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

K. Krishnan Anthony Jeyaraj

Accused-Appellant

C.A.No.197/2016

H.C. Colombo No. 5414/2010

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12

Respondent

****

BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI J.

COUNSEL : Rienzie Arasacularatne P.C. with G. Premakumar for the Accused-Appellant.

Dilan Ratnayake D.S.G. for the respondent

ARGUED ON : 24th January, 2019

DECIDED ON : 29th March, 2019

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ACHALA WENGAPPULI J.

The Accused-Appellant (hereinafter referred to as the "Appellant") was indicted before the High Court of Colombo for trafficking in and being in possession of 1288 grams of heroin on or about 28th May 2009 at *Modera*.

After trial, he was found guilty on both counts by the trial Court and sentenced to death.

Being aggrieved by the said conviction and sentence, the Appellant sought intervention of this Court invoking its appellate jurisdiction. Learned President's Counsel for the Appellant, at the hearing of this appeal, sought to challenge the validity of the conviction and sentence of the Appellant on the following grounds:-

a. the trial Court acted in violation of the principles laid down in the judicial precedents by recalling prosecution witnesses under Section 439 of the Code of Criminal Procedure Act No. 15 of 1979,

b. the trial Court had already decided that the prosecution had proved its case beyond reasonable doubt even before making an attempt to consider the contents of the Appellant's statement from the dock,

c. the trial Court erroneously held that the Appellant failed to prove the falsity of the prosecution case, thereby imposing an illegal burden on him.

The prosecution case against the Appellant is that SI *Wanigasinghe* of the Surveillance Unit of *Colombo* North Division, received information on 28.05.2009 at about 8.15 a.m., from one of his private informants about a person called *"Anton"* who would bring illegal drugs to *Kimbula Ela* area that day and that he could point out the person. He then entered this information in his pocket note book and conveyed it to his superiors. Upon their direction, he proceeded to *Modara* Police and proceeded for the detection with Chief Inspector *Ranagala.* A Police party led by CI *Ranagala,* including SI *Wanigasinghe,* left the Police Station at 9.30 a.m.

They have arrived at *Pannananda Mawatha* and have parked the vehicle near a pharmacy. Then *Ranagala* and *Wanigasinghe* walked along the road to meet up with his private informant. They met the informant near a *Bo* tree and on his instructions have awaited the arrival of the suspect. After some time, the informant had pointed out the Appellant to

the witness and identified him as *"Anton"*. When the Appellant was about to turn to *Kimbula Ela* from the junction from *Madampitiya* Road, the witnesses have stopped him and conducted a search.

The Appellant was carrying a reddish cellophane bag contained in a black coloured polythene outer bag and was arrested at 10.05 a.m. There were several smaller parcels that were found in the reddish cellophane bag containing heroin. Thereafter, the Police party conducted a search of his house at No. 162/376A, *Kimbula Ela, Madampitiya, Colombo* 15. The parcel detected from the Appellant was kept in the personal custody of *Wanigasinghe* until it was weighed and produced at the Police Narcotics Bureau. The parcel contained 18 individual packets with 1683 grams of heroin as its gross weight. They were sealed at *Modera* Police Station in the presence of the Appellant.

The heroin detected from the Appellant was analysed by the Government Analyst, and the pure quantity of heroin found in the production was 1288 grams.

Perusal of the proceedings before the High Court reveals that the trial commenced on 08.09.2011 and the learned High Court Judge who delivered the judgment presided over the trial of the Appellant only from 05.08.2015. As at that time, the cases for the prosecution and defence were closed. The Appellant has made a dock statement.

When the succeeding trial Judge presided over the Court on 05.08.2015, the parties had no objection for the adoption of the proceedings thus far recorded. However, it was discovered that part of the proceedings in relation to the examination in chief of the PW1, C.I. *Ranagala* on

27.03.2012 was not available in the case record. The trial Court, having perused the printed version of the proceedings that had been retrieved from the computer of the stenographer who took down them on that day, noted that the signature of the then trial Judge could not be taken to authenticate those proceedings since he has retired from the Judiciary.

Thereupon, learned High Court Judge who convicted the Appellant, made an order on 10.09.2014, allowing the application by the prosecution under Section 439 of the Code of Criminal Procedure Act No. 15 of 1979 to recall witnesses and issued summons on PW1 and PW2. PW2 SI *Wanigansinghe* was re-summoned upon the application by the prosecution to correct his name that appears in the proceedings.

Learned High Court Judge, in her order noted that due to the authentication issue, it is not possible to adopt the proceedings already filed in the case record. The only concern raised by the Appellant at that point of time was in respect of allowing him to peruse the "proceedings" which had no authentication by the then presiding Judge.

On 13.10.2014, SI *Wanigansinghe* was recalled by the prosecution to correct his name and he was released by the trial Court after the cross examination by the Appellant. Only the evidence of PW1 was recorded afresh and the trial Court afforded an opportunity for the Appellant to cross - examine him by making an order to that effect on 01.12.2014. At the conclusion of his evidence a certified copy of the proceedings was issued to the Appellant on his request.

The prosecution "closed its case" on 23.03.2015 for the second time and the trial Court verified from the Appellant whether he needed to present his case afresh.

Upon request of the Appellant, proceedings were adjourned to 09.03.2015 enabling him to make another statement from the dock. His second dock statement was recorded on 09.03.2015 and after closing submissions of the parties, the trial Court pronounced its judgment convicting the Appellant on 23.07.2015.

Learned President's Counsel rested his submissions in relation to the first ground of appeal on the pivotal issue that whether in such a situation the provisions contained in Section 439 could be utilised. He relied on the judgments of ***Ponniah v Abdul Cader*** 38 N.L.R. 281, ***King v Aiyadurai*** 43 N.L.R. 289, ***David v Idroos*** 45 N.L.R. 300, ***Fernando v Samath*** 45 N.L.R. 548, ***Don Lazarus v Waas*** 62 N.L.R. 431 and ***Francis Alwis v Queen*** 70 N.L.R. 558, in support of his contention that it could not. Learned President's Counsel urged before us that this is a situation which resulted due to negligence of "someone" and the procedure adopted by the trial Court has prejudiced his rights since Section 439 does not envisage repetition of the evidence of a witness. He added that there was nothing remaining to clarify from the witness and the recalling of the witness was done after the prosecution has closed its case.

Learned Deputy Solicitor General sought to counter this submissions on the basis that the trial Court needed to observe the demeanour and deportment of the main witness for the prosecution and in delivering judgment, it has considered the evidence of witness CI

Ranagala, recorded before it. Learned Deputy Solicitor General also contended that the Appellant, having acquiesced to the application of the prosecutor to recall the witness owing to the defect in the proceedings (at p. 294 of the appeal brief), now cannot raise any objections as he is estopped.

It is the submission of the learned Deputy Solicitor General that Section 439 has no mention of the time it could be utilised by the Court and hence there was nothing prejudicial to the Appellant that occurred during the later proceeding since he was afforded an opportunity to cross-examine the witness and to make another detailed statement from the dock.

Learned President's Counsel, in his reply to the Respondent's submissions, sought to challenge the correctness of the procedure adopted by the trial Court on the footing that if it so wished the trial Court could have had a trial *de novo* under Section 48 of the Judicature Act.

Relevant portions of Section 439 of the Code of Criminal Procedure Act No. 15 of 1979 in relation to the appeal before us, reads thus;

> *"Any Court may at any stage of ... trial or proceedings under this Code summon ... recall and re examine any person already examined; and the Court shall summon and examine or recall and re examine any such person if his evidence appears to it essential to the just decision of the case."*

As the learned Deputy Solicitor General submitted, upon plain reading of the section, there is no restriction to recall and re-examine a witness whose evidence already recorded by a trial Court. However, it appears from the wording of that section that the trial Court is vested with the discretion in the application of its provisions. It is clear that this course of action should be embarked upon by a trial Court, only *"... if his evidence appears to it essential to the just decision of the case."*

However, apparently the judicial precedents relied upon by the learned President's Counsel have placed certain other limitations to the scope of its applicability.

In ***Ponniah v Abdul Cader*** 38 N.L.R. 281, it was held that in order to remedy a *"defect or fill a gap in the prosecution"*, provisions of Section 429 (of the then Code) should not be used by the trial Courts. The judgment of ***David v Idroos*** 45 N.L.R. 300, dealt with a situation where a witness was called after close of the prosecution case for the first time and it was held that recourse to provisions of Section 439 should not be made *"if such evidence puts the accused at an unfair disadvantage."* The judgments of ***Fernando v Samath*** 45 N.L.R. 548 and ***Don Lazarus v Waas*** 62 N.L.R. 431 also refer to situations where the witness was called after close of the prosecution.

The judgment of the Court of Criminal Appeal in ***King v Aiyadurai*** 43 N.L.R. 289 too falls into this category and their Lordships have made reference to several English judgments including the judgment of ***R v Stanley Liddle*** 21 Cr. App. Rep. 3, and made pronouncement as to the scope of Section 439 in relation to calling witnesses in rebuttal.

In ***Francis Alwis v Queen*** 70 N.L.R. 558, Court of Criminal Appeal considered calling of fresh evidence after the cases for the prosecution as well as defence were closed.

Clearly the situation under instant appeal could easily be distinguished from the facts of those judgments since there was no consideration of the question by the Courts of the propriety of recalling a witness who has already been examined in any of them.

The English judgment of ***R v Stanley Liddle*** (ibid) deals with a situation where after the cases of the parties were closed a fresh witness was called. It cited ***R v Harris*** 20 Cr. App. Rep. 86, where it was held that

> *" a judge should not call a witness in a criminal trial after the case for the defence is closed, except in "a case where a matter arises ex improviso, which no human ingenuity can foresee, on the part of the prisoner, otherwise injustice would ensue."*

In the absence of a binding judicial precedent to the issue before us, we are of the view that it is appropriate us to consider the commentaries contained in the accepted authoritative texts.

It is observed by *Dias* in his ***Commentary on the Ceylon Criminal Procedure Code*** (Vol. II p 1228) that *"it will be thus seen that the provisions of Section 138 of the Evidence Ordinance and those of Section 429 of this Code overlap".*

In this context, *Dias* further observes that " Section 138 of the Evidence Ordinance provides that "the Court may *in all cases* permit a witness to be re-called, either for further examination-in chief or for further cross-examination, and if it does so, the parties have the right of further cross- examination and re-examination respectively"."(emphasis original).

He further expands the applicability of the provision in respect of recalling of witnesses to the parties in addition to Courts, by stating that *"The Court or parties may recall and further examine witness who has already given evidence and the Court is further empowered to summon any person as a witness, or examine any person in attendance in Court, if it is necessary so to do."*

A similar view is expressed by *Coomaraswamy* in his treatise ***The Law of Evidence*** (Vol. II Book 2, p. 732) as he observes that;

> *"The Court would exercise its discretion under Section 138(4) when unforeseen circumstances develop or there are inadvertent omissions, but surprise or prejudice to the other party should be guarded against, not should a party be allowed to fill up a lacuna in his evidence under the pretext of a recall."*

The situation under consideration in the appeal before us arose due to a failure of the presiding Judge to place his signature to a section of proceedings that had been recorded in his presence. Section 272(1) of the Code of Criminal Procedure Act imposes a duty on a trial Judge to take

down evidence of witnesses in writing under his personal direction and superintendence and such proceedings be *"signed and dated by the Judge"*.

It is undisputable that the Appellant has had the opportunity of taking note of the nature of the evidence already given by CI *Ranagala.* As he did in the first instance, the witness was cross examined by the Appellant for the second time, when he was recalled. The Appellant also had the advantage of making a more descriptive second statement from the dock. In the circumstances, there is absolutely no prejudice caused to the Appellant except the delay which resulted in due to this unfortunate lapse.

We are of the considered view that the procedure adopted by the trial Court in recalling the witness and offering him to the Appellant for cross examination satisfies the requirements of Section 439, since the evidence of CI *Ranagala* is *"essential to the just decision of the case"*.

The complaint of the Appellant that the trial Court should have acted under the proviso to Section 48 of the Judicature Act as amended by Act No. 27 of 1999 is a valid one if he made an application to that effect before the trial Court. The trial Court, although not acting under provisions of Section 48 directly had adopted somewhat a "hybrid" procedure which consisted of combination of provisions of both Section 439 of the Code of Criminal Procedure Act and proviso to Section 48 of the Judicature Act in allowing the Appellant to make his second statement from the dock, which only Section 48 has provided for.

Since no prejudice caused to the Appellant by the said procedure we hold that this ground of appeal is without merit.

In support of the second ground of appeal, learned President's Counsel contended that the trial Court had already decided that the prosecution had proved its case beyond reasonable doubt even before making an attempt to consider the contents of the Appellant's statement from the dock. It is his complaint that thereby the trial Court had deprived the Appellant of a fair trial. He also complained that the trial Court had taken extraneous matters in to consideration since it had observed that dangerous drugs are not available in the open market and the distribution of dangerous drugs are made through public places.

Learned President's Counsel in support of his contention invited our attention to page 425 of the appeal brief where the trial Court, at page 34 of its 44-page judgment, stated as follows;

> " මෙම නඩුවෙහි චූදිතට එරෙහිව නහා තිබූ 1 සහ 2 වන චෝදනාවන් පැමිණිල්ලේ සාක්ෂි මහින් ඔප්පු කිරීමට සමත් වී තිබූ හෙයින් පැමිණිල්ලේ නඩුව අවසන් කර තිබූ අවස්ථාවේ දී චූදිතට සිය විත්ති වාචකය ඉදිරිපත් කිරීමට මෙම අධිකරණය විසින් දැනුම් දී තිබුන ද, ඔහු විත්ති කුඩුවේ සිට ප්‍රකාශයක් පමණක් කරමින් පවසා තිබුනේ අහිංසක අන්දමට තම නිවසේ කඩයක් කරමින් සිටි අවස්ථාවකදී ඔහු ඇතුළුව පවුලේ අනිත් අයවද, පාරේ සිටි දෙදෙනෙක්ද අත් අඩංගුවට ගෙන මෙම නඩුව ඔහුට විරුද්ධව ඉදිරිපත් කල බවත් ඔහුට එරෙහි වූ චෝදනාව කුමක්දැයි යන්න පවා තමා නොදන්නා බවත්ය . "

It is correct that upon plain reading of the first few lines of the said quotation from the judgment of the trial Court, it could be seen that the

trial Court had concluded the two counts against the Appellant were already proved by the prosecution evidence. However, the Learned Deputy Solicitor General submitted that what the trial Court considered at this juncture was the evidence of the Appellant after the prosecution had closed its case, in the light of the provisions of Section 200(1) of the Code of Criminal Procedure Act No. 15 of 1979. The words "ඔප්පු කිරීම" are different to " සාධාරණ සැකයෙන් ඔබ්බට" that is found at the very end of the judgment

It is evident from the text of the judgment that the trial Court had considered the evidence presented before it by the prosecution and defence as a whole and at the same time. The trial Court considered the Appellant's evidence at the very outset of its judgment (at page 3) and thereafter against the version of events as narrated by the prosecution (at p.13). The trial Court again made its observations on the Appellants evidence in relation to the evidence of production chain at pages 21 and 22 of its judgment. Thereafter, the trial Court has considered the Appellant's case in the light of the Ellenborough dictum at pages 30 to 34 and then only the highlighted pronouncement is recorded.

The submissions of the learned President's Counsel might have some validity, if the trial Court has compartmentalised the evidence of the parties and considered them in isolation in a sequential order, thereby arriving at its final conclusion in a step by step approach. However, it is relevant to note that Section 283(1) of the Code of Criminal Procedure Act No. 15 of 1979 imposes a statutory requirement that a Judgement "... *shall contain the point or points for determination, the decision thereon, and the reasons for the decision*".

In ***James Silva v. The Republic of Sri Lanka*** this Court outlined the structure of a judgment ;

> *" A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalising and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty* - ***Jayasena v. The Queen 72 NLR 313 (PC)"***

Whilst leaving a generous margin for individual styles of presentation, this Court must emphasise its strong view that a judgment should contain the essential requirements the law expects it to have .

Thus, in considering the quoted part of the judgment of the trial Court, in the light of the above identified manner of presentation of its reasons, we are satisfied that the trial Court had considered the evidence presented before it as a whole and expressed its conclusions on it, correctly.

Connected to this ground of appeal, learned President's Counsel also made submissions on the point that it is not clear as to which of the two dock statements the trial Court has considered in coming to its conclusion. He further added that irrespective of which statement the trial

Court has considered, it was misled in its conclusion that the Appellant has put up a defence of *alibi*, when in fact he did not.

This contention is at variance with the Appellant's position that had been recorded at the very commencement of his trial. On 08.09.2011, the Appellant informed Court that he would be relying on a defence of *alibi* and therefore asserts that the prosecution is put on notice of his intended defence, in compliance of the provisions contained in Section 126A of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 14 of 2005.

In the statement of the Appellant on 30.01.2014, the Appellant merely stated in three short sentences that he was arrested from his home in the presence of his wife and children whilst denying his complicity to the offence. In the 2nd statement from the dock, the Appellant expands this claim by making few additions on factual matters. He stated that he runs a small shop in a shanty area and two persons who came on a bicycle arrived at to his shop followed by a Police jeep. He was arrested thereafter and taken to Police. On their way two more persons were arrested. Police said that " පොලීසිය කිවුවා බැග් එකේ මොනවද තියෙනවා කියලා මම දන්නේ නැහැ".

The trial Court was mindful of the fact that the Appellant made two statements from the dock. The fact that the trial Court had referred to an arrest of another person by the Police, in addition to that of the Appellant, is a clear indication as to which of the two dock statemens it proceeded to consider. It is only in the 2nd dock statement the Appellant made any reference to the arrest of others.

In relation to the third ground of appeal, it was contended by the learned President's Counsel that the trial Court has taken a view which is highly prejudicial to the Appellant when it erroneously held that the Appellant failed to prove the falsity of the prosecution evidence, thereby imposing an illegal burden on him. Our attention was drawn to the segment of the judgment of the trial Court, where it is stated that;

> ".....පැමිණිල්ල විසින් ඔප්පු කර තිබූ අවස්ථාවේදී පැමිණිල්ලේ, සාක්ෂි කිසිවක් අසත්‍ය යැයි පෙන්වා දීමට තරම් කිසියම් සාධාරණ සැකයක් මතු කිරීමට වුදිත සමත් වී නොතිබූ බවට ඉහත සියළු කරුණු අනුව නිගමනය කරමි.

Learned President's Counsel complained of the failure of the trial Court to consider the Appellant's evidence when it held that he offered no explanation, when in fact he offered an explanation.

It is evident that the trial Court, heavily relied on the Ellenborough dictum and commented on the failure of the Appellant to offer an explanation acceptable to the trial Court as to why he was falsely implicated by the Police.

The Appellant stated in his dock statement that he was arrested at his house in the presence of his family members. However, the Appellant in cross-examination of CI *Ranagala* did not suggest to him that he was not arrested at the junction of *Kimbula Ela* or that he was arrested at his house in the presence of his family members. Instead, what was suggested to him

was that the heroin parcel, which belonged to one *"Guna"* was introduced to the Appellant.

His claim of arrest at his house therefore is clearly an afterthought and the trial Court was right to reject his dock statement in its totality. The attempt to shift the place of arrest by the Appellant is sufficient to consider it as a defence of *alibi* when considered with the notice he issued on the prosecution that he intends to raise such a defence. The defence of *alibi* is defined in ***Fernando and five Others v The State*** (2011) 1 Sri L.R. 382 as follows:-

> *" ... in its essence a defence of alibi is nothing more than a plea of not guilty, because the accused was not present where the offence was committed on the occasion indicted."*

However, the quoted section of the judgment of the trial Court offends the established principles in dealing with defence of *alibi* as it made no reference to any of them. The applicable law has been clearly spelt out in the judgment of ***Yahonis Singho v The Queen*** 67 N.L.R. 8 where the Court of Criminal Appeal has held that;

> *"If the evidence of an alibi is accepted, such acceptance not only throws doubt on the case for the prosecution but, indeed, it does more, it destroys the prosecution case and establishes its falsity. As the jury convicted the appellant, it must be assumed that they*

did not accept the evidence of Sirimane. The learned judge directed the jury, if we may say so with respect, correctly as to what course they should follow if they rejected the evidence of Sirimane. He however, omitted altogether at both stages of his charge referred to above to give them any direction as to what they were to do if they neither accepted Sirimane's evidence as true nor rejected it as untrue. Jurors may well be in that position in regard to the evidence of any witness. There was in this case no question of a shifting of the burden of proof which throughout lay o the prosecution. If Sirimane's evidence was neither accepted nor was capable of rejection, the resulting position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction of the jury on a necessary point and thus constituted a misdirection. "

Thus, the said statement by the trial Court is contrary to the established legal principles which govern consideration of a dock statement. We are of the considered view that this is an instance where the proviso to Section 334(1) of the Code of Criminal Procedure Act No. 15 of 1979 should be applied. The question *" whether on the evidence, a reasonable jury, properly directed on the burden of proof, would without doubt have convicted the appellant?"* as their Lordships asked themselves in ***Mannar***

Mannan v Republic of Sri Lanka (1990) 1 Sri L.R. 280, following ***Stirland v. D.P.P.*** 30 Cr. App. Rep. 40, is assumed by this Court in the affirmative.

The conviction and the sentence imposed on the Appellant by the High Court of Colombo is therefore affirmed.

The Appeal of the Appellant is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL