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

In the matter of an Appeal under section 14 of the Judicature Act No. 2 of 1978 read with the provisions of section 11 of the High Court of the Provinces (Special Provisions) Act, No.19 of 1990 and section 331 of the Code of Criminal Procedure Act No. 19 of 1990 and section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No: 398/2019

HC of Colombo Case No: 6640/2013

The Attorney General,

Attorney General's Department,

Colombo 12.

Complainant

V.

Henpitage Dharma Sri Pushpakumara

Accused

AND NOW BETWEEN

Henpitage Dharma Sri Pushpakumara

Accused-Appellant

V.

The Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

Before: **Menaka Wijesundera,J.**
B. Sasi Mahendran, J.

Counsel: Samantha Premachandra for the Accused-Appellants
Dileepa Peiris, SDSG ,for the Respondent

Written Submissions On: 29.06.2021 (by the Accused-Appellant)
02.06.2021(by the Respondent)

Argued On: 29.11.2023

Decided On: 13.12.2023

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Sasi Mahendran, J.

The Accused Appellant (hereinafter sometimes referred to as the Accused) was indicted at the High Court of Colombo for the following charges,

i. Section 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance. – Possession of 2.60g grams of Heroin (Diacetyl Morphine),
ii. Section 54A (b) of the Poisons, Opium and Dangerous Drugs Ordinance. – Trafficking 2.60g grams of Heroin (Diacetyl Morphine),
iii. Section 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance– Possession of less than 1g of morphine,

iv. Section 54A (b) of the Poisons, Opium, and Dangerous Drugs Ordinance. – Trafficking of less than 1g of morphine,

The prosecution led evidence of seven witnesses and marked seven documents and closed the case for the Prosecution. The Accused Appellant made a Statement from the Dock and closed his case.

After the trial, the Accused was convicted of all 4 counts. For the 1st and 2nd counts, the Accused was sentenced to Life Imprisonment, and for the 3rd and 4th counts sentence of 2 years each to run concurrently was imposed. Being aggrieved with the said conviction and the sentence the Accused had preferred this appeal and submitted the following grounds of appeal.

a) That the learned trial Judge failed to observe that the inward journey of the productions was not proved beyond reasonable doubt and in any event, there is reasonable doubt cast on the production chain emanating from the evidence adduced before the Court and that the appellant must thereby get the benefit of the doubt,

b) That the learned trial Judge has failed to consider the contradictions, omissions, and inconsistencies reflected in the prosecution evidence,

c) That the learned trial Judge misdirected himself on the law relating to burden of proof and also failed to appreciate that the prosecution failed to establish the case against the appellant beyond reasonable doubt,

d) That the learned trial Judge failed to appreciate that the evidence led at the trial was insufficient to rebut the presumption of innocence and the duty of the prosecution to prove the case beyond reasonable doubt,

e) That the learned trial Judge failed to appreciate that the duty of discharging the burden of proof is on the prosecution,

f) That the learned trial Judge misdirected himself by imposing an unnecessary burden on the defence in a case of bare denial,

g) That the learned trial Judge erred in law in failing to properly consider and evaluate the evidence place before him in totality and that convicting the appellant is explicitly contrary to the law and against the weight of the evidence led in this case,

h) That the learned trial Judge failed to consider the evidence placed before Court by the defence in this case,

i) That the learned trial Judge failed to appreciate that the prosecution failed in its duty to call key witnesses which would deprive the right of appellant to have a fair trial,

j) That the learned trial Judge failed to consider that the prosecution failed to prove the offences to trafficking to the requisite standard,

k) That the learned trial Judge failed to appreciate that the prosecution evidence led by the prosecution contradicted itself and prima facie failed to prove the charges of possession and trafficking of Morphine,

l) That the conviction and sentence cannot be supported having regard to the evidence led at the trial,

m) That the conviction and sentence of the appellant who was denied a fair trial should be set aside.

Before we analyze the evidence of the prosecution, we are mindful of the 3rd and 4th counts related to the possession and trafficking of morphine.

According to the evidence of Sandhya Rajapaksha PW08 Government Analyst has stated that heroin is made from opium. According to her, Opium is first converted to morphine and thereafter subjected to acetylene to change to heroin, which is also known as Diacetyl Morphine.

Due to the time factor, Diacetyl Morphine can turn back into Morphine. (Here 15 months were taken to analyse the production). Therefore, there is a possibility that a particular production would have been changed into morphine before analyzing the production. In other words, 74mg of Morphine found by the Government Analyst would have been reformed from heroin during the said time from the drugs recovered.

Learned High Court Judge had failed to consider this fact and convicted the Accused for Counts 3 and 4.

Therefore, the conviction and sentence for the 3rd and 4th Count could not be sustained.

The main ground urged by the Counsel for the Accused is that the prosecution had failed to establish the chain of Custody, a break in the chain of production being sent to the Government Analyst.

According to the Prosecution, the accused was arrested on the 19th of August 2008 at a checkpoint on the Dehiwala-Wellawatte bridge consequent to being subjected to a random search. The officers were able to recover the alleged 2.6 grams of Heroin from the Accused.

According to the prosecution, they found a green shopping bag in his Denim pocket which contained 9 white shopping bags each of them containing 40 packets of heroin. This amounts to 360 packets in total.

After arresting the Accused PW01 along with PW02 PC 68801 Saman took him to the Wellawatte police station and was handed over to PW04 Jayathunga along with the production.

The productions have been separately marked as PR 84/08 - 87/08. Productions have been purportedly sealed using PW01 and the Accused signature, but no police seal has been used.

PW01 and PW02 went back to the STF camp in Kalubowila to sign out from their duty and came back together to the Wellawatte police around 8:20 am. They have taken the Accused and the production to the narcotics bureau for the purpose of weighing.

The alleged packets of heroin were emptied into an A4 sheet and weighed 8.15g. Thereafter he proceeded to Wellawatte police station and entered the production containing heroin in 88/08 and empty envelopes in 89/08 and handed to the (PW09) PC 20505 Pathiraja.

According to (PW09) Pathiraja, who was on reserve duty between 2 p.m.-9.00 pm has received production from PW01 and he stated that before him it was (PW04) Jayathunga who was on reserve duty.

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ප්‍ර : මහත්මයා 14 පැයට උප සේවා රාජකාරි භාර ගන්න කොට කාගෙන්ද භාර ගත්තේ?

උ : පො.සැ. 734 ජයතුංග.

ප්‍ර : මහත්මයා එදින රාජකාරි කරද්දී පී. ආර්. 88/2008 සහ 89/2008 කියන නඩු භාණ්ඩ භාර ගැනීමක් කලාද?

උ : ඔව්.

PW09 had handed over the productions to PW10, PC 22659 Kulathunge at 9:50 pm on 19.08.2008. It is pertinent to note that in PW10's evidence all productions namely, PR 84/08, 85/08, 86/08,87/08,88/08,89/08 have been received by him at 9:50 pm on 19.08.2008.

We note that the prosecution has only asked questions from PW09 about the production of 88/08 and 89/08. therefore, he has not mentioned the other productions.

According to him, his duty was over in the early morning at 5:50 am. Therefore he has handed over the production 88 and 89 to PC 8069 Anthony(PW06) at night for as he was the person who takes the production to the Court. Further, he has stated that he has given the other production to (PW09) Pathiraja.

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ප්‍ර : මහත්මයා විසින් ඔබ උපසේවා රාජකාරි සිදු කරන ලද කාලය තුලදී පී. ආර්. 84 සිට 89 දක්වා වන නඩු භාණ්ඩ අතුරින් මොනවහරි කාටහරි භාර දීමක් කර තිබෙනවාද?

උ : පී.ආර්. 88 සහ 89 දරන නඩු භාණ්ඩ උසාවි රාජකාරි කරන පො.සැ. 8069 ඇන්ටන් නිලධාරියාට භාර දුන්නා රාත්‍රී කාලයේ

ප්‍ර : උසාවි රාජකාරි කරන ඒ නිලධාරියාට දුන්නේ ඇයි?

උ : අධිකරණයට ඉදිරිපත් කරන්න.

ප්‍ර : මහත්මයා 20 වෙනිදා පැය 5.15 ට නැවත උපසේවා රාජකාරිය පතිරාජ නිලධාරියාට භාරදෙන සටහනේදී පතිරාජ නිලධාරියා ඔහු විසින් භාර ගන්න දේපළ කුවිතාන්සි අංක සටහන් කරලා සටහනක් දාලා තිබුනා. මහත්මයා ඊට යටින් අත්සනක් දාලා තිබුනා කියලා කිව්වොත් පිළිගන්නවද?

උ : උපසේවා රාජකාරි භාරදීම සම්බන්ධයෙන් සටහන් යොදා තිබෙනවා.

ප්‍ර : ඔය අවස්ථාවේදී පී.ආර්. 88,89 ඒ සටහනේ තිබෙනවාද නැද්ද?

උ : නැහැ.

ප්‍ර : අනෙක් පී.ආර්. අංක ඒ කියන්නේ 84,85,86,87 කියන අනිත් ඒවා තිබෙනවාද?

උ : තිබෙනවා.

According to PC 8069 Anthony PW06, he has received production PR 84/08—89/08 from (PW09) Pathiraja, , and handed over the production to the clerk Inoka Uswatte under case number 2412/2008, he further stated that he has taken the production from the court to the Government Analyst Department

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ප්‍ර : එම දේපල කුවිතාන්සි මහත්තයා කාගෙන්ද භාර ගත්තේ?

උ : පො.සැ. 20505 පතිරාජගෙන්.

ප්‍ර : එය සඳහන් කල 84-89 දක්වා දේපල කුවිතාන්සි සියල්ල භාර ගත්තේ එම නිලධාරියාගෙන්ද?

උ : එහෙමයි.

ප්‍ර : මෙම නඩුව සම්බන්ධව තව රාජකාරි කටයුත්තක් කලාද?

උ : ඔව්. රජයේ රසපරීක්ෂක වෙත එම භාණ්ඩ රැගෙන ගියා.

ප්‍ර : කොතන සිටද රැගෙන ගියේ?

උ : 84-89 දේපල රැගෙන ගියා.

ප්‍ර : දිනය කවදද මහත්තයා රැගෙන ගිය?

උ : 2008.08.26 වෙනිදා.

ප්‍ර ; තොරතුරු සටහන් පොතේ 233/399 යටතේ ගල්කිස්ස මහේස්ත්‍රාත් අධිකරණයේ උසාවි නඩු බඩු බී 24/28 අඩංගු දේපල රජයේ රස පරීක්ෂකට භාරදුන්නා. එදිනම 225/430 යටතේ රැගෙන සී ඩී අංක 2400 යටතේ ඇතුලත් කර තිබෙනවා.

ප්‍ර : මෙම නඩු භාණ්ඩ මහේස්ත්‍රාත් අධිකරණයේ කාගෙන්ද භාර ගත්තේ?

උ : ඉනෝකා උස්වත්ත මෙනවියගෙන්.

ප්‍ර : එම අවස්ථාවේ එම නඩු භාණ්ඩ නිසියාකාරව මුද්‍රා කර නිසියාකාරයෙන් ආවරණය කර තිබුනාද?

උ : එහෙමයි.

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ප්‍ර : දේපල කුවිතාන්සි අංක කීයක් යටතේ භාර ගත්තාද?

උ : 84,85,86,87,88,89.

ප්‍ර : දේපල කුවිතාන්සි 6 ක් යටතේ දේපල ගොනු වුනා?

උ : එහෙමයි.

ප්‍ර : මහත්මයා භාර ගත්තේ දේපල කුවිතාන්සි අංක කුමන භාණ්ඩද?

උ : 84 සිට 87 හැර අනෙක් ඒවා මම භාරගත්තා.

ප්‍ර : දේපල කුවිතාන්සි අංක 5ක් යටතේ?

උ : එහෙමයි.

ප්‍ර : මහත්මයා දන්නවාද දේපල කුවිතාන්සි අංක 87 යටතේ භාණ්ඩයට කුමක්ද සිදු වුනේ කියා?

උ : මේ ලේඛන අනුව එම වැටලීම කල ඉන්වාජ් එදිනම නාකොටික් එකට ඉදිරිපත් කරන්න භාරගෙන තිබෙනවා.

We note that according to (PW10) Kulathunge, he has handed over the production to (PW06) Anthony. When we peruse the evidence of (PW09) Pathiraja we note that he

has not mentioned handing over production to Anthony or receiving production from Kulathunga.

According to (PW11) Jinasinghe has stated that there is no name indicating who received the production from (PW06) Anthony.

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ප්‍ර: සාක්ෂිකරු ඒ භාර ගත්ත පුද්ගලයා කව්ද?

උ : ස්වාමීනි ඒ පිළිබඳව සටහන් වෙන්නේ නැහැ එවකට භාණ්ඩ භාරකරු විසින් භාර ගැනීම සිදු කර තිබෙනවා.

Also, we note that the person who received the production from (PW06) Anthony was not called to give evidence. When we analyze the evidence placed before the High Court Judge there is a discrepancy regarding the chain linking the production.

We are mindful of the observation made by **Justice J.A.N De Silva (as he was then) in Perera v Attorney General 1998 (1) SLR page 379** held that;

" it must be recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the Analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the Analyst. therefore, it is correct to state that the most important journey is the inwards journey because the final Analyst report will depend on that. The outward journey does not attract the same importance."

In CA 99-101/96 Decided on 12.11.1997 held that;

"We are of the view that the prosecutions has failed to establish the chain linking the production which were recovered at the detection to the productions which were forwarded to the Government Analyst. The prosecution has therefore failed to prove its case beyond reasonable doubt. "

In the light of the above decision, in **Witharana Doli Nona v. The Republic of Sri Lanka, CA 19/99,** His Lordship Justice Sisira 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. To prove this, the prosecution must **prove all the links of the chain (emphasis added)** from

time it was taken from the possession of the accused-appellant to the Government Analyst department.

In Faiza Hanoon Yoosuf v. Attorney General CA/121/002 decided on 22.11.2010 it was held that;

"In effect the first ground of appeal is that the prosecution failed to establish the nexus between the Heroin detected and what was produced in Court. In Court, the prosecution must prove the chain of custody. This must be done by establishing the nexus between the heroin detected and what was handed over to the Government Analyst for examination and report. The prosecution must prove that, what was subjected to analysis is exactly the same substance that was detected in that particular case. In this regard, the inward journey of the production plays a dominant role and is most significant".

In considering the totality of evidence led in this case, in the light of the said judicial decisions, we are of the view that the prosecution has to establish beyond reasonable doubt that there is no break in the inward journey. In the instant case, there is a discrepancy of evidence, and Inoka who was a clerk who received the production was not called to give evidence. PW11 could not identify the signature of Inoka. Therefore, the prosecution had failed to establish the chain of custody with regard to the inward journey up to the Government Analyst beyond reasonable doubt.

For the above-mentioned reason, I set aside the conviction and sentence imposed on 2019.07.05.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL