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/0352/2019

Simiyon Robinson

High Court of Colombo
Case No: HC/404/2019

Accused-Appellant

Vs.

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

Complainant-Respondent

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

COUNSEL : **I.B.S Harshana for the Appellant.**
Anoopa De Silva, DSG for the Respondent.

ARGUED ON : **26/02/2024**

DECIDED ON : **03/07/2024**

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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) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession and Trafficking of 62.736 grams of Heroin (diacetylmorphine) and Possession and Trafficking of 12.170 grams of Cannabis Sativa L alias Ganja punishable under Sections 54(A) (d) and 54(A) (b) of the same Act on 18.02.20018.

The prosecution had called 04 witnesses in support of their case and marked production P1-37. When the defence was called, the Appellant had made a

dock statement, called 04 witnesses, marked documents V1 and V2 and closed his case.

After the consideration of evidence presented by the prosecution and the defence, the Learned Trial Judge found the Appellant guilty on all counts and had sentenced him to death on 1st and 2nd Counts and imposed 01-year rigorous imprisonment each on Counts 3rd and 4th on 13/12/2019.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Counsel for the Appellant informed this Court that the Appellant had given his consent to argue this matter in his absence due to the Covid 19 pandemic. Hence, argument was taken up in his absence but he was connected via Zoom platform from prison.

On behalf of the Appellant the following Grounds of Appeal were raised.

1. That the Learned Trial Judge failed to consider the doubtfulness in relation to the raid conducted by the prosecution witnesses.
2. That the Learned Trial Judge had not properly considered the evidence for the defence.
3. The Learned High Court Judge had performed the role of the prosecutor under Section 165 of the Evidence Ordinance.

Background of the case.

On18/02/2018 PW1 SI/Nishantha Officer-in-Charge of the Court Unit of the Colombo Crime Division, had received an information through PW2 PS 3856 Priyantha of the CCD that a person named Robinson was in possession of a firearm. After noting down the information in his pocket note book, PW2 had conveyed the same to PW1. After verifying the reliability of the information,

PW1 had chosen PS 3856 Priyantha, PC 84328 Kavinda, PC 84333 Wickramanayake, PC72701 Dhanuska and PC 79098 Tennakoon for the raid. Attiring in civil clothes, the officers dividing in two groups left the CCD at 9.05 am in two private three wheelers. PW1 and PW2 had travelled in a three-wheeler driven by PC 84333 and PC 72 with PW1, PW2 and 72701, PC 79097 had travelled in the other three-wheeler driven by PC 84328. After arriving at Keselwatte, they had met the informant who had shown them an apartment complex and left the place. When the team had reached the apartment complex, they had seen a person coming out of the complex but turned after seeing the three-wheelers. Upon feeling suspicious of him, they searched his body and discovered a packet of heroin in his trouser pocket.

He was arrested and the team commenced to check all the floors of the apartment complex which consisted five floors. The Appellant had occupied the fifth-floor house. Then the team had noted a new locked almirah in the Appellant's room. Informing that he had a firearm which he had already been handed over it to the Organized Crime Unit, he had handed over a bunch of keys to the detectives. As directed, the Appellant had opened the almirah which contained male clothes and two small parcels and a phone box. One of the parcels contained some white coloured substance which reacted for Heroin. The second parcel contained some dried particles which PW1 had identified as Cannabis through his experience. The phone box contained two electric weighing machines, a spoon and 17 small bags. Traces of Heroin had been identified on the spoon. The Appellant was arrested and brought to CCD at 15.28 hours. The productions were weighed at the CCD by PW1 with assistance of others. The weight of the Heroin had been revealed 107.70 grams while the weight of Cannabis had been revealed 120.170 grams. All productions had been sealed and handed over to PW07 under PR No. 129/2018.

PW2 had corroborated the evidence given by PW1. The productions had been sent to the Government Analyst on 16.03.2018. According to the report,

62.736 grams of pure Heroin (Diacetylmorphine) had been found in the parcel and traces of Heroin had been identified on the spoon too.

The dried particles had been identified as Cannabis Sativa L by the Government Analyst.

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".*

At the hearing the Learned Counsel for the Appellant commenced his augment by combining the first and second grounds of appeal together. In those grounds the Appellant contended that the Learned Trial Judge failed to consider that the prosecution version did not pass the test of probability and erred in both facts and law when concluding that the prosecution proved the case beyond reasonable doubt.

In this case, PW1 had vividly given evidence as to how the raid was conducted after the information, he had received from PW2. Acting on that information, he had successfully arrested the Appellant who was totally a stranger to him.

The Learned Counsel strenuously placed his submission on the occupants of the house at the time of the raid.

The main point of contention was the dispute over whether the appellant's wife was present at the time of his arrest. PW1 maintained that, after interrogating all the occupants of the entire building, including the appellant's wife, he was satisfied that the room where the narcotics were found was under the exclusive possession of the appellant.

PW2 in his evidence confirmed that the wife of the Appellant had come there with her mother. The presence of the Appellant's wife was established in the B Report filed by the police.

The Appellant and the defence witnesses also took up the position that the wife of the Appellant was present at the time of the arrest of the Appellant.

Citing this per se and inter se contradiction, the Counsel for the Appellant had strenuously argued that this raid was not conducted as narrated by the prosecution witnesses and it was an introduction by the police in order to arrest the Appellant.

When comparing the evidence given by the Appellant's wife and the Dock Statement of the Appellant, some inconsistencies had very correctly been noted by the Learned High Court Judge in his judgment. Although the Appellant's position was that he only opened the door when the police arrived, his wife in her evidence stated that she opened the door when the police knocked at the door. Further, the Appellant had not contradicted the position that the keys of the almirah were in his possession.

Considering the evidence given by PW1 and PW2, their evidence had been very consistent and the defence could not create any plausible doubt over their evidence. Further, the evidence regarding presence or non-presence of the Appellant's wife would not able to create a doubt of the prosecution's version. Therefore, acceptance of the prosecution's version had not caused any prejudice to the Appellant.

Further, police are not restricted from doing an investigation beyond the information they receive. In this case, although the information was regarding the possession of a firearm, the investigators were able to detect narcotics in the exclusive possession of the Appellant. Hence, it is incorrect to say that the Appellant was falsely implicated to this incident as the police officers were total strangers to the Appellant.

Learned High Court Judge had very accurately discussed and analysed the evidence pertaining to time consumption for the entire raid and accepted the prosecution's position which clearly demonstrates that the prosecution had passed the test of probability.

Next, the appellant contended that the Learned Trial Judge did not evaluate the defence evidence from the correct perspective and rejected the same in the wrong premise.

In his dock statement, the appellant claimed that PW1 intentionally implicated him in this case. He admits the arrest but disputes that he possessed narcotics as alleged by the prosecution.

Even though the dock statement of an accused has less evidential value, our courts never hesitated to accept the same when it created a doubt on the prosecution case.

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."*

In this case the Learned Trial Judge had very correctly and extensively discussed and analysed the dock statement of the Appellant and the evidence given by two witnesses on behalf of him and correctly concluded that the defence evidence is not able to create any doubt against the overwhelming evidence of the prosecution. He has correctly given reasons as to why he rejected the defence evidence. Thereby, the Learned High Court Judge had considered all the evidence placed in its correct perspective and arrived at the finding to convict the Appellant. Hence, the Learned Counsel for the Appellant had failed to satisfy any merit under these grounds of appeal.

In the third ground of appeal, the Counsel contends that the Learned High Court Judge had performed the role of the prosecutor under Section 165 of the Evidence Ordinance.

Section 165 of the Evidence Ordinance states:

> The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:
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> Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved;

> Provided also that this section shall not authorize any judge to compel any witness to answer any question, or to produce any document, which such witness would be entitled to refuse to answer or produce under sections 121 to 131 both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, excepting the cases herein before excepted.

In a criminal trial it is not uncommon to see an involvement of the judge into proceedings and ask questions as he is, by law, permitted to question the witness. The purpose of questioning by a judge should be to protect the record or direct the presentation of evidence and such questioning may not go further.

In **People v Arnold** 98 N.Y.2d 63 (2002) the New York Court of Appeal held:

> *"Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial".*

Although the power conferred under Section 165 to Judges to question witnesses, it is to be noted that power is subject to inherent limitations.

In **Senanayake v De Silva** 75 NLR 409 the Court held that:

> *"(ii) that the power conferred on the Court by section 165 of the Evidence Ordinance to put questions to a witness is subject to inherent limitations. In the present case, the questioning by the Court of a material witness called by the 2nd respondent was not such an exercise of the powers of the Court as are permitted by section 165 of the Evidence Ordinance."*

In this case, on perusal of the proceedings it is clear that the Learned High Court Judge had not put questions which are detrimental to defence's right. Further, he had not based solely his findings on the questions put to the witnesses by him. Therefore, this ground of appeal also devoid any merit.

In this case PW1 and PW2 are key witnesses. Their evidence is clear, cogent, and unambiguous. The court considering all other evidence presented by the prosecution, without any hesitation relied on that evidence and convicted the Appellant. Further, their evidence has passed the probability test.

As the prosecution had proven this case beyond reasonable doubt, I affirm the conviction and the sentence imposed by the Learned High Court Judge of Colombo dated 13.12.2019 on the Appellant. Therefore, his appeal is dismissed.

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