IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of appeal in terms of section 331(1) of the Code of Criminal Procedure Act No: 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA No: CA/HCC/ 0463/2017
HC: Colombo: HC 6889/2013

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Arumugam Jegadeeswaran

Accused

And now between

Arumugam Jegadeeswaran

Accused- appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Shehan de Silva AAL with Hemal Seneviratne AAL and Naveen M. Arachchige AAL for the Accused-Appellant

Riyaz Bary, DSG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 10.09.2018

By the Complainant-Respondent 05.10.2021

Argued on : 27.09.2022

Decided on : **24.01.2023.**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned trial Judge of the High Court of Colombo, dated 08.11.2017, by which, the accused-appellant, who is before this Court via Zoom platform was convicted and sentenced to life imprisonment.

The accused-appellant above named (hereinafter referred to as "the appellant") stood indicted for being in possession and trafficking of 10.7 grams of heroin without any legal excuse on or about 16.03.2012 within the jurisdiction of the Colombo High Court which is an offence punishable under section 54 A (b) and section 54 A (d) of the Poisons Opium and Dangerous Drugs Act Number 13 of 1984. After the trial in the High Court of Colombo the accused-appellant was found guilty of two counts and was given the life sentence for both counts.

Being aggrieved by the conviction and sentence, the accused-appellant has preferred this appeal to this court.

Grounds of appeal are as follows;

(i) The learned High Court Judge has failed to consider the test of probability in evaluating the credibility of evidence of the prosecution witnesses.

(ii) The learned trial Judge erred in law by failing to evaluate the defence evidence in the correct perspective.

(iii) In any event, the rejection of the defence evidence is erroneous.

(iv) The prosecution has not proved the charge of trafficking beyond reasonable doubt.

(v) The learned trial Judge who delivered the judgment did not have the opportunity to observe demeanour and deportment of the prosecution witnesses.

Following witnesses were called by the prosecution;

PW 1 - Inspector Chandana Mahendra Ranasinghe -Kotahena Police Station

PW 6 - Police Sergeant 10757 Fonseka

PW 8 - PC 44709 Pathirana

PW 11 - PC 23965 Anil

PW 13 - PC 40657 Kapilarathne

PW 12 - PC 40605 Ariyadasa

PW 10 - PC 21534 Randika Roshan

PW 9 - PC 77385 Pradeep Paramashivam Suba - Court Interpreter Mudlier

The following productions were marked by the prosecution during the trial.

P 1 - Production receipt

P 2 - Envelope

P 3 - Envelope

P 4 - White colour paper

P 5 - Pink colour cover

P 6 - Transparent paper

P 7 - Government Analyst Report

Police Inspector Chandana (PW 1) who was attached to Kotahena Police Station had organised a sudden patrol at the area of Wadullawatta. This raid was organised without receiving a tip-off from an informant and without having proper information. Thereafter, PW 1 called a team of police officers attached to the Kotahena Police Station and left the station at 2.30 pm in a white colour Dolphin van bearing number 58-0093. They arrived at Wadullawatta area at about 2.50 pm and stopped the vehicle and waited at a by-road.

The appellant was walking on the road towards the said van. PW 1 got off from the van and caught the appellant just as he was passing the said van. When he was searched, PW 1 found a pink colour cellophane bag inside the side pocket of his short. The appellant was arrested at 3.10 pm. After that, PW 1 had taken the appellant to the Police Narcotic Bureau with the other police officers at 4.05 pm. The gross quantity of heroin was 40.330 grams. Thereafter, the accused-appellant was taken to the Kotahena police station at about 4.40 pm.

Only two witnesses gave evidence regarding the detection, and other police officers were called to testify about the chain of custody. The Government Analyst in his report stated that the gross weight of the parcel he received was 40.2 grams and according to the said report the net weight of heroin is 10.7 grams.

At the closure of the case for the prosecution, the appellant opted to give a statement from the dock in which he denied the charges levelled against him. He further denied that no such parcel of heroin was recovered from his possession and also stated that he was falsely implicated. According to the appellant on the day in question the police had initially come and searched his house when he was at home, and thereafter they left. Subsequently, the police had come back to his house after searching some shanties in the same area. At this point the police had arrested him and taken him to the police station. At the police station, his signature has been obtained in respect of the parcel.

In the cross-examination, the learned counsel for the appellant suggested to the prosecution witnesses that the appellant was arrested at his house. It was denied by the witnesses.

The learned counsel for the respondent submits that the alterations made to the notes cannot be considered in isolation as no suggestion was made as to the implications of this, such as the raid never having been conducted or the officers being elsewhere at the time.

Learned counsel for the respondent argued that proceeding to investigate a drug related offence is not always instigated based on receiving information. It is a common practice of the police to engage in patrol, upon which it is possible to encounter offenders. It is not a mandatory requirement to search or question multiple people in the vicinity prior to making an arrest. The differing evidence submitted by PW 1 and PW 6 as to how the appellant came to the road is attributable to varying powers of observation of the individuals.

The behaviour of the appellant, that is him walking towards the police, was regarded as improbable for a guilty individual to resort to such behaviour. Logic dictates that turning or running away upon seeing the police would immediately alert them. It is clear that the appellant resorted to such. Learned counsel for the respondent says that it was observed in the prosecution witness's evidence that they were amply corroborated and were consistent *per se* and *inter se*. This has been discussed extensively by the learned trial Judge. Evidence of all the prosecution witnesses regarding material facts and especially the chain of custody had been corroborated.

It was held in Attorney General vs. Devunderage Nihal 2011 (2) SLR 409 that, it cannot be stated as a rule of thumb that the evidence of a police witness in a drug related offence must be corroborated in material particulars where police officers are the key witnesses. If such a proposition was to be accepted it would impose an added burden on the prosecution to call more than one witness on the back of the indictment to prove its case in a drug related offence, however satisfactory the evidence of the main police witness would be.

In Devunderage Nihal vs. The Attorney Genereal SC/SPL/LA No.100/2010 dated 03.01.2019 , it was held that this court is mindful of the fact that the witnesses testify before the trial Judge and it is the trial Judge who would have the benefit of observing the demeanour and the deportment of the witnesses. It is the trial Judge who would have the benefit of observing the manner in which a witness faces the cross examination.

Hence, in the absence of any other infirmities, having considered all these matters, if the trial Judge forms the opinion that the witness is credible, I do not think the trial Judge has any other option, other than to accept the evidence and to act on it. Hypothetically, if the rationale of the Court of Appeal expounded in this case is applied, when a single police officer whilst on duty acts on a tip-off that a person is engaged in an illegal activity, takes action and apprehends the person so engaged in the illegal activity with a prohibited substance, no prosecution can be brought about against the person who was engaged in the said illegal activity, as there would be no other witness to corroborate the police officer who made the detection.

Although the learned counsel for the respondent relies on the above mentioned Devunderage Nihal case, the facts and the circumstances are different in the present case.

It is true that section 134 of the Evidence Ordinance explicitly lays down that "no particular number of witnesses shall in any case be required for the proof of any fact", those witnesses should explain the raid confirming the probability of the incident.

It was held thus in Devunderage Nihal vs. The Attorney General. SC/Appeal 154/2010 03.01.2019: "In fairness, it must be stated that the Court of Appeal had referred to the principle that there is no necessity for a party to summon more than one witness to prove a fact. Learned Judges of the Court of Appeal also had been mindful of the fact that, what matters is "not the quantity or the volume but the quality of the evidence", the principle laid down in section 134 of the Evidence Ordinance is as follows;

> "134. No particular number of witnesses shall in any case be required for the proof of any fact."

Sir John Woodruff and Syed Amir Ali, Law of Evidence 1st edition, Vol. I page 601-603 says that;

> "It is open to the court to accept the evidence of a police officer and to convict the accused on the basis thereof, if the evidence of the police officer is trustworthy and reliable. If the court feels that the uncorroborated testimony of the police officer by itself is capable of inspiring confidence there is nothing forbidding the court from acting upon the same. The law does not require that such evidence should be corroborated. In prosecution under the prevention of Corruption Act 1947, the testimony of police officials cannot be rejected merely because they are interested in the success of the prosecution."

The evidence of witnesses cannot be judged on the basis of them being officials, and non-officials simply because they are officers. They cannot be said to be interested or uninterested. The merit of the evidence is to be considered and not the persons who come to depose. The credibility of public officers should not be doubted on mere suspicion, without acceptable evidence. Presumption that person acts honestly applies as much as in favour of police as of other persons. It is not proper judicial approach to distrust and suspect them without proper ground. There is no principle of law that without corroboration by independent witnesses, their testimony cannot be relied upon.

In Vadivelu Thevai Vs. State of Madras AIR 614, 1957 SCR 981, the Indian Supreme Court observed that as a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

The Supreme Court in State of U.P. Vs. M. K. Anthony AIR 1985 SC 48, 1985 CriLJ 493, 1984 (2) SCALE 728, (1985) 1 SCC 505, has held that;

> "Appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by him and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole"

The learned counsel for the respondent submits that non-compliance of section 48 of the Judicature Act number 2 of 1978 and the learned trial Judge who delivered the judgement did not have the opportunity to observe demeanour and deportment of the main prosecution witnesses. The counsel for the appellant has at length discussed the application of section 48 and the alleged non-compliance with the same, although it is amply clear that the requisites of the section have been fulfilled totally by the learned trial Judges, who presided over the case in handling the matter.

The proviso to section 48 of the Judicature Act number 2 of 1978 reads as follows;

> "Provided that in any such case, except on an inquiry preliminary to committal for trial, either party may demand that the witnesses be re-summoned and re-heard, in which case the trial shall commence afresh. There has been no prejudice caused to the appellant, as encapsulated within the section was an opportunity for the accused person to call for witnesses, which the accused has chosen not to act on. It is unreasonable to claim at this stage, that there has not been compliance with section 48 to the satisfaction of the appellant. It is clear that there has been proper adoption of the proceedings by each succeeding Judge and the contention of the appellant should not be allowed to stand."

It was held in Watawalakankanamlage Martin vs. The Attorney General;Court of Appeal Case No. HCC 260/2015 dated 05.11.2019 that more importantly the proviso to section 48 which was brought by the amended Act No. 27 of 1999 provides for the accused in a criminal case to demand that the witnesses whose evidence were recorded be re-summoned and reheard.

That clear provision is made to avoid any prejudice that would cause to the accused and also to give the accused person a fair trial. Although the appellant was represented by counsel in the High Court, no application was made to re-summon or rehear any of the witnesses. After waiving his right to demand to re-summon or rehear the witnesses, now at the appeal stage the appellant cannot claim that he was prejudiced or was deprived of a fair trial.

The learned trial Judges have had due regard for the preceding evidence in the case and have duly adopted such and it is on this basis that the Judges have the discretion and entitlement to proceed as they see fit. The appellant vis-a-vis section 48 have the right to make certain demands and if this right conferred upon the accused has been blatantly disregarded, it is unjust to allow the appellant at this stage to invoke its application and the corresponding benefit.

1. Kotta Gamage Pangnadasa, 2. Kotta Gamage Sunil 3. Ratnayake Lekamlage Weeraratne, vs. the Attorney General, Court of Appeal Case No. HCC 52/2010, held that the intention of the legislature was clear when the amended Act No 27 of 1999 to the Judicature Act was enacted. It is to expeditiously continue and conclude the cases. To avoid any prejudice to the accused persons in criminal cases, proviso to section provides for the accused to demand if he so wishes to recall the witnesses before the successor Judge. That gives the accused an opportunity to a fair trial.

The learned counsel for the respondent argued that in the instant case, defence had not made any request before the successor Judge to recall any of the witnesses who testified before his predecessor. Hence, the contention of the counsel for the appellant that the appellant was deprived of a fair trial is untenable. This ground of appeal has no merit.

In 01. Mohamed Siddik Mohamed Rauf 02. Mohamed Rauf Mohamed Ishnas 03. Mohamed Rauf Mohamed Inpas. Vs. the Attorney General. C.A. No. HCC No.130-132/2017 dated 28.08.2020, it was held that lastly this Court proceeds to examine the validity of the complaint by the appellants that there was no proper adoption of evidence under section 48 of the Judicature Act.

Learned President's Counsel invited attention of Court to the proceedings of 21.05.2013, where the succeeding trial Judge had proceeded to hear evidence of the medical witness but no reference was made regarding any adoption of proceedings that had already taken place, under section 48 of the Judicature Act. The trial against the appellant has commenced before a

different trial Judge, who was succeeded by the 2nd trial Judge, who in turn had proceeded from the point the trial was adjourned by his predecessor on 21.05.2013.

It is correct that there is no record confirming of any adoption of proceedings before the said succeeding Judge. He too had been succeeded by a third trial Judge on 17.11.2015, who eventually delivered the impugned judgment. What is important here is that the proceedings were properly adopted before the 2nd succeeding trial Judge, and in fact a witness, whose evidence had already been led before his immediate predecessor, was recalled by the said trial Judge, upon an application of the appellants made under section 48. On 01.06.2017, the said trial Judge delivered his judgment, after the defence case was heard by him in its entirety. Hence, this Court is of the view that there is proper adoption of evidence by the trial Court, as mandated by section 48 of the Judicature Act (as emended). It is my contention that considering the above evidence, this ground of appeal too therefore fails.

The learned counsel for the accused-appellant says that the learned High Court Judge has failed to consider the test of probability in evaluating the credibility of evidence of the prosecution witnesses. It is important to note that in assessing the question of probability, the learned High court Judge has failed to advert to the factual circumstances. There was no first information or any other information received regarding the offence. PW 1 organised only a sudden patrol. The Dolphin van was parked on a by-road which turns to Wadullawatta Janapadaya at 2.50 pm with eight police officers in the van.

It is evident that Wadullawatta Janpadaya is a highly populous area which has a huge number of shanties. The police officers waited inside the van for 20 minutes at the place mentioned. The appellant was the one and the only person arrested in the said patrol. The police carried out the patrol even without having proper information, and the appellant was the only person searched by the police officers.

There was nothing on record to suggest that the police had even questioned or searched any other person who was walking on the road. For me it is highly improbable and implausible that only one person had been searched during the sudden patrol where 40.33 grams of heroin were found. The description of evidence of PW 1 and PW 6 were different from each other as to how the appellant came to the road. PW 6 stated that the appellant came from “watta” to the right side of the road and he crossed the road. However, PW 1 stated that the appellant came straight on the road.

It was disclosed that PW 1 was in uniform and was sitting on the left side of the front seat inside the van. When the police saw the appellant walking towards the van, the distance between both parties were 25 - 30 meters. PW 6 admitted that the appellant was able to see the police officers who were inside the van. In addition, PW 6 states that the appellant had come forward on the middle of the road. Wadullawatta colony was 200 m away from the place at which the van was parked, the appellant had walked towards the police van without running away.

It is my view that this behaviour of the appellant is highly improbable. If the appellant had heroin in his pocket, it would have been more reasonable to presume under section 114 of the Evidence Ordinance that normal human conduct would have required a rational person, however arrogant the suspect may be, to have taken necessary safety precautions in order to avoid arrest and detection. It is highly improbable that a suspect would have walked towards the van upon seeing

a uniformed police officer among others, without any apprehension. According to the facts, there isn't a slightest of indication that the appellant had displayed any sense of anxiety when he had seen PW 1 who was in uniform had opened the door and run towards him.

It is highly improbable to assume that a suspect would have waited until he was arrested without any resistance whatsoever.

According to PW 1's evidence, soon after the appellant had passed the driver's seat situated on the right side of the van, he had alighted from the vehicle and arrested the appellant at the far end of the van. At the time of arrest, the appellant could not have passed the van. In contrast to the above, PW 6 had stated in his evidence that PW 1 arrested the appellant soon after the appellant passed the driving seat of the van. PW 1 was in the left side of the front seat of the van, and practically he had to open the door, and alight from the van and had to come to the end of the van and turn left twice around the van before to get to the place where the appellant captured.

As PW 1 opened the door of the van, appellant could hear that sound and could have easily run away before PW 1 reached him since PW 1 had to come around the van to arrest the appellant. Based on the evidence of PW 1, it is highly improbable that a person who was having such a large quantity of heroin would have acted in such a manner.

PW 1 admitted that he put his hand into appellant's front pocket of the short and found a pink coloured cellophane cover. The appellant was arrested at 3.10 pm, and then was brought to Narcotic Bureau by 4.05 pm. Thereafter, he was brought to Kotahena Police Station at 4.40 pm. According to the available evidence, it is my view that from the time the appellant has been arrested the cellophane cover with heroine, was with PW 1. Reading the out entry contained in the police information book, the original entry pertaining to the time of departure from the police station had been 11.30 am. It is very clear that the above entry had been later altered and had been changed to 2.30 pm. During the cross-examination of PW 1 and PW 6, it had emerged that the above alteration had been done in a manner which was not in conformity with the standard practice contained in the police regulations, raising serious suspicion pertaining to the truthfulness of the prosecution witnesses.

It had also emerged in evidence that the original entry pertaining to the time of arrival mentioned in the police information book had also been altered. The learned Trial Judge had made a judicial observation on the said alteration. The above alteration contained in the police information book pertaining to the time of departure and arrival, raises serious doubt in the entire prosecution version. According to PW 1's evidence, the test of probability would necessarily fail due to the evidence regarding the sudden patrol. It created a severe dent in the testimonial trustworthiness of PW 1.

Subsequent to the arrest of the appellant, the police officers had not searched the house which the appellant was residing in Wadullawatta. It would have been a necessary part of the investigation procedure that the police could have done immediately after the arrest. The other police officers who were in the van did not call to give evidence. This would bring about a situation where in a drug-related offence the prosecution has to corroborate the testimony of the chief witness.

In the case of Wickremasinghe vs. Dedoleena and others 1996 (2) SLR at 96 - per Jayasooriya J:

> "In applying the test of probabilities and improbability relies heavily on his knowledge of men and matters and the pattern of conduct observed by human beings both ingenious as well as those who are less talented and fortunate".

Singharam Thiyagarajah vs. AG, CA 216/2010 decided on 27.11.2014 held;

> "The test of probability need to be applied and recognised to 12 grapple with normal human behaviour and problems and pave the way for the likelihood of occurrence."

E.R.S.R Kumaraswamy in his The Law of Evidence book states on a test of probability as follows; (volume II book 2 page 1052)

Mr Justice Mackenna has said;

> "When I have done my best to separate the truth 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."

Another argument raised by the learned counsel for the appellant was that the rejection of the defence evidence is erroneous.

The dock statement of the appellant clearly states that the appellant was arrested at his house. The said dock statement further elaborated the improbability of the scene of the arrest, which was on the road. Therefore, rejecting the dock statement by the learned High Court Judge is erroneous.

In the recent case of Wijeratne vs. Attorney General, C.A. Appeal No.218/2008 decided on 06.03.2013 the legal position of a dock statement was clearly stated as follows;

> "For the benefit of the trial Judges and legal practitioners of this country I would like to state the following guidelines with regard to the evaluation of the dock statement.
>
> (i) If the dock statement is believed, it must be acted upon.
>
> (ii) If the dock statement raises a reasonable doubt in the prosecution case, the defence taken up in the dock statement must succeed.
>
> (iii) The dock statement of one accused person should not be used against the other accused person.

When considering the evidence of the prosecution witnesses and then comparing it with the dock statement of accused-appellant, it is my view that the dock statement raises a reasonable doubt in the prosecution case.

Another argument raised by the learned counsel for the appellant was that the learned Trial Judge who delivered the judgment did not have the opportunity to observe the demeanour and deportment of the first two prosecution witnesses. Those 2 witnesses where the only witnesses who gave evidence regarding the sudden patrol and the scene of the arrest, for the reason that the trial had been led before his predecessor.

In the case of W.M Sirisena vs. Attorney General BASL Law Journal 1999 Vol VIII part 1/35 at page 72, decided on 22.03.1999, it was held;

> "In this particular case no contradictions and omissions have been proved or marked, and the learned trial Judge having had the benefit of the demeanour and deportment of the witness, has been impressed by the witness's testimonial, trustworthiness and has accepted his evidence as creditworthy and truthful."

Justice Colin Thome in Jagathsena vs. Bandaranaike 1984 (2) SLR observed that in evaluating evidence even in such a situation, the trial Judge must give his specific attention and consideration to the all-important factor of the witness's demeanour and deportment, in the witness box.

In the light of the judgments mentioned above it is my contention that the learned trial Judge had no material to determine the credibility of the main two prosecution witnesses. In the totality of the aforesaid circumstances, the prosecution has not discharged its burden of establishing the charges of possession and trafficking of heroin against the accused-appellant beyond a reasonable doubt.

It is unsafe to act upon the prosecution's unreliable evidence. The conviction and the sentence cannot be substantiated by law or on the evidence led before the trial Court.

Therefore, we find that the conviction cannot be upheld. We decide that the accused-appellant not guilty for both charges in the indictment and allow the appeal.

Conviction and the sentence dated 08.11.2017 are quashed. Accordingly, we acquit the accused-appellant.

Appeal allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal