

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.*

Court of Appeal No:

CA/HCC/0185/18

The Democratic Socialist Republic of Sri
Lanka

COMPLAINANT

Vs.

High Court of Colombo

Case No: HC/7491/2014

Selvaraj Wasantharani

ACCUSED

AND NOW BETWEEN

Selvaraj Wasantharani

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Tenny Fernando with Terin Marasinghe for the
Accused-Appellant
: Azard Navavi, S.D.S.G. for the Complainant-
Respondent
Argued on : 01-08-2024
Written Submissions : 25-06-2019 (By the Accused-Appellant)
: 08-02-2021 (By the Complainant-Respondent)
Decided on : 21-10-2024

Sampath B. Abayakoon, J.

This is an appeal preferred by the accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of her conviction and the sentence dated 27-04-2018 by the learned High Court Judge of Colombo.

The appellant was indicted before the High Court of Colombo for trafficking 4.73 grams of Diacetylmorphine, which is a prohibited drug, commonly known as Heroin, and thereby committing an offence in terms of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Amendment Act No. 13 of 2004, which is an offence punishable in terms of the same Ordinance. The offence is said to have been committed on 01-02-2014.

She was also indicted for having in her possession, the same quantity of the drug, which is also an offence punishable in terms of the same Ordinance as stated above.

After trial, the learned High Court Judge of Colombo found her guilty of the 2nd count preferred against her, which was the charge of possession of Heroin. She

was acquitted of the 1st count. Accordingly, after having considered the aggravating and mitigatory circumstances, the learned High Court Judge sentenced her to life imprisonment.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant, although he has raised several grounds of appeal in his written submissions, confined his grounds of appeal to the following.

1. The learned High Court Judge failed to consider the improbabilities in the evidence adduced by the prosecution.
2. The learned High Court Judge failed to consider the dock statement of the appellant in line with the defence version of events.

Before considering the above grounds of appeal, I find it appropriate to consider the evidence led in this case in brief.

The Evidence in Brief

PW-01 was the Police Inspector who conducted this detection along with several other subordinate officers. He was functioning as the Officer-in-Charge of the Vice-Prevention Unit of the Colombo Crimes Division. On 01-02-2014, PW-01, along with several other officers, including WPC 8041 Anusha, has left their unit, which was situated in Dematagoda area. PW-01 had been wearing his official uniform while all the other officers had been in civilian clothing. After making the necessary entries and completing the relevant procedural steps, the team has left in a white-coloured Dolphin Van belonging to the Police Department. They have left the station at 10.00 a.m. for routine vice-prevention duties.

After travelling to several areas, the police team have come to the Technical Junction in Colombo 12 from the direction of the Tower Hall theater, and has turned left and had entered Adhikarana Mawatha, which was again to the left side of Sangharaja Mawatha. They have stopped the vehicle in front of the temple situated at Adhikarana Mawatha, and PW-01, along with the earlier mentioned

WPC Anusha and several other officers, had gotten down from the vehicle and had entered the Locket Lane situated to their right side.

While walking 25–30 meters on that lane, PW-01 has observed a female coming out of a house that was about 10–15 feet away from them, and she, after walking about 4–5 feet, turning and going towards the house again. This has arisen his suspicion and he has immediately rushed towards the female along with the other officers and had detained her. She had been a woman of about 40-50 years of age, wearing a blue-coloured long dress. He had managed to stop her in front of the veranda of the house, just in front of the main entrance.

After the detention, PW-01 has instructed WPC Anusha to search the female. WPC Anusha has recovered a pink-coloured cellophane bag, which contained a kind of a powder from the right-hand side pocket of the dress worn by the female. The cellophane bag has had a knot on the top. When opened and inspected, PW-01 has realized through his experience that the powder contained Heroin.

After the detection, he and his team had searched the house where they had not been able to find anything incriminating. PW-01 has taken steps to place the quantity of Heroin he found in an envelope and to keep it with him. At the time of the raid, the only other inmate of the house had been a girl of about 9 years of age. After the detection and the arrest of the female, whom PW-01 has identified as the appellant at the trial, the police team had travelled to Dedigama Pawning Center situated on the Baseline Road in order to weigh the contents. When weighed using the electronic scale available at the pawning center, they have found that the suspected parcel contained 15 grams and 100 milligrams.

Thereafter, PW-01 has taken steps to seal the productions in front of the appellant, and had returned to the police station. According to the evidence of PW-01, the police party has reached Adhikarana Mawatha at 16.15 hours and the appellant had been arrested at 16.20 hours. After the search of the house, weighing of the parcel and sealing the same, the police party has returned to their police unit at 17.40 hours. PW-01 has taken steps to enter the suspected

Heroin parcel under the PR number 159/2014 and handover it to the reserve officer at the police station. After coming to his unit, he has entered his in-entry at 17.50 hours. He has also taken steps to handover the suspect, who is the appellant, to the police reserve and had directed one of his subordinate officers to record her statement.

Subsequently, the appellant has been produced before the learned Magistrate of Maligakanda and remanded. He has also taken steps to forward the detected quantity of the suspected drug to the Government Analyst for a Report.

At the trial, the PW-01 has identified the productions recovered, and had marked them accordingly.

The position taken up by the appellant while cross-examining PW-01 had been that PW-01 and his team came to Locket Lane looking for a known drug dealer called Lena Paba, and since they could not find her, believing that the appellant is one of her associates, she was arrested, and the witness was uttering a falsehood.

To corroborate the evidence of PW-01, the prosecution has called WPC 8041 Anusha, who was the officer who assisted PW-01 in the arrest. She has testified to the effect that she, along with the team led by PW-01, went on routine patrol duty on the day relevant to this detection, and came to the road that leads to Locket Lane. She has stated that after parking their vehicle in front of the temple, they walked towards the Locket Lane where she has observed a female coming out of a house and turning back. She has corroborated the evidence of PW-01 as to the detention of the female on suspicion and says that upon the orders given by PW-01, she searched the female and found a parcel in a pink-coloured cellophane bag in the right-hand side pocket of the dress worn by the female. When the parcel was given to PW-01, he has inspected the contents and had confirmed that the parcel contained Heroin.

She has also given evidence to corroborate the subsequent steps taken by PW-01 and his team to weigh the productions and handover the female arrested and

the productions to the police. She has testified that she was a witness for all the procedural steps as well. At the trial, she has identified the productions and has also identified the appellant as the female she searched and recovered the parcel of Heroin.

Under cross-examination, the witness has admitted that she has not made detailed notes about the routes she and her team took on that day, before coming near the lane where the raid took place, but has taken up the stand that it is usually the officer who leads the team who takes such notes.

The defence has made the same suggestion to the witness as well, denying that the appellant had any Heroin. The witness has stated that the appellant was arrested because Heroin was detected from her possession.

The Government Analyst who has given evidence as PW-15 has confirmed that the Government Analyst received the sealed parcel containing a substance suspected to be Heroin on 03-02-2014 and she did the analysis on 21-02-2014.

When weighing the gross quantity of the contents, it has shown a weight of 14.73 grams which was different to the gross weight stated by PW-01, who says that when he got the contents weighed at Dedigama Pawning Center, it showed a weight of 15.1 grams. However, the Government Analyst has clearly explained the probable reasons for such a small weight difference that can occur due to various factors, but has stated that since the Government Analyst weighed the productions under strict laboratory conditions, the accurate weight can vary in this manner. After analysis, the Government Analyst has found 4.73 grams of pure Heroin in the parcel sent to the Government Analyst Department. The Government Analyst has identified the productions sent to the Department at the trial confirming that it was she who analyzed the contents.

At the trial, the accused had admitted the chain of custody of productions from the time of detection, and accordingly, that fact has been recorded as an admission in terms of section 420 of the Code of Criminal Procedure Act.

At the conclusion of the prosecution evidence, the learned High Court Judge has decided to call for a defence of the appellant where she has made a dock statement. In her dock statement, the position taken up by her had been that while she was watching TV in her house on 01-02-2014, a police team along with a female police officer came and inquired from her as to the house of Lena Paba, and she told them that her house is about 4 or 5 houses away from hers. It had been her position that the police insisted she is the one who was hiding Lena Paba and she should help them to locate her, and took her into custody. She has claimed that after she was taken to the police station, she was questioned and was unaware of what was written. She has also claimed that it was only after she was produced before the Maligakanda Magistrate's Court, she came to know that Heroin has been introduced to her.

The Consideration of the Grounds of Appeal

With the above facts in mind, I will now proceed to consider the grounds of appeal urged by the learned Counsel on behalf of the appellant.

In the 1st ground of appeal, the learned Counsel urged that the learned High Court Judge has failed to consider the inconsistencies and improbabilities in the evidence of the prosecution witnesses. Although the learned Counsel claimed that there are improbabilities in the version of events as stated by prosecution witnesses, I am unable to find a reason to agree with such a contention.

The evidence of PW-01 and 02 is to the effect that the police team led by PW-01 left their station around 10.00 a.m. for usual vice-prevention duties and after travelling to several areas, reached the place where the detection was made. I do not find PW-09 not making detailed entries as to the other places where they travelled during the day in her notes as to this raid as a major discrepancy in her evidence.

At no stage of the trial, the appellant has not denied that the team of police officers led by PW-01 including PW-09 came to Locket Lane where she was arrested. In fact, it was an admitted fact, the only difference being the claim that

the appellant was inside the house when the police team arrived at her house. Therefore, based on that admission, as viewed correctly by the learned High Court Judge, any minor discrepancy as to where the police team travelled during the day would have no impact whatsoever in the evidence of PW-01 and 09.

It was contended that the piece of evidence in relation to the way the appellant has come and attempted to turn back was not probable. It was claimed that if that was the case, she should have either attempted to run away or throw away whatever she was carrying.

However, the clear evidence of PW-01 as well as that of PW-09 in that regard had been that they saw the appellant at a very close range coming out of her house, walking a few feet towards them and turning back after seeing them. PW-01 says that there was no room for the appellant to run away or throw away what she was carrying due to the close proximity of the appellant to PW-01 and his team, and they were able to apprehend her within few seconds of their suspicions being raised. Under the circumstances, it is my considered view that unlike in a case where there was some distance between the raiding party and the suspect when a suspect sees the raiding party, a person who meets a police team at a very close range cannot be expected to have the ability to run away or throw whatever he or she was carrying which can be easily observed by the police party or raise their suspicions to a higher level.

Therefore, I am unable to agree the earlier considered piece of evidence as improbable. The learned Counsel raised the question whether a police party would leave a 9-year-old child at home, virtually abandoning her without a guardian as stated by PW-01. However, the evidence is that when they arrested the appellant, there was a girl child who was about 9 years of age at the house. Nowhere in the evidence or in the dock statement of the appellant, she has claimed that the child was left abandoned by the police after her arrest, which means that the child has been taken care by someone else after the raid.

I am unable to find anything unusual in PW-09 not proceeding to body search the appellant any further after she recovered a parcel from the right-side pocket of the dress the appellant was wearing. After the finding, the police team has searched her house which is also not unusual.

It was contended that the appellant has consistently maintained her defence that the police party came looking for someone else, and when they could not find her, the appellant was arrested instead.

The fact the defence version being consistent is not a reason to doubt the prosecution evidence. I find that the learned High Court Judge has considered the evidence being very well mindful of the legal requirement that it was the prosecution who should prove its case beyond reasonable doubt. The learned High Court Judge has well considered the argued improbabilities of the version of events, but has concluded with sound reasoning that the claimed improbabilities cannot have a bearing on the prosecution case or has not created a reasonable doubt.

The learned High Court Judge has considered the defence in order to determine whether it has created a reasonable doubt as to the prosecution case or at least has provided a reasonable explanation, as to the prosecution case.

I am of the view that the learned High Court Judge has correctly determined on the relevant questions of law that he should have considered and the facts of the matter in its correct perspective when analyzing the evidence placed before the Court.

As correctly stated by the learned Senior Deputy Solicitor General (SDSG) who represented the Hon. Attorney General, beyond reasonable doubt does not mean beyond any fanciful doubt.

In the case of **State of Punjab Vs. Karnail Singh (2003) 11 SCC 271**, it was held:

*“Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape, than punish an innocent. Letting guilty escape is not doing justice according to law. Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. Vague hunches cannot take place of judicial evaluation. ‘A Judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties.’ (Per Viscount Simon in *Stirland Vs. Director of Public Prosecution* (1944 AC(PC) 315) quoted in *State of U.P. Vs. Anil Singh* (AIR 1988 SC 1998). Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.”*

In the case of **Ramakant Rai Vs. Madan Rai AIR 2004 SC at 84**, it was stated,

“A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however no absolute standard. What degree of probability amounts to ‘proof’ is an exercise particular to each case. Doubts would be called

reasonable if they are free from a zest for abstract speculation. Law cannot afford any favorite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary trivial or a merely possible doubt: but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. The concepts of probability, and the degree of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and ultimately, on the trained intuitions of the Judge. While the protection given by the criminal proceeds to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice.”

For the reasons as considered above, I find no merit in the grounds of appeal urged. Accordingly, the appeal is dismissed. The sentence and the conviction dated 27-04-2018 affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal