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/0260/16

High Court of Kuliyapitiya

Case No: HC/225/2000

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Adikari Mudiyanselage Ranjith Tilakasiri

alias Boyingamuwe Gamini

ACCUSED

AND NOW BETWEEN

Adikari Mudiyanselage Ranjith Tilakasiri

alias Boyingamuwe Gamini

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Tenny Fernando for the Accused Appellant
	: Azard Navavi, DSG for the Respondent
Argued on	: 03-11-2022
Written Submissions	: 05-08-2021 (By the Accused-Appellant)
	: 05-11-2018 (By the Respondent)
Decided on	: 05-12-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Kuliyapitiya, upon which he was sentenced to life imprisonment after conviction.

The appellant was indicted before the High Court of Kuliyapitiya for possessing 2.7 grams of Diacetylmorphine, commonly known as Heroin, which is a prohibited dangerous drug in terms of Poisons, Opium and Dangerous Drugs Ordinance and punishable in terms of the same Ordinance.

The appellant was also charged for trafficking the same quantity of heroin at the same time and at the same transaction, which is also an offence punishable in terms of the same Ordinance.

The offences allegedly have been committed on 12th April 1999 at Kuliyapitiya.

After trial, the learned High Court Judge found the appellant guilty for both the counts preferred against him by his judgement dated 19th December 2016, and accordingly, he was sentenced as mentioned above.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

1. The conviction of the appellant by the learned High Court Judge was in contrary to the law and against the weight of the evidence led at the trial.
2. The learned High Court Judge has failed to give due consideration to the unrealistic and improbable nature of the evidence led by the prosecution.
3. The learned High Court Judge had completely misdirected in his analysis of evidence with regard to the *inter se* and *per se* contradictions of the evidence by the main prosecution witnesses.

Facts in Brief

PW-01 who was a Police Inspector attached to Kuliyapitiya police and was functioning as the officer-in-charge of the Divisional Security Investigation Unit during the time relevant to this incident.

On 12th April 1999, he has left the police station around 7 a.m. with seven other police officers clad in civilian clothes in the jeep number 61-2066 for routine security patrol duties.

While stationed in Kuliyapitiya town, one of his subordinate officers, namely Police Sergeant 16072 Vijitha Kumara has informed him that he received an information that a person called Boyingamuwe Gamini has gone to Colombo in order to bring heroin and he has left his motorbike near the petrol shed and gone. Upon the information, he has instructed two of his officers to wait near the petrol shed and observe whether the mentioned Gamini is coming and has left for other duties in the Dummalasuriya police area. He has tasked Police Sergeant Vijitha Kumara and another officer called Dharmaratne for this duty.

While returning after about an hour from the direction of Kuliyapitiya police towards the town, he has observed the mentioned Gamini while being followed by the two police officers. He too has Immediately got down from the vehicle and along with the other officers has stopped the mentioned Gamini. When he was body checked, PW-01 has found a shopping bag with some substance in his right trouser pocket. When opened, he has found a number of folded small packets, and inspecting some of them, he has found a brown colour powder, which he has recognized as heroin through his experience.

Accordingly, the appellant had been informed of the charge against him and arrested. It has been his evidence that after taking the productions under his charge, he, along with the appellant and the other officers went to the Kuliyapitiya police station and recorded the statement of the appellant and went to Kuliyapitiya hospital along with the appellant for the purpose of weighing the productions. He has weighed the productions in front of the appellant with the help of the hospital pharmacist and has recorded 8.71 grams of heroin in the 210 packets recovered from the possession of the appellant.

He has identified and marked the productions at the trial. The learned Counsel for the appellant informed the Court during the hearing of the appeal, that he is not challenging the proper custody of the productions.

PW-02 Police Sub-Inspector Vijitha Kumara was a Police Sergeant at the time of this incident and was the person who assisted PW-01 in the arrest. He has given evidence corroborating the version of events as stated by PW-01.

The Government Analyst Kanapathipillai Sivarasa (PW-14) has confirmed that the productions brought before the Government Analyst for analysis had a pure quantity of 2.7 grams of heroin. He has also identified traces of heroin in the paper foils produced for identification.

In this matter, the pharmacist of the Kuliyapitiya general hospital who weighed the quantity of heroin initially, has given evidence as well. According to her, it was she who has opened 210 small packets, separated the heroin contained in

them and weighed the contents. She has issued a report in that regard to the police, which has been marked as P-11. It was her evidence that the total weight of the substance was 8.7 grams. The Government Analyst has confirmed that the weight of the brown-coloured powder received by him was also 8.7 grams.

After the conclusion of the prosecution evidence, the learned High Court Judge has called for a defence from the appellant. The appellant has decided to make a dock statement. It has been his position that on the day of his arrest, he came to Kuliyapitiya town to attend to one of his requirements and the police officers Vijitha Kumara and Dhanaratne stopped and searched him and took him into custody.

It was his statement that he was taken to the police station and shown 268 small packets that was taken out of a drawer and 210 of the packets were introduced as recovered from his possession. He has admitted that he was taken along with the packets to the Kuliyapitiya hospital for the weighing of the contents. He has claimed that he was a person who never used trousers, but only a person who used to wear sarongs in his daily life, and has claimed that the witnesses were lying in that regard.

He has also been stated that due to a dispute the villagers had with him over a hotel run by him at the village, he was falsely implicated in this crime.

Considerations of the Grounds of Appeal

As all the grounds of appeal urged by the learned Counsel for the appellant are interrelated, I will now consider them together.

The main contention of the learned Counsel was that PW-01 who led this raid has given contradictory evidence as to the time of arrest and the mode of arrest. He contented further that in relation to the same, the evidence of PW-01 and PW-02, who was the other witness called by the prosecution to corroborate, are *inter se* and *per se* contradictory in relation to the same. Further, he relied on

the claim by the appellant that he was wearing a sarong and not a trouser as claimed by the prosecution witnesses to challenge the evidence.

It is trite law that evidence of witnesses has to be considered as a whole and not by compartmentalizing it. PW-01 in his evidence-in-chief has stated that he and his team left the police station around 7 a.m. and one of his subordinate officers provided the information which led to this arrest between 7 and 7.15 a.m. He has also stated that they were at the Kuliyapitiya town for about 2 hours, and after leaving two officers for surveillance duty, left for the Dummalasuriya police area and returned after about an hour. It was clear from this evidence that the arrest had been made after his return. It is true that the witness at one stage has stated that when the appellant was body checked, the time was around 7.02 and 7.05 a.m. But it is also in evidence that the arrest of the appellant has been around 11.45 a.m.

PW-02 has also confirmed in his evidence that the arrest was around 11.45 a.m. PW-01 has given evidence that after the arrest, the appellant was taken to the police station and his statement was recorded. Thereafter, he was taken to Kuliyapitiya Hospital for the purpose of weighing the productions recovered.

PW-11, the pharmacist who weighed the productions has confirmed that the police along with the appellant came to her and the weighing was done by her.

Apart from the above, the appellant has never denied that he was arrested in Kuliyapitiya town. He has admitted the presence of police officers Vijitha Kumara and Dhanaratne and that they were the ones who stopped him and searched him. He has also admitted that after the arrest, he was taken to the police station and productions were sealed. The fact that he was taken along with the productions to Kuliyapitiya Hospital for the purpose of weighing was also an admitted fact by the appellant. What he has denied was that he was found in the possession of 210 packets of heroin as claimed by the police. He has claimed that the heroin was introduced upon him at the police station.

It clearly appears from the judgement of the learned High Court Judge that the discrepancies as to the time of arrest in the evidence of PW-01 has been well considered. When considering the sequence of events that has taken place after PW-01 and his team has left the police station around 7 a.m., it is clear that PW-01 stating in one occasion that the arrest was between 7.02 and 7.05 a.m. was either a genuine mistake or a typographical error as correctly observed by the learned High Court Judge. However, the witness has corrected himself as to the time of arrest in his evidence. If one considers the timeline of the events that have taken place before and after the arrest of the appellant, it clearly shows that the arrest had been at 11.45 a.m. and it was only thereafter, that he has been taken to the police station and his statement has been recorded. After that, the police have accompanied him to the Kuliyapitiya hospital for the weighing of the quantity of heroin found in his possession.

PW-11 who is an independent witness has testified that the police came with the appellant and it was she who weighed the productions.

When taken as a whole, it is abundantly clear that such a trivial mistake in evidence which has been subsequently well explained cannot be treated as a discrepancy that go into the root of the matter.

It was stated in **Sarkar on Evidence, 15th Edition, page 112;**

> *"Minor discrepancies are possible, even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence. (**Sidhan Vs. State of Kerala (1986) Cri LJ 470, 473 (Kerala)**). But discrepancies in the statements of witnesses on material points should not be passed over, as they seriously affect the value of their testimony (**Brijlal Vs. Kunwar, 36A187: 18CWN649: A1914PC38**). The main thing to be seen is whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the*

*latter, however, no such benefit will be available to it (***Krishna Pillai Sree Kumar Vs. State of Kerala A (1981) SC 1237, 1239**).*"*

In the case of **State of UP Vs. Anthony AIR (1985) SC 48,** the Indian Supreme Court stated that;

"While appreciating the evidence of a witness, the approach must be whether the evidence read as a whole appears to have a ring of truth."

The court went on to elaborate further that,

"Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole."

When it comes to the question of credibility of the witnesses and the probability factor of what they are saying is concerned, PW-01 and his team have left the police station not with the aim of arresting the appellant. After receiving an information that the appellant has gone to Colombo and he would be returning with some quantity of heroin, PW-01 has not waited until the time the appellant will arrive. He has assigned that duty to two of his subordinates and has left for some other duty. It was his evidence that on his return towards the place where he was informed that the appellant would come, he saw the appellant and his two subordinate officers following him. The position of the appellant had also been that, when he was walking in the Kuliyapitiya town, PW-02 and the other officer came and questioned him and later he was arrested. Apart from the discrepancy as to the time which I have considered earlier, there are no material contradictions in the evidence of PW-01 or the evidence of PW-02.

I am unable to agree with the contention of the learned Counsel for the appellant that there are *per se* and *inter se* contradictions between the evidence of the said two witnesses. On the contrary, when taken as a whole, I am of the view that

their evidence was credible and trustworthy and has not created any doubt in relation to their version of events.

As determined correctly by the learned High Court Judge, after being satisfied that the prosecution evidence can be believed, he has proceeded to consider whether the defence taken up by appellant has created any reasonable doubt as to the evidence of the prosecution witnesses and at least whether it has given a reasonable explanation in relation to the incriminating evidence against him. The learned High Court Judge has found it was not so, and has decided to reject the defence of the appellant.

It is well settled law that in a criminal case, an accused person does not have to prove anything and it is solely upon the prosecution to prove the case against an accused beyond reasonable doubt. The only obligation towards an accused person is to explain any incriminating evidence against him reasonably or to create a reasonable doubt on the evidence of the prosecution. In such a scenario, benefit should be given to the accused person and he should be acquitted of the charges.

In the Indian case of **Mohamad Radhi Bin Yaakob Vs. Public Prosecutor (1991) 3CLJ2073**, it was held that;

> *"In a criminal matter, at the close of the defence case, what the Court needs to decide is to whether the defence has succeeded to raise any reasonable doubt on the prosecution case. If the answer is in the positive, then the accused person is entitled to his acquittal. It has to be remembered always that at no time, except in special circumstances, the burden of proof is cast on the defence. The burden rests all throughout on the prosecution to prove its case beyond reasonable doubt."*

The evidence of the prosecution had been that the appellant was found with 210 small packets of heroin in his possession. The stand of the appellant had been that the police took 263 packets of heroin from a drawer at the police station and 210 packets out of which was introduced to him. Other than suggesting that

there was no heroin in his possession when he was arrested and he was not wearing a trouser as claimed, but a sarong, the position that 210 packets of heroin were introduced at the police station had never been put to the relevant witnesses so that they can respond to the allegations. It is very much clear the position of the appellant when called for a defence was an afterthought, which has not created a reasonable doubt as to the charges against the appellant.

It needs to be noted that this is a case where a single High Court Judge has heard the evidence in its entirety and pronounced the judgement. Therefore, the learned High Court Judge had the benefit of hearing and observing the demeanor and deportment of all the witnesses and even hearing the dock statement of the appellant.

It is clear from the judgement that the learned High Court Judge has considered the evidence adduced before him with a good understanding as to the way the evidence in a criminal case should be weighed and analyzed. It was after well considering the evidence placed before him, the learned High Court Judge has concluded that the charges against the appellant had been proved beyond reasonable doubt.

Lord Pearce in the case of **Onnassi Vs. Vergottis (1968) 2 Lloyd's Report 403** observed that;

> *"One thing is clear not so much as a rule of law but rather as a working rule of common sense. A trial judge has, except on rare occasions, a very great advantage over an appellate court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a Court of Appeal should never interfere unless it is satisfied both that the judgement ought not to stand and that the divergence of view between the trial judge and the Court of Appeal has not been occasioned by any demeanor of the witnesses or truer atmosphere of the trial (which may have eluded the appellate court) or any other of those advantages which the trial judge possesses."*

In the case of **Alwis Vs. Piyasena Fernando (1993) 1 SLR 119, G.P.S.D. Silva CJ.** observed that the Court of Appeal would not lightly disturb the findings of primary facts made by a trial judge unless it is manifestly wrong as they have the priceless advantage of observing the demeanor of witnesses which the judge of the Court of Appeal does not have.

I am of the view that this is a judgement pronounced by the learned High Court Judge after giving due consideration to the evidence placed before him with good reasoning, which is a judgement that needs no interference by this Court.

Hence, the appeal of the appellant is dismissed for want of merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal