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

In the matter of an appeal made in terms of Article 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Hon. Attorney General

Complainant

Court of Appeal Case No.

CA/HCC/171/2020

Panadura High Court Case

No. HC/3264/2015

Vs.

Ishwara Wellappili Arachchilage Neil Wasantha

Accused

AND NOW BETWEEN

Ishwara Wellappili Arachchilage Neil Wasantha

Accused – Appellant

Vs.

Hon. Attorney General

Complainant- Respondent

Before : Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel : Neranjan Jayasinghe with Harshana Ananda for the Accused – Appellant.

Wasantha Perera, DSG for the State.

Argued on : 26.10.2023

Decided on : 22.11.2023

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 24.8.2020 of the High Court of Panadura.

The accused appellant (hereinafter referred to as the appellant) has been indicted on four counts and they are as follows,

1) Being in possession of 6.649 grammes of Morphine,
2) Trafficking of 6.649 grammes of Morphine,
3) Being in possession of 1.12 grammes of Heroin,
4) Trafficking of 1.12 grammes of Heroin.

The appellant has pleaded not guilty and upon the conclusion of the trial the appellant has been convicted for all the charges in the indictment. **The grounds of appeal raised by the appellant were ,**

1) **The chain of production not being in order,**
2) **The defense being rejected unfairly**.

The version of the prosecution is that a group of police officers of the Horana police station had on 24.5.2008 stayed watch in the Horana main bus stand and they had taken in to custody the appellant while trying to board a bus and he had been carrying a black tulip bag. On inspection the police had found inside the tulip bag another grocery bag in which 3700 small bags had been found in which the contents they had suspected to be narcotics.

Upon the search being successful the appellant has been brought back to the police station and the tulip bag had been temporarily sealed and handed over to the reserve while PW1 had gone to get the scale to weigh the narcotics, and until such time the appellant had been in the police cell.

Upon returning PW1 had weighed and sealed the narcotics and had returned to the reserve police officers.

The defense had very lengthily cross examined PW 1and 2 and they had challenged the fact that when PW1 went to get the scale the tulip bag containing the narcotics was not properly sealed. The trial judge also had observed that there were no marks of sealing on the tulip bag, although the prosecution had said in evidence that the tulip bag had been sealed with “lakada”.

Another position challenged by the defense during cross examination was that before the weighing of the productions that PW1 did not put a proper note in the IBEs, but PW1 had said that he had put a note in the pocket note book and that it was a temporary handing over and the reserve officer had put a suitable note.

But PW1 is the officer who had led the team and the safety of the productions until it is handed over to the reserve officers for safe keeping it is the responsibility of PW1 , hence even though it had been a temporary handing over the safety of the productions has to be ensured and a suitable note has to be put in so that no party could make an allegation.

The defense in cross examination had maintained the position that the alleged parcel had been introduced by the police officers. But we note that the police officers had been on normal duty of checking the buses for any explosives when they had been informed by a three wheel driver to check the appellant who had tried to board the bus which was being checked by the police officers and on seeing them, he had tried to get off and this action of the appellant had made the police officers suspect him in addition to the signal they had received from the informant.

The defense had right along suggested to the witnesses of the prosecution, that the productions were an introduction and the appellant also in evidence had denied the allegation and had said that he never carried the narcotics and he on the fateful day had boarded the bus which had been searched by the police and since the bus was full he had got down to board the next bus and then the police officers had shown him a parcel and had asked whether it was his and when he denied he had been taken in to custody.

The prosecution had lengthily cross examined him but they had not been able to show any discrepancies in the evidence of the appellant.

The position of the defense had been the same right along.

The trial judge upon considering the evidence had said that the appellant had not proved any items of evidence he had narrated in evidence by calling any evidence.(page 484).

This we observe to be against the basic principles of criminal because it is a well-established fact that the accused has nothing to prove but it is the prosecution which has to prove its case beyond a reasonable doubt .

The trial judge had referred to the presumption of innocence of an accused until he is proved to be guilty of the offence but has later said that in view of the evidence adused at the trial he has failed to call any evidence to substantiate his position which we consider is a burden laid on the accused which is not required in law.

The Counsel for the appellant while bringing the above misdirection by the trial judge , on the law cited the case of **Sunil Appuhame vs The Republic of Sri Lanka CA 74-2005 decided on 25.2.2008 by Justice Ranjith Silva J in which he has said",**

"The main ground argued on behalf of the Accused- Appellant was that the learned trial Judge misapplied the principle of law relating to the burden of proof. I now advert to this contention. The learned trial Judge at page 177 of this Judgement, rejected the defense of the accused on the basis that it had not been proved. I shall now consider whether the above conclusion reached by the learned trial Judge is right or wrong. In considering this question I am guided by certain judicial decisions. In Ariyadasa Vs. Queen 68 N.L.R. page 66 Justice Fernando held thus: *"where in a prosecution for murder the accused gives evidence without seeking to bring himself within the benefit of a general or special exception in the Penal Code, the burden of proof does not shift on to him at any stage."*

In Martin Singho Vs. Queen 69 C.L.W. at page 22 Justice T.S. Fernando remarked thus: "As this Court has pointed out on many occasions in the past, where an accused person is not relying on a general or special exception contained in the Penal Code, there is no burden on him to establish any fact". Applying the principles laid down in the above judicial decisions, I hold that when an accused person denies the incident, there is no burden on the accused to prove any fact. In such an event the burden of proof does not shift on to the accused. It is clear from the above conclusion of the learned trial Judge; the learned trial Judge has shifted the burden on the accused to prove his defense namely the denial. The learned trial Judge, by the said conclusion, ignored the presumption of innocence. In short, the learned trial Judge, by the said conclusion, decided that the accused should prove his innocence. This becomes so since the accused denied the incident of the murder. The above conclusion of the learned trial Judge is a serious misdirection on law, which cannot be ignored or overlooked by applying the provisos the Article 138 of the Constitution and Section 334 of the Criminal Procedure Code."

In the instant matter also, we find that the trial judge had attached a certain degree of a liability on the appellant saying that he has failed to prove certain facts in his evidence which we think is contrary to the basics of criminal law.

As such we find that the defense of the appellant has not been considered fairly by the trial judge.

Further to the above we also find that the trial judged has failed to take in to consideration the observations that has been made with regard to the sealing of the productions during the cross examination of PW1, because it has been sealed with "ලාකඩ", if that is so a mark on the parcel is inevitable because the substance "lakada " is a very sticky substance which would inevitably leave a mark. This probability has not been considered by the trial judge.

Hence in the light of the above we are compelled to conclude that the trial judge had misdirected himself on the law and the facts of the case.

Hence, we are compelled to set aside the conviction and the sentence of the trial judge and allow the instant appeal.

JUDGE OF THE COURT OF APPEAL

Hon. Justice B. Sasi Mahendran

I agree.

JUDGE OF THE COURT OF APPEAL