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. HCC/344/19
High Court of Colombo
Case No. 327/2018

Complainant

Vs.

Kussiyage Susantha
Priyajanaka Costa,

Accused

AND NOW BETWEEN

Kussiyage Susantha
Priyajanaka Costa,

Accused –Appellant

Vs.

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

Complainant-Respondent

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

COUNSEL : Neranjan Jayasinghe with Harshana Ananda for the Accused-Appellant

Dilan Ratnayake SDSG for the Respondent

WRITTEN SUBMISSIONS
TENDERED ON : 10.06.2022 (On behalf of the Accused-Appellant)

27.06.2022 (On behalf of the Respondent)

ARGUED ON : 21.10.2022

DECIDED ON : 23.11.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Colombo on two counts of possession of 9.06 grams of heroin and trafficking of 9.06 grams of heroin. After the trial, the appellant was convicted of both counts and sentenced to death. This is a case where the learned High Court Judge who wrote the judgment heard the entire evidence in the case.

The learned Counsel for the appellant and the learned Senior Deputy Solicitor General for the respondent made oral submissions at the hearing of this appeal. Prior to the hearing, written submissions have been filed on behalf of both parties.

In this case, after conducting a raid based on information received, the accused-appellant was arrested. PW-1, IP Samarathunga led the raid

but his evidence was not led in the trial, as he had vacated his post and left the island. Accordingly, the evidence of PW-3 and PW-2 was led regarding the raid.

According to the prosecution, the raiding team went to "Obeysekarapura" for this raid on information received. The appellant was waiting in front of the house of one "Renuka". They searched him and found a parcel of heroin in the right-side trouser pocket. The appellant was then arrested.

After the prosecution case, the appellant made an unsworn statement from the dock. In addition, two witnesses were called on behalf of the appellant. In brief, the defence version is as follows: There was animosity between IP "Samarathunga" and the said woman, "Renuka", for making complaints against IP "Samarathunga" to the police headquarters and the Human Rights Commission. Hence, they went to "Obeysekarapura" to arrest "Renuka". First, they arrested two defence witnesses for possession of heroin, and then they arrested the appellant, the son of "Renuka" since she could not be found. The appellant and two defence witnesses stated that none of them were in possession of heroin at the time of the arrest.

The learned counsel for the appellant advanced his arguments on the following two grounds:

1. The learned High Court Judge has failed to take into consideration vital contradictions between PW-3 and PW-2 and thereby arrived at a wrong conclusion that the evidence of PW-3 and PW-2 is cogent.
2. The evidence of the defence had been rejected on unreasonable grounds.

The first ground of appeal

The learned counsel for the appellant contended that, according to PW-3, the information received by PW-1 before leaving the police station was that a person was waiting with heroin in front of the house of “Renuka” in “Obeysekarapura”, Rajagiriya. However, according to PW-2, the information was that the son of Renuka in “Bandaranayakapura” was waiting with heroin in front of her house. Also, the learned counsel pointed out that, according to PW-3, they got to know that the appellant was the son of Renuka only after the appellant was taken into custody. However, according to PW-2, before they left the police station, they knew that they were going to take into custody the son of Renuka. Apart from that, the learned counsel for the appellant contended that, according to PW-2, they got to know before leaving the police station that the appellant was wearing a white T-shirt and black trousers. However, according to PW-3, the description regarding the appellant’s clothes had been received by a telephone call when they reached “Borella” after receiving the information.

I agree with the learned counsel for the appellant that the aforementioned discrepancies between PW-3's evidence and PW-2's evidence in respect of the information appear to exist. When these discrepancies existed, the learned High Court Judge stated in his judgment that there were no discrepancies or contradictions between PW-3's and PW-2's evidence, which is an incorrect observation according to my view.

This court should now decide whether the aforementioned discrepancies and the learned High Court Judge's observation affect the final decision in this case. The learned Senior Deputy Solicitor General contended that these are minor discrepancies and that the

subsequent incidents demonstrate that the information received is correct.

When considering the aforesaid discrepancies, it is apparent that all of these discrepancies are related to the information received. The argument of the learned counsel for the appellant was that these discrepancies regarding the information occurred because they did not receive information about the appellant and the raiding team went to arrest "Renuka." If these police officers went to arrest "Renuka" but instead arrested the appellant, Renuka's son, because she was not there, and wanted to pretend that they arrested the appellant based on information received, the police officers attached to the same police station could make entries to that effect and give evidence without any discrepancy. Therefore, it is difficult to agree with the contention that these discrepancies occurred as there was no such information.

In the case of Sunil vs. The Attorney General (1999) 3 Sri LR 191, it was observed that "the Court must not be unmindful of the fact that they are human witnesses and it is a hallmark of human testimony that such evidence is replete with mistakes, inaccuracies, and misstatements. Also, it is stated in this judgment that the court has to be equally mindful of the fact that the evidence tendered by human testimony will suffer from certain deficiencies and defects. It is in this light that Justice Cannon in *Attorney General v. Visuavalingam* – (47 NLR 286) emphasized that no prudent and wise Judge would disregard testimony for the mere proof a contradiction but that a wise Judge should critically assess and evaluate the contradiction. He emphasized the Judge must give his mind to the issues what contradictions are material in discrediting the testimony of a witness".

In considering the facts and circumstances of the instant action with the substance of the aforesaid judicial authority, I agree with the contention of the learned SDSG that the aforesaid discrepancies

relating to the information received are not vital discrepancies that go to the root of the case.

The second ground of appeal

The vital issue to be considered in this appeal is the two different versions in respect of the raid, presented by the prosecution and defence, and not the discrepancies regarding the information received. In dealing with that issue, it has to be considered whether defence evidence has been rejected on unreasonable grounds, as contended by the learned counsel for the appellant.

The learned Senior Deputy Solicitor General for the respondent contended that the learned High Court Judge had carefully considered the dock statement and the evidence of defence witnesses and correctly rejected the same as the defence version was improbable.

It is needless to state that when a criminal case is determined, the evidence of the defence should be considered in the same manner as the evidence of the prosecution. The Supreme Court of India, held in the case of Dudh Nath Pandey vs The State Of U.P, decided on 11th February 1981, reported in 1981 AIR 911, 1981 SCR (2) 771 that "defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses".

The basis of the defence case was that since "Renuka" had complained to the Police Headquarters and the Human Rights Commission against IP Samarathunga, the raiding team wanted "Renuka" to be taken into custody. Since the said attempt failed, the appellant was arrested, according to the defence version. To examine whether there is any acceptability in the said basic premise of the defence, "Renuka" has

not given evidence and stated that she made such complaints, and as a result, IP Samarathunga had animosity with her. So-called animosity is merely a suggestion made on behalf of the appellant. Therefore, the basic premise of the defense has not been presented in a plausible manner. This matter was considered not because the appellant had a burden of proving anything. It is sufficient for the appellant to create reasonable doubt on the prosecution case. However, there must be an acceptable basis in the defence version in order to create reasonable doubt on the prosecution case.

Furthermore, the two defence witnesses stated in their testimony that they were arrested for no reason, and the defence version was that the appellant was also arrested with them for no reason when they were at “Bandaranayakapura.” However, it transpired in the cross-examination that both defence witnesses had pleaded guilty for possession of heroin when they were at “Meethotamulla”. Although they have given explanations like they pleaded guilty on the advice of their lawyer, it is a fact that they themselves had pleaded guilty to the heroin cases against them and were convicted. Now they cannot come to this court and say that they were arrested with the appellant when nothing was possessed by them. They also cannot say that they were arrested when they were at “Bandaranayakapura” because they pleaded guilty to possessing heroin when they were at “Meethotamulla”. Furthermore, when DW-3 was cross-examined in this case, a contradictory portion of his statement made to the police in the said heroin case, "When I arrived, some police officers suddenly came near the "Meethotamulla" bus station, surrounded me, and searched me," had been marked as X-5. Hence, the defence story that three of them were arrested at “Bandaranayakapura” for no reason appears to be improbable. Considering the said circumstances, I am of the view that the learned High Court Judge has correctly rejected the defence witnesses’ evidence.

As stated above, the prosecution version was not that all three were arrested at “Bandaranayakapura” but the two defence witnesses were arrested at “Meethotamulla”. While the prosecution presented this evidence, the learned High Court Judge carefully observed in his judgment how the defence witnesses attempted to demonstrate initially that they knew nothing about "Meethotamulla."

In perusing the judgment of the learned High Court Judge, it is apparent that the learned Judge has carefully considered the prosecution evidence as well as the defence evidence. Only after careful analysis of the evidence, the learned High Court Judge correctly rejected the defence evidence. Therefore, I regret that I am unable to accept the second ground of appeal that the evidence of the defence has been rejected on unreasonable grounds.

Finally, it should be mentioned that in Oliver Dayananda Kalansuriya *alias* Raja V. The Democratic Socialist Republic of Sri Lanka – C.A. 28/2009, Decided on 13.02.2013, it was held that “It is an accepted principle that a criminal case cannot be proved with a mathematical accuracy as it has to be proved by the evidence given by human witnesses. Thus, discrepancies, errors and contradictions are bound to occur. If they do not create a reasonable doubt in the prosecution case, Court should disregard them. Courts should not reject evidence of witnesses on the basis of minor discrepancies and contradictions.”

The Learned High Court Judge had correctly analyzed the evidence relating to the raid. Reasons are sufficiently given for the findings. Although, the aforesaid discrepancies relating to the information were not considered and analyzed by the learned High Court Judge, those discrepancies have no impact on the final decision of the case, for the reasons stated above.

In the circumstances, I find no reason to interfere with the judgment of the learned High Court Judge. Accordingly, the judgment dated 30.10.2019, the convictions and 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