 දින IIB තොරතුරු පොතේ පිටු අංක 389 හි 178 වන ඡේදයෙන් යෙදූ බව පවසයි. ඔහුගේ සාක්ෂිය අනුව පැමිණීමේ සටහන යොදා ඇත්තේ, ඒදින පිටු අංක 389 හි ම 176 වන ඡේදයේය. පිටවීමේ සටහන පැණීමේ සටහනට පසු ඡේදයක සඳහන් විය නොහැකි නිසා මෙය අසත්‍ය සටහන් යෙදීමක් ද එසේ නැත්නම් වැරදීමක් ද යන්න පරීක්ෂා කරමින් යුක්තිය ඉටු කිරීමේ කාර්ය සඳහා අධිකරණය විසින් IIB තොරතුරු පොතේ එම සටහන පරීක්ෂා කරන ලදී.

12.0 ..... මෙම නඩුවේ ද සටහන් ඒ ආකාරයෙන් යොදා තිබේ නම් එය වැටලීමේ සත්‍යතාවය පිළිබඳව ගැටළුවක් මතු කරන බැවින් විශේෂයෙන් විත්තිකරුට යුක්තිය ඉටු කිරීම පිණිස එකී සටහන පරීක්ෂා කරන ලදී. ඒ අනුව අධිකරණයට පැහැදිලිව පෙනී ගියේ පැය 10:25 ට යොදා ඇති පිටවීමේ සටහන 21.06.2014 දින IIB තොරතුරු පොතේ 389 යන පිටුවෙහි 175 යන ඡේදයේ සටහන් කර ඇති බවයි. 175 වන ඡේදය වෙනුවට 178 වශයෙන් සාක්ෂි සටහන් වල ඇත්තේ, සාක්ෂිකරුට වැරදීමක් නිසා නොව, යතුරු ලියනය කරන ලද අධිකරණයේ නිලධාරිණියට සිදුවූ වැරදීමක් නිසා බව ඉතා පැහැදිලිය. ඊට හේතුව 175 ඡේදය යන්න, මැකීමක් හෝ කිසිදු වෙනස් කිරීමක් නොමැතිව පැහැදිලිව IIB තොරතුරු පොතේ සටහන්ව ඇති බැවිනි. ඒ අනුව

පිටවීමේ සටහන 175 වන ඡේදයේත් ආපසු පැමිණීමේ සටහන 176 වන ඡේදයේත් සටහන් වී ඇති බව පෙනී යයි. එබැවින් සටහන් යෙදීමේ කිසිදු ගැටළුවක් නැත.

In **Paulis Appu v. Don Davit** 32 NLR 335, the court held that:

> *"The use of Information Book for the purpose of arriving at a decision was irregular".*

In **K.A.Shantha Udayalal v. The Attorney General** SC. Spl. LA. No. 57/2017 decided on 30/01/2018 Sisira De Abrew, J. held that:

> *"In the present case, it is very clear that the Learned High Court Judge has used the police statement, non-summary evidence and inquest evidence which were not properly admitted in evidence. I therefore hold that the decision of the Learned High Court judge to peruse the said documents was wrong and contrary to law".*

Hence, it is quite clear that perusal of the Information Book without awarding an opportunity to the defence is wrong and contrary to law. Hence, this ground also has merit.

Further In the 10th ground of appeal, the Appellant claims that the Learned Trial Judge was biased before to the final finding since he appeared to have made a decision without conducting a thorough review and analysis of the facts. Thereby, the Learned Trial Judge had denied the Appellant a fair trial guaranteed by the Constitution.

The concept of fair trial is a fundamental principle in every judicial system. In another sense, the notion of a fair trial secures justice. A trial in criminal jurisprudence is a judicial examination or determination of the issues at the hand of the Court to arrive at a conclusion whether the accused is guilty of the offence or not.

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial.

In this case as stated earlier, the Learned Trial Judge had come to a conclusion that the evidence given by PW1 and PW2 could be accepted as true regarding the raid conducted in respect of the Appellant before considering other evidence adduced by the prosecution and the Appellant and his witnesses. This clearly shows that the Learned High Court Judge has been highly influenced on the inadmissible or prejudicial evidence led by the prosecution. Although the Learned High Court Judge mentioned in his judgment that he had disregarded the inadmissible or prejudicial evidence in deciding this case, it has not been properly reflected in his judgment. Hence, this ground also has merit.

As the pleaded grounds of appeal above have merits which certainly disturb the judgment of the learned High Court Judge, it is not necessary to address the remaining grounds in this appeal.

Therefore, I now consider whether this is an appropriate case to send for a re-trial.

In this case, the prosecution has failed to establish the custody of the production chain beyond reasonable doubt. As this is a substantial fact, this ground alone is sufficient to vitiate the conviction in this case. Even though this case is sent for re-trial, the prosecution will not be able to rectify in the breaking of chain of custody.

In **Asrappulige Neel Rohan Gomes v. The Attorney General CA/276/2007** decided on 03/04/2013, the court held that:

> *"…. But the court cannot use its discretion in the interest of justice in this case. In the event this case is sent back for fresh trial, the court is encouraging slackness on the part of the investigation and the prosecution. The court is not only allowing the prosecution to fill gaps in the prosecution case it is also encouraging the investigators to do now and what he should have done at the time of the investigation. It is a bad precedent, and unfair by the accused".*

Due to the aforesaid reasons, I set aside the conviction and the sentence dated 18/06/2020 imposed on the Appellant by the learned High Court Judge of Colombo. Therefore, I acquit him from both charges.

Accordingly, the appeal is allowed.

The Registrar of this Court is directed to send a copy of this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL