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/0200/2020

High Court of Colombo

Case No: HC/7401/2014

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Thewaththa Kale Reman Appuhamilage Karunaratne

ACCUSED

AND NOW BETWEEN

Thewaththa Kale Reman Appuhamilage Karunaratne

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Dimuthu Senarath Bandara with Keheliya Alahakoon and Malindu Peiris for the Accused Appellant

: A. R. H. Bary, DSG for the Respondent

Argued on : 16-11-2022

Written Submissions : 09-03-2022 (By the Accused-Appellant)

: 05-10-2021 (By the Respondent)

Decided on : 15-12-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) preferred this appeal on being aggrieved by his conviction and the sentence by the learned High Court Judge of Colombo, where he was sentenced to life imprisonment.

The appellant was indicted before the High Court of Colombo for trafficking 2.37 grams of Diacetylmorphine, commonly known as Heroin, which is a prohibited drug in terms of Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984, and punishable in terms of the said Ordinance. The offence was alleged to have been committed on 27th August 2013.

He was also indicted for having possession of the same quantity of the drug at the same time and at the same transaction, which was also an offence punishable in terms of the above-mentioned Poisons, Opium and Dangerous Drugs Ordinance.

After trial, he was found guilty as charged by the learned High Court Judge of his judgement dated 14th October 2020, and sentenced as mentioned above.

Facts in Brief

This was a detection by the officers of the Excise Department attached to its Drugs Prevention Unit. PW-09 who was an Excise Inspector during the time relevant to this raid was the officer who made the detection. On 27th August 2013, he and a team of officers, including PW-07, Excise Guard 990 Sisira, has left their office for routine vice prevention duties. While on duty and after conducting two successful raids, the earlier mentioned Excise Guard Sisira has informed PW-09 that he received an information that a person called Kalu is preparing to sell some packets of heroin and if they travel towards the Siripala Jinthu Mawatha, the person can be arrested. The said information has been received around 6.50 p.m. in the evening.

Upon the receipt of this information, PW-09 and PW-07 Sisira has travelled to the area mentioned by the informant by getting into a three-wheeler. After reaching the location around 7.20 p.m. they have met the informant and had walked with him up to a telecommunication center located by the side of the road. While both of them were waiting outside, the informant had gone inside the communication center, which was about five meters away from the place where they were standing. It was also his evidence that the informant provided the description of the person named Kalu and how he will be dressed for easy identification. After waiting for about 25 minutes, they have observed a person with the given description coming towards them. At that moment, the informant has come out of the communication center and after informing the PW-01 that the person coming towards them is the person called Kalu, has discreetly moved away.

It was his evidence that after confronting the person, whom he has identified as the appellant in the Court, and informing that they are from the Excise Department, the appellant was escorted to the behind of the earlier mentioned communication shop and searched. He has stated that because it was difficult to search a person on the street, he was escorted to the behind of the

communication shop. Upon searching the appellant, he has found a parcel in a cellophane cover in the possession of the appellant. Upon inspecting further, he has found a brown-coloured powder inside the cover, which he has identified as heroin through his experience.

Upon this detection, PW-09 has arrested the appellant around 7.55 p.m. He has then informed his superior officer who was in the vehicle they were travelling to come near the place of arrest. After taking the appellant and the heroin recovered to the vehicle, he has taken steps to temporarily seal the production. The contents had been weighed at the Excise Station, and it has been found that the appellant was in possession of 4800 milligrams of heroin. Thereafter, PW-09 has taken the usual steps to seal the productions and later hand it over to the Court.

According to the Government Analyst Report, the quantity of the substance sent to them for analysis had contained 2.37 grams of pure heroin.

PW-07 Excise Guard 990 Sisira, who was the officer who assisted PW-09 in this detection has given evidence to corroborate the version of events as stated by PW-09.

The stand taken up by the appellant at the trial had been that he was never arrested in the manner the prosecution witnesses are narrating, but arrested at his home in Ragama. He has maintained that he had no heroin in his possession at that time.

When called for a defence at the conclusion of the prosecution evidence, the appellant has chosen to make a statement from the dock. He has maintained the same position as stated above, and it was his stand that excise officers came to his home and demanded him to hand over heroin, for which he has replied that he has no such thing in his possession. He has taken up the position that when the excise officers could not find any heroin in his possession or in his house, they demanded money from him and because of his refusal, he was implicated for having heroin and the charges against him are false charges.

The Grounds of Appeal

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

1. The learned trial Judge has misdirected himself in law by interpreting an admission of a certain part of the inward journey by the defence as an admission of the entire production chain and the alleged apprehension of heroin.
2. The prosecution has failed to adduce cogent evidence to prove the chain of custody of productions from the point of detection up to the sending of the productions to the Government Analyst.
3. The learned trial Judge has failed to duly evaluate the omissions and contradictions of the prosecution evidence which were brought to his attention by the defence and misdirected himself both on facts and law in arriving at the impugned judgement.
4. The learned trial judge has failed to consider the reasonable doubts created by the defence pertaining to taking productions into custody.
5. The learned High Court Judge has failed to properly evaluate the doubts as to the alleged part played by the informant in the raid and whether it was probable.
6. The learned High Court Judge has failed to properly evaluate the dock statement made by the appellant.

Consideration of The Grounds of Appeal

I will now proceed to consider the first two grounds of appeal urged by the learned Counsel for the appellant, which are grounds based on the custody of productions, that the prosecution has failed to prove the proper chain of custody.

It is clear from the proceedings before the High Court that an admission had been recorded in terms of Section 420 of the Code of Criminal Procedure Act admitting the chain of custody of the productions.

The learned High Court Judge has gone on the basis that the custody of productions has been an admitted fact and therefore, the appellant is precluded from challenging the custody at a later stage.

It was the contention of the learned Counsel for the appellant what has been admitted was the fact that PW-07 Sisira has properly handed over the productions to the Government Analyst and nothing more.

However, it was informed by the learned Counsel that he is only challenging the custody of the productions on the basis that the prosecution has failed to provide evidence to substantiate the custody of productions from the moment PW-09 allegedly detected heroin and until it was sealed. Other than that, it was informed by the learned Counsel that he is not challenging the chain of custody of the productions.

As pointed out rightly by the learned Deputy Solicitor General (DSG) on behalf of the respondent, it is abundantly clear from the evidence of PW-09 who was the person who allegedly have made the detection, that the production was in his custody until he handed over the same to the Court on the following day. Evidence clearly shows that after the detection, he has taken the productions to the van on which the raiding party was travelling. The evidence provides clear indication that the productions have been in the custody of PW-09 when he took them to the van and temporarily sealed it. Thereafter, he has taken the productions along with the appellant to the excise station, where he had weighed the productions and resealed it following the proper procedure. He has kept the productions in his personal locker until it was handed over to the Magistrate Court on the following day.

I am unable to agree with the learned Counsel for the appellant that the prosecution has failed to establish the chain of custody, as I have considered above. I find no merit in the first two grounds of appeal urged by the appellant.

As the other four grounds of appeal urged are interrelated, I will now consider the said grounds of appeal together. The learned Counsel for the appellant

submitted that the way the prosecution witnesses have given evidence in relation to the informant cannot be considered probable in the way the learned High Court Judge has determined. It was his contention that no reasonably prudent person will take a risk in the manner the prosecution witnesses have given evidence as to the way the informant has shown the appellant to them and left the place of detection.

According to the evidence, the informant has accompanied PW-09 and PW-07 up to a communication shop situated by the side of the street where the detection has allegedly taken place. While the two excise officers were waiting outside of the communication shop, the informant has gone inside the shop. After about 25 minutes, the two officers have noticed a person wearing the clothes as mentioned by the informant and fits the description given, coming towards them. At that moment, the informant had come out of the communication shop. According to the evidence of PW-09, the informant has shown the person coming towards them, saying, that is Kalu, and had left the place discreetly.

However, according to the evidence of PW-07, the informant had pointed towards the appellant by gestures using his head to indicate that he was the person the witnesses are waiting for, and had left the place.

It is clear from the judgement that the learned High Court Judge also has considered that there is a discrepancy between the evidence of PW-09 and 07 in that regard. However, he has concluded that what the PW-09 referred to as that the informant said (අර එන්නේ කලු) could also mean the gestures referred to by PW-07, and hence, there is no material to consider the said discrepancy as relevant.

With all due respect to the learned High Court Judge's determination of this matter, I am of the view that this was not a discrepancy that can be lightly disregarded if the probability factor of the version of events by the witnesses are to be considered.

According to the evidence of the witnesses, this is a raid that had been conducted based on an information provided by an informant. The informant has allegedly provided the name of the person, his physical features and the clothes that he would be wearing, which would mean that for an officer who is well experienced can identify such a person without any other help.

In the instant action, the informant, after seeing the appellant coming towards them has come out of the communication shop and spoken to PW-09. According to PW-07, he has shown gestures so that the appellant can be identified by them. It can be hardly believed that an informant would take such a risk in showing a person who is dealing in heroin in full view of him in the manner the witnesses say. If he exposes himself in the way it was stated, there is a possibility that the approaching person would see him in the company of the excise officers. The possibility of others who even may be acquaintances of the person who is dealing in Heroin observing the informant coming with the officers, waiting in the lookout and speaking or communicating with them exposing himself to the appellant is very remote in my view. I am unable to believe that such a thing is probable under normal circumstances.

I am of the view that the probability factor of the evidence of the witnesses as to the actions of the informant is doubtful under the circumstances.

In the same context, I find the discrepancy in the evidence of the two main witnesses with regard to the way the appellant had been searched also creates a doubt in the prosecution case. According to PW-09, when the appellant was stopped, he has decided to escort him to the behind of the communication shop because they could not search him on the street, which was crowded. In his evidence, he has stated several times that it was to the behind of the communication center the appellant was taken. However, the evidence of PW-07 had been that the appellant was taken into the inside of the communication shop and searched.

I am not in a position to agree with the learned High Court Judge's determination that there was no contradiction in the two positions. The learned High Court Judge has determined that what was said by PW-09 that he escorted the appellant to the behind of the communication shop means that he has taken him inside of the communication shop and to the rear side of the inside of it. I find that if one looks at the evidence of the relevant witnesses in its totality, there was no basis to come to such a conclusion. I am of the view that there was a clear contradiction between the version of events by the two witnesses.

The next matter brought to the notice of the Court by the learned Counsel for the appellant was that there was a contradiction as to the cellophane bag allegedly found in the possession of the appellant. He referred to the evidence where PW-09 says a small cellophane bag was recovered with a tightened top in the possession of the appellant. This is the bag that has been marked as P-2 at the trial. It has been brought to the notice of the trial Court that in fact P-2 was not a small bag, but a part of a cellophane bag that has been cut out of a corner of a larger bag. I do not find any material contradiction in that regard as the witness has explained later what he meant by a small cellophane bag and as to why he did not make notes that when found it had a knot.

However, I am of the view that the earlier mentioned probability factor and the discrepancies and contradictions are material that goes into the credibility of the evidence of the witnesses, which should have been looked in the favour of the appellant.

It was held in the case of **Alim Vs. Wijesinghe (S.I. Police, Batticaloa) 38 CLW 95** that; Where the same facts are capable of inference in favour of the accused and also of an inference against him, the inference consistent with his innocence should be preferred.

Needless to say, that the two witnesses are Excise Department officials who are trained in conducting this type of raids and knowledgeable of the way they should give evidence before a Court in that regard. They have the added

advantage of reading their notes beforehand. I am of the view that under the circumstances, an accused person is entitled to have the advantage of material contradictions of the evidence of such witnesses. I am also of the view that a trial Court cannot justify such discrepancies with a view of filling the gaps in the evidence of the prosecution, especially in the cases of this nature.

It is settled law that when considering the evidence in a criminal case, the evidence has to be taken in its totality, be it the evidence for the prosecution or for the defence.

In the case of **Don Samantha Jude Anthony Jayamaha Vs. The Attorney General, C/A 303/2006 decided on 11-07-2012** it was held:

> *"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 in in the light of the evidence for the prosecution as well as the defence."*

In this matter, when called for a defence, the appellant has chosen to make a statement from the dock. Under our law, although such a statement has a lesser value, given the fact that it was not evidence given under oath or subjected to the test of cross-examination, it does have evidential value.

In the case of **Queen Vs. Kularatne 71 NLR 529** the Court of Criminal Appeal considering the question as to how to evaluate a dock statement of an accused, held as follows;

(1) If the unsworn statement is believed, it must be acted upon.
(2) If it raises a reasonable doubt in the minds of the jury about the case for the prosecution, the defence must succeed.

In **Ariyadasa Vs. Queen 68 NLR 66,** it was held as follows;

(1) If the Jury believed the accused- appellant, he was entitled to be acquitted.

(2) The accused is also entitled to be acquitted if his evidence, though not believed was such that it caused the jury to entertain a reasonable doubt in regard to his guilt.

The position maintained right throughout by the appellant had been that he was never arrested in the place mentioned by the witnesses and in the manner, it was mentioned. His position had been that he was arrested while at home in Ragama and when the excise officers could not find any heroin in his possession or in his house, the heroin was introduced to him because he could not adhere to the demands made by the officers.

In my view, it is therefore necessary for the prosecution to establish beyond reasonable doubt that the detection was made in the manner it was stated and at the place of the detection. When considering the probability factor of the way the informant has allegedly had behaved just before the arrest of the appellant and the discrepancies in the evidence of PW-09 and PW-07, as I have considered earlier, I am of the view that this was not a conviction that can be considered safe.

Therefore, giving the benefit of the doubt in the appellant's favour, I set aside the conviction and the sentence, and acquit the appellant of the charges preferred against him for the reasons considered as above.

The appeal is allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal