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

In the matter of an appeal under and in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:

CA/HCC/0310/15

High Court of Colombo

Case No. HC/4983/2009

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Kariyawasam Ampegama Gamage Kamal Shantha Kariyawasam

ACCUSED

AND NOW BETWEEN

Kariyawasam Ampegama Gamage Kamal Shantha Kariyawasam

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Shavindra Fernando, P.C. for the Accused-Appellant

: Maheshika Silva, DSG for the Respondent

Argued on : 12-05-2023, 29-05-2023, 06-06-2023, 15-06-2023, 27-06-2023

Written Submissions : 07-07-2020 (By the Respondent)

: 21-02-2019 (By the Accused-Appellant)

Decided on : 19-09-2023

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Vavuniya for having committed the offences of possession and trafficking of 5.919 kilograms of Diacetylmorphine (commonly known as Heroin) on 14-06-2006, and thereby committing offences in terms of sections 54A (b) and 54A (d) of the Poisons, Opium And Dangerous Drugs Ordinance as amended by Act No. 13 of 1984, punishable as stipulated in the Ordinance.

The Attorney General, by his letter dated 26-08-2009 had transferred the case to be heard before the High Court of Colombo. After trial, the appellant was found guilty for both the counts preferred against him, namely, possession and trafficking of Heroin, of the judgement dated 12-08-2015 by the learned High Court Judge of Colombo, and accordingly he was sentenced to life imprisonment on both the counts.

It is against the said conviction and the sentence, the appellant has preferred this appeal, challenging both the conviction and the sentence.

When this matter was taken up for hearing before this Court, the learned President's Counsel representing the appellant sought permission of the Court to make submissions in relation to the sentence imposed upon the appellant, which was allowed by this Court. It was the contention of the learned President's Counsel that although the sentence prescribed by the Ordinance is a mandatory sentence, there was no impediment for a trial Court to deviate from the mandatory sentence, as judicial discretion cannot be restricted by way of a statute. He cited several judgements in that regard, and sought an order from this Court before he proceeds to argue the appeal proper.

Having listened to the learned President's Counsel as well as the learned Additional Solicitor General (ASG) who represented the complainant-respondent then, this Court pronounced the order dated 01-04-2022 and dismissed the contention of the learned President's Counsel in that regard.

When this matter was taken up for argument accordingly, the learned President's Counsel formulated the following ground of appeal for the consideration of the Court.

The Ground of Appeal

1. In considering the totality of the evidence and the judgement, and the questions asked by the trial Judge when the appellant was giving evidence, there was no fair trial for the appellant guaranteed under Article 13 (3) and 13 (5) of The Constitution.

Before considering the submissions made in relation to the ground of appeal urged by the learned President's Counsel, and that of the learned Deputy Solicitor General (DSG) in that regard, I will now consider the facts as revealed by the evidence before the trial Court as summarily as possible in the following manner.

Facts in Brief

PW-01 Chief Inspector of Police Upul Seneviratne was the Officer-in-Charge of Murukkan police station in Vavuniya on 14-06-2006, which is the date relevant to this incident.

Around 14.30 in the evening, while at his station, he has received a telephone call from a person who spoke in broken Sinhala language, informing him that a person is travelling with a suspicious looking parcel. Few minutes thereafter, at 14.35, he has received another call from a Captain of the Thalladi Army Camp of a person travelling with a suspicious parcel, which may be a concealed weapon.

After making the relevant notes of the information received by him, he immediately proceeded to meet his supervising officer who was the Senior Superintendent of Police in charge of Zone 10 and informed him of the information. With his approval, he has assembled a team of police officers and had issued them with the necessary weapons, as the area they have to travel was an area having frequent terrorist activities. Subsequently, he has left in the vehicle number WP HD-9791 to inquire into the information.

As he has received the information that the suspected person is travelling in the bus of Rathna Tours travelling towards Colombo, he has informed the forward roadblocks to stop the bus and wait for him. When he reached the roadblock at Zone 01, he has seen the relevant bus parked as instructed by him. The bus was parked facing towards Colombo. He has reached the place at 15.10 hours and after providing security to the rear door, he has entered the bus from the front door along with 2 other officers, and had instructed the passengers to take their identity cards and belongings for the police to inspect the same.

At that time all the passengers were seated, and there were some vacant seats as well. When he reached the right-side front seat next to the driver's seat, the person seated there had identified himself as Major Kariyawasam and had given

his identity card. Next to the Major, a Police Sergeant serving in his own station who left the police station on leave was seated.

The Major was dressed in civilian clothes and had a black coloured large bag on his lap. When he directed the Major to open the bag, he has observed that he panicked, and was reluctant to open the bag, but had stated that he wishes to speak with the witness. As the bag was with a padlock, the witness has directed the person to get the key, for which he has replied that the key is in Colombo. Having failed to get the person to open the bag voluntarily, the witness has searched his trouser pockets and found a key inside the purse the person was carrying, which appeared to be the key of the padlock. When the witness opened the bag using the key the person had in his possession, he has discovered 15 neatly packed and taped parcels of about 10 x 06 inches. Realizing that these packets may carry prohibited drugs through his experience, he has pierced one of the parcels and had taken out a small sample of the powder like content inside, and had confirmed for himself that the contents are Diacetylmorphine or Heroin.

Accordingly, PW-01 has arrested the person who possessed the drugs, after informing the charge against him. At the trial, he has identified the appellant as the person who was arrested by him. Apart from the parcel that was on the lap of the appellant, he had found another bag under the seat, where he has found a camouflaged army uniform as well as a uniform of an Army Major. The arrest has been made at 15.15 hours.

After a brief inspection, he has taken charge of the productions and the appellant and had decided to immediately go back to his police station, as the area where the detection took place was a highly insecure area due to constant terrorist activities. His intention had been to reach a secured location as soon as possible to conduct further investigations.

In his evidence, the witness has described the steps he took to secure the safety of the productions and the appellant, who was under his custody. At the police station, he has weighed the gross weight of the 15 packets he took into custody

from the possession of the appellant, and had taken necessary steps to seal the productions and enter the productions under PR 166/2006 in the police station PR registry. In the 15 parcels recovered from the custody of the appellant, PW-01 has found little over 1 kilogram of the substance he suspected to be Heroin in each of the packets, which had a total content of over 15 kilograms. After the due procedural steps, the PW-01 has taken the relevant steps to produce the appellant before the Magistrate of Mannar.

The witness has identified the productions he detected and had marked the same before the trial Court. He has explained the procedure he has followed to take charge of all the other productions recovered and the steps he took in that regard as well. He has marked and produced the relevant other productions before the trial Judge.

The next witness of importance called by the prosecution to prove its case was PW-04 Lance Corporal Dissanayake. He had been serving at the Thalladi Camp of Sri Lanka Army during the time relevant to this incident as a Corporal attached to the military police.

His commanding officer had been Major Ratnayake who was a Captain during the time relevant to this incident. He had been assigned the motorbike numbered UA 100-606 for his duties as a military police officer. On the day relevant to this incident, he had been summoned by his commanding officer, and when he entered his office, he has pointed to the person seated in front of him and informed that he was an officer who had come from Colombo to travel to Puthukaman Army Camp on an official duty, and to take him to the said camp on his motorbike. The said person was wearing a camouflaged army uniform indicating the rank of a Major and he has identified him as the appellant at the trial. He has come to know him as Major Kariyawasam. Following the order, he has taken the appellant in his motorbike intending to go to the Puthukaman Army Camp, which is situated towards Medawachchiya from his camp at Thalladi. However, instead of going towards Medawachchiya, the appellant has

ordered the witness to travel towards the opposite direction towards Mannar, informing him that he needs to go to Mannar to collect some dry fish from a friend and thereafter, he will be going to the Puthukaman camp. Although PW-04 was reluctant, he has followed the orders of the appellant since he was a senior army officer and he had no way of disobeying his orders. After reaching Mannar, the appellant has directed the witness to travel towards Talaimannar, which was in an unsecured area. Although the PW-04 was carrying a T-56 weapon, he has informed the appellant that traveling in this area is highly dangerous as he was dressed in army uniform. The appellant has said 'do not be afraid and travel.' They have travelled for about 15 – 20 kilometers towards Talaimannar and the appellant has directed the witness to turn left from the Pesalai junction towards Murugan Kovil road. After travelling for about 200 meters, the appellant has directed the witness to stop and the appellant has got down. Then he has seen the priest of the Kovil coming out and having a discussion with the appellant. The appellant has returned and got onto the motorbike and had directed the witness to travel further. When they travelled about 25 meters, a well-built person has come towards them in a foot bicycle. The appellant has directed the witness to stop the bike and had gone towards the person and had another discussion. Afterwards, the said person had turned back and paddled the foot bicycle. The appellant had directed the witness to follow him in the motorbike, and after travelling for about 50 meters, the appellant had asked the witness to stop near a large house, which had parapet walls around it. The appellant had gone inside the house and had returned after about 20 – 30 minutes, this time carrying a black coloured large bag hanging on his shoulder.

Thereafter, the appellant has informed PW-04 that he got the dry fish and to travel fast because it is late and he needs to go back to Colombo. While on their way back, his bike has suffered a tyre puncture near Mannar hospital and the witness has taken the bike to a repair shop nearby. While they were waiting inside the repair shop for the repair to be completed, the witness has observed

the black coloured bag the appellant brought from the house having a padlock, which had aroused his suspicions. Waiting for an opportune moment where the appellant had walked out of the repair shop, the witness had gone near the bag and smelled it to find whether it emanates any dry fish smell, and it was his evidence that there was no such smell emanating from the bag.

After the repair was done, the appellant had instructed the witness to travel towards Puthukaman. However, as the witness suspected some foul play, he has lied to the appellant saying that the motorbike has no fuel and he has to get back to the Thalladi camp to obtain more petrol. The appellant has resisted this and had informed the witness that it is not necessary to go the camp, but to take the bike to a petrol station nearby and that he will pay for the petrol. The witness has stated the appellant that it cannot be done as it would amount to an offence to get petrol from private sources and had suggested to the appellant to wait near the place called Runaway Point, which was about 500 meters away from the camp, and he will go to the camp and get the required petrol and return. Reluctantly, the appellant had agreed.

After reaching the entrance to the camp, PW-04 has contacted Captain Ratnayake who was his commanding officer and the officer who directed him to take the appellant to Puthukaman, and informed him of what happened. Captain Ratnayake along with the witness has returned to the Runaway Point where the appellant was, and has found that the appellant has left the place in a firewood lorry that was travelling to Puthukaman army camp. Although both of them had gone in pursuit of the vehicle, they had been unable to track it, but when inquired from the next checkpoint about the vehicle, they have been informed that the appellant gotten down at the checkpoint, and changed his uniform to civilian clothing and had gotten onto the Rathna tour bus plying from Mannar to Colombo. They have decided to pursue the bus and when they had reached the 215 Brigade Headquarters which was about 15 kilometers away, they had come to know that the bus has gone past that place. After realizing that they cannot catch up with the bus by traveling on a motorbike, Captain Ratnayake

has gone inside the Brigade Headquarters and obtained an army truck from the camp and had pursued the bus further. When reaching the Medawachchi Parayanakulam junction, they have seen the bus being stopped. They have observed the appellant under the custody of the Murukkan police. The witness has identified the appellant as the person who travelled with him and the bag marked P-05 as the bag the appellant brought from the house near the Kovil. It was also his evidence that while traveling towards Talaimannar, the appellant wanted him to stop the bike and took calls 4 – 5 times using his mobile phone and informed him that it was from his wife who was worried about his travel to Mannar. He has testified that when he saw him in police custody, he was in civilian clothes and had identified the bag marked as P-31 as the bag the appellant had with him when he met the appellant for the first time in Captain Ratnayake's office.

Under cross-examination, PW-04 has testified that when the appellant brought the bag marked P-05, it had a shoulder strap, but the P-05 produced for his identification had no such strap. It had been suggested to the witness that he never took the appellant to Talaimannar and he was lying in that regard, and it was the witness who instigated Captain Ratnayake by telling a falsehood to him, which the witness has denied saying that he had nothing personal against the appellant and it was the first time he met him. It was also suggested to him that the witness did not drop off the appellant near the runaway point as claimed by him, but near the bunker situated at the turn off to the army camp and he informed the witness that he needs to wait for one Captain Samaraweera until he returns from duties, which the witness has again denied saying that it was not what happened. It was the suggestion made on behalf of the appellant that the witness is giving false evidence at the instigation of the Police Narcotics Bureau, which the witness had denied again.

PW-02 who was the Captain Ratnayake mentioned by PW-04 has given evidence in this matter and had confirmed that on the day in question, the appellant who was a Major, came to his camp and identified himself as Major Kariyawasam. He

had informed Captain Ratnayake that he came to conduct a preliminary investigation as to a lost weapon and needs to go to an army unit called 17-SLNG stationed in Puthukaman area. Accordingly, he has facilitated the appellant to change into his uniform and provided a motorbike ridden by PW-04 who was attached to the military police to accompany the appellant. The appellant and PW-04 have left the camp around 11.30 a.m.

Around 1.15 p.m., PW-04 has given a call using the internal communications of the camp informing him that the appellant did not go to the place where he informed that he is going, but went to Mannar and obtained a suspicious parcel. The witness has corroborated as to the events that took place thereafter, as stated by PW-04 in Court and, the fact that they saw the appellant in police custody near the checkpoint.

PW-08 has been one of the police officers who accompanied Chief Inspector Seneviratne in pursuit of the Rathna tour bus and assisted him in searching the appellant and arresting him. He has corroborated what Chief Inspector Seneviratne said in Court in that regard.

PW-05 has been the driver of the Rathna tour bus mentioned in this trial. According to his evidence, when they were travelling from Mannar to Colombo, his bus was stopped at Parayanakulam road block and was informed that the Officer-in-Charge of Murukkan police will come to travel in his bus and to wait for about 5 minutes. While he was in the process of registering his name at the checkpoint, the OIC and a team of police officers have come and searched the bus. It was his evidence that the police arrested the person seated behind the driving seat along with his bag and taken to the police jeep. He has identified the person arrested by the police as the appellant in the Court. He has stated further that the appellant travelled in the bus on their way from Colombo to Mannar as well, and according to his memory, he got into the bus from either Anuradhapura or Medawachchiya and wanted him to drop him off at Thalladi camp.

His evidence has been that because of the war situation and several checkpoints they had to pass, he has the ability to remember a person well, and that is the reason why he remembers the appellant as a person who travelled in his bus previously.

It is clear from his evidence that when the police arrived, he was the only person waiting outside the bus and the search of the appellant had been while he was seated inside the bus.

The Registrar of the Magistrate's Court of Mannar has given evidence in relation to the handing over of productions to the Court.

PW-03 had been the Commander of the army camp where the appellant had gone and requested for a vehicle to travel, claiming that he has to conduct an inquiry, where a motorbike had been provided. He has confirmed the evidence of Captain Ratnayake and has confirmed the highly volatile situation that existed in the Talaimannar area during that time, and the precautionary measures the army used to take while travelling in that area.

When the Government Analyst gave evidence at this trial, the defence has admitted the competency of the Government Analyst to give evidence, the fact that the productions had been taken over, properly accepted and the analysis in terms of section 420 of the Code of Criminal Procedure Act.

The Government Analyst giving evidence has confirmed that the parcels marked K-01 to K-15 contained a pure quantity of 5919 grams of Diacetylmorphine, which is also commonly known as Heroin. The prosecution has called evidence to prove the chain of custody of the productions as well. The prosecution has recalled PW-01, Chief Inspector Seneviratne to clarify certain matters as to the identity of the productions, which arose as a result of the evidence of the Government Analyst.

After the prosecution closed its case, the learned High Court Judge has decided to call for a defence of the appellant and had informed him of his rights.

The appellant has chosen to give evidence under oath. In his evidence, he has stated that he had a reason to go to the Mannar area on 14-06-2006. Explaining the reason, he has stated that he had a financial issue during that period and one Captain Ajith Samaraweera who served with him in the army was a close friend of him from his school days, and his family and Captain Samaraweera's family had a close relationship. It was his position that when he discussed his financial issues with Captain Samaraweera, he wanted him to come and meet him at his workplace to help him over the issue and has promised to give him a cheque, and he was serving at the 17 SLNG camp, which was situated between Parayanakulam junction and Thalladi army camp. He has stated that towards reaching the said camp, he got onto a bus from Colombo and got down near the main camp which was Thalladi camp with the intention of going to 17 SLNG camp. It was his position that when he started his journey from Colombo, he was unaware of the location of 17 SLNG camp so he got down near the Thalladi camp in order to find out from the Commanding Officer of the camp, the location of the camp he wanted to reach.

He has stated that he was able to meet the Commanding Officer and to obtain a motorcycle along with a Lance Corporal rider from the military police. He has claimed that he had to wait for several hours to obtain this facility and he changed his civilian clothes to a camouflaged uniform in order to travel with the military police rider. He has admitted that one has to travel passing 17 SLNG camp to reach the Thalladi camp, but has claimed that he was forced to travel to Thalladi camp as he was unaware of the said location.

It was his position that to reach the said camp, one has to travel 3 kilometers off Mannar-Colombo road and once he reached the army check point near the junction that leads to the camp, he inquired with the assistance of the radio communication set available with the soldiers manned in the checkpoint whether Captain Samaraweera is in the camp, and was informed that he has gone out of the camp for an urgent operation. The appellant has claimed that he decided to wait near the checkpoint and waited for nearly 2 – 2.30 hours there expecting

his friend to return. However, the military police Corporal wanted to return to his camp stating that he cannot wait any longer and there was a verbal altercation with him in that regard. It was his position that being a Senior Officer, he insisted the Corporal to stay, but he left the place without obeying his orders.

He has admitted that the said Corporal mentioned by him was Corporal Dissanayake who gave evidence in this matter. After inquiring from the camp whether his friend has returned, and after being informed that he will not be returning until the nightfall, he decided to return to Colombo and changed his clothing to civilian clothes at the checkpoint and got onto a bus plying from Mannar to Colombo which is the Rathna tours bus mentioned by the witnesses in this matter.

He has stated that there was less crowd in the bus at that time and that he sat on the seat behind the driver's seat. He has claimed that he had only the bag he took from Colombo. He has denied that he had with him the other bag produced in this trial which contained Heroin.

He has been adamant that he never travelled to Mannar with Corporal Dissanayake and never received a black coloured briefcase type bag with a shoulder strap.

He has admitted that the bus was stopped at the Parayanakulam checkpoint, but has claimed that the bus was kept there for about 30 minutes, and when inquired, he was informed that the OIC is coming to travel on the bus. It was his position that because of the hot weather of the area, he too got down from the bus along with the driver, and was smoking a cigarette when the police led by OIC of Murukkan police came and ran towards the bus. He has claimed that after 2 – 3 minutes, a police officer inquired who is Major Kariyawasam and at that point, he got onto the bus and identified himself. It was his position that when Chief Inspector spoke to him, he showed him the only bag he was carrying and denied that he had any other bag in his possession. However, according to him, the Chief Inspector has inquired about another bag and has taken a bag

from the rack above him and had claimed that it belonged to him which he refuted. He has denied that the police took a key from his purse, but had stated that he was arrested by the police along with the other bag, and when they could not open the other bag found, one officer damaged a part of the bag using the cleaning rod of his T-56 weapon and there was a brown-coloured powder in the bag. He has strenuously denied that the said bag belonged to him.

He has claimed that after the arrest, he was physically harassed and questioned. He has further claimed that the police forcibly attempted to take his left thumb impression to seal the productions, and at that time, his left thumb got burned. He has denied that he was taken to a hospital, but claimed that the police took him to various places and ultimately produced him before the Magistrate.

Under cross-examination by the prosecution, he has admitted that the police officers involved in this detection were not known to him previously and that the army officers too, apart from meeting them during army operations, have no enmity with him. He has also admitted that PW-04 Lance Corporal Dissanayake was a very much junior ranker in the army.

The prosecution has alleged that if the appellant was assaulted as claimed by him in his evidence, he has failed to put that evidence to the relevant witnesses when they were cross-examined on behalf of him and there was no dispute when the police produced the Medico-Legal Examination Form marked P-52 before the trial Court. Under cross-examination, he has admitted that the bag taken by the police had a padlock, although he denied that it belongs to him. He has taken up the position that he wanted to obtain Rs. 200000/= from his friend Captain Samaraweera.

The position taken up by the prosecution had been that he is making up a story without any basis, to counter the incriminating evidence presented against him by the prosecution

Consideration of the Ground of Appeal

During the course of his submissions before this Court, the learned President's Counsel urged the following points for the consideration of the Court to argue that the appellant did not receive a fair trial, and his appeal should succeed on that basis.

- The indictment was not read and explained to the appellant in his presence before the trial commenced.
- The case was transferred from one High Court to another in Colombo without giving any reason and at the request of the prosecuting State Counsel.
- The learned High Court Judge failed to mention any legal principles that a trial Judge should have considered before determining that the case has been proved beyond reasonable doubt.
- The learned High Court Judge has only given a narration of evidence in his judgement and has failed to analyze the evidence in its correct perspective.
- The learned High Court Judge has cited judgements to cover the infirmities in the evidence of the prosecution and had failed to consider a single ground that was in favour of the appellant.
- The improbability of the timings from the point of receipt of information and to the arrest of the appellant, which included PW-01 going to get his pocket notebook signed by the SSP.
- The learned High Court Judge asked several questions during the appellant's evidence and the questions suggest that they were asked in favour of the prosecution and not in favour of the defence.
- The prosecution's failure to call Police Sergeant Ratnayake who was attached to Murukkan police and was seated next to the appellant who should have been a vital witness for the prosecution to prove the detection.

- The learned High Court Judge's failure to consider the major contradiction marked V-01 in his judgement and has brushed aside the contradictions pointed out as minor differences between the witnesses for the prosecution.
- The burning of the finger of the appellant was considered quite normal by the learned High Court Judge, however, the MLEF produced by the prosecution indicates no injuries, and this should have been considered in the light of the appellant's evidence that although he was taken to a place resembling a hospital but never produced before a doctor.
- Glaring contradictions with regard to the bag alleged to have been carried by the appellant having a strap was not considered by the learned High Court Judge but, had made an incorrect assumption that the PW-08 had identified the bag with a strap.
- The learned High Court Judge failed to consider glaring contradictions with regard to the information received.
- The learned High Court Judge failed to consider in a proper manner the evidence given by the appellant that the bag was opened using a cleaning rod in the weapon and the bag being torn.
- The learned High Court Judge failed to consider that the padlock and the key were introductions made by the witnesses to implicate the appellant.
- The learned High Court Judge failed to consider that the padlock and the key were not kept in proper custody and was sent to the High Court by the Registrar of the Mannar Magistrate's Court separate to the other productions.
- The learned High Court Judge failed to consider the contradiction between the police witnesses and army witnesses as to whether the police knew the name of Kamal Kariyawasam who is the appellant at the time of the raid.
- The learned High Court Judge failed to consider the contradiction of evidence between the driver of the bus and PW-01 with regard to both the information, and the driver being out of the bus when the police arrived.

- The learned High Court Judge's comment in the judgement that the defence did not challenge the evidence of the driver of the bus is untenable, because the driver's evidence was favourable to the defence as it contradicted with PW-01.
- The learned High Court Judge has made an erroneous comment in the judgement that the appellant has failed to ask any questions from PW-01 of the fact that he was outside the bus when the police arrived.
- There is no proper acceptance of the prosecution evidence on the basis that the prosecution has proved the case beyond reasonable doubt, nor a rejection of the appellant's evidence with reasons. The learned High Court Judge failed to consider the intermediatory position where the appellant's evidence is neither accepted nor rejected, in which case the appellant should have been acquitted.

Making submissions extensively in relation to the above points taken, it was the position of the learned President's Counsel that the conviction of the appellant was bad in law and urged the Court to acquit the appellant from the charges preferred against him.

The Deputy Solicitor General (DSG) in her extensive submissions pointed out that the conditions prevailed in the area where the offence had been committed, and was of the view that it needs to be considered as a relevant factor in analyzing the evidence presented by the prosecution. Commenting on each of the points taken by the learned President's Counsel, the learned DSG submitted that none of the positions have any merit as the learned High Court Judge has adequately dealt with the matters concerned in his judgement.

It was her view that what the appellant claims as evidence that favours him cannot be accepted as such, and the contention that the learned High Court Judge has failed to consider evidence favouring the appellant also has no basis. Commenting on the way the judgement has been written by the learned High Court Judge, it was the position of the learned DSG that each Judge has his or

her own way of writing and the learned High Court Judge, although may not have followed the conventional way of writing a judgement, all the necessary principles that should be considered, have been considered and the evidence had been properly analyzed before reaching the final conclusion that the prosecution has proven the case beyond reasonable doubt against the appellant.

The learned DSG urged the dismissal of the appeal on the basis that it has no merit.

I will now proceed to consider each of the points taken up by the learned President's Counsel with reference to the evidence presented before the trial Court, the judgement, and other incidental matters, to consider whether there is merit in the ground of appeal urged by the appellant.

The learned President's Counsel took up the position that the indictment was not read over and explained to the appellant, probably based on the fact that there is no indication in the journal entries maintained by the trial Court in the case docket and the copies of the proceedings filed of record.

According to the proceedings of this action, the prosecution witness number 01 has commenced his evidence on 26-07-2010. Although there is no indication in the typewritten proceedings for that day that the indictment was read over and explained to the appellant and he pleaded not guilty to the charge, it is abundantly clear from the case record that in fact the indictment had been read over to him and he has pleaded not guilty.

The learned High Court Judge who presided over the trial at that time has entered the following note in his handwriting in the indictment itself in the space provided for recording of the plea of an accused and signed and dated on 26-07-2010.

The said endorsement reads as follows.

> ‘‘කොළඹ මහාධිකරණයේදී මේ අධිචෝදනා පත්‍රයේ ඇතුලත් චෝදනා වලට වර්ෂ 2010 ක් වූ ජූලි මස 26 වන දින වුදිතට අධිචෝදනා පත්‍රයේ සඳහන් චෝදනා දෙක කියවා දීමෙන් පසු වුදිත විසින් චෝදනා වලට "මම නිවැරදිකරු" යැයි ප්‍රකාශ කරන ලදී.’’
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> (Page 07 of the original case record)

The above endorsement made by the learned High Court Judge clearly establishes the fact that the charge has been read over and explained to the appellant and he has pleaded not guilty.

The appellant has been represented throughout the trial by a Counsel, and it is clear that the case had proceeded to trial because the appellant has pleaded not guilty to the two charges preferred against him. Hence, I find no basis for the argument considered as above.

This is a case where the indictment had been originally filed before the High Court of Vavuniya and subsequently transferred to be heard before the High Court of Colombo. The case record indicates that the trial proper has commenced before the High Court number 03 of the Colombo High Court and after leading the evidence of PW-01 halfway, the learned High Court Judge who presided over the matter has gone on transfer. When the matter was resumed before the succeeding High Court Judge, the learned State Counsel who prosecuted has made a request from the Court to send the case before the High Court Judge who is presiding at High Court number 07 for further trial, which has resulted in the presiding High Court Judge in High Court number 03 sending it before the learned High Court Judge of High Court number 01 in Colombo who is the Judge assigned with administrative functions of the Court to a suitable directive. This has resulted in the nomination of the learned High Court Judge who presided in High Court number 07 to hear and determine this matter. When the matter was taken up before the learned High Court Judge in High Court number 07 in that regard on 15-01-2013, both the defence as well as the prosecution has agreed to proceed with the trial by adopting the evidence taken previously.

The appellant had been represented by a Counsel, and if he had any issue with the High Court Judge of Court number 07 taking up the further hearing of the matter, it should have been informed to the Court, which was not the case. I am of the view that there is no basis for the appellant to take up that matter on the basis that he was denied of a fair trial, as the trial had been proceeded in High Court number 07 of the High Court of Colombo with the consent of all the parties.

The learned President's Counsel in his submissions contended that the learned High Court Judge failed to mention the legal principles a trial Judge should consider in a judgement and has only narrated the evidence but failed to analyze in reaching his conclusions.

As submitted to the Court correctly by the learned DSG, each Trial Judge has his or her own style of writing a judgement. It is correct to say that the learned High Court Judge has not stated the legal principles that he would consider to determine whether the prosecution has proved the case beyond reasonable doubt against the appellant. However, that in itself does not mean that the learned High Court Judge has failed to consider the relevant legal principles in the judgement.

I am of the view that only if it can be determined that the learned High Court Judge has failed to consider the relevant legal principles and misdirected himself as to the evidence, there can be merit in the argument. In the judgement under consideration, although the learned High Court Judge has not mentioned the fact that he is considering the evidence with the principles of law that has to be borne in mind by a trial Judge when considering evidence, it is clear from the judgement that the learned High Court Judge has been well aware of the required legal principles that he should adhere to in that regard.

I am in agreement with the submissions of the learned DSG that although the learned High Court Judge has not followed the conventional method of discussing the charges, relevant legal principles he needs to consider, and

summarizing the evidence before analyzing the same and coming to a final conclusion, it is very much apparent from the judgement that after considering the charges against the appellant, the learned High Court Judge has directly proceeded to consider and analyze the evidence while summarizing the same. I am in no position to agree with the contention of the learned President's Counsel that the learned High Court Judge has produced only a narration of evidence but failed to analyze.

The complaint of the learned President's Counsel is that the learned High Court Judge only considered judgements to cover the infirmities of the prosecution but failed to consider a single ground that was in favour of the appellant.

In the judgement, the learned High Court Judge, while considering the evidence has cited the judgement of **Bhoginbhai Hirjibhai Vs. State of Gujarat 1983 AIR 753** to explain that a witness is not supposed to have a photographic memory of the events that took place in a given scenario and the Court needs to be aware of such situations when considering evidence.

I find that this is the correct approach that any trial Court should adhere to when considering the evidence in a case where number of witnesses have given evidence some years after the actual occurrence of an event.

I will consider at a later stage of this judgement whether there was sufficient evidence in this case to consider in favour of the appellant, which creates a doubt in the prosecution case.

The learned President's Counsel contended that the timeline from the point of receiving of the information and the arrest of the appellant do not match since the PW-01 has stated that after receiving the information, he went and met his supervising officer who is the SSP of the area and obtained his endorsement to conduct the raid. It was his contention that the SSP was stationed in Mannar, which was several kilometers away from the Murukkan police station and there was no possibility for him to conduct the raid and arrest the appellant at 15.15 hours as claimed. However, it is quite apparent from the evidence of PW-01 and

that of PW-08, that the SSP meant by PW-01 in his evidence was the SSP in charge of zone number 10 and not the SSP stationed at Mannar. PW-08 has given clear evidence that the mentioned zone 10 was a zone especially established due to the war situation that existed in that area and the SSP in charge of that zone was SSP Gnanaratne. The OIC has gone to his office and returned in about 5 minutes time, after which they have proceeded to conduct the raid (page 597 and 598 of the appeal brief). I find no discrepancy as to the timeline mentioned by the witnesses in that regard.

It is correct to say that the learned High Court Judge has posed several questions to the appellant when he was giving evidence. It was the contention of the learned President's Counsel that those questions were asked in favour of the prosecution and not in favour of the defence.

However, I must emphasize that a trial Judge is not precluded from asking questions from witnesses in order to clarify matters.

This position was well considered in the Court of Appeal case of **Gamage Vs. Attorney General And Others (2020) 1 SLR 44**. This was a transfer application made in terms of section 46 of the Judicature Act by the accused in a High Court case on the basis that the learned High Court Judge who presided over the trial was biased because of the questions posed by the learned trial Judge when the witnesses were giving their evidence, and a fair and impartial trial could not be expected. Held:

1. *Notwithstanding that the system of justice which prevails in this country is adversarial as opposed to inquisitorial, a Judge need not be a silent spectator at the battle fought between two rival parties. The Judge has the arduous task of delivering the judgement based on true facts devoid of distortion and falsity. In this endeavour, the Judge cannot be found fault with for questioning the witnesses to ascertain the truth, as long as he does it within limits. No hard and fast rules can be laid down to*

demarcate such limits. It shall depend on the facts and circumstances of each individual case.

2. *In pursuit of the attainment of truth and justice, a Judge is statutorily empowered to question a witness as he pleases. (Section 439 of the Code of Criminal Procedure Act, sections 164 and 165 of the Civil Procedure Code, section 165 of the Evidence Ordinance)*
3. *The number of questions a Judge puts to a witness is not decisive. What is decisive is whether it results in a miscarriage of justice.*

When it comes to the questions posed by the learned trial Judge to the appellant when he was giving evidence in his defence, I find that although, the learned trial Judge appears to have used his personal knowledge as to the workings of the army in some instances, it is clear that such questions have been posed in order to ascertain whether the evidence given by the appellant can be accepted as truthful. The learned High Court Judge has questioned the appellant of the various claims he made during his evidence, and I do not find any reason to believe that the line of questioning by the learned High Court Judge has resulted in a prejudice to the substantial rights of the parties or occasioned a failure of justice.

However, I am also very much mindful of the observations made by the **Samayawardhena, J.** in the same matter considered earlier which reads thus;

> *"Judges are not above the law. They cannot do anything they think right. Although section 439 of the Criminal Procedure Code, sections 164 to 165 of the Civil Procedure Code and section 165 of the Evidence Ordinance seemingly give unfettered discretion to the trial Judge to question witnesses, this is not so. These provisions are intended to be used by the Judges sparingly and cautiously not as a rule but as an expression with the ultimate objective of ascertaining the truth, not to fill the gaps of the case of either the prosecution or the defence."*

It appears from the case record that the learned trial Judge has asked questions only when the appellant gave evidence because of the obvious deficiencies in his evidence in relation to the questions posed on his behalf to the witnesses called on behalf of the prosecution as to his stand in this matter, which I do not see as a reason to conclude that the questions were posed to boost the prosecution version.

It was the position of the learned President's Counsel that Police Sergeant Ratnayake who was attached to Murukkan police at that time and was admittedly seated next to the appellant when the detection was made by PW-01 and his team of officers, should have been called as a witness for the prosecution as he would have revealed what really happened at the time of detection.

As correctly pointed out by the learned DSG, Police Sergeant Ratnayake was not a member of the police party who went in pursuit of the information received by PW-01 that a person is carrying a suspicious parcel. However, according to the evidence of PW-01, when this detection was made, Police Sergeant Ratnayake who served under him in Murukkan police was seated next to the appellant clad in civilian clothes as he was going home on vacation. I do not see him as a vital witness for the prosecution to prove its case as the prosecution has called several witnesses to prove the detection, made on that day.

It is up to the prosecution to decide for whom to call in order to prove their case since it is not the numbers that matter, but the quality of the witnesses. Section 134 of the Evidence Ordinance, which deals with the number of witnesses, reads as follows.

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

In the case of **The Attorney General Vs. Devunderage Nihal (2011) 1 SLR 409,** it was held:

> *"There is no requirement in law that a particular number of witnesses shall in any case be required for the proof of any fact. Unlike in a case where an accomplice or a decoy is concerned, in any other case there is no requirement in law that the evidence of a Police Officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated on material particulars."*

The next point taken up by the learned President's Counsel was that the learned High Court Judge has simply brushed aside the contradictions pointed out at the trial on the basis that they are minor contradictions which do not go into the root of the matter. He has specially pointed out that the contradictions marked V-01 was a major contradiction that cannot be brushed aside as a minor contradiction. He argued that the learned High Court Judge decided to ignore the material contradictions being biased towards the prosecution witnesses. The contradictions marked V-01 which is in the statement given by PW-04 who was the military police officer who accompanied the appellant throughout his motorcycle ride as the rider of the bike reads as follows.

> "විනාඩි 2 ක් විතර දෙන්නා කතා කරමින් සිටියා. ඉන් පසුව ඒ තරුණයා ගෙන ආ කළු පාට බෑගය මේජර් සර්ට දුන්නා."

Contrary to the above statement the witness has made to the police, which has been made on 15-06-2006, when he gave evidence before the trial Court in 02-10-2013, his position had been that the appellant went into the house and came out with a bag. When confronted with this difference, the witness has stated that since the incident happened some years ago, he cannot exactly remember what happened and he is giving evidence from his memory.

It is trite law that evidence cannot be considered in relation to a small portion of it taken in its isolation but in its totality.

When considering the evidence of PW-04 in its totality, there cannot be any doubt that he was telling the truth as to what happened on that day. The evidence clearly shows that he has no reason to lie by creating a story like this against a senior officer of the army who has no connection to him or any animosity with him.

Similarly, I am of the view that the other contradictions referred to in the case are very minor in its nature that had not created any doubt as to the evidence of the prosecution witnesses, as correctly considered by the learned High Court Judge. Therefore, I do not find any basis for the argument that the said contradictions had created a reasonable doubt as to the prosecution case.

The learned President's Counsel strenuously argued that the incident of the burning of the finger of the appellant mentioned by the witnesses do not tally with the Medico-Legal Examination Form (MLEF) produced in evidence, and it was his position that this shows that the position of the appellant that he was never taken to a hospital, but was taken to a place resembling a hospital and not produced before a doctor was credible.

If one reads the relevant portions of the evidence, it is clear that the burning of the finger spoken of by the witnesses are not getting it burnt due to a fire. The evidence was that when the appellant was asked to place his left thumb impression on the sealing wax (ලාකඩ) which was in hot melted form, the appellant did not wet his finger properly as instructed before doing so, which resulted in his finger getting burned. It is clear that this does not amount to getting burn injuries in its proper sense but a temporary incapacitation only. That may be the very reason why there is no indication of any injury in the MLEF produced in relation to the appellant in the Court.

I find no basis to accept the appellant's version that he was taken to a place that resembles a hospital but not produced before a doctor. I have no reason to believe that the appellant being a senior army officer, for the arresting officer to take

him near a hospital and bring him back without producing him to a doctor, or a doctor of a hospital will sign and hand over the MLEF back to a police officer knowing very well what such a step would lead to under the given circumstances.

The PW-04 who was with the appellant when he obtained the bag from an unknown person has stated that when he came back to the motorbike, he was carrying a black coloured bag with a strap hung around the shoulder, but PW-01, the arresting officer and PW-08, who assisted him, both have not stated anything about the bag they detected from the possession of the appellant having a strap. The said bag which has been marked as a production (P-05) at the trial had no strap that can be hung around the shoulder. It was the position of the learned President's Counsel that the learned High Court Judge came into an incorrect assumption that PW-08 who assisted PW-01 in the arrest had identified a strap in the bag. However, it appears that under re-examination what the PW-08 has referred to as a bag with a strap was the bag carried by the appellant when he came to the army camp and had with him when he was arrested at the checkpoint by the police.

Even if it was a misdirection by the learned High Court Judge, I do not find it a matter that creates any prejudice towards the appellant. The witnesses have given credible evidence as to the bag found in the possession of the appellant. It has been marked and identified at the trial. Although there is no explanation about a strap that was spoken by PW-04, that is not a reason that can be concluded in favour of the appellant as the evidence in its totality creates no doubt as to that fact.

Although it was contended that there was a glaring contradiction with regard to the information received and also between the evidence of army and police witnesses, which shows that the police knew the name of the appellant at the time of arrest, I do not find any merit in that contention either.

The evidence of PW-01 had been that he received two pieces of information few minutes apart from each other over the phone. The 1st one had been from a person who spoke broken Sinhalese and informed him about a person carrying a suspicious parcel, and the 2nd information had been from a Captain attached to the Thalladi army camp about a person carrying a suspicious parcel suspected to be a weapon.

Although evidence of the relevant army witnesses is suggestive that they took steps to inform the name of the appellant to the police, there is nothing to say that the army captain who spoke to PW-01 and provided the 1st information to him, informed the name of the suspected person as Major Kariyawasam who is the appellant. I find no reason to believe that if the information was in relation to a specific army officer, for PW-01 to not make a note of the name of the person, as it would be much helpful for him to conduct the raid.

The evidence of PW-01 had been that he opened the bag found in the possession of the appellant which had a padlock using the key he found in one of his purse pockets and used a small knife he was carrying to create an opening in one of the parcels found in order to take out a sample of what was inside. The prosecution witnesses have clearly identified the bag marked P-05 which had its cover stitched on a part of it indicating a repair has been done to it previously. When the bag was produced as evidence, no specific questions had been asked on the basis that the bag was cut open.

However, it appears that when the appellant gave evidence, he has chosen to state that the bag was cut open by the police and that is the reason for the stitches, which appears to be a repair done to the torn off part of the bag. It was contended that this opening was created when one of the officers of the raiding party used a cleaning rod of a T-56 weapon to force open the bag, which clearly appears to be a story created as a result of an afterthought. I find no basis to consider it in favour of the appellant.

There was nothing to indicate that the evidence of the prosecution witnesses as to the bag being padlocked and the key of it, as introductions by the witnesses to implicate the appellant. The appellant himself had indicated that the bag had a padlock when he was arrested although he has claimed that the bag was not in his possession, but on the rack above the seats. In his evidence in chief, he has stated as follows.

> ප්‍ර : ඒ බොනට් එක උඩ තිබ්බ බෑග් එක කවුරුන් විසින් හෝ මොනවහරි කරනවා තමා දැක්කද?
>
> උ : ඒ අවස්ථාවේදී ඉඩ්බෙක් දාලා තිබෙන එම බෑග් එකට මගෙන් ඇහුවා යතුර කෝ කියලා. මා ළඟ යතුරක් නැහැ කියලා ප්‍රකාශ කර සිටියා.

It is the view of this Court that the evidence of the appellant itself establishes that there is no basis for the contention.

It is evidence before the Court, that the arresting officer had separately sealed the padlock and the key and had given a marking as K-16 to the sealed productions and handed it over to the Magistrate's Court of Mannar.

In Court, PW-01 has marked the said cover as P-22. However, when it was marked, there was no production of a padlock and a key. At a later stage of this trial, the Registrar of the Magistrate's Court of Mannar has given evidence as PW-17, and had confirmed that the cover marked P-22 along with its contents, sealed properly, was handed over to the Court under PR 173/06. The Registrar has explained that when the productions relating to this matter were handed over to the High Court on 14-07-2010, only the cover of the productions that was handed over to the Magistrate Court under PR 173/06 was handed over. It was her evidence that due to some reason, while the productions were in the Court custody, the sealed cover has been torn off and the lock and the key had fallen off, and subsequently, that production was separately sealed by the Magistrate Court and handed over to the High Court along with a covering letter explaining the reasoning for such a cause of action.

For the reasons as stated above, I find no basis to consider that the padlock and the key was not a production before the Court.

Another position taken up by the learned President's Counsel was that according to the evidence of PW-01, all the passengers were inside the bus when he reached the checkpoint where the bus was stopped. According to the evidence of PW-05, the driver of the bus, he was outside of the bus when the police party came to the checkpoint. The appellant has given evidence and had claimed that when the police party came, he was also outside of the bus having a cigarette, and he decided to get down from the bus because the bus was kept parked there for about half an hour.

The position of the learned President's Counsel was that, the learned High Court Judge failed to consider these facts that are in favour of the appellant in his judgement.

He found fault with the learned High Court Judge's comment that the appellant did not challenge the evidence of the driver (PW-05), on the basis that it was untenable, because, there was no necessity for the appellant to challenge the evidence as the evidence was in fact favourable to the appellant's position.

It needs to be noted that what the PW-01 has stated in his evidence was that all the passengers who travelled in the bus were inside the bus and they were checked while being inside. He has not referred to the positioning of the driver at that time. In his evidence, the driver has stated that after he was informed to wait for about 5 minutes to pick up the OIC of Murukkan police who were going on leave, he stopped the bus and got down from it to follow the usual formalities of entering the details of his bus in the book maintained at the checkpoint. He has stated that while he was in that process, the police party came, which was within few minutes of him stopping the bus. His evidence was that the police officers entered the bus and arrested the appellant after they conducted a search.

There was nothing in the evidence of the driver other than to indicate that in fact the appellant was arrested while he was inside the bus. He has well remembered the appellant because he travelled in the same bus when he came to the area and got down near Thalladi camp. He has stated that the appellant got into the bus near the army point at zone 11 Uilankulama. He has specifically stated that because of the war situation that existed, they make it a point to remember the passengers and their belongings.

I find nothing to conclude that the evidence of PW-05 was in favour of the appellant. As contended correctly by the learned DSG and considered by the learned High Court Judge, if the stand of the appellant was different to the evidence given by PW-05, he should have been confronted with that position when he gave evidence and was subjected to cross-examination. PW-05 being a civilian witness, the position taken up by the appellant in his evidence should have been put to him and confront him at the trial.

The appellant has come out with this position when the PW-01 was cross-examined, but had failed to take a similar stand when the PW-05's evidence was led at the trial. Although he has given evidence and stated that he was outside the bus when the police party came, that in itself does not create any doubt as to the evidence of the officers who conducted the raid and arrested him and that of PW-05.

In the Supreme Court case of **Galagamage Indrawansa Kumarasiri and Others Vs. The Attorney General (Angulana Murder Case) S.C. TAB Appeal No. 2/2012** decided on 02.04.2014, it was held that,

> *"Whenever the evidence given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and accepted by the opponent."*

In the case of **Sarwan Singh Vs. State Of Punjab (2002) AIR S.C. 111**, it was held that,

> *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted."*

The learned President's Counsel contented that the learned High Court Judge has failed to properly accept the prosecution evidence on the basis that the prosecution has proved the case beyond reasonable doubt, nor had he rejected the appellant's evidence with reasons. It was also his position that the learned High Court Judge failed to consider the intermediary position where the appellant's evidence is neither accepted nor rejected, in which case, it should have been considered in favour of the appellant.

I am in no position to agree with the submission of the learned President's Counsel. As I have stated before, each trial Judge has his or her own way of evaluating evidence. It is clear from the judgement that the learned High Court Judge has done the evaluation of the evidence while summarizing the relevant evidence and analyzing it along with the evidence of other witnesses. Although it may not be the conventional way of considering the evidence, it is my considered view that the learned High Court Judge has been well possessed of the relevant legal principles when the evidence of the prosecution as well as of the appellant was considered.

The learned High Court Judge has well considered the appellant's evidence and decided that he has no basis to accept it and it has not created any doubt as to the prosecution evidence.

He has found no basis to conclude that this was a concocted story created by the police and the army officers against the appellant. I have no basis to disagree with the reasoning given by the learned High Court Judge as to why he is

rejecting the appellant's evidence. I am of the view that the learned High Court Judge has decided to consider appellant's evidence and the evidence of the prosecution in its totality in coming to his conclusions, which in my view has been done in accordance with the law.

When considering the evidence led in this action in its totality, I do not find any reason to doubt the credibility and the truthfulness of the prosecution witnesses. It is clear from the evidence that the appellant being a senior army officer has convinced the Commander of the army camp to provide him with transport in the pretext of going to another camp to hold an inquiry.

PW-04 has given clear evidence as to the conduct of the appellant when he left the Thalladi camp with him. There was no reason whatsoever to believe that PW-04 being a soldier ranked very much below to the appellant in the army hierarchy would concoct a story against the appellant in this manner. PW-04 has immediately informed his superiors of his suspicions in the best way he can, which has led the officials of the Thalladi camp going in pursue of the appellant, and I find that the evidence in that regard is very much credible.

PW-1 has well explained the information he received and the steps he took to investigate the matter. He has gone after the bus where he was informed that a person is carrying a suspicious parcel, and had taken due steps to search the bus while it was parked at the checkpoint as revealed in evidence. There is no doubt that the appellant was seated behind the driver's seat when the search was carried out.

Although the appellant claims that he was outside the bus when the police party came and the recovered bag was not in his possession, I find no basis to accept that version as the raiding police officers as well as PW-05 who is a civilian bus driver has given evidence which creates no doubt as to what happened and the manner of the arrest of the appellant, while having in his possession a bag which carried over 15 kilograms of the suspected drug.

The defence put forward by the appellant in his evidence has not created any doubt in relation to the prosecution evidence. Even though he has come up with his own version as to the reasons why he went to Thalladi army camp and requested a vehicle, he has failed to take up that stand convincingly when the relevant witnesses gave evidence in Court, as I have considered before.

I am of the view that the prosecution has proved the case beyond reasonable doubt against the appellant.

Although there may be some misdirections in the consideration of the evidence and the learned trial Judge may not have followed the conventional way of evaluating the evidence, that cannot be held in favour of the appellant unless it has prejudiced the substantial rights of the parties or occasioned a failure of justice.

The proviso of Article 138(1) of The Constitution, which provides for the jurisdiction of the Court of Appeal reads,

> **"Provided that no judgement, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

I would also like to draw my attention to the provisions of section 436 of the Code of Criminal Procedure Act No. 15 of 1979, which reads;

> **436. Subject to the provisions hereinbefore contained any judgement passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-**
>
> > **(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgement, summing up, or other proceedings before or during the trial or in any inquiry of other proceedings under this Code.**

(b) of the want of any sanction required by section 135, unless such error, omission, irregularity, or want of has occasioned a failure of justice.

It was held in the case of **Hiniduma Dahanayakage Siripala Alias Kiri Mahaththaya And Others Vs. Hon. Attorney General S.C. Appeal No. 115/2014,** decided on 22-01-2020,

Per Aluvihare P.C. J.,

"With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the proviso to Article 138(1), which is placed under the heading "The Court of Appeal". The proviso to the said Article of the Constitution lays down that;

"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the court that the impugned error, defect or irregularity has either prejudiced the substantial rights of the parties or has occasioned a failure of justice. It must be observed that no such Constitutional provision is to be found either in the '1948 Soulbury Constitution' or the 'First Republican Constitution of 1972'.

The same requirement was considered by the Supreme Court in **Sunil Jayarathna v. The Attorney General, SC 97/09 (SC Minutes of 29.07.2011)** where it was observed that,

"When considering the Proviso to Article 138(1) of the Constitution, it is evident that the judgment of the Learned High Court Judge need not be reversed or interfered on the account of any defect, error or irregularity which has not prejudiced the substantial rights of the parties or occasioned

a failure of justice. An Accused would therefore only be entitled to relief if it is shown that the irregularity complained of, had in fact prejudiced the substantial rights of the parties or has occasioned a failure of justice. A mere statement to that effect would certainly not be sufficient, but it must be shown as to how the failure of justice resulted."

For the reasons considered aforesaid, I find no basis to interfere with the conviction and the sentence of the appellant by the learned High Court Judge of Colombo.

Accordingly, the appeal is dismissed for want of merit. The conviction and the sentence affirmed.

Having considered the period of incarceration of the appellant from the date of his arrest, it is directed that his sentence shall deemed to have taken effect from the date of the sentence namely, from 12th August 2015.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal