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

In the matter of an appeal in terms of Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist
Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0143/2023

Complainant

High Court of Colombo
Case No. HC/154/2018

Vs.

Anthony Theresa.

Accused

AND NOW BETWEEN

Anthony Theresa.

Accused-Appellant

Vs.

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

Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Kavithri Hirusha Ubeysekera, Assigned Counsel for the Accused-Appellant.
Padmal Weerasinghe De Silva, SSC for the Respondent.

ARGUED ON : 30.05.2024

DECIDED ON : 26.06.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted for two charges before the High Court of Colombo, under Section 54A (b) and 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance (as amended) for trafficking and possession of 3.62 grams of heroin, on or about 27th of March 2016.

After trial, the learned High Court Judge convicted the accused-appellant by his Judgment dated 28.04.2023 and sentenced him for life imprisonment for both charges. The accused preferred this appeal against the said convictions.

Prior to the hearing, written submission was filed only on behalf of the appellant. At the hearing of the appeal, the learned Counsel for the appellant and the learned Senior State Counsel (SSC) for the respondent made oral submission.

Briefly, the prosecution case is as follows:

An informant came to the Colombo Crimes Division and gave an information regarding a woman who carries heroin to PW-1, the officer in charge of the Colombo Crimes Division. Accordingly, he organized a

raid consisting of eight other police officers. They left the Colombo Crimes Division at 10.40 hours and reached the place called "Stacepura" in the Grandpass police division. The informant did not go with the team of police officers but giving an information for the second time, he informed that the woman who carries the heroin wears a black trouser and a purple blouse. PW-1 and some other police officers turned right from the Stacepura road and walked nearly one Kilometer (answering the very next question, PW-1 stated they walked about 500 meters). Then the police officers saw near a playground a woman coming, they questioned her and PW-7, the Woman Police Constable "Deepika" who went with the team, searched the woman and found a parcel of heroin from her right side pocket in her trouser. Thereafter, they went to search her house and found nothing. Then they went to the "Dedigama Pawning Centre", weighed the heroin, sealed, and came back to the Colombo Crimes Division.

The grounds of appeal urged by the learned Counsel for the appellant are as follows:

1. The learned High Court Judge failed to notice, consider, and evaluate that the "information" which is the "source" of present matter has inherent discrepancies/infirmities.
2. The learned High Court Judge failed to take cognizance of the improbability of the prosecution case.
3. The learned High Court Judge failed to consider and evaluate that there is a reasonable doubt whether a Woman Police Constable accompanied the raid team.
4. The prosecution had failed to act under Rule 52 of the Supreme Court Rules (Conduct and Etiquette for Attorneys-at-Law) Rules 1988.
5. The learned High Court Judge failed to consider that there is no sufficient evidence to prove beyond a reasonable doubt, the charge of trafficking.

6. The learned High Court Judge failed to consider whether the prosecution has proved the possession of heroin beyond a reasonable doubt.
7. The learned High Court Judge misdirected himself on the facts and convicted the appellant.
8. The conviction and the sentence are bad in law.

I wish to deal first, the arguments in respect of improbability of the prosecution case because if there is a reasonable doubt regarding the probability of the prosecution case, there is no need to consider the other grounds of appeal.

According to the prosecution, the raid was carried out on an information received by PW-1, the officer in charge of Colombo Crimes Division. PW-1 stated that the informant came to his office and informed that a woman in the Grandpass Police Division carries heroin and she can be arrested if you go immediately. In PW-1's own words, the information is as follows:

ප්‍ර : මහත්මයාට කාගෙන්ද තොරතුරු ලැබුනේ?

උ : මගේ තොරතුරුකරුවෙක්. මම කොළඹ අපරාධ කොට්ඨාශයේ කාර්යාලයේ ඉන්න කොට ස්ථානයට පැමිණිලා මට දැනුම් දුන්නා ග්‍රෑන්ඩ්පාස් පොලිස් වසමේ කාන්තාවක් හෙරොයින් රැගෙන යනවා දැම්ම ගියොත් අත්අඩංගුවට ගන්න පුළුවන් කියලා.

(page 48 of the appeal brief)

The contention of the learned Counsel for the appellant was that in this information, the identity of the person who carries the heroin had not been mentioned and the area where the woman is said to be coming with heroin is not mentioned. However, she contended that the OIC entered the information in the information book stating the identity of the person who carries heroin as the wife of "Niroshan" and she resides in "Stacepura" in the Grandpass police division (page 49 of the appeal brief). The issue raised by the learned Counsel for the appellant was

that when the informant did not inform the identity of the person who was supposed to be carrying heroin and not informed about the area in which she resides, according to the evidence of PW-1, how did PW-1 enter all these details in the information book.

In replying, the learned SSC drew the attention to page 55 of the appeal brief and stated that the informant had given an information for the second time and informed about her dress, therefore, the fact that there were two informations must be taken into consideration. Hence, he contended that there was no discrepancy in respect of the information received.

It is to be noted that the learned SSC has not correctly realized the issue raised by the learned Counsel for the appellant. It is correct that after the police officers reached "Stacepura", giving an information for the second time, the informant had informed about the dress that she wore. The second information has no relevancy to the argument advanced by the learned Counsel for the appellant. Her argument was in respect of the information given by the informant when he came to the Colombo Crimes Division and which was recorded at 10.25 hours. According to PW-1's evidence at page 48 of the appeal brief, identity of the woman who carries heroin had not been mentioned by the informant and the place where she resides or is coming from had also not been mentioned. But when PW-1 entered notes in the information book regarding the information that he received, he stated that the wife of the "Niroshan" who is residing in "Stacepura" is about to leave her house with a parcel of heroin. Hence, it is apparent that there is a vital infirmity with regard to the information received by PW-1 and that was not explained by the prosecution. Therefore, I agree with the contention of the learned Counsel for the appellant that the said vital infirmity raises a reasonable doubt on the prosecution case.

Apart from that, the learned Counsel for the appellant pointed out several improbabilities in the prosecution case. I wish to deal only with the vital improbabilities that go to the root of the case. I am of the view that the argument raised regarding the alleged timeframes in relation to the various occasions of the raid affects the reliability of the entire raid. According to PW-1, they left Colombo Crimes Division at 10.40 hours. The accused-appellant was arrested at 11.40 hours. The learned Counsel for the appellant contended that none of the witnesses have stated whether it is 10.40 in the morning or in the evening. However, in considering all the circumstances, it is apparent that it is 10.40 in the morning. Anyhow, what was stressed by the learned Counsel for the appellant was that the second information they received was that the woman is leaving her house, after receiving the said information the police officers walked nearly one kilometer or 500 meters, so, the story that they apprehended the woman (the appellant) after walking nearly one Kilometer or 500 meters, is totally improbable. The reply of the learned SSC to the said argument was that the woman may have been hanging around there and that is why the police officers could apprehend the woman even after walking a distance of nearly one kilometer or 500 meters. I regret to hear such an argument from a Senior State Counsel because no Counsel can raise arguments on his own assumptions. There is no iota of evidence in this case that after leaving the house, the said woman (the accused-appellant) hung around that place. Therefore, the learned SSC advanced this argument not on the evidence placed before the High Court but on his own assumptions.

I agree with the contention of the learned Counsel for the appellant because even in the first occasion, the informant came to the Colombo Crimes Division and informed that a woman carries heroin, she is getting ready to leave the house and if you go immediately, she could be arrested (page 48 of the appeal brief). Thereafter, when the police officers went to the “Stacepura” and stopped their vehicle near

“Kamkarupura” apartments, the informant informed that Niroshan’s wife “Theresa” is coming out with a parcel of heroin. The said item of evidence appear as follows: “කිවුවා ස්ටෙස්පුර ක්‍රීඩා පිටිය අසල ඉන්න නිරෝගේ බිරිඳ තෙරේසා කියන අය හෙරොයින් පාර්සලයක් රැගෙන එළියට එනවා කියලා. ඇදන් ඉන්න ඇඳුම ගැන දැනුම් දුන්නා ස්වාමීණි”. (page 55 of the appeal brief). After receiving that information, according to PW-1, they walked nearly one kilometer or 500 meters and apprehended the accused-appellant.

PW-1 stated in his evidence that the distance between the place of the arrest and the appellant’s house was 50 meters (page 65 of the appeal brief). PW-1 stated in cross-examination and re-examination that the said distance is about 10 or 20 meters (pages 102 and 111 of the appeal brief). There is a discrepancy in the said items of evidence also. The important matter to be mentioned is that the learned High Court Judge has not realized that when the police officers walked nearly one kilometer or 500 meters, the accused-appellant also could have walked at least 500 meters and according to the evidence presented by the prosecution, there was absolutely no possibility of apprehending her within fifty meters of her house. Hence, the prosecution story regarding the raid is totally improbable.

In addition, when the learned Counsel for the appellant pointed out the discrepancies between the evidence of PW-1 and PW-7, the learned SSC contended that there are no discrepancies between the evidence of PW-1 and PW-7. However, the learned SSC failed to give any acceptable reason to substantiate his contention. Also, when the learned Counsel for the appellant pointed out that in compliance with the Section 1(V) of the Police Departmental Order No. A16, no notes were made in respect of searching the house of the appellant, the learned SSC contended that making detailed notes is not necessary, as nothing was found in the house. I agree with the contention of the learned Counsel for the appellant because Section 1(V) of the Police Departmental Order No. A. 16 states that entries must be made in the notebook on every

matter arising in the course of one's official duties. The Police Departmental Order No. A. 16 is reproduced below.

"For the purpose of investigating crime or accidents a notebook is the most important record kept by a Police Officer. Notebooks should be regularly examined, initialled and dated, by Officer-in-Charge of Stations, Districts, Divisions and Provinces. The following rules regarding notebooks are to be strictly observed.

(I) All entries in a notebook will be in ink or indelible pencil.

(II) Notes relating to inquiries will be headed with the date, time and place at which they are written. On completion each note will be initialled and dated by the Officer making the entry.

(III) No blank space will be left.

(IV) Nothing will be rubbed out, altered, or interpolated. Every error will be crossed through by a single line so that it is still legible and will be enclosed in brackets.

(V) Entries will be made in the Notebook on every matter arising in the course of one's official duties. Entries will also be made when an Officer has by reason of sickness or other personal reasons to deviate from orders given to him when he was sent out on duty.

(VI) No leaves will be removed from the Notebook.

(VII) Notebooks will be examined, initialled, and dated by the Reserve Constable or Sergeant every time an Officer reports for or from duty. At every Instruction Class Notebooks will be examined, initialled and dated by the Officer holding such class.

(VIII) Officers when initialling and dating Notebooks will do so with a different coloured ink or pencil when possible and in small characters to save space.

(IX) Notebooks will always be carried when on duty, except on parade unless specifically ordered to do so.

(X) *All Police Officers will when leaving the Service return any unfinished Notebook and re-fill to the Officer-in-Charge of the Station. Cost of any re-fill not returned will be recovered and credited to revenue."*

In addition, although nothing was found in the house of the appellant, making notes about searching the house is important in a raid of this nature to decide whether, in fact, they carried out a raid as they claim.

Another discrepancy that was shown is that according to PW-1, when he asked the appellant whether she possessed with any illegal substance, she kept silent (page 61 of the appeal brief). According to PW-7, when PW-1 asked whether she possessed with any illegal substances, the appellant had replied that she does not possess anything. This is also a vital contradiction because in her dock statement, the appellant stated that she was arrested when she was at home. When there are discrepancies of this nature in respect of the most important moment of the raid, a reasonable doubt arises as to whether a raid was carried out as the prosecution witnesses claim or whether the arrest of the appellant could happen in the way that she described in her dock statement.

Another discrepancy is that PW-1 stated that his team searched the house of the appellant from 11.50 to 12.30; that is, 40 minutes (page 66 of the appeal brief). PW-7 stated that the house was searched from 11.50 hours to 12 hours; that is, 10 minutes. Hence, there is a vital discrepancy in the time duration of searching the house of the appellant.

In addition to the aforesaid discrepancies, the learned Counsel for the appellant pointed out some other discrepancies between the evidence of PW-1 and PW-7. She has pointed out these discrepancies to substantiate her argument that there is a reasonable doubt whether a Woman Police Constable accompanied the raid team. As the learned

Counsel contended, the learned High Court Judge has not considered these discrepancies and focused his mind whether those discrepancies cast a reasonable doubt on the prosecution story.

Apart from that, the learned Counsel for the appellant pointed out that the informant did not come with the team of police officers but without any problem, PW-1 has identified the appellant whom he had never seen before. Another matter pointed out by the learned Counsel was that although PW-8 has done an important role in the raid, he has not made any entries. His reason for not making entries was that he did not take part in any act relating to the raid. ("සැකකරු අත්අඩංගුවට ගැනීමට හෝ නඩු බඩු සොයා ගැනීමට හෝ වෙනත් ක්‍රියාවකට සම්බන්ධ වුණේ නැති නිසා මා එයට අදාළ සටහන් යෙදුවේ නැ ස්වාමිනි" – page 191 of the appeal brief) However, the learned Counsel pointed out that PW-1 has clearly stated that S.I. Jayathilake and other officers who went for the raid, searched the house of the appellant. Therefore, the learned Counsel pointed out that PW-8 had also searched the house of the appellant, although he stated giving an explanation for not making notes that he did not take part in any act relating to the raid.

The learned Counsel for the appellant also pointed out that one of the reasons for rejecting the dock statement of the accused by the learned High Court Judge is that the defence did not suggest to PW-1 in cross-examination that they came to arrest the husband of the appellant although the appellant stated so in her dock statement. However, the said observation of the learned High Court Judge is wrong, as contended by the learned Counsel for the appellant because at page 98 of the appeal brief, the said suggestion had been made to PW-1 in cross-examination.

Therefore, as explained previously, there is a vital discrepancy about the information received. The said discrepancy raises a reasonable doubt on the prosecution case. In addition, a serious doubt casts about

the way of carrying out the raid as explained previously in detail. Therefore, I hold that the prosecution has not proved beyond a reasonable doubt that a raid was carried out in the manner that the prosecution witnesses described. The learned High Court Judge has come to an erroneous conclusion without properly analyzing the evidence of the case.

Accordingly, the Judgment dated 28.04.2023, the convictions and the sentences imposed on the accused-appellant are set aside. The accused-appellant is acquitted of both charges leveled against her.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL