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/0044/2022

Ranasinghe Arachchige Don Subashini

High Court of Colombo
Case No: HC/230/2017

Accused-Appellant

vs.

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

Complainant-Respondent

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

COUNSEL : **M.S.M.Imtias for the Appellant.**
Madawa Tennakoon, DSG for the Respondent.

ARGUED ON : **04/09/2023**

DECIDED ON : **06/12/2023**

****

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 23.86 grams of Heroin (diacetylmorphine) on 05th April 2016.

After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed life imprisonment on the both counts on 08/12/2021.

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

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

1. Learned High Court Judge erred in law by failing to consider that the prosecution failed to establish the chain of custody.
2. Learned High Court Judge erred in law by not granting the accused the benefit of doubt surrounding the two receipts issued by the Government Analyst.
3. Learned High Court Judge erred by failing to resolve the discrepancy between the two different weights of the heroin.
4. Learned High Court Judge erred in law by failing to consider the elements necessary to constitute the offence of trafficking.

Background of the case.

In this case the raid was conducted in absence of any specific information received. The raid was headed by PW1 with team of police officers from the Anti-Corruption Unit of Harbour Police Station. All have been named as witnesses in the indictment including the Government Analyst. The prosecution had called PW1, PW2, PW5, PW7, PW12, PW14 and the Government Analyst and closed the case after marking production P1-P11.

When the defence was called, the Appellant made a dock statement and closed the case.

On 05/04/2016 IP/Champika attached to the Anti-Corruption Unit of Harbour Police Station had gone for a routine narcotics raid with a team of police officers to Kosgas Junction via Ingurukade Junction. At about 12.35 noon PW1 Champika and PW2, Dayaratna walked along the Stacepura Road towards Orugodawatte Junction after stopping their vehicle in front of Wijeyaba Vidyalaya. Walking down the road, they had come near a petrol shed. Thereafter, the duo had walked along a road called Awwal Saviya Road which is situated opposite to the petrol shed. On walking along Awwal Saviya Road, the duo had seen the Appellant coming towards Stacepura Road. Having seen PW1 and PW2, the Appellant turned back immediately which

arose the suspicion of the police officers. They ran towards the Appellant and stopped her for questioning. At that time, the police officers had observed a pink coloured cellophane bag with something in it in the right-handed clenched fist. PW1 took the parcel into his custody and inspected the same. The parcel contained some brown coloured substance. As it reacted for Heroin (Diacetylmorphine) the Appellant was arrested immediately. The Appellant was taken to the Letchumi Jewellers situated in Kosgas Junction to weigh the substance. The Appellant was taken to the Jewellers only by PW1 and PW2. The parcel contained 100.500 grams of substances. After entering notes, the Appellant and the productions were handed over to the Grandpass Police Station at about 15.00 hours under PR No.152/2016.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person and this burden never shifts. Hence an accused person has no burden to prove his case unless he pleads a general or a special exception in the Penal Code.

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".*

As the appeal grounds raised by the Appellant are inter-related, the grounds will be considered together in this case.

The chain of custody is the most important of evidence in a drug related trial. The prosecution has the paramount duty to prove that it is the same production recovered at the time of detection. 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 adjudication of the case. This proves the integrity of production which had been recovered and until it reaches to the Government Analyst Department.

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 an accused person. If there is any discrepancy in the chain of custody of a production and the prosecution is unable to prove who had the custody of production until it reached the analyst, the chain of custody stands broken.

According to PW1 he had handed over the production PR 152/16 on 05.04.2016 to PW5 PC 17812 Ananda. On the following day morning, the production was handed over to PW7 PC 18755 Vishvapala. PW7 again handed over the production to PW 05. On 06.04.2016 PW5 had handed over the production to PW10 PS 28070 Rohana who took the same to the Maligakanda Magistrate Court and produced it under Case No. B/8862/16. The prosecution had neither called PW10 Rohana to give evidence nor led evidence through PW5 to establish that PW5 had received the same from PW10 Rohana. Hence, there is no evidence to show what was returned by PW10 Rohana was the same item that was produced in the Magistrate Court of Maligakanda under PR No. 152/16.

This shows a clear break in the custody chain which need to be proved beyond reasonable doubt in a case of this nature. Without a proper chain of custody, drugs do not come in as evidence. The discrepancies highlighted above cannot be ignored lightly, as the entire case rests on the cogent and unambiguous evidence pertaining to the chain of production.

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 de 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"*

In the above cited judgments, the Court has highlighted the importance of proving the production evidence in a drug related trial.

Although there is a missing link in the production which was sent to the Government Analyst Department, the Learned High Court Judge in his judgment had not taken into cognisance of this fact.

This missing link got further aggravated of the issue of the receipt by the Government Analyst Department. After receiving the production from PW12 the Government Analyst Department had issued the receipt stating that it received two parcels from PW12. The said receipt was marked as P-9 by the prosecution.

14 days after receiving the production, PW 14, the Government Analyst had issued an amended receipt dated 20.04.2016 stating that the Government Analyst had received only one parcel. Even though the amended receipt which was marked as P-10 dated 20.04.2016, the same had been received by the Court on 29.06.2016.

Although the Government Analyst report was dated 27.05.2016, the Court had received the same on 03.06.2016. This is evident as the Government Analyst had sent the second receipt after the report was prepared and sent to Court which is approximately after one month. This too had escaped the attention of the Learned High Court Judge.

According to the prosecution, the raid was done without specific information. According to PW1, who knew the Appellant earlier had arrested after only checking her clenched fist. But she was never subjected to a body check even though a woman police constable (PW8) was included in the raiding team. Even the WPC was not utilized to escort the Appellant to jewellery shop when PW1 had weighed the production. Only PW1 and PW2 escorted the Appellant to the jewellery shop.

Although PW1 admitted that he knew the Appellant earlier, he had not taken any endeavour to check her house.

The Appellant in her dock statement took up the position that on the date of the incident she was arrested at her house and not on the Awwal Saviya Road as claimed by PW1 and PW2.

Even though the dock statement of an accused has less evidential value, our courts never hesitate 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 way how the raid was conducted by two male officers without using a woman police constable even to conduct further investigation raises serious doubt about the prosecution's story.

Therefore, the prosecution's case 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 explanation given by the Appellant.

In this case PW1 and PW2 are the key witnesses and if their evidence is clear, cogent and unambiguous the court could without any hesitation rely on their evidence and convict the Appellant. But as discussed above the evidence given by prosecution witnesses, in my view, had not passed the probability test. It is tainted with much ambiguity and uncertainty which definitely affect the root of the case.

Guided by the above cited judicial decisions, I conclude that the appeal grounds advanced by the Appellant have very serious impact on the prosecution 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 08/12/2021 on the Appellant. Therefore, she 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