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/287/2019

Complainant

High Court of Colombo
Case No. HC/7465/2014

Vs.

Selvaraj Ranjith Kumara.

Accused

AND NOW BETWEEN

Selvaraj Ranjith Kumara.

Accused-Appellant

Vs.

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

Respondent

BEFORE : MENAKA WIJESUNDERA, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Amila Palliyage with Sandeepani Wijesooriya, Savani Udugampola, Lakitha Wakishta Arachchi and Subaj De Silva for Accused-Appellant.

Azard Navavi, S.D.S.G. for the Respondent**.**

ARGUED ON : 30.04.2024

DECIDED ON : 22.05.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Colombo on following two counts:

i. On or about 13th of September 2012, for trafficking 27.02 grams of heroin, an offence punishable under Section 54A (b) of the Poisons, Opium, and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

ii. During the course of the same transaction for possessing 27.02 grams of heroin, an offence punishable under Section 54A (d) of the Poisons, Opium, and Dangerous Drugs Ordinance.

The prosecution led the evidence of eight witnesses. After the prosecution case was closed, the learned Trial Judge called for the defence. Accordingly, the accused-appellant made an unsworn statement from the dock and one witness was called on behalf of the appellant. At the conclusion of the trial, the appellant was acquitted of the first count and convicted of the second count by the Judgment dated 02.07.2019. The appellant was sentenced to life imprisonment. This appeal has been preferred against the said conviction and sentence.

Prior to the hearing of this appeal, written submissions were filed on behalf of both parties. At the hearing, the learned Counsel for the accused-appellant and the learned Senior Deputy Solicitor General for the respondent made oral submissions.

The prosecution witness number one was a soldier attached to the Surveillance Unit of Sri Lanka Army. On 13.09.2012, together with two other soldiers he had gone to Grandpass area on usual surveillance duty. PW-1 had received an information from one of his informants and as a result, the raid pertaining to this case was carried out.

According to the prosecution, PW-1 met the informant close to the clock tower at Sirimavo Bandaranaike Mawatha around 6.20 in the evening and provided him with information that a young man was carrying heroin and he was near the Mahawatta rail gate. Then they proceeded by foot in the said direction. The informant who came along with these Army officers stopped about 25-30 meters before the rail gate and pointed at a person. Then, PW-1 and other two soldiers approached that person, searched him and found a parcel from his right trouser pocket containing a brown colour substance. Thereafter, PW-1 contacted his senior officer Major Ratnayake (PW-10) and on his instructions, the appellant was handed over to PW-7 at the Police Narcotics Bureau around 7.10 pm on the same day. Subsequently, it was found that the brown colour substance recovered from the possession of the appellant is heroin.

The learned Counsel for the appellant advanced his arguments on the following three grounds:

i. The learned Trial Judge failed to consider the inconsistencies in the prosecution case.
ii. Prosecution has failed to establish the last link of the inward journey of the production beyond a reasonable doubt.

iii. The learned Trial Judge has rejected the dock statement on a wrong premise.

The basis of this appeal according to the learned Counsel for the appellant is that the evidence of the prosecution fails the tests of probability and credibility. The learned Counsel pointed out that there is no note whatsoever made by PW-1, the officer who received information from his private informant. While admitting the fact that making notes is not essential for a witness to give evidence, the learned Counsel contended that unlike in other cases, the prosecution must be closely scrutinized when there are no inward and outward notes.

What the learned Counsel for the appellant was trying to demonstrate is that giving evidence regarding the raid after four years without notes is far from possible. The senior DSG replied that PW-1 has explained that he remembered the facts relating to this raid without notes because this was his first ever heroin raid.

It is hard to believe if a police officer or an officer of the Narcotics Bureau states that he remembers the facts of a raid after four years for the simple reason that they engage continuously in this kind of raids and it is not possible for a person to remember the details of many raids for years without any note. However, in the case at hand, this was the first ever heroin raid conducted by PW-1 (page 71 of the appeal brief). Hence, his explanation of how he remembered the facts of the raid without notes is acceptable and believable.

The learned Senior DSG stressed the fact that PW-1 and PW-2 who were in usual surveillance duty had no reason to introduce heroin to the appellant because they did not know anything about the appellant, they had no animosity whatsoever with him and they are not rewarded by doing this kind of a raid. The learned Senior DSG contended that there were no contradictions in the prosecution case that go to the root of the case and the evidence of the prosecution witnesses is probable and credible.

Now, I proceed to consider the aforesaid grounds of appeal raised by the learned Counsel for the appellant.

The first ground of appeal -
The learned Trial Judge failed to consider the inconsistencies in the prosecution case.

The learned Counsel for the Appellant pointed out that according to PW-1, he met the informant near the Mahawatta clock tower and the same person went with them and showed the accused-appellant but according to the evidence of PW-2, he has stated about two informants. Also, the learned Counsel submitted that PW-1 had not stated that he met the private informant near the stadium before they met near the clock tower.

When going through the evidence of PW-1 and PW-2 regarding the aforesaid point, it appears that both witnesses have stated about only one informant. PW-1 has stated that they met the informant near the clock tower at Sirimavo Bandaranaike Mawatha, they proceeded by foot towards the rail gate, the informant stopped about 25-30 meters before the rail gate and pointed out the appellant. PW-2 had stated that they met the informant near the stadium and came near the clock tower at Sirimavo Bandaranaike Mawatha. It is correct that PW-1 had not stated that they met the informant first near the stadium. However, it is not an omission that affects the credibility of these witnesses. Apart from that, both witnesses narrated the same story on this point. It is apparent from the following portion of PW-2's evidence that he also stated that the same informant who met them previously showed the accused-appellant subsequently.

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උ: බණ්ඩාරනායක මාවත ගාවදි හම්බ වුනේ.

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(Page 161 of the appeal brief)

Although some other matters relating to the inconsistencies of the prosecution case have been mentioned in the written submission submitted on behalf of the appellant, the learned Counsel for the appellant made submission only with regard to the aforesaid point at the hearing. As explained previously, there is no discrepancy between the evidence of PW-1 and PW-2 regarding the said point. PW-1 had omitted to state in his evidence that he met the informant near the stadium before they met again near the clock tower. However, the said omission is not a material omission relating to the main events regarding the raid and thus no reasonable doubt creates as a result of the said omission.

In addition, the learned Counsel for the appellant contended that according to PW-1, when the appellant was taken into custody after the raid, they contacted PW-10, Major Ratnayake and on his instructions the appellant was handed over to the Police Narcotics Bureau. However, the learned Counsel pointed out that according to Major Ratnayake, he instructed them to handover the appellant to the Narcotics Bureau before he was arrested. I do not see the said discrepancy as a vital contradiction which affects the credibility of the witnesses because Major Ratnayake explained that all those incidents took place within a short period of time, he knew about the information regarding the trafficking of heroin and therefore, he instructed his officers to handover the suspect to the Police Narcotics Bureau.

The second ground of appeal -

<u>Prosecution has failed to establish the last link of the inward journey of the production beyond a reasonable doubt.</u>

Citing two Judgments of this Court, the learned Counsel for the appellant contended that the chain of productions, especially, the inward journey to the Government Analyst Department has to be proved beyond reasonable doubt by the prosecution to satisfy the Court that there has been no tampering with the production. It is perfectly correct that in a case of this nature, the prosecution must establish beyond a reasonable doubt that there was no opportunity to tamper with the productions.

In the case at hand, what the learned Counsel for the appellant pointed out was although PW-6, the Police Inspector Rajakaruna stated that he took the productions from the Magistrate Court of Maligakanda and handed over the same to the Assistant Government Analyst C.B. Kumarapeli in the Government Analyst Department but the said Ms. Kumarapeli was not called in evidence to establish the chain of production. However, PW-8, Senior Assistant Government Analyst Vajira Jayasekara has been called as a witness on behalf of the prosecution and she testified that the Police Inspector Rajakaruna had handed over the productions to the Government Analyst Department, and the Assistant Government Analyst who was on duty had accepted the productions and handed over to her for analysis. The Senior Assistant Government Analyst stated further that the seals in the production were intact when she received the productions.

I am of the view that these items of evidence are sufficient to prove the chain of productions beyond a reasonable doubt because although Ms. Kumarapeli was not called in evidence, Senior Assistant Government Analyst Vajira Jayasekara who tested productions has stated in her evidence that seals were intact when she received productions for testing. Hence, I regret that I am unable to agree with the contention that the prosecution has failed to establish the last link of the inward journey of the production beyond a reasonable doubt.

The third ground of appeal -

The learned Trial Judge has rejected the dock statement on a wrong premise.

The learned Counsel for the appellant pointed out that on page 08 of the Judgment, the learned High Court Judge wrongly observed that although the accused stated in the dock statement that he had been arrested by a group of persons but he did not possessed heroin, the position taken up by the appellant when cross-examining the prosecution witnesses was that the accused-appellant was never arrested. As correctly contended by the learned Counsel for the appellant, the appellant has not taken the position in cross-examining the prosecution witnesses that the accused-appellant has never been arrested by them. what was suggested to PW-1 and PW-2 was that the appellant never possessed heroin. However, the prosecution witnesses have never been suggested on behalf of the appellant, the position taken up in the dock statement that the appellant was taken to the Narcotics Bureau and forcibly his finger prints were taken to a parcel that was introduced.

The Indian Judgment of ***Sarvan Singh V. State of Punjab*** (2002 AIR SC (iii) 3652) pages 3655 and 3656, was cited in the case of ***Ratnayake Mudiyanselage Premachandra V. The Hon. Attorney General*** C.A. Case No. 79/2011, decided on 04.04.2017 as follows:

"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted."

In the case at hand, as explained above, it has not been suggested to the prosecution witnesses the position taken up in the dock statement. Therefore, in view of the aforesaid decision denial made by the appellant in his brief dock statement creates no doubt on the prosecution case.

Therefore, the decision of the learned Trial Judge to reject the dock statement is correct although he stated the aforesaid wrong observation in his Judgement.

In addition, according to the dock statement of the accused, placing his finger impression to a parcel is admitted. What the appellant said is that some people came, pointed out a pistol to him, he was taken to the Narcotics Bureau, introduced a heroin parcel and took his finger impression. It is important to consider whether it is possible for Army officials who were in surveillance duty to apprehend an innocent person who was on the road and handover him to the Police Narcotics Bureau. According to the appellant's dock statement not only the Army personals (PW-1, PW-2 and other officers) apprehended him without any reason but also the officers of the Narcotics Bureau also introduced heroin and forcibly taken the finger impression from an innocent person who was brought by the Army officers and handed over to the Narcotics Bureau. As contended by the Senior DSG, PW-1, PW-2 or any other officer did not have any animosity with the appellant. They do not get any reward by conducting this kind of raid. In addition, according to the appellant's story, heroin parcel was introduced and his finger impression was taken after he was brought to the Narcotics Bureau. That means when he was caught by the Army officials and was being taken to the Narcotics Bureau, the appellant did not possess anything. If it is so no man with common sense can believe that the Army officers caught and produced a man with nothing to the Police Narcotics Bureau. Hence, this statement made by the appellant from the dock is totally improbable. Therefore, it is obvious that no reasonable doubt creates on the prosecution case because of the improbable statement of the accused-appellant.

For the reasons stated above, I find no reason to interfere with the Judgement of the learned High Court Judge on the aforesaid three grounds of appeal urged by the learned Counsel for the appellant. For

the sake of completeness of this Judgment, I wish to consider the legal position regarding the foundation of all the arguments advanced by the learned Counsel for the appellant. What the learned Counsel stated is that there is a reasonable doubt on the prosecution case.

What is meant by a "reasonable doubt" has been discussed in the following Judicial Authorities. In the case of ***Veerasamy Sivathasan V. Hon. Attorney General*** - SC Appeal 208/2012, decided on 15 December 2021, it was held as follows: "As regards the standard of proof to be satisfied in a criminal case, there is no doubt that the prosecution must prove its case beyond reasonable doubt. However, one must take a realistic and pragmatic view of what can be reasonably expected of a prosecution. It is important in my view to bear in mind that a prosecution cannot be expected to prove its case to a degree of mathematical accuracy of scientific certainty. The degree of accuracy and certainty that a prosecution can be reasonably expected to satisfy is much less. That is quite natural, as prosecutions have to rely primarily on human testimony, which is subject to the inherent frailties associated with human observation, memory, recollection, and verbal articulation through oral testimony."

In ***Shivaji Sahebrao Bobade & Anr. V. State of Maharashtra*** – equivalent citations: 1973 AIR 2622, 1974 SCR (1) 489, the Supreme Court of India has commented that, "the cherished principles of the golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch and degree of doubt. … Only reasonable doubts belong to the accused. Otherwise, any practical system of justice will break down and lose credibility with the community."

In ***Dharm Das Wadhwani V. The State of Uttar Pradesh***, 1974 Cri. LJ (SC) 1249, the Supreme Court of India has observed that, "… The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must

take a practical view of legitimate inferences flowing from evidence, circumstantial or direct.…"

In ***Wijesekera (Excise Inspector) V. Arnolis***, (1940) (17 CLW 138), Justice Wijeyewardene has held that, "… it is not every kind of doubt the benefit of which an accused person is entitled. An accused person could claim only the benefit of a reasonable doubt. It is always possible to conjure up a doubt of a very flimsy nature. But an accused person cannot be acquitted on the ground of such doubt … The guilt or innocence of an accused person must be determined on evidence and not on some suggestion made in the course of an argument…"

In view of the decisions of aforesaid judicial authorities, it is apparent that in the instant action the prosecution has proved its case beyond a reasonable doubt.

Accordingly, the Judgement of the learned High Court Judge of Colombo dated 02.07.2019, the conviction and the sentence imposed on the accused-appellant are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL