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/0332/2018

Mohomad Mansoor Mohomad Asmin

High Court of Colombo
Case No: HC/527/2001

Accused-Appellant

Vs.

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

Complainant-Respondent

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

COUNSEL : **Saliya Peiris, PC, with Pasindu Thilakaratne and Mark Fernando for the Appellant.**
Azard Navavi, SDSG for the Respondent.

ARGUED ON : **05/07/2024**

DECIDED ON : **11/10/2024**

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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 Section 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession of 2.67 grams of Heroin (diacetylmorphine) on 04.07.2000.

After trial, the Appellant was found guilty as charged and the Learned High Court Judge of Colombo sentenced the Appellant to life imprisonment on 31.08. 2018.

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

The Learned Counsel for the Appellant informed this court that the Appellant has given his consent to argue this matter in his absence. At the hearing, the Appellant was connected via Zoom platform from prison.

In this case, the raid was conducted based on a specific information received. The raid was headed by PW1 along with seven police officers from the Police Narcotics Bureau. Each of them including the Government Analyst has been named as witnesses in the indictment. The prosecution had called PW1,

PW2, PW4, and PW09 and marked productions P1 to P7 and Z in support of their case. The Government Analyst's qualifications were admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979.

When the defence was called, the Appellant had given evidence from the witness box and called four witnesses to provide evidence on his behalf and moved for further time to call more witnesses. Due to an unforeseen incident, this matter came before a new judge on 02.12.2004. On that day the defence Counsel made an application for a trial de novo. The application was accepted and a trial *de novo* was ordered. When this matter came before another judge on 07.06.2005, the same *de novo* application was made by the appellant and amidst great resistance from the prosecution the learned High Court Judge holding in favour of the Appellant, ordered a *de novo* trial and all prosecution witnesses were summoned. Hence, a new trial commenced on 09.11.2005.

After leading the evidence of PW1, PW2, and PW4, the prosecution made an application to adopt the evidence of PW9, the Government Analyst who gave evidence in the first trial before the learned High Court Judge (deceased). As the defence did not object, it was decided to adopt only the evidence given by PW9 in the first trial. After closing of the prosecution, the defence was called and the learned Counsel for the defence filed a list of witnesses amounting to about 11 witnesses. As several witnesses out of the 11 had already given evidence in the first trial, the Counsel for the Appellant made an application to adopt their evidence too. The application was allowed and summons issued only against the remaining witnesses in the defence list.

When the Appellant gave evidence, he stated that he was not arrested with Heroin as contended but was arrested at his residence. At that point, the learned High Court Judge misunderstanding that the Appellant was going to raise the defence of alibi, disallowed the evidence that the Appellant was arrested at his residence. Due to this order, the learned Counsel for the Appellant informed the Court that he was unable to call the remaining witnesses without leading evidence that the Appellant was arrested at his

residence. Hence, the defence was closed and the case was fixed for submissions.

A revision application under case No. **CA/PHC/APN 116/2010** was filed to quash the order made by learned High Court Judge on 11.05.2010. After hearing both the sides, His Lordship P/CA held that:

> *"Learned Senior State Counsel who appears for the Attorney General contends that due process and ends of justice would be best served if this matter goes back to the High Court for the evidence that had been excluded, to be led afresh and the trial concluded to a finish, for the reason that the same evidence had been permitted at the previous trial in 2004 and that can be considered as a notice given to the prosecution of the case that the accused was seeking to present at his trial.*
>
> *Learned Counsel for the accused-petitioner also submits that he has no objection to the adoption of the entire prosecution evidence that had been led up to the point of the conclusion of the prosecution case. He further submits that the defence evidence at the further trial would focus mostly on items of evidence that were excluded by the trial Judge.*
>
> *In the circumstances, this Court is of the view that the order made by the learned High Court Judge dated 11.05.2010 (P2) should be set aside and the matter is sent back for further trial."*

As per the above Judgment, the learned High Court Judge on 28.04.2015 and 27.06.2016 made an order to continue the trial with the evidence led at that point and allowed the defence to file their list of witnesses. On 29.09.2015 the Appellant was present, but a date was moved for the defence trial. Hence, further trial was fixed for 27.06.2016. On that it was brought to the notice of the Court that the Appellant was receiving treatment at Ward No.60 of the National Hospital of Colombo. On the next day the Appellant continued to be absent but his surety, his mother was present and informed that the whereabouts of the Appellant was not known to her and that she was not in a position to produce him before Court. Hence, an open warrant

was issued against the Appellant and the matter was fixed for further trial on 29.07.2016.

On that day, the Counsel for the Appellant informed the Court that the Appellant had given written consent which had been received via registered post, authorizing his Counsel Saliya Peiris, PC and his junior to continue the case in his absence. This application was refused by the learned High Court Judge.

Thereafter, evidence under Section 241(1) of the Code of Criminal Procedure Act was led and the case was concluded in his absence.

Background of the case.

On 04.07.2000 around 2.05 p.m., PW4 Senaratna PC/30762 attached to the Police Narcotics Bureau had received information from his personal informer that a person from 391 Watta was trafficking Heroin near the Bo-tree at Thotalanga. Acting on this information, a police party led by PW1 IP/Kumaratunga had gone to the place mentioned in the received information around 3.10 p.m. At the place the police party had met the informer and PW1 had directed PW4 and PW3 to accompany the informer to obtain the identification of the alleged trafficker. All personnel had lingered near a building and after about 10 minutes the informer had left after indicating the Appellant to PW4 and PW3 and had. Thereafter, the Appellant was arrested by PW4 and PW3 and they had called for PW1, who was in the jeep. PW1 had rushed to the scene and had conducted the search and which had revealed a cellophane bag with some substance in his right-side trouser pocket. Upon the substances in the parcel being recovered from the Appellant reacting for Heroin (diacetylmorphine), he was arrested and subjected to further investigation. As the investigation revealed that his house was located 15 to 20 meters away, the police party had gone to the Appellant's house and had done a search but had not been successful in recovering any more illegal substances.

Thereafter, the police party had returned to the bureau, sealed the production, entered a record under the production register and handed over the production to PW2 who was the production officer of the bureau.

Thereafter, PW4 was called to give evidence to corroborate the evidence of PW1 and it was followed by the evidence given by the Government Analyst and PW9.

The following Grounds of Appeal were raised on behalf of the Appellant.

1. Whether the learned High Court Judge erred in law in refusing the application made under Section 241(2) of the Code of Criminal Procedure Act No. 15 of 1979.
2. Whether the learned High Court Judge fairly and squarely evaluated the evidence of the defence.
3. Whether PW1 and PW4 are credible witnesses.
4. Whether the learned High Court Judge by disallowing the Appellant to be represented and defended by counsel deprived the Appellant of the benefit of the outcome in CA (PHC) APN 116/2010 and thus permitted the previous erroneous order pertaining to *alibi* to remain.

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 provided 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".*

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

> *"the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice".*

In the first ground of appeal the learned President's Counsel contended that refusing an application made under Section 241(2) of the Code of Criminal Procedure Act is wrong and the Appellant is deprived a statutory right, thereby denied a fair trial.

Section 241(2) of the Code of Criminal Procedure Act states:

> The commencement or continuation of a trial under this section, shall not be deed or construed to affect or prejudice the right of such person to be defended by an attorney-at-law at such trial.

In **Mohamed Buhary Mohamed Asmin v Attorney General** CA/240/2010 decided on 09.10.2014 the Court held that:

> *"As per Section 241 (2) of the Code, it is very clear that the commencement or continuance of the trial under this Section shall not be deemed or*

constitute to affect or prejudice the right of such person to be defended by an attorney at law, at the 'trial.

This court observes that, to be defended by an Attorney-at-law is a fundamental right which cannot be denied to an accused party."

In **Thilakaratne v Attorney General** [1989] 2 SLR 191 the Court held that:

"Section 241(2) does not make it obligatory for court to assign a counsel to defend an absent accused. This subsection applies to a case where an absent accused or someone on his behalf retains a counsel to defend him in absentia, or to a case where, a counsel (assigned or retained) is defending an accused who absconds during the course of the trial."

Considering the above judgments, it is crystal clear that the learned High Court Judge who made the refusal order had erred in law and caused great prejudice to the Appellant. Further, whatever the justification given regarding Section 241(2) of the Code of Criminal Procedure Act, refusal of an appeal by the learned High Court Judge who wrote the judgement is totally unreasonable and he had overlooked the fundamental rights guaranteed under Article 13(3) of the Constitution. This has caused another serious procedural mishap in this case.

In the second ground of appeal, the learned President's Counsel contended that the learned High Court Judge had not fairly and squarely evaluated the evidence of the defence.

Each accused is entitled to public, fair proceedings conducted impartially and in full equality. A strong defence is a vital component of a fair trial. The defence Counsel represent and protect the rights of the accused. All accused persons are presumed innocent until proven guilty beyond reasonable doubt before the Court. Evidence plays a crucial role in proving or disproving an accused's guilt and building a solid defence. As the admissibility of the evidence is a critical factor, each piece of evidence must be carefully examined and evaluated for its admissibility and relevance to the case.

The learned President's Counsel highlighting the following points, contended that the learned High Court Judge had not evaluated and analysed the defence in his judgment. The points are set out below:

- That PW4 had arrested the Appellant in February few months prior to the impugned raid.
- That during said arrest the Appellant was severely beaten by the police and he was treated at the National Hospital Colombo.
- That on the day of the incident on 04.07.2000 the Appellant was arrested at his home while he was having his lunch and the Appellant was wearing a sarong? at the time of the arrest.
- That nothing illegal was found in the possession of the Appellant at the time of his arrest.
- That the Appellant's brother gave evidence in the bribery case bearing No. 1156/96 against few higher-ranking police officers.

The learned High Court Judge who wrote the judgment only benefited of hearing the submission of the prosecution. Further, he has not participated in conducting the trial except for conducting an inquiry under Section 241(1) of the Code of Criminal Procedure Act to conclude the matter.

In **Martin v Queen** 69 CLW 21 T.S Fernando, J. held that:

> "*Even if the jury declined to believe the Appellants' version, he was yet entitled to acquit on the charge if his version raised in the mind of the jury a reasonable doubt as to the truth of the prosecution's case.*"

The learned High Court Judge who wrote the judgement had concluded that the defence taken up by the Appellant would not succeed. He had reached this conclusion only considering the evidence given by PW1 and PW2. Further it consisted with his opinion. Further he had not given proper reasoning for the rejection of documents marked as V1 to V5 by the defence. The relevant portion of the judgment is re-produced below:

Page 995 of the brief.

විත්තියෙන් යෝජනා කර ඇත්තේ විත්තිකරුට පහර දීමක් හේතුවෙන් එය වසන් කිරීමට මෙවැනි කුඩු හඳුන්වාදීමක් සිදු කල බවය. එම කාරණාව සලකා බැලීමේ දී විත්තිකරුට පහර දීමක් සිදු කළේ නම්, ඔහුව ඉන් පසුව නිවසට රැගෙන යාම සිදු නොවන දෙයකි. නිවසේ මව, පියා සිට ඇත. තවද, අසත්‍ය ලෙස හඳුනා දීමක් කරන්නේ නම්, දළ බර ග්‍රෑම් 8 න් පමණ හඳුන්වා දීම තරමක් අස්වාභාවික වේ. ඒ අනුව පහර දීමක් නිසා මෙය හඳුන්වා දීම යන්න ස්ථාවරය කිසිදු බලපෑමක් මෙම සාක්ෂිකරුවන්ගේ සාක්ෂිය මතින් මතු වන්නේ නැති බවට තීරණය කරමි.

In my view this has caused grave prejudiced but has also denied a fair trial to the Appellant.

In the third ground of appeal the learned President's Counsel contended that PW1 and PW4 are not credible witnesses.

In **Kumara De Silva v The Attorney General** [2010] 2 SRI LR. 169 the Court held that:

> *"(1) Credibility is a question of fact, not of law. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge."*

A prosecution's case depends on the evidence they adduce against an Accused person. And that evidence, in one way or another, comes from witnesses. Witnesses are people who saw an Accused commit the crime or get caught while the offence is being committed.

Witnesses testify to what they saw or detected. Just because a witness says something happened it does not mean a judge or jury needs to believe their testimony. Not all witnesses are credible. If a witness is not credible, his or her testimony is not credible. To accuse someone "beyond reasonable doubt," it is essential to possess substantial evidence.

Learned President's Counsel contended that PW1 and PW4 had deliberately uttered lies against the Appellant, and that the infirmities in the evidence of

these two witnesses go to the root of the case and thereby create a reasonable doubt on the prosecution case.

The evidence of PW1 revealed that the Appellant was arrested at 3.25 p.m. for the possession of 8.8 grams of Heroin. The charge was explained to the Appellant when he was arrested at the place of arrest. In the cross examination, PW1 admitted that he weighed the substance at the Police Narcotics Bureau. The question arises as to how PW1 charged the Appellant for possession of 8.8 grams of Heroin before it was weighed. The said portion of proceeding is re-produced below:

<u>Pages 707-708 of the brief</u>

ප්‍ර : එම ස්ථානය තමා දාලා තිබෙන්නේ අත් අඩංගුවට ගත්තා කියලා ?

උ : ඒ වාක්‍යයෙන් කියන්නේ අත් අඩංගුවට ගත්තු බව. 15.25 ට අත් අඩංගුවට ගත්තා කියලා.

ප්‍ර : ඒකේ කියලා තිබෙන්නේ ඒ චෝදනවා ග්‍රෑම් 8 යි මිලි ග්‍රෑම් 800 ක් ළඟ තබා ගැනීම සම්බන්ධව චෝදනාව කියා ද කියලා ?

උ : එහෙමයි.

ප්‍ර : එතකොට අත් අඩංගුවට ගත්ත වෙලේ තමා අත් අඩංගුවට ගත්තේ ස්පෝට් ස්ටාර් බිල්ඩිම ළඟ දී ?

උ : එහෙමයි.

ප්‍ර : ඒ වෙලාවේ කිරුවේ නැත ?

උ : නැත.

ප්‍ර : අත් අඩංගුවට ගත්ත වෙලාවේ තමාට ඔය චෝදනාව කියා දෙන්න බැහැ ?

උ : බැහැ.

ප්‍ර : තමා ප්‍රමාණය දන්නේ නැත ?

උ : එහෙමයි.

According to PW1 and PW4 the Appellant was arrested near a building. But the defense suggested that he was arrested at his residence. An unusual entry had been made by PW1 before he left the Bureau. It states that:

"77 වගන්තිය යටතේ වරෙන්තුවක් ලබාගැනීමට කාලය නොමැති නිසා විෂ වර්ග අඹිං සහ අන්තරාදායක ඖෂධ පනතේ 77 (ii) වගන්තිය යටතේ බලය පවරාගෙන ක්‍රියා කරමි."

As the raid was in consequence of an information received by PW4, there was no necessity to obtain a search warrant to conduct the raid. When PW1 was cross examined on this point he could not give a reasonable explanation and admitted that in a situation of this nature adherence to Section 77(ii) of the Poisons, Opium and Dangerous Drugs Ordinance is not necessary. The relevant portion of the proceeding is re-produced below:

Page 712 of the brief.

ප්‍ර : එතකොට මේ උත්තරය අනුව බෝ ගහ යටට එන්නේ කියලා තමා ආරංචි වුනේ ?

උ : එහෙමයි.

ප්‍ර : බෝ ගහ ළඟට එන මිනිහෙක් අත්අඩංගුවට ගැනීම සඳහා 77 (ii) වගන්තිය යටතේ බලය පවරාගැනීමක් අවශ්‍ය වන්නේ නැහැ ?

උ : නැහැ.

Considering above mentioned infirmities of the evidence of PW1, it certainly affects the credibility and trustworthiness of the witness and conducting the raid in a manner as explained by the prosecution depicts incompetence on the part of the policemen involved.

A witness who is believed to be credible and trustworthy can add great value to their testimony in the eyes of both the judge and the jury. A witness can be deemed to be credible based on his knowledge, experience, training and also on the appearance of trustworthiness. Similarly, a witness who seems to be untrustworthy, while unlikely to help a case, could actually end up harming it.

In the final ground of appeal, the learned President's Counsel contended that by disallowing the Appellant to be represented and defended by a counsel, the learned High Court Judge deprived the Appellant of the benefit of the outcome in CA (PHC) APN 116/2010 and thus permitted the previous erroneous order pertaining to *alibi* to remain.

In this case two erroneous orders of the learned High Court Judge had caused great prejudice to the Appellant. The first erroneous order was rectified by this Court under case No. CA/PHC/APN 116/2010. But the Appellant was deprived of the representation of a Counsel in his absence which had not only caused great prejudice to the Appellant but had also denied him a fair trial.

To determine whether an accused is innocent or guilty, the concept of fair trial plays a vital role. A fair trial is a universally recognised human right. Fair trials help establish the truth and are vital for everyone involved in a case. It is a cornerstone of democracy, helping to ensure fair and just societies.

Guided by the above cited judicial decisions, I conclude that the appeal grounds advanced by the Appellant has a very serious impact on the prosecution case.

Now I consider whether this is an appropriate case to be sent for a re-trial. A re-trial is a second (or further) trial on the same issues with the same parties. It is not treated as an extension of the first trial, as new evidence can be called.

In this case the date of offence is 04.07.2000. The prosecution witnesses and the defence had given evidence twice. Further, more than 24 years had passed since the alleged incident. Therefore, this is not an appropriate case to send for re-trial.

In this case I am of the view that the defence evidence is more than sufficient to create a reasonable doubt in the prosecution case. As the evidence presented by the Appellant creates a reasonable doubt over the prosecution case, I set aside the conviction and sentence imposed by the learned High Court Judge of Colombo dated 31.08.2018 on the Appellant. Therefore, The Appellant is acquitted from both charges.

Accordingly, the appeal is allowed.

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