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 as amended read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No: **CA / HCC / 267 / 19**

High Court of Galle Case No: **HC 3967 / 2013**

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant

Vs.

Dilum Iroshana Panditharathna

Accused

AND NOW BETWEEN

Dilum Iroshana Panditharathna

Accused – Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant – Respondent

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Saliya Pieris, PC with Thanuka Nandasiri for the Accused –

Appellant.

Suharshi Herath Jayaweera DSG for the State.

Argued On: 03.05.2023

Decided on: 06.06.2023

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 27.9.2019 of the High Court of Galle.

The accused appellant in the instant matter had been indicted in the High Court for possession and trafficking of 3.34 grams of heroin under the provisions of the Poisons Opium and dangerous drugs act.

The appellant had pleaded not guilty and trial had proceeded against him and upon the conclusion of the trial the accused appellant had been convicted for both the charges.

The appellant being aggrieved by the said judgment had filed the instant appeal on the following grounds,

1) The evidence of prosecution witnesses no 1 and 4 being contradictory and the trial judge had failed to consider the same,
2) The time frame led by prosecution in evidence being improbable,
3) The evidence of the appellant not being considered by the trial judge,

4) The defense witness had cut across the version of the prosecution and the trial judge had failed to analyze the same and there by the appellant had been denied a fair trial.

The evidence of the prosecution had been that the police had received a tip off from the Senior Superintendent of the police of the area that a white colored car would be transporting narcotics to Galle on 7.5.2010.

As such on the said information received the Galle police had arranged a team led by witness no 1 to conduct a raid and had positioned themselves on the main Colombo Galle Road around 10.30 am at Hikkaduwa and the accused appellant is supposed to have arrived at 2.45 in the afternoon and he had been searched and the police had found an alleged substance suspected to be heroin in the right trouser pocket of the appellant.

The police had searched the car in which the appellant had arrived at a place called Dodanduwa and not at the time of the arrest and not at the someplace. But they had not found any thing incriminating against the appellant inside the vehicle he had travelled.

The police had weighed the substance from a jewelry shop in Galle which had been only one kilometer away from the police station in Galle.

The version of the defense is that the accused had been arrested at Seenigama around 4 in the afternoon and he had not carried any alleged substance but the police had waited for his arrival and had introduced the alleged substance to him. The accused had alleged that it was Charith Manoj who had instigated the police and the said Charith Manoj had come to the scene of crime on the day of the incident. The accused had given evidence from the box and had called two witnesses to establish his defense.

Now this Court will consider each ground of appeal separately.

Evidence of PW1 and PW4 being contradictory.

The evidence of Pw1 is that the appellant arrived at Hikkaduwa at 2.45 but according to pw4 who had been the corroborative witness of pw1 had said that the entire raid was concluded by 2 o' clock in the afternoon, which contradicts the position of pw1.

Pw1 had very clearly said that after the appellant was arrested the police group along with the appellant had proceeded to Dodanduwa to search the vehicle but the evidence of pw4 is that the police party had straight away proceeded to the jewelry shop to weigh the alleged substance around 5.30 in the evening.

Evidence of pw1 is that the police party had returned to the police station around 10.30 in the night after the raid but the evidence of Pw 4 had been that the police party had returned to the police station around 4.10 in the evening.

But we observe that the trial judge had failed to consider the same but had only proceeded to reproduce the evidence of the prosecution without analyzing the possible effects of the above mentioned discrepancies in the prosecution case.

It has been held in the case ofWickramasuriya vs Dedolina and others 1996 (2) SLR page 95 by Jayasuriya J that witnesses cannot be expected to be having photographic memories to repeat exactly what they have seen or heard, but in the instant matter the evidence of pw1 who had been the chief investigative officer had been corroborated by pw4 but the said

corroboration is invariable made to be highly improbable and unlikely in the light of the above mentioned discrepancies which the trial judge had failed to consider.

<u>The second ground of appeal raised by the appellant is the time frame led by the prosecution being highly improbable.</u>

According to the main witness in the prosecution the appellant had arrived at the scene at 2.45 to Hikkaduwa and the party had arrived at the jewelry shop at 5.30 in the evening which had been at Kaluwella and they had reached police station only by 10.30 in the evening after the raid which had been only 1 kilo meter away from the jewelry shop.

Therefore, the Counsel for the appellant averred that it is highly unlikely that the police officers took such a length of time to travel the distance indicated in evidence.

Upon perusal of the brief and the evidence this Court also has to agree that if the distance between the jewelry shop and the Galle police was only one meter away and how was it that the officers took time from 5.30 to 10 30 to travel that distance of one kilo meter even if the weighing process took a long time.

It is a well understood principle of criminal law that the party making the allegation must prove the same beyond a reasonable doubt, but if there arises a doubt with regard to the prosecution story the benefit of the doubt must be given to the accused. But in the instant matter the trial judge had failed to analyze the improbability of the situation.

It has been said in the case of Sinnaiya vs AG CA 128-2005 BaslCriminal Law 2010 Vol 111 page 31 in which Ranjith Silva J quotes from E.S.R Coomaswamy in the Law of Evidence Vol 2 book 1 page 395 that,"in the great many cases the police are as a rule unreliable witnesses, it is always in their interest to secure a conviction in the hope of getting a reward. Such evidence ought therefore to be received with great caution and should be closely scrutinized."

The same principle has been applied in the case of Nalleperuma Thanthirige Danuka Roshan vs AG CA 216-2015 decided on 12.10.2017 which was also a case of narcotics.

Therefore, this Court fails to understand as to why such a lot of time had been spent to reach the police station after the weighing process which the learned trial judge had overlooked to consider.

<u>The third ground of appeal is that the evidence of the appellant and his witnesses not being considered.</u>

It is a well-founded principle of criminal law that the accused has nothing to prove but if he puts forwards a defense the trial judge has the duty of considering the same and either reject it or accept it and he must say so in plain language.

In the instant matter the evidence of the appellant was that he had been introduced with the alleged narcotics by the police on the instructions of Charit Manoj whom he alleges in fact came to the place where he had been arrested and calls his friend to the box to establish this position but it is noted that the trial judge had failed to say that whether he rejects it or accepts it.

The appellant had called the jewelry shop owner to give evidence and he had said that the police officers who conducted the raid never came to his shop to weigh the productions which has cut across the story of the prosecution, but the learned trial judge had not considered the impact of the evidence of the jewelry shop owner he had merely referred to the evidence of the defense witnesses and had said that they had not been able to give any acceptable evidence but he had not given any reasons for the same.

According to the evidence of the prosecution the witnesses had gone to the shop and had spoken to the owner of the shop and had said in evidence that the owner was known to them. Therefore, although the learned Counsel for the appellant said that he was not contesting the chain of productions of the prosecution the evidence of the jewelry shop owner in fact places the chain of productions also in doubt because his evidence casts a doubt whether the prosecution witnesses really went to the shop to weigh the productions which is in fact the beginning of the chain of productions. Therefore, the learned trial judge by not considering these aspects deprives the appellant of his right for a fair trial which is enshrined in the Constitution. Cross on Evidence 5th edition page 29 has said that "a judge has the overriding duty in every case to secure a fair trial ". But in the instant case the failure of the trial judge to consider the case for the defense and state very clearly whether he accepts it or rejects it and his failure to consider the improbabilities in the version of the prosecution with regard to the timeline involved in the case and the discrepancies in the story of the prosecution between its witnesses is a clear denial of the right of the appellant for a fair trial.

The learned Counsel appearing for the respondents tried her level best to convince this Court that the learned trial Judge had considered the defense and the prosecution both but we fail to observe the same.

As such we are of the opinion that the grounds of appeal raised by the appellant are worthy of merit and have raised serious lapses on the part of the trial judge who by forgetting to apply the fundamental principle in criminal law that the prosecution has the sole responsibility of proving its case against the appellant and until such time the accused is innocent, and the case of the prosecution and the defense has to be weighed with equal patience and open mindedness. It has been held in the case of Karuppiah Pankhudi vs AG CA 11-2005 decided on 26.8.2014 by Salam J in a similar case of narcotics that "the inbuilt improbabilities in the version of the prosecution which will go to show that no conviction could be possible even if the evidence of the witnesses are taken on their face value warrant a Court dealing with a criminal appeal not to shut their eyes particularly when the criminal proceedings set in motion against the appellant appear to be a probable case of abuse of process of Court to put the appellants liberty in jeopardy".

As such we allow the instant appeal and we set aside the conviction and the sentences imposed by the trial judge.

Judge of the Court of Appeal

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.