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

In the matter of an Appeal under Section 154(P) of the Constitution read with Article 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:
CA/HCC/39/2020

The Democratic Socialist Republic of Sri Lanka.

Plaintiff

Vs.

1. Nagaratnam Nagalectchami *Alias* Rajeswari
2. Subramaniam Virantha Priyadarshana *Alias* Dharshana

Accused

AND NOW

Nagaratnam Nagalectchami *Alias* Rajeswari

Accused – Appellant

Vs.

The Democratic Socialist Republic of Sri Lanka.

Plaintiff-Respondent

Before : Menaka Wijesundera J.
Wickum A. Kaluarachchi J.

Counsel : Neranajan Jayasinghe with Harshana Ananda, Randula Heelage and Imanzi Senarath for the Accused-Appellant.

Azard Navavi, SDSG for the Respondent.

Argued on : 25.07.2024

Decided on : 03.09.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgement dated 28th May 2020.

The accused-appellant has been indicted with another for being in possession of 3.43 grammes of heroin and trafficking of the same on or about 26th June 2007. The accused-appellant has pleaded not guilty and the trial has commenced and the prosecution has led the evidence of the raiding officers, the Government analyst and the accused-appellant, had made a statement from the dock. Upon the conclusion of the trial, the learned trial judge had acquitted the other accused and has convicted the accused-appellant for the charges in the indictment and has passed a life imprisonment.

The accused-appellant, being aggrieved by the said conviction and sentence, had filed the instant appeal and raised the following grounds of appeal,

1. The prosecution has not proved its case beyond a reasonable doubt and the trial judge has failed to properly analyse the evidence
2. The trial judge has failed to consider the contradictions and omissions in the prosecution's case,
3. The trial judge has wrongly rejected the dock statement.

The main witness for the prosecution has been PW-01, according to whom, on the date of offence, he had received an information at 4.25am, which had made him prepare a police team and leave the Police Narcotics Bureau to reach the Madampe cemetery around 5.20 am for the instant detection.

At the cemetery they had waited till about 12 noon when the informant had instructed them to follow him to proceed to Kimbula ela at Modara. PW-01 and the others had left in a three-wheeler behind the informant. They had gone to Kimbula ela at Modara and had stayed till 1.20pm, when the informant had showed them a three-wheeler, asking them to follow the same. On doing so they had seen this particular three-wheeler stopping in front of a house and the driver getting out of the three-wheeler and going near a house.

At that point they had seen the appellant coming out of the house and taking a parcel from him. PW-01 and PW-02 had immediately taken steps, to take the appellant into custody and PW-02, who was a woman Police Constable, had body searched the appellant. While doing so,PW-02 had found the appellant clutching a parcel in her hand. That particular parcel had been taken into custody by PW-01. The substance inside the parcel, they had suspected to be heroin and PW-01 had kept it in his custody until they had reached the Police station.

Thereafter, they had searched the appellant's house and from the kitchen, in a bottle, they had found a powder which they suspected to be heroin. These two parcels, recovered from the custody of the appellant and from her kitchen, had been separately kept in the custody of PW-01 until they reached the police station.

Once they reached the Police station, the first parcel, taken from the custody of the appellant, had been sealed separately as N1 and the second parcel, taken into custody from the house of the appellant, had been sealed as N2.

These two parcels, marked as N1 and N2, were put into one envelope and had been sent to the Government analyst. The Government analyst, in evidence had said that, N1 and N2 were separately sealed and that the seals had been intact. But the Government analyst had detected heroin only in the parcel marked as N1 and not in N2.

When PW-01 was led in evidence-in-chief, the existence of N2 was not revealed in evidence. But during cross-examination of PW-01 the existence of N2 was brought in.

Therefore, the counsel for the accused-appellant submitted that the failure on the part of the prosecution to lead evidence with regards to the existence of N2, in evidence-in-chief and the Government analyst not detecting heroin in N2, creates a reasonable doubt in the case for the prosecution.

Evidence of PW-02 has also been led and she corroborates the evidence of PW-01, but there were certain contradictions marked in evidence between PW-01 and PW-02, which the trial judge had considered to be of no importance because it has not gone to the root of the case.

Thereafter, the case for the prosecution had closed and the appellant had made a statement from the dock denying the whole incident.

Having considered the submissions of both parties, it is the opinion of this court that the argument of the learned counsel pertaining to the two parcels, marked as N1 and N2, does not carry any weight because the said two parcels had been kept separately from each other from the time of arrest and until it

was sent for analysis. Furthermore, it had been meticulously sealed separately. Therefore, the recovery of N2 and the non analysis of any heroin in N2 does not create any reasonable doubt in the case for the prosecution. It would have certainly created a confusion in the case for the prosecution if the contents of N1 and N2 had been mixed together and sealed. This has not been so in the instant case.

It has been said in the case of **Shivaji Sahebrao Bobade and Anr. V State of Maharashtra** 1973 AIR 2622, 1974 SCR(1) 489, that "*The cherished principles of the golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch and degree of doubt.... Or else any practical system of justice will breakdown and lose credibility with the community.*" which we think is very appropriate to be mindful of at this stage.

The other contention for the learned counsel of the accused-appellant is that the informant travelling with the accused-appellant, at the time of the investigation, in the three-wheeler being very remote and improbable, because the identity of the informant is generally not revealed.

But it is the opinion of this court that as long as the identity of the informant is closely guarded, the informant could be among the investigators during the investigation for more clarity and for good assistance. Therefore, we see no merit in the first ground of appeal.

The second ground of appeal is that the trial judge has not considered the omissions and contradictions.

The learned counsel has pointed out in page 161, 266, 183, 184, with regards to the three contradictions he has brought to the notice of this court. But upon perusal of the three contradictions, we find that it has not gone to the root of the case. Therefore, it is the opinion of this court that it had had no impact in the case for the prosecution. The learned counsel for the accused-appellant had stated that the trial judge has not considered the above contradictions, but we find it to be wholly incorrect, because the learned trial judge had considered them very meticulously and carefully at page 9 and 16 of his judgement and had gone on to state the case of **Devundarage Nihal v Attorney General** CA 125/2008, decided on 04/05/2008 and **Senaka Priyantha v Attorney General**, CA 91/2008, decided on 30/09/2011. Therefore, in the second ground of appeal we see no merit as well.

The third ground of appeal has been that the trial judge has rejected the dock statement wrongly.

The trial judge has considered the dock statement in page 21 in his judgement and had concluded that that he is unable to accept the contents of it because

he had not found it to be truthful. He concluded that the prosecution has proved the two charges against the accused-appellant beyond a reasonable doubt.

Merely because a judge concludes that the contents of a dock statement is not true, does not mean that he has considered the defence case wrongly.

It has been held in the case if **Mataralage Nishantha Sampath v Hon Attorney General**, CA Appeal No. 82/2011, decided on 31/10/2013, by Sisira J, De Abrew J, where it has been held that, *" The guidelines pertaining to a dock statement and they are, 1) If the dock statement is believed it must be acted upon, 2) If the dock statement creates a reasonable doubt in the case for the prosecution, defence of the accused must succeed, 3) Dock statement of one accused must not be used against the other.*

The judgement has referred to **Kularatne v Queen** *71 NLR 529, which has said that the dock statement must be considered as evidence, subject to the infirmities that it is not made under oath and it is not subject to cross-examination."*

Therefore, in the instant matter, the trial judge has not been able to believe the contents of the dock statement and has rejected the same, which is entirely within the discretion of the trial judge.

Therefore, it is the considered view of this court that we are unable to accept the grounds of appeal raised by the learned counsel for the appellant and is of the view that there is no reason to set aside the conviction and sentence given by the trial judge against the appellant.

We are also mindful that it has been held in the case of **Fattal v Wallbrooke Trustee (Jersey) Ltd**, CA (2008) EWCA Civ 427 Court of Appeal of England and Wales observe that, "*An Appellate Court should not interfere with case management decisions by the judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which irrelevant".* This has been quoted in the judgement **Kahandagamage Dharmasiri v The Republic of Sri Lanka**, SC Appeal 4/2009, decided on 3/2/2012, by Justice Thilikawardena, who had also quoted **Ambikar Prasad and another v State of New Delhi** 2000 SCCCrl.5221, which had said that, *"a criminal trial was meant to do justice for the accused, victim and the society so that law and order is maintained. A judge doesn't 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. One is as important as the other, both are public duties.*"

Therefore, for the aforesaid reasons, the instant appeal is dismissed and the judgement and sentence of the trial judge is affirmed.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal