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/0052/2018

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Colombo

Case No: HC/7853/2015

Zeik Ismail Akbar *alias* Master

ACCUSED

AND NOW BETWEEN

Zeik Ismail Akbar *alias* Master

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Amila Palliyage with S. Udugampola and Gimhana Jagodaarachchi for the Accused Appellant
	: Lakmali Karunanayake, DSG for the Respondent
Argued on	: 21-11-2022
Written Submissions	: 01-03-2021, 28-02-2019 (By the Accused-Appellant)
	: 12-10-2021, 29-04-2019 (By the Respondent)
Decided on	: 20-01-2023

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved of his conviction and the sentence by the learned High Court Judge of Colombo where he was sentenced to death.

The appellant was indicted before the High Court of Colombo for trafficking 51.88 grams of Diacetylmorphine, commonly known as Heroin, which is a dangerous drug, prohibited in terms of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Amendment Act. No.13 of 1984, on the 3rd of July 2014 at Modara Rajamalwaththa, an offence punishable in terms of the same Ordinance.

He was also indicted for having in his possession the said quantity of Heroin which is also an offence punishable in terms of the Poisons, Opium and Dangerous Drugs Ordinance.

In this matter, the prosecution has led the evidence of PW-01, the police officer who conducted this raid and has called PW-02 to corroborate the evidence of PW-01. According to the evidence led by the prosecution, PW-01 has conducted this raid on an information provided by one of his informants. He and a team of

officers, including PW-02 has laid in wait on the information provided by the informant in a place called Hubert Road in Rajamalwaththa area expecting the arrival of the person described by the informant. PW-01 has confronted the appellant when he arrived and upon body searching him, he is supposed to have recovered a quantity of brown-coloured powder in the appellant's trouser pocket, which he suspected to be heroin through his experience as a police officer. After arresting the appellant and searching the place he was living, which was about 500 meters away from the place of arrest, the police party led by PW-01 has gone to the Police Narcotics Bureau (PNB) to weigh the productions recovered.

Upon weighing the productions in front of the appellant, it has been found to have 306 grams and 20 milligrams. PW-01 has given evidence in relation to the steps taken to seal the productions and hand it over to his police station, which was the Western Province Vice Prevention Unit of Colombo Crime Division.

The defence taken up by the appellant in this matter had been a denial that he had any heroin in his possession. It had been his position that he was a fishmonger, and never had any heroin when the police came to the house he was residing and searched it. He has taken up the position that he was taken to Dematagoda police station and held there for five days and introduced a parcel upon him and produced before the Court.

At the hearing of this appeal, the learned Counsel for the appellant formulated only one ground of appeal on the basis that the prosecution failed to prove the ingredients of the indictment beyond reasonable doubt.

Making submissions in that regard, it was his position that the appellant has admitted the chain of custody of the productions in terms of Section 420 of the Code of Criminal Procedure Act. He brought to the notice of the Court the High Court trial proceedings, where that fact had been recorded as an admission (page 156 of the appeal brief).

It was the position of the learned Counsel that after the said admission was recorded, the next witness called had been the Court Interpreter and through

him, the Government Analyst Report in relation to the productions sent to the Government Analyst has been marked as P-8 and the prosecution has closed the case marking productions P1 to P-8.

It was pointed out that there was no such admission recorded as to the Government Analyst Report. It was the position of the learned Counsel that, by adopting this procedure, the prosecution has failed to prove that the productions sent to the Government Analyst were actually heroin, and the quantity of Heroin as well. He was of the view that marking the Government Analyst Report through an officer of the Court cannot be accepted as proving the contents of the report.

Referring to the judgement of the learned High Court Judge where the Government Analyst Report marked P-8 had been considered, it was the position of the learned Counsel that the learned High Court Judge was misdirected in law when he determined that since the appellant has not challenged the marking of the Government Analyst Report, such a report can be considered as evidence in terms of the section 414 of the Code of Criminal Procedure Act, and therefore P-08 need not be further proved by calling the Government Analyst to give evidence. He also contended that the learned High Court Judge has decided on matters that was not in evidence in analyzing as to the difference in weight in the quantity of the substance received by the Government Analyst and when it was weighed at the PNB.

It was the argument of the learned Counsel that given the misdirections in the judgement, the conviction and the sentence of the appellant should be set aside as the conviction was not according to the law.

It was the contention of the learned Deputy Solicitor General (DSG) for the respondent that the appellant's stand during the trial had been consistent that no heroin was recovered from him, but he has never denied the productions produced before the Court was not heroin. It was her argument that this position was never taken up before the High Court and if the appellant intended to challenge the Government Analyst Report, the witness who produced the report

should have been confronted. It was the argument of the learned DSG that the learned High Court Judge has correctly decided to accept the Government Analyst Report as evidence in order to find the appellant guilty and the judgement needs no disturbance from the Court.

However, she also admitted that there was no admission recorded in terms of section 420 of the Criminal Procedure Code in relation to the Government Analyst Report.

In view of the above, it becomes necessary to consider whether the prosecution has established the case beyond reasonable doubt against the appellant. The charge against the appellant was that he trafficked 51.88 grams of heroin and at the same time possessed it. To prove the charges against the appellant, it was up to the prosecution to prove beyond reasonable doubt that the appellant had in his possession, the said quantity of heroin. I am of the view that an accused person accepting the chain of custody of productions in term of section 420 of the Criminal Procedure Code is not an admission that can be considered as admitting the Government Analyst report as well.

In this matter, there had been no admission as such. Therefore, it was imperative on the prosecution to call the Government Analyst and prove that fact before the Court which had not happened in this instance. I am in no position to agree with the learned High Court Judge's determination that, since the report marked P-8 has not been challenged by the appellant when the Court official gave evidence and marked it, it can be considered as evidence in terms of section 414 of the Code of Criminal Procedure Act.

For matters of clarity, I will now reproduce the relevant section 414 (1) which reads thus;

> **414 (1). Any document purporting to be a report under the hand of the government analyst, the government examiner of questioned documents, the registrar of fingerprints, examiner of motor vehicles or government medical officer upon any person, matter or thing duly**

submitted to him for examination or analysis and report, or the report of a government medical officer based upon any skiagraph purporting to have been made by a government radiologist or such skiagraph itself and any document purporting to be a report under the hand of such radiologist upon such skiagraph, may be used as evidence in any inquiry, trial or other proceeding under this Code although such officer is not called as a witness..

Provided that nothing in this section shall affect the necessity of proving the identity of the person, matter or thing so examined or analyzed and reported on (the emphasis is mine)

The proviso of section 414 of the CPC clearly provides that the identity of a matter or thing so examined or analyzed and reported to have to be proved. The appellant not objecting for such a report to be marked through a Court Interpreter is not a matter that can be considered as accepting the report, since proving the ingredients of the charge is a matter that rests solely upon the prosecution.

Besides that, when a Court Interpreter marks and produces a report of the Government Analyst, there is nothing for a defence Counsel to ask from such a witness as he was not competent to speak about the contents of a Government Analyst Report. I am of the view, that the learned High Court Judge was misdirected when it was decided to accept the contents of the Government Analyst Report without the prosecution proving it at the trial Court.

I am also in agreement with the contention of the learned Counsel for the appellant that the learned High Court Judge has determined on matters that was not in evidence when he justified the difference in weight of the productions, which was a matter for the Government Analyst to explain.

For the reasons as set out above, I am of the view that this is a judgement that cannot be allowed to stand as it has been reached based on wrong principles of law.

Therefore, this Court has no option but to allow the appeal and set aside the conviction and the sentence.

I am also of the view that this is not a matter fit to order a retrial given the period of time the appellant had been in incarceration and also the time he had to spend in remand custody before the conclusion of the trial, as well as the date of the offence.

Accordingly, I set aside the conviction and the sentence of the appellant and acquit him of the charges.

The appeal is allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal