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

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

Court of Appeal Case No.
CA/HCC/226 A-B/2015

High Court of Colombo
Case N. HC 5847/2011

1. Umagilige Inoka Shayamalee
2. Jacob Richard Victor

ACCUSED-APPELLANTS

vs.

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

COMPLAINANT-RESPONDENT

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

P. Kumararatnam, J.

COUNSEL	:	**Rienzie Arsekularatne, PC with Chamindri Arsekularatne, Udara Muhandiramge, Thilina Punchihewa, Punsisi Gamage, C. Fernando and Himasha Silva for the 1st Appellant.** **Neranjan Jayasinghe with Harshana Ananda for the 2nd Appellant.** **Rohantha Abeysuriya, ASG, PC for the Respondent.**
ARGUED ON	:	**17/11/2023**
DECIDED ON	:	**28/03/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter after referred as the Appellant) were indicted by the Attorney General in the High Court of Colombo as follows:

1. The 1st Appellant was indicted for being in possession of 22.91 grams of Heroin punishable under Section 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

2. The 2nd Appellant was indicted for aiding and abetting 1st Appellant, to be in possession of 22.91 grams of Heroin punishable under Section 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.
3. In the same transaction 1st and 2nd Appellants for trafficking 22.91 grams of Heroin punishable under Section 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

The date of indictment is 15.05.2011.

After trial the Appellants were found guilty on all counts and the Learned High Court Judge of Colombo had imposed death sentence on all three counts on 29.09. 2015.

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

The Learned Counsels for the Appellants informed this court that the Appellant has given consent to argue this matter in his absence due to Covid 19 pandemic. During the argument they were connected via zoom from prison.

<u>On behalf of the 1st Appellant following Grounds of Appeal are raised.</u>

1. Whether it was lawful for the Learned High Court Judge to amend the date of offence in Count number one in the indictment to read as 15.10.2010 instead of 15.10.2011 by placing his signature dated 07.03.2013.
2. Whether it was lawful for the Learned High Court Judge to insert the words “සංශෝධිත චෝදනාව කියවා පහදා දෙමි.” under his signature dated 04.09.2014 (vide page 164 of the brief) after the prosecution closed its

case on 15.05.2013 (Vide pages 234-235 of the brief) and after the defence closed its case on 07.08.2013 (Vide page 462 of the brief).

3. Whether it was lawful for the Learned High Court Judge to rely on Section 439 of the Code of Criminal Procedure Act No.15 of 1979 to allow the prosecution to call witness Nihal Mapitigama Liyanarachchi (retired Government Analyst) (Vide journal entry dated 04.09.2014 at page 48 of the brief and the evidence of the said Liynarachchi at page 470 of the brief).
4. The prosecution failed to explain as to how the weight of Heroin along with the covers which weighed 154 grams (Vide page 95 of the brief) and purportedly the same weighed without covers (Vide page 220 of the brief) 156.5 grams when the Government Analyst weighed on 06.01.2011 (Vide pages 216-223 of the brief).

On behalf of the 2nd Appellant following Ground of Appeal is raised.

1. The Learned High Court Judge has failed to take into consideration that there is a strong likelihood for the prosecution witnesses specially PW1 Rangajeewa to falsely implicate the 2nd Appellant due to the enmity prevailed between him and PW1.

The Learned Counsel for the 2nd Appellant informed this Court that he also sails with the appeal grounds raised by the Learned President's Counsel on behalf of the 1st Appellant.

Background of the case.

According to PW1, IP Rangajeewa, had received information from one of his personal informants at around 4.00 am on 15.05.2010 about trafficking of Heroin in the area of Thalahena. With PW1, seven other police officers

including a woman police officer had reached Thalahena around 6.15 am. Their vehicle was turned towards Halbarawa and parked.

While they were waiting, at about 8.15 am, a scooter bearing No. UW-4158 had approached from the direction of Halbarawa. PW1 had stopped the scooter after proceeding to the middle of the road. The 2nd Appellant was the rider and the 1st was the Appellant was the pillion rider of the scooter. PW2 IP Perera had checked the 2nd Appellant but nothing was found in his possession.

Since the 1st Appellant was shocked and was trying to escape when her husband was being checked, PW1 had decided to search the 1st Appellant. PW3 WPC Hendeniya was entrusted to check the 1st Appellant by taking her to the van. Upon checking, PW3 had found a parcel wrapped with a blue cellophane concealed in the right side pocked of the frock of the 1st Appellant. As the substance in the parcel reacted for Heroin, the Appellants were arrested and taken to their house at Thalahena. Nothing was recovered from their house except cash amounting to Rs.250,000/-. The money was then handed over to mother of the 1st Appellant. The suspected Heroin weighed about 154 grams. The production was properly sealed and registered under production number 98/2010. As the person in charge of the production was not available, the production was kept in the personal locker of PW1 and handed over to PW4, PS 26878 Obeysekera on 17.05.2010.

After obtaining court order, the productions had been handed over to Government Analyst Department on 19/05/2010.

The prosecution led 05 witnesses including the Government Analyst, marked productions and closed the case. Defence was called and the Appellants preferred to give evidence from witness box and closed their case.

Reasonable doubt is legal terminology referring to insufficient evidence that prevents a judge from convicting a defendant of a crime. In a criminal case, it is the job of the prosecution to convince the judge that the defendant is

guilty of the crime with which he has been charged and, therefore, should be convicted. The phrase "beyond a reasonable doubt" means that the evidence presented and the arguments put forward by the prosecution establish the defendant's guilt so clearly that they must be accepted as fact by any rational person.

In **Woolmington v DPP** (1935) the Court ruled that in criminal cases, the burden of proof is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt. The defendant is presumed innocent until proven guilty, and it is not for the defendant to prove his innocence.

As the first two grounds advanced by the Learned President's Counsel for the 1st Appellant are connected to trial procedures, said two grounds will be considered together hereinafter.

The Learned High Court Judge amended the date of offence in the Count one of the indictment to read as 15.10.2010 instead of 15.10.2011 by placing his signature dated 07.03.2013

Section 167 of the Code of Criminal Procedure Act No. 15 of 1979 reads as follows:

1. Any court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials, before the High Court by a jury, before the verdict of the jury is returned.
2. Every such alteration shall be read and explained to the accused.
3. The substitution of one charge for another in an indictment or the addition of a new charge to an indictment and in a Magistrate's Court the substitution of one charge for another or the addition of a new charge shall be deemed to be an alteration of such indictment or charge within the meaning of this section.

The Learned High Court Judge had placed his signature on the indictment after amending the date of offence on 07.03.2013, as the prosecution had made an application to amend the date of offence. But nowhere it mentioned that the said amendment was read and explained to the Appellants. Nearly six months after the said amendment, on 04.09.2014 the Learned High Court Judge in his own handwriting at page 164 of the brief has recorded that the amended charge was read and explained and placed his signature. This was not reflected either in the proceedings dated 04.09.2014 or the journal entry of the said date. Hence, it is crystal clear that the amendment done to the indictment was never read over and explained to the Appellants. This is a clear violation of Section 167 of the Code of Criminal Procedure Act stated above.

In the 3rd ground of appeal, the Learned President's Counsel contended that whether it was lawful for the Learned High Court Judge to rely on Section 439 of the Code of Criminal Procedure Act No.15 of 1979 to allow the prosecution to call witness Nihal Mapitigama Liyanarachchi (retired Government Analyst) (Vide journal entry dated 04.09.2014 at page 48 of the brief and the evidence of the said Liynarachchi at page 470 of the brief).

Section 439 of the Code of Criminal Procedure Act No.15 of 1979 states:

Any court may at any stage of an inquiry, trial, or other proceeding under this Code summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re- examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

In this case the prosecution closed its case on 15.05.2013. Defence was called the Appellants opted to give evidence from the witness box and closed their case on 07.08.2013.

Thereafter, corrections have been carried out on 23.09.2013 and on that day, the case has been postponed to 01.11.2013 for written submissions of both parties. The written submissions were filed on 12.12.2013 and the case was fixed for oral submissions on 19.02.2014. But the journal entry of 12.12.2013 states that the case had been fixed for oral submissions on 27.01.2014. As the trial judge has got transferred, the oral submissions had finally been fixed on 04.09.2014.

When this matter came up for oral submissions on 04.09.2014, the Learned State counsel made an application to call PW5 under Section 439 of the Code of Criminal Procedure Act No. 15 of 1979. At that point the Learned High Court Judge without consulting the defence allowed the application. Thereafter, on 14.05.2015, the evidence of PW5 was led. The evidence of PW5 was recorded nearly 02 years after the defence closed their case.

In **M.K.Francis Alwis v The Queen** 70 NLR 558 the court held that:

> *"Where, after the cases for the prosecution and the defence have been closed, the Court, purporting to act under section 429 of the Criminal Procedure Code, calls a fresh witness whose name appears on the list of witnesses contained in the indictment, it would be wrong to direct the jurors that the fresh evidence may be relied upon, either by itself or as corroboration of the evidence of the principal witness for the prosecution, to convict the accused".*

In **David v Idroos** 45 NLR 300 the court held that:

> *"The power given by section 429 of the Criminal Procedure Code to a Magistrate- to summon and examine a witness at any stage of the trial should not be exercised in order to call evidence after the defence is closed, if such evidence puts the accused at an unfair disadvantage".*

In **Vendendriesen v Houwa Umma** 39 NLR 65 the court held that:

> *"that evidence for the prosecution should not be taken after the case for the prosecution has been closed, when such evidence will have the effect either of filling in a gap left in the evidence or resolving some doubt in favour of the prosecution".*

As correctly argued by the Learned President's Counsel, Section 439 of the CPC cannot be invoked to fill the gaps of the prosecution case. This is clear misdirection of the law by the Learned High Court Judge.

In the final ground of appeal, the Learned President's Counsel argued that the prosecution failed to explain as to how the weight of Heroin along with the covers which weighed 154 grams (Vide page 95 of the brief) and purportedly the same weighed without covers (Vide page 220 of the brief) 156.5 grams when the Government Analyst weighed on 06.01.2011 (Vide pages 216-223 of the brief).

Weight is vital to drug charges and matters very seriously in a drug prosecution. *Chain of custody* refers to the documentation that establishes a record of the control, transfer, and disposition of evidence in a criminal case. In drug related cases the prosecution not only need to prove the case beyond reasonable doubt but also ensure, with cogent evidence that the inward journey of the production has not been disturbed at the all-material point.

To prove someone guilty for possession and trafficking drugs, a prosecutor must prove that the evidence presented in court is the same evidence that was recovered at the time of the arrest of an accused. They must be able to show that the evidence was handled properly and was not contaminated or tampered with. If law enforcement does not properly handle the recovery evidence, the evidence can be challenged on the grounds that it was tampered with, that test results are faulty or inaccurate, or that evidence was planted at the time of arrest as the criminal prosecutions rely on evidence gathered by police officers, and it is typically the prosecutors who must establish the chain of custody.

Proving the chain of custody can be difficult. If law enforcement does not do it correctly, chain of custody can be successfully challenged in a criminal case.

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 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 where the identity of the good analysis for examination has to be proved beyond reasonable doubt. A prosecutor should take pains to ensure that the chain of events pertaining to the productions that had been taken charge from the Appellant from the time it was taken into custody to the time it reaches the Government Analyst and comes back to the court should be established".*

The Learned President's Counsel takes up the position that the Learned Trial Judge misdirected himself by failing to analyse the discontinuation of custody of production chain, which is a substantial fact, which the prosecution shall prove beyond reasonable doubt and thereby the conviction is bad in law and unsafe.

According to chief investigation officer PW1 IP Rangajeewa, the substance found in the possession of the 1st Appellant was weighed using a scale used in the Police Narcotics Bureau. The parcel in original shape was weighed and it showed 154 grams. The substance was not weight separately. According to PW1, the parcel was contained three wrappings.

PW5, Government Analyst gave evidence that the parcel received by the Department on 19.05.2010 indicated on its cover that it weighed 154 grams. However, when she weighed the said parcel on 06.01.2011 without the cover, it weighed 156.5 grams. According to the reason for this weight difference could be that the Government Analyst Department use a more accurate scale. This discrepancy cannot occur in this case as the initial weighing had been done at the Police Narcotics Bureau which is a specialist unit in the Police Department to deal with narcotics. This unit is equipped with sophisticated weighing machines and other equipment.

The Learned President's Counsel argued the fact that the accuracy of scale that has been used to weigh the Heroin at the Government Analys's Department itself cannot explain the difference of 2.5 grams of Heroin, thereby, such inaccuracy leads to a conviction of the Appellants with a death sentence under the under the Poisons Opium and Dangerous Drugs Act. Hence, the Learned President's Counsel strenuously argued that the prosecution has not properly explained the difference in the weight of the Heroin which fortifies the case of the defence that the Heroin was introduced.

It is very important to consider at this stage whether the above-mentioned discrepancy in handling productions in drug related matters cause any reasonable doubt over the prosecution case as claimed by the Appellants. To consider this issue it is very important to discuss our Higher Court's approach with regard to handling evidence pertaining to productions in drug related matters.

In **Faiza Hanoon Yoosuf v. Attorney General CA/121/2002** it was held that:

> *"….. 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".*

As this weight discrepancy is a substantial fact, the prosecution had not put relevant questions either to PW1 or to the Government Analyst to explain the reason. Considering the pure Heroin detected in this case, this weight discrepancy is very significant one which certainly has impacted on the outcome of the net result of the Government Analyst.

The Learned Counsel for the 2nd Appellant while sailing with the appeal grounds raised on behalf of the 1st Appellant, submitted to this Court that the Learned High Court Judge has failed to take into consideration that there is a strong likelihood for the prosecution witnesses specially PW1 Rangajeewa to falsely implicate the 2nd Appellant due to an enmity prevailed between him and PW1 as the 2nd Appellant was an ex-police officer. He submitted further, that the PW1 had kept the production in his personal locker until 17.05.2020.

All appeal grounds raised by the Counsels for the 1st and 2nd Appellants have merit. Among them the weight discrepancy is in a drug related prosecution is very significant and which certainly affect the outcome of the case.

In **Mahasarukkalige Chandani V. Attorney General** CA/213/2009 decided on 30/06/2016 His Lordship Justice Malalgoda held that:

> *"Since the court is not inclined to act on the evidence placed by the prosecution in establishing the inward journey as safe, it is not*

necessary for this court to consider the other grounds of the appeal raised by the Learned counsel during the argument before us".

Due to aforesaid reasons, we set aside the conviction and sentence imposed by Learned High Court Judge of Colombo dated 29/09/2015 on the Appellants. Therefore, they are acquitted from their respective charges.

Accordingly, the appeal is allowed.

The Registrar is directed to send this judgment to 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