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 Code of Criminal Procedure Act No. 15 of 1979

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs,

Gonapinuwalage Indrajith Sisira Kumara

ACCUSED

CA/191/2010
H.C Colombo Case No 3296/2006

And,

Gonapinuwalage Indrajith Sisira Kumara

ACCUSED-APPELLANT

Vs,

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT- RESPONDENT

Before : **Vijith K. Malalgoda PC J (P/CA) &**

H. C. J. Madawala J

Counsel: Neranjan Jayasinghe for the Accused-Appellant

Dilan Ratnayake SSC for the AG

Argued On: 23.09.2015

Written Submissions on: 22.10.2015

Order On: 29.01.2016

Order

Vijith K. Malalgoda PC J (P/CA)

The Accused-Appellant Gonapinuwalage Indrajith Sisira Kumara was indicted before the High Court of Colombo for possession of 5.1 grams of Heroin on 03.02.2001 an offence punishable under section 54A (d) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

The Learned High Court Judge of Colombo by Judgment dated 11.01.2010 convicted the Accused-Appellant and sentenced him for life imprisonment. Being dissatisfied with the said conviction and sentence the Accused –Appellant had preferred this appeal.

During the argument before us Accused –Appellant raised several grounds of appeal including

a) improbabilities in the prosecution version of this case
b) failure by the prosecution to establish the inward journey of the production chain
c) failure by the Learned Trial Judge to give due consideration to the defence taken up by the Accused-Appellant in the Trial Court

being the main grounds of Appeal.

I will now turn to the prosecution version of the present case. The prosecution has mainly relied on the evidence of the following witnesses at the trial.

1. Sub Inspector Dehiwaduge
2. PC 20530 Sunil Bandara
3. Assistant Government Analyst Bandumala Perera

As admitted by both parties the officers of Kirulapana Police Station were engaged in a raid on 08.02.2001. According to the evidence of Sub Inspector Dehiwaduge, he had gone to Siddartha Road via High Level Road along with a police party consist of PC Sunil Bandara, PC Rajendra, PC Jayasiri, PC Gamage and police assistance Silva.

When they reached Siddartha Road junction near the Kirulapana Bridge, he had seen a person taking to his heels after seeing the police party. He further observed something fallen from the running person. He identified the person as the Accused-Appellant, but they could not apprehend him at that time. Witness Dehiwalage had recovered a small parcel dropped by the Accused-Appellant and the said parcel contained several small packets wrapped in a white paper put inside a cellophane bag. The said parcel was in the custody of SI Dehiwaduge until they returned to the station and thereafter the parcel was handed over to witness Bandara with instructions for him to go to the Police Narcotic Bureau and get the parcel weighed. When PC Bandara returned to the police station with two covers the said covers were sealed by him and handed over to the reserve PC 27296 Nimal.

According to witness Dehiwaduge, the said parcels were with the reserve until the Accused-Appellant was arrested by him on 04.02.2002 at Kalinga Mw, Kirulapana. The said productions were sent to the Government Analyst on 15.02.2002.

Witness Bandara in his evidence had corroborated the evidence given by Sub Inspector Dehiwaduge. According to this witness when he gave a chase to the Accused, he saw something dropping on the bridge, whilst running away.

According to him, the unsealed parcel which was recovered near the Kirulapana Bridge was handed over to him by SI Dehiwaduge at the police station and he had gone to the Police Narcotic Bureau

along with the said unsealed parcel and handed over the parcel to P.S. Wimalarathne of Police Narcotic Bureau for weighing and sealing purposes. Weighing was done by P.S Wimalarathne in presence of the witness and he placed his signature with date and placed the seal on the parcel at that time. The two sealed parcels received by him from P.S. Wimalarathne were duly handed over to SI Dehiwaduge on the same day.

The next witness summoned by the prosecution was Bandumala Perera an Assistant Government Analyst from the Government Analyst Department. According to her evidence PC 10757 Fonseka had handed over the parcel to the Government Analyst Department and a receipt was issued dated 15.02.2002.

The examination of the parcel too was carried out by the witness and according to her when she opened the parcel in addition to the seals she observed some unclear fingerprints on the parcel.

When the case for the prosecution was closed and the rights of Accused was explained the Accused opted to make a dock statement, and in his dock statement, he has admitted a police party led by SI Dehiwaduge visiting his house and questioning him after showing him a parcel on 08.02.2001 but denied arresting him on that day. He further speaks of visiting Fort and Borella police station on that day with six others to ascertain whether he was wanted by any police.

However on 04.02.2002 when he went to push a broken police jeep on the road, SI Dehiwaduge who was there had arrested him saying that there is a warrant on him.

As referred by me earlier, one of the main arguments raised by the counsel for the Accused Appellant was the improbability of the prosecution story. The counsel argued that considering the street value, no person would throw a parcel carrying 9 grams and 790 mg of Heroin when he could easily escape as described by the prosecution witnesses.

However we observe that none of the prosecution witness said that the parcel was thrown but what they said was that they saw parcel being dropped when he was running away. In such a situation, one cannot expect a person to pick the parcel and take it along with him, when police officers are giving a chase to him. Under these circumstances we cannot agree with the argument raised by the Accused-Appellant.

Counsel for the Accused-Appellant further argued that the prosecution has failed to establish the inward journey of the productions to the Government analyst.

In this regard I am mindful the decision in ***Perera V. Attorney General 1998 (1) Sri LR 378*** where J.A.N. de Silva (J) (as he was then) held that "The most important journey is the inwards journey because the final Analyst Report will depend on that.

As the Defendant had admitted the correctness of the procedure adopted by the prosecution in sending the production to the Analyst Department he is estopped from contesting the validity of the correctness of the Analyst Report even if the prosecution had not led in evidence the receipt of acceptance of the productions by the Analyst Department."

When considering this argument I observe the following admissions recorded during the High Court Trial.

Page 120; දේපල කුවිතාන්සි අංක 1/2000 යටතේ උප පොලිස් පරීක්ෂක දෙහිවඩුගේ නිළධාරියා විසින් මුදා තබා උපසේවා නිළධාරියා වන පොකො 27296 නිමල් නිළධාරියාට 2001.02.08 දින භාරදීමෙන් අනතුරුව එතැන් සිට රජයේ රස පරීක්ෂක දෙපාර්තුමේන්තුව වෙත මුදා යහපත් තත්වයේ තිබියදී 2002.02.15 වෙනි දින පොකො 10757 ෆොන්සේකා නිළධාරියා විසින් ගෙනගොස් භාරදීම සහ නැවත මහාධිකරණයට දන්වා භාන්ඩ ගෙනඒමේ සාක්ෂිදාමය අපරාධ නඩුවිධාන සංග්‍රහයේ 420 වගන්තිය යටතේ පිළිගැනීමක් ලෙස ඉල්ලා සිටී.

නියෝගය: අපරාධ නඩුවිධාන සංග්‍රහයේ 420 වගන්තිය යටතේ පිළිගැනීමක් ලෙස සටහන් කර තබමි.

The above admission recorded at the Trial Court had covered the period commencing from 08.02.2001 when the said sealed productions were handed over to the reserve up to handing over the production to the High Court. The only step which was not covered by the said admission is the period commencing from the time of detection up to the handing over the production to SI Dehiwaduge by PC Bandara. The court observes that the transaction took place during this period has been covered by the two witnesses Dehiwaduge and PC Bandara as I have discussed earlier in this judgment.

According to the evidence of PC Bandara, weighing of the productions was taken place at the Police Narcotic Bureau (PNB) by PS Wimalaratne of Police Narcotic Bureau (PNB) but it took place in his presence. In fact it is PC Bandara who sealed the productions and placed the signature on the two parcels.

In the case of ***Walimunige John and Another V. The State 76 NLR 485 at 496 GPS de Silva SPJ*** (as he was then) concluded "the question of presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would if called not have supported the prosecution. But where one witness' evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance.

Counsel for the Accused–Appellant further argued that it is unsafe to act on the evidence of PC Bandara alone since what he took was an unsealed parcel. However I observe that the said parcel was first taken in charge by SI Dehiwaduge and handed over to PC Bandara and both these witnesses had given evidence to that effect. These two witnesses are members of the raiding party too. The evidence

of the above two officers were corroborated each other and no contradictions were marked during the High Court trial.

Counsel for the Accused –Appellant brought to our notice the evidence of witness Bandumala Perera the Assistant Government Analyst who examined the production. In her evidence she referred to an unclear fingerprint in the parcel she examined. Even though the Counsel argued that it is unsafe to act on her evidence since there is a doubt with regard to the parcel on the strength of the above evidence but, we observe that the said evidence was not challenged before the High Court and therefore the above evidence alone will not make the prosecution version unacceptable before us.

In the case ***of Gunasiri and Two Others V. Republic of Sri Lanka 2009 1 SLR 39*** justice Sisira de Abrew whilst referring to a decision in Indian Supreme Court concluded as follows.

> "Although the 3rd Accused-Appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The Learned Counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd Accused Appellant. What is the effect of such silence on the part of the counsel. In this connection I would like to consider certain judicial decisions. In the case of Sarwan Singh V. State of Punjab 2002 AIR SC III at 3656 Indian Supreme Court held thus "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew V. State of Karnataka 2004 Cr. LJ 3003.
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> Applying the principles laid down in the above judicial decision, I may express the following view. Failure to suggest the defence of alibi to the prosecution witnesses, who implicated the accused, indicates that it was a false one. Considering all these matters I am of the opinion that the defence of alibi raised by the 3rd Accused Appellant is an afterthought."

As referred by me earlier in this judgment the Accused-Appellant in his dock statement had admitted a police team visiting his house and SI Dehiwaduge questioning him with regard to a parcel the said police officer had in his possession at that time. Whilst referring to the date of arrest he referred to an incident took place when he went to help a police party and further said that SI Dehiwaduge was not in good terms with him.

The Learned Senior State Counsel who represented the Attorney General before us took up the position that the above position taken by the Accused-Appellant in his dock statement had not been suggested to any of the prosecution witnesses and therefore it is wrong to conclude that the Learned Trial Judge had not given due consideration to the dock statement of the Accused-Appellant. He brought to our notice the reasons given by the Learned Trial Judge when rejecting the dock statement.

When considering the above argument and especially the decision of the Indian Supreme Court in ***Sarawan Sing V. State of Punjab*** I see no merit in the third argument raised by the Accused–Appellant.

For the reasons set out above I see no reason to interfere with the findings of the Learned High Court Judge. I therefore up holding the judgment, conviction and the Sentence of the Learned Trial Judge dismiss the appeal as devoid of merit.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL

Appeal dismissed