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

C.A. 146/2010
H.C. Colombo Case No: H.C.4763/09

Randeer Liyon Siyas Alias Liyon Siyas Randeer
No:247,
Besline Road,
Dematagoda,
Colombo 09.

Defendant-Appellant

Vs.

Hon Attorney General
Attorney General's Department,
Colombo 12.

Respondent

C.A. 146/2010 H.C. Colombo Case No: H.C. 4763/09

Before : Sisira J. de Abrew,J. (Acting P/CA) &
P.W.D.C. Jayathilaka,J.

Counsel : Nuwan de Silva for the Accused-Appellant.
H. I. Peris SSC. for the Respondent.

Argued &

Decided on : 03.12.2013

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Sisira J. de Abrew,J.

Heard both counsel in support of their respective cases. The accused-appellant was convicted for being in possession of 1.282 grams of heroin and was sentenced to a term of 7 years Rigorous Imprisonment and to pay a fine of Rs: 100,000/- carrying a default sentence of six months Rigorous Imprisonment. Being aggrieved by the said conviction and the sentence, he has appealed to this Court. According to the facts of this case, two Police teams from Dematagoda Police went to remove election posters and banners of the area. While they were removing the posters, they saw two persons walking on the road. One was caught by the Police Officers. The other person started running after throwing his helmet. But the two

persons had not come on a motor cycle. One Police Officer gave chase to the person who was running and arrested. The Police Officers found heroin inside the helmet that was thrown by him. The person who threw the helmet is the accused-appellant in this case. The Police Officer found 5 grams of heroin inside the helmet. The Government Analyst later certified that the net amount of heroin was 1.282 grams. The accused-appellant making a dock statement stated that he was arrested when he was at Jayapala's son's tailor shop . He stated that he came to this tailor shop to get his wedding suit tailored. He further stated that Jayapala too was arrested at the tailor shop. He took up the position that one Sanker's heroin was introduced to him. He denied the charge. Soon after the close of the prosecution case, the accused- appellant filed a list of witnesses. Jayapala is one of the witnesses in the list of witnesses. Reports have been filed in the trial Court to the effect that Jayapala was in Prison Custody. It appears that the learned trial Judge had not taken any meaningful step to get Jayapala produced in Court. It appears that the accused could not call Jayapala as a witness, since he was in the custody of Prison Officers. If the defence witness was in the custody of Prison Officers all what the accused-appellant can do was to move Court to produce him as a witness. But since Jayapala was not produced from the Prison Custody, accused-appellant could not lead his evidence. The accused-appellant, when the case was fixed for submission made an application again to summon Jayapala as a witness. Learned trial Judge refused this application. Learned trial Judge took up the position allowing of such an application would affect the future proceedings. Position taken up by the accused-appellant was that he was

arrested at Jayapala's son's tailor shop. Thus if Jayapala was called as a witness the accused would have been able to support the position taken up by him in his dock statement. This opportunity was not given to the accused-appellant. For the above reason we hold that disallowing the application of the accused-appellant to call Jayapala as a witness who was in the Prison Custody has caused immense prejudice to the accused-appellant.

I.P. Bandara Gunathilaka in his evidence took up the position that after the arrest of the accused-appellant they went to the Police Station by a Police Jeep. But this was not stated by S.I. Sanjeewa who gave evidence. Learned trial Judge in order to overcome the said difficulty used the investigation notes in the I.B. extracts which had not been produced at the trial as evidence. I hold that this was a misdirection committed by the trial Judge. Learned trial Judge is not entitled to use material that had not been produced at the trial as evidence. When we consider the above matters, we feel that the conviction of the accused-appellant cannot be permitted to stand. The next point that must be considered is whether it is fair to order a fresh trial and permit the Accused-appellant to face a new trial. It has to be noted here that the two Police parties, went to Dematagoda area, on the day of the incident in order to remove election posters and banners. But I.P. Douglas had taken a weighing scale on this day. I.P. Douglas was not available to give evidence at the trial because. He had died prior to the commencement of the trial. This evidence was given

by I.P. Bandara Gunathilaka. If the Police Officers went to remove election posters and banners, why did I.P. Douglas carry a weighing scale. There is no answer to this question. Learned Senior State Counsel too submits that he is unable to find an answer to this question. Learned Senior State Counsel leaves the entire matter in the hands of Court. The position taken up by the accused-appellant in his dock statement was suggested to the prosecution witnesses. As we pointed out earlier the fact that he was arrested at Jayapala's son's Tailor shop could not be corroborated as his application to call Jayapala as a witness was disallowed. When we consider all these matters, we feel that the evidence led by the prosecution witnesses was not all that convincing. In deciding the question whether a retrial should be ordered or not, I am guided by the judgment of His Lordship Chief Justice Sansony in **Queen Vs. Jayasinghe 69 N.L.R. 314** wherein His Lordships remarked thus. 'For these reasons we allow the appeals and quash the convictions of the appellants. We have considered whether we should order a new trial in this case. We do not take that course, because there has been already a lapse of over three years, since the commission of offences, and because of our own view of unreliable nature of the accomplice's evidence on which alone with the prosecution rests ".

The offence in this case is alleged to have been committed on 10/10/2005. Trial commenced on 17/01/2008 and was concluded on 01/04/2010. The accused-appellant was sentenced on 26/04/2010. Both counsel admit the accused-appellant has not been released on bail after his

conviction. The accused-appellant has been incarcerated for a period of over 3 ½ years. When we consider all these matters, we feel that it is unreasonable to order a retrial. Considering all these matters, we set aside the conviction and the sentence and acquit the accused -appellant .

Appeal allowed.

ACTING PRESIDENT OF THE COURT OF APPEAL

P.W.D.C. Jayathilaka,J.

I agree.

JUDGE OF THE COURT OF APPEAL

Jmr/-