

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

*In the matter of an Appeal in terms of
section 331 (1) of the Code of Criminal
Procedure Act No- 15 of 1979, read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

Court of Appeal No:

CA/HCC/0068/22

High Court of Colombo

Case No. HC/363/17

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Hettiarachchige Haputhanthrige

Kulawathi

ACCUSED

AND NOW BETWEEN

Hettiarachchige Haputhanthrige

Kulawathi

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Isuru Somadasa for the Accused-Appellant
: Maheshika Silva, DSG for the Respondent

Argued on : 28-06-2023

Written Submissions : 02-06-2023 (By the Respondent)
: 17-01-2023 (By the Accused-Appellant)

Decided on : 20-09-2023

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted by the Attorney General before the High Court of Colombo on following counts.

1. On or about 6th April 2016 at Stespura, within the jurisdiction of the Court, had in her possession 2.31 grams of Diacetylmorphine which is a prohibited drug commonly known as Heroin in terms of the Poisons, Opium And Dangerous Drugs Ordinance as amended by Amendment Act No. 13 of 1984, and thereby committing an offence punishable in terms of the Ordinance.
2. At the same time and at the same transaction, trafficking the said quantity of 2.31 grams of Heroin, and thereby committing an offence punishable under the provisions of the same Ordinance.

The appellant pleaded not guilty to the charges preferred against her, and after the trial, the learned High Court Judge of Colombo found the appellant guilty of his judgement dated 06-01-2022 to the 1st count which is the charge of possession preferred against her and convicted her accordingly.

She was acquitted from the 2nd count preferred against her. She was sentenced to life imprisonment after having considered the two possible sentences for a

person convicted of an offence of this nature, which is the death sentence or the sentence of life imprisonment. The appellant preferred this appeal on the basis of being aggrieved by the said sentence and the conviction.

The Facts in Brief

This is a raid conducted by a police team led by PW-01 Sub Inspector Hirantha of Colombo District Vice Prevention Unit on 06-04-2016. On the said day, SI Hirantha along with several other police officers including WPC-9424 Priyangani has left their station for routine vice prevention duties. While on mobile duty, he has received an information from a known informant that a female named Kulawathi is having Heroin in her possession and had given the location of her house situated in Stespura area of Colombo. The informant has also provided the details of the dress the said Kulawathi was wearing at that time.

Having decided to conduct the raid in relation to the information provided, he along with his team, has gone to a Kosgas junction area, parked the jeep nearby and had gone to the place informed by his informant along with WPC-9424 Priyangani and two other police officers in order to conduct the raid.

The information received by PW-01 SI Hirantha had been that the said Kulawathi is living in the 7th house when walked along the road mentioned by the informant. When they reached that place, he has seen a woman fitting the description given by the informant seated on the front stair of the house. When questioned, she has confirmed that she is Kulawathi. After identifying them as police officers, SI Hirantha has instructed the female police officer who went with him to search her from outside. After searching, the female police officer has taken out two parcels from the right-hand side pocket of the dress worn by her.

When inspecting further, he has identified a brown-coloured powder in one of the packets, which he determined as Heroin through his experience. In the other parcel, he has found money of various denominations.

After arresting the person for the offence of possessing heroin, he has taken her to a place called Lechchami Jewelers situated near Kosgas junction and has taken steps to weigh the brown-coloured powder suspected to be Heroin. It had been measured that it had 25.170 grams. After the weighing of productions, he has taken steps to seal them at the Lechchami Jewelers and has taken the suspect whom he has identified in Court as the appellant to Grandpass police station and handed over her along with the productions to the relevant officials.

At the trial, the witness has clearly identified the productions taken over by him and had explained the procedures he followed in that regard. Under cross-examination, he has stated that he did not know the number of the house where the appellant was arrested by him but only knew it as the 7th house in that street.

The stand taken by the appellant had been that the appellant was arrested not from her house but at the house number 185/22 C, the house situated in front of her house, which has been denied by the witness. The appellant's stand has been that the house in front of her house is a house belonging to one Krishna Ranjani. She had taken up the position that while the appellant was in that house, one person called Ichchi came suddenly to that house and gave her a parcel stating that it contains money and she is in need of going to the hospital and will come and collect it later. The line of cross-examination of the witness clearly suggests that the stand of the appellant had been not that she did not have anything in her possession, but what she had belonged to some other person.

In this matter, the prosecution has called PW-03 mentioned in the indictment as WPC-9424 Gunawardena to corroborate the evidence of PW-01. In his evidence, PW-01 has stated that the female police officer participated with him in the search and arrest of the appellant was WPC-9424 Priyangani. However, in giving evidence, PW-03 has stated her full name as Ratnayake Mudisanselage Priyangika Kumari Gunawardena and given her WPC number as 3926. She has corroborated the evidence of PW-01 in every detail. However, as observed rightly

by the learned High Court Judge in his judgement, there is a difference in the time of arrest between the evidence of PW-01 and PW-03. The learned High Court Judge has also observed the discrepancy in the evidence as to the place of sealing of the production mentioned by the two witnesses and also of the fact whether the house belonging to the appellant was searched or not at the time of the raid.

It needs to be noted that the stand taken by the appellant when PW-03 was cross-examined had been very much different to the stand she took up when PW-01 was cross-examined in that regard.

It had been suggested to her that the productions were recovered from a table inside of the house, which the witness has denied. It has also been suggested to her that at the time of the arrest, the appellant was not seated in front of her house, but was washing her pots and pans in the house. It had also been suggested that the parcel taken from the table was handed over to her by a person called Ichchi, which was also denied by the witness.

According to PW-03's evidence and that of PW-01, it has been revealed that a sum of Rs. 12500/= of various denominations had been recovered from the possession of the appellant in the second parcel found by PW-03 in the right-hand side pocket of the dress worn by the appellant, and the said money has been duly entered in the productions register of the Grandpass police and handed over to the Court.

As I have considered before, there had been no material discrepancy in the evidence of PW-01 and PW-03 as to the raid conducted by them and the procedures followed in that regard.

The prosecution has called the relevant witnesses to prove the chain of custody of the productions and at the trial, the parties have recorded several admissions in terms of section 420 of the Code of Criminal Procedure Act. The following admissions had been recorded.

1. The memorandum number CD 1998/16 dated 07-04-2016 issued by the Government Analyst.
2. The fact that the productions in relation to the said memorandum had been handed over to the Government Analyst Department by PC-35836 Nissanka of Grandpass police.
3. The fact that the Government Analyst has issued the Government Analyst Report N/3812/2016 (CD 1998/16 and 29th August 2016).
4. The contents of the Government Analyst Report.

Once the prosecution closed its case after leading the relevant witnesses and marking the productions, the learned High Court Judge, after considering the evidence has decided to call for a defence from the appellant. The appellant has decided to make a dock statement and in her dock statement, what she has stated was as follows.

"ස්වාමිනි මම කිසිදෙයක් දන්නේ නැහැ, මම රෙදි සෝදා සෝදා හිටියේ. මම රෙදි සෝදා සෝදා ඉන්නකොට මේ එහා පැත්තේ එක්කෙනා ඇවිල්ලා පාර්සලයක් තිබ්බා. මට කිව්වා මම ගිහිල්ලා එන්නම් මම ඇවිල්ලා ගන්නම් කියල. මම කිසිදෙයක් දන්නේ නෑ ස්වාමිනි, එපමණයි."

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following 2 grounds of appeal for the consideration of the Court.

1. The learned High Court Judge has failed to consider the fact that the prosecution has called a witness who never participated in the raid to corroborate the evidence of the main investigation officer.
2. The prosecution has failed to prove the case beyond reasonable doubt.

Consideration of The Grounds of Appeal

Ground of Appeal 01:-

It was the contention of the learned Counsel for the appellant that the police officer who gave the evidence as PW-03 was not the female police officer who assisted PW-01 in this raid. It was his position that according to PW-01's

evidence, the female police officer who travelled with him to conduct the raid was WPC-9424 Priyangani. However, the female police officer who came to give evidence before the Court as PW-03 had given her official number as WPC 9326 and her name had been Priyangika, not WPC 9424 Priyangani mentioned by PW-01.

The learned Deputy Solicitor General (DSG) replying this submission brought to the notice of the Court that this was a position never taken up before the trial Court when relevant witnesses gave evidence. She pointed out that PW-03 had been cross-examined on the basis that it was she who participated in the raid. It was the position of the learned DSG that although there is a discrepancy in her police number mentioned by PW-03 when she gave evidence in Court, it is clear from the evidence of all other witnesses and the PR registry and the relevant investigation notes that it was in fact PW-03 who participated at the raid and her number is WPC-9424. It was her argument that a mere discrepancy in the number when PW-03 administered her oath before giving evidence which may well be a typographical error cannot be taken as a reason to vitiate a conviction which was based on sound evidence.

It is clear from the indictment that PW-03 has been named as WPC-9424 Gunawardena of Grandpass police. According to PW-01, the WPC who participated with him in the raid had been WPC-9424 whom he has referred to as Priyangani. As pointed out correctly by the learned DSG, when the productions were entered in the police production register (PR), it clearly appears that WPC-9424 had been part of the raiding party where her name appears as WPC-9424 Gunawardena. She has been the only female member of the raiding party.

It appears that since this was never a position taken up by the appellant at the trial Court, the learned High Court Judge had no opportunity of considering this allegation as to whether it has any merit. However, it is clear from the evidence that the full name of PW-03 is Ratnayake Mudisanselage Priyangika Kumari

Gunawardena. It may well be she is known as Priyangani to her peers which may be the reason why PW-01 referred to her by that name. It is abundantly clear from her evidence that she had been a part of the raiding party and her evidence had been cogent and credible.

It is well settled law that if a party wishes to challenge the evidence of a witness and put forward another proposition, the relevant witness has to be confronted with that position. In the matter under consideration, the appellant has never suggested that it was not the PW-03 who searched her and assisted the raid in arresting her on the date of her arrest. Therefore, I find no merit in the considered ground of appeal.

Ground of Appeal 02:-

Although it was the contention of the learned Counsel for the appellant that the prosecution has failed to prove the charges beyond reasonable doubt against the appellant, I have no basis to agree with the said contention. It is trite law that a trial Court has to consider the evidence in its totality be it by the prosecution or by the defence and come to a finding whether the prosecution has proved its case beyond reasonable doubt.

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

“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.”

It was held in the case of **Motilal Vs. State Of Madhya Pradesh (1990) CLJ, NOC 125 MP** that,

“Absence of cross-examination of prosecution witnesses of certain facts leads to the inference of admission of that fact.”

In this matter, as I have considered before, the evidence of PW-01 and 03 are very much consistent to each other as to the way the raid was conducted and the arrest was made.

As considered correctly by the learned High Court Judge in his judgement, the appellant has taken up various stands at various times in relation to the evidence of the relevant witnesses that the parcel containing Heroin was recovered from her right-side pocket.

When PW-01 was giving evidence, the appellant's initial stand had been that she was arrested from the house opposite to her house. It was also her stand that police came in pursuit of a person called Ichchi and it is she who came hurriedly into her house and gave a parcel saying that it has money and she needs to go to the hospital, she will take it back on her return. Contrary to the above stand, when PW-03 was subjected to cross-examination, the appellant's position had been that a female called Ichchi gave her a parcel and she kept it on the table, and she was arrested while she was attending to her household work. When the defence was called, her position had been that while she was washing clothes at home, a next-door neighbour came and handed over a parcel to her saying that it will be taken later and she is unaware of anything.

It is my view that although there exists no burden on an accused in a criminal trial, an accused person must create a reasonable doubt against the convincing evidence placed before the Court by the prosecutions in order for the Court to hold in favour of the accused.

It is apparent from the judgement that the learned High Court Judge had not only considered the evidence in favour of the prosecution, but had considered the discrepancies in the prosecution evidence in order to find whether such discrepancies create a reasonable doubt as to the credibility of the witnesses. Although the learned High Court Judge had considered three such discrepancies, I find that in fact there are only two discrepancies in the evidence, the first being the time of the arrest.

However, as considered correctly by the learned High Court Judge , the discrepancies had not created any doubt in relation to the arrest of the appellant as the appellant has admitted that she was arrested on the day in question. The various stands taken up by the appellant also differs with each other which clearly shows that she in fact has not denied that she was arrested with a parcel.

The second apparent discrepancy is whether the house of the appellant was searched after the arrest. PW-01 says that it was not searched, but PW-03 says that the house was searched after the arrest.

However, she has admitted that she did not enter any notes in that regard. As a witness cannot be expected to have a photographic memory of all the matters in a raid like this, I do not find any reason to believe that any of the witnesses are not telling the truth when considering the evidence in its totality.

I do not find the other discrepancy considered by the learned High Court Judge as a discrepancy as such. The evidence of PW-03 clearly suggests that, after the arrest of the appellant and until the productions were taken to Lechchumi jewelers for weighing, the productions were not sealed. The evidence of PW-03 had been that the productions were sealed at the Lechchami jewelers after the weighing, and taken to the police station, which is also the evidence of PW-01.

I find in this judgment; the learned High Court Judge was well possessed of the relevant legal principles that he should have had in his mind when analyzing the evidence placed before the Court. The learned High Court Judge, after well summarizing the evidence has analyzed the evidence in its correct perspective in order to find whether the evidence of the prosecution is trustworthy and cogent enough and whether any reasonable doubt has been created in relation to the evidence.

The learned High Court Judge has considered the evidence in its totality and had found that the prosecution had proved the case beyond reasonable doubt in relation to the charge of possessing 2.31 grams of Heroin by the appellant.

The prosecution has rightly found the appellant not guilty to the 2nd count preferred against her, which was a count based on trafficking of Heroin.

In sentencing the appellant, the learned High Court Judge has considered the relevant facts and the circumstances and had decided to impose the lesser of the two mandatory sentences that can be imposed upon a person who was found guilty in terms of the relevant provisions of the Ordinance.

As I have considered above, I have no basis to disagree with the findings of the learned High Court Judge and find no merit in the grounds of appeal urged before the Court.

Accordingly, the appeal is dismissed, and the conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal