

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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979 and in terms of High Court of Provinces (Special Provisions) Section 19 of 1990.

Democratic Socialist Republic of Sri Lanka

Plaintiff

V.

CA Case No: HCC 41/2021

HC of Colombo Case No:
HC 609/2018

Hennadige Asantha Sanjeewa Fernando

No. 22, Sri Shantha Road,
Kawdana, Dehiwala.

Accused

AND NOW BETWEEN

Hennadige Asantha Sanjeewa Fernando
No. 22, Sri Shantha Road
Kawdana, Dehiwala.

Accused-Appellant

v.

Hon. Attorney General, Attorney General's
Department,

Colombo 12.

Respondent

Before: Menaka Wijesundera, J.
B. Sasi Mahendran, J.

Counsel: Neranjan Jayasinghe for the Accused-Appellant
Wasantha Perera DGS for the Respondent

Written 09.06.2022 (by the Accused-Appellant)

Submissions: 14.09.2022 (by the Respondent)

On

Argued On: 05.12.2023

Decided On: 15.12.2023

Sasi Mahendran, J.

The Accused -Appellant Hennadige Asantha Sanjeewa Fernando (hereinafter referred to as "the Accused") was indicted in the High Courts of Colombo with having being in possession and trafficking of 82.45g of Heroin on 23.06.2017, near the Pettah bus stand, in contravention of Section 54A(d) and 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984.

The Trial was before a Judge and after the conclusion of the case, the Learned Trial Judge convicted the Accused and sentenced him to a term of life imprisonment on both counts. For the Prosecution, eight witnesses had given evidence. On behalf of the defence, two witnesses were called to give evidence. Additionally, the Accused made a statement from the dock to the effect that he was unaware of the Heroin parcel in question, that he was only a drug addict but not a trafficker, and the parcel was introduced by the Police.

Being aggrieved by the said conviction the Accused filed an Appeal to this Court.

The case for the Prosecution was that on information received by PW06 PC Asanka, PW01 IP Kosala Fernando, was instructed to conduct a raid near the Pettah bus stand around 10:00 a.m. to 10:30 am. They had observed the Accused anxiously coming toward the toilet behind the bus stop. Since the description that was in their possession matched the Accused the Police team questioned him. PW01 further describes that the Accused was

carrying a traveling bag that had “orange mobile” written on it, and after opening that bag, they found a tulip bag and, inside that bag, they found a pink polythene bag containing a brown substance; the polythene bag was opened and the substance therein was identified to be Heroin. Once the parcel was examined, PW01 re-tied the package with a knot. PW01 also mentioned that apart from the parcel there was also a silver color electric scale in it.

As set out in page 83 of the Appeal brief ;

ප්‍ර : මොකද්ද එකේ ඇතුළේ තිබුනේ?

උ : රෝස පාට කට ගැට ගසන ලද යම් දුඹුරු පැහැති කුඩක් සහිත මුලක් හම්බ වුනා.

Further, page 84 of the Appeal brief:

ප්‍ර : ටියුලිප් බෑගය ඇතුළේ මොනවාද තිබුනේ එතකොට ඔක්කොම ආයින් පාරක් කියන්න අධිකරණයට?

උ : රෝස පාට ග්‍රොසරි කවරයක කට ගැට ගසන ලද කුඩක් සහිත ද්‍රව්‍යයක්. සිල්වා පැහැති විද්‍යුත් තරාදිය.

On page 85 of the Appeal brief he notes;

ප්‍ර : කොහොමද ඒ බෑග් එක තිබුනේ, එකේ කට කොහොමද තිබුනේ?

උ : කට ගැට ගසා තිබුනේ.

ප්‍ර : තමුන් මොකද කළේ?

උ : මා විසින් එහි කට විවෘත කර හොඳින් පරීක්ෂාවට ලක් කළා.

ප්‍ර : තමන්ට මොකද්ද ඇතුනේ?

උ : මාගේ ඇතුම හා සේවා පළපුරුද්ද අනුව මෙම ද්‍රව්‍ය නීති විරෝධී මත්ද්‍රව්‍ය වන හෙරොයින් බවට මා හට වැටහී ගියා,

ප්‍ර : ඉන් පසුව ඔබ මොකද්ද කළේ ඒ බෑගයට?

උ : පසුව මම එහි කට ගැට ගසා එය තිබූ බෑගයට දමා පසුව කළු බෑගයට දමා ඔහුට නීති විරෝධී මත්ද්‍රව්‍ය ඩයිසෙටයින් මෝරින් හෙවත් හෙරොයින් සන්නකයේ තබා ගැනීමේ වරදට වරද කියා දී එම ස්ථානයේදී අත් අඩංගුවට ගත්තා.

According to PW01 the Accused was taken into custody at 10:20 a.m. after the interrogation. Upon information received by him, they left the said place of arrest with the Accused. First, they went in search of a house belonging to the Accused at Kaulana, Dehiwala,

According to PW01, there was no illegal substance found in the said house. No one was at the house at that time. At this juncture a few questions such as how did the Police enter the house? , who gave the key to open the said premises? Was it already opened? arise for consideration. According to PW01, no keys were found in the Accused possession.

Thereafter, they proceeded to search the house belonging to one Nishantha at Dehiwala. According to the evidence, Nishantha and his wife were present during the search. Since here too, they had not found any illegal substance during the search, they went to the narcotics bureau where they weighed the parcel and conducted the preliminary tests relating to it. The evidence indicates that they opened the parcel at that moment as well.

On Page 93 of the Appeal brief;

ප්‍ර : ඊටපසුව ඔබ එම හෙරොයින් ආයින් මොකක් හරි පරීක්ෂාවක් කලාද?

උ : ක්ෂේත්‍ර පරීක්ෂාවක් කළා.

ප්‍ර : ක්ෂේත්‍ර පරීක්ෂාවක් සිදුකලා?

උ : එහෙමයි

Thereafter, they handed the productions under PR. No 34/17 to (PW12) Keerthi Perera and No. PR 35/17 to Athula. Thereafter, (PW12) Keerthi Perera took the productions bearing PR No. 34/2017 to the Government Analyst on 28.06.2017 and obtained the receipt-bearing No.CD 4705/17 which is marked as P23.

During the proceedings, it was revealed that the productions had been in two grocery bags; one bag inside the other. This in our view contradicts the evidence of the investigating officer.

We will now analyze the evidence of the Accused.

According to the Accused, after his arrest at the bus stand, he revealed that he was a drug addict and it was Nishantha who was the drug dealer. He further revealed that they searched his house and that they could not find any illegal substance. Thereafter, they went to another house brought a parcel, and introduced it to him.

The issue before us is whether to believe the story of the Prosecution or the Accused.

We are mindful of the evidence of the Government Analyst.

According to the Government Analyst, she received the parcel which was in a pink polythene bag tied with a knot that was sealed and stamped. When she cut open the parcel, she observed that there were two bags. Which shows that Heroin was contained in two polythene bags. This, in our view, creates a grave reasonable doubt in the Prosecution case.

Learned Counsel who appeared for the Accused relied on the test of probability and referred to the evidence of PW01. According to PW01, he never stated that he found two bags that contained Heroin. The version of events as transpired in his evidence was that he untied the parcel, identified the Heroin and retied the knot. He stated that even at the narcotics bureau he opened it for examination purposes and re-tied the knot. This creates a doubt in our mind. The reason for that is, although one might not see two bags together at a glance when one opens and reties a bag several times, especially in this case, where the contents of the bag are subject to a close scrutiny, instead of a fleeting glance, one would have observed that felt that the parcel contained more than one bag. In the instant case, he has opened the parcel twice.

We have to consider whether PW01's testimony is improbable. If so, the Learned High Court Judge failed to consider the test of probability regarding the Prosecution's version.

Probability, in the context of legal matters, is defined as follows:

Sarkar and Monohara, in their book "SARKAR ON EVIDENCE" (Fifteenth Edition) on page 71, state,

"...probability is meant the likelihood of anything being true, deduced from its conformity to our knowledge, observation, and experience. When a supposed fact is so repugnant to the laws of nature that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible."

According to **E.R.S.R. Coomaraswamy, in "The Law of Evidence Volume II Book 02" on Page 1053,**

"The test of improbability has been described as essential inconsistency. There may be facts which may show it to be impossible or so highly improbable as to justify the inference that it never occurred."

Furthermore, his Lordship Justice Jayasooriya **In Wickremasinghe v. Dedoleena and others 1996 (2) SLR held that;**

"A Judge, in applying the test of probabilities and improbability relies heavily on his knowledge of men and matters and the pattern of conduct observed by human beings both ingenious as well as those who are less talented and fortunate.

This proposition was followed by his Lordship Justice Gooneratne in, **Singharam Thiagarajah v. AG CA 216/2010 Decided on 10.10.2014** wherein his Lordship held;

"I wish to observe that the realities of life and the testimony of a witness cannot always be co-related. Nothing is perfect in life and the truth does not surface so easily as a man so bias could attempt to hide the truth or distort it. The test of probability needs to be applied and recognized to grapple with normal human behavior and problems and pave the way for the likelihood of occurrence."

Considering the evidence led by PW01 we note that as per his evidence, he had opened the parcel and seen the brown substance inside which he identified as Heroin. However, the Government Analyst, in her evidence, later revealed that there had been two polythene bags containing Heroin. If a prudent man opened the said parcel, it is most likely for him to realize that there had been another bag inside the other. The bag itself, and the contents specially ought to have been examined closely. Therefore, upon applying the Test of Probability and Test of Improbability to the aforementioned facts, it becomes evident that the evidence presented through the Prosecution's narratives cannot be deemed credible, it creates doubt.

This Court agrees with the submission of the Learned Counsel for the Appellant that the PW01 never opened the bag. The question is what made him not to open the parcel. According to the Accused, the parcel was introduced by the police. Therefore, we can conclude that the reason for not opening the parcel by PW01 is that he knew in advance the parcel contained Heroin

In light of these circumstances, we find that the defense's narrative appears more plausible than that of the Prosecution. Therefore, on these grounds and for the reasons detailed above, we overturn the conviction and sentence.

This appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL