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

In the matter of an application under and in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No:

CA/HCC/0170/2019

High Court of Colombo

Case No: HC/7787/2015

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Amukotuwe Gedara Kamal Nishantha *Alias* Mahaththaya

ACCUSED

AND NOW BETWEEN

Amukotuwe Gedara Kamal Nishantha *Alias* Mahaththaya

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Neranjan Jayasinghe with Randunu Heellage for the Accused-Appellant
	: Sudharshana De Silva, S.D.S.G. for the Respondent
Argued on	: 27-06-2024
Written Submissions	: 18-03-2021 (By the Complainant-Respondent)
	: 18-05-2020 (By the Accused-Appellant)
Decided on	: 11-09-2024

Sampath B. Abayakoon, J.

This is an appeal preferred by the accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Colombo.

The appellant was indicted before the High Court of Colombo for trafficking 4.03 grams of Diacetylmorphine, a dangerous drug commonly known as Heroin, on 11-08-2013 at Dam Street within the jurisdiction of the High Court of Colombo, and thereby committing an offence punishable in terms of Poisons, Opium and Dangerous Drugs Ordinance as amended by the Amendment Act No. 13 of 1984.

He was also indicted for having in his possession the above-mentioned quantity of Diacetylmorphine at the same time and at the same transaction, and thereby committing an offence punishable as above.

After trial, the learned High Court Judge of Colombo of the judgment dated 17-06-2019 found the appellant guilty as charged, and after having considered the mitigatory as well as aggravating circumstances, sentenced the appellant for life imprisonment.

The Facts in Brief

PW-01, an officer attached to Police Narcotics Bureau (PNB) has been informed by one of his subordinates (PW-02) on 11-08-2013 at 12.50 hours that he received an information from one of his private informants about trafficking of Heroin.

The information had been to the effect that one Keselwatta Dinuka, who is a Heroin trafficker operating from Dubai, distributes Heroin through one Vimukthi living in Madaawi Flats, Keselwatta and he does it through a person called Mahaththaya.

After the information, PW-01 has organized a raid and has left the PNB at 13.40 hours with a team of police officers including PW-02. They have reached the old fish market situated on Reclamation Road around 14.00 hours and has stopped their vehicle at the old car park of the fish market. The private informant has come and met them and had informed further that the person called Mahaththaya would be coming near Hasthagiri Hotel situated on Dam Street around 5.30 and 6.00 in the evening to hand over a Heroin parcel to another.

Having received this information, the police team had waited, expecting further communication. They have been informed at 17.10 hours by the informant as to the place where he would be stationed so that he can show the person called Mahaththaya to them. After a while, the informant has signaled to a person coming towards them, which has resulted in PW-01 and his team stopping him in front of Hasthagiri Hotel and searching him. It has been his evidence that the person attempted to escape, which resulted him being handcuffed. PW-01 has recovered a parcel concealed in his undergarment as a result of the search, and through his experience, has observed that the contents in the parcel was Heroin.

Accordingly, the person has been arrested after informing him of the charge against him. Both PW-01 and 02 had identified the person they came to know as Mahaththaya as the appellant at the trial before the High Court.

After the arrest, the police team had gone to Mahara area where the appellant was residing and had searched a room, and had then returned to Keselwatta and searched a flat situated in Madaawi Flats where the appellant's parents, sister and some small children were living. The search of the houses has not resulted in finding anything illegal. Thereafter, the appellant has been taken to the PNB and after testing and confirming that the powder found was Heroin, PW-01 has taken the other procedural steps to seal the productions and hand over the same to the relevant Production Officer.

The evidence of PW-02, who has given evidence to corroborate PW-01, has been the same.

At the cross-examination of PW-01 as well as PW-02, the position taken up by the appellant had been that he was arrested while walking in Dam Street in order to go to his employer's house to handover the days' collection of the shop situated in the Manning Market where he was employed. It has been alleged that he was assaulted, and his sister and little daughter who came there after hearing about his arrest was also taken into custody along with another person, and later released. It had been the position of the appellant that the police officers could not find anything illegal from his possession, but later introduced Heroin to him and falsely accused him of having Heroin in his possession.

The prosecution has also led the evidence to establish the chain of custody and since the Government Analyst Report has been admitted in terms of section 420 of the Code of Criminal Procedure Act, the Government Analyst has not been called as a witness.

When the appellant was called upon for a defence at the conclusion of the prosecution case, he has made a lengthy dock statement. He has stated that on the day of his arrest, he went to meet his employer to give him Rs. 12,800/- which was the days' collection of the shop situated in Manning Market where he was employed. He has claimed that police officers stopped him while he was walking on Dam Street and searched him, but could not find anything illegal in

his possession. He has claimed that he was assaulted at that point, and when his sister and young daughter came and intervened, all of them were arrested and taken in a police jeep. He has also claimed that he was blindfolded at that time, severely assaulted, and another person was also taken into police custody while he was taken in the jeep.

He has admitted that the police officers searched his boarding place in Mahara and the house where his parents lived. He has stated that he was made to sign several documents at the PNB and later produced before the Magistrate's Court for allegedly possessing Heroin. He has claimed that the Heroin was introduced to him and he is innocent of committing any crime.

On behalf of the appellant, his sister and the daughter whom the appellant claimed to have come when he was arrested, has also given evidence.

The sister's evidence had been to the effect that while at home, she came to know about her brother being assaulted in Dam Street, which was a short distance away from their home, and she and the daughter of the appellant who was with her went in a three-wheeler to inquire. She has seen her brother being assaulted, and when attempted to intervene, she was addressed in filth by those who assaulted her brother, she has come to know that they were police officers. She has also stated that the police team searched her house. She has denied that her brother had any Heroin in his possession. She has been subjected to lengthy cross-examination on behalf of the prosecution.

The daughter mentioned earlier has also been called on behalf of the appellant to give evidence for his defence. When giving evidence before the High Court, she was an 11-year-old child and had been a 6-year-old when this incident occurred. After leading her evidence up to an extent, the learned Counsel who appeared for the appellant had informed the Court that he will no longer lead evidence of her. She has also been subjected to cross-examination by the prosecution.

It appears from the proceedings before the High Court that the learned High Court Judge has questioned the defence witnesses while they gave evidence. It

needs to be observed that when the daughter of the appellant was called upon to give evidence and when the learned Counsel for the appellant led her evidence, it was the learned High Court Judge who has asked more questions from her than the learned Counsel for the appellant who commenced leading her evidence in chief. This appears to be the reason why the learned Counsel has informed the Court that he will no longer call the daughter of the appellant as a witness. It needs to be observed further that the learned High Court Judge has put several questions to her at the cross-examination as well.

Pronouncing his judgment on 17-06-2019, the learned High Court Judge after having analyzed the evidence placed before him has rejected the defence put forward by the appellant on the basis that it has no merit and is improbable. On the basis that the prosecution has proved the case beyond reasonable doubt, the appellant has been convicted for both the counts preferred against him and sentenced accordingly.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for consideration of the Court.

1. That the learned High Court Judge has acted contrary to the provisions of section 165 of the Evidence Ordinance as he has encroached into the role of the prosecutor and thereby denied a fair trial to the appellant.
2. That the learned High Court Judge has not given a fair opportunity to the appellant to present the defence case.
3. That the learned High Court Judge has failed to consider whether the defence version passes the test of probability rather than that of the prosecution, and the dock statement of the appellant has not been considered properly.

The learned Counsel for the appellant made submissions mainly referring to the manner in which the learned High Court Judge questioned the defence witnesses to argue that it has denied a fair trial towards the appellant. The learned Counsel

for the appellant was of the view that an accused person when called upon for a defence is entitled to place his defence before the trial Court without hindrance. He was of the view that the learned High Court Judge has failed to give him a fair trial due to the excessive questioning of the prosecution witnesses.

He pointed out towards the evidence of the daughter of the appellant who has been called as a witness for the defence. It was his view that the learned High Court Judge has prejudged her evidence on the basis that she was lying from the very outset of her evidence, and had excessively questioned the witness even before she could conclude her evidence in chief by putting questions the prosecution Counsel should have put while the witness was being subjected to cross-examination. He was of the view that this was the very reason why the learned Counsel who represented the appellant at the trial has given up on leading the evidence of the daughter of the appellant.

He also pointed out that the learned High Court Judge has used the knowledge he gained from the other witness called for the defence, namely the sister of the appellant, to confront the daughter of the appellant and had used it to make adverse references as to the evidence of the defence witnesses in a manner that has caused great prejudice to the appellant.

It was the submission of the learned Senior Deputy Solicitor General (SDSG) that the prosecution has led cogent and truthful evidence to prove the charges against the appellant, and was of the view that the learned High Court Judge has analyzed the evidence in its correct perspective. The learned SDSG justified the learned High Court Judge's view that the defence put forward by the appellant was a built up defence. However, the learned SDSG also conceded that the way the learned High Court Judge questioned the defence witnesses might have exceeded the powers vested in a High Court Judge to put questions to witnesses in terms of section 165 of the Evidence Ordinance.

He was also of the view that the defence put forward by the appellant was a defence that cannot be believed; therefore, no prejudice has been caused to the appellant because of the earlier mentioned excessive questioning.

Consideration of the Grounds of Appeal

As the learned Counsel for the appellant argued this matter on the basis that the appellant was denied of a fair trial and the learned High Court Judge had been biased towards the prosecution throughout the trial, I will now proceed to consider the three grounds of appeal together as they are interrelated.

Having listened to the submissions of the learned Counsel for the appellant and that of the learned SDSG, it is the view of the Court that the question that should be decided in this appeal is whether the manner in which the defence witnesses, especially the daughter of the appellant, was questioned by the learned High Court Judge has caused a prejudice towards him and thereby, he has been denied of a fair trial guaranteed to him under the provisions of the Constitution.

The Article 13(3) of the Constitution reads as follows.

> **13(3) Any person charged with an offence shall be entitled to be heard in person or by an Attorney-at-law, at a fair trial by a competent Court.**

The relevant section 165 of the Evidence Ordinance, the learned High Court Judge may have used to question the defence witness reads as follows.

> **165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:**

Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document, which such witness would be entitled to refuse to answer or produce under sections 121 or 131 both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, expecting the cases hereinbefore excepted.

The provisions of section 165 are clear that a trial Judge has been given a wide option to examine and put questions to any witness called upon either by the prosecution or by the defence. However, it is the view of this Court that, that right is not an unfettered right in view of the provisos to the section as the expected purpose of section 165 is to allow a trial Judge to ascertain the truth of a relevant fact or facts.

In the case of **State of Rajasthan Vs. Ani, AIR 1997 SC 1023, 1025: 1197 CriLJ 1529**, it was observed,

"Criminal trial should not turn out to be about or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chance of erring

may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelt out by witnesses during evidence collecting process. It is a useful exercise for trial Judge to remain active and alert so errors can be minimized."

In this context, I would also like to quote from the observation of **Chinnappa Reddy, J.** in **Ram Chander Vs. The State of Haryana (AIR 1981 SC 1036)**.

"The adversary system of trial being what it is there is an unfortunate tendency for a Judge presiding over a trial to assume a role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the defence distortions flowing from combative and competitive elements entering the trial procedure. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recoding machine. He must become a participant in the trial by evincing intelligent, active interest by putting questions to witnesses in order to ascertain the truth."

In view of the above judgments and the constant view held by our Superior Courts, it is clear that although our system of justice is adversarial as opposed to inquisitorial, still a Judge can get involved in a case to ascertain the truth so that he can dispense justice fairly and equally. However, it must be emphasized that while doing so, a Judge must also make sure not to exceed the expected parameters in that regard so that any line of questioning should not be seen or can be interpreted as being biased or prejudicial towards the rights of the parties to have a fair trial, may it be for the prosecution or the defence.

In this relation, I would like to cite the case of **Sisilinona Vs. Balasuriya (2002) 1 SLR 404**, which I find relevant in terms of section 165 of the Evidence Ordinance as well, although this was a matter where provisions of the Civil Procedure Code were considered,.

Held,

"1. Section 164 of the Civil Procedure Code provides that the Court may question a witness at any time and by section 165 a Judge is vested with a power to put questions to a witness in order to discover or to obtain proper proof of relevant facts.

2. The Court must not question the witnesses in the spirit of beating him down or encouraging him to give an answer.

Per Somawansa, J.,

One must not forget the fact that even witnesses who are able to stand their ground in the face of the severest cross-examination at the hands of the opposing counsel are in view of the difference with which they treat the Court incline to treat with greatest regard suggestions when they come from Court and are couched in compelling language and it is a rare witness who still steadily maintain his version in the face of such questioning by Court."

In the case of the **Queen Vs. V.P. David Perera 66 NLR 553**, it was held,

"*A Judge is not entitled to put leading questions, the answers to which are calculated to prejudice the accused. Further, he must not ask questions in such manner or such great number as to encroach upon the functions of a counsel who appears in the case.*"

Basnayake, C.J. cited the English case of **Yuill Vs. Yuill (1945) 1 All E.R. 183** where it was stated by **Greene, M.R.**:

"*It is quite plain to me that the Judge was endeavoring to ascertain the truth in the manner which at the moment seem to him most convenient. But he must, I think, have lost sight of the inconveniences which are apt to flow from an undue participation by the Judge in the examination of witnesses. It is of course always proper for a Judge and it is his duty to put questions with a view to elucidating and obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are*

matters which the Judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course take steps to see that deficiency is made good. It is, I think, generally more convenient to do this when the counsel has finished his questions or is passing to a new subject. It must always be borne in mind that a Judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination in chief or cross-examination."

In the case of **Jones Vs. National Coal Board (1957) 2 WLR 760**, **Denning, L.J.** endorsing what **Greene M.R.** had said in **Yuill's case** and added,

"The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemingly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetitions, to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a Judge and assumes the role of an advocate; and the change does not become him well."

The above judicial pronouncements clearly establish the fact that although a trial Judge is entitled to put questions to a witness, it should be with the view of ascertaining the truth and clarifying the relevant facts. It is my considered view that a trial Judge should be careful not to show that he has crossed the line and gone beyond the rights conferred upon him in terms of section 165 of the Evidence Ordinance. In such a scenario, the questioning of a trial Judge can be interpreted as fulfilling the role of a prosecutor, which amounts to a denial of a fair trial to an accused person.

In the appeal under consideration, the main contention of the learned Counsel for the appellant was that the appellant was not afforded a fair trial because of the way the learned High Court Judge put questions to the defence witnesses,

especially for the daughter of the appellant, who gave evidence on behalf of him. She has been an 11-year-old child at the time she gave evidence. It is quite apparent from the evidence that from the very outset of leading her evidence by the learned Counsel for the appellant, the learned High Court Judge has intervened and put his own questions, which should have been put by the prosecuting State Counsel when the witness was subjected to cross-examination. It is quite apparent that the learned High Court Judge was of the view from the very outset of her evidence that she is saying something taught to her by someone else. He has questioned the witness to the effect that "who told you to come and narrate this story before the Court", and when she said no one did, the learned High Court Judge has put several questions to confront her. It appears that when the learned Counsel for the appellant attempted to lead further evidence, the learned High Court Judge has again intervened by putting questions based on the knowledge he gained when the sister of the appellant gave evidence previously.

In this process, based on his questioning, the learned High Court Judge has made several observations as to the demeanour and deportment of this child witness.

It is clear that as a result of this excessive questioning by the learned High Court Judge, the learned Counsel who represented the appellant may have thought that there would be no purpose for him to lead evidence anymore. This has prompted the learned Counsel to inform the learned High Court Judge that he will no longer lead evidence of the daughter of the appellant. It appears that, the said statement has also been found fault by the learned High Court Judge.

When the witness was allowed to be cross-examined, it clearly appears that the learned High Court Judge has again put several questions, which appears to be filling the gaps in the line of cross-examination by the learned State Counsel.

It is with regret I need to observe that, this gives the appearance no fair trial has been granted to the appellant, which would have a vitiating effect on the final judgment pronounced after a full trial.

It is the view of this Court that it is not only important to hold a fair trial, but it must be manifestly seen that a fair trial was afforded to an accused person.

In the case of SC (SPL) LA 184/2017 – decided on 26.06.2020

Per **Aluwihare, P.C., J.,**

"*Lord Chief Justice Hewart's remarks in the case R v. Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233) made almost 100 years ago, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done" are now heard throughout the common law legal regimes. They sustain, in my view, not only an ethical requirement that judges cannot hear a case if, from the perspective of a reasonable and informed observer, their impartiality might reasonably appear to be compromised, but transcends to the requirement that judges must also observe procedures that are widely regarded as fair and transparent, especially in criminal cases.*"

It was observed in the case of **The King V. Namasivayam *Et Al.* Appeals Nos. 21-24 of 1948 49 NLR 289,**

"*While it cannot be doubted that a Judge has very wide powers of asking any question he pleases in any form and at any time of any witness, we feel that those powers should not be so used as to afford ground for the legitimate criticism that the accused persons have not had the benefit of a* trial *which can be regarded as entirely fair*"

For the reasons as set out above, I am of the view that this is a judgment that cannot be allowed to stand. Accordingly, I set aside the conviction and the sentence dated 17-06-2019 of the appellant by the learned High Court Judge.

The next matter that needs to be considered is whether this is a fit and proper case to be sent for a re-trial. This is an incident that was alleged to have occurred on 11-08-2013, some 11 years ago. After trial, the judgment has been pronounced in the year 2019. Since this conviction, the appellant had been in incarceration for over 5 years.

As this is an action which was instituted based on a raid conducted by trained police officers who have access to their notes made in that regard, recalling of such witnesses has to be considered under that context. Such witnesses will be able to be more perfect in order to cover any lapses that may have been made in the first trial. Hence, I am of the view that this is not a case fit to be sent for a re-trial.

Accordingly, I acquit the accused-appellant from the charges preferred against him.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal