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/0092/2018

High Court of Colombo

Case No: HC/4754/2009

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Munasinghe Arachchige Sumanasiri *Alias* Ananda

ACCUSED

AND NOW BETWEEN

Munasinghe Arachchige Sumanasiri *Alias* Ananda

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Kapila Waidayratne, P.C. with Asela Muthumudalige, Nipun Jayodarachchi and Akila Jayasundara for the Accused Appellant

: A. Navavi, DSG for the Respondent

Argued on : 12-01-2023

Written Submissions : 05-02-2019 (By the Accused-Appellant)

: 25-03-2019 (By the Respondent)

Decided on : 27-02-2023

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo for having in his possession, 14.60 grams of Diacetylmorphine commonly known as heroin on 4th October 2007, which is a dangerous and prohibited drug, an offence in terms of Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984, punishable in terms of the same Ordinance.

He was also indicted for trafficking the same quantity of heroin at the same time and at the same transaction, which is also an offence punishable in terms of the Poisons, Opium and Dangerous Drugs Ordinance.

After trial, the learned High Court Judge of Colombo by his judgement dated 14th March 2018 found the appellant guilty as charged, and he was sentenced to death by his sentencing order of the same date.

Being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

The Facts in Brief

This is a raid conducted by the officers of the Police Narcotic Bureau (PNB). PW-01 who led this raid has received an information from a known informant that a person called Ananda who lives in Kalubowila area has gone to bring heroin and he would be returning to his house after 5 p.m. The said information has been received by PW-01 around 1.30 p.m. in the afternoon.

Accordingly, he has assembled a team of officers. The informant has also come to the PNB to take part in the raid. After making the necessary entries and having followed the relevant procedures, PW-01 and his team of seven officers has left the PNB along with the informant to the place mentioned by the informant. They had reached a place in front of the Buddhagosha School near Kalubowila hospital and had stopped their vehicle. The informant who was with the team has left them stating that he will look whether the mentioned Ananda is coming to his house and let them know.

The team of officers has waited near the said school in their vehicle expecting the return of the informant. The informant has returned around 11.30 in the night and had informed that the mentioned Ananda may come towards his house at any moment. Expecting the arrival of the said person, PW-01, along with another officer called Sampath and the private informant have walked towards the house of the mentioned Ananda and has laid in wait near a salon, which was

about 20 meters away from the house. Just after the midnight, the informant has pointed to a person who is coming towards them, and after identifying him as Ananda, has discreetly left them.

PW-01 along with the mentioned officer Sampath have confronted the person and after identifying themselves as police officers had questioned him. According to the evidence of PW-01, after they identified themselves, the person had behaved strangely and had started to sweat and shiver. Upon checking the said person, PW-01 has recovered a blue-coloured cellophane parcel with a brown-coloured powder in his left trouser pocket. Inspecting the contents, he has identified the brown-coloured powder as heroin through his experience as a narcotics officer. Accordingly, the person whom the witnesses have identified in the Court as the appellant had been arrested 10 minutes passed midnight, that is to say, early hours of 4th October 2007.

It had been his evidence that when questioned, the appellant informed him of a person called Shiran Harshik as the person from whom he received the heroin and agreed to show the place from where he got it. He has given further evidence to say that although they went in search of the mentioned person, they did not search the place but decided to come later and returned to PNB with the appellant and the productions taken (at page 85 and 86 of the appeal brief).

When weighed at the PNB, the brown-coloured powder has shown a weight of 186 grams. The witness has explained the procedure followed by him in order to safely seal the productions and to handover the productions to the relevant productions officer at the PNB on the following morning.

When PW-01 was cross-examined on behalf of the appellant, the position taken up has been that no heroin was recovered from the appellant and no raid as stated by the witness took place. It has been suggested that the appellant's son was taken into custody and kept in a place at Bambalapitiya and released only after the appellant came and a parcel found near the salon was introduced to

the appellant. The witness has rejected the suggestion, saying that he has no reason to implicate the appellant falsely.

In supporting the evidence of PW-01, Police Inspector Sampath Ariyaratne (PW-02) who was the officer who assisted the PW-01 in the arrest has given evidence. He has given similar evidence to that of PW-01 in describing the incident of arrest of the appellant with heroin in his possession.

He too has stated in his evidence that upon questioning the appellant, it was revealed that the heroin recovered from the appellant was obtained by him from a person called Shiran Barza, and although they went in search of him as well, but could not arrest him (evidence recorded at page 159 of the appeal brief).

In this matter, the Government Analyst had confirmed that the productions received in relation to this case had a pure quantity of 14.60 grams of heroin.

When called for a defence at the conclusion of prosecution evidence, the appellant has chosen to make a statement from the dock. He has called his son and wife to give evidence on his behalf.

Making his statement from the dock, it has been his position that, on the day in question, he went to Kottawa to purchase some goods for the repairs of his house. While there, he received a call that one of his workers in his garage has fallen sick and advised him to be taken to the hospital. In a little while, he received another call informing him that a parcel containing drugs was recovered from Suresh who was running a salon. After some time, he received another call from his wife Renuka informing him that the earlier mentioned Suresh and his son Sachintha were taken away which prompted him to return home. It was his position that he went with his wife in a three-wheeler to Bambalapitiya and he found the van. After questioning whether he was Ananda, he and his wife were taken inside the van where he found his son. He has stated that, thereafter, all three of them were taken back to a place near the salon. He was severely assaulted inside the van, and the son was handed over to his wife. Thereafter,

he was taken to Colombo. He was asked to sign black papers and his fingerprints were taken. He has claimed that nothing was recovered from his possession.

Evidence of Chamika Sachintha who is the son of the appellant had been that, on the day of question, he returned home around 1.45 p.m. When he returned home, his father was not in the house, and the mother too has gone with his sister to attend a tuition and a swimming class. Around 2 pm, two persons came and inquired about his father and wanted his father's telephone number. Since he did not have his father's number, he gave a call to his mother and informed that two persons are inquiring about his father. The persons who came informed that they are from the police, although they were in civilian clothing. After about five minutes, they left the house informing the witness not to get out of the house.

According to his evidence at around 7.30 p.m. in the night, about eight persons including the two persons who came earlier have come to the house. By that time too, his parents were not in the house. The persons who came have escorted the witness to a van. After taking him, they have gone near the salon, which was nearby, and taken Suresh, the person who runs the salon, also into the van.

It was the evidence of the witness that he was assaulted while inside the van and one of the officers allowed him to call his mother through the officer's phone and he informed her that a group of persons came and took him away. The position of the witness had been that he was taken to Wellawatta beach around 11 p.m. Thereafter, the officers called the uncle of Suresh to come and pick him up. His uncle came in a three-wheeler and took Suresh away. Later, his abductors called his mother and informed her to come near the old passport office situated in Bambalapitiya. After both his mother and father came, both of them were taken into the van and taken near the salon belonging to Suresh, where the witness was released along with his mother. The witness has stated that he saw his father being severely assaulted inside the van and taken away.

The witness has been subjected to a lengthy cross-examination by the prosecution. However, he has maintained the same position as above.

In her evidence, the wife of the appellant has stated that while she was travelling with her daughter to take her for swimming classes, she received a call from her son stating that some persons have come and inquiring him about the father. It was her evidence that around 7.30 in the night, she received another call where his son told her that he is being taken away and come with the father. When she attempted to contact the number from which the call originated, she had been unable to do so as no connection could be established.

After coming home, she has informed her husband what took place, and both of them had been looking for the son. She has received another call from the same number of which she received the previous call around 1.00 a.m. in the morning requiring her to come to the bus stand near the old passport office at Bambalapitiya, along with her husband. When they went there, both she and her husband were taken into the van and they found their son inside. Her evidence was that after taking them near the salon of Suresh, she and her son were released.

According to her evidence, the officers had assaulted her husband and taken him away claiming that her husband will be charged for possessing heroin.

She too had been subjected to lengthy cross-examination by the prosecution. Although it appears from the case record that the Counsel representing the appellant had informed the Court that he is closing the defence case, the learned trial Judge who presided over the case then, has ordered the appellant to take steps to obtain the telephone call details as revealed in the defence evidence on the basis that the truthfulness of the defence position can be determined if the telephone call details are available to Court.

However, it appears from the case record, that endeavour has not been successful and the learned trial Judge before whom the defence evidence was taken has gone on transfer.

When this matter was mentioned before the learned High Court Judge who ultimately pronounced the judgement, it has been informed that the defence has

closed its case. It has been decided to proceed with the trial by adopting the previous evidence.

However, the learned High Court Judge has informed the appellant that if he so wishes he can recall the relevant previous witnesses for the purpose of cross-examining them again, obviously, because the relevant witnesses have not given evidence before the learned High Court Judge.

Accordingly, at the request of the appellant's Counsel, the learned High Court Judge has allowed the recalling of witness number 01 and 02 and subjecting them to cross-examination again, which has resulted in PW-01 and 02 being re-summoned.

Accordingly, PW-01 has been subjected to cross-examination again. While being cross-examined, it has been noted by the learned High Court Judge, that the said witness was recalled for the purpose of observing the demeanour and deportment of the witness. The learned High Court Judge also has questioned the witness as to the street value of the heroin alleged to be found in the possession of the appellant.

It appears from the proceedings of 25-05-2017, it was the learned High Court Judge who has decided to conclude the further cross-examination on the basis that the Court had the opportunity of observing the demeanor and deportment of the witness. Furthermore, the learned High Court Judge has decided that it was not necessary to recall PW-02 for the purpose of cross-examination, as he has already observed the demeanour and deportment of PW-01, who was the raiding officer and there is no need for him to observe PW-02 for that purpose.

However, subsequent to an application made against the order of the learned High Court Judge, the Court of Appeal has given a direction to the Court that PW-02 should also be recalled and the defence should be given the opportunity of cross-examining him, which has resulted in PW-02 also being subjected to cross-examination for the 2nd time.

Grounds of Appeal

At the hearing of the appeal, the learned President's Counsel urged the following grounds of appeal for the consideration of the Court.

1. The conviction of the appellant by the learned High Court Judge was contrary to the law and the evidence led in the trial Court.
2. The learned High Court Judge has failed to take to his notice the improbability and the inconsistency of the prosecution witness number 1 and 2 and that the prosecution has failed to prove the case against the appellant beyond reasonable doubt.
3. The learned High Court Judge has failed to properly analyze the evidence.
4. The learned High Court Judge has failed to analyze and consider the defence evidence in its correct perspective.
5. The appellant has been denied of a right to a fair trial, as the learned High Court Judge has been prejudiced before the conclusion of the trial and even before the analysis of all the evidence presented to Court.

Commenting on the probability factor of the evidence of PW-01 and 02, it was the submission of the learned President's Counsel that the Court should have looked at whether it was probable for an informant who gave a call and provided an information, to come to the PNB thereafter and expose himself and also to travel together with the raiding party.

It was his position that the raiding party waiting for such a long time as mentioned in the evidence, expecting the return of the informant who has left after they reached the place where the informant has stated that the appellant would come, was also not probable given the way the evidence has been unfolded.

He was also of the view that as of normal practice, if a person is arrested with heroin in front of his house as alleged by the prosecution witnesses, the raiding

party not going into the house of the arrested person and searching it creates a doubt whether this was an actual incident or not.

Referring to the contradictions in the evidence of PW-01 and 02, it was the position of the learned President's Counsel that in his evidence-in-chief, PW-02 had stated that PW-01 informed him to get ready for a raid at 2.55 p.m. (at page 147 of the appeal brief) while PW-01 has stated that they left for the raid at 2.35 p.m. (at page 80 of the appeal brief). He points to the facts that at a later stage of his evidence, PW-02 has stated that they left at 2.15 p.m. (at page 150 of the appeal brief).

Furthermore, it was pointed out that PW-02 in his evidence (at page 154 of the appeal brief) has stated that the person they apprehended was wearing a brown coloured trouser and a T-Shirt while, PW-01 (at page 82 of the appeal brief) has stated that the person apprehended by them was wearing a white and grey coloured three-quarter trouser. It was contended that the learned trial Judge has failed to consider these contradictions and infirmities *per se* and *inter se*, and the learned High Court Judge was not correct when it was determined that there were no contradictions in the prosecution witnesses' evidence.

The learned President's Counsel submitted that the trial Court has permitted the evidence, which amounts to a confession as to the offence committed by the appellant to be admitted at the trial. He pointed out to the evidence in chief by PW-01 where he had stated that after the arrest, the appellant confessed about a person who supplied heroin to him (at page 85 and 86 of the appeal brief). It was contended that even when PW-02 was giving evidence, same confessional statement alleged to have been made by the appellant had been admitted as evidence (at page 159 of the appeal brief).

It was the submission of the learned President's Counsel that admitting such evidence was against the law, and it was his view that the leaned High Court Judge has made use of such inadmissible evidence in his judgement in a subtle way, which has denied a fair trial towards his client.

He was critical of the procedure adopted by the learned trial Judge by curtailing the cross-examination of PW-01 when he was recalled to be cross-examined on the basis that evidence of PW-01 and 02 were not recorded before him, apparently in terms of Section 48 of the Judicature Act. It was his position that the way the learned trial Judge has decided to end the cross-examination of PW-01 and not to recall PW-02 after he was summoned in order to allow the appellant to cross-examine him for a 2nd time was not correct. The fact that the appellant had to go before the Court of Appeal challenging the order of the learned High Court Judge where the Court of Appeal ordered that the learned High Court Judge should allow PW-02 to be subjected to cross-examination are also matters in his view, that has denied a fair trial towards the appellant.

Commenting on the defence taken up by the appellant, it was the position of the learned President's Counsel that the appellant who has made a dock statement has called his son and the wife to substantiate the position taken up by him at the trial. It was his complaint that the learned trial Judge had failed to consider the defence evidence in an equal footing and come to a finding in the correct perspective as to whether that has created a reasonable doubt on the prosecution case, rather than rejecting the defence evidence in a biased manner.

It was his submission that the learned High Court Judge has first considered the prosecution evidence and had come to a finding that the prosecution has proved its case before considering the defence evidence and thereby compartmentalized the evidence rather than considering them as a whole. It was his view that the learned High Court Judge has been prejudiced when he considered the defence evidence and rejected it. It was the position of the learned President's Counsel that this is a judgement that should not be allowed to stand as the prosecution has failed to prove their case beyond reasonable doubt.

It was the submission of the learned Deputy Solicitor General (DSG) that although the judgement of the learned High Court Judge gives an appearance

that the learned High Court Judge has compartmentalized the evidence in his findings, each Judge has his or her own way of writing.

It was the position of the learned DSG that the evidence of the prosecution as well as that of the defence has been well considered by the learned High Court Judge and there is no material to consider that the appellant has been prejudiced in the way the judgement has been written.

Taking up the position that when the learned High Court Judge mentioned that the prosecution case has been established through "ප්‍රබල සාක්ෂි" means that the prosecution has presented cogent evidence, and considering the defence case thereafter, does not amount to prejudice, it was the position of the learned DSG that it should not be looked at in such a manner.

Commenting on the evidence that has been admitted which amounts to that of confessional in nature, it was his position that since this is not a trial by jury and Judges are learned in the law, where they have the ability to distinguish admissible and inadmissible evidence. It was his contention that in the instant matter, the mentioned evidence relating to a confession has not been considered by the learned High Court Judge in his judgement and therefore, it cannot be said that a fair trial has not been afforded to the appellant.

It was pointed out that the learned High Court Judge has well considered the prosecution and the defence evidence and accepted the prosecution evidence with clear reasoning, while rejecting the defence also with clear reasoning, has come to his finding of guilt within the accepted parameters of the law. Relying on the proviso to Article 138 of the Constitution and the related judgements of our Superior Courts in that regard, it was his submission that this is a judgement that needs no interference as the contested defects and irregularities have not prejudiced the substantial rights of the appellant or occasioned a failure of justice.

Consideration of the Grounds of Appeal

As the grounds of appeal urged by the learned President's Counsel are interrelated, I will now proceed to consider the said grounds as a whole in order to find whether there is merit in the same.

Since one of the main arguments presented on behalf of the appellant was that the trial Court had permitted evidence that amounts to a confession to be admitted, hence, it is not safe to let the conviction stand, I would now proceed to consider the relevant argument and the law in that regard.

The contentious parts of the evidence by PW-01 are as follows.

> ප්‍ර : ඒ අනුව මෙම වැටලීම තව දුරටත් පවත්වාගෙන ගියාද ?
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> උ : සැකකරුගෙන් ප්‍රශ්න කිරීමේදී හෙළිදරව් උනා ශිරාන් හරශික් නැමැති හෙරෝයින් ලබාදෙන පුද්ගලයෙක් ගැන සැකකරු විසින් ප්‍රකාශ කළා. සැකකරු හට එම ස්ථානය පෙන්වා දිය හැකි බවත් ප්‍රකාශ කල නිසා අප රථයෙන් එම ප්‍රදේශයට පිටව ගියා.
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> (At Page 85 of the appeal brief)
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> ප්‍ර : මෙම සැකකරුගෙන් ප්‍රශ්න කිරීමේදී හොයාගත්තා හෙරෝයින් ලබාදෙන පුද්ගලයෙක් පිළිබඳ.
>
> ඔහු අත්අඩංගුවට ගත්තාද?
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> උ : මද්‍යම රාත්‍රිය පසු වී වෙලා ගොස් ඇති නිසාත් ප්‍රශ්න කිරීමක් කර එම ස්ථානය ආරක්ෂක ලෙස ගොස් පරීක්ෂා කර බැලුවා, පසු දින වැටලීම කිරීමේ බලාපොරොත්තුවෙන් කොහුවල ප්‍රධාන පාර හරහා ටවින්හෝල් හරහා කාර්යාලයට පැමිණියා.
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> (At Page 86 of the appeal brief)

When PW-02 gave his evidence, the question posed to the witness and the answer was as follows.

> ප්‍ර : අත්අඩංගුවට ගැනීමෙන් පසුව කුමක්ද සිදු උනේ ?
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> උ : ඔහුගෙන් ප්‍රශ්න කිරීමේදී හෙළිඋනා ඔහු හෙරොයින් ලබාගන්නේ ශිරාන් බාසා නැමති පුද්ගලයෙකුගෙන් බව. ඒ අනුව එම පුද්ගලයා වැඩිපුර ගැවසෙන ප්‍රදේශ සම්බන්ධයෙන් පරික්ෂාවට ලක් කළා. ඒ පුද්ගලයා අත්අඩංගුවට ගැනීමට හැකියාවක් ලැබුනේ නැහැ.

(At Page 159 of the appeal brief)

In terms of section 17 (2) of the Evidence Ordinance, a confession has been defined as follows;

> **17 (2). A confession is an admission made at any time by a person, accused of any offence, stating or suggesting the inference that he committed that offence.**

E.R.S.R. Coomaraswamy in his book **The Law of Evidence Volume 1 at page 378** refers to the necessary elements of a confession in the following manner.

> *Section 17 (2) defines a "confession" as an admission made at any time by a person, accused of any offence, stating or suggesting the inference that he committed that offence. This definition suggests 4 elements.*
>
> *(a) It must be an admission, that is, a statement, oral or documentary, which suggests an inference as to any fact in issue or relevant fact within the meaning of Section 17 (1) of the Ordinance:*
> *(b) It may be made at any time;*
> *(c) It must be made by a person accused of an offence;*
> *(d) It must **state or suggest** the inference that he committed that offence.*
>
> *This definition tallies substantially with Stephen's definition of a "confession" as an admission made at any time by a person charged with a crime stating or suggesting the inference, that he committed that crime. (Stephen, Digest, op. cit., 4th Ed., Art. 28, pp. 28-29)*

There cannot be any doubt that the above-mentioned pieces of evidence led before the trial Court are evidence that shows that the appellant has confessed as to his source of heroin, which amounts to an admission of his guilt. It is also in evidence that the said statement has been made when the appellant was under arrest in the custody of PW-01.

Section 25 (1) of the Evidence Ordinance reads thus;

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

The above provision is subject to exceptions in relation to laws like Prevention of Terrorism Act where a confession becomes relevant if it can be proved that such a confession was not caused by inducement, threat, or promise as provided for in Section 24 of the Evidence Ordinance.

As contend correctly by the learned DSG, although a confessional statement has been admitted in evidence, if it can be shown that the learned trial Judge who pronounced the judgement has not made use of such a confession in his judgement by applying the correct legal principles, it cannot be said that the learned trial Judge has been prejudiced and a fair trial has not been afforded. It was his view that as a person trained in law a Judge is well equipped not to consider inadmissible evidence in a judgment.

Under the circumstances, the matter that needs the attention of this Court is whether the mentioned confessional statement has been considered by the learned trial Judge in his judgement. In the judgement, while analyzing the evidence of PW-01, at page 08 of the judgement (at page 410 of the appeal brief), the learned High Court Judge has stated as follows;

> “මෙම සාක්ෂිකරුගේ පළපුරුද්දට අනුව එය හෙරොයින් බවට හඳුනාගෙන ඇත. සැකකරු අත්අඩංගුවට ගෙන ඇත. එම සැකකරු අධිකරණයේ සිටින විත්තිකරු බවට හඳුනාගෙන ඇත. ඔහුව අත්අඩංගුවට ගැනීමෙන් පසුව වාහනය එම ස්ථානයට ගෙන්වා ගෙන එම විත්තිකරු නංවාගෙන ප්‍රශ්න කිරීමේදී ශිරාන් හාපිෂ් නැමති පුද්ගලයෙකු සම්බන්ධයෙන් තොරතුරක් ලබාදීමෙන් අනතුරුව එම තොරතුර පිළිබඳ සොයාබැලීමට එම ස්ථානයෙන් පිටව ගොස් ඇත.”

Referring to the evidence of PW-02 at page 13 of the judgement (page 415 of the appeal brief), it has been stated that;

> "ඔහුව අත්අඩංගුවට ගෙන ශිරාන් නැමැත්තෙකු සම්බන්ධයෙන් හෙළිදරව් වූ තොරතුරක් පරීක්ෂා කර මත්ද්‍රව්‍ය කාර්යංශයට නැවත පැමිණ ඇත."

It is my view that by looking at the way the learned High Court Judge has referred to the relevant evidence of PW-01 and 02, the learned High Court Judge being a person well learned in the law, had been aware that a statement made to a police officer which amounts to a confession cannot be accepted as evidence. This becomes clear in the way the learned High Court Judge has referred to the contentious part of the evidence by avoiding the portion where the witnesses say that the appellant informed them that the heroin was supplied by the mentioned Shiran, and that was the reason why they went in search of that person.

The learned High Court Judge has glossed over the contentious statement in order to take it out of the meaning of a confession. It is my view that this should not be the way the evidence in a case should be looked at.

If the learned trial Judge had determined that he is not going to consider the parts of the evidence which amounts to a confession and had not used it in a way giving it a different meaning, it can be agreed that such a statement has not prejudiced the mind of the learned High Court Judge being trained as to how such prejudicial evidence should be disregarded.

However, I am not in a position to agree with the submissions of the learned DSG that the learned High Court Judge has not been influenced by the evidence of PW-01 and 02 that the appellant disclosed his source of heroin in the judgement. I am of the view, that the judgement points to the fact, that although not in a direct manner, it has influenced the final outcome of the judgement, when the learned High Court Judge stated; At page 25 of the judgement (page 427 of the appeal brief) that;

"මෙවැනි ග්‍රෑම් 186ක පමණ කුඩු ප්‍රමාණයක් ***විත්තිකරු සපයාගෙන තිබීමත්*** එය කිසියම් හෝ ස්ථානයක සිට තව තැනකට රැගෙන යමින් එනම් ප්‍රවාහනය කර තිබීම යන කරුණු මෙම නඩුවේදී සෘජුව ඉදිරිපත් වී ඇත." (The emphasis is mine)

Under the circumstances, it is my view that this is an irregularity that goes into the core of the judgement, which cannot provide cover in terms of the proviso to Article 138 of the Constitution.

The next matter I would like to highlight is the way the learned High Court Judge who finally pronounced the judgement has proceeded to hear the case from where his successor has stopped.

When the learned High Court Judge commenced the hearing of the matter, the evidence of the prosecution had been concluded and the evidence of the defence as well.

In terms of section 48 of the Judicature Act, when a matter is taken up before a successor of a Judge who previously heard the case, the matter may be continued before such Judge who shall have the power to act on the evidence already recorded by his predecessor or partly recorded by his predecessor and partly recorded by him, if he thinks fit, to re-summon the witness and commence the proceedings afresh.

The proviso to the section 48 of the Judicature Act reads as follows:

> **48. Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such Judge, the accused may demand that the witness be re-summoned and reheard.**

There is nothing to indicate that the appellant made such a demand before the learned High Court Judge. However, it appears that on his own motion, which I believe for the purposes of fair play, the learned High Court Judge has allowed

the defence to determine whether it needs to recall any witnesses for the purpose of cross-examination.

As a result, an application has been made by the defence to recall PW-01 and 02 and subject them to cross-examination. Accordingly, they have been re-summoned, and witness number 01 has been subjected to cross-examination partly.

It is my considered view that once you allow a witness to be re-summoned and subject him to be cross-examined for the 2nd time, the defence should be allowed to cross-examine the witness in full, rather than concluding the cross-examination by the trial Judge himself on the basis that he had the opportunity of observing the demeanour and deportment of the witness sufficiently.

When the PW-01 was subjected to cross-examination for the 2nd time, at page 376 of the appeal brief, the learned High Court Judge has recorded the following.

> ‘‘මේ අවස්ථාවේදී සාක්ෂිකරුව විනාඩි විස්සක කාලයක් දැඩි ලෙස හරස් ප්‍රශ්න වලට ලක් කරන ලදී. මෙම සාක්ෂිකරු නැවත කැඳවීම සිදුකර ඇත්තේ මෙම අධිකරණයට පූර්වගාමී විනිසුරු මෙහෙයවන ලද සාක්ෂි පිළිගැනීම මත සාක්ෂිකරු සාක්ෂි දුන් විලාසය නිරීක්ෂණය කිරීම සඳහා වේ.
>
> මේ අවස්ථාවේදී, උගත් විත්තියේ නීතීඥ මහතාගෙන් විමසා සිටින්නේ, වැඩිදුර දීර්ඝ වශයෙන් හරස් ප්‍රශ්න ඇත්ද යන්නයි.
>
> ඒ අනුව අධිකරණයට ප්‍රශ්න කීපයක් ඇසීමට කටයුතු කරමි.’’

After recording as earlier, the learned High Court Judge has proceeded to question the witness as to the value of the heroin detected by him in the year 2007, and the witness has answered the question indicating a general value he can determine for a gram of heroin at that time.

After allowing the learned Counsel for the appellant to further cross-examine the witness on the questions posed by the Court, the learned High Court Judge has

decided that since the Court heard sufficient evidence to determine the demeanour of the witness, the cross-examination will be concluded.

He has determined further, that although PW-02 has also been summoned for the purposes of cross-examination, since he has observed the demeanour and deportment of witness number 01, there would be no necessity to recall PW-02. The above determination, which appears in page 380 of the appeal brief, reads as follows.

> "මේ අවස්ථාවේ මෙම අධිකරණයට මෙම සාක්ෂිකරු සාක්ෂි දුන් විලාසය ප්‍රමාණවත් පරිදි නිරීක්ෂණය කිරීමට අවස්ථාව ලැබී ඇත. ඒ අනුව වැඩිදුර හරස් ප්‍රශ්න අවසන් කරමි.
>
> නැවත ප්‍රශ්න නැත. සාක්ෂිකරු මුදාහරිමි.
>
> මෙම නඩුවේ පැ.සා. 2ක ගේ වැඩිදුර හරස් ප්‍රශ්න ඉදිරි දින මෙහෙයවීමට තීරණය කර ඇත. පැ.සා. 1 වැටලීම් නිලධාරියා වශයෙන් කටයුතු කර ඇත. මේ අවස්ථාවේදී මෙම සාක්ෂිකරුගේ සාක්ෂි දුන් විලාසය නිරීක්ෂණය කර අතර පැ.සා. 2 සාක්ෂි දෙන විලාසය නිරීක්ෂණය කිරීම අවශ්‍යතාවයක් නොමැති බව මා මේ අවස්ථාවේ තීරණය කරමි. ඒ අනුව පැ.සා. 2 කැඳවීම අවශ්‍ය වන්නේ නැත. දෙපාර්ශවයෙන් නඩු කටයුතු අවසන්."

It is my view that although the appellant had gone before the Court of Appeal and obtained a directive that the learned High Court Judge should allow witness number 02 to be cross-examined and accordingly, it had been done, the damage caused by then, when it comes to the principle of a fair trial, is a matter that cannot be ignored.

I find that when the learned High Court Judge decided to stop the cross-examination of witness number 01, the said witness had not been confronted with the position taken up by the defence. Although, the learned High Court Judge has decided that the evidence recorded in the cross-examination before him was sufficient for him to determine the demeanour and deportment of the witness, I am of the view that without observing his evidence with regard to the

defence put forward by the appellant, determining the demeanour and deportment would be of no value.

As trained witnesses in giving evidence in this type of matters, there may hardly be any infirmity of a witness in relation to a raid conducted by him. It would be only by confronting a witness in relation to the defence of an accused person and cross examining the supporting witnesses, an accused person can create a doubt in the evidence or in the other hand, the Court can be satisfied that the evidence was cogent and truthful.

Furthermore, it needs to be remembered that the judicial system in this country is based on adversarial system and not on the inquisitorial system. Judges are not expected to assume the role of a prosecutor and put questions to witnesses which may tend to cause prejudice to either party, may it be an accused or the prosecution. This does not mean that a trial Judge has to be a silent observer. A trial Judge is always permitted to question witnesses in order to clarify matters and to have a control over the proceedings before him.

For the reasons as stated above, I am of the view that this is a matter where a fair trial principle has been violated which has caused prejudice towards the appellant.

Hence, it is my considered view that this is a case where it is not safe to allow the conviction and the sentence of the accused appellant to stand.

I am of the view that considering the other grounds of appeal urged would not be necessary, as the appeal should succeed as stated above.

Therefore, I set aside the conviction and the sentence of the appellant by the learned High Court Judge.

The next matter to be considered is whether this a fit and proper case to consider sending the matter for a retrial.

This is a matter where the offence had alleged to have been committed on 4th of October 2007. The accused had been released on bail by the High Court on 27th of July 2010, nearly 3 years after being in remand custody. The judgement has been pronounced after a protracted trial on 14-03-2018, nearly 10 years after the alleged offence. Up to now, the appellant has been in incarceration pending the determination of the appeal for a period of nearly 4 years and 10 months.

Taking all these factors into account, I am of the view that ordering a retrial is not warranted and this is not a fit and fair case to order such a retrial.

Accordingly, I am of the view that this Court has no option but to acquit the appellant.

The appeal is allowed, and the appellant is acquitted of the charges preferred against him.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal