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 Case No.
CA/HCC/ 0414/2018
High Court of Colombo
Case No. HC/7718/2014

Ravindra Raj Kumar

Accused-Appellant

vs.

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

Complainant-Respondent

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Ramalingam Ranjan for the Appellant.** **Riyaz Bary, DSG for the Respondent.**
ARGUED ON	:	**03/02/2023**
DECIDED ON	:	**21/03/2023**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred as the Appellant) was indicted by the Attorney General 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 the Trafficking and Possession of 2.51 grams of Heroin (Diacetylmorphine) on 12th May 2014 in the High Court of Colombo.

Following the trial, the Appellant was found guilty on both counts and the learned High Court Judge of Colombo had imposed a sentence of life imprisonment for both counts on 30th of November 2019.

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

The learned Counsel for the Appellant informed this court that the Appellant had given consent for this matter to be argued in his absence due to the restrictions of the Covid 19 pandemic. During the argument he has been connected via Zoom platform from prison.

The Appellant has raised following appeal grounds in this case.

1. Learned trial Judge erred to apply the correct legal principles when rejecting the defence evidence given on oath which creates a reasonable doubt.
2. The learned Trial Judge erroneously determined the place of arrest and convicted the Appellant although the prosecution had failed to prove the place of arrest beyond reasonable doubt.

Facts of the case.

The Appellant was a labourer who manually handles loads in the Pettah Market. His permanent address is No.95/17, Avissawella Road, Wellampitiya.

PW1/IP Ranasinghe who was attached to Colombo Crime Division (CCD) had received information from a reliable informant that a person named Ravindra Raj from Majeed Place, Orugodawatta will be engaging in trafficking drugs in the Orugodawatta area on 11/05/2014. The informant asked the witness to be present under the Orugodawatta overhead bridge for the raid. The informant had told the witness that Ravindra Raj was wearing a green coloured shirt and a red coloured pair of short and further informed that he would give a call once the said person departs from his house. He had received this information at 10:33 hours and had reported the same to his superior officer and arranged the raid. Having selected nine other officers, they had left the CCD around 10:40 hours after completing all formalities. The team had reached the place as per the information at about 11.00 hours. At that time, another police officer also had joined them. At about 11.05 hours the informant had called the witness and asked them to come to the Majeed Road quickly. When they were proceeding to Majeed Road, close to the temple on the Majeed Road, they had noticed a person as described by the informant walking briskly. The vehicle in which the team went for the raid stopped close to the person and surrounded him quickly. When he was checked a small cellophane bag was recovered from the right-side of his shorts pocket. When the police team checked the parcel, they found some substance which reacted for Heroin (Diacetylmorphine). Hence, he was arrested along with the parcel. According to this witness, the Appellant's address is No.100/153, Majeed Place, Avissawella Road, Orugodawatta. Thereafter, the team had gone to the Appellant's house which was situated at the end of Majeed Place. Although the team had checked his house, nothing found in his house. At that time, the Appellant's wife, a small child

and another male were in the Appellant's house. Thereafter, the team had gone to Dadigama Jewellers situated on Baseline Road to weigh the substance. The weight of the substance was observed to be 20.50 grams and the production was sealed in front of the Appellant. Thereafter, the team had come to the CCD at about 12.50 hours. After sealing, the production was handed over to PW11/PC 47316 Jansz of the CCD under production No.107/2014.

PW2, PS 10757 Fonseka who was a member of the raiding team, was called to corroborate the evidence given by PW1.

After closing the case for the prosecution, as the evidence led by the prosecution warranted the presence of a case to be answered by the Appellant, the learned High Court Judge called for the defence. The Appellant gave evidence under oaths and called his wife in support of his case.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person.

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 **Girija Prasad (dead) by LRs. V. State of M.P.,** AIR [2007] SCW 5589 (2007) 7 SCC 625, it was observed:

> *"It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other*

independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence".

In **Vadivelu Thevar v. State of Madras** AIR 1957 SC 614 it was observed on Page 619, as under: -

"Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact".

I have decided to consider the both appeal grounds together in this case.

In an appeal it is the profound duty of the Appellate Court to consider all the evidence presented by both parties in the trial. If the evidence presented by the prosecution is cogent and passes all the tests, the court has no difficulty whatsoever to act on the same and affirm the conviction of the Appellant. But, if the prosecution fails to adduce cogent and consistent evidence, then the court has no option but to award the benefit of the doubt to the Appellant.

In ***Lal Mandi* v. *State of West Bengal*** (1995) 3 SCC 603, the Court opined that:

"In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible

on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused".

The Learned Counsel strenuously argued that the inadmissible confessionary items of evidence had been allowed to creep into the proceedings thereby prejudicing the mind of the Trial Judge.

In terms Section 25 of the Evidence Ordinance, confessions made to a police officer is irrelevant and inadmissible. Hence, if an accused has made a confessionary statement in the course of the police investigations and where such statement is recorded under Section 110 of the Code of Criminal Procedure Act, there is an absolute restriction to use such confession as evidence at the trial.

Section 25 of the Evidence Ordinance states:

"25(1) No confession made to a police officer shall be proved as against a person accused of any offence."

In **R v. Martin Singho 66 NLR 391** the court held that:

"Any evidence, which, if accepted, would lead to the inference that the accused made a confession to a police officer is inadmissible."

Further, in **Queen v. Sumanatissa Thero (1962) 61 CLW 97** it was held that:

"It is illegal to use statements made by an accused in the course of an investigation for any purposes other than those provided in section 122(3) [corresponding section to the current section 110(3)] and such a statement would only become relevant for the purpose of impeaching a credit of the witness."

In this case, a confessionary statement of the Appellant was led in the trial by the prosecution. The Appellant had admitted that a person called Dileepa

is the supplier of Heroin to him. The relevant portions of the evidence of PW1 are re-produced below:

(Pages 160-161 of the brief.)

අධිකරණයෙන් :-

පැමිණිල්ලේ නීතිඥවරිය විසින් පෙර අසන ලද ප්‍රශ්නය නැවත වතාවක් අධිකරණයේ දෙමළ සිංහල භාෂාණ පරිවර්ථක තැන විසින් දෙමළ භාෂාවෙන් චූදිත ගෙන් අසා සිටී.

ප්‍ර : සාක්ෂිකරු තමුන් පොලිස් කටඋත්තරයේ කිව්වා ද, "දිලිප තමයි දන්නේ, මට ගෙනත් දෙන්න කෝල් කරනවා, මම ගිහිං ගන්නවා කියලා" දිලිප මට කෝල් කරනවා. මම ගිහිල්ලා ඔහු ගෙන් බඩු ගන්නවා කියලා ප්‍රකාශයේ සඳහන් කලා ද පොලිසියට දීපු ?

උ : එහෙමයි ස්වාමීනි.

(මහාධිකරණ විනිසුරු අංක 05 – කොළඹ)

ප්‍ර : එතකොට ඒක හරි දිලිප තමයි බඩු ගෙනල්ලා දෙන්නේ ?

උ : එහෙමයි ස්වාමීනි.

(මෙතැන් සිට පැමිණිල්ල විසින් අසන ලද සියලුම හරස් ප්‍රශ්න අධිකරණයේ සිටින සිංහල - දෙමළ භාෂාණ පරිවර්ථක විසින් චූදිතට දෙමළ භාෂාවෙන් පරිවර්ථනය කර සිටී.)

ප්‍ර : දිලිප ගෙනත් දෙන බඩු වලට තමුන් මොනවා ද කරන්නේ ?

උ : එයා කෝල් එකක් දෙනවා, දෙන කොට මම ගිහිල්ලා ඒක වෙන එක්කෙනෙක්ට දෙනවා ස්වාමීනි.

ප්‍ර : ඒ කියන්නේ දිලිප කියන එක්කෙනෙකුට ද දෙන්නේ ?

උ : ඔව් ස්වාමීනි.

අධිකරණයෙන් :-

ප්‍ර **:** සාක්ෂිකරු බඩු කියන එකෙන් තමුන් අදහස් කරන්නේ මොකක්ද ?

උ **:** හෙරොයින් ස්වාමීනි.

The Learned High Court Judge, before he could analyse the entire evidence presented by both parties, relying on the evidence given by the prosecution witnesses concluded at page 29 of the judgment that the arrest and recovery of Heroin from the Appellant could be accepted beyond reasonable doubt. The relevant portion is re-produced below:

(Page 217 of the brief.)

ඒ අනුව, පැමිණිල්ලේ සාක්ෂි මුල් අවස්ථාවේ සළකා බැලීමේ දී 01,02 චෝදනා සම්බන්ධයෙන් ප්‍රබල සාක්ෂි මත නඩුවක් ගොනු කර ඇති බවට තීරණය කරමි.

This approach of the Learned High Court Judge clearly demonstrates that he had been greatly influenced by the confessionary statement which had creeped into the court proceedings. The prosecution should not have led evidence which contained confessionary statement of the Appellant. This leads to a denial of a fair trial.

In this case a serious mistake done by the Learned High Court Judge has caused great prejudice to the Appellant. Further, the Appellant for his defence had given evidence under oath and called his wife as a defence witness. But instead of analysing the evidence of the defence, the Learned High Court Judge had analysed the law pertaining to the acceptance or rejection of the dock statement of an accused in the judgment. The relevant portion of the judgment is re-produced below:

(Pages 218-219 of the brief.)

විත්තිවාචකය සළකා බැලීම.

විත්තිකරුවෙකුට නිශ්ශබ්දව සිටීමේ අයිතියක් ඇත. එසේ නිශ්ශබ්දව සිටියේ නම් ඒ මත කිසිදු ආකාරයක අගතිදායක අනුමිතියකට එළඹීමට හැකියාවක් නැත. එසේ වුව ද නිශ්ශබ්දව සිටීමේ අයිතිය විත්තිකරු විසින්ම බැහැර කොට විත්ති කූඩුවේ සිට ප්‍රකාශයක් කල අවස්ථාවේ දී එවැනි ප්‍රකාශයක් දිවුරුම් පිට දෙන සාක්ෂියක් නොවන්නේ වුව ද අනෙකුත් සාක්ෂි මෙන් සැළකිය යුතු වේ. එවැනි ප්‍රකාශයක පිළිගත හැකි භාවය සාමාන්‍ය නිර්ණායකයන් යොදාගෙන සිදු කල යුතු වේ. විත්ති කූඩුවේ සිට කල ප්‍රකාශය පිළිගැනීමට හෝ ප්‍රතික්ෂේප කිරීමට නොහැකි අතරමැදි තත්ත්වයකට පත් වන්නේ නම්, හෝ එය පිළිගන්නේ නම් හෝ විත්තියට එහි වාසිය ලබා දිය යුතු

වේ. එපමණක් ද නොව මෙම ප්‍රකාශය තුලින් කිසියම් හෝ සැකයක් මතු වන්නේ නම් එහි වාසිය ද විත්තියට ලබා දිය යුතු වේ.

අපරාධ නඩුවකදී චූදිතයෙකු විත්ති කූඩුවේ සිට කරන ප්‍රකාශයක් ඇගයීමට ලක් කල යුතු ආකාරය සම්බන්ධයෙන් මෙහිදී මා Gunasiri and two other Vs Republic of Sri Lanka (2009) 01 SRI.LR 47

"In evaluating a dock statement, the Trial Judge must consider the following principles:

1) If the dock statement is believed it must be acted upon.
2) If the dock statement created a reasonable doubt in the prosecution case the defence must succeed

Dock Statement of one accused person should not be used against the other persons."

යන කරුණු මාගේ සැළකිල්ලට ගනිමි. එමෙන්ම, Kularatna Vs.Queen 71 NLR 529 යන නඩුවෙහිදී අපරාධ අභියාචනාධිකරණය විසින් ද පෙන්වා දී ඇති පරිදි විත්තිකූඩුවේ සිට කරන ලද ප්‍රකාශයක් සම්බන්ධයෙන් නඩුව අසන විනිසුරුවරයා විසින් අනුගමනය කල යුතු නීතිමය තත්ත්වය මා විසින් සැළකිල්ලට ගනිමි. එනම්, විත්තිකූඩුවේ සිට කරන ප්‍රකාශයක් ඇගයීමකට ලක් කිරීමේ දී,

1) විත්තිකූඩුවේ සිට කරන ප්‍රකාශය විශ්වාසය කරන්නේ නම්, ඒ මත පිහිටා කටයුතු කල යුතුය.
2) විත්තිකූඩුවේ සිට කරන ප්‍රකාශයෙන් පැමිණිල්ලේ නඩුව කෙරෙහි සාධාරණ සැකයක් ජනිත වන්නේ නම් එකී සැකයේ වාසිය විත්තිකරුට ලබා දී විත්තිකරු නිදොස් කොට නිදහස් කල යුතුය.
3) එක් විත්තිකරුවකු විත්තිකූඩුවේ සිට කරන ප්‍රකාශයක් අනිකුත් විත්තිකරුවන්ට එරෙහිව උපයෝගී කර නොගත යුතුය.

යන නෛතික තත්ත්වයන් කෙරෙහි මාගේ අවධානය යොමු කරමි.

This is a very serious mistake done by the Learned High Court Judge. This shows that the Learned High Court Judge neither considered the evidence properly nor appreciated the difference between the dock statement and the

evidence given from witness box under oath by an accused. As this is serious matter it certainly vitiates the conviction of the Appellant.

In criminal cases the burden always rests upon the shoulder of the prosecution to prove the case beyond reasonable doubt. The Appellant is not required to prove his innocence but if he decides to plead a general or special exception of the Penal Code, then the Appellant has a duty of establishing that the case of the Appellant comes within such exceptions. This burden is imposed under Section 105 of the Evidence Ordinance.

In **H.M. Mahinda Herath v. The Attorney General** CA/21/2003 in Appellate Court Judgments (Unreported) 2005 at page 35-39 the court held that:

> *"Where it was held that in a criminal case burden is always on the prosecution to prove the charge levelled against the accused beyond reasonable doubt. The trial judge must always bear in mind that the accused is presumed to be innocent until the charge against the accused is proved beyond reasonable grounds".*

The Learned High Court Judge in his judgment at page 225 of the brief stated as follows:

පැමිණිල්ල විසින් යොදා ඇති සටහන් සියල්ලම අසත්‍ය සටහන් බවට යෝජනා කර ඇති නමුත්, ඒ බව ඔප්පු කිරීමට විත්තිය වෙනුවෙන් කිසිදු සාක්ෂිකරුවෙක් කැඳවා නොමැත.

Referring to the above-mentioned portion of the judgment, the Learned Counsel for the Appellant claims that the learned High Court Judge has placed an additional burden on the Appellant to prove his innocence, which is contrary to the standard of proof in criminal cases. He further submits that this is a clear misdirection which certainly vitiates the conviction of the Appellant.

The wording of the above cited portion of the judgment very clearly demonstrates, that the learned High Court Judge had reversed the burden

of proof on the Appellant which is not in accordance with the basic rules of criminal prosecution.

As stated above, PW1 had arrested the Appellant at Majeed Road on the date of the incident. Thereafter he had been taken to his home for further investigation. The indictment is presented considering this sequence of events by the prosecution.

The Learned High Court Judge highlighting the evidence given by the Appellant convicted him on the basis that the subject matter was recovered from the three-wheeler. This completely destroys the prosecution's version. This is another serious lapse that had occurred in this case. The relevant portion is re-produced below:

(Pages 225-226 of the brief.)

තවදුරටත් විත්තිකරුව අත් අඩංගුවට ගනු ලැබුවේ ත්‍රීරෝද රථයකදී බවට විත්තිකරු විසින්ම පිළිගෙන ඇති බැවින්, විත්තිකරු විසින් හෙරොයින් ජාවාරම් කිරීමක් සිදු කර ඇති බව පැමිණිල්ල විසින් සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කර ඇති බවට තීරණය කරමි.

In Adversarial Judicial System criminal cases are contested between two opposing sides, which ensures that evidence and legal arguments will be fairly presented to the court by both sides. The Judge, however, remains neutral, presiding as an impartial mediator or referee between the prosecution representing "the people" and the defence representing the "defendant". A Judge's profound duty is to judge whether the evidence is credible and the witnesses are telling the truth or not. If the evidence presented by the defence create a reasonable doubt on the prosecution case, the judge should not hesitate to award the benefit to the defence, as the judge's decisions can dramatically affect people's lives.

Considering the grounds of appeal advanced by the Appellant, the learned Trial Judge should not have rejected the defence evidence in this case as I consider the defence evidence is more than sufficient to create a reasonable doubt in the prosecution case. As the evidence presented by the Appellant

creates a reasonable doubt over the prosecution case, I set aside the conviction and sentence imposed by the learned High Court Judge of Colombo dated 30/11/2018 on the Appellant. Therefore, The Appellant is acquitted from both charges.

Accordingly, the appeal is allowed.

The Registrar 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