# 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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist
Republic of Sri Lanka.

**Court of Appeal Case No.**
**HCC/0097/19**

**Complainant**

**High Court of Colombo**
**Case No. HC/7848/2015**

**Vs.**

Kottabadhuge Kasun
Madhushanka.

**Accused**

**AND NOW BETWEEN**

Kottabadhuge Kasun
Madhushanka.

**Accused-Appellant**

**Vs.**

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

**Complainant-Respondent**

**BEFORE : MENAKA WIJESUNDERA, J**

**WICKUM A. KALUARACHCHI, J**

**COUNSEL :** R. Arsecularatne, PC with Ms. Chamindri Arsecularatne, U. Muhandiramge, Tharindu Punchihewa, Pasindu Gamage, Punsi Gamage and Eranga Yakandawala for the Accused-Appellant.

Udara Karunathilaka, SSC for the Respondent.

**ARGUED ON :** 07.05.2024

**DECIDED ON :** 11.06.2024

**WICKUM A. KALUARACHCHI, J.**

The accused-appellant was indicted in the High Court of Colombo for trafficking and possessing 2.64 grams of Heroin, on or about 24.07.2014, offences punishable under Section 54A(b) and 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984. After trial, the learned High Court Judge of Colombo convicted the accused-appellant of both counts by his judgment dated 15.05.2019 and imposed life imprisonment for both counts. This appeal has been preferred against the said convictions and the sentences.

Prior to the hearing, written submissions were filed on behalf of both parties. The learned President's Counsel for the appellant and the learned Senior State Counsel (SSC) for the respondent made oral submissions at the hearing of the appeal.

In brief, the prosecution story is as follows:

On July 24, 2014, about 14:40, IP Mahinda Wanasinghe, PW-1, received information from an informant that a bearded man named Kasun, who lives in the Henamulla camp and is dressed in a black collarless t-shirt and red shorts, is making preparations to bring heroin to a place near the mosque situated close to the playground called “Somaliyawa”. PW-1 was asked to come over and be located nearby, and he was further informed that he would make a follow-up call when the aforementioned Kasun" leaves his residence.

At 14:45 p.m., PW-1 organized a group of twelve police officers, including IP Wasantha Kumara and, PW-2, for a raid, and they departed the police station for the detection by a van belonging to the police department. The investigation team arrived at 15.05 p.m. and parked the van at a land belonging to the Municipal Council which was situated near to the Playground called “Somaliyawa.” While they were waiting in the Van around 15:10 p.m., the informant called again, urging them to approach the mosque right away. Accordingly, the police team drove up to the mosque, parked the van there, and ten police officers continued walking along the street where the van had been parked. Thereafter, they turned onto a by-way on the left and saw a person who fit the informant's description approaching them from a distance of roughly ten to fifteen meters. However, according to the prosecution evidence, the person has turned back presumably after seeing PW-1 who was wearing the police uniform at the time. Thereafter, the police team ran behind him and caught him. Upon search, the police found a light pink colour cellophane bag in his right-side trouser pocket containing a light brown powder which was identified as heroine and accordingly he was arrested at 15.15 p.m. The heroin found in the possession of the accused-appellant was put to the envelope that police took along with sealing equipment. The heroine package was then weighed and sealed at the Dedigama Pawning Centre on Baseline Road, where the police

team next went. They then went on to the Colombo Crimes Division, where the investigating team was based, and arrived there at 15.25 p.m.

The learned President's Counsel for the appellant did not formulate specific grounds of appeal. He contended that PW-1 stated once that he arrested the suspect at 3.15 p.m. (page 72 of the appeal brief) and in his evidence in chief, PW-1 stated the van that they travelled reached the Colombo Municipal Council at 3.15 p.m. (page 40 of the appeal brief) and he received the telephone call from the informant at 3.10 p.m. The learned President's Counsel pointed out if the van reached the Colombo Municipal Council at 3.15 p.m. the accused-appellant cannot be arrested at the same time, thus, the prosecution story is improbable.

Pointing out the items of evidence appear at page 66 of the appeal brief, the learned SSC submitted that the aforesaid times mentioned by the learned President's Counsel are typing mistakes. However, it is to be noted that the learned State Counsel appeared in the High Court had not taken steps to rectify them if they were typing mistakes.

Another point that the learned President's Counsel stressed was that the information received was that a bearded person named Kasun is getting ready to bring heroin to a place near a mosque situated close to playground called "Somaliyawa". Also, he has informed PW-1 that when the Kasun leaves his home he will give another telephone call. The learned President's Counsel contended that when the police received an information that a person is coming from home with heroin, it is natural to search the home after that person is arrested. However, in this case, the learned President's Counsel contended that no police officer had searched the house of the accused-appellant and this reason also makes the prosecution story improbable.

The learned President's Counsel also contended that according to PW-1, the detection took place on a by road after he noticed the accused-appellant walking towards them, whereas according to PW-2

the detection took place not on a by road and PW-2 did not see from where the accused came to the scene of the detection on the main road leading to the Heinamulla camp.

The learned President's Counsel pointed out further that according to PW-1 hand cuffs were taken (page 39 of the appeal brief) when they went for the raid but according to PW-2 hand cuffs were not taken (page 106 of the appeal brief).

The learned President's Counsel also submitted that PW-2 made his notes after he came to the police station, but even at the police station, he has not made his notes on the information book maintain at the police station but on a crime pad and thereafter the notes that he made on the crime pad has been pasted three days later. The learned President's Counsel contended that this is also an unusual way of making notes. It is correct that if PW-2 came to the police station and made notes, he could have used the information book maintained at the police station to make notes without making notes on the crime pad and taking three days to paste the notes.

Other than the aforesaid discrepancies and improbabilities of the prosecution case, the learned President's Counsel has also pointed out some other defects in the prosecution case and contended that the charges have not been proved beyond a reasonable doubt. The learned President's Counsel for the appellant stressed another fact that the main investigating officer PW-1 was clad in uniform and he went with twelve other officers who were not in uniform. What the learned President's Counsel pointed out was that in a raid of this nature, one police officer goes with the uniform but normally the main investigating officer does not go with the uniform. The learned SSC stated in reply that the main investigating officer clad in uniform is not unusual.

The important matter that this Court observed is that although the learned High Court Judge stated that prosecution has proved the

charges beyond a reasonable doubt, the learned Judge has not given reasons for the said decision. His Judgment contains seventeen pages. Up to the page 15 of the Judgment, there is only narration of evidence of the prosecution and defence. Thereafter, the learned Judge states that there are no discrepancies in the prosecution evidence and the prosecution has proved the first and second counts beyond a reasonable doubt. Accused-appellant's dock statement has been rejected for the reason for not complaining to a higher police officer about his illegally arrested.

When the learned High Court Judge came to the conclusion that there are no discrepancies in the evidence of the prosecution witnesses, he has not considered any of the contradictions pointed out by the learned President's Counsel for the appellant. When PW-2 stated that they did not take hand cuffs when they went for the raid, and PW-1 stated that they took hand cuffs when they went for the raid, the learned High Court Judge decided stating no reason that it is proved that they had taken hand cuffs (page 8 of the High Court Judgment) when they went for the raid. Not only the aforesaid contradiction, but also the other discrepancies, infirmities and improbabilities pointed out by the learned President's Counsel have not been considered by the learned Judge. It appears clearly that this is a Judgment written without analyzing the prosecution evidence. In other words, the learned High Court Judge has concluded that two charges have been proved beyond a reasonable doubt without analyzing the prosecution evidence.

Apart from that, the learned High Court Judge rejected the dock statement of the accused-appellant for the reason that the accused-appellant had not complained to the higher police officer if he had been arrested without any reason. No other reason is mentioned in the Judgment to reject the dock statement. The learned Judge's reason for rejecting the dock statement appears as follows:

“චිත්තිකරු ප්‍රකාශ කර සිටින ආකාරයට කිසිදු හේතුවක් නොමැතිව චිත්තිකරුව අත්අඩංගුවට ගනු ලැබුවේ නම් සහ චිත්තිකරුගේ බිරිඳ සහ පියා ඒ අවස්ථාවේ නිවසේ සිටියේ නම්, ඔවුනට ඒ සම්බන්ධව උසස් නිලධාරියෙකුට පැමිණිලි කිරීමට හෝ යම් නීතිමය පියවරක් ගැනීමට අවකාශය තිබී ඇත. නමුත් එවැනි පියවරක් ගත බවට වූ සාක්ෂියක් චිත්ති පාර්ශවයෙන් ඉදිරිපත්ව නොමැත. එබැවින්, චිත්ති කුඩුවේ සිට කරන ලද ප්‍රකාශය විශ්වාස කිරීමට නොහැකි වනවා මෙන්ම පැමිණිල්ලේ නඩුව කෙරෙහි එම ප්‍රකාශය මගින් සාධාරණ සැකයක් හෝ ජනිත නොවේ”.

It must be said that this is by no means a reason to reject the dock statement. The meaning of the said statement of the learned Judge is that when an accused makes a statement from the dock stating his innocence, the said statement cannot be considered if he had not made a complain about that to a higher police officer. When a person is produced before a Magistrate as a suspect for an offence under Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance, Magistrate has no jurisdiction to grant bail. Hence, after the arrest, the suspect has to be in remand. Therefore, practically, the suspect has no opportunity to make a complaint to a higher police officer. Even if there was an opportunity, any accused person can come to the Court and claim his innocence and there is no requirement to complain to the police before coming to the Court to consider his statement or evidence by the learned Trial Judge.

The presumption of innocence is a fundamental principle that lies at the core of the Criminal Justice System in Sri Lanka as well as in many other jurisdictions worldwide. Under this principle, every accused of a crime is deemed innocent until proven guilty by a competent Court of Law. When a Trial Judge is called for a defence, every accused is free to state his innocence before the Court by way of a dock statement or by giving evidence. In the instant action also, when the appellant stated in making a dock statement that he was arrested without any reason, the learned Trial Judge should have considered his statement and see whether the said statement creates a reasonable doubt on the

prosecution case. Certainly, the learned Trial Judge can reject the said statement, if he is not satisfied but he must first consider the dock statement of the accused and if the learned Judge thinks that the dock statement cannot be accepted, he can reject it stating the reasons for the rejection. In the case at hand, as stated previously, the learned High Court Judge rejected the dock statement for the reasons stated above without considering the same. Therefore, the learned Judge has not only did not analyze the prosecution evidence but also did not consider the dock statement in deciding that the charges have been proved beyond a reasonable doubt.

In addition, when convicting the accused-appellant for the first charge of trafficking 2.64 grams of heroin, the learned High Court Judge convicted him for the said offence stating in the Judgment that 2.64 grams of heroin is not kept for his personal consumption and thus, it should have been kept on the intention of trafficking. I must say that the said basis of the learned Trial Judge to convict the appellant for the offence of trafficking is completely wrong. In the Section 54A of the Poison, Opium and Dangerous Drug Ordinance as amended by the Act No. 13 of 1984, the meaning of "traffick" is given as follows:

(a) To sell, give, procure, store, administer, transport, send, deliver or distribute; or
(b) To offer to do anything mentioned in paragraph (a).

If it is found that the accused is engaged in one of the things specified in the aforesaid interpretation of "traffick", he could be convicted for trafficking. In the case at hand, if it was found after correct analysis of the evidence that the appellant was in possession of "heroin", he could have been convicted for trafficking, as he had transported the "heroin" according to the prosecution story. However, it is completely wrong to convict an accused for trafficking when the Trial Judge felt that the quantity of "heroin" is excess than what is kept for personal consumption.

Section 283(1) of the Code of Criminal Procedure Act states that "The judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point or points for determination, the decision thereon, **and the reasons for the decision**" (emphasis added). The impugned Judgment does not contain the points for determination and the reasons for the decision. Hence, the Judgment is not in compliance with Section 283(1) of the CCPA and cannot be allowed to stand.

The next matter to be considered is, as requested by the learned SSC whether this case can be sent back for retrial. In this case, the offence was committed on 24th of July 2014 according to the indictment. The accused-appellant was convicted on 15.05.2019. The appeal was heard in 2024. Now, ten years have elapsed since the date of the offence. The appellant has been incarcerated for almost five years. In the case of ***Nandana V. Attorney General*** – (2008) 1 Sri L.R. 51, it was held that "therefore, a discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice, taking into consideration the nature of the evidence available, the time duration since the date of the offence, the period of incarceration the accused person had already suffered, and last but not least, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effort in his immediate family members who have no connection to the alleged crime.

In the case at hand also, there was no fault of the accused-appellant. In fact, there was no fault of the prosecution as well. The prosecution presented their case and the accused-appellant presented his case. However, the learned Trial Judge has come to a conclusion without analyzing the prosecution evidence and not considering the dock statement. There is a maxim "*Actus Curiae Neminem Gravabit*". The

meaning of this maxim is that an act of the Court shall prejudice no man. Hence, the accused-appellant of this case should not suffer again by facing a fresh trial after ten years.

In the said Judgment of ***Nandana V. Attorney General*** it is also stated as follows: "as regards the second ground as to the time duration, it must be noted as the alleged offence has been committed on 07.02.99, almost ten years have elapsed since the date of the offence. In a long line of case law authorities, our Courts have consistently refused to exercise the discretion to order a retrial where the time duration is substantial.

In ***Peter Singho V. Werapotiya*** – 55 NLR 157, Gration, J. refused to order a retrial where the time duration was over 04 years.

> In ***Queen V. Jayasinghe*** - 69 NLR 413, Sansoni, J. refused to order a retrial where the time duration was over 03 years.
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> In ***L.C. Fernando V. Republic of Sri Lanka*** – 79 (2) NLR 313 at 374 Wijesundara, J. held that "it is a basic principle of the criminal law of our land, that a retrial is to be ordered only, if it appears to the Court that the interest of justice so required".

In the case at hand, as ten years have elapsed since the date of the offence, in view of the aforesaid decisions, I hold that this is not a fit and proper case to order a retrial.

For the reasons stated above, the appeal is allowed and the convictions and sentences dated 15.05.2019 are set aside. The accused-appellant is acquitted of both counts.

Appeal is allowed.

**JUDGE OF THE COURT OF APPEAL**

Menaka Wijesundera, J

I agree.

**JUDGE OF THE COURT OF APPEAL**