

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

In the matter of an Appeal made under
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.

**Court of Appeal Case No.
CA/HCC/ 0434/2019
High Court of Colombo
Case No. HC/7811//2015**

Mohamed Rasheed Nazeera

Accused-Appellant

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

Complainant-Respondent

BEFORE : **Sampath B. Abayakoon, J.
P. Kumararatnam, J.**

COUNSEL : **Rushdie Habeeb with Waseemul Akram and
A. Perera for the Appellant.
Suharshi Herath, DSG for the Respondent.**

ARGUED ON : **11/09/2024**

DECIDED ON : **02/12/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General under Sections 54(A) (b) and 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for trafficking and possession respectively of 5.58 grams of Heroin on 25th June 2014 in the High Court of Colombo.

The Prosecution had called eight (8) witnesses in support of their case and marked productions X1-X9 and Y and Y1 and had closed the case. When the defence was called, the Appellant only made a statement from the dock.

After the trial, the Appellant was found guilty on the 2nd count and the learned High Court Judge of Colombo had sentenced her to life imprisonment on 01.03.2019. She was acquitted from the 1st count by the learned High Court Judge.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in her absence. During the argument she was connected via zoom from prison.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. The prosecution has failed to prove the charge beyond reasonable doubt.
2. The variation in the quantity of the production goes to the root of the case as the prosecution had failed to prove the chain of custody beyond reasonable doubt.
3. The dock statement was not considered in light of the decided cases.

Background of the case albeit briefly is as follows:

On 25/06/2014 IP Chandana attached to the Colombo Crime Division had received information from one of his informants that the Appellant being the mother-in-law of a lady called Nilanthi is attempting to traffic drugs. After performing all formalities PW1 with nine (9) other police officers including a female police officer had set off from the Bureau at 12.35 hours in a van. Except PW1 the others were clad in civil attire and PW4, PS 33936 Bandara had carried the sealing equipment. As per the information the police party had gone to Stacepura, which is situated in Grandpass Police area. They had parked the vehicle on the main road close to a fruit stall and entered Stacepura through a by road. PW1 had assigned two police officers to look after the vehicle. As they proceeded to Stacepura they had observed a lady wearing a frock (her appearance had tallied with the description given by the informant) walking towards them. After seeing him (PW1) with the others, the lady had turned back and walked away in the opposite direction. PW1 had quickly rushed to her and had directed the lady police officer PW9 WPC

8041 Anusha to check the Appellant. PW9 had uncovered a parcel from the right-side pocket of her frock. When PW1 examined the parcel, he had found some brown coloured powder in it. As the substance in the parcel reacted for Heroin, the Appellant was arrested at 13:15 hours, and the production had been sealed in front of the Appellant.

Thereafter, PW1 along with some other police officers including the woman police constable had gone to the Dadigama Jewellery Store to weigh the production. The substance weighed to be 25.110 grams. The production was handed over to the reserve police officer of the Colombo Crime Division, PC 41295 Ranatunga under PR No. 121/2014.

PW3, WPC 8041 Anusha was called to corroborate the evidence given by PW1.

After the conclusion of the prosecution case, the defence was called, and the Appellant opted to make a statement from the dock. She admitted the arrest but denied the recovery of any illegal substance from her possession on that date.

Under the first ground of appeal, the learned Counsel for the Appellant strenuously argued that this is not a genuine raid as claimed by the Prosecution.

According to PW1 his informant had only said that the mother-in-law of one Nilanthi is about to attempt to traffic Heroin. He admitted that he did not enquire about the whereabouts of the Appellant or about the location of her house. The Prosecution witnesses never mentioned that the Appellant was residing in Nilanthi's house or that she was living in Stacepura. According to the prosecution witnesses the Appellant was searched and arrested at Stacepura Road, Colombo-14. But in the cross examination PW1 admitted that he did not enquire from his informant as to the whereabouts of the Appellant nor her residence. The relevant portion is re-produced below:

Page 92-93 of the brief.

ප්‍ර : නිලන්ති යන නැතැත්තියගේ නැන්දම්මා වන නසිරා මත් ද්‍රව්‍ය රැගෙන යාමට සූදානම් වනවා. ඒකතෙ මහත්මයාට ලැබුණු තොරතුරු ?

පි : එහෙමයි.

ප්‍ර : ඉතින් මහත්මයා නිකන්වත් ඔය තොරතුරු දෙන මනුස්සයාගෙන් ඇහුවද කොහේ ඉඳන් කොහේද මේවා අරගෙන යන්නේ කියලා ?

පි : නැහැ. මම එහෙම අහන්න ගියේ නැහැ.

ප්‍ර : එහෙම අහන්න මහත්මයාට අවශ්‍යතාවයක් වුණේ නෑ ?

පි : නැහැ ස්වාමිණී. ඒ විස්තරය කියලා දුරකථනය විසින්දි කරා.

This clearly shows that PW1 was not aware as to the residence of the Appellant before he left from the CCD. But he had gone to Nilanthi's house to arrest the Appellant. In my view this casts a serious doubt about the method of execution of the raid.

In the second ground of appeal the Counsel for the Appellant contended that the variation in the quantity of the production goes to the root of the case as the prosecution had failed to prove the chain of custody beyond reasonable doubt.

In every criminal case, the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person. In cases of this nature the prosecution not only need to prove the case beyond reasonable doubt but also ensure, with cogent evidence that the inward journey of the production has not been disturbed at all-material points.

In the case of **Mohamed Nimnaz V. Attorney General CA/95/94** held:

“A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions where the identity of the good analysis for examination has to be proved beyond reasonable doubt. A prosecutor should take pains to ensure that the chain of events pertaining to the productions that had been taken charge from the Appellant from the time it was taken into custody to the time it reaches the Government Analyst and comes back to the court should be established”.

In **Perera V. Attorney General [1998] 1 Sri.L.R 378** it was held:

“the most important journey is the inward journey because the final analyst report will depend on that”.

In **Witharana Doli Nona v. The Republic of Sri Lanka CA/19/99** His Lordship Justice Abrew remarked thus;

“It is a recognized principle that in drug related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. Prosecution must prove that the productions taken from the accused Appellant was examined by the Government Analyst”

Therefore, proving the chain of custody is a very important task for the prosecution. If investigating officers do not do their duty properly, the chain of custody can be successfully challenged at the trial. This is because the prosecution always relies on evidence gathered by police officers in cases of this nature. Just because the law enforcement found drugs on an accused, it does not mean that he can be convicted.

According to PW1 the substance recovered from the Appellant weighed about 25.110 grams. The production was properly entered in the production register and dispatched to the Government Analyst Department. But the Government Analyst weighed the production at 24.74 grams which is 1.36 grams less than the original weight. Comparing with the net weight 5.58 grams of Heroin, the discrepancy is very much notable in this case. This cannot be simply disregarded without any plausible explanation. But the prosecution was unable to explain the discrepancy in the weight of the production that was evident in their evidence.

The prosecution has the paramount duty to prove that it is the same production recovered at the time of detection which has reached the Government Analyst. The main reason is to establish that the evidence, which is related to the alleged crime, was collected from the accused and was in its original condition rather than having been tempered with or planted deceitfully to make someone else guilty. Handling of production evidence is a lengthy process but the court necessitates it for the proper adjudication of causes related to drugs cases. This proves the integrity of the production which had been recovered from the accused has been preserved until it reaches the Government Analyst Department.

Naturally, the Defence can challenge the chain of custody evidence by questioning whether the evidence presented at trial is the same evidence as what was collected from the accused person.

The Appellant takes up the position that the amount of Heroin which had been mentioned in the indictment was not recovered from her. But she admits that she was arrested on the date mentioned in the indictment at her residence.

In this regard, the learned High Court Judge in his judgment had not made any comments about a discrepancy in weight in the given case. In the absence of any comment regarding this particular point; no doubt, the

Appellant had not been afforded a fair trial. Thereby this has caused great prejudice to her.

In the final ground of appeal, the Counsel for the Appellant contended that the dock statement of the Appellant was not properly considered by the learned High Court Judge. Even though the dock statement of an accused has less evidential value our courts never hesitated to accept the same when it creates a doubt on the prosecution case. In this case I consider it is very important to consider the dock statement of the Appellant.

In **Don Samantha Jude Anthony Jayamaha v. The Attorney General** CA/303/2006 decided on 11/07/2012 the court held that:

“Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of the evidence that is in the light of the evidence for the prosecution as well as the defence.”

In **Kathubdeen v. Republic of Sri Lanka** [1998] 3 SLR 107 the court held that:

“It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt.”

The position of the Appellant in the present case was that she was not arrested on the road but was arrested at her residence. In this case PW1 had admitted that he had gone to Stacepura without knowing the location of the Appellant’s movement. Further PW1 had admitted that he only knew the address of Nilanthi’s house. Hence, the stance taken by the Appellant in her dock statement creates very serious doubt over the prosecution case.

As the appeal grounds raised by the Appellant have merit, I set aside the conviction and the sentence dated 01/03/2019 imposed on the Appellant by the learned High Court Judge of Colombo. Therefore, I acquit her from the second charge.

Accordingly, the appeal is allowed.

The Registrar of this Court is directed to send this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL