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 No:
CA/HCC/0314/2018

Kekulandara Mudiyanselage Don Anura Weerasinghe

High Court of Colombo
Case No: HC/7320/2014

Accused-Appellant

Vs.

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

Complainant-Respondent

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

COUNSEL : **Nihara Randeniya for the Appellant.**
Dileepa Peeris, SDSG for the Respondent.

ARGUED ON : **04/03/2024**

DECIDED ON : **05/07/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Colombo 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 of 5.75 grams of Heroin (diacetylmorphine) on 13th March 2011.

After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed death sentence on 21/11/2018.

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 had given his consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing, the Appellant was connected via Zoom platform from prison.

In this case the raid was conducted upon a specific information received by PW1 IP/Epalakotuwa on 13.03.2011. The raid was headed by him with 06 police officers including a woman police constable from the Boralesgamuwa Police Station. All have been named as witnesses in the indictment including the Government Analyst. The prosecution had called PW1, PW2, PW4, PW7, PW8, PW10, PW12, PW13 and PW14 Government Analyst and closed their case. The prosecution marked production P1-P14.

When the defence was called, the Appellant had made a statement from the Dock and closed the case.

Background of the case.

PW1 received information that two individuals on motorcycles with registration numbers WP UI 9114 and WP UK 6396 were distributing heroin in the Badowita area. Subsequently, PW1 organized a raid with police officers from Boralesgamuwa Police Station and departed from the station at approximately 12:00 noon. The police unit travelled along Colombo Road to Pepiliyana Junction, then proceeded to Pepiliyana Sunethradevi Raja Viharaya, following information that the two individuals were traveling on Pepiliyana-Nedimala Road, in front of the Raja Maha Viharaya. The police jeep entered the temple premises and parked near the main gate. PW1 instructed PW2 and PW5 to wait on the other side of the road. PW1 and others remained in the jeep. At about 1.00pm the team had seen a motor bike bearing No. WP UI 9114 coming and the police party had manged to apprehend him by blocking his way and had taken him to the temple premises. Thereafter, he was subjected to a body search and the police had recovered 25 grocery bags from the right-side pocket of the jacket worn by the rider. Inside each grocery bag, there were 40 small packets. Altogether, 1000 small packets were detected from the person who is the Appellant in

this case. Further, the police had recovered Rs.50,000/- cash in different denomination and two mobile phones from the Appellant.

As per the information, the other person along with his motor bike bearing No.WP UK 6396 was arrested at about 2.40pm with Heroin. Both persons were taken to Ameesha Jewellery to weigh the Heroin. The 25 packets recovered from the Appellant were weighed together with the cellophane bag and without removing the cover in the 40 small packets. The reading of the scale was 158.50 grams. A receipt was obtained from Ameesha Jewellery.

The production pertaining to this case was temporarily sealed and taken to the police station. The next day, PW1 opened the parcel, transferred the powder into a grocery bag, and weighed it separately at Dilani Jewellery. The total weight of the substances recovered from the Appellant was 25 grams. The Appellant and the other individual were taken to Dilani Jewellery along with the substances. However, PW1 did not obtain any receipt from Dilani Jewellery Shop.

PW2, SI/Silva had corroborated the evidence of PW1 and other police witnesses called by the prosecution had established the movement of production up to the Government Analyst Department.

According to the Government Analyst Report the weight of the brown coloured powder was 25.06 grams and which contained pure Heroin (Diacetylmorphine) of 5.75 grams.

The following Grounds of Appeal were raised on behalf of the Appellant.

1. That the Learned Trial Judge erred in law when concluding that the prosecution proved the chain of custody beyond reasonable grounds.
2. That the Learned Trial Judge violated the provisions of the Section 159 of the Evidence Ordinance.

3. That the Learned Trial Judge failed to consider that the prosecution version did not pass the test of probability.
4. That the Leaned Trial Judge did not evaluate the defence evidence from the correct perspective and the rejected same in the wrong premise.

Reasonable doubt is legal terminology referring to insufficient evidence that prevents a judge from convicting a defendant of a crime. In a criminal case, it is the task of the prosecution to convince the judge that the defendant is guilty of the crime with which he has been charged and, therefore, should be convicted. The phrase "beyond a reasonable doubt" means that the evidence presented and the arguments put forward by the prosecution establish the defendant's guilt so clearly that they must be accepted as fact by any rational person.

In **Woolmington v DPP** (1935) the Court ruled that in criminal cases, the burden of proof is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt. The defendant is presumed innocent until proven guilty, and it is not for the defendant to prove his innocence.

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 in 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...."*

In **the Attorney-General v. Rawther** 25 NLR 385, Ennis, J. states thus: [1987} 1 SLR 155

> *"The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt".*

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

> *" the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice".*

In the first ground of appeal the Counsel for the Appellant contends that the Learned Trial Judge erred in law when concluding that the prosecution proved the chain of custody beyond reasonable grounds.

According to prosecution, the Heroin recovered from the Appellant as well as other suspect were initially sealed at Ameesha Jewellery without removing the cover. A receipt was obtained for the proof. The following day, PW1 opened the parcels, transferred the powder into a cellophane bag, and weighed it separately at Dilani Jewellery Shop. The weight of the substances recovered from the Appellant, including the cellophane bag, was 25 grams. This was confirmed by PW1 and PW2 in their evidence on pages 83 and 210 of the brief, respectively.

However, according to the Government Analyst Report, the gross weight of the brown-coloured powder alone (excluding the cellophane bag) recovered from the Appellant was 25.06 grams. This indicates a weight discrepancy (increase) in the substances recovered, which the prosecution did not explain. It is noteworthy that the defence suggested to the prosecution

witnesses that the Appellant was never taken to Dilani Jewellery Shop on the following day. Additionally, no receipt was obtained from Dilani Jewellery Shop.

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 the case of **Koushappis v. The State of WA** [2007] WASCA 26; (2007) 168 A Crim R 51 at para 85 the court held:

> "*Whilst the safe custody of critical exhibits such as these ought to be readily proved by clear and specific evidence rather than being left to inference, having regard to the way the case was conducted on both sides, the evidence here was such in my view, as to allow the jury to be satisfied beyond reasonable doubt that the drugs that were analysed… were in fact those seized by police from the appellant's house";*

The aforementioned judgments clearly highlight the critical importance of chain of custody evidence in drug-related offenses. They provide clear guidance on how this evidence should be presented to satisfy the trial court. Each piece of evidence requires thorough analysis to ascertain its origin and who had access to it, ensuring no deviations from standard practice.

In drug cases, chain of custody issues is crucial. The prosecution must present undisputable evidence to establish the chain of custody of the exhibits. Additionally, they must prove that the item presented at trial is the same item originally in the possession of or taken from the accused. Relying on tainted, unreliable, or tampered evidence would undermine the judicial

system's integrity. Moreover, it is not the court's role to rectify mistakes made by investigating officers.

As there was a glaring weight discrepancy of the substances noted in this case, this ground of appeal has merit.

Further, as the 2nd and 3rd grounds are interrelated, those grounds will be considered together hereinafter.

In the second ground of appeal the Appellant contends that the Learned Trial Judge violated the provisions of the Section 159 of the Evidence Ordinance and in the 3rd ground the Appellant contends that the Learned Trial Judge failed to consider that the prosecution version did not pass the test of probability.

During the trial it was noted that PW2 had given evidence by looking at a separate paper, which was not the notes put by the witness.

Section 159 of the Evidence Ordinance states:

> (1) A witness may, while under examination, refresh his memory be referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.
>
> (2) The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it, he knew it to be correct.
>
> (3) Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of such document.

Provided the court be satisfied that there is sufficient reason for the non-production of the original.

(4) An expert may refresh his memory by reference to professional treaties.

As PW2 referred to another document which is contrary to Section 159 of the Evidence Ordinance, this raises very serious doubt as to the conduct of the raid as described by both PW1 and PW2.

Further, probability holds a very important role when it comes to convincing the judge on specific point as more the probability of the assumption, more will be chances for the judge to get convinced. Probability is of utmost importance during criminal investigation and is used to assess the significance of various types of evidence. To accuse someone "beyond reasonable doubt" it becomes quintessential to have strong evidence and for the sake of that one must make few assumptions to reach certain conclusions, the possibility of these assumptions to be true is specifically known as principle of probability in legal terms.

In this case, PW1 admitted that he pasted the detailed notes on 24.03.2011 after 10 days from the raid.

PW1, under cross examination admitted that he did not put notes as to the time at which point the Appellant moved towards the Pepiliyana Raja Maha Viharaya area where they were ready to arrest the Appellant.

According to PW1, he had clearly stated that he received the information at about 11.00 hours. But in his departure notes he had mentioned 12 hours. But subsequently, 11 hours written over 12 hours. This was brought to the notice of the Court during the trial. Page 144 of the brief.

In general, once a police report has been filed, it is considered an official document. Altering or modifying an official police report can have serious consequences. It is important for police officers to maintain the integrity of

police reports to ensure the accuracy and reliability of the information contained within them.

Although PW1 and his team obtained a receipt from Ameesha Jewellery Shop, when they weighed the substances with the packing on very first day, they failed to obtain a receipt from Dilani Jewellery Shop after dismantling the packets. In this context it is very important to obtain a receipt from Dilani Jewellery as the production was weighed second time by the police and importantly, the Appellant had taken up the position that he was not taken to Dilani Jewellery. Further, a serious doubt arises on the evidence given by PW2, as he said that police team carried all scales and sealing equipment to the raid. But this position was contradicted by PW1.

According to PW2, the Appellant was identified through his identity card and he was handcuffed after his arrest. But PW1 had failed to corroborated these positions taken up by PW2.

As the two grounds considered above have serious impact on the prosecution's case, I conclude those two grounds also have merit.

The Appellant in his dock statement took up the position that he was falsely arrested by PW2 when he was taking a call to a person from whom he was planning to by a three-wheeler. Rs.110,000/- has been in his possession. When he was making a call a motor bike had collided with a three-wheeler in which PW2 and other police officers had come. This had happened in front of the cemetery at Anderson Road. Firstly, they had checked the rider of the motorbike. (Dhammika Perera). After recovering a parcel from him, the Appellant too was searched and arrested. 300 grams of Heroin was recovered from Dhammika Perera and divided into two parcels and introduced 158 grams to the Appellant and equal amount to the other person. Further, PW2 had taken Rs.10,000/- for the three-wheeler repair and the balance Rs.100,000/- was divided in to two and introduced to the Appellant and other person. The evidence led at the trial revealed that the Appellant and

other person had possessed similar amount of gross weight of Heroin and Rs.50,000/- each. This position had been very well suggested to the prosecution witnesses during the trial.

The Learned High Court Judge had failed to consider the Dock Statement of the Appellant in its correct perspective. He had disbelieved and rejected the Dock Statement of the Appellant.

The profound duty of the trial court is to consider the evidence placed by the prosecution and the defence on equal footings to arrive at its finding.

In **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

> *"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".*

In this case, the Learned High Court Judge had not considered the probability factors in conjunction with the defence evidence. The rejection of defence evidence without proper analysis had caused great prejudice to the Appellant.

In this case, the raid was conducted with a specific information. Further, recovery and weighing the production has failed to pass the probability test in this case. Had the Learned Trial Judge looked in to the evidence presented in its correct perspective, he should have accepted the evidence adduced by the Appellant.

All appeal grounds raised by the Appellant has merit. Among them the weight discrepancy is very significant which certainly affects the outcome of the case.

As the prosecution had failed its duty to prove this case beyond reasonable doubt, I set aside the conviction and sentence imposed by the Learned High Court Judge of Colombo dated 21/11/2018 on the Appellant. Therefore, he is acquitted from this case.

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