

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

In the matter of an Appeal made under 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/0216/2017**

Mohomed Sadik Mohamed Hasan

**High Court of Negombo
Case No: HC/66/2015**

Accused-Appellant

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

Complainant-Respondent

BEFORE : **Sampath B. Abayakoon, J.
P. Kumararatnam, J.**

COUNSEL : **Amila Palliyage with Sandeepani
Wijesooriya for the Appellant.
Wasantha Perera, DSG for the Respondent.**

ARGUED ON : **17/07/2023**

DECIDED ON : **12/10/2023**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Colombo under Sections 54(A) (b), 54(A) (d) and 54(A) (c) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking, Possession and Importing of 43.74 grams of Heroin (diacetylmorphine) on 29.10. 2013.

The prosecution had called 03 witnesses in support of their case and marked the Government Analyst Report under Section 420 of the Code of Criminal Procedure Act No.15 of 1979. When the defence was called, the Appellant had made a dock statement and closed his case.

After the consideration of the evidence presented by the prosecution and the defence, the Learned Trial Judge found the Appellant guilty on the second and third counts and acquitted from the first count. Thereafter, he was sentenced to life imprisonment on the second and third counts on 07/07/2017.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Counsel for the Appellant informed this Court that the Appellant had given his consent to argue this matter in his absence due to the Covid 19 pandemic. Hence, argument was taken up in his absence but was connected via Zoom platform from prison.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. That the Learned Trial Judge erred in law by failing to consider the fact probably favourable to the Appellant.
2. Last link of the inward journey is not proven beyond reasonable ground.
3. The version of the prosecution is not credible as the Appellant was not produced before a JMO and also the reasons given by the prosecution is not tenable.
4. The way the investigation carried out by the police is in violation of Article 11 of the Constitution.

Background of the case.

On 29.10.2013, IP/Basnayake attached to Katunayake Airport Police Narcotics Bureau, while on usual surveillance duty with other officers attached to the bureau, received an information through PW4, PC/61100 Dinesh regarding a person who traffics drugs into the country. After getting all the necessary information about the Appellant's description including his type of attire he had clad with, IP/Basnayake proceeded to the location which was in the baggage section. When the Appellant was about to go out through the green channel, he was stopped at the bank lobby and taken to the bureau after declaring their identity. The Appellant had two bags in his custody.

Although the two bags were checked thoroughly, no incriminating items were found by the police. As the Appellant started to sweat unusually in the air-conditioned room and behaved in an uncomfortable manner, it raised a suspicion to the officers. Hence, the Appellant was taken to a toilet allocated for disabled persons observing the Appellant's uncomfortable behaviour. At the toilet the Appellant had excreted three wraps of substances, suspected to be Heroin (Diacetylmorphine). The substances found in the wraps were weighed using an electronic scale used in the bureau and the substances weighed about 145 grams.

The production was sealed and placed in the personal locker of PW1. The Appellant was produced before the Magistrate of Negombo and obtained a detention order to investigate further under police custody. On 31.10.2013 the Appellant was taken to the Police Narcotics Bureau, Colombo-01 along with the production. Although the Appellant was taken to the JMO Office Colombo, he was not seen on that day due to non-availability of a JMO. But he was examined by a JMO on a subsequent date.

PW4 had given evidence and corroborated the evidence of PW1.

At the Police Narcotics Bureau, the productions were handed over to PW7, IP/Rajakaruna who had handed over the production to the Government Analyst Department thereafter.

As the Government Analyst Report was admitted under Section 420 of the CPC, the prosecution had closed the case after marking the same as P32. When the Learned Trial Judge had called for the defence, the Appellant made a dock statement taking up the position that he was falsely introduced to this case by the police officers and closed the case for the defence.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person and this burden never

shifts. Hence an accused person has no burden to prove his case unless he pleads a general or a special exception in the Penal Code.

In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 held:

“A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences in relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions....”

In **the Attorney-General v. Rawther** 25 NLR 385, Ennis, J. states thus:
[1987] 1 SLR 155

“The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt”.

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

“the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt, but nothing short of that will suffice”.

As the first, third and fourth grounds of appeal are inter-connected, I decided to consider those grounds jointly hereinafter. At the hearing, the Learned Counsel for the Appellant contended that the Learned Trial Judge failed to consider that the prosecution version did not pass the test of probability and erred in both facts and law when concluding that the prosecution proved the case beyond reasonable doubt.

In this case, PW1 had vividly given evidence as to how the raid was conducted after the information he had received while on duty. Acting on that information, he had successfully arrested the Appellant who was totally a stranger to him. The Learned Counsel strenuously placed his submission on the time factor consumed for the arrest, as the Appellant arrived four hours before his arrest, improbability of carrying drugs in anus, absence of medical evidence, storing the productions in the personal locker of PW1 and conflicting evidence regarding taking the Appellant from the Airport to Colombo Narcotics Bureau.

These positions had been very clearly explained during the trial by the witnesses. The Learned High Court Judge had very accurately discussed and analysed the evidence pertaining to the entire raid and accepted the prosecution position which clearly demonstrate that the prosecution had passed the test of probability of the prosecution case.

The consideration of the evidence of the Learned High Court Judge can be found from pages 286-291 of the judgment.

Considering the analysis of evidence of the Learned High Court Judge, it is very clear that the appeal grounds raised in 1st, 3rd and 4th have no merit.

In the second ground of appeal, the Appellant contends that the last link of the inward journey has not been proven beyond reasonable doubt. Thereby the learned counsel for the Appellant argues that the conviction is bad in law and unsafe.

In **Perera v. Attorney General** [1998] 1 Sri.L.R it was held:

“ the most important journey is the inward journey because the final analyst report will depend on that”.

In **Witharana Doli Nona v.The Republic of Sri Lanka** CA/19/99 His Lordship Justice Abrew remarked thus;

“It is a recognized principle that in drug related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. Prosecution must prove that the productions taken from the accused Appellant was examined by the Government Analyst”

Therefore, proving the chain of custody is a very important task for the prosecution. If investigating officers do not do their duty properly, the chain of custody can be successfully challenged at the trial. This is because the prosecution always relies on evidence gathered by police officers in cases of this nature.

It is the contention of PW1 that after sealing the productions, it was in his locker until it was handed over to PW7 at the Police Narcotics Bureau Colombo-01. The witness very clearly gave evidence regarding the recovery of the body packed production, sealing and handing over to PW7.

In this regard the Learned High Court Judge in his judgment had adequately analysed and satisfied that the prosecution had proved the chain of production beyond reasonable doubt. Hence, this ground also has no merit.

In this case PW1 and PW4 are key witnesses. Their evidence is clear, cogent and unambiguous. The court considering all other evidence presented by the

prosecution, without any hesitation relied on that evidence and convicted the Appellant. Further, their evidence has passed the probability test.

As the prosecution had proven this case beyond reasonable doubt, I affirm the conviction and the sentence imposed by the Learned High Court Judge of Negombo dated 07/07/2017 on the Appellant. Therefore, his appeal is dismissed.

The Registrar of this Court is directed to send this judgment to the High Court of Negombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL