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/0198/2020

Rupasinghe Arachchilage Chaturanga Priyadharshana

High Court of Colombo
Case No: HC/429/2017

Accused-Appellant

Vs.

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

Complainant-Respondent

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

COUNSEL : **Hafeel Farisz with Sanjeewa Kodithuwakku for the Appellant.**
Azard Navavi, SDSG for the Respondent.

ARGUED ON : **14/02/2024**

DECIDED ON : **13/06/2024**

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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) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession and Trafficking of 3.78 grams of Heroin (diacetylmorphine) on 11th January 2017.

After trial, the Appellant was found guilty only for the 1st count and the Learned High Court Judge of Colombo has imposed life imprisonment on the Appellant on 21/01/2020.

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 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 raid is false.
2. No fair investigation.
3. The contradictions inter se and per se not considered.
4. That the manifest false narrative of the raid was not considered.

In this case the raid was conducted in the absence of any specific information received. The raid was headed by PW1 with seven police officers from the Crime Prevention Unit of Wellawatta Police Station. All have been named as witnesses in the indictment including the Government Analyst. The prosecution had called PW1, PW2, PW5, PW6 and PW8 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-P10.

When the defence was called, the Appellant made a statement from the Dock closed the defence case.

Background of the case.

On 11/01/2011 IP/Danapala attached to the Crime Prevention Unit functioned under Wellawatta Police Station had gone for a routine crime prevention duty with 07 police officers in a van belonging to the said unit. The team had left the police station at about 09.00am. All officers were clad in civil dress. Among other items, they had taken sealing and measuring instruments with them. Firstly, they had gone to Keselwatte police area but were not successful. As such the team proceeded to Granspass police area for crime prevention duty. While IP/Danapala was on his way, his private informant provided information that a person named Chaturanga- clad in blue coloured pair of shorts and a black tshirt was engaging in selling Heroin in smaller packets at Pasalwatte, Madampitiya. This information divulged assisted in conducting a successful raid. The informer had further provided the details of the location describing it to be a place where the houses were

demolished. After briefing about the information to all officers in the team, PW1 had told PW2, PW3 and PW4 to come with him to conduct the raid. All of them went to the place of raid on foot. Four persons including the Appellant was seen at the place where the Appellant was arrested. The police tried to apprehend all persons, but could not apprehend others except the Appellant. When the Appellant was searched, PW1 had observed a pink coloured cellophane bag with something in it in the right pocket of the shorts pocket. PW1 took the parcel into his custody and inspected the same. The parcel contained 132 small packets with some brown coloured substance. As it reacted for Heroin (Diacetylmorphine) the Appellant was arrested immediately. The arresting time was 5.00pm. The Appellant was taken to the Letchumi Jewellers situated in Kosgas Junction, to weigh the substance. The Appellant was taken to the Jewellers by PW1 and the three officers to weigh the substances. The parcel contained 10610 milligrams of substances. After entering notes, the Appellant and the productions were handed over to the Grandpass Police Station under PR No.160/2017 at 8.00pm.

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 inter-related, the grounds will be considered together in this case.

Probability holds a very important role when it comes to convincing the judge on a specific point as more the probability of the assumption more will be chances for the judge to get convinced. Probability, it is of utmost importance during criminal investigation and is used to assess the significance of various types of evidence. To accuse someone "beyond reasonable doubt" it becomes quintessential to have strong evidence and for the sake of that one has to make few assumptions to reach certain conclusions, the possibility of these assumptions to be true is specifically know as principle of probability in legal terms.

In this case, only 04 police officers had conducted the raid. They had set off from the police station without any specific information. According to PW1 he had received the information after seven hours of leaving their unit and the Appellant was arrested at 5.00pm. The Appellant was taken to a jewellery shop named 'Letchumi Jewellery' at 5.30pm and weighed the substances which took about two and half hours and the Appellant was produced to Grandpass Police Station at 8.00pm. The gross quantity said to have recovered from the Appellant is 10610 milligrams. To weigh this meagre, amount the police officers had taken two and half hours, which is highly improbable considering the circumstances of the case.

According to PW1, when he set off for the crime prevention duty on the 11.01.2017, he had taken a Criminal Note Pad, Sealing and Weighing Kit, his Pistol, and cash Rs.2000/-.When he was questioned as to why he did not note down the information in the Criminal Note Pad, PW1 had stated that he did not possess a pad on which he could have written the information. This is a per se contradiction which certainly impacts adversely in his evidence.

PW1 was the Officer-in-Charge of the Colombo South Crime Prevention Unit that came under the direct supervision of the Deputy Inspector General of Colombo and it is a specialized unit to combat crime. As such crime prevention duty is not restricted to any particular crime, but include all crimes. With this intention PW1 had taken sealing and weighing Kit along with them. Instead of using the same, he had gone to a jewellery shop to weigh the Heroin said to have recovered from the Appellant. When PW1 was confronted of this point, he had simply said that he did not take the sealing kit but had taken the measuring kit to measure illicit liquor. This too raises doubt in the prosecution's case to some extent.

Although the Appellant was arrested at Madampitiya Road, Colombo-14, where he also resides, PW1 had not taken any meaningful action to search his house nor common sense approach to investigate the person from whom he received the Heroin packets for sale. This lethargic attitude of the raiding

officers will certainly fail the probability test which certainly favours the Appellants claim.

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".*

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."

To determine whether you are innocent or guilty, the trial judge must consider the evidence presented by both sides with an open mind.

In this case the defence suggested to PW1 that the Appellant was not the person arrested first, a person called 'Dhamma' was arrested first and Heroin was recovered from a toilet ceiling of an old house situated close to Dhamma's house. The Appellant in his Dock Statement too had taken up the position that this was an introduction which he never possessed.

PW1, under cross examination vehemently denied the fact that he arrested a person called Dhamma on that day. According to him on that day he had only arrested the Appellant and nobody else. The relevant portion of the evidence is re-produced below:

Pages 63-64 of the brief.

ප්‍ර : සාක්ෂිකරු මම තමුන්ට යෝජනා කරනවා මේ තැනැත්තව අත් අඩංගුවට ගන්න යද්දී ඉස්සෙල්ලාම සාක්ෂිකරු තමුන් අත් අඩංගුවට ගත්තේ ධම්මා කියලා තැනැත්තෙක් කියලා තමුන්ට යෝජනා කර සිටිනවා ?

උ : පිළිගන්නේ නැහැ උතුමාණෙනි. මේ සැකකරුව අත් අඩංගුවට ගැනීමට තිබෙනවා මම ස්ථානයට ඉදිරිපත් කරන ලද ලේඛනයේ තිබෙනවා. එහි පිටු අංක 69, ඡේද 177 යටතේ මේ සැකකරු මා නඩු භාණ්ඩත් සමඟ ග්‍රෑන්ඩ්පාස් පොලිස් ස්ථානයට ඉදිරිපත් කරලා තියෙන්නේ. ඒ සටහනට අනුව මෙම සැකකරු පමණයි මා අත් අඩංගුවට ගැනීමට ඉදිරිපත් කර තිබෙන්නේ. යම් අවස්ථාවක මම සැකකරුවෙක් අත් අඩංගුවට ගත්තානම් මේ සටහනේම මම සටහන් කර ඒ සැකකරුත් භාර දිය යුතු වෙනවා. නමුත් මම එසේ කරලා නැහැ. එහෙම කරලා නැත්තේ මම වෙනත් සැකකරුවෙක් අත් අඩංගුවට නොගත් නිසා. මම එය පිළිගන්නේ නැහැ උතුමාණෙනි.

Learned Counsel for the Appellant, with the permission of the Court filed a motion on 14.02.2023 and filed a Magistrate Court proceeding in the Maligakanda Magistrate Court No. 1083/17. A suspect was arrested on 11.01.2017 by PW1 with PW08 for possession of Cannabis Sativa L in the Police Division of Grandpass and was handed over to Grandpass Police Station. The production recovered from the suspect was entered under PR No.161/17 which was the number next to the production number of this case. But PW1 vehemently denied of arrest another person on that day in the Grandpass Police area. With the defence taken up by the Appellant, concealing the arrest of another person for a narcotic offence clearly raise very serious doubt in the prosecution case.

In this case the raid was conducted without any specific information. The information pertaining to this case was received while they were going to Grandpass Police Division. The information was not recorded in the note book taken by PW1. Further, recovery and weighing the production has failed to pass the probability test in this case. Further, the defence's case had led to very serious doubt in the prosecution's case. Had the Learned Trial Judge

looked in to the evidence presented in its correct perspective, he should have accepted the evidence adduced by the Appellant.

Although the Appellant was arrested on the allegation of trafficking Heroin, he was acquitted on the count of trafficking and was convicted only for possession of 3.78 grams of Heroin.

Therefore, considering all the evidence presented in the trial, I conclude that the appeal grounds advanced by the Appellant have very serious impact on the prosecution's case.

As the prosecution had failed 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 21/01/2020 on the Appellant. Therefore, he 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