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/0176/2020

Kiduru Mohideen Mohamed Ishtikar

High Court of Galle
Case No: HC/4231/2015

Accused-Appellant

vs.

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

Complainant-Respondent

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

COUNSEL : **Nihara Randeniya for the Appellant.**
Azard Navavi, DSG for the Respondent.

ARGUED ON : **03/11/2022 and 08/11/2022**

DECIDED ON : **12/12/2022**

****

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Colombo under Sections 54(A) (b) and 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking and Possession of 3.83 grams of Heroin (diacetylmorphine) on 06th June 2014.

The prosecution had called 08 witnesses in support of their case and marked production P1-18. When the defence was called, the Appellant had made a dock statement and closed his case.

After the consideration of evidence presented by the prosecution and the defence, the Learned Trial Judge found the Appellant guilty on both counts and has sentenced him to life imprisonment on the both counts on 29/05/2020.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Counsel for the Appellant informed this Court that the Appellant had given his consent to argue this matter in his absence due to the Covid 19

pandemic. Hence, argument was taken up in his absence but was connected via Zoom platform from prison.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. That the Learned Trial Judge failed to consider that the prosecution version did not pass the test of probability.
2. That the Learned Trial Judge erred in both facts and law when concluding that the prosecution proved the case beyond reasonable doubt.
3. That the Learned Trial Judge did not evaluate the defence evidence from the correct perspective and rejected the same in the wrong premise.

Background of the case.

On 06/06/2014 SI/Nimal Officer-in-Charge of Crime Prevention Unit of the Galle Police Station, as usual left the police station at around 8.30 hours with his team of five police officers to engage in Crime Prevention Duty in Galle police area. While they were patrolling in Wakwella, Minuwangoda, Binge Kanda,Weliwatta and Kongaha in Galle Police areas, near Weliwatte railway gate he had met an informer who had provided a reliable information about a person trafficking of Heroin. After getting all necessary information about the person's description including his type of attire he had clad with, proceeded to the location which was about 50-60 meters ahead.

At the location, which was called by Kone Gaha Handiya spotted a person matching with the information standing behind few three-wheelers parked. When he reached him and inquired, his suspicious conduct led to further inquiry. When he was subjected to a body check taken to a nearby construction site, a parcel with a brown coloured substance had been detected from his underwear. As the substance recovered from the Appellant reacted for Heroin, the Appellant was arrested immediately and brought to the Galle Police Station after temporary sealing the productions at the place

of arrest. At the Galle Police Station, the substance was weighed in front of the Appellant. The gross weight of the substance had been 17.940 grams and same had been re-sealed and handed over to the reserve police officer PW7, PS/1623 Dharmappriya under PR No.1069/2014 at 11.06 hours.

PW2, SI/Asanka Kumara had corroborated the evidence given by PW1 on every aspect including on minute details put in the police Information Book.

To prove the chain of custody witnesses PW07, PW08, PW9 and PW12 and production clerk of the Galle Magistrate Court were called.

After calling PW10, the Government Analyst, the prosecution had closed the case. When the Learned Trial Judge had called for the defence, the Appellant made a dock statement and closed the case for the defence.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person and this burden never shifts. Hence an accused person has no burden to prove his case unless he pleads a general or a special exception in the Penal Code.

In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 held:

> *"A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences in relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions…."*

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 **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

> *"the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice".*

At the hearing the Learned Counsel for the Appellant commenced his augment by combining the first and second grounds of appeal together. In those grounds the Appellant contended that the Learned Trial Judge failed to consider that the prosecution version did not pass the test of probability and erred in both facts and law when concluding that the prosecution proved the case beyond reasonable doubt.

In this case PW1 had vividly given evidence as to how the raid was conducted after the information he had received while on duty. Acting on that information, he had successfully arrested the Appellant who was totally a stranger to him. The Learned Counsel strenuously placed his submission on the time factor consumed for the entire raid and reporting back to the police station.

As correctly pointed out by the Learned Deputy Solicitor General, PW1 and PW2 had clearly explained that after the arrest of the Appellant at 9.45 hours, they returned to the station, though the exact time is not mentioned and the time referred to as 10.45 hours is not the time, but it was the time they entered their notes in the Information Book. The time was put as 10.45 hours includes the time they reached to the police station under the road

traffic condition, weighing and sealing the production. Hence, 10.45 hours is not the time of return but the time the notes were entered. This position had been very clearly explained during the trial by the witnesses. The Learned High Court Judge had very accurately discussed and analysed the evidence pertaining to time consumption for the entire raid and accepted the prosecution position which clearly demonstrate that the prosecution had passed the test of probability of the prosecution case.

The next point that the Counsel for the Appellant argued about using a private vehicle for the raid conducted. As stated by the witnesses this is not a case the raiding team left after an information. While they were on normal patrol duty, they received the information which needed to be acted immediately. This is not an unusual happening considering the nature of the case. Further going for raid in civics also not unusual or illegal considering the nature of the raid. Further the witnesses had put clear notes that they were going in civil uniform and also in a private vehicle.

Bradford Smith, Law Commission, WWW.smithlitigation.com 2014 states that:

> *"Good police note taking is important for two reasons. First, it invariably bolsters the credibility of the police officer giving evidence. Second, it promotes the proper administration of criminal justice by facilitating the proof of facts".*

Hence, the Learned Counsel for the Appellant had failed to the satisfy any merit under these appeal grounds.

In the final ground of appeal, the appellant contend that the Learned Trial Judge did not evaluate the defence evidence from the correct perspective and rejected the same in the wrong premise.

The Appellant in his dock statement submitted that he was wrongly joined to this case by PW1, who is known to him also he insisted him to provide

information about two of his friends living in Maligawatte, Colombo-10. He admits the arrest but disputes the place of arrest.

Even though the dock statement of an accused has less evidential value our courts never hesitated to accept the same when it creates a doubt on the prosecution case.

In **Don Samantha Jude Anthony Jayamaha v. The Attorney General** CA/303/2006 decided on 11/07/2012 the court held that:

> *"Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of the evidence that is in the light of the evidence for the prosecution as well as the defence."*

In **Kathubdeen v. Republic of Sri Lanka** [1998] 3 SLR 107 the court held that:

> *"It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt."*

In this case the Learned Trial Judge had very correctly and extensively discussed and analysed the dock statement of the Appellant and correctly concluded that the dock statement of the Appellant not created any doubt against the overwhelming evidence of the prosecution. He has correctly given reasons as to why he rejects the defence evidence. Thereby, the Learned High Court Judge had considered all the evidence placed in its correct perspective and arrived at the finding to convict the Appellant. Hence, this ground also sans any merit.

In this case PW1 and PW2 are key witnesses. Their evidence is clear, cogent and unambiguous. The court considering all other evidence presented by the

prosecution, without any hesitation relied on that evidence and convicted the Appellant. Further their evidence has passed the probability test.

As the prosecution had proven this case beyond reasonable doubt, I affirm the conviction and the sentence imposed by the Learned High Court Judge of Galle dated 29/05/2020 on the Appellant. Therefore, his appeal is dismissed.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL