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

An Appeal filed in terms of Section 331 of the Criminal Procedure Code and Section 11 of the Provincial High Court Special Provisions Act No. 9 of 1990.

CA 297/2015

H.C. Colombo 2901/2006

Hettiarachchige Sanjeewa Kumara alias Sampath,

No.47/5/52,

Sammipura,

Mattakkuliya.

(Now resident in Welikada Prison)

Accused – Appellant

Vs.

Hon. Attorney General,

Attorney's General Department,

Colombo 12.

Respondent

Before : MenakaWijesundera J.

Wickum A. Kaluarachchi J.

Counsel : Rienzie Arseculeratne, PC with Chamindri Arseculeratne, ThilinaPunchihewa, Punsisi Gamage, Eranga Yakandawala, Himasha Silva, ErandiPathiranage for the Accused- Appellant.

Sudharsha De Silva, SDSG for the Respondent.

Argued on : 06.02.2024

Decided on : 12.03.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 05.08.2015 of the High Court of Colombo.

The accused appellant (appellant) has been indicted in the High Court for being in possession and trafficking of 196.1 grammes of heroin under the provisions of the Poisons Opium and Dangerous drugs Ordinance. Upon the conclusion of the trial, the appellant had been convicted for both the charges in the indictment.

The learned Counsel for the appellant raised the following grounds of appeal.

1) The prosecution has relied on a single witness's evidence,
2) PW2 had relied on the notes made by PW1 which is a violation of section 159 of the Evidence Ordinance,
3) The trial judge had not looked for corroboration,
4) Defense case not being analyzed,
5) Chain of productions not being established.

The main investigative officer had been witness number 1 and he had left the country but he had been all the time assisted by witness number 2 who had given evidence at the trial and witness number two also had made notes during the investigation.

According to the evidence of witness number two, witness number one had received a tipoff and on that tip off after making the due entriesboth of them along with another team of officers of the police narcotics bureau had on 13.9.2003gone to the Peliyagoda area and had stood watch for the appellant and then the appellant had arrived and he had been carrying a shoulder bag which had been searched by pw1 in the presence of pw2 and had found a tulip

bag in which they had found a pink colored grocery bag which had contained a substance they suspected to be heroin.

The said production had been taken into custody along with the appellant and on further questioning the party of PNB officers had gone to the house of the mother-in-law of the appellant at Sinharamulla where they had not found any suspicious looking items and as such no person nor any article had been taken in to custody.

Thereafter they had proceeded to the house of the person who is alleged to have provided the alleged heroin to the appellant at Modera and there they had not found any alleged substance from his custody but he had been arrested.

Hence the learned President's Counsel for the appellant stated that it is a very unusual behavior for the narcotics officers.

Thelearned President's Counsel appearing on behalf of the appellant also stated that the PW2 who had given evidence had violated the norms of section 159 of the Evidence Ordinance because he had been reading from PW1' s notes.

But in evidence PW2 had said that although PW1 conducted the entire raid,PW2 had been with him right along and that PW2 also made notes and he was giving evidence mainly on his notes but sometimes referred to the notes of PW1.

Section 159 of the evidence Ordinance reads as below,

159 (1) A witness may, while under examination, refresh his memory by 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.

As such even if PW2 was reading from the note of PW1 he was acting with in the law and further more PW2 had worked closely with PW1 during the instant raid and he had seen PW1 making his notes and he was able to identify the handwriting of PW1.

In the case of **The King vs Navasivayam 49 NLR 294 it has been held that "a witness may refer to a note made by someone else to refresh his memory but read by the witness during the time referred to in section 159 of the EO."**

Hence, we are unable to agree with the learned President's Counsel for the appellant that PW2 has violated the provisions of the EO in refreshing his memory by reading from the notes of PW1.

Secondly the learned President's Counsel had stated that PNB officers were acting unusual when they had not searched the house of the person who is supposed to have provided the alleged substance to the appellant, but the PNB officers had taken the said person in to custody for questioning.

The next improbability cited by the President's Counsel for the appellant was that soon after the arrest of the appellant the PNB officers had gone to the house of the mother-in-law of the appellant but had not searched the said house.

Both theses instances as stated by the President'sCounsel for the appellant we find it to be a little unusual although the trial judge had failed to consider it the same, especially in view of the fact that the raid had been conducted by PNB officers and they are generally skilled and trained in conducting these types of raids. Hence, the most prudent and the most natural thing would have been to carefully search the house of the appellantsmother-in-law and the house of the person who is supposed to have provided the alleged narcotics to the appellant.

Hence, we observe that the said improbability of the story for the prosecution has not been dully considered by the trial judge instead he had been too eager to agree with the evidence of the prosecution.

The next point raised by the Counsel for the appellant is that the prosecution had placed the evidence of a single witness during trial and the trial judge had believed the said witness.

At this point we draw our minds to the case of **Rajapaksha Pathirage Justin Rajapaksha VS Prasanna Rathnayake & Others**

SC/FR 689/2012

Decided On: 28.03.2016

"The incident that took place in this case is a good example for the trial judges to remember that the police sometimes arrest people without any reasons and later introduce contraband or similar illegal items to the person arrested to justify the arrest. When the story of the police is false, one police officer may sometimes contradict the other police officer. The trial judges must be extremely careful when they are called upon to act only on one police officer's evidence when the police claim that a team of

police officers conducted a raid and found contraband in the possession of the suspect because there can always be an introduction as happened in this case. Therefore, in cases where the police allege that they found contraband in possession of a suspect or suspects, it is safer not to act only on one police officer's evidence if more than one police officer have participated in the raid because if there is an introduction by the police officers as happened in this case, there may, sometimes, be contradictions among the evidence of police officers. In such situations, adjudication of issues in the case becomes easier to courts. I am mindful of the principles laid down in Section 134 of the Evidence Ordinance when I make the above observation. But however, courts should not fall into the trap of convicting an innocent person by strictly following the principles laid down in section 134 of the Evidence Ordinance. The incident that had taken place in the present case is a classic example that court should, in appropriate cases, relax the principles laid down in section 134 of the Evidence Ordinance. However, if a police officer who was not assisted by any other police officer searches a person on suspicions and finds contraband or any illegal items in the possession of the said person the situation discussed above may be different."

But in the case of SC-SPL-LANO100-2010 Justice Aluvihare had discussed the matter of the prosecution relying on a single witness in a similar case to prove its caseextensively and had held as follows,
"a) an accused can be convicted on a single witness in a prosecution based on a police detection, if the judge forms the view that the evidence of such witness can, with caution, be relied upon, after probing the testimony.

b) corroboration is not *sine qua non* for a conviction in a police detection case, if the judge, after probing, is of the opinion that the witness is credible and the evidence can be acted upon without hesitation.

c) there is no burden on the prosecution to provide an accused with the opportunity to contradict the prosecution witnesses."

The above quoted judgment also has discussed the fact that a trial judge need not look for corroboration unless he feels that he should because a trial judge has the opportunity of observing the demeanor and the deportment of witnesses, hence whether it is a single witness or otherwise, the trial judge has the prime opportunity of observing the witness hence as said in section 134 of the EO evidence no particular number of witnesses are needed for the proof of any fact.

Hence, if the statute has not prescribed that there should be corroboration the trial judge can form his own opinion by watching the demeanor and the deportment of evenof the single witness.

Hence, we see no merit in the ground raised by the learned President's Counsel for the appellant that the trial judge should have looked for corroboration.

The next point raised by the learned President's Counsel for the appellant is that the case for the defense has not been considered.

The appellant has made a statement from the dock and he had denied the entire incident and had said that he had been arrested while he had been at home.

This position of the appellant has been put to the main and the only witness of the prosecution that is witness number 2.

The position taken up by the appellant in the dock statement had been corroborated by the wife and the daughter of the appellant who had given evidence on oath.

Both had been cross-examined but both had stood the test of cross-examination well and has had no contradictions or omissions in their evidence.

Hence, the defense of the appellant has been right through out consistent and corroborated by the defense witnesses.

But we note that the trial judge had referred to the defense position and has rejected the same without analyzing the said position of the defense.

He had rejected the defense position by saying that if the appellant had been arrested at home, the officers would have made notes but if that is so the whole purpose of fabrication as alleged by the appellant would have been lost.

Hence the said possibility has not been considered by the trial judge and he has also failed to consider the evidence of the wife and the daughter of the appellant whose evidence has been uncontradicted.

It is the opinion of this Court that the trial judge had been too eager to believe the prosecution and disregard the defense.

As such, by not considering the defense evidence with the same weight with which he has considered the evidence of the prosecution we are of the opinion that the appellant has been denied a fair trial.

As such we are of the opinion that the denial of a fair trial to the appellant and the improbability of the behavior of the PNB officers during the raid as pointed

out above makes it an appropriate situation for this Court to allow the instant appeal as it has caused a grave miscarriage of justice to the appellant.

As such, the instant appeal is allowed and the conviction and the sentence entered by the trial judge is hereby set aside. The accused-appellant is acquitted of the counts 1 and 2 of the indictment.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal