

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

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

The Republic of Sri Lanka

Complainant

CA Case No: CA/HCC/119/2020

HC of Colombo Case No:

HC 8061/2015

Vs.

Milinda Stanley Laos Silva

Accused

AND NOW BETWEEN

Milinda Stanley Laos Silva

Accused-Appellant

v.

Hon. Attorney General,
Attorney Generals Department
Colombo 12

Respondent.

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

Counsel: Vishwa De Livera Tennakoon with Lilani Ganegama for the Accused-Appellant
Janaka Bandara, DSG for the Respondent

Written 23.02.2023.(by the Accused-Appellant)

Submissions: Respondent failed to file

On

Argued On: 14.06.2023

Decided On: 09.08.2023

Sasi Mahendran, J.

The Accused Appellant (hereinafter referred to as the Accused) was indicted in the High Court of Colombo on the 6th of October 2015 for committing the following offences;

1. Trafficking 7 g of Heroin (Diacetylmorphine) an offence punishable under 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.
2. For being in possession of 7 g of Heroin (Diacetylmorphine) under Section 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

Prosecution led evidence of thirteen witnesses, with marked production P1 to P10, and closed the case. The Accused made a dock statement. At the conclusion of the trial, the Learned High Court Judge found the Accused guilty and convicted him on both counts and sentenced him to life imprisonment on each count.

Being aggrieved by the aforesaid conviction and sentence, the Accused preferred this appeal to this Court.

The Following are the Grounds of Appeal set out in the written submission:

- a) Has the learned High Court Judge not given due regard to the contradictions between the Prosecution witnesses?
- b) Has the learned High Court Judge not given due regard to the dock statement of the Appellant?
- c) Has the learned High Court Judge not give due regard to the untrustworthiness and weaknesses of the prosecution?
- d) Is the Judgment contrary to the evidence?

The Facts and circumstances are that:

According to PW1, Police Inspector G.H. Susantha Silva, he received information via his mobile phone from an informant on the 10th of October 2010, between 11:50 and 11:55, regarding the trafficking of heroin in a house situated at the end of a narrow lane adjacent to St. Anthony's Shrine in Blumendhal.

Thereafter PW1 assembled a team of officers and embarked on the raid on foot at 12:11. Upon arriving at 13:00 pm, they observed an individual seated on the ground of the living room. As PW1 reached the doorstep, the Accused became excited and attempted to escape. During the ensuing chase, PW1, who attempted to stop and search the agitated individual, clashed with him, and they both fell off the steps at the front of the house. Other officers assisted in apprehending him. The Accused was attired in a pair of brown shorts and a white T-shirt at that time. A search of the Accused led PW1 to discover a pink cellophane bag in the Accused's pants pocket; upon inspection, he identified a brown powder within as heroin.

The Accused was arrested at 13:15, and notes were written regarding the arrest. They left the scene at 13:30 and reached a pawn shop at 13:55 to weigh the bag, which weighed 38g. They arrived at the Kottahena Police Station at 14:15 . At the station, PW1

sealed the production with the Accused's fingerprint and police seal, entering it as P.R 66/2010 (marked as P1), and handed over the production and the Accused to P.C. 79724 Rajapaksha (PW10). PW1 stated that he arrived at the Kottahena Police Station at 14:15 pm, as recorded on page 37, paragraph 38 of the I.B, and only thereafter sealed the production. However, he also stated that the production was sealed at 13:55 pm, a time which coincides with his visit to the pawn shop to weigh the bag. These inconsistencies have been observed and the following questions have been posed by the prosecution.

On Page 54 of the brief:

ප්‍ර : ඔය උකස් ආයතනයට ගියා කියලා කිව්වේ කියට විතරද?

උ : මා එම ස්ථානයට යන විට වෙලාව 13.55 ට පමණ.

On Page 56 and 57 of the brief:

ප්‍ර : කිරා බැලුවට පස්සේ මහත්මයා මොකද කලේ?

උ : එය නැවත මා අතේ තබාගෙන සැකකරුට පෙනෙන සේ සැකකරුත් රැගෙන අනික් නිලධාරීන් සමඟ කොටහේන පොලිස් ස්ථානයට පැමිණියා.

ප්‍ර : පොලිස් ස්ථානයට එද්දී වෙලාව කීය විතර වුනාද?

උ : පැය 14.15 වුනා.

ප්‍ර : පොලිස් ස්ථානයට ඇවිල්ලා මොකද්ද කලේ?

උ : උතුමාණෙනි සැකකරු ඉදිරියේ මුද්‍රා තැබීමට අවශ්‍ය කටයුතු සඳහා සුදු පැහැති කොලයක් රැගෙන මා එහි කෙටි අත්සන, දිනය යෙදුවා. සැකකරු එහි ඔහුගේ කෙටි අත්සනත් ඇඟිලි සලකුණත්, කෙටි නමත් යෙදුවා උතුමාණෙනි.

ප්‍ර : ඒ යෙදුවේ ඔය සුදු පාට කොලයේ?

උ : එහෙමයි.

ප්‍ර : ඊට පස්සේ?

උ : ඉන් පස්සේ හෙරොයින් අඩංගු පාසර්ලය සැකකරු ඉදිරියේ කවරයක දමා එම සුදු පැහැති කොලයද එයට ඇතුලත් කර සැකකරුගේ වම් මාපට ඇඟිල්ලෙන් හා පොලිස් මුද්‍රාවෙන් මුද්‍රා කළා.. නඩු භාණ්ඩ 66/2010ට ඇතුලත් කළා.

On Page 60 of the brief:

ප්‍ර : දැන් මහත්මයා පැමිණීමේ සටහන් දාලා තිබෙන්නේ කීයටද?

උ : 14.15 .

ප්‍ර : මොන පොතේ මොන පිටු අංකයක් යටතේද?

උ : ඩී.අයි.බී. පිටුව අංක 37 වේදය 138 ලෙස.

ප්‍ර : කවදාද?

උ ; 2010.10.10 වන දින.

ප්‍ර : දැන් ඔය නඩු භාණ්ඩ මහත්මයා දේපල කුවිතාන්සි ගත කලාද?

උ ; එහෙමයි.

ප්‍ර : කුමන අංකයක් යටතේද?

උ : නඩු භාණ්ඩ 66/2010 යටතේ ඇතුළත් කලා.

.....

Following questions were asked by the Court.

අධිකරණයෙන්

ප්‍ර: දැන් අත් අඩංගුවට ගත්තේ භාණ්ඩ කීයටද?

උ : 13.15 ට.

ප්‍ර : මුද්‍රා කරලා තිබෙන්නේ කීයටද?

උ : 13.55 ට.

ප්‍ර : 13. 15 ට අත් අඩංගුවට අරගෙන, 13.55 ට වෙනකොට මේ ඔක්කොම කලාද?

උ : 13.15 ට අත් අඩංගුවට ගත්තා. 13.55 ට කිරා බැලීම කලා . 14.15ට මුද්‍රා තැබුවා.

උ : අත් අඩංගුවට ගත් වෙලාවේ ඉදන් පැමිණීමෙන් පසු මුද්‍රා කලා?

උ : එහෙමයි.

ප්‍ර : කොච්චර දුරක්ද ?

උ : කිලෝ මීටර 2ක් විතර

Upon a careful examination of PW1's evidence, certain inconsistencies emerge that give rise to doubt. Specifically, the timeline delineated in the testimony appears

perplexing. PW1 stated that they left the pawn shop at 13:55 and arrived at the Kottahena Police Station at 14:15. However, the testimony lacks clarity regarding the precise time at which the production was sealed and handed over to PW10, leaving an unexplained duration that engenders uncertainty as to when this crucial task was carried out.

PW1 further testified that he had not opened the cellophane bag to examine the light brown powder contained therein, a point that warrants scrutiny in the context of the overall investigation.

In his cross-examination, PW1 revealed additional information that may bear relevance to the case. Specifically, he stated that upon receiving a phone call at 11:45 from the informant, he was notified only about heroin being trafficked at the particular location, with no mention of the Accused or any other identifying details.

On Page 74 of the brief:

ප්‍ර : ඒ පුද්ගලයා ඒ වෙලාවේ 11.00 යි ගානට කතා කරන වෙලාවේ ජාවාරම කරන පුද්ගලයා ඒ ස්ථානයේ ඉන්නවා කිව්වාද?]

උ : ඉන්නවා කිව්වේ නැහැ. එම ස්ථානයේ හෙරොයින් ජාවාරමක් සිදු වන බව තමයි දැනුම් දුන්නේ.

PW1's testimony provides that the distance from the Police station to the specified location was 1 ½ km, and they arrived at the location at 13:00 pm after a walk of more than 40 minutes. According to PW1, his knowledge of the precise location was limited, relying solely on the information received from the informant. Upon reaching the Blumendhal railway track, PW1 and his team took a turn onto the narrow path on the right side of St. Anthony's shrine, leading to the house at the end of that pathway.

However, an apparent contradiction arises when considering the initial information PW1 received, which directed him to turn onto the left side of St. Anthony's shrine. This variance in direction illustrates a substantial discrepancy between the instructions provided to PW1 and the route they ultimately followed to the specified location.

This inconsistency warrants careful scrutiny, as it raises questions about the accuracy and reliability of the information upon which the operation was conducted.

On Page 77 of the brief:

ප්‍ර : මහත්මයා කොහොමද දැනගත්තේ අර තොරතුරුකාරයා විස්තරයක් හරියට කිව්වෙන් නැත්නම් තැන මේ

නිවාස බොහොමයක් තිබෙන ජනාකීණර් ප්‍රදේශයේ ඔය වින්තිකාරයා ඉන්න නිවස මහත්මයා හරියටම දැනගත්තේ කොහොමද?

උ : තොරතුරුකරු දැනුම්දුන්නා උතුමාණනි. බ්‍රවුමැන්ඩල් රේල් පාරෙන් මහවත්ත දෙසට යනවිට සුරුවමක් හම්බෙනවා. ඒ සුරුවමන එක්කම තිබෙනවා වම් පැත්තට කුඩා පටුමක් ඒ පටුමගේ අවසානම ගෙදර කියලා තමයි දැනුම් දුන්නේ.

It is also pertinent to note that the informant had not provided the name or a detailed description of the Accused. We also observe that the team of officers travelled during broad daylight armed with a T-56 gun. Even though there were several houses in the vicinity, only PW1 noticed the house with an opened door where the Accused was found residing. The explanation provided was that the other house was locked, leaving only this particular house accessible.

On page 86 of the brief:

ප්‍ර : වම් අත පැත්තේ යනකොට දොර ඇරලා ඒ නිවසට කෙලින්ම ගමන් කිරීමක් කලාද?

උ : එහෙමයි.

ප්‍ර : දකුණු අත පැත්තේ නිවසක් තිබ්බද?

උ : තිබ්බා. ඒ නිවස වහලා තිබ්බේ මේකේ දොර ඇරලා හින්දා ඒ පැත්තට ගියේ.

It is also important to note that PW1 received the information regarding the illicit activities at 11:45 am but only reached the house at 13:00 pm, leaving a notable gap in the timeline.

Upon arrival, the Accused was searched in front of the house. PW1 did not investigate the house further after recovering the illicit drugs from the Accused, deeming it unnecessary due to the absence of any other occupants. The Accused was arrested at 13:15 pm, and after spending 10 to 15 minutes at the location to record the entry in their book, they left the place at 13:30 pm.

In a significant detail, PW1 stated that he did not open the pink cellophane bag, asserting that his expertise was sufficient to identify the brown powder in the bag as heroin. This claim might raise questions about the exact identification process used.

Further, PW1 indicated that the distance between the place of arrest and the pawn shop was 1 ½ km. Since it was a Sunday, the shop was closed; thus, PW1 had to communicate with a worker who resided there to open the shop and complete the process

of weighing the production. He later admitted that they set out to the Pawn shop from the place of arrest at 13:30 pm.

We observe the following questions put forward by the prosecution in the re-examination.

On page 109 of the brief:

ප්‍ර : ඔබ කිවවා එහෙම දැන ගන්න අවශ්‍යතාවයක් තිබුණේ නෑ කියලා?

උ : එහෙමයි.

ප්‍ර : ඇයි ඒ වෙලාවේ ඔබ ඒ සඳහා උත්සාහයක් ගත්තේ නැත්තේ කියලා කියන්න?

උ : ස්වාමිනි නීතිවිරෝධී යමක් සිද්ධ වෙනවා නම් ඒක කා අතින්ද වෙන්නේ කියන එක දැන ගැනීමට

අවශ්‍යතාවයක් තිබ්බේ නෑ. සිද්ධිය සම්බන්ධයෙන් පමණයි දැන ගැනීමට අවශ්‍යතාවයක් තිබුණේ නැහැ.

From the evidence presented by PW1, the court must grapple with significant questions including that of how the officers would have conducted a search if the Accused was a woman and about the decision-making of the officers involved. Notably:

The Method of Travel: What is the reason for the officers to travel on foot for a distance of 1 ½ km during daytime? The decision to go by foot raises concerns, especially considering that PW1 received information about heroin trafficking at 11:45 am. A prudent officer would likely prioritize rapid response to ensure that suspects do not leave the location.

On page 106 of the brief:

ප්‍ර : දැන් මහත්මයා පුද්ගලිකව ඒ සේවකයාව අදුනනවාද?

උ : නෑ ස්වාමිනි.

ප්‍ර : එහෙනම් මහත්මයා කොහොමද දැන ගත්තේ?

උ : ඒ යාබද නිවාස නිසා ඒ නිවසට කතා කළා. උකස් මධ්‍යස්ථානය වහල තිබ්බ හින්දා. ඉන් පසුව ඔහුට පැමිණි කාරණය කියා දීලා දොර අරින ලෙස කිව්වා.

ප්‍ර : මම මහත්මයාට යෝජනා කර සිටිනවා මහත්මයා කියන්නේ සම්පුණ්‍ර අසත්‍යක් කියලා?

උ : පිළිගන්නේ නැහැ උතුමාණෙනි.

ප්‍ර : දැන් ඔය ස්ථානයට ගිහිල්ලා භාණ්ඩ කිරණ කොට දොර අරින්න එපැයි ඉස්සෙල්ලා?

උ : එහෙමයි.

ප්‍ර : සම්පුණ්‍රයෙන් විවුතර් කරලා ඇතුලට ගියාද නැත්නම්?

උ : එක දොරක් පමණයි ස්වාමිනි.

Upon evaluating the testimony provided by this witness, it becomes highly implausible that the events related to the pawn shop could have occurred within the stated short time frame. Consequently, we find it necessary to reject PW1's account. Now, shifting our focus to PW2's testimony.

PW2, H.G Jayasekara, a Police Sergeant, recounted that they initiated their investigation into the reported heroin trafficking near the Blumendhal railway tracks based on information received by PW1. PW2 proceeded to describe their journey to the mentioned location, indicating that it was situated 60 meters down the road from where the house identified by PW1 was located. Notably, PW1 had provided the exact address "අංක ඊ /62/65 දුම්රිය පටුමග, බලුමැන්ඩල් පාර, කොළඹ 15," which was not supplied by the informant and included details about the Accused's residence.

On Page 115 of the brief:

උ : එම පාර ඔස්සේ මීටර 60ක් පමණ ඇතුළට ගිය විට උතුමාණෙනි පොලිස් පරීක්ෂක සිල්වා මහතාට ලද තොරතුරේ සඳහන් අංක ඊ /62/65 දුම්රිය පටුමග, බලුමැන්ඩල් පාර, කොළඹ 15 දරණ නිවස පිහිටා තිබුණා උතුමාණෙනි.

It is important to highlight that, in PW1's account, he had become aware of this address only after the arrest of the Accused.

According to PW2's account, upon apprehending the Accused with the pink cellophane bag containing the heroin, PW1 allegedly unsealed the bag and inspected the brown powder. Drawing on his expertise, he identified the substance as heroin, discerning this from its aroma and colour. However, it's important to note that in PW1's testimony, there is no mention of him ever opening the aforementioned bag at any point during the proceedings

On Page 117 of the brief:

ප්‍ර : එහි මොනවා අන්තර්ගතව ඇති බවටද පොලිස් පරීක්ෂක සිල්වා නිගමනය කළේ?

උ : උතුමාණෙනි පොලිස් පරීක්ෂක සිල්වා මහතා විවුනර් කර පරීක්ෂා කර එය තුළ දුඹුරු පැහැති කුඩු වගරියක් තිබෙනවා මමත් දුටුවා උතුමාණෙනි. එය උතුමාණෙනි ගත්ධයෙන් සහ වණරයෙන් එය හෙරොයින් කුඩු බවට මාගේ පළපුරුද්ද හා දැනුම අනුව සහ පොලිස් පරීක්ෂක සිල්වා මහතාගේ පළපුරුද්ද හා දැනුම මත තීරණ කිරීමක් කළා හෙරොයින් මත කුඩු බවට උතුමාණෙනි .

During his cross-examination, he added that they possessed knowledge of the drug trafficking location but lacked precise information about the house number. Nevertheless, they were aware that the activity was taking place near the Blumendahl railway track,

approximately 1 ½ km away from the police station. The specifics of the house's number were undisclosed, though they were instructed to proceed to the lane adjacent to the shrine. The distance between the house and the shrine was estimated at 30 to 40 meters.

It appears highly unusual that, for a drug raid, they did not carry a pair of handcuffs and chose to travel on foot to apprehend the Accused. It is customary for a prudent officer to utilize a vehicle in such scenarios.

According to PW2, there were no residences located on the right side of that road. However, PW1's testimony contradicts this by indicating that the houses on the right side were shut. It's noteworthy that PW2 mentioned focusing solely on the left-hand side of the lane during their search. Nevertheless, the information conveyed to PW1 regarding the exact location of the house lacked specificity.

On page 138 of the brief:

ප්‍ර : ඉතිං අනිත් පැත්තෙන් තිබෙනවානේ ජේලියේ ආවසාන නිවාසයක් එහෙනම්?

උ : ස්වාමීනි මම කියා සිටියේ වම් අත පැත්තට තමයි අපි පරීක්ෂා කල නිවස තිබෙන්නේ උතුරාණෙනි පටු මාගර්යේ, දකුණු අත පැත්තෙන් ඒ ආසන්නයේම නිවාස නැහැ.

What is evident is that PW2 has presented two distinct versions: one during the examination-in-chief and another during the cross-examination, in two different dates.

Additionally, he maintains that they refrained from conducting a search of the house due to the absence of any investigative leads. Furthermore, PW1 took the initiative to unseal the cellophane bag and inspect the brown powder, holding it in proximity to his nose. Similarly, PW2 replicated the same action during the course of the procedure.

On page 149 of the brief:

ප්‍ර : කොහොමද පරීක්ෂා කලේ?

උ : ඔහු සුවඳ කරලා බැලුවා. දුඹුරු පාට කුඩක්.

ප්‍ර : ඒ කියන්නේ පාසර්ලයේ කට විවර කරලා ඉම්බාද , පාසර්ලය ඉබලා බැලුවාද?

උ : සැර බැලුවා උතුරාණෙනි.

ප්‍ර : මහත්මයා කොහොමද පරීක්ෂා කලේ?

උ : මාත් උතුරාණෙනි නයහට ලං කරලා බැලුවා මේ සැර දැනුනා.

Upon analyzing this excerpt, it becomes evident that PW2 has completely contradicted the version postulated by PW1. Furthermore, he asserts that the pawn shop they visited was a two-story building.

When considering this evidence, a number of discrepancies emerge within the witness evidences of PW1 and PW2. It is observed that the Learned High Court Judge failed to address the vital inter se and per se contradictions in the accounts of the main witnesses, PW1 and PW2, as well as the overall implausibility of the Prosecution's evidence. Our perspective is that the charges against the Accused have not surpassed the threshold of beyond reasonable doubt.

Taking into consideration all these circumstances, we are of the view that the conviction and sentence of the Accused cannot stand. We set aside the judgment delivered on 17.06.2020 by the High Court of Colombo. This Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL