

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

*In the matter of an Appeal in terms of
section 331 of the Code of Criminal
Procedure Act No- 15 of 1979.*

Court of Appeal No:

CA/HCC/0004/21

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Colombo

Case No: HC/7856/2015

Rohana Priyanthage Antony Kumar,

No. 162/542,

Madampitiya Road,

Kimbula Ela,

Modara,

Colombo 15.

ACCUSED

AND NOW BETWEEN

Rohana Priyanthage Antony Kumar,
No. 162/542,
Madampitiya Road,
Kimbula Ela,
Modara,
Colombo 15.

ACCUSED-APPELLANT

Vs.

The Attorney General,
Attorney General's Department,
Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Rienzie Arsecularatne, P.C. with Chamindri Arsecularatne, Thilina Punchihewa, Eranga Yakandawela, P. Gamage and Himasha Silva for the Accused Appellant
	: Dileepa Pieris , SDSG for the Respondent
Argued on	: 13-09-2023

Written Submissions : 25-08-2022 (By the Accused-Appellant)

: 20-01-2022 (By the Respondent)

Decided on : 12-01-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo on two counts of possession and trafficking of Diacetylmorphine, commonly known as Heroin.

The allegation against him had been that on 22-05-2014 at Maligawatta, he had in his possession 3.13 grams of Diacetylmorphine which is a prohibited drug in terms of the Poisons Opium and Dangerous Drugs Ordinance as amended by Amendment Act No. 13 of 1984, and thereby committed the offences of possession and trafficking of Heroin, punishable in terms of the Ordinance.

The appellant had pleaded not guilty to the indictment, and after trial, the learned High Court Judge of Colombo had found the appellant guilty as charged, of the judgement dated 12-01-2021. Accordingly, the appellant had been sentenced to life imprisonment.

It is against the said conviction and the sentence; the appellant has preferred this appeal.

Facts in Brief

PW-01 Police Inspector Ranasinghe was the officer who led the team of police officers attached to the Colombo Crimes Division to conduct this raid, where the appellant had allegedly been arrested while having Heroin in his possession. IP Ranasinghe was a well-experienced officer in drug related detections. On 22-05-2014, he has left the Colombo Crimes Division at 14.40 hours along with 10 other officers in a white coloured van belonging to the police department.

He had been dressed in number 02 police uniform, while all other officers had been in civics. The team has left the police station on routine crime prevention

duty. After traveling to various places, they have come near Babapulle road and had parked the vehicle in front of a mosque named as Podi Palliya.

After leaving two police officers in the van, PW-01, along with other team members had walked towards the Premadasa International Cricket Stadium. While walking, he has observed a person coming towards him. After seeing him, crossing the road towards the other side pavement, and having suspected the movements of the person, PW-01 and the team has surrounded him.

When searched, PW-01 has found a pink-coloured cellophane bag with some brown-coloured substance in his right-hand side pocket. Through his experience, PW-01 has realized that the substance is Heroin, and arrested the person, namely, Rohana Priyanthage Antony Kumara at 15.10 hours. The witness has identified the suspect arrested as the appellant who stood indicted before the High Court.

After the arrest, PW-01 and his team has gone to a place called Dedigama Pawning Center in Dematagoda and had used the electronic scale available in the pawning center to weigh the productions. The parcel had shown a weight of 20 grams and 30 milligrams. After the weighing, PW-01 has taken steps to seal the productions, and had return to his station. PW-01 has entered his in entry note at 16.25 hours. He has handed over the suspect and the productions to police reserve under production receipt number 163/2014.

The evidence in chief of PW-01 itself shows that the learned State Counsel who prosecuted has questioned the witness as to the duties he performed before he left the station at 14.40 hours. It has been revealed that in fact PW-01 has left the police station at 6.30 hours in the morning for his vice prevention duties. He and his team have arrested 4 suspects including a female, and had returned to the police station at 14.20 hours, which means, PW-01 and his team had left the police station again within 20 minutes of their arrival, for vice prevention duties.

It appears that the learned prosecuting State Counsel himself had doubts about the timeline as mentioned by PW-01, which has led to several questions being posed to PW-01 in that regard.

The other witness called by the prosecution to substantiate the evidence of PW-01 had been PW-02, PS10757 Fonseka. His evidence had been similar to that of IP Ranasinghe.

The position taken up by the appellant during the cross-examination of the prosecution witnesses had been that he was not arrested in the manner stated by PW-01. It had been his position that PW-01 got the female suspect whom he arrested previously to call the appellant and persuaded him to come near Kethtarama Stadium and he was arrested in the morning itself when he came in a three-wheeler and got down near Kethtarama Stadium. He has denied that he was arrested in the evening as claimed by the witnesses and had any Heroin in his possession.

During the trial, several admissions had been recorded before the trial Court, and the Government Analyst Report had been admitted.

When the appellant was required to present his defence at the close of the prosecution case, he has made a dock statement. It had been his position that in the morning of 22-05-2014, he came in a three-wheeler and got down from it near Kethtarama Stadium to meet a person called Suresh with the intention of obtaining employment, and he was arrested by the police at that point. He has claimed that he was assaulted, although he had nothing in his possession, but later took him to the police station and was charged for having Heroin in his possession.

On behalf of the appellant, a person called Ismaldeen has given evidence. He has stated that he took the appellant in his three-wheeler on a hire and when they reached Maligawatta area, four police officers in civilian clothes stopped the vehicle and arrested them, and both of them were assaulted and taken to the

police station. According to the witness, he had been released by the police around 6.00 p.m.

In his judgement, the learned High Court Judge has found no contradictions or omissions in the evidence of PW-01 and 02 with regard to the detection of Heroin in the possession of the appellant. He has found that after the arrest, the productions had been properly sealed, handed over to the police reserve and taken to the Government Analyst in the proper manner.

The Government Analyst Report reveals that the substance found in the possession of the appellant had a pure quantity of 3.13 grams of Diacetylmorphine, commonly known as Heroin.

The attention of the learned High Court Judge had been drawn to the timeline given by PW-01 and his team about coming to the police station after conducting several raids and leaving again within 20 minutes time. It had been determined that there was no ambiguity in the timeline given by the witnesses as it was probable for the police to complete their necessary duties within 20 minutes and leave the station.

The learned High Court Judge has determined that the stand taken by the appellant when the witnesses gave evidence for the prosecution, and when he was called upon for the defence, were different to each other, and had determined that the appellant has failed to create a reasonable doubt of the prosecution evidence.

Accordingly, he has been convicted as charged.

The Ground of Appeal

At the hearing of this appeal, the learned President's Counsel informed the Court that he is relying mainly on the probability factor of the evidence presented by PW-01 and supported by PW-02.

The learned President's Counsel formulated the following ground of appeal for the consideration of the Court.

- (1) The learned High Court Judge misdirected himself of the facts of the case by failing to properly analyze the evidence.

In his submissions the learned President's Counsel brought to the notice of the Court that for a team of police officers who left their police station at 6.30 in the morning, and returned at 14.20 in the afternoon with 4 arrested persons, to leave the station in 20 minutes time after completing the necessary formalities that should be fulfilled in relation to the 4 arrested persons, is highly improbable.

He was of the view that if the learned High Court Judge looked at the improbability factor in that relation in the correct perspective, there was no basis to conclude that the charges have been proved beyond reasonable doubt against the appellant.

Although the learned President's Counsel made his submissions based on several other factors he termed as weaknesses in the prosecution case, I will proceed to consider all the factors on the basis of probability, as it was the main ground of appeal urged on behalf of the appellant.

It was the submission of the Senior Deputy Solicitor General (SDSG) that the arrest of the appellant by the police was not a disputed fact, and since there were no omissions or contradictions as to the evidence for the prosecution, it has been established that the arrest was made in the afternoon and not as claimed by the appellant.

It was the position of the learned SDSG that the improbability factor as claimed by the learned President's Counsel had drawn the attention of the learned High Court Judge, and since the learned High Court Judge had considered the facts and the relevant law in its correct perspective before reaching his conclusions, the appeal should stand dismissed.

Consideration of the Ground of Appeal

It is clear from the evidence of PW-01 that he and his team of police officers had initially left the Colombo Crimes Division at 6.30 a.m. for their daily vice prevention duties. According to the witness, they have returned to the station at 14.20 hours and had left again in 20 minutes time at 14.40 hours. It has been established that the PW-01 has entered his entry note at 14.20, which means that he has begun to write the entry note at that time. When they returned to the station at 14.20, the police team has had in their custody, four suspects, including a female. Three of them had been arrested for having Cannabis in their possession while the female had been arrested for having Heroin with her.

The question before this Court is whether it would have been possible for the PW-01 to follow all the necessary formalities once an arrested suspect is brought to a police station, especially, with productions relating to drugs, and leave the police station within 20 minutes, again on vice prevention duties.

As I have stated before, when the witness says that he returned to the police station at 14.20 hours, it is clear that it was the time he began to prepare his entry note in the relevant book. There is no doubt that after having arrested four persons, it will at least take few minutes time for him to obtain the relevant book and enter the notes. Then thereafter, he needs to hand over the four accused persons and the productions to the police reserve, each one separately. It is hard to believe that such a procedure can be completed within a short span of 20 minutes as claimed by the witness. Each production has to be entered in the production register. The Production Officer has to accept the productions after checking the relevant seals. If the suspected persons had any personal belongings, such belongings need to be entered separately and handed over to the Productions Officer.

It is only thereafter, the PW-01 will have time to organize another outing on crime prevention duties. He needs to search or inspect his fellow team members to make sure that they do not carry unwanted items and also to search the vehicle they were traveling before leaving for their duties. A police team who returned to a police station after several hours of crime prevention duties needs at least few minutes rest before they embark on another journey of crime prevention.

It is very much apparent that even the prosecuting State Counsel had a doubt in his mind as to the timeline given by PW-01 in this regard when the witness was examined in detail of this fact.

Although it is correct to say that this fact had drawn the attention of the learned High Court Judge, I am not in a position to accept the justification given in that regard. For matters of clarity, I would now reproduce the relevant portion of the judgement, which appears at page 12 of the judgement (at page 257 of the appeal brief).

“එසේම මුල් වැටලීම සිදුකර පොලිස් ස්ථානයට පැමිණ විනාඩි 20ක් වැනි කාල සීමාවක් තුළ නැවත වැටලීමක් සඳහා පිටත්ව යෑමට කාලය ප්‍රමාණවත් නොවන බව යෝජනා කළ අතර එයද සාක්ෂිකරු ප්‍රතික්ෂේප කරන ලදී.

මේ සම්බන්ධයෙන් පැ.සා. 01 පවසන්නේ මුල් වැටලීම සිදු කිරීමෙන් පසු නඩු භාණ්ඩ මුද්‍රා තබාගෙන පැමිණි හෙයින් ඒවා භාරදීමට විනාඩි 20ක කාලය ප්‍රමාණවත් බවයි. මෙම පැහැදිලිකිරීම අධිකරණයට පිළිගත හැකිය. මක් නිසාද යත් එසේ අත්අඩංගුවට ගත් සියලුම සැකකරුවන් සන්නකයේ තිබූ භාණ්ඩ මුද්‍රා තබාගෙන පැමිණි අවස්ථාවකදී ඒවා භාර දීමට වැඩි කාලයක් ගත නොවන හෙයිනි.”

It clearly appears that although the learned High Court Judge has drawn his attention to the probability factor, he has failed to adequately analyze whether it was possible under the given circumstances, other than merely accepting the evidence of PW-01 in that regard on its face value.

I am of the view that if viewed at the viewpoint of a reasonably prudent person, the evidence of PW-01 that he left within 20 minutes after arriving at the police station having conducted several detections previously, was highly improbable.

It is my considered view that the evidence of the prosecution witnesses fails the test of probability as argued by the learned President's Counsel, which is a matter that should be considered in favour of the appellant.

It is trite law that however weak the defence taken up by an accused person, weaknesses of the defence will not lessen the burden of the prosecution to prove the prosecution's case beyond reasonable doubt.

In the case of **Narender Kumar Vs. State of Delhi (NCT of Delhi, AIR 2012 SC 2281)**, it was held:

“Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of the defence. However great the suspicion against the accused and however strong the moral belief and conviction of the Court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for the offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.”

In the appeal under consideration, the position taken up by the appellant as to the reason why he came near the stadium on the day of his arrest differs from what was suggested to PW-01 and stated in his dock statement. However, the stand taken up by him as to the way he was arrested in the morning hours of the day had been consistent. The witness who gave evidence on behalf of the appellant had been consistent with the stand of the appellant that he was arrested while traveling in his three-wheeler during the morning of the day of arrest. When considering these factors together with the probability issue raised on behalf of the appellant, I find strong merit in the ground of appeal urged by the learned President's Counsel.

Accordingly, agreeing that the prosecution has failed to prove its case beyond reasonable doubt against the appellant, I set aside the conviction and the sentence as it cannot be allowed to stand.

The appellant is acquitted of the charges preferred against him.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal