209/2012

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

In the matter of an appeal in terms

Of section 331 of the Criminal

Procedure Act No. 15 of 1979 as

Amended

Kiriwala Mudalige Chaminda

Accused-Appellant

C.A.Case No:-209/2012

H.C. Colombo Case No:-4853/2009

V.

Hon. Attorney-General

Respondent

Before:- H.N.J.Perera, J &

P.W.D.C.Jayathilake, J

Counsel:-Anil Silva P.C. with Nandana Perera for the Accused-Appellant

S.Thurairaja D.S.G. for the Respondent

Argued On:- 02.09.2014/03.09.2014

Written Submissions-29.09.2014/09.12.2014

Decided On:-21.01.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Colombo for being in possession and trafficking of 6.4 g of Heroin and thereby committing an offence punishable under Section 54A(b) and Section 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance.

The accused pleaded not guilty and the case proceeded to trial. After trial the accused-appellant was convicted for both charges and sentenced to death. Aggrieved by the said conviction and sentence the accused-appellant has preferred this appeal to this court.

At the appeal the Counsel for the accused-appellant relied mainly on two grounds of appeal.

(a)Leading of evidence relating to the bad character of the accused-appellant

(b)The effect of the Trial Judge extensively questioning the

Accused-appellant

The prosecution case rested mainly on the evidence of three witnesses. Out of the three witnesses the first and second were the investigating officers whereas the third witness was the Senior Additional Government Analyst.

The facts pertaining to this case are briefly as follows:

According to IP.Welegedera and PC Lal Kumara on information received by PC Lal Kumara they proceeded to Peliyagoda and close to Pearl Ray Hotel the accused-appellant was arrested and on examination in his pocket IP Welagedera found a bag containing heroin and small packets also containing Heroin. Thereafter he was taken to the Narcotic Bureau and on the following day produced in court and remanded. The accused-appellant denied that he was

arrested at Peliyagoda. His position was that he was arrested at Kadawatha at the residence of his sister Chamila. He also denied that he had Heroin in his possession and no Heroin was recovered from the house either.

It was contended by the learned President's Counsel for the accused-appellant that as there was two diametrically opposed views as to what happened on 14.03.2007 a careful analysis of the evidence is needed by the learned High Court Judge in an impartial manner.

The appellant's first ground of appeal was that in the course of the trial, evidence of bad character of the accused was elicited from the accused-appellant by the State Counsel as well as by the learned Trial Judge when he gave evidence. It was argued that the accused on his own did not volunteer to state that he has a good character and that he was questioned about whether he had any problems with the Police. It was the position of the Counsel for the accused-appellant that the said evidence was elicited in cross examination to show that the accused had a case pertaining to Heroin in Negombo and also he was involved in an incident in the Dematagoda police area.

The legal position relating to the leading of evidence of bad character is set out in the Section 54 of the Evidence Ordinance .The Section states as follows:-

"In criminal proceedings the fact that the person is of bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant."

In Roshan V. Attorney General 2011(1) SLR 366 it was held that:-

"There is a paramount duty cast on a trial judge to exclude inadmissible evidence and prevent such evidence creeping in to the record. The resultant situation is such that these offending items of

bad character evidence has now crept in to the record and formed part of the proceedings. This is extremely prejudicial to the interests of the accused and would adversely affect the right of an accused to a fair trial."

It is contended on behalf of the accused-appellant that in the instant case when evidence of bad character has been led, the defence has not objected but the learned trial judge instead of preventing the leading of such evidence, actively took part in the questioning of the witness and the evidence was permitted to get in to the record. Further in this case the learned trial judge has referred to the evidence of bad character he did not refer to the fact that he was not taking that evidence into account but went further and stated that it was the reason why the defence evidence was rejected. Therefore it is very clear in this case that the learned trial judge was in fact influenced by the evidence of bad character that was led in finding the guilt of the accused.

It was argued by Counsel for the appellant that the conviction should be set aside on the ground of the admission of irrelevant evidence of character of the appellant. This was based on the fact that in cross-examination of the accused-appellant the State Counsel as well as the trial judge elicited evidence of bad character of the accused when he gave evidence.

Counsel for the Respondent sought to meet the objection by the argument that mere reception of inadmissible evidence will not vitiate a conviction if there is other evidence to support it and secondly if it cannot be shown that the trial judge was influenced by such evidence.

In Aron V. Amerawardene 49 N.L.R.167, Basnayake, J. held that in a case where irrelevant evidence as to character has been admitted it

is open to the Appellate Court to apply the provisions of Section 167 of the Evidence Ordinance and uphold the verdict if there is sufficient admissible evidence to justify it.

In Stireland V. Directore of Public Prosecutions (1944) 2 All England Law Reports 13, the House of Lords did not interfere with a conviction in a case where apart altogether from the impeached evidence there was an overwhelming case proved against the accused.

In King V. Pila (1912) 15 N.L.R. 453 Lascelles, C.J., observed that there was no question but that the Appellate Court, under Section 167 of the Evidence Ordinance, has power to uphold a conviction if it was of opinion that the evidence improperly admitted did not affect the result.

Section 167 of the Evidence Ordinance declares that the improper admission or rejection of evidence shall not be a ground itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there is sufficient evidence to justify the decision.

In the case of King V. Pila 15 N.L.R. 453, where several witnesses stated in evidence that they were deterred from coming forward to give evidence by the fact that the accused were reputed rowdies, gamblers and thieves, Larcelles C.J. while declaring the evidence of character as irrelevant observed:-

"There can be no question but that this Court, under section 167 of the Evidence Ordinance, has power to uphold the conviction, if we are of opinion that the evidence improperly admitted did not affect the result of the trial."

Further in Abdul Rahim V. Emperor (1946) A.I.R.Peivy Council 82 at 85 it was held that:-

"The appellate Court must apply its own mind to the evidence, and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the appellate Court does not think that the admissible evidence in the case is sufficient to justify the verdict then it will not affirm the verdict and may adopt the course of ordering a new trial or take whatever other course is open to it. But the appellate Court if satisfied that there is sufficient admissible evidence to justify the verdict, is plainly entitled to uphold it."

It was never the position of the Counsel for the appellants that the finding of the learned High Court Judge cannot be sustained even on facts and that there is abundant reason for this Court to interfere with the decision.

There can be no question but that this Court, under section 167 of the Evidence Ordinance, has power to uphold the conviction, if we are of the opinion that the evidence improperly admitted did not affect the result of the trial.

In the present case the findings of the learned High Court Judge does not rest on the evidence to which exception is taken, and I am satisfied that there is sufficient evidence to justify the verdict.

Section 165 of the Evidence Ordinance states as follows:-

"The judge may in order to discover or obtain proper proof of relevant facts, ask any question he pleases in any form, at any time of any witness or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any such

objection or order, nor without the leave of the court to cross examine any witness upon any answer given in reply to any such question.

Provided the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved....."

It is submitted by the learned President's Counsel for the accused appellant that the learned trial judge extensively questioned the only defence witness called and the said questioning has nothing to do with the "discovery or to obtain proper proof of facts."

In Queen V. Nimalasena De Zoysa (LV) Vol. CLW 49 Basnayake C.J. observed that:-

"That the mere fact that the trial judge in the exercise of power vested in him under section 165 of Evidence Ordinance put a large number of questions to a witness even if the number is greater than the number put by the prosecution or the defence is not a ground for quashing a conviction. The appeal Court will quash a conviction only if the appellant satisfy that the fact that the judge put so many questions resulted in a miscarriage of justice."

It is evident that in the instant case the learned High Court Judge has exercised this power granted to him under section 165 of the evidence Ordinance and has questioned the said witness extensively. Yet, I cannot agree that this has resulted in a miscarriage of justice.

It was contended by the Counsel for the Respondent that the prosecution has proved their case beyond reasonable doubt.

On a perusal and consideration of the learned High Court Judge's judgment and totality of the evidence led in the case we are of the considered view that he had come to a right decision in finding the accused-appellant guilty of all the charges. In conclusion, for reasons

stated above I hold that the accused-appellant has failed to satisfy this court on any ground urged on his behalf that a miscarriage of justice had occurred. Therefore I dismiss the appeal of the accused-appellant and affirm the conviction and the sentence dated 15.03.2012 of the learned High Court Judge of Colombo.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C.Jayathilake, J

I agree.

JUDGE OF THE COURT OF APPEAL