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

In the matter of an appeal in terms of Section 33 of the Code of Criminal Procedure Act No: 15 of 1979 and in terms of Article 138 of the constitution of the Democratic Socialist Republic of Sri Lanka.

CA No: CA/HCC/ 151/2017
HC: Kalmunai: HC 305/2014

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

Complainant

Vs.

Yapa Mudiyanselage Yapathilaka

Accused

And now between

Yapa Mudiyanselage Yapathilaka

Accused- Appellants

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Shanaka Ranasinghe, PC with Niroshan Mihindukulasuriya AAL for the Accused-Appellant

Rohantha Abeysuriya, PC, ASG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 13.10.2022 and 28.02.2020

By the Complainant-Respondent 14.07.2020

Argued on : 26.09.2022 and 05.10.2022

Decided on : **31.10.2022**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Kalmunai, dated 09.01.2017, by which, the accused-appellant, who is on bail at the moment was convicted and sentenced for 2 years rigours imprisonment and a fine of Rs. 25,000/- in default 3 months simple imprisonment to run consecutively.

The accused-appellant above named (hereinafter referred to as "the appellant") stood indicted for being in possession and trafficking of 2 kgs and 519 grams of Cannabis Sativa alias Ganja without any legal excuse on or about 01.12.2013 at Kudakalliya within the jurisdiction of Kalmunai High Court which is an offence punishable under section 54 (a) (b) and 54 (a) and (c) of the Poisons, Opium and Dangerous Drugs (Amendment) Act Number 13 of 1984.

After the trial in the High Court of Kalmunai, the accused was found guilty of the two counts and was sentenced to 2 years of rigours imprisonment and a fine of Rs. 25,000/- in default 3 months simple imprisonment to run consecutively.

Being aggrieved by the said conviction and sentence, the accused-appellant has preferred this appeal to this Court.

The grounds of Appeal are as follows;

1. Prosecution's failure to call vital witnesses
2. The manner in which the raid was conducted by the police in arresting the appellant
3. The manner in which the parcels were sealed
4. Discrepancy in the quantity.

On the day of the incident, that was on 01.12.2013 PW 1 having been informed by PC 44414 Mohideen, who was attached to the Investigation Unit, contacted his Officer in charge using his mobile phone and was instructed to conduct a raid. A team was arranged to comprise PW 1, PW 2 and four other officers who then went in a private vehicle to the Kudakallu junction. They waited until the specified CTB bus No. WP-NB 4462 arrived at around 3.26 am. The appellant carrying a travelling bag was seen to have got off the bus whilst using a mobile phone (X 1).

He was stopped and then searched by PW 1 who recovered four parcels wrapped in brown paper which on further examination was revealed to be that of Cannabis Sativa alias Ganja. The appellant was taken into police custody after which the team proceeded to a shop belonging to an individual named Cader, whose shop they generally utilise to weigh such contents. As Cader was not at his shop the two witnesses and the team had gone to his house and brought him back to the shop for the said purpose of weighing the contents, which was also certified by the same.

The recoveries were then sealed and handed over to the reserved Officer PW 3 which subsequently were sent to the Government Analyst Department through the Court for analysis. The appellant gave evidence on oath and alleged that he was a victim of fabrication due to his service at the Monaragala Police wherein he participated in very important raids. One such raid involved an accused from the Pothuvil area and it was on the instructions of the said accused person that he had been falsely implicated in this case, for revenge.

The learned President's Counsel for the accused-appellant argued that the prosecution's failure to call vital witnesses has created doubt about the incident. The officer by the name of Mohideen who has cordial ties with the above-mentioned drug peddler from Pothuvil was part of the raid where the accused was arrested although Mohideen was listed as a witness by the prosecution, he was not called upon to give evidence.

It was the main contention of the appellant that this case was fabricated against him and there were police officers namely Mohideen and Sugathananda who were involved in such fabrication and were also part of the raid as brought out in evidence. Learned President's Counsel submitted that in cross-examination of PW 1, it was clear that the witnesses are concealing the truth and are narrating a version consistent with his testimony. In the present context, it was the duty of the prosecution to bring forward these witnesses in order to counter the position of the appellant. However, the prosecution has failed to do so raising a strong presumption under section 114 (f) of the Evidence Ordinance that if the witnesses were produced it would have been in favour of the accused-appellant.

It was argued by the learned President's Counsel for the respondent that under section 134 of the Evidence Ordinance No.14 of 1895, there is no particular number of witnesses required for the proving of any fact. Moreover, in the case of Devunderage Nihal vs. The Attorney General SC Appeal 154/2010, the learned Additional Solicitor General for the respondent further argued that it is up to the person against whom the charge is levelled to formulate his or her defence.

The system of administration of justice gives such a person the freedom to testify, to call witnesses to testify on his behalf or even the freedom to make an application to the court, in the interests of justice, to summon a prosecution witness that had not been called, as a witness of court, in terms of section 439 of the Code of Criminal Procedure. The accused person gets an opportunity to cross-examine such a witness. In the present case, the witnesses called upon by the prosecution included PW 1, the Chief Investigating Officer, the second officer who accompanied and got involved in the raid PW 2, the officers who took over the productions at the Reserve Service of the Police Station PW 3 and PW 7, the Government Analyst PW 9 and another one of the accompanying officers PW 4.

The 5th and 6th witnesses were not called to give evidence, moreover, the 5th witness was released on order of the court as such evidence was deemed unnecessary. Thereafter, on 06.07.2015 when questioned by the court as to who is the most important witness out of the four put forward, the Defence Counsel informed the court that it was PW 1 that should be recalled. Therefore, on such considerations, it can be deduced that PC Mohideen was not called upon by the prosecution as he was not involved in the actual recovery of the contents, but merely a supporting officer.

The learned President's Counsel for the respondent submitted that the evidence given by PW 1, was corroborated by PW 2 and PW 4 gave no rise to the need for further corroboration on part of the prosecution's case put forward. As mentioned above, the defence if it was deemed so vital for the case should have raised section 439 of the Code of Criminal Procedure in order to call on PC Mohideen as a witness. By not following such procedure they waive the right to deem such a witness as significant and use such as a ground to appeal. Furthermore, the High Court Judge holds that although the appellant in his sworn evidence states this relationship

with PC Mohideen, in his A-2-127 statement made to the Learned Magistrate of Pothuvil there is no such mention or instigation of the condition of the case and the involvement of such Police Constable, nor was there any reference to the High Court case from which this concoction for revenge stemmed from or the placing of such position to any of the prosecution's witnesses.

It was the contention of the learned President's Counsel for the accused-appellant that the raid conducted by the police in arresting the accused was not a genuine incident. It was testified by PW 1, that they travelled from the station to Panama by stopping a private van which was travelling and it was further revealed that details of the van that they travelled in were not remembered including the colour of the van. It was also testified that after the arrest that the accused along with the cannabis was taken to one Cader's shop for the purpose of weighing the parcels that were allegedly found in the possession of the accused-appellant containing cannabis. The statement of the PW 1 marked A 1 which was the statement given at the disciplinary inquiry that was carried out subsequent to the arrest of the accused stated that they travelled in motorbikes to conduct the raid and when the proposition was made to PW 1 in cross-examination, he admitted it to the effect that if he had mentioned it in his statement that it is true.

The Learned Trial Judge erred in law by his failure to evaluate and analyse the evidence as it was and by imposing the burden on the accused stating in his judgment that, " If such contradictory portions are there, they should be given proper marking and prove them according to the rules of evidence during the course of the trial," while disregarding the cardinal principle that the prosecution must not derive from the weakness of the defence. It was argued on behalf of the appellant that the said vital contradiction that directly attacks the credibility of the main witness has caused severe prejudice to the accused-appellant.

Further, it was suggested by the appellant that the accused was taken to "Carder's Shop" for the purposes of weighing the Cannabis, no corroborative evidence was brought before the learned Trial Judge, when PW 1 testified, and the prosecution made application to mark a document purported to have been signed by one Cader certifying the weight to be 2.519 kgs. The defence raised an objection in marking this document as it was contrary to the provisions of section 67 of the Evidence Ordinance, court permitted the prosecution to mark the said document subject to proof. The prosecution failed to provide the required proof and failed to bring forward Cader as a witness. Learned President's Counsel appearing on behalf of the accused-appellant says that the prosecution's failure to adduce evidence to prove that the seized cannabis was at weighed 2.519 Kgs. in Cader's shop raises a presumption under section 114 (f) of the Evidence Ordinance against the prosecution.

Learned Additional Solicitor General for the respondent says that the appellant argues that the contradiction of PW 1 of the evidence given in court in comparison to the Disciplinary Inquiry marked as A-1 was not considered nor evaluated by the Learned Trial Judge. It is just noted that firstly this document was marked subject to proof. Learned President's Counsel for the respondent argued that priority of credibility is given to evidence presented within the four walls of the court rather than to the disciplinary Inquiry. If the appellant seeks to mark such a contradiction as the document is valid only subject to proof, they must first have the

Officer- in-Charge of handling the Disciplinary Inquiry give evidence to the court as to whether and what was occasioned during such Inquiry.

In the case of Attorney General vs. Sandanam Pitchi Mary Theresa 2011 (2) SLR. 292 it was 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 judgement on the nature 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. Witnesses should not have disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter."

In relation to the appellant's ground of the prosecution not bringing Cader as a witness to mark proof of the certification of the weight at 2.519kgs, firstly it must be noted that the High Court Judge did not deliberate on such evidence marked X as it was held that the prosecution had not proven the authenticity of such document. It must be realised that in terms of the Criminal Procedure the prosecution must be inclined to and are at liberty to adduce such witnesses as they see fit to prove the facts in issue.

In the present circumstances, the learned Additional Solicitor General submitted that the prosecution was contending that the appellant was caught during the raid whilst in the possession of Cannabis Sativa alias Ganja to which the necessary witnesses were called.

Another argument preferred by the learned President's Counsel for the accused-appellant was that manner in which the parcels were sealed was doubtful. The recovering officer testified to the effect that after weighing the recovered productions at the shop of one Cader, he duly sealed them and handed them over to PW 3, Muthubanda.

The prosecution witness testified in cross-examination that the parcels were sealed and a paper was put on it and the accused's thumb impression was taken on it. The appellant's version was that his thumb impressions were separately taken on four papers and that he never signed on any parcel. In light of the above ground raised that there is no conclusive evidence placed that 2.519 Kgs of Cannabis was taken into custody, the manner in which the productions were sealed becomes vital. As per the evidence, the learned counsel for the accused-appellant says that if the left thumb impression was on separate white sheets of paper, can it not be placed on any parcel?

Production in police custody can be tampered with at any amount of time and can be re-sealed with wax and seals. It is only the acknowledgement of the accused by way of a thumb impression or mark that ensures that it was the same parcel that was sealed and not tampered with by using white paper on top of the parcel. That gives the opportunity for the parcels to be tampered with. The learned High Court Judge has accepted the evidence of the investigating officer without any analysis and disregarded the fact that the accused-appellant's evidence has a more likelihood in contrast to the prosecution version with regard to the sealing of parcels.

The learned President's Counsel for the appellant holds that the High Court Judge has accepted the evidence of the Investigating Officers without any analysis and disregarded that of the appellant. Firstly, it must be noted that the High Court Judge before analysing the evidence provided, mentioned the case of Woolmington vs. Director of Public Prosecution [1935] AC 462 holding that; if the defence has created a reasonable doubt about the prosecution case, the benefit of the said doubt should be given to the accused person. Therefore, by the appellant merely providing evidence as to what he allegedly contends took place, this does not warrant a shifting of the burden of proof, especially where there is a strong *prima facie* case made out or proof which warrants a reasonable and just conclusion against him.

Another argument forwarded by the learned President's Counsel is the discrepancy in the quantity. The appellant was indicted on the basis that 2.519 Kgs. of Cannabis was in his possession. The above-mentioned quantity was in four separate parcels, as per the covering letter sent by the Learned Magistrate to the Government Analyst and it contained quantities in a below manner,

P1 - 1029 g

P2 - 480 g

P3 - 530 g

P4 - 480 g

Total = 2.519 Kg

However, the government analyst revealed in her evidence that the quantity they received varied in quantity, while stating that there were 4 parcels, she mentioned the quantities as follows;

P1 - 958 g

P2 - 263 g

P3 - 654 g

P4 - 490 g

Total = 2.365 Kg

It is evident that P 3 and P 4 were increased and P 1 and P 2 were decreased. The above figures demonstrate a total reduction of 154 g in weight. As per the evidence, it is also revealed that this change in weight had occurred within 16 days from the detection on 01.12.2013 when it was sent to the Government Analyst on 17.12.2013.

The learned Trial Judge appraised that it was the opinion of the government analyst that the difference was due to lapse of time the moisture is removed and due to the reason that the substance becoming dry, there is a possibility of such a difference. A careful analysis of the numbers, reveals that although there is a reduction as a whole in weight to support the above contention. The individual parcels demonstrate a different outcome. It is evident that P 3 and P 4 have increased in weight as per the evidence of the Government analyst. The government

analyst gave no explanation or expressed an opinion on how an increase could occur in the present context. The learned Trial Judge completely failed to analyse this vital portion of the evidence which runs to the root of the case annihilating the credibility of the main prosecution witness.

The learned President's Counsel for the respondent in reply says that it can be noted that evidences given by the Government Analyst PW 9 and the Judgment of the High Court Judge, the change in weight of each respective package are negligible. Thereby indicates that there is no increase in any of the weights respectively as contended for by the Learned Counsel. Therefore, it was further argued by the respondent that this ground of appeal cannot be considered falsification.

As a counterargument learned President's Counsel submitted that in the aforementioned circumstances the learned Trial Judge completely erred by ruling out possible tampering with the parcels which raises grave doubt on the inward journey. Therefore, the learned High Court Judge had failed to analyse the evidence led by the prosecution and failed to judicially evaluate the doubts that have arisen as demonstrated above resulting in the benefit of such doubt being denied to the accused-appellant.

The learned President's Counsel for the accused-appellant further argued that the contradictions between the prosecution witnesses were very serious contradictions. The learned Trial Judge applied the wrong principles of law and decided to convict the accused-appellant.

Superior courts have decided that there is no burden for the accused-appellant to rebut the evidence of the prosecution case. The defence need not prove anything in a criminal trial since the burden is on the prosecution to prove their case beyond a reasonable doubt. The court's acceptance of a police investigator's notes as being circumstantially corroborative of that officer's evidence and account of the events. When police investigator testifies in court, they are usually permitted by the court to refer to their notes to refresh their memory and provide a full account of the events. If the investigator's notes are detailed and accurate, the court can give significant weight to the officer's account of those events. If the notes lack detail or are incomplete on significant points, the court may assign less value to the accuracy of the investigator's account.

The learned Trial Judge misdirected himself and decided to go against his conscience although he found that there is a serious contradiction between the key witnesses. It is my view that those are material contradictions that go to the root of this case. What is important in this case falls to be decided on a consideration of the nature and extent of the misdirection on the burden of proof, all facts and circumstances of the case, the quality of the evidence adduced, and the weight to be attached to it.

It is important to note that a credible witness is competent to give evidence and is worthy of belief. In deciding upon the credibility of a witness, it is always pertinent to consider whether he is capable of knowing the thing thoroughly about which he testifies. Whether he was present at the transaction, whether he paid sufficient attention to qualify himself to be a reporter of it and whether he honestly relates the affair fully as he knows it, without any purpose or desire to deceive or suppress or add to the truth.

A credible witness is a witness who comes across as competent and worthy of belief. Their testimony is assumed to be more than likely true due to their experience, knowledge, training, and sense of honesty. The Judge will use these factors to determine whether he believes the witness is credible.

An attorney can show the Trial Judge that a witness is not credible by showing the following elements;

(i) inconsistent statements,
(ii) reputation for untruthfulness,
(iii) defects in perception,
(iv) prior convictions that show dishonesty or untruthfulness, and
(v) bias.

An attorney may also enhance a witness's credibility by showing that the witness has always been consistent in their statements.

To gain credibility, we must be assured, first, that the witness has not been mistaken nor deceived. To be assured as far as possible on this subject, it is proper to consider the nature and quality of the facts proved. The quality and person of the witness, the testimony in itself and to compare it with the depositions of other witnesses on the subject and with known facts. Secondly, we must be satisfied that he does not wish to deceive. There are strong assurances of this when the witness under oath is a man of integrity and is disinterested.

Witnesses not infrequently are mistaken or wish to deceive. The most that can be expected is that moral certainty that arises from analogy. The credibility which is attached to such testimony arises from the double presumption that the witnesses have good sense and intelligence and that they are not mistaken nor deceived. They are further presumed to have probity, and they do not wish to deceive.

Considering the evidence prosecution witness, it is my view that the learned High Court Judge has applied in this case wrongly and decided to convict the accused-appellant who has already completed nearly 6 years in prison. Those contradictions go to the root of the prosecution case. The impact of those contradictions is not negligible. Therefore, we unanimously decide that the accused-appellant was dealt with unfairly and unreasonably by the Trial Judge.

It is interesting to note that the yardstick the learned High Court Judge applied weighed the credibility of the prosecution witnesses. This same yardstick was not applied to weigh the evidence of the defence case.

The learned High Court Judge concluded that the prosecution has proved the case beyond a reasonable doubt. This was before considering the evidence of the accused-appellant. The judgement reflects how the learned High Court Judge came to the conclusion before considering and analysing the defence case. This procedure is un-expectable and I believe that the Trial Judge misdirected himself by convicting the accused-appellant before he had analysed the defence case. Further, this court finds that there is no sufficient evidence or credible evidence to establish that the accused-appellant had in possession of 2.519kgs of Cannabis Sativa alias Ganja on 01.12.2013.

The learned President's Counsel for the accused-appellant argued that the explanation given by the accused-appellant had not been considered by the learned High Court Judge. The learned High Court Judge had misdirected himself on the question that has to be decided by the court on the argument of the defence whether the accused-appellant was arrested by the officers of the Investigation Unit at the Monaragala Police whilst in possession of 2.519kgs of Cannabis Sativa alias Ganja.

The grounds of appeal urged by the learned President's Counsel was the failure on the part of the learned Judge of the High Court to consider the improbabilities of the version of the prosecution. It is pertinent at this stage to consider the chain of events that had taken place on 01.12.2013 during the raid before the arrest of the accused person. The story of the prosecution is in many ways improbable. The evidence of the prosecution, if we take them as a whole, the testimony about the raid conducted does not inspire confidence.

The inbuilt improbabilities in the version of the prosecution which will go to show that no conviction could be possible even if the evidence of the witnesses is taken on their face value warrant a court dealing with a criminal appeal not to shut its eyes particularly when the criminal proceedings set in motion against the appellant appear to be a probable cause of abuse of process of court to put the appellant's liberty in jeopardy.

Though the legal proposition points towards such evidence not strictly requiring corroboration, in the singular facts and circumstances of the present case, having regard to the quality of the version of the prosecution about the incident, it cannot be safely relied upon to sustain the conviction against the accused of multifaceted reasons.

Taking into consideration, all these circumstances, I am of the view that the conviction of the accused cannot be allowed to stand as the prosecution had failed to prove the case beyond all reasonable doubts.

The conviction quashed.

Accused-appellant is acquitted and discharged from all charges in the indictment.

Appeal allowed

Judge of the Court of Appeal

R. Gurusinghe J

I agree.

Judge of the Court of Appeal