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

In the matter of an application under Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:
HCC 69/18
HC Colombo Case No:
HC 7533/2014

Vs.

Mohammad Mohideen Mohommad Mohomaas Faizer

Accused

AND NOW BETWEEN

Mohammad Mohideen Mohommad Mohomaas Faizer

Accused-Appellant

Vs.

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

Complainant Respondent

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

Counsel: Chathura Amarathunga for the Accused-Appellant
Janaka Bandara, DSG for the State

Written Submissions: 15.10.2018(by the Accused-Appellant)
16.11.2018(by the Respondent)
On

Argued On : 24.03.2023

Decided On : 20.06.2023

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B. Sasi Mahendran, J.

This is an appeal by the Accused Appellant (here in after referred to as the Accused) on being aggrieved by his conviction and the sentence by the learned High Court Judge of Colombo.

The Accused was indicted before the High Court of Colombo for having in his possession 3.52 grams of Diacetylmorphine, commonly known as Heroin and trafficking the said quantity of Heroin on 29th December 2013, which were offenses punishable under Poisons, Opium and Dangerous Drugs Ordinance No. 13 of 1984 (as amended).

The prosecution led evidence of 6 witnesses including the government analyst. The Accused made a dock statement. The Learned High Court Judge found the Accused guilty on first count, convicted and sentenced him 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.

- The Items of evidence are not sufficient to prove the prosecution's case against the appellant beyond reasonable doubt.
- The Rejection of the dock statement is wrongful and the learned judge of the high court has failed to correctly apply the principles governing the evaluation of a dock statement.

Facts in brief as per evidence led by the prosecution.

According to the evidence of PW1, namely PI Chandana Ranasinghe, then OIC of Vice Division of the Western Province of Colombo Crimes Division (commonly known as "CCD"), on the day in question that is 29th of December 2013 at 13.50, he along with seven other officers have proceeded to 56 Watta, an area known for drug peddling and trafficking in a van belonging to CCD. According to PW1 this was done, as part of their daily routine which PW1 describes as 'සාමාන්‍ය දෛනික වැටලීම් රාජකාරිය'. The officers were all dressed in civil attire, except for PW1 who was in his uniform.

They arrived at Musjeed Place and proceeded by foot to 56 Watta, where he noticed a person coming from a house. When this person saw the officers, he tried to re-enter the house. However, it appeared that the door was locked, as that person was seen struggling to reopen the door. PW1 describes the same in the following words (On page 49 of the Brief – proceedings dated 24/07/2015);

"උ - ස්වාමිනී නිවස තුළ සිට එක්වරම ඔහු කඩිසර ගමනින් පැමිණියා. මට මේක තමයි සැකයට හේතු වුණේ. ඒත් එක්කම ස්වාමීනි ඔහු මා දකිනවාත් සමගම ආපසු හැරිල ඒ නිවසටම යන්න ගියා. "

When PW1 saw that person was panicking he got suspicious and ran towards him. In the meantime, a woman opened the said door and that person tried to go inside. Seeing this PC 61072 entered the house, obstructing that person from entering and that woman from closing the door. PW1 searched the person at the doorway. He found an electronic scale and a pink cellophane bag containing brown powder in his shirt pocket. When PW1 inspected the contents in the bag through his experience, he suspected it to be Heroin.

The Accused was arrested at 14.25 and the cellophane bag was retained by PW1. He then searched the house with PS 10757 Fonseka. Several persons were found inside the house. No other illegal substance was discovered inside the house. Thereafter, they proceeded to Dedigama Pawn Center to weigh the heroin at around 15.30. This was done by PW1 in the presence of PS 10757 Fonseka and the Accused. When weighed with the cellophane bag, the weight of the parcel was recorded as 25.1g. The cellophane bag and the scale were then put inside different envelopes and sealed. Thereafter, they arrived at CCD upon which, the Accused along with the production and the scale were handed over to PS 49692 Thushara. The production was entered into the PR book and sent to the government analyst.

PW3, namely PC 10757 Fonseka in his evidence corroborated with the version of PW1.

In his dock statement, the Accused has taken the position that he was arrested by four police officers who came to his house while he was taking a nap. He was put in a van and taken to Dematagoda Police Station. At the station, a statement was taken from the Accused and he was asked to sign some papers. He further claims that the Prosecution version is highly improbable pointing out the unlikeliness of going out in the daytime with illegal drugs in his possession in such a crowded area which was commonly scouted by the Police.

The first ground of appeal is the insufficiency in Prosecution's evidence to create reasonable doubt. Therefore, this Court must consider whether the Prosecution has proven its case beyond reasonable doubt. Before dealing further, it must be noted that this Court is mindful that the Learned High Court Judge had the opportunity to see and hear the witnesses. In the instant case, after observing demeanour and deportment of PW1 and PW3 the Learned High Court Judge has made the following remarks. (On page 265 of the Brief – judgement dated 20/03/2018);

''පැ. සා. 1 ගෙන් සහ පැ. සා.3 ගෙන් වැටලීමට අදාල සියළු කරුණු පිළිබඳව හරස් ප්‍රශ්න අසා ඇති නමුත් ඔවුන් දෙදෙනාගේ සාක්ෂි අතර කිසිදු පරස්පරතාවක් පෙන්වා නැතිවා පමනක් නොව, වැටලීම් නිලධාරීන්ගේ සටහන් සහ ඔවුන් දෙන සාක්ෂි අතරද, කිසිදු වෙනස්කමක් ඇති බව හෝ පෙන්වා දී නැත. වැටලීමට අදාල වැදගත් කිසිදු කරුනක් සම්බන්දව සටහන් යොදා නැති බවට කිසිදු ඌණතාවක්ද පෙන්වා දී නැත. ඒ අනුව එකිනෙක මගින් තහවුරු වූ පැසා 1 ගේ සහ පැසා 3 ගේ සාක්ෂි සාධාරණ සැකයෙන් තොරව අධිකරණයට පිළිගත හැක.''

In evaluating the evidence of PW1 and PW3 the learned Trial Judge has considered the consistency of their evidence. The learned Judge further satisfied himself on the inward journey to the government analyst PW13. As such, there is no break in the chain of custody of the productions, nor is there any omission or contradiction in the Prosecution's narration of events marked by the Defence.

We are mindful that the arrest took place while the officers were on their daily routine. According to the evidence of PW1 he got suspicious of the way the accused behaved. That is to say, after seeing the police officers he turned and tried to re-enter the house. We are mindful of the fact that the arrest of the Accused was not pre-planned or is a result of a tipoff, but rather it was his 'suspicious conduct' observed by PW1 which led to the search. In relation to this particular point, the events which transpired in Siddick v. The Republic of Sri Lanka [2005] 1 SLR 383 come to our mind. In the said case, the main witness (who was a customs officer) had searched the Accused on suspicion raised 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."

In the light of the version taken up by the Defence which is that the Accused was framed, the failure to address the vital details in the events renders their case highly untrustworthy. For instance, the weighing machine, purportedly recovered from the possession of the Accused is never addressed in the version of the Defence. Further, as the Defence contends in the cross-examination of PW1 the Heroin was found in a public toilet nearby, which as the learned High Court Judge correctly points out, the Accused would have had no way of knowing by the manner he was arrested. In the eyes of this Court, these gaps do not spark any suspicion in the prosecution case.

The other point taken by the Defence is that the learned High Court Judge has not considered the dock statement. In assessing the evidentiary value of a dock statement, this Court is guided by the celebrated judgment of Queen v. Kularatne 71 NLR 529 at p.551;

"We are in respectful agreement, and are of the view that such a statement must be looked upon as *evidence* subject to the infirmity that the Accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,

(a) *If the dock statement is believed, it must be acted upon to.*

(b) *If it raised a reasonable doubt in their minds about the case of the prosecution, the defence must succeed. and*

(c) *It must not be used against another accused."*

With the above dictum in mind, this Court has to consider whether the learned High Court Judge has rightly evaluated the dock statement. In this regard, the relevant excerpt from the judgement is reproduced below (On page 268 of Brief – judgement dated 20/03/2018);

"වැටලීම් නිළධාරීන්ගේ සාක්ෂි අනුව චූදිත සන්තකයේ තිබී කුඩා ඉලෙක්ට්‍රොනික තරාදියක්ද සොයාගෙන ඇත. පැ.6 ලෙස ඉදිරිපත් කර ඇත්තේ එම ඉලෙක්ට්‍රොනික තරාදියයි. එය සාමාන්‍ය භාවිතයේ තිබෙන තරාදියක් නොව, විශේෂ වගර්යක ඉලෙක්ට්‍රොනික තරාදියකි. හෙරොයින් හදුන්වාදුන් බවට චිත්තිය යෝජනා කළත් මෙම ඉලෙක්ට්‍රොනික තරාදිය ගැන චිත්තියේ කිසිම යෝජනාවක් නැත. එවැන්නක් හදුන්වාදීමට හැකියාවක් නොමැති බවද පැහැදිලිය. හෙරොයින් චිත්තිකරුගේ සන්තකයේ තිබී සොයා ගන්නා අවස්ථාවේදීම මෙම ඉලෙක්ට්‍රොනික තරාදියද සොයාගෙන තිබේ. එම කරුණු අනුවද පොලීසිය විසින් හෙරොයින් හදුන්වාදීමක් කළ බවට චිත්තිය කරන යෝජනාව පිළිගත නොහැකි යෝජනාවක් බව පෙනේ. එසේම මෙම චිත්තිකරු සමඟ පොලිසිය කිසිදු තරහක් හෝ අමනාපයක් තිබූ බවටද චිත්තිය යෝජනා කර නැත. මීට පෙර පොලීසිය නොහදුනන මෙම චිත්තිකරුට හෙරොයින් හදුන්වාදීමට වැටලීම් නිළධාරීන්ට මේ අනුව කිසිදු අවශ්‍යතාවයක් නොතිබූ බවද පැහැදිලි කරුණකි. ඒ නිසා හෙරොයින් හදුන්වාදුන් බවට චිත්තිය කරන යෝජනාව අධිකරණයට පිළිගත නොහැක. "

In review of this excerpt, we are of the view that the learned High Court Judge has rightly considered the dock statement and his Defence. We hold that the learned Trial Judge has correctly concluded that the dock statement has not created any reasonable doubt in the evidence of the Prosecution.

Additionally, the Accused has not been successful in establishing any of the limbs set out in the dictum of Shah J. in the case of Kirpal Singh v The State of Uttar Pradesh AIR (1965) SC 712, which was insisted upon by our courts. For the purpose of convenience, it is pertinent to set out the said dictum of Shah J;

"The conclusion recorded by the Court of First Instance and affirmed by the High Court is based upon appreciation of evidence and no question of law arises therefrom. Normally this Court does not proceed to review the evidence in appeals in criminal cases, unless the trial is vitiated by some illegality or irregularity of procedure or the trial is held in a manner violative of the rules of natural justice resulting in an unfair trial or unless the judgment under appeal has resulted in gross miscarriage of justice. "

Considering the same, this Court is of the view that the Accused has failed to satisfy us of any such gross miscarriage of justice. Therefore, we see no reason to interfere with the judgement dated 20th March 2018. 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