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

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No. HCC 272/2016

High Court of Colombo No. 7590/2014

Kumarage Sanjeer Kumara

Accused

AND NOW

Kumarage Sanjeer Kumara

Accused Appellant

V.

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

Respondent

BEFORE	:	**K.K. WICKREMASINGHE, J** **K. PRIYANTHA FERNANDO, J**
COUNSEL	:	Razik Zarook PC with Rohana Deshapriya, Nalik Cader, Chanakya Liyanage and Thilak Wijesinghe for the Accused Appellant. Azard Navavi DSG for the Respondent.
ARGUED ON	:	24.06.2019
WRITTEN SUBMISSIONS FILED ON	:	07.12.2017 & 22.07.2019 by the Accused Appellant. 12.11.2018 & 06.02.2019 by the Respondent.
JUDGMENT ON	:	30.09.2019

K. PRIYANTHA FERNANDO, J.

01. Accused-Appellant (Appellant) was indicted in the High Court of Colombo on 1st and 2nd counts for trafficking and being in possession of 13.51 grams of Heroin respectively. After trial the learned High Court Judge acquitted the Appellant from count No.1 and convicted for count

No.2 and was sentenced to imprisonment for life. Being aggrieved by the said conviction for count No 2, the Appellant preferred the instant Appeal on the following grounds;

1. The learned Trial Judge has not taken into consideration that the version of the prosecution relating to the arrest of the Accused Appellant fails the test of probability and credibility.

2. The learned Trial Judge has erred in law by failing to evaluate that the prosecution has not proven the 'chain' relaying to the inward and outward journey of the production.

Ground No.1

02. Learned President's counsel for the Appellant submitted that according to the evidence for the prosecution PW 1 Inspector Lankadeva has received the information about the Appellant at 21.20 hours on 03.05 2013. The information had been that the Appellant was on the road between Seewalipura school and the railway gate keeping heroin in his possession. He had made out entry at 22.12 hrs. and had left the camp at 22.30. It had been about 23.00 hrs. by the time he arrived at the place where the Appellant was. The contention of the Counsel for the Appellant is that it is highly improbable for the Appellant to wait there on the road for about 1 hour and 40 minutes until the police team arrived at the scene.

03. Position taken by the defence was that the Appellant was arrested by the police when he was at home with his father and the uncle.

04. PW2 SI Dinesh Sanjeeva Gnanaratne who took part in the raid also has given evidence corroborating the evidence of PW1. Although, he had been cross examined at length by the defence he had testified without any contradiction that goes to the root of the matter.

05. Learned Trial Judge who heard the evidence of the witnesses who conducted the raid had been satisfied about the credibility of the witnesses. The Appellant in his dock statement has not mentioned anything about any previous enmity between the official witnesses who conducted the raid to implicate the Appellant falsely.

06. In case of ***Attorney General V. Mary Theresa [2011] 2 Sri L.R. 292*** at page 304, Her Ladyship Justice Shiranee Thilakawardene said;

> *"Credibility is a question of fact, not of law. Appellate Judges have repeatedly stressed the importance of the Trial Judges' observations of the demeanor of witnesses in deciding questions of fact. ... No doubt the Court of Appeal has the power to examine the evidence led before the High Court. However, when they go so far as to conduct a demonstration of the evidence, they observe the material afresh and run the risk of stepping into the role of the original Court. ... The Trial Judge has a unique opportunity to observe evidence in its totality including the demeanor of witnesses. Demeanor represents the Trial Judge's opportunity to observe the witness and his deportment and it is traditionally relied on to give the Judges' findings of fact their rare*

degree of inviolability. (Vide, Bingham, 'The Judge as Juror' 1985 p.76)"

07. The learned Trial Judge after observing the witnesses and analyzing the evidence has concluded that the evidence of the witnesses for the prosecution who conducted the raid to be credible and did not find the raid to be improbable. Hence, there is no reason for this Court to overturn trial findings of fact that is supported by the evidence. Hence, this ground of Appeal should fail.

Ground No.2

08. Counsel for the Appellant contended that the police officers who conducted the raid have failed to comply with section 77A (1), (2) and (3) of the Poisons Opium and Dangerous Drugs (Amendment) Act. It is the contention of the learned President's Counsel for the Appellant that in terms of section 77(A)(1), the officer who seized the illegal drug, himself, has to hand over the same to the Government Analyst. In this case, although the chain of officers who handled the seized drugs had given evidence, the drugs were handed over to the Government Analyst not by IP Lankadeva who seized it, but by Officer IP Rajakaruna (PW10). Evidence of IP Rajakaruna was that he handed over the productions to Government Analyst on 04.05.2013. Prosecution has led the evidence to prove the chain from the seizure to handing over the drugs to the Government Analyst. The issue raised by the Counsel for the Appellant is that it was incumbent upon IP Lankadeva who seized the drugs to take the drugs to the Analyst by himself.

09. Previously there was no provision for the police officers who conduct raids and seize illegal drugs to send the drugs directly to the Government Analyst for analysis. The procedure was to send the productions to the Government Analyst through the Magistrate's Court. By section 8 of the Poisons Opium and Dangerous Drugs (Amendment) Act, additional provision was made for the police officers who seize drugs to directly take the drugs to the Government Analyst. This provision was obviously made to effectively and expeditiously get the illegal substance seized analyzed without following the long procedure through Magistrate's Court. However, it is of utmost importance that the same production that was seized is handed over to the Government Analyst without making any room for tampering or interfering with the same.

10. In the instant case clear evidence had been led by the prosecution on the chain to prove that the seized productions were handed over to the Government Analyst without any tampering. From the time IP Lankadeva seized the drugs from the Appellant to the time IP Rajakaruna (PW10) handed over the same to the Government Analyst Department clear evidence had been led by the prosecution without breaking the chain. Hence, no prejudice has caused to the Appellant on the analysis of the drugs, by IP Lankadeva himself not taking it to the Government Analyst. It has not caused any miscarriage of justice. Article 138(1) of the Constitution provides that no Judgment, decree or order of any Court shall be revised or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

11. In case of ***Perera V. Attorney General [1998] 1 Sri L.R. 378*** at page 380 Court held;

> *'It is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the Analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the Analyst. Therefore, it is correct to state that the most important journey is the inwards journey because the final Analyst report will depend on that. The outward journey does not attract the same importance.'*

12. However, there is no issue raised, and an admission had been recorded on 13.01.2016 by the defence that they do not challenge the Government Analyst report and the outward journey. In the above premise ground of Appeal No.2 also should necessarily fail.

13. Learned Presidents' Counsel for the Appellant brought to the notice of the Court that the Witness Lankadeva has given contradictory evidence on placing the imprint of the Appellant on the parcel when it was sealed. It is clear that it was a genuine mistake and on perusing the notes he had given the correct version. It would not affect the credibility of the PW1.

Hence, I affirm the conviction and the sentence imposed on the Appellant by the learned High Court Judge.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL