

C.A 204/2008

High Court Walikada Case

No:430/06

Hettiarachchige Amila Pathum

Accused-Appellant.

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The Attorney-General,

Respondent.

Before : Sisira de Abrew J. &
P.W.D.C. Jayathilaka, J.

Counsel : Gayan Perera with Prabha Perera for
the Accused-Appellant.

Jayantha Jayasuriya DSG for the
State.

Argued & decided on : 27.02.2013.

Sisira de Abrew J.

The Accused-Appellant produced by the Prison Authorities is present in court.

Heard both counsel in support of their respective cases. The Accused-Appellant in this case was convicted for being in

possession of 10.5 grams of heroin. The learned High Court Judge imposed life imprisonment on the Accused-Appellant. The facts of this case may be briefly summarized as follows.

On 02.05.2002 around 3.45 p.m the Accused-Appellant who came on a pillion of a motor cycle ridden by a person called Sudda got down from the motor cycle near the petrol station at Rajagiriya. I. P. Balachandra who was waiting at this place on an information received by him earlier went up to the Accused-Appellant and searched him. He found a parcel of heroin concealed in his under garment. At the time that the Accused-Appellant was being searched the person who rode the motor cycle (Sudda) went away shouting at I.P. Balachandra.

On the information received from the Accused -Appellant, I. P. Balachandra and the police party went to the house of Sudda. According to I.P. Balachandra a member of the police party (I.P. Jayasinghe) had searched the house of Sudda doors of which were not locked. There was nobody in this house. Before the search police party had requested the people in the neighbourhood to assist them in searching of the house. Deepal Dammika and Nilanka Lakshmini who were living in the neighbourhood of Sudda were present at the time of the search. It is not clear from the evidence

whether Deepal Dammika and Nilanka Lakshmini were present inside the house of Sudda at the time of the search. However, police party had recorded statements of Deepal Dammika and Nilanka Lakshmini. This is the summary of the evidence of I.P. Balachandra. I. P. Rangajeewa too corroborates the evidence of I.P. Balachandra. Government Analyst confirms that the parcel contained 10.5 grams of heroin.

Deepal Dammika who was called as a defence witness gave evidence. His summary of evidence may be briefly summarized as follows. Deepal Dammika lived in the neighbourhood of Sudda. On the day of the incident described by the prosecution witnesses police party came near Sudda's house with the Accused -Appellant in this case. On the invitation of the police party, he came near the house of Sudda and thereafter police party searched the house of Sudda the doors of which were not locked. There was no body in the house of Sudda. Deepal Dammika does not say whether he went inside the house when the house was being searched. However, he says when the police party came out of the house, a police officer brought a parcel from the house. This was the summary of the evidence of Deepal Dammika.

The Accused -Appellant too gave evidence in this case under oath. The summary of the Accused -Appellant's evidence may be briefly summarized as follows. The Accused-Appellant on the day of the incident described by the prosecution witnesses went to his grandmother's house for the purpose of handing over a packet of lunch to his grand mother. Accused -Appellant joined Sudda at the grand mother's house. Sudda is married to Accused-Appellant's first cousin. They both came on the motor cycle ridden by Sudda . Accused -Appellant got down near C.W.E at Rajagiriya. (ස.වෙ.ස) At this time an officer claimed to be from the Narcotic Bureau arrested him. Thereafter the Accused -Appellant was taken to Sudda's place by the officers. According to him a parcel of heroin was recovered from Sudda's house and this parcel was introduced to him. This was the summary of the evidence of the Accused-Appellant. Learned High Court Judge rejected both the evidence of Deepal Dammika and the Accused -Appellant. Learned High Court Judge rejected Deepal Dammika's evidence on two grounds. One ground is that the fact that police officers invited Deepal Dammika to search Sudda's house is improbable. Number two is that Deepal Dammika was a biased witness. Learned Counsel for the Accused-Appellant submitted that the rejection of the evidence of Deepal Dammika was wrong. I now advert to this contention. Is the reason number one given by the learned Trial Judge correct?

Prosecution witness I.P. Balachandra himself admits that police party took the assistance of Deepal Dammika to search the house of Sudda. The police officers have even recorded the statement of Deepal Dammika on this matter. Then how does learned Trial Judge conclude that the invitation by the police officers to search the house of Sudda is improbable? In my view the said conclusion reached by the learned Trial Judge is wrong when we consider the evidence of the prosecution. I therefore hold that the ground number one adduced by the learned Trial Judge cannot be accepted.

Ground number two is that Deepal Dammika was a biased witness. This means that Deepal Dammika has taken the side of the Accused-Appellant. In other words Deepal Dammika takes up the position taken up by the Accused-Appellant. If Deepal Dammika is a biased witnesses the Accused should know in advance that Deepal Dammika was going to support his position. But Accused - Appellant did not list Deepal Dammika as a witness before the commencement of the trial. The name of Deepal Dammika was revealed when I.P. Balachandra gave evidence. This was on 23.03.2006, but Deepal Dammika was listed as a witness only on 28.03.2008 (Vide page 29 of the brief). When we consider all these matters the conclusion reached by the learned Trial Judge that Deepal Dammika was a biased witness is erroneous and cannot be

accepted. Learned High Court Judge rejected the evidence of the Accused -Appellant on the basis of the difference of time narrated by the prosecution witnesses. According to the Accused-Appellant's evidence, he was taken to Sudda's house between 1.30 and 2.00 p.m. But the prosecution witnesses had said they left the Police Narcotic Bureau around 2.55 p.m. Thus the Accused says that the time was between 1.30 and 2.00 p.m. Prosecution witnesses say that the time was around 2.55 p.m. It was on this basis that the learned Trial Judge rejected the accused's evidence. Is this rejection correct? In a criminal trial the Accused is a person who is having a big burden on his head. Therefore, it is reasonable to ^{expect} ~~except~~ these kind of mistakes. It is unfair for the trial Judge to reject the Accused's evidence on this ground. When we consider all these matters, I hold that the rejection of the Accused -Appellant's evidence by the learned Trial Judge is wrong. I am pleased with the submissions of the learned Additional Solicitor General President's Counsel who said that the rejection of the evidence of Deepal Dammika and the Accused -Appellant's evidence by the learned Trial Judge was not reasonable. When I consider all these matters I hold that the rejection of the defence evidence is wrong. Learned Additional Solicitor General submitted that he could not find any reason to reject the defence evidence. I have gone through the defence evidence and I hold the view that there is no reason to

reject the defence evidence. If the rejection of the defence evidence by the trial judge is wrong and there are no reasons to reject the defence evidence it leads to a situation where court cannot reject the defence evidence. If the court cannot reject defence evidence what does it mean?. It means that the defence evidence has created a reasonable doubt in the prosecution case. Then the accused should be acquitted. I would like to consider the principles governing the Accused's evidence. In this connection I would like to consider a judicial decision. In Ariyadasa Vs. Queen 68 NLR page 66 His Lordship Justice T.S. Fernando held thus (i) if the jury believed the Accused's evidence he is entitled to be acquitted. (ii) Accused is also entitled to be acquitted even if his evidence, though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt. In Queen Vs. Kularatne 71 NLR page 529 Court of Criminal Appeal dealing with the dock statement of the Accused-Appellant held thus (1) If the dock statement is believed it must be acted upon (2) If the dock statement raises a reasonable doubt in their minds about the prosecution case, the defence must succeed. (3) Dock statement of one accused should not be used against the other accused. After considering the said legal literature I, for the benefit of the legal practitioners and the trial judges in this country set down the following guide lines with regard to the defence evidence.

- (i) If the Accused's evidence is believed it must be acted upon
- (ii) If the Accused's evidence creates a reasonable doubt in the prosecution case his defence must succeed.

I have earlier held that the accused-appellant should be acquitted. For the above reasons, I set aside the conviction of the Accused - Appellant and the sentence and acquit him of the charge for which he was convicted.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C Jayathilaka.

I agree.

JUDGE OF THE COURT OF APPEAL

Vkg/-