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

In the matter of an Appeal under in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka and in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:
CA/HCC/0105/2018
High Court of Colombo
Case No: HC/5377/2010

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Thangaiah Paul Owen Kanagaraj Kadosha

Accused

AND NOW BETWEEN

Thangaiah Paul Owen Kanagaraj Kadosha

Accused – Appellant

Vs.

Hon. Attorney General

Complainant- Respondent

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

Counsel : Rienzie Arsecularatne, P.C. with Chamindrie Arsecularatne, Thiliina Punchihewa, Punsisi Gamage and Eranga Kahandawala for the Accused-Appellant.
Anoopa De Silva, DSG for the Respondent.

Argued on : 02.05.2024

Decided on : 04.06.2024

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 5.6.2018 of the High Court of Colombo.

The accused appellant (appellant) has been indicted for possession and trafficking of 15.68 grammes of heroin under the provisions of the Poisons Opium and Dangerous drugs Ordinance.

The accused appellant having pleaded not guilty to the indictment had stood the trial and upon conclusion of the same the trial judge had convicted him for the same and had sentenced accordingly.

The main grounds of appeal raised by the learned Counsel for the appellant are as below,

1) The learned trial judge had failed to consider the improbability of the prosecution story,
2) The trial judge had followed wrong procedure to cover the gaps of the prosecution,
3) The trial judge had commented on the demeanor of witnesses who had not been led before him and thereby denying a fair trial to the appellant.

The story of the prosecution is that on the day of the incident the Police Narcotics Beuroe officers led by PW1 had received a tip off regarding the appellant and they had gone to the St Johns Market in Colombo around 1pm.

Then PW1 and PW3 had been informed by the informant that the appellant would be coming to the market around 6pm or 7pm and they had waited till he came,which the learned Counsel for the appellant had said was very improbable when the PNB was right next door.

On arrival of the appellant, he had been searched and the alleged substance had been found and he had been taken in to custody.

The PNB officers had searched the three houses habituated by the appellant and in one his sister had been residing but they had not found anything illegal, in the said house.

Thereafter, they had proceeded to the appellant's house at Wattala and from that house they had recovered some jewelry and a large amount of money which had been later handed over to the sister of the appellant on the instructions of the appellant which the learned Counsel for the appellant submitted to be very improbable.

Upon perusing the evidence led at the trial this Court finds nothing unusual in handing over the money to the appellant's sister which had been done on the request of the appellant.

Secondly the PNB officers waiting in the vehicle for several hours until the appellant arrived when the PNB office was very nearby is also nothing unusual because had they gone back,they run the risk of missing the appellant.

PW1 had been corroborated by PW3 who had assisted him and all the witnesses of the raid had been very lengthily cross-examined but they had stood the test of cross examination well.

Hence this Court fails to see any improbability in the story of the prosecution.

The next ground of appeal raised by the learned Counsel for the appellant was that the learned trial judge had adopted wrong procedure to fill the gaps of the prosecution.

This Court observes that the Government Analyst report in the case has been admitted by both parties on the 30th August 2017 and the report was only to be marked and produced as evidence through the Interpreter Mudliyar.

The trial judge had called for the defense on the 25th of September 2017 and on the 31st October 2017 the appellant has made a dock statement and the case for the prosecution and the defense had been closed and it had been fixed for submissions of both parties for the 27th of November 2017 but on that due to a practical difficulty the submissions had been refixed for the 14th of December 2017.

On the 14th December 2017 also the matter has gone down to the 13thof March 2018 and again the Journal entry and the proceedings both indicate that it is due for the submissions of both sides, but the trial judge had minuted in the journal entry that the Government Analyst Report has been marked and the trial judge had proceeded to make an order in the proceedings that it is only to mark the GAR which has already been admitted. Thereafter the mudliyar has been called to mark the GAR which the learned Counsel for the appellant said

is violating the procedure to fill the gaps of the prosecution and went on to cite several cases which are as follows,

Ponnaiya vs Abdul Cader, 38 NLR 281 it had been held by Abrahem CJ that the magistrate cannot call witnesses after closure of the case to fill in the gaps of the prosecution.

The King vs Ariyadasa 43 NLR 289 Howard CJ had held that fresh evidence called by the judge except upon a matter which arises ex-improvise is irregular and will vitiate a trial unless such evidence was not calculated to prejudice the accused.

In the instant matter, the GAR has been admitted by both parties and it was only to be marked, but the prosecution had failed to do so and until it had been fixed for submissions of both parties the prosecution has made an application to do so and the proceedings show that the defense had not objected but that is also questionable because there is an alteration by the trial judge by hand in the proceedings which is not there in the journal entry and which is also undated. The alteration is from ඉඩෙදන්නෙනෑ to විරුද්ධවන්නෙනෑ.

Hence, whether the defense did object or not is questionable in view of the alteration by the trial judge which is not dated and which is not reflected in the journal entry.

Hence, although during the trialthe parties had admitted the report it had not been admitted in evidence and the proceedings reveal that the trial judge had allowed it to be called in as evidence even after the appellant has made his defense,and had the document been marked in evidence the appellants defense may have been different, because the GAR report is not a mere document in the case it is the most vital piece of evidence against the appellant in the instant case.

Hence, it is the opinion of this Court that the procedure followed by the trial judge is not laid down in any law book but it has been held in many of the cases cited above that the wrong procedure cannot be adopted to fill in the gaps of the prosecution because the prosecution has the primary duty to prove the case against the appellant beyond a reasonable doubt.

But in the instant matter the prosecution has failed to do its primary duty and the trial judge had stepped in to fill in the lapses of the prosecution.

The learned Counsel appearing for the respondents stated that while not approving the procedure followed by the trial judge stated that the trial judge in allowing the prosecution to mark the GAR when the case for the prosecution

and the defense has been closed has not caused any injustice to the appellant because it had been admitted by the defense during the trial.

But we note that it had been admitted to be marked in evidence at the proper stage and by not doing so the appellant has been denied to be presented with all the facts against him.

As such, we are unable to agree with the submissions of the learned DSG for the respondents.

As such, we are of the opinion that in the instant case, the findings of the trial judge areerroneous and illegal which is good enough to vitiate the conviction and the sentence passed by the trial judge.

Last ground of appeal raised by the learned Counsel for the appellant is also infavor of the appellant because the trial judge had commented on the demeanor of PW1 when he had not been led before him. Hence, we are surprised to observe such a comment being made by the trail judge.

As such, considering the above grounds of appeal,this Court is unable to affirm the conviction and the sentence of the trial judge hence the instant appeal is allowed and the accused appellant is acquitted of the charges.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal