

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

In the matter of an Appeal in terms of
Section 331 of the Code of Criminal
Procedure Act No.15 of 1979.

C.A. No. HCC 310/2012

H.C. Colombo No. HC 4875/2009

Mohottige Janaka Prasantha

Accused-Appellant

Vs.

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

Complainant- Respondent

BEFORE : ACHALA WENGAPPULI, J.
DEVIKA ABEYRATNE, J.

COUNSEL : Shanaka Ranasinghe P.C. with Niroshan
Mihindukulasuriya for the Accused-Appellant.
A. Navavi D.S.G. for the respondent

ARGUED ON : 21st January, 2020 & 22nd January, 2020

DECIDED ON : 06th March, 2020

ACHALA WENGAPPULI, J.

This is an appeal where the accused-appellant was convicted for trafficking in and being in possession of *Deacetylc Morphine*, a prohibited substance, contrary to Section 54A (b) and (d) of Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

Upon his conviction on both these counts, the accused-appellant was imposed two terms of imprisonment for life as the appropriate sentence by the trial Court.

In challenging validity of the conviction, the learned President's Counsel who appeared for the accused-appellant, had broadly framed the ground of appeal as the failure of the trial Court to appreciate the improbability of the prosecution version of events. In addressing this Court in support of this ground, learned President's Counsel had highlighted following factors, in his

submissions which the trial Court should have considered and resolved in his favour;

- a. the considerable disparity in the distance in conducting this detection as described by the prosecution witnesses and the reading of the odometer,
- b. the inconsistency of the evidence of the detecting officer that he identified Heroin in all 7 small parcels whereas the Government Analyst had only identified Heroin in six of the seven parcels,
- c. the failure of the prosecution to prove the inward chain of production,
- d. the finding of the trial Court that the version of events as spoken to by the accused-appellant could neither be rejected nor accepted and its failure to afford the resultant benefit of the intermediate position in favour of the accused-appellant.

It is helpful, therefore to have a brief overview of the respective cases that were presented by the prosecution as well as the accused-appellant at the outset, in view of the above stated reasons and in order to fully appreciate the factual positions that had been relied upon by him in support since they are based on determination of certain facts by the trial Court.

The prosecution presented its version of events, leading to the detection of the prohibited substance in the possession of the accused-appellant, primarily through the Detection Officers IP *Nalaka Prabashwara* and SI *Warnapriya* who assisted him in the detection. Both of these officers attached to Police Narcotics Bureau at that time. The detection of Heroin on 25.05.2006 being in possession of the accused- appellant, was made upon information received by PS 27391 *Rajitha*

through one of his private informants that a transaction of a prohibited drug was to take place in *Peliyagoda* area and if the officers of PNB could come near *Nawaloka Hotel* of *Peliyagoda*, the offender could be pointed out. PS *Rajitha* had entered this information in his Pocket Note Book. Having verified the entry made by PS *Rajitha*, IP *Nalaka* had mobilised a team of officers to carry out the detection.

The team had left PNB 4.40 p.m. after making an out entry and arrived at *Nawaloka Hotel* at about 5.30 p.m. along the route of *Kochchikade*, *Inguru Kade Junction* and *Peliyagoda* where IP *Nalaka*, PSs *Rajitha* and *Wimalaratne* had met the informant for a brief discussion. The informant was directed to proceed to a place near *Cargills Food City* of *Peliyagoda*, where he informed the Police party that the transaction of illicit drugs was to take place. The team had parked their vehicle in the car park of the super market and waited for the three wheeler of the suspected drug peddler to arrive. A three wheeler had turned into the said car park from the opposite direction and the informant had pointed out the said three wheeler.

IP *Nalaka* had then got off the van along with PS *Rajitha* and PS *Wimalaratne* and walked up to the three wheeler. He noted that the driver of the vehicle too had noted and appeared alarmed by their arrival. The officers had thereafter run towards the three wheeler as its driver was attempting to start its engine. *Rajitha* and *Wimalaratne* had held onto the accused-appellant who then threw out a green coloured parcel, which fell by the side of the road, having hit on the side of the three wheeler.

Having secured the accused-appellant with a pair of handcuffs, IP *Nalaka* then examined the contents of the green coloured bag. He found 7 yellowish

bags of cellophane containing a brown substance which he identified as Heroin. The accused-appellant was formally arrested at 6.25 p.m. for possession of Heroin.

The Police party had thereafter decided to conduct a search and the accused-appellant had led the team of officers to his residence, located at 312/68, *Madampitiya Road, Colombo 14*. The search yielded nothing and the party had returned to PNB office along the route of *Aluth Marwatha, Kochchikade* and *Colombo Fort*. After the detection of Heroin, IP *Nalaka* had kept the parcel of heroin in his possession until it was properly handed over to the reservist at the PNB, having completed the sealing process.

The prosecution had called *Rajitha* as its 2nd prosecution witness in support of the evidence of the detecting officer IP *Nalaka*. The prosecution also called IP *Gunasekara* who was the reservist when this detection was made and Ms. *Chandrani* of the Government Analyst Department.

When the trial Court called for the defence, the accused-appellant made a statement from the dock claiming that the parcel containing Heroin was introduced to him by the officers of PNB at its Headquarters and he was arrested near *Oliyamulla Culvart* in *Wattala* and not at *Peliyagoda* as the prosecution claims. He also called *Mirissa Gedarage Wijesiri* in support of his claim of arrest at *Oliyamulla*, an officer from the Department of Motor Traffic in relation of vehicle bearing No. HD 2726, Registrar of High Court of Gampaha in relation to case No. 5809, which was pending before that Court where one *Samarasinghe Mudalige Krishantha Lalith* was indicted for multiple counts of possession and trafficking in of different quantities of Heroin on 26.12.2006.

In support of the ground of appeal that had been raised on the improbability of the prosecution case, learned President's Counsel submitted that the considerable disparity in the distance in conducting this detection as described by the prosecution witnesses and the reading of the odometer is clearly indicative of distortion of facts by the prosecution witnesses and therefore supports the claim of the accused-appellant that he was arrested elsewhere, a fact supported by the Defence Witness *Wijesiri*. It was admitted by the prosecution witnesses during cross-examination that the route they have taken to reach Cargills Food City at *Peliyagoda* and to return back to PNB would be less than five kilometres, whereas the odometer readings as reflected in the notes indicate that the vehicle had travelled a total distance of 24 kilometres.

Learned Deputy Solicitor General, in his reply contended that the witness had merely entered the readings of the odometer as he was told by the driver of the vehicle in making these entries and therefore the witness is unable to vouch for its accuracy.

When the relevant segment of the cross-examination is examined, it is apparent that the witness was questioned as to the distance they had travelled from *Nawaloka* Hotel to Cargills Food City at *Peliyagoda*. The witness had replied that he is unable to answer the question since he had not made any notes and unable to estimate the distance with his memory. In continuing the same line of cross-examination, the accused-appellant pressed the witness for an answer suggesting that it is less than 5 or 6 km. When the officers have left their office, the odometer reading was 22488 and when they returned, it read 224812, indicating they had covered a distance of 24 km in total. Then the witness was only suggested that they had travelled more than what they have declared and hence the disparity. This suggestion was rejected by the witness.

When the evidence is considered in its proper context, there is no clear evidence as to the total distance from the PNB office to the place of detection. In addition, the officers have visited the residence of the accused-appellant to conduct a search. This fact was not challenged by the accused-appellant. In re-examination, the witness clarified that the total distance of 24 km includes the 2 to 2 ½ km distance they had travelled to conduct the search. There is clear evidence that they have travelled from the PNB office to the place of detection and then to the residence of the accused- appellant at *Madampitiya* Road and returned back to the PNB. Therefore, there is no improbability of the prosecution version of events in this respect which had the effect of rendering the same a highly improbable one, which no Court can place reliance on.

It was also the submission of the learned President's Counsel that the inconsistency of the evidence of the detecting officer that he positively identified Heroin in all 7 small parcels and the Government Analyst who had identified Heroin only in six of the seven parcels, creates a doubt as to the integrity of the productions, when coupled with the fact that the prosecution's failure to call *Wimalaratne* who assisted IP *Nalaka* in sealing them at the PNB. He also contended that the prosecution had failed to prove the inward chain of production.

This contention by the learned President's Counsel needed to be considered in the light of the evidence of IP *Nalaka* and PS *Rajitha* in relation to identification of Heroin and the sealing of productions.

It is the evidence of IP *Nalaka* that no sooner he had picked up the parcel thrown out by the accused-appellant and examined its contents. There were seven packets in it. It is his evidence that he identified Heroin in them by its smell and

upon his experience in such detections. Having returned to PNB, just before the sealing, he decided to conduct a field test and had therefore pricked the "parcel" he had recovered from the accused-appellant with a probe, on which he applied the field test. The test showed a positive result.

During cross-examination, he admitted that he had applied "Marquis Test" by pricking each parcel using a paper pin as a probe and then immersing the probe in the test tube containing the testing chemical. He asserted that he conducted tests on all seven packets and all of them tested positive for Heroin. However, *Rajitha* in his evidence stated that *Nalaka* used the same probe in pricking the seven packets, although he tested them separately. Whilst giving evidence before the trial Court, IP *Nalaka* also noted that one of the packets had its original colour in its contents even at that point of time while the other six had changed its colour into a darker hue.

Government Analyst, in her evidence stated she had examined seven packets containing a brown coloured powder. Having analysed their contents, it was clear that, of these seven packets, she did not identify Heroin in one of the packets, marked as "P07".

Learned President's Counsel utilises this seemingly inconsistent factual position of *Nalaka* and Government Analyst, in support of his contention that the prosecution version in relation to the detection of Heroin is an improbable one.

Marquis test is a test used by law enforcement agencies throughout the world to conduct on the spot tests in identifying prohibited drugs. It is only a basic test to identify whether the suspected substance had any Heroin in it. The witnesses have correctly referred to as the "field test". The "field test" that was conducted by IP *Nalaka* on the seven packets recovered from the accused-

appellant was done only after returning to PNB. By this time, he had initially founded his reasonable suspicion that the brown powder contained Heroin, upon its smell and his work experience. The field test therefore is meant only to confirm his suspicion that the brown powder contained Heroin.

The very purpose of conducting field tests had to be clearly distinguished from the more formal scientific analysis conducted by the officers of the Government Analyst Department who possess the required knowledge in the science of Chemistry and the expertise to carry out the required chemical analytical tests to identify and quantify the presence and concentration of a prohibited substances from a sample of suspected production item. The acceptance by IP *Nalaka* of having identified Heroin in all seven packets during cross-examination will have to be considered in this context. His objective was to have his suspicions justified by conducting a field test on the parcel containing packets of brown powder suspected to contain Heroin.

It is undisputable that the accusation of possession and trafficking of Heroin against the accused-appellant is based on the report of the Government Analyst. In that context, irrespective of the fact whether Heroin was identified during field test or not, the decisive factor is the confirmation of the presence of Heroin in the parcel recovered from the accused-appellant by the Government Analyst. In evaluating relative probabilities of the version of events as spoken to by the Prosecution witnesses, the trial Court had to be mindful whether the initial suspicion of the detecting officer is justified in view of the results obtained through a more formal analysis of the production by the Government Analyst at a subsequent stage.

In this particular instance, the issue under consideration is whether the non-identification of Heroin in P07 by the Government Analyst, when the same packet was tested positive for Heroin detecting officer who conducted the field test on it creates a doubt in the integrity of the productions or as to the testimonial trustworthiness of the evidence of the detecting officer.

Whether the integrity of the production was compromised or not could be tested by other more accurate evidence.

The evidence of the prosecution is, after having conducted a successful detection, the officers have returned to PNB with the production in the possession of the detecting officer. Whilst at the PNB, the sealing of the detected heroin was done by IP *Nalaka* with the assistance of *Wimalaratne*. The parcel was pricked with a paper pin and tested with chemicals which indicated positive for Heroin. Each packet of Heroin weighed 100 grams. The 7 cellophane parcels were placed in a transparent polythene cover along with an identification tag with the witness's and the accused-appellant's signatures and the date of detection. This polythene cover was sealed and was then placed inside a brown coloured large envelop and was sealed with the witness's personal seal and finger prints of the accused- appellant. This brown envelop was marked as "J1".

The green bag, in which the seven packets were originally found, was also placed inside another transparent polythene bag with a similar identification tag. The polythene bag was then put inside of a long brown envelop and sealed with the marking "J2" placed on it.

Both these parcels were entered in the Productions Register under PR 33.

During the trial, a properly sealed parcel was opened in the well of Court. The outer brown coloured wrapping paper with seals placed by the Government

Analyst was marked P4. Inside the parcel, another parcel wrapped in a brown coloured was found and it was marked P5. P5 parcel had the description of M.C. Colombo case No. B 2861/06 with the relevant Information Book references and as containing seven packets each of which containing 100 grams of heroin. The said P5 cover was identified by IP *Nalaka* as the "J1" parcel. There was another polythene bag was found in P5, which contained an identification tag. The witness had identified them as the polythene bag he used to put in the 7 packets of heroin and the identification tag. These were marked P6A and P6 respectively. IP *Nalaka* also clarified the 7 packets were in fact had two bags in each of the packets and although there were 7 packets but in total they contained 14 individual bags.

When questioned as to how he identified the seven bags of heroin, the witness replied out of the 7 packets, he had found that only one of them remained in its original colour as seen at the time of detection, when examined in Court. The contents of other 6 packets had turned itself into a substance of darker colour.

This indicates that there was cogent evidence before the trial Court to satisfy itself that the productions that had been recovered from the accused-appellant are the ones that were analysed by the Government Analyst who identified and quantified Heroin contained in it. When the evidence is taken as a whole, the mere fact that Heroin was not identified in P07 would not create a reasonable doubt as to the integrity of productions in reaching Government Analyst for analysis. The trial Court was alive to this issue and held that no reasonable doubt exists on this claim. The failure to call witness *Wimalaratne* had no significant effect, as there were sufficient cogent evidence as to the integrity of the production.

In this regard, this Court notes with regret the manner in which the evidence of the detecting officer is presented by the learned prosecutor before the trial Court. It appears that the prosecutor was blissfully unaware as to the conflict that exists in the detecting officer's find of Heroin in all seven packets and the Analyst's finding that only six of them contained Heroin. When the accused-appellant cross-examined both the detecting officer and the one who assisted over the performance of a field test on all seven packets, no alarm bell rang in the mind of the learned prosecutor even to offer a clarification during re-examination of these witnesses.

When this appeal was argued, learned President's Counsel and learned Deputy Solicitor General had to labour in order to sieve through the apparent inconsistencies among the evidence of the detecting officer and the description of the productions given by the learned prosecutor when the sealed parcels were unsealed and opened in the well of the trial Court in support of their respective positions. The Counsel before this Court had to struggle to present their respective submissions simply due to the incoherent manner of leading evidence. The obvious errors in the proceedings too were not corrected. It is strongly suggested that the prosecutions are undertaken after a proper appreciation of the role of a prosecutor, especially in a drug detection.

This Court, in considering the issue whether the said inconsistency creates a reasonable doubt as to the testimonial trustworthiness of the evidence of the detecting officer, must observe that the way IP *Nalaka* had conducted the field test is not clearly elicited in his examination in chief. There is evidence that he had used the same probing instrument in taking samples from all seven packets before he inserted it in the chemical agent in order to perform the test for presence of Heroin. The results of the field test, being only an aid in

investigations, is primarily for the detecting officer to decide whether there are reasonable grounds available for him to suspect that an offence was committed by the suspect he had arrested with the questionable item of production. It appears that IP *Nalaka* verily believed that the all seven packets contained Heroin, while this belief was challenged by the more precise findings of the Government Analyst. But that was a finding made subsequently. In these circumstances, the mere inconsistency that exists with the evidence of IP *Nalaka* and the Government Analyst cannot be a basis to cast aspersions on the credibility of the detecting officer, who had no control over the contents of the composition of the substance he had detected and its improbable for him to say that all 7 packets contained Heroin when only six packets had Heroin in them.

It is interesting to note that out of the 7 packets, "P1" and "P4" weighed 100.1 grams as its gross weight, per the evidence of Government Analyst. But after analysis, it was found that packet "P1" contained 29.2 grams of pure Heroin, while "P4" contained a higher value of 31.1 grams of pure Heroin. One expects to find the purity of the seven packets to reflect a same figure as it is reasonable to assume that they may have been packed from the same principle stock of brown powder. Yet these differences did exist, and that fact alone cannot challenge the trustworthiness of the assertion that they were detected in one and the same parcel. Therefore, the inconsistent findings of the field test with the findings of the Government Analyst cannot pose a challenge to the testimonial trustworthiness of the detecting officer.

Lastly, this Court must deal with the contention of the learned President's Counsel that the finding of the trial Court over the version of events as spoken to by the accused-appellant could neither be rejected nor accepted and its

subsequent failure to afford the resultant benefit of the intermediate position, in favour of the accused-appellant.

This contention was made by the accused-appellant by placing reliance of the very wording used by the trial Court, in its judgment. The relevant part of the judgment is accurately reproduced below :-

“මේ අනුව විත්තිකරු දක්වන කරුණු ඒ ආකර්ශනම
පිළිගැනීම කළ නොහැකි බව සටහන් කරමි.”

This statement appears in page 17 of the 20-page judgment of the trial Court. When the structure and presentation of the judgment is considered it appears that the trial Court had commenced dealing with the case presented by the accused-appellant from page 14 with the opening statement that the trial Court would consider the evidence adduced by defence through a dock statement to determine whether it results in creating a reasonable doubt about the prosecution's case. Then the Court continues to consider the positions advanced by the accused-appellant during his cross-examination of prosecution witnesses and the statement from the dock. In dealing with the 24 km issue and the alleged suppression of the place of arrest only the trial Court had made the above observation. Then the trial Court continued with the analysis of defence case including its witnesses and finally reaches its conclusion on the acceptability of the defence case at page 19, the penultimate page of the judgment, the trial Court had rejected the case presented by the accused- appellant totally.

When the manner of the trial Court in considering the defence case is considered in its entirety, the isolated reference relied upon by the accused-appellant is indicative of the fact that the Court was not in a position to accept nor reject his evidence, seemed an unfounded proposition, especially in view of

its more explicit finding on the defence case at the concluding stage of the judgment.

Therefore, in view of the reasoning contained in the preceding paragraphs, this Court is of the view that there is no merit in the appeal of the accused-appellant and his appeal ought to be dismissed.

Accordingly, the conviction of the accused-appellant as entered by the trial Court is hereby affirmed. Since the accused-appellant was imposed life sentences and not the death sentences, there is no need to seek the submissions of the accused-appellant on sentence. The sentences that are imposed on the accused-appellant by the trial Court too are affirmed in the circumstances.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE,J.

I agree.

JUDGE OF THE COURT OF APPEAL