

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

Don Ranasuriya Arachchige Rohana Kithsiri

Accused-appellant

**Vs.**

C.A. 214/2008

H.C. Welikada Case No. 493/2006

The Attorney General

Respondent

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

Counsel : Tenny Fernando for the accused-appellant  
Rohantha Abeysuriya, DSG for the A.G.

Argued &

Decided on : 11.02.2014

Sisira J. de Abrew, J.

Heard both counsel in support of their respective cases.

The accused-appellant in this case was convicted for being in possession of 43.1 grams of heroin and trafficking the said amount. The learned trial Judge after trial, by his Judgment dated 19.12.2008, imposed Life Imprisonment on both counts. Being aggrieved by the said convictions and the sentences, he has appealed to this Court. Facts of this case as narrated by the prosecution witnesses may be briefly summarized as follows. On 28.12.1998 around 9.30 – 10.00 in the morning I P Liyanage of Narcotic Bureau went in front of the accused's house. On seeing I P Liyanage the accused-appellant ran inside the house. Thereafter the police party went inside the house. I P Liyanage found a parcel of heroin in the shirt pocket of the accused-appellant. The accused-appellant gave evidence in this case. The version of the accused-appellant is quite different from the version of the prosecution. The evidence of the accused-appellant may be briefly summarized as follows. On 28.12.1998 around 9.30-10.00 when he was sleeping in his house, a person came and woke him up and took him to the front area of the house. Thereafter the said person received a telephone call on his mobile. The said person whom he later identified as I P Liyanage instructed two officers who had come with him to jump over the wall which was behind the house of the accused-appellant. Little later the two officers brought a parcel. I P Liyanage thereafter questioned the accused-appellant as to the ownership of the parcel. When he denied any knowledge of the parcel, I P Liyanage assaulted him. When

the wife of the accused-appellant shouted and told not to assault, I P Liyanage assaulted her with an antenna wire which was the antenna wire of the adjoining house. The accused-appellant, in his evidence, says that the two houses were separated from a wall and the two houses were very close to each other. Wife of the accused-appellant cursed the officers. This was the summary of the evidence of the accused-appellant. The most important question that must be decided in this case is whether heroin was found in the shirt pocket of the accused-appellant. If there is any reasonable doubt on this matter accused is entitled to be acquitted.

According to the evidence of I P Liyanage, heroin was found in the shirt pocket of the accused-appellant who was trying to jump over the wall which was behind the accused-appellant's house. If this evidence is true, then there was no necessity for I P Liyanage to go to the adjoining land. However, I P Liyanage, at page 129 of the brief, admitted that he went to the adjoining land. This was the land, according to the accused-appellant, that the two officers went, after I P Liyanage received a telephone call. I P Liyanage, in his evidence, admits that he went to the adjoining land and observed the height of the wall. According to him, the height of the wall from the adjoining land is three feet and the height of the wall from the accused's land is six feet. This shows that I P Liyanage had gone to the adjoining land. If the heroin was found inside the shirt pocket of the accused-

appellant as claimed by I P Liyanage and the police party, there was no necessity for I P Liyanage to go to the adjoining land. This evidence of I P Liyanage therefore, creates a reasonable doubt in the version taken up by him. Further, this evidence corroborates the position taken up by the accused-appellant in his evidence. The accused-appellant says that two officers went to the adjoining land probably after jumping over the wall and thereafter the two officers brought a parcel in which heroin was found. The accused-appellant claims that this parcel of heroin was foisted on him. Learned Deputy Solicitor General upholding the best traditions of the Attorney General's Department informs Court that he too is unable to understand as to why I P Liyanage went to the adjoining land.

It is interesting to find out the reason for the rejection of the evidence of the accused-appellant by the learned trial judge. When I P Liyanage was giving evidence, learned defence counsel suggested to him that I P Liyanage used a wire to assault the wife of the accused-appellant. But when accused-appellant was giving evidence he stated that I P Liyanage used an antenna wire to assault his wife. The learned trial Judge observed the difference between the wire and the antenna wire and proceeded to reject the evidence of the accused-appellant. This was one of the grounds to reject the evidence of the accused appellant by the learned trial Judge. The above ground, in our view, is not a ground to reject the

evidence of the accused-appellant. Learned D.S.G. too submits that he is unable to agree with the said ground to reject the accused appellant's evidence. We are pleased with this submission of the learned D.S.G. . I will now consider the other ground adduced by the learned trial Judge to reject the accused appellant's evidence. When I P Liyanage was giving evidence, learned defence counsel suggested to him that he came from the adjoining land. But, when accused-appellant was giving evidence, he took up the position that while I P Liyanage was questioning him, he ( I P Liyanage) instructed two officers to go to the adjoining land and they brought a parcel. Therefore, it appears there is a discrepancy between the suggestion and the evidence of the accused appellant. This was one of the grounds to reject the accused- appellant's evidence. When we consider the accused appellant's evidence, it appears that he had given consistent evidence on this point. He says that I P Liyanage instructed two officers to go to the other land and little later the two officers brought a parcel. We have gone through the evidence of the accused-appellant. He has been subjected to lengthy cross-examination. But in our view his evidence has not been shaken by the cross-examination. When I consider the evidence of the accused –appellant, I hold the view that there is no reason to reject the accused appellant's evidence. Learned trial Judge without properly evaluating the accused- appellant's evidence rejected his evidence on the above two grounds. The accused –appellant, in his evidence,

admitted that he was a heroin addict. It appears that he had honestly admitted that he had two previous convictions where he was fined Rs.4000/= (four thousand rupees). Accused-appellant, in his evidence, stated that when he was taken to the Police Narcotic Bureau he was suffering from the withdrawal of heroin and I P Liyanage gave him six packets of heroin. It appears that he has honestly admitted all these facts before the learned trial Judge. When we consider his evidence, we hold that there is no reason to reject the evidence of the accused-appellant. Learned trial Judge, in our view, was wrong when he reject the accused appellant's evidence. What is the position if the Court believes the evidence of the accused appellant or is of the opinion that the evidence of the accused appellant creates a reasonable doubt in the prosecution case? In this connection I would like to consider the Judgment of His Lordship Justice T.S. Fernando in Ariyadasa Vs. Queen 68 NLR 66. His Lordship in the said judgment held thus:

1. If the jury believed the accused's evidence he is entitled to be acquitted.
2. 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.

It appears that the learned trial Judge has not followed the said principles. Courts, in evaluating evidence, should not look at the evidence of an accused person with a squint eye. This view is supported by the Judgment of the Indian Supreme Court in D.N. Pandey Vs. State of Uththarapredesh AIR 1981 Supreme Court 911. Indian Supreme Court in the said case held thus: *“Defence witnesses are entitled to equal treatment with those of the prosecution and, Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses.”* It is the bounden duty of the trial Judge who has the opportunity of observing the demeanor and deportment of witnesses to come to the conclusion whether witnesses speak the truth or not. As I pointed earlier, there is no reason to reject the accused appellant’s evidence. This means that the evidence of the accused-appellant was capable of creating a reasonable doubt in the prosecution case. As I pointed out earlier, the evidence of I P Liyanage creates a reasonable doubt in his own evidence and corroborates the position taken up by the accused-appellant. When I consider the above matters, I feel that it is unsafe to allow the conviction to stand. For these reasons, I set aside both convictions and the sentences and acquit the accused appellant of both charges.

*Appeal allowed.*

ACTING PRESIDENT OF THE COURT OF APPEAL

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

I agree

JUDGE OF THE COURT OF APPEAL

Cr/-