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/0282/2018

High Court of Colombo
Case No: HC/8298/2016

George Gnanapragasam Irangani alias Batti

Accused-Appellant

Vs.

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

Complainant-Respondent

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

COUNSEL	:	**Amila Palliyage with Sandeepani Wijesooriya, Sawani Udugampola, Lakitha Wakishta Arachchi and Subaj De Silva for the Appellant.** **Dileepa Peeris, SDSG for the Respondent.**
ARGUED ON	:	**12/02/2024**
DECIDED ON	:	**07/06/2024**

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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) (b) and 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking and Possession of 3.85 grams of Heroin (diacetylmorphine) on 04th November 2015.

After trial, the Appellant was found guilty only on the second count (Possession) and the Learned High Court Judge of Colombo has imposed life imprisonment on her on 14/09/2018.

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

The Learned Counsel for the Appellant informed this court that the Appellant has given her consent to argue this matter in her absence due to the Covid 19 pandemic. At the hearing, the Appellant was connected via Zoom platform from prison.

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

1. The case for the prosecution does not satisfy the test of probability.
2. The rejection of the defence evidence on wrong premise.

In this case the raid was conducted in the absence of any specific information received. The raid was headed by PW1 with two police officers from the Grandpass Police Station. All have been named as witnesses in the indictment including the Government Analyst. The prosecution had called PW1, PW2, PW5, PW7 and PW9 and closed their case. The Government Analyst Report was admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979. The prosecution marked production P1-P11.

When the defence was called, the Appellant had made a statement from the Dock and called a witness (husband) and closed the defence case.

Background of the case.

On 04/11/2015 PW1 IP/Chammika attached to the Grandpass Police Station had gone for a routine mobile patrolling with two police officers in a van belonging to the Police Department. The team had left the police station at about 9.38am. The witness and PW2 were in civil dress while PW3 were

clad in a No.02 police uniform. In addition to other items, they had also taken sealing instruments with them. First, they had gone to Stacepura for the raid. After parking the van in a petrol shed, they decided to go on a foot patrol along Stacepura main road. The witness had spotted the Appellant who was standing near a Buddha statue on the Stacepura Road. PW1 reported that upon seeing the police officers, the Appellant began walking towards her house, arousing suspicion. Consequently, the Appellant was stopped for questioning and searched. At that time, the police PW1 had observed a pink coloured cellophane bag with something in it in the hand of the Appellant. The Appellant was trying to hide the same by fisting her right hand and keeping it behind her. PW1 took the parcel into his custody and inspected the same. The parcel contained some brown coloured substance. As it reacted for Heroin (Diacetylmorphine) the Appellant was arrested immediately. The arresting time was 10.30am. The Appellant was taken to Letchumi Jewellers situated in Kosgas Junction to weigh the substance. The Appellant was taken to the Jewellers by PW1 and assisted by PW2. The parcel contained 10 grams of substances. After entering notes, the Appellant and the productions were handed over to the Grandpass Police Station under PR No.189/2015. Rs.470/- also recovered from the Appellant at that time.

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".*

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".*

As the appeal grounds raised by the Appellant are interrelated, the grounds will be considered together in this case.

Probability plays a crucial role in persuading a judge on specific points, as the higher the probability of an assumption, the greater the likelihood of convincing the judge. Probability is highly significant in criminal investigations, where it is utilized to evaluate the relevance of different types of evidence. In order to accuse someone "beyond reasonable doubt," it is essential to have strong evidence, which often involves making certain assumptions to draw conclusions. The likelihood of these assumptions being true is specifically referred to as the principle of probability in legal terms.

In this case, only three police officers had conducted the raid. They had set off from the police station without any specific information. After the arrest, the Appellant was taken to a jewellery shop named 'Letchumi Jewellery' and weighed the substances.

The gross quantity said to have recovered from the Appellant is 10 grams. The arresting time was 10.30am and the police party left the Lecthumi Jewellers at about 12.16 noon. Considering the circumstances of the case, it is highly improbable that the police officers took over an hour to weigh this small amount.

Although PW1 and PW2 were not in police uniform, the Appellant got nervous after seen them and she had started to walk towards her house. Further, standing alone near the Buddha statue also arose the suspicion of the witness on her. Although the prosecution denied that she was arrested at her house by the police, PW1 admitted that he knew the Appellant earlier. This clearly confirms the defence's version and raises doubt over the narration of the prosecution witnesses, as it so fanciful.

As per PW1's testimony, the Appellant was wearing a frock with a pocket. As aptly argued by the Appellant's Learned Counsel, this factual account raises doubts about why she would become nervous upon seeing two random men, who were actually the two officers in plain clothes, and then proceed towards her house while allegedly holding a packet of heroin. This was not properly evaluated by the Learned High Court Judge in his judgment.

Further, Learned High Court Judge had failed to consider the Dock Statement of the Appellant in its correct perspective. He had disbelieved and rejected the Dock Statement merely because it was not given under oath and was not subjected to cross examination. This approach, no doubt had caused great prejudice to the Appellant. The relevant portion of the judgment is re-produced below:

Page 234 of the brief.

එහිදී විත්තිකාරිය විසින් විත්තිකූඩුවේ සිට කර ඇති හුදු ප්‍රකාශය දිවිරුමක් මත කරන ලද ප්‍රකාශයක් නොවන අතර, හරස් ප්‍රශ්න වලට භාජනය වීමක්ද සිදු වී නොමැත. ඇය විසින් පවසා ඇත්තේ, අදාළ දිනයේ දී ඇය නිවසේ සිටිය දී පොලිස් නිළධාරීන් විසින් ඇය අත්අඩංගුවට ගෙන පොලිස් ස්ථානය වෙත භාරදුන් බවත්, එහෙත් අදාළ චෝදනාව සඳහා ඇය වගකීමට නොබැඳෙන බවත් ය. විත්තිකාරියගේ හුදු ප්‍රකාශය අවධානයට යොමු කිරීමේ දී එහි සාක්ෂිමය වටිනාකම ඉහත සඳහන් පරීදි ව්‍යතිරේඛ දෙකකට හසුවෙන අත. එකී සාක්ෂියෙහි සාක්ෂිමය වටිනාකම අල්ප බැවින් පැමිණිල්ල විසින් සනාත කර ඇති කරුණු අභිබවා යෑමට එය ඉවහල් වී නොමැති බවට සඳහන් කරමි.

Although PW1 said that the raid was a routine exercise, he admitted that he knew the Appellant previously as “Batti” and her house location. I too agree with the Learned Counsel for the Appellant that the Learned High Court Judge should have considered this portion of evidence when he analysed the evidence of the defence.

The profound duty of the trial court is to consider the evidence placed by the prosecution and the defence on equal footings to arrive at its finding.

In **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

> *“A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done”.*

In this case, the Learned High Court Judge had not considered the probability factors in conjunction with the defence’s evidence. The rejection of defence’s evidence without proper analysis had caused great prejudice to the Appellant.

The burden of proof is usually on the person who brings a claim in a dispute. It is often associated with the Latin maxim *semper necessitas probandi incumbit ei qui agit*, a translation of which is: "the necessity of proof always lies with the person who lays charges."

In this case, the raid was conducted without any specific information. Further, recovery and weighing the production has failed to pass the probability test in this case. Had the Learned Trial Judge looked into the evidence presented in its correct perspective, he should have accepted the evidence adduced by the Appellant.

As the prosecution had failed in its duty to prove this case beyond reasonable doubt, I set aside the conviction and sentence imposed by the Learned High Court Judge of Colombo dated 14/09/2018 on the Appellant. Therefore, she is acquitted from this case.

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