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

In the matter of an Application for Appeal in terms of Section 331(1) of the code of Criminal Procedure Act No. 39 of 1979.

Court of Appeal

Case No: 401/2017

High Court of Colombo

Case No. HC 7452/14

Hon. Attorney General

Attorney General's Department

Colombo 12

Complainant

Vs.

1.Hadugala Mudiyanselage Shriyani Jayalatha

2.Hithawakage Sujith Kumara Saram

Accused

Hadugala Mudiyanselage Shriyani Jayalatha

Accused – Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12

Complainant- Respondent

Before : Menaka Wijesundera J.

Wickum A. Kaluarachchi J.

Counsel : Saliya Pieris P.C. with Varuna De Saram for the Accussed-Appellant.

Madhawa Tennakoon, D.S.G. For the State.

Argued on : 11.03.2024

Decided on : 02.04.2024

MENAKAWIJESUNDERA J.

The instant appeal has been lodged to set aside the judgement dated 6.12.2017 of the High Court of Colombo.

The accused appellant (appellant) along with the 2nd accused had been indicted for being in possession of and trafficking 12 grammes of heroin and the 2nd accused had been indicted for aiding and abetting the appellant to commit the 1st and the 2nd charges.

At the conclusion of the trial, the trial judge had convicted the appellant for both the charges and had acquitted the 2nd accused of the 3rd charge.

The appellant having been aggrieved by the said judgment and sentence had preferred the instant appeal.

The grounds of appeal raised by the learned presidents counsel for the appellant were as follows,

1) Prosecution evidence being not credit worthy and plausible,
2) The trial judge had not considered the defense fairly,
3) The appellant not being granted a fair trial,
4) Sentence being excessive,
5) The adoption of evidence at the trial being erroneous was raised by the counsel for the appellant if this Court does not accept the other grounds of appeal from the first to the fourth.

The evidence of prosecution is that on the date of offence the prosecution witnesses being attached to the police narcotics bureau had received a tip off in the morning and accordingly witness number 1 had organized a raid and had proceeded to the Athurugiriya junction with the others and had stood watch.

Around 12.15, they had seen a three wheeler approaching the town and the appellant had been seated on the back seat and the 2nd accused had driven the three wheeler.

The PW 1and PW 2 had seen the 1st accused taking a small parcel out of his pocket and giving it to the appellant and the appellant had clutched in her hand and had got down from the three wheeler when she had seen the prosecution witness number 1 and 2 approaching her and she had got agitated but had been clutching the small parcel in her hand.

PW 1 and 2 had introduced themselves to her and had taken the parcel in to their hands and had inspected and having suspected it to be heroin they had taken it in to the custody of the 1st witness and had taken the appellant to their vehicle to be searched by the woman police constable.

Thereafter according to the prosecution witnesses, they had taken the appellant and the 2nd accused in to custody and the three-wheeler and had proceeded to the house of the appellant and the 2nd accused to inform the inmates of the house of the appellant that she had been arrested. But they had not searched the house of the appellant. Her house had been at Delgoda.

Upon concluding all these duties, the narcotics officers had returned to the PNB around 3.15 in the afternoon and had proceeded to weigh and seal the productions.

The productions had been dully handed over to the officer in charge of the productions and the said productions had been handed over to the Government Analyst on the 16th of August.

Once the evidence of the prosecution had been concluded, the appellant had made a dock statement and had said that she had been arrested while she was at home at Delgoda and that she was arrested along with the 2nd accused who had gone to replace the seats in the three-wheeler and he too had been brought back and assaulted and arrested by the narcotics officers. Appellant and the 2nd accused had been living in the same house.

The defense had led a prosecution witness and he had said that at the time the three-wheeler was handed over to him the said three-wheeler has had no back seat and that he has put notes to that effect.

This particular witness had been questioned by the trial judge very lengthily and he had said that even without a seat a person can travel in the said three-wheeler.

Having considered the above mentioned evidence of both sides, now this Court considers whether the prosecution story is plausible or not as submitted by the learned president's counsel for the appellant.

We observe that the PNB officers after arresting the appellant at Athurugiriya had gone to the house of the appellant which had been at Delgoda in order to inform of her arrest to the son but yet they have not searched the house of the appellant.

This act of the PNB officers we find to be very unusual and that they would travel around 10 kilometers in order to inform the family of the appellant and not search the house.

Hence, we find this to be very doubtful and unbelievable.

The defense had been right along of the position that the appellant had been arrested at home and that the three-wheeler in which the appellant is supposed to have travelled had been minus the back seat.

In this aspect also we find that the position of the appellant has not been considered by the trial judge adequately and he had been too eager to believe the prosecution version.

The police witness who was led by the defense had stated that the back seat of the three-wheeler being missing cuts across the prosecution story to the effect that if that is so how did the appellant travel to Athurugiriya to traffic the heroin.

But in this instance too we find the trial judge had overly cross-examined witness of the defense for nearly three pages and had got him to admit that even without the back seat one can travel in the three-wheeler.

Hence, when considering the said portions of evidence, we find that the trial judge had not afforded her a fair trial to the appellant and that he had been too eager to believe the prosecution version.

Furthermore, this Court also observes that trial judge had failed to consider the probability of the defense story but had firmly believed that since the evidence of the prosecution witnesses had not contradicted each other that the evidence is cogent and credit worthy. But what the trial judge had forgotten to consider is that all these witnesses are police witnesses who have been trained to give evidence in a Court of law.

Hence this Court is of the opinion that although the trial judge had considered the case for the defense running in to two pages, he has failed to apply his mind to the evidence of the prosecution and the defense judiciously. At this point we take note of the case law submitted by the counsel for the appellant,

which is **CA 10-11/2010 decided on 07.02.2014 by Sisira de Abrew J in which it has been held that "The Judges in deciding criminal cases must not look at the evidence of an accused person with a squint eye." It has gone on to quote, D.N. Pandey vs. State of Uththara Pradesh AIR 1981 SC 911 which has held that *"Defence witnesses are entitled to equal treatment with those of the prosecution and Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses".***

Hence, this Court is of the opinion that the appellant has not been given a fair trial in the High Court.

Another aspect this Court observed in the evidence of the prosecution is that they have received the tip off well in advance and they had got ready for the same but they had failed to carry the weighing equipment and also, they had put all notes well over three to four hours from the time the appellant has been detected with heroin which creates a doubt in the credibility of the evidence of the prosecution.

The other point which this Court observed is that the prosecution witnesses had observed the 2nd accused giving something to the appellant and the appellant had clutched the same and within a matter of minutes she had been arrested.

Hence this Court is at a loss to find the proper men's rea of the appellant at the time of the arrest because her possession of the same had been momentary and the person who handed over the same had been acquitted by the trial judge.

But of course, the trial judge had addressed the issue of the men's rea of the appellant in to lengthy pages but we find that it has not been established by the prosecution beyond a reasonable doubt.

Hence, we find the grounds of appeal raised by the learned counsel for the appellant to be with merit and the last ground of appeal has been raised in the event the 1st to the 4thfails. Hence,we do not go in to the merits of the last ground of appeal raised by the counsel for appellant as the 1st to the fourth has been accepted by this Court.

As such, we find that the conclusions of the trial judge in finding the appellant guilty of the 1st and the 2nd charges in the indictment to be erroneous and bad in law.

As such, the conviction and the sentence entered by the trial judge is hereby set aside and the appellant is acquitted of both the charges and the instant appeal is allowed.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal