IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the Matter of an appeal made in terms of Article 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal Case No:
CA/HCC/323/2019

VS.

HC of Colombo Case No:
HC 7262/14

Mathakadeera Arachchige Manjula Kumara
No. X/481,Rajaguru,
Subhuthi Road,Wellawatta.

Accused

AND NOW BETWEEN

Mathakadeera Arachchige Manjula Kumara
No. X/481,Rajaguru,
Subhuthi Road,Wellawatta.

Accused-Appellant

Vs.

The Democratic Socialist Republic of Sri Lanka.

Complainant-Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Neranjan Jayasinghe with Harshana Ananda for the Accused Appellant
Azard Navavi, DSG for the State

Written Submissions: 03.07.2020 (by the Accused Appellant)
30.07.2021 (by the Respondent)

Argued On : 02.03.2023

Decided On : 03.04.2023

****

B. Sasi Mahendran, J.

This is an appeal by the Accused-Appellant (hereinafter referred to as "the Accused") on being aggrieved by his conviction and sentence imposed by the learned High Court Judge of Colombo.

The Accused was indicted before the High Court of Colombo for having in his possession 2.11 grams of Diacetylmorphine, commonly known as Heroin, and trafficking the said quantity of Heroin on 07th May 2013, which are offences punishable under the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

The Prosecution led evidence of eight witnesses including the government analyst and closed the case for the Prosecution. The Accused made a dock statement and led the evidence of one witness. The learned High Court Judge of Colombo, in his judgment, found the Accused guilty on both counts. Accordingly, the Accused was convicted and sentenced to life imprisonment.

Being aggrieved by said judgment this appeal was preferred by the Accused.

The following grounds of appeal were urged by the learned Counsel for the Accused in the course of his oral and written submissions:

1. The learned trial Judge had failed to consider the vital contradictions of the Prosecution witnesses.
2. The learned trial judge had wrongly rejected the dock statement and the evidence of Defence witness.
3. The learned trial judge has been biased towards the Prosecution and has abused Defence witnesses.

When this matter was argued before us on 02.03.2023, the learned Counsel for the Defence informed us that the Accused would not be pursuing the third ground of appeal. Therefore, it is the first two grounds of appeal that we will address.

Facts in brief, as per evidence led by the Prosecution, are as follows.

The witness SI Nawarathna (PW1), attached to Dehiwala Police Station, had been contacted by the Officer in Charge (OIC) of Dehiwala Police Station on 7th May 2013 at around 13.20 while he was on patrol duty, pertaining to information regarding an individual in possession of Heroin. It should be noted that at this point he had previously arrested a person for possession of Heroin at 12.10. Upon receiving the call, he proceeded to the Police Station and handed over the suspect and the production to the reserve. He then met with the four Army intelligence officers and ascertained information about the individual in possession of drugs, residing at No. 481 Rajaguru Sri Shubodhi Road, Wellawatta. Following this, PW1 went to the house in question in a Police three-wheeler with PC 1568 Bandara (PW2), PC 7248 Prasad (PW3), PC 82459 Kumara (PW4), and the Army Officers who showed the place. At the house, they searched a person, believing that person to be the Accused, and found a parcel covered in pink cellophane paper in his right trouser pocket.

As stated by PW1, (On page 63 of the Brief – proceedings dated 20/10/2020)

"ප්‍ර - මහත්මයා, ඔබ කිව්වා අංක 481 කියන නිවසට ගිය බව?

උ - එහෙමයි.

ප්‍ර - ගිහිල්ලා මොකද කලේ?

උ - ස්වාමීනි, ඒ නිවසට ගිහිල්ලා නිවැසියන්ට කතා කරලා ඊට පස්සෙ ඒ නිවස ඇතුලෙ පුද්ගලයෙක් හිටියා.

තොරතුරට අනුව ඒ පුද්ගලයා සැකකරු බවට සැක හිතිලා පරික්ෂා කලා."

Upon inspection, PW1 identified the contents in the parcel as Heroin and accordingly, they made the arrest at 14.10. Thereafter, the suspect, along with the Heroin which was in his possession, was taken to Devi Jewelries (situated at No. 269, Galle Road, Wellawatta) at around 15.00 to weigh the Heroin. It was found that there were 11 grams and 20 milligrams of Heroin. They reached the Wellawatta Police Station at 18.05, and the production was sealed and handed over to the reserve along with the suspect. Thereafter, the police officers PW1 along with other officers proceeded to the Dehiwala Police Station. They arrived at the said Police Station at around 20.00 and at that time only, the production from the first raid is properly sealed and the entry is made by PW1.

PC 72992 Prasad (PW3) is an officer who assisted PW1 in the raid. PW3, corroborates PW1's version regarding the place, time, and way they arrested the Accused, but varies from PW1's version as to the time of arrival at Wellawatta Police Station. According to PW3, they arrived at Wellawatta Station at around 16.30 and he had recorded the statement of the Accused at 17.00.

PW9, namely Major (retired) Wanninayaka was an Army intelligence officer and a subordinate to Major Peiris (PW7) who led the surveillance of the Accused. According to his evidence, he only joined the surveillance team on the day before the arrest, and on the evening of the same day, they reported to Major Peiris. The next day, they went to the Dehiwala Police Station and met with PW1, and after that followed PW1 and his team to the house of the Accused, although the Army officers did not enter the house. It is his position that after the arrest, the Police team took the Accused and the production to Devi Jewelers to weigh the Heroin. According to PW9, Devi Jewelers was just opposite the Police Station, on other side of the Galle Road from the Wellawatta Police Station and the distance between was about 500m.

The Accused, in his dock statement, stated that he was not arrested by PW1 or any the other police officers, at his house, but he was taken to his house, while he was washing his vehicle at the public tap, by persons who identified themselves to be army officers. Once there, after receiving a telephone call, a parcel containing Heroin had been retrieved

from the goat shed near the house. Accordingly, he was arrested and taken to the Dehiwala Police Station around 13.00. His version was corroborated by one witness called by him, namely one Weerasingha Arachchilage Gnanasiri (W1).

At the hearing, the learned Counsel for the Accused contended that the learned High Court Judge failed to consider the vital inter se and per se contradictions in the evidence of the three main witnesses, namely PW1, the officer who led the raid, PW3, one of the officers that assisted him, and PW9, one of the Army officers. He further submitted that the learned Trial Judge failed to evaluate the dock statement and the evidence of the Defence witness correctly. That is to say, if the learned Judge properly considered the vital contradictions and evidence of the Prosecution, he would not have dismissed the version of the Accused.

Before we consider the discrepancy in the two witnesses' evidence, as quoted above, this Court has to consider the evidentiary value in the event such contradictions are discovered.

In Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyd's Rep. 403, Lord Pearce along with Viscount Dilhorne, Lord Morris of Borth-Y-Gest, Lord Guest, held that (page 431):

> *" "Credibility" involves wider problems than mere " demeanour " which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the tight, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that 'which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that,*

is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

This judgment was adopted in the case of Wickremasuriya v. Dedoleena and Others 1996 [2] SLR 95 in which his Lordship Jayasuriya J. held:

"I have already referred to the unsatisfactory and untrustworthy evidence given by witness Agampodi Sirisena Mendis Gunasekera. Learned President's Counsel has referred me to the evidence given by some of the witnesses called on behalf of the Applicant and certain contradictions marked in relation to their evidence given at the abortive inquiry. In particular, he has referred me to contradiction marked V6. After a considerable lapse of time, as has resulted on this application, it is customary to come across contradictions in the testimony of witnesses. This is a characteristic feature of human testimony which is full of infirmities and weaknesses especially when proceedings are held long after the events spoken to by witnesses; a judge must expect such contradictions to exist in the testimony. ***The issue is whether the contradiction or inconsistency goes to the root of the case or relates to the core of a party's case. If the contradiction is not of that character, the court ought to accept the evidence of witnesses whose evidence is otherwise cogent, having regard to the Test of Probability and Improbability and having regard to the demeanour and deportment manifested by witnesses.*** *Trivial contradictions which do not touch the core of a party's case should not be given much significance, specially when the 'probabilities factor' echoes in favour of the version narrated by an applicant. Justice Thakkar in his judgment in Barwada Boginbhai Hirjibhai v. the State of Gujerat, remarks: "Discrepancies which do not go to the root of the matter or to the core of a party's case and shake the basic version of the witness cannot be given too much importance. More so, when the all important probabilities factor echoes in favour of the version narrated by the witness."* [emphasis added]

The first discrepancy brought to the notice of this Court is the time and place at which the information was received by PW1. It is pointed out that according to the evidence of PW1, he and his team were away from the Police Station when they received the information. As stated by PW1 (on page 59 of the Brief – proceedings dated 20/10/2016):

“ප්‍ර - මහත්මයා, කිව්වා මෙම නඩුවට අදාලව රාජකාරි කලේ 2013-05-07 දින කියලා.

උ - එහෙමයි.

ප්‍ර - මහත්තයා කුමන ස්ථානයේ සිටින කොටද මෙම තොරතුර ලැබුනෙ? කුමන රාජකාරියක නිරත වෙලා ඉන්න කොටද මෙම තොරතුර ලැබුනෙ?

උ - ස්වාමීනී, මම වැටලීම් භාර නිලධාරින් සඳහා ප්‍රථමයෙන් නිළධාරී කණ්ඩායමක් සමඟ යනකොට තමයි මෙම තොරතුර ලැබුනේ.”

Later he contradicts the above by saying that he received information when he came to the Police Station. As stated by PW1 (on page 157 of the Brief – proceedings dated 03/09/2018):

“ප්‍ර - ඔබතුමා එදා තවත් වැටලීමකින් පස්සෙ පොලිස් ස්ථානයට ආවට පස්සෙ මේ තොරතුර ලැබුණා. ඒ සම්බන්දයෙන් ක්‍රියාත්මක උනා කියලනේ කියන්නේ?

උ - එහෙමයි ස්වාමීණී.”

Another vital point raised by the learned Counsel for the Accused is the discrepancy in the evidence of PW1 and PW3 as to the time of arrival at Wellawatta Police Station. PW1 claims that they arrived at 18.05. As stated by PW1 (on page 133 of the Brief - – proceedings dated 03/09/2018):

“ප්‍ර - එතකොට වැල්ලවත්ත පොලිස් ස්ථානයට මහත්මයලා ගියේ කීයටද?

උ - වැල්ලවත්ත පොලිස් ස්ථානයට පැය 18.05ට ගියෙ ස්වාමීනි.”

However, according to evidence of PW3, they arrived at the Wellawatta Police Station at around 16.30 and he recorded the statement of the Accused at 17.00. As stated by PW3 (on page 187 of the Brief – proceedings dated 03/09/2018):

“ප්‍ර - මහත්මයලා වැල්ලවත්ත පොලිස් ස්ථානයට ගියේ කීයටද?

උ - මා විසින් සටහන් යොදා නෑ ස්වාමීනි. 16.30 පමණ වන විට පොලිස් ස්ථානයට ගියා ස්වාමීනි.”

(On page 187 of the Brief)

“ප්‍ර - මහත්මයාගේ සටහන දැම්මෙ වැල්ලවත්ත පොලිස් ස්ථානයේ ඉදන් ද?

උ - එසේය ස්වාමීනි.

ප්‍ර - කීය ද ඒ මහත්මයා දාලා තිබෙන වෙලාව?

උ - ප්‍රකාශයේ වෙලාව දාලා තියෙන්නෙ ගරු ස්වාමීනි පැය 17.00 ට පමණ ස්වාමීනි.”

As the learned Counsel pointed out, according to PW1's evidence the police kept the Accused at Devi Jewelers for about three hours. Taking such a long time to surrender the production and the Accused to the Wellawatta Police Station casts a doubt on the credibility of PW1.

Another discrepancy found in regard to the Prosecution evidence is regarding the distance from the Wellawatta Police station to Devi Jewelers.

As stated by PW1 (on page 133 of Brief – proceedings dated 03/09/2018):

"ප්‍ර - දේවි ජුවලසර්ී ආයතනයේ ඉදන් වැල්ලවත්ත පොලිස් ස්ථානයට කොච්චර විතර දුරයි ද?
උ - කිලෝමීටරයකට ආසන්න ප්‍රමාණයක් දුරයි ස්වාමීනි."

On the other hand, PW9 stated thus (page 273 of Brief – proceedings dated 14/112018):

"ප්‍ර - මහත්මයාට හරියටම මතකද දේවි ජුවලසර්ී ආයතනය සහ වැල්ලවත්ත පොලිස් ස්ථානය අතර දුර?
උ - ජේන දුර අතන සිකුරිටි පාර හන්දියෙ ඉදල මීටර් 500 ක් වගේ."

It is our considered view that these discrepancies in the evidence need to be considered in the light of the Defence taken by the Accused to determine whether the evidence was credible and truthful.

In the case of James Silva v. The Republic of Sr Lanka [1980] 2 SLR 167, his Lordship Rodrigo J. stated thus:

> *"It is a grave error of law for a trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the defence in the light of the evidence led by the Prosecution. Our criminal law postulates a fundamental presumption of legal innocence of every accused till the contrary is proved. This is rooted in the concept of legal inviolability of every individual in our society, now enshrined in our Constitution. There is not even a surface presumption of truth in the charge with which an accused is indicted. Therefore to examine the evidence of the accused in the light of the Prosecution witnesses is to reverse the presumption of innocence.*

A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the Prosecution or by the defence in its totality without compartmentalising and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."

In the instant appeal, we are of the view that the discrepancies alluded to above cannot be treated as trivial; we cannot justify the same as being a result of human fallibility, since the evidence of the Prosecution Witnesses, when evaluated along with that of the Defence, does not appear to be cogent. Although keeping with the wisdom of Section 134 of the Evidence Ordinance, there are judicial dicta that a single Police Officer's evidence would suffice to secure a conviction, in this case, there appears to be a lack of cogency not only intra the evidence of the chief witness but a lack of cogency inter the evidence of the Prosecution witnesses; officials who are expected to be trained in their craft, as opposed to ordinary lay persons who are intimidated or overwhelmed by the processes. This is not to say that there are no exceptions. When we consider these contradictions, it is sufficient to reject the prosecution version as these contradictions go to the root of the case.

The other ground of appeal urged by the learned Counsel for the Accused was the failure on the part of the learned High Court Judge to consider the improbabilities of the version of the Prosecution. The learned Counsel for the Accused has submitted that evidence of the Army officers who gave the information regarding the raid is highly improbable. It was further submitted by the learned Counsel that the position taken by the Defence that the Accused was arrested by the Army Officers and later handed over to the Police is more probable. Learned Counsel further contended that the learned High Court Judge had clearly erred in rejecting the Defence's version.

PW1 stated that he went to the house, searched, and arrested the suspect. Yet, there is evidence to show that there were a number of people who were on the said premises, along with the suspect. There are no reasons given by PW1 as to why he had not searched the others, and how he was able to identify the suspect with such accuracy and precision, in a room of many. We have to be mindful of the fact that the information PW1 received concerned only the location of the house and the fact that a person with

Heroin was residing at that location. Therefore, the question that arises is if there were several people inside the house why the officers did not think to search the others?

According to the evidence of PW1 (on page 61 of the brief – proceedings dated 20/10/2016)

"ප්‍ර - ඒ අවස්ථාවේදී මොකක්ද ලැබුනේ තොරතුර. මේ වැටලීම සම්බන්ධයෙන් මොකක්ද ලැබුන තොරතුර?
උ - ස්වාමීණී, වැල්ලවත්ත, "රාජගුරු ශ්‍රී සුබෝධි" පාරේ අංක 481 දරණ නිවසේ පුද්ගලයෙකු සන්තකයේ විෂ මත්ද්‍රව්‍ය තිබෙනව කියල තමයි තොරතුරු ලැබුනේ."

(On page 63 of the Brief)

"ප්‍ර - මහත්මයා, ඔබ කිව්වා අංක 481 කියන නිවසට ගිය බව?
උ - එහෙමයි.
ප්‍ර - ගිහිල්ලා මොකද කලේ?
උ - ස්වාමීනි, ඒ නිවසට ගිහිල්ලා නිවැසියන්ට කතා කරල ඊට පස්සෙ ඒ නිවස ඇතුලේ පුද්ගලයෙක් හිටියා. තොරතුරට අනුව එම පුද්ගලයා සැකකරු බවට සැක හිතිලා පරීක්ෂා කලා"

The question arises without the identification of the Accused and the number of people who were inside the house how PW1 spotted the Accused and arrested him.

A similar circumstance was considered by his Lordship Sisira De Abrew J. in Munasighe Arachchilage Samanalee Perera v. The Republic of Sri Lanka CA 270/2006, decided on 2009-06-19. Where there were multiple individuals at the place of search and only one was searched by the Police, his Lordship questioned:

"If there were several women inside the house why didn't the police officers search the other women."

According to PW1, they did not take steps to search the house nor around the house after finding Heroin on the Accused. Therefore, it appears that upon finding Heroin on the Accused the raiding party has somehow come to the conclusion that it is the only amount the Accused had in possession. This again conjures up the matter of probability. How likely is it that the officers did not think to search the house of the Accused, the house in which the Accused was allegedly caught in possession of Heroin? How likely is it

that the Accused only had the Heroin in his pocket, and the police knew not to look for anymore?

Furthermore, according to PW9, he along with Major Peiris came to surveil a person suspected to have Heroin in his possession. Yet, when they came to know the person is having Heroin in his possession, they left the location without informing the police officers to come to the place immediately. On the other hand, the next day only they went to the Station and informed. It is highly improbable that army officers who have come to know of a person with drugs and identified him, leave the place, go to the police station and come back to arrest. A prudent officer would have stayed at the location to make sure the suspect does not leave the place. On the other hand, the Accused and his witness state that the Accused was handed over to the Police by the Army Officers. It is our considered view that, in the light of the Defence taken by the Accused, the story of the Prosecution is improbable.

Another point to consider is PW1's conduct. According to PW1, he handed over the production from the first arrest and left to No. 481 Rajaguru Sri Shubodhi Road, Wellawatta immediately. When we analyze how the production of evidence from the previous arrest was handled, it is evident that PW1 has failed to conduct himself according to the legal requirements pertaining to the handing over of substances such as Heroin and the suspect and to make entries in his notes as they left. Instead, the Heroin is simply handed over to the reserve and the entry is made by PW1 only at 20.00. When the question is put to him, PW1 claims that he deviated from standard procedure so that he could reach the place of the Accused immediately. In contrast, it is claimed by PW1 before they left, they checked both police and army vehicles and made sure nothing unwarranted was carried by the raiding party. The question here is whether it was possible for a reasonable person to do all these things when he was supposedly in a rush. This response by PW1 seems inconsistent with his assumed urgency at the time.

As stated by PW1 (on page 124 of the Brief – proceedings dated 03/09/2018):

"ප්‍ර - මම මහත්මයාට යෝජනා කරනවා එහෙම මෙම නඩුවට අදාල වැටලීම් සිදු කිරීම සඳහා දෙහිවල පොලිස් ස්ථානයෙන් මහත්මයා පිටවෙලා යනවානම් පිටවීමේ සටහනක් අනිවාර්යෙන් දමා තමා පිටවෙලා යන්න ඕනේ කියල යෝජනා කරනවා?

උ - පිළිගන්නවා ස්වාමීණි. නමුත් මෙය හදිසියේ ලැබුණු පණිවිඩය නිසා මෙම සැකකරු සහ නඩු බඩු

අස්ථානගත වෙයි කියන සැකය මත තමයි හැකි ඉක්මණින් පිටව ගියේ.''

(on page 62 of the Brief - – proceedings dated 20/10/2016) :

''ප්‍ර - කොයි ආකාරයෙන්ද යනකොට මහත්මයාගේ ඉතිරි නිලධාරින් තුන්දෙනාව දැනුවත් කලේ මේ සම්බන්ධයෙන්. මොන වගේ උපදෙස් ද ලබා දුන්නේ?

උ - මම දැනුවත්ව මුලින්ම සැකකරු පරීක්ෂා කරන ආකාරය, අත් අඩංගුවට ගෙන පරීක්ෂා කරන ආකාරය සහ සියලුම දේවල් පිලිබඳ දැනුවත් කලා.

ප්‍ර - මෙම වැටලීමට යාමට ප්‍රථමයෙන් මෙම නිලධාරින් සහ මහත්මයාගේ වාහනය පරීක්ෂා කිරීමට ලක් කරාද?

උ - එහෙමයි ස්වාමිණි.''

According to the Prosecution, the information was with regard to the surveillance conducted at No. 481 Rajaguru Sri Shubodhi Road, Wellawatta by the army officers. According to PW9 Major Wanninayaka, the Army officers had been surveilling the place for the past three days and got the information regarding Heroin. On the day in question, they had gone to the Police Station, informed the officers, and together they went near the house. The Army Officers had shown the house. They did not inform the Police Officers of the identity of the Accused. On the other hand, PW1 went in, searched the Accused, and found the Heroin. Despite there being a number of people, they didn't search anyone else except for the Accused. The story of the Defence was that he was arrested by the army officers and handed over to the police. When we consider the facts, including the absence of any explanation as to why the Army Officers did not inform the Police Officers to come to the place, knowing the fact that there is a person in possession of Heroin; simply arresting a person without even searching others with him, especially when his identity was not known, we consider the version of the Prosecution to be highly improbable. The manner in which the information was given by the Army Officer and the way in which the Accused was arrested with the production creates reasonable doubt.

Therefore, in the instant case, in the light of vital inter se and per se contradictions found in Prosecutions' evidence, as well as the improbability of the Prosecutions' evidence as a whole, we are of the view that the charges against the Accused have not surpassed the beyond reasonable doubt threshold.

Taking into consideration all these circumstances, We are of the view that the conviction and sentence of the Accused cannot stand. We set aside the judgment delivered on 10/07/2019 by the High Court of Colombo.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL