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/0220/2015
High Court of Colombo
Case No: HC/235/2001

Tuan Faizeen Johar

Accused-Appellant

vs.

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

Complainant-Respondent

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

COUNSEL : **Hafeel Fariz with Sanjeewa Kodithuwakku for the Appellant.**
Harippriya Jayasundara, P.C, ASG for the Respondent.

ARGUED ON : **20/02/2023.**

DECIDED ON : **03/04/2023.**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred as the Appellant) being aggrieved by the conviction and the sentence imposed on him on 12/03/2015 by the Learned High Court Judge of Colombo, preferred this appeal to this Court well within time.

The Appellant was indicted by the Attorney General in the High Court of Colombo under Sections 54A (d) and 54A (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984 for Possession and Trafficking respectively of 51.9 grams of Heroin (Diacetylmorphine) on 19th October 1999.

As the Appellant absconded before the closer of prosecution case, an inquiry under Section 241 of the Code of Criminal Procedure Act No.15 of 1979 was held and the Learned Trial Judge continued the case in absentia of the Appellant.

Prosecution had closed the case on 27.10.2009 and on the same date the Appellant through an Attorney-at-Law filed a letter of authority and commenced to appear on behalf of the Appellant.

When the defence was called, the Appellant called two defence witnesses and closed the case. After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed the death penalty on each count on 12/03/2015.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom platform from prison.

The Learned Counsel, on behalf of the Appellant had raised following appeal grounds.

1. The version of the defence was rejected contrary to law and the principles of evaluating the defence.
2. The Learned High Court Judge has failed to judicially scrutinize the version of the defence.
3. The Learned High Court Judge permitted illegal and inadmissible evidence including evidence of bad character of the accused causing grave miscarriage of justice.
4. The presumption of innocence was reversed by the Learned Trial Judge denying the right to a fair trial.
5. The prosecution and the defence were not treated with equality of arms.
6. The Learned High Court Judge has failed to apply the long held dictas and principles in evaluating the evidence of trained police officers and disregarded the contradictions inter se and per se causing grave miscarriage of justice.
7. The Learned High Court Judge has failed to appreciate the discrepancies of the productions itself as described by the prosecution.
8. The production chain has not been proved.
9. The judgment is contrary to law and against the weight of the evidence adduced in the case.

At the trial, PW1 IP/Liyanage, PW3 PS 30762 Senaratne, PW04 SI/Perera, PW05 Government Analyst and PW06 Assistant Government Analyst were called by the prosecution to give evidence on behalf of the prosecution. Further, the prosecution had marked productions P1-P10. Two witnesses were called by the Appellant on his behalf.

Background of the case

PW1 was attached to the Police Narcotic Bureau when he arranged the detection pertaining to this case. Upon receiving information from a personal informant about trafficking of Heroin, PW1 having selected a group of police officers had left the Bureau after completing all formalities. They had gone to a housing scheme named Samagipura at Kosgashandiya in Grandpass with the informant.

After arriving at the location, the informant had showed them a person clad in a sarong and a short leave shirt as the person who was carrying Heroin.

When the person showed by the informant reached up to them, he was questioned and searched. Upon search, PW1 had felt something was underneath in his underwear. As per the direction the Appellant had removed a parcel which was wrapped in a cellophane cover and handed over to PW1.Upon checking further, PW1 had found another parcel which too was wrapped in a cellophane paper. When PW1 had examined the substance contained in the parcels and identified Heroin in both parcels. The Appellant was taken to his house but nothing illegal had been recovered there. Thereafter, the Appellant was brought to the Police Narcotic Bureau.

Another person named Jamaldeen Roomy was also arrested at that time. A packet of Heroin was recovered from his possession. He was charged in the Magistrate Court.

The weight of two parcels was recorded as 103.600 grams and 41.400 grams respectively and were entered under PR No. 78/99.

The Substances which were recovered were handed over to the Police Narcotic Bureau's production officer PW SI/Perera on 19/10/1999.

PW3, PS/30762 Senaratne had corroborated the evidence given by PW1 IP/Liyanage.

The productions alleged to have been recovered from the Appellant had been sent to the Government Analyst Department. According to the Government Analyst's Report, the total weight of pure Heroin (diacetylmorphine) detected from the brown coloured powder was 51.9 grams.

When the prosecution closed the case after leading the prosecution witnesses mentioned above, the defence was called, and the Appellant had called two witnesses for his defence. The Appellant's wife admitted that the Appellant was arrested by officers of the Police Narcotic Bureau at his house, but categorically denies recovering Heroin from his possession as claimed by the prosecution.

The person who was arrested along with the Appellant gave evidence on behalf of the Appellant. According to him, he was also arrested on the date the Appellant was arrested and was taken to the Appellant's house. The Appellant had been assaulted by the police at the Appellant's house. In the cross examination admitted that he had been serving a life sentence for the possession of Heroin recovered from his house.

The Learned Counsel for the Appellant, although had filed 09 grounds of appeal argued this appeal under two grounds after evaluating all the grounds. The said two grounds are set out below:

1. The Appellant had been denied a fair trial.
2. The production chain has not been proved.

This Court has already held in the case of **Devage Thusitha Chamara alias Thilan v. The Attorney General CA/HCC/0050/2020 decided on 01/11/2022** the importance of adhering to fair trial concept in a criminal trail which had been guaranteed under the Constitution. The relevant portion of the judgment is reproduced below:

> *"The concept of fair trial is a fundamental principle in every judicial system. In another sense, the notion of a fair trial secures justice. A trial in criminal jurisprudence is a judicial examination or determination of the issues at the hand of the Court to arrive at a conclusion whether the accused is guilty of the offence or not.*
>
> *The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial".*

When the defence was called on behalf of the Appellant, his wife and the other person who was arrested when the Appellant was arrested on the date of incident gave evidence on behalf of the Appellant. According to the wife of the Appellant, the Appellant was arrested at his resident by the police. After being beating severely, the Appellant was taken away by the police. Before leaving, the police had requested two underwear from this witness. When provided the police had told the Appellant to wear one and the other was put into a bag and taken away by the police.

In her evidence it was elicited that the Appellant had gone to India due to fear while this case was pending. During the cross examination, the Learned State Counsel suggested to the defence witness that the Appellant had escaped to India due to this pending case. Several portions of evidence of

defence witness number 01 have been highlighted by the Learned Counsel for the Appellant. Those portions are re-produced below:

(Pages 419-420 of the brief.)

ප්‍ර : ඔහු ඉන්දියාවට ගිහින් ඉන්නේ ?

උ : ඔව්.

ප්‍ර : ඒ, මේ තර්ජන නිසා ද ?

උ : ඔව්.

ප්‍ර : එතකොට, අනිත් අය තමුන්ගේ පවුල නඩත්තු කරනවා, මහත්තයා ඉන්දියාවට වෙලා ඉන්නවා ?

උ : ඔව්.

ප්‍ර : මහත්තයා ආපහු එන්න බලාපොරොත්තුවක් නැද්ද ?

උ : ඒක කියන්න දන්නේ නැහැ ස්වාමීණි.

ප්‍ර : එතකොට, තමුන්ගේ මහත්තයා මේ නඩුව තියෙන අතරතුර තමයි ඉන්දියාවට විදේශගත වුනේ?

උ : නැහැ.

ප්‍ර : නමුන් තමුන්ට ශත පහකවත් මුදලක් ලැබෙන්නෙ නැහැ ?

උ : කඩේ තමයි තියෙන්නේ. කඩේ සල්ලිවලින් තමයි ජීවත් වෙන්නේ.

ප්‍ර : තමුන්ට මහත්තයා කතා කරනවාද ?

උ : නැහැ. මම තමයි තාමත් මේ නඩුව නිසා දුක්විඳින්නේ.

ප්‍ර : තමුන් දුක් විඳින්නේ, මේ නඩුවට අහුවෙච්ච ස්වාමිපුරුෂයා රටින් පැන්නට ?

උ : ඔව්.

(Page 494 of the brief)

ප්‍ර : මම යෝජනා කරනවා ස්වාමි පුරුෂයාට කිසිම තර්ජනයක් කාගෙන්වත් නැහැ. නඩුවෙන් බේරෙන්න ඕනේ නිසා තමයි රට පැන්නේ ?

උ : කවදාවත් එහෙම ගියේ නැහැ.

(Page 518 of the brief)

ප්‍ර : තමන්ගේ ස්වාමිපුරුෂයාට විරුද්ධව මේ නඩුව විභාග කරන්නේ මේ නඩුවේ සාක්ෂි ඔක්කෝම අහගෙන ඉඳලා මේ නඩුවට මුහුණ දෙන්නේ බැරි නිසා මේ නඩුවේ විත්තිකරු ගරු අධිකරණයට එන්නේ නැතිව දැන දැනම කට්ටි පනින්නේ ?

උ : නැහැ.

The Learned Counsel contended that the Learned High Court Judge had allowed the prosecution to lead bad character evidence under Section 54 of the Evidence Ordinance thereby acting on those evidence and had erroneously misdirected himself and denied a fair trial.

Section 54 of the Evidence Ordinance states:

> In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.
>
> Explanation 1.- This section does not apply to cases in which the bad character of any person is itself a fact in issue.
>
> Explanation 2.- A previous conviction is relevant as evidence of bad character in such case.

In **R.G.Moses v. The Queen 75 NLR 121** the Court held:

> *" that the conviction of the Appellant must be quashed on the ground that the evidence of the previous conviction, which was inadmissible according to Section 54 of the Evidence Ordinance, had been taken into account in the trial judge's judgment and was in a high degree prejudicial to the Appellant. In such a case the substantial question is whether or not the accused has been deprived a fair trial".*

The above cited portions of evidence clearly indicate that the bad character evidence had creeped into the proceedings. This has caused prejudice and denial of a fair trial to the Appellant.

As stated earlier, on behalf of the Appellant two witnesses had given evidence. Those evidence also demand an equal consideration of the court.

In **Kithsiri v. Attorney General [2014] 1 SLR 38** the court held that:

> *"[1] Courts evaluating evidence should not look at the evidence of the accused person with a scant eye. Defence witnesses are entitled to equal treatment with those of the prosecution and Courts ought to overcome their traditional instinctive belief in defence witnesses. Quite often they tell lies but so do the prosecution".*

In the case of **Shiv Kumar v. Hukam Chand and Anr [1999] 7 SCC 104** the court observed that:

> "*The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should*

not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the Court if it comes to his knowledge"

The Learned High Court Judge had simply rejected the defence's evidence because the Appellant had not adduced evidence personally. The relevant portion of the judgment is re-produced below:

(Pages 605-606 of the brief)

විත්තිකරු මෙම සාක්ෂිකරුගේ සාක්ෂිය සම්බන්ධයෙන් ස්ථාවරයක් ගෙන නැත. මන්ද විත්තිකරු කිසිදු සාක්ෂියක් මෙම අධිකරණය හමුවේ ඉදිරිපත් කර නොමැති අතර, ඔහු කර ඇත්තේ, ඔහු වෙනුවෙන් සාක්ෂිකරුවන් දෙදෙනෙකු කැඳවීම පමණි. විත්තිකරු වෙනුවෙන් කැඳවන ලද සාක්ෂිකරුවන් දෙදෙනාගේ සාක්ෂි ද සම්පූර්ණයෙන් ප්‍රතික්ෂේප කිරීමට මා තීරණය කර ඇත. එකී තීරණය අදාල හේතූන් එකී සාක්ෂි අගයන අවස්ථාවේදි මා විසින් දෙනු ලැබ ඇත. ඉහත සඳහන් කරන ලද හේතූන් සමස්ථයක් ලෙස ගෙන සලකා බැලීමෙන් අනතුරුව මෙම සාක්ෂිකරුගේ සාක්ෂිය සාධාරණ සැකයෙන් ඔබ්බට පිළිගැනීමට මම තීරණය කරමි.

This is a clear misdirection which certainly affects the fair trial. In this case when the defence was called the Appellant had absconded and the trial had been fixed in absentia of him thereafter. Even when the Appellant is present, he has the statutory right remain silent. Hence, the absence to adduce evidence personally by the Appellant is not a ground to refuse defence evidence called by the Appellant. This is a clear misdirection and denial of a fair trial.

Further, the Learned Trial Judge had concluded that the evidence given by PW1 and PW3 could be accepted as true regarding the raid conducted in

respect of the Appellant before considering other evidence adduced by the prosecution and the defence. The relevant portion is re-produced below:

(Page 610 of the brief.)

විත්තියේ නීතීඥ වරයා මෙම සාක්ෂිකරුට යෝජනාවන් කිහිපයක් කර ඇත්තේ වූවද, එකී යෝජනා කිසිදු අවස්ථාවක සාක්ෂි ලෙස තහවුරු වී නැත. එබැවින් එකී යෝජනාවන් හුදෙක් යෝජනාවන් වලටම පමණක් සීමා වේ. මවිසින් කලින් පැ.සා 01 ගේ සාක්ෂි දෙන අවස්ථාවේදි පවසා ඇති පරිදි චූදිත මෙම නඩුවේදී ස්ථාවරයක් ගෙන නොමැති අතර, ඔහු වෙනුවෙන් කැඳවන ලද සාක්ෂිකරුවන් දෙදෙනාගේ සාක්ෂි සම්පූර්ණයෙන් ප්‍රතික්ෂේප කිරීමට මා තීරණය කර ඇත. පැ.සා 01 ගේ සාක්ෂිය සහ මෙම සාක්ෂිකරුගේ සාක්ෂිය එකිනෙකට ගැළපෙන අතර, ඒවා අතර කිසිදු ගැටීමක් නොමැති බව මා මින් පෙරද සඳහන් කර ඇත. මේ අනුව මෙම සාක්ෂිකරුගේ සාක්ෂියද සාධාරණ සැකයෙන් ඔබ්බට මම පිලිගැනීමට තීරණය කරමි.

The above highlighted portion of the judgment very clearly shows that the Learned High Court Judge has been greatly influenced on the inadmissible or prejudicial evidence led by the prosecution. Therefore, it is crystal clear that the Appellant had not been awarded a fair trial in this case.

In **C.A.Sisira alias Mahatun CA/122/2006 decided on 09/10/2014** Anil Gooneratne,J. held that:

> *"The prime duty of the trial judge is to weigh the evidence correctly and decide whether the defence case is capable of creating a reasonable doubt in the prosecution case……However good or bad the witness or whether he has a bad track record should be forgotten and not the deciding factor. Trial Judge should only concentrate on the evidence before court".*

Next, the Learned Counsel contends that the Learned Trial Judge has failed to give due consideration on the discrepancies of the production from the point of detection to the office of the Police Narcotic Bureau and from the Police Narcotic Bureau to the office of the Government Analyst.

Chain of custody issues are very important in cases involving drugs. To prove chain of custody, the prosecution must present cogent testimonial and documentary evidence to establish that the items presented is the same item that had been recovered from the possession of an accused person.

The defence can challenge the chain of custody evidence by questioning whether the evidence presented at trial is the same evidence as what was collected from an accused person. If there is any discrepancy in the chain of custody of a production and the prosecution is unable to prove who had the custody of production until it reached the analyst, the chain of custody stands broken.

The Appellant takes up the position that the amount of Heroin which had been mentioned in the indictment was not recovered from him. Further he was not arrested as stated by PW1.He was arrested at his residence.

According to PW1, although he had testified that two parcels of Heroin were recovered from the Appellant, in his notes he had stated that the suspected Heroin parcels had been recovered from them. This a vital discrepancy in the evidence given by PW1.The relevant portion is re-produced below:

(Page 198 of the brief)

ප්‍ර : තමාගේ පැමිණීමේ සටහනේ මුල් කොටසේ තවදුරටත් කියවන්න මෙනවාද තමාට හමු වුනේ කියාලා ?

(එය කියවයි)

හෙරොයින් බවට සැකකල කුඩු අඩංගු පාර්සල් දෙකක් ඔවුන්ගේ සන්තකයේ තිබී සොයා ගත්තා ?

උ : එහෙමයි.

According to defence witness Romy Jamaldeen, the team of police officers first had come to his house, searched his house but nothing had been found. Thereafter, the team had gone to a nearby abandoned house and brought two parcels. Next, the team had gone to the Appellant's house and searched his house. As the Appellant expressed his displeasure and involved in a verbal exchange with the police team, the Appellant was brought to Police Narcotic Bureau thereafter.

According to PW1, after the raid he had come to the Bureau at 11.15 hours and handed over the production pertaining to this case at 15.40 hours to PW04 SI/Perera. The relevant portions are re-produced below:

(Page 107 of the brief)

ප්‍ර : තමන්ගේ කාර්යාංශයට පැමිණෙන විට වෙලාව කීයට විතර ඇති ද ?

උ : පැය 11.15 ට පමණ.

(Page 110 of the brief)

ප්‍ර : තමන් විසින් මේ විත්තිකරු සම්බන්ධ වැටලීමේ දී ලබා ගත්ත භාණ්ඩ එවකට සිටිය උ.පො.ප. සුනිල් පෙරේරාට භාර දුන්නේ එදිනම ද?

උ : ඔව්.

ප්‍ර : කොයි වෙලාවේ ද ?

උ : පැය 15.40 ට පමණ.

But under further cross examination PW1 had stated that he handed over the production to PW4 at 12.05 hours. The relevant portion is re-produced below:

(Page 170 of the brief)

ප්‍ර : 6.50 ට පිටවගිය සටහන් අන්තිමට ලිව්වේ කීයටද ?

උ : පැය 14.15 ට. ඒ ගිය වැටලීම් පිළිබඳව සටහන් කිරීමට ප්‍රථම මා සටහන් අතුලත් කරලා තියෙනවා පැය 12.05 ට තොරතුරු පොතේ, ස්ථානයට පැමිණ නඩුබඩු ඉදිරිපත් කලා.

The above highlighted portions of evidence of PW1 shows the per se contradictory position he had taken in his examination-in-chief and cross examination.

PW4 even though admitted that he handed over the productions pertaining to this case to court, in the cross examination admitted that he did not hand over productions to the court. This is another per se contradiction highlighted by the defence.

According to PW3, another person was also arrested at the time when the Appellant was arrested. Two small packets had been recovered from the second person and he was handed over to PW2 SI/Basnayake. The relevant portion is re-produced below:

(Page 235 of the brief)

ප්‍ර : ඒ තැනැත්තාට මොකද කලේ ?

උ : ඒ තැනැත්තාව පරීක්ෂා කලා.

ප්‍ර : පරීක්ෂා කිරීමේදී මොනවාද හෙලිදරව් වුනේ ?

උ : ඊයම් කොල වල එතූ කුඩා පැකට් දෙකක් හමු වුනා. එය බස්නායක මහතාට ලබා දුන්නා. ඔහුට වරද කියා දී අත් අඩංගුවට ගත්තා.

(Page 238 of the brief)

ප්‍ර : තමන් කිව්වා තවත් පුද්ගලයෙකුගෙන් හෙරොයින් පැකට් දෙකක් අත් අඩංගුවට ගත්තා කියල?

උ : ඔව්.

According to PW1, only one packet of Heroin was recovered from the second person, and he was charged in the Magistrate Court. This is another inter se contradiction highlighted between the evidence of PW1 and PW3.

The highlighted inter se and per se contradictions are extremely vital to establish the production chain.

According to PW1, the team had left the bureau at 6.05 hours for the raid. Under the cross examination the witness said that they left the bureau at 6.50 hours.

According to PW3, the team had left the bureau at 6.25 hours.

Further, although PW1 and his team had left the Bureau in the morning, the information pertains to the Appellant was received at 7.20 hours. It is not clear from the evidence given by PW1 why his team had left 6.05 hours whereas the information was received only at 7.20 hours.

This contradictory and ambiguous evidence of PW1 and PW3 create serious doubt on the probability of the prosecution version.

I consider it is very appropriate to mention what **Justice Mackenna in "Discretion", The Irish Jurist**, Vol.IX (new series), 1 at page10 has stated.

> *"When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to me the more probable, the plaintiff's or the defendants, and If I cannot say which, I decide the case, as the law requires me to do in the defendant's favour."*

In this case as stated earlier, the Learned Trial Judge had concluded that the evidence given by PW1 and PW3 could be accepted as true regarding the raid conducted in respect of the Appellant before considering other evidence adduced by the prosecution and the defence. This clearly shows that the Learned High Court Judge has been highly influenced on the inadmissible or prejudicial evidence led by the prosecution. This is a clear violation of the fair trial concept.

Further, leading contradictory evidence about the detection of Heroin from the Appellant diminishes the evidentiary value of witnesses PW1 and PW3 who are the important witnesses in this case.

With the highlighted serious defects above, this case cannot march forward with the conclusion reached by the Learned High Court Judge of Colombo.

Therefore, I set aside the conviction and the sentence dated 12/03/2015 imposed on the Appellant by the learned High Court Judge of Colombo and acquit him from both charges.

Accordingly, the appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL