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 and in terms of High Court of Provinces (Special Provisions) Act No. 19 of 1990.

Democratic Socialist Republic of Sri Lanka

Plaintiff

Court of Appeal Case No:
CA/HCC/89/22

Vs.

High Court Case No.
HC 7513/14

Abdul Maji Fathima Razeena alias Rizna

Accused

AND NOW

Abdul Maji Fathima Razeena alias Rizana
(Presently at Welikada Prison)

Accused-Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Neranjan Jayasinghe with Harshana Ananda and Dulshan Katugampola for the Accused-Appellant
Dishan Warnakula, DGS for the State

Written Submissions: 24.11.2022 (by the Accused-Appellant)
On 13.02.2023(by the Respondent)

Argued On : 07.03.2023

Decided On : 02.05.2023

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B. Sasi Mahendran, J.

The Accused Appellant (hereinafter referred to as "the Accused"), aggrieved by the conviction and sentence imposed by the learned High Court Judge of Colombo, preferred this appeal.

The Accused was indicted before the High Court of Colombo for having in her possession 5.80 grams of Diacetylmorphine, commonly known as Heroin, and trafficking the said quantity of Heroin on 15th November 2013, which are offences punishable under the Poisons, Opium, and Dangerous Drugs Ordinance No. 13 of 1984, as amended.

The prosecution led evidence of 6 witnesses including the government analyst and closed the case for the prosecution. The Accused made a dock statement. The Learned High Court Judge of Colombo after giving reasons found the Accused guilty on both counts, convicted and sentenced her to life imprisonment.

Being aggrieved by said judgment this appeal was preferred by the Accused.

The following grounds of appeal were urged by the learned Counsel for the Accused.

1. The evidence of the prosecution fails the test of probability.
2. The evidence of the prosecution fails the test of credibility.
3. The prosecution has failed to prove the chain of custody of production.
4. The dock statement of the Accused has been rejected on unreasonable grounds.

Facts in brief as per evidence led by the prosecution is as follows.

According to the evidence of PW1, the OIC of the Vice Division of the Western Province of Colombo Crimes Division (commonly known as "CCD"), he along with seven other officers namely PS 10751 Fonseka (PW2), PS 33931 Bandara (PW3), PS 529 Botheju (PW4), PC 61072 Bandara (PW5), PC 61178 Chathuranga (PW6), PC Driver 76147 Nissanka and WPC 8041 Anusha (PW7), left the CCD in a white van belonging to CCD at 1410 on 15th November 2013. The officers were clad in civil attire, except for PW1 who was in his uniform. They travelled to Satthmma Watta in the Dematagoda area which according to PW1 is notorious for drug peddlers, traffickers and addicts. This patrol was not based on particular information received but was a part of their daily duty, which he describes as '*deynika rajakariya'*.

In his evidence, PW1 demonstrated the route they took to arrive at Masjeed Place. They stopped the van near a temple and on PW1's instructions the driver stayed behind to guard it. PW1 and the six other officers, then travelled by foot before taking a left onto a 'Mudukku' Road to enter Satthamma Watta.

According to PW1, he had noticed a woman in a yellow dress walking towards the police officers. She had been about 15m away from the officers when she was spotted. Suddenly, after seeing the officers the woman turned and walked towards the housing complex on her right side.

As stated by PW1 (on page 80 of the brief – proceedings dated 24/05/2019):

"උ - මා දකිනකොට ඇය ඇයගේ දකුණු පැත්තට මගේ වම් පැත්තට තිබුණු මහල් නිවාස සංකීර්ණයට එකවරම ගමන් කරන්න පටන් ගත්තා."

This conduct alerted PW1. He along with fellow officers reached her. PW1 then directed WPC 8041 Anusha (PW7) to search the woman as he observed something in her right-side pocket. PW7 searched the pocket and found a pink cellophane bag that contained a brown powder. Upon inspection by PW1, this was suspected to be heroin.

The Accused was arrested at 1450 and the cellophane bag was put inside an envelope and retained by PW1. PW1 kept the envelope in his possession until they reached the station. On their way back, they stopped at Dedigama Pawn Center to weigh the heroin. This was done by PW1 in the presence of PW2, PW7, and the Accused. When weighed with the cellophane bag, it was recorded as 20g and 100mg. The cellophane bag was then put back in the envelope and sealed. They then arrived at CCD, and PW1 made an entry at 16.35. Thereafter, the Accused and the production were handed over to the reserve police officer, and the production was entered into the PR book and sent to the government analyst. PW1 in his evidence identifies this reserve police officer as, PS 27675 Amila Kumara.

As stated by PW1, (on page 92 of the brief – proceedings dated 24/05/2019)

"ප්‍ර - කවර උප සේවා නිලධාරියාටද භාරදුන්නේ?
උ - එදින උපසේවා වාශයෙන් රාජකාරී කරන ලද පොලිස් සැරයන් 27675 අමිල කුමාර මහත්මයාට නඩු භාණ්ඩ සමග සැකකරු හරියාකාරව භාරදුන්නා."

The evidence of PW7, the other main witness of the prosecution, is consistent with the version of PW1.

As listed in the indictment, the reserve police officer who received the production from PW1 is PS 27675 Ramya Kumara (PW8). However, in his evidence, PW8 identified his name appears as PS 28675 Ramya Kumara. Further, PW8 identified P1B to be his signature.

When the Accused gave a dock statement, she took the position that she was not arrested at 1450 on 15th November 2013 in the manner stated by the officers but instead, the arrest occurred in the morning of 15th June 2013. She had gone to purchase buns for her nephew before sending him to the nursery when PW1 asked her to come and thereafter took her to Ajji's house. She claims that she was unaware of what was taken from the house upon searching. She had refused her involvement, cried, and opposed being taken. Nonetheless, she along with the infant child that was with her, was taken to the police.

The Accused in her dock statement (on page 223 of the Brief – proceedings dated 29/09/2020) observed:

"මාව එක්කන් ගියා පොඩි දරුවෙක්, මගේ කිරි බොන දරුවෙක් අතේ තිබ්බා. එයත් එක්ක මාව එක්කන් ගියා, මම ඇඬුවා මම එන්න නැහැ කියල මම කෙරුවේ නැහැ කියලා. නෑ එන්ඩ කියලා මාව එක්කන් ගියා. එක්කන් ගිහිල්ල පහුවෙනිදට මාව උසාවි දැම්මා."

The first ground of appeal is that the learned High Court Judge failed to consider the test of probability. According to the prosecution's version, this raid was not conducted following specific information, but it was done as a part of the daily routine by PW1's team. When questioned on the reason for choosing this particular area for the search, PW1 responded by saying, Satthamma Watta is an area known for drug related activities.

Assessing this, we must be mindful of the fact that police officers involved are from CCD, a specialized unit responsible for investigating and combatting organized crime, including drug trafficking. It is perfectly within the reasonable capacity of such officers to make a calculated decision as to where a random search is to be conducted. As a crime prevention unit, it is also within its reasonable capacity to show up arbitrarily and inspect such areas. Further, according to PW1's evidence, he has been at CCD and has conducted several raids in said area for about two years.

As stated by PW1 (on page 109 of the Brief – proceedings dated 28/05/2019):

"උ - ස්වාමීනී, මා විසින් සංචාරය කරල තියනව අවුරුදු දෙකක පමණ කාලයක්, මම මේ ප්‍රදේශයේ රාජකාරි කළා. මම දන්නව ස්වාමීනී හෙරොයින් කොළඹ ප්‍රදේශයේ කොයි කොයි තැන් වලද වැඩි වශයෙන් තියෙන්නේ කියලා. ඒක ස්වාමීනී මම පළපුරුද්දෙන් මම ලබා ගත්ත දැනුම."

When considering the manner the Accused was caught by the officers, PW1 claims that she abruptly turned away upon seeing the officers and that conjured up his suspicion. As stated by PW1 (on page 119 of the Brief – proceedings dated 28/052019):

"උ - අපේ දිශාවට එන්න ආපු ඒ තැනැත්තිය එක පාරටම ඇගේ දකුණු අත පැත්තට තිබුනු ඒ මහල් නිවාස සංකීණර්ය දෙසට ගමන් කිරීම සම්බන්ධව මට සැක හිතුණා."

Is this narration probable? We must take note of the fact that she was not randomly stopped in the street and searched, but rather it was her 'suspicious conduct' observed by PW1 which led to the search. In relation to this particular point, we may observe the events in Siddick v. The Republic of Sri Lanka [2005] 1 SLR 383, in which the main witness (who was a customs officer) had searched the Accused on suspicion roused by the fact that the accused was wearing ill-matching shoes. To reiterate the words of his Lordship Imam J., "Nazeer in his evidence stated that what roused his suspicion was that the Accused at the time of detection was attired in a dark blue suit and wore ill-matching pair of brown shoes. …by virtue of his job was entrusted to question and check suspicious looking persons, by virtue of which he arrested the Appellant."

Further, on the matter of probability, the defense raises the question of whether it was likely for the officers to not search the house of the Accused. According to PW1, such an exercise would have been pointless as the news of the Accused being arrested would have quickly spread. As stated by PW1 (on page 128 of Brief – proceedings dated 28/05/2019):

"උ - ඒක වත්තක්. ජනාකීණර් ප්‍රදේශයක්. මහල් නිවාස සංකීණර්යක් ඒක. මිනිස්සු ගොඩක් ගැවසෙන ප්‍රදේශයක්. අන්තුරුව ස්වාමීනි එතන තියාගෙන ඇයව පරික්ෂා කරලා ස්වාමිනි මේ සම්බන්ධව චෝදනාව කියවලා දීලා අතඩංගුවට ගත්තට විනාඩි ගණනාවක් ගත වෙනවා. ඒ අවස්ථාවේ නිවස පරික්ෂා කරන එකේ කිසිම තේරුමක් නැහැ කියලා මගේ අවබෝධයේ හැටියට මට තේරුණා ස්වාමීනි."

At this point, we must also be mindful of the fact that they were only patrolling in the Satthamma Watta as a part of their daily duty. It is because of this, the prosecution's version of the fact that the Accused was spotted walking towards the police seems probable. Further, given that it is a notorious area for drug activity, it is reasonably

assumed that entering the housing complex unprepared at that point would have posed a threat to the officers. Therefore, this Court believes the prosecution's version.

On the other hand, the Accused's version was that she was arrested with her infant while she had gone to buy buns for her nephew. Her testimony is limited and there is no evidence in regard to where the witness was when she was arrested. This version does not incriminate nor create doubt in the prosecution's version as incriminating information simply does not exist.

The second ground raised by the defense was the presence of a contradiction between the evidence PW1 and PW7. The position of the Accused was that PW1 stated that the Accused, on seeing the police, has turned right while PW7 stated that the Accused turned back. The issue before us is whether this contradiction is a minor contradiction or whether it goes to the root of the matter.

In this light, it is worth referring to the dictum in State of Uttar Pradesh v. M. K. Anthony 1984 (2) SCJ 236:

> *"Minor discrepancies on trivial matter 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 the rejection of evidence as a whole. If the court, before whom the witness gives evidence had the opportunity to form an opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the grounds of minor variations or infirmities in the matter of trivial details. Even honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."*

The above dictum was cited by his Lordship Ranjith Silva J. in Nanediri Devage Wilman CA 122/2005, decided on 12/11/2007. We hold that this particular contradiction does not go to the root of the matter.

Another issue raised by the learned Counsel for the Accused was that the prosecution failed to establish the chain of production. This Court is mindful of the observation made by his Lordship J.A.N. De Silva J. (as he was then) in Perera v. AG [1998] 1 SLR 378,

> *"It is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the Analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the Analyst. Therefore, it is correct to state that the most important journey is the inwards journey because the final Analyst report will be depend on that. The outward journey does not attract the same importance."*

According to PW1, he handed over the production to the reserve officer namely, PS 27675 Amila Kumara (PW8). But when the prosecution called PW8 to give evidence on 13th January 2020, a person called Rajamuni Wasantha Ramya Kumara PS 28675 appeared and gave evidence. According to him, on the day in question which is 15th November 2013, he was the reserve officer at the CCD and he received the production from PW1 namely, IP Chandana at 2000. He handed over the production along with the Accused. The production record was marked as P1. He identified his signature as well as PW1's signature. When he was cross-examined, he identified his signature in P1. We are of the view that the learned trial judge has correctly concluded that there is no reasonable doubt created with regard to the inward journey.

In the instant case, the prosecution has proved that it was, in fact, PW8 who received the production from PW1, through the confirmation of the signature by both PW8 and PW1.

As stated by PW1 (on page 94 of the Brief – proceedings dated 24/05/2019):
"ප්‍ර - එතකොට මහත්මයා උපසේවා නිලධාරියගේ අත්සන මහත්මයාට හඳුනා ගන්න හැකියාවක් තියෙනවද?
උ - එහෙමයි, බාරගනු ලබන තැනැත්තා යටතේ ඔහුගේ අත්සන තියෙනවා."

As stated by PW8 (on page 178 of the Brief – proceedings dated 13/01/2020):
"ප්‍ර - එතකොට මහත්මයා ඔබ ඔය අත්සන යොදා තිබෙන ස්ථානය අධිකරණයට පෙන්වන්න පුලුවන්ද?
උ - පුලුවන්."

මේ අවස්ථාවේදී ගරු උතුමාණනි, භාරගනු ලබන නිලධාරියා වශයෙන් යොදා ඇති සිය අත්සන හඳුනාගනී. ඒ අනුව පැ. 1 සහ පැ. 1B සාක්ෂිකරු විසින් හඳුනාගනී.

Considering all these factors, we must ask ourselves whether the mentioning of the wrong name by PW1 has created reasonable doubt in the case of the prosecution. The defense has failed to not only articulate the way injustice was caused but to raise it entirely in the cross-examinations of PW1 and PW8. Since the authenticity of the signature is confirmed by both parties and there is no further doubt created by the defense, we are of the view that the particular discrepancy is not substantial enough to interrupt the chain of production. The prosecution has established the inward journey of the production to the satisfaction of the Court and the learned High Court Judge has carefully analyzed this issue. Therefore, we reject this ground.

The final ground urged by the learned Counsel was that the learned High Court Judge rejected the dock statement without any reason. Before we analyze the dock statement in the instant case, we have to consider the impact of a dock statement.

In Weddikkarage Thusharika Priyadarshani v. AG CA/HCC/0080/2020 decided on 05.09.2022, his Lordship Abayakoon J. in his judgement explained his view thus:

> *"In the case of Queen Vs. Kularatne (1968) 71 NLR 529, it was held that while jurors must be informed that such a statement must be looked upon as evidence subjected however, to the infirmities that the accused's statement is not made under oath and not subjected to cross-examination.*
>
> *Held further,*
>
> *1. If the dock statement is believed, it must be acted upon to.*
> *2. If it raised a reasonable doubt in their minds about the case of the prosecution, the defence must succeed. and;*
> *3. It must not be used against another accused.*
>
> *It was held in the case of Don Samantha Jude Anthony Jayamaha Vs. The Attorney General, C.A. 303/2006, decided on 11-07-2012 that,*

"Whether the witness of the defence or the dock statement is sufficient to create a doubt cannot be decided in vacuum or in isolation, because it needs to be considered in the totality of evidence, that is in the light of the evidence for the prosecution as well as the defence."

With the above dictum in mind, this Court will consider the dock statement made by the Accused. On page 223 of the Brief, the following is uttered by the Accused:

"2013.06.15 වෙනිදා මම කඩේට ගියා. අක්කගේ පුතාව නේසරි දාන්න කඩේට බනිස් ගන්න ගියා. යන කොට මය වන්දන මහත්මයා අඩගැහුවා. අඩගැහුවා මම ඇයි සර් කියල ඇහුවා. එන්ඩකෝ කියලා අඩගැහුවා. මම කිව්වා මාව මොනවටද අඩගහන්නෙ කියලා ඇහුවා. එන්ඩකෝ කියලා එක්කන් ගියා. එයාගේ නම අජ්ජී. ඒගොල්ලන්ගේ ගෙදරට එක්කන් ගිහිල්ලා වෙක් කරලා මොනවද ගත්තේ කියලා දන්නේ නැහැ. මාව එක්කන් ගියා පොඩි දරුවෙක්, මගේ කිරි බොන දරුවෙක් අතේ තිබ්බා. එයත් එක්ක මාව එක්කන් ගියා. මම ඇඩුවා මම එන්න නැහැ කියලා මම කෙරුවේ නැහැ කියල. නෑ එන්ඩ කියලා මාව එක්කන් ගියා. එක්කන් ගිහිල්ල පහුවෙනිදට මාව උසාවි දැම්මා. එහෙන් මොනවද වුනාද කියලා මම දන්නේ නැහැ. මම අඬ අඬ හිටියේ. දරුවත් එක්ක මාව ගෙනිව්ව බන්ධනාගාරයට එව්වරයි."

Now we will focus on how the learned High Court Judge has addressed his mind to the dock statement made by the Accused. The relevant excerpt of the judgment (on page 241 of the brief) is as follows:

"වුදිත විත්තිකුඩුවේ සිට ප්‍රකාශයක් කරමින් 2013.06.15 වන දින අත්අඩංගුවට ගැනීමක් සම්බන්ධයෙන් ප්‍රකාශ කර ඇත. ඉදිරිපත් කර ඇති අධිචෝදනා පත්‍රය අනුව වුදිත අත්අඩංගුවට ගෙන ඇත්තේ 2013.11.15 දින වේ. එදින අත්අඩංගුවට ගැනීමට අදාලව විත්තිකුදුවේ සිට කරන ලද ප්‍රකාශයෙන් කිසිවක් අනාවරණය නොවන අතර එමගින් පැමිණිල්ලේ සාක්ෂි කෙරෙහි කිසිදු සැකයක් ජනිත නොවන බව මම තීරණය කරමි. එබැවින් වුදිත විත්තිකුදුවේ සිට කල ප්‍රකාශය සහ ඇයගේ විත්ටිවාචකය පිළිගත නොහැකි විත්ති වාචකයක් වන හෙයින් එය ප්‍රතික්ෂේප කිරීමට මම තීරණය කරමි."

We are of the view that the learned High Court Judge has rightly considered the dock statement by the Accused and her defense and has come to the conclusion that the dock statement has not created any reasonable doubt in the evidence of the prosecution. It should be mindful that in the dock statement, the Accused has referred to an incident dated 15th June 2013, when in fact the raid had taken place on 15th November 2013. The learned High Court Judge dismissed the dock statement for reasons that the Accused had referred to the wrong date in her dock statement. This Court further observes that when

perusing the dock statement by the Accused she had an infant with her when the police arrested her. But there's no explanation given by her as to what happened to the infant when she was arrested. No question was put to the police witnesses regarding the infant.

On this ground, when we evaluate the dock statement and the evidence of the prosecution, we find that it has not created a reasonable doubt as to the prosecution's case with regard to the manner of the arrest. Therefore, we are of the view that the defence has failed to raise a reasonable doubt about the case of the prosecution.

For the above-said reasons, this Court is of the view that the grounds of appeal raised by the Accused are without merit. We see no reason to interfere with the judgement dated 24th May 2022. The conviction and the sentence are affirmed, and the appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL