**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

**C.A. Case No: 260/2013**
**H.C. Colombo Case No: 4899/2009**

The Democratic Socialist Republic of Sri Lanka

**Complainant**

**-Vs-**

Wehalla Arachchige Chaminda Kumara

**Accused**

**-AND NOW BETWEEN-**

Wehalla Arachchige Chaminda Kumara

**Accused-Appellant**

**-Vs-**

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

**Complainant-Respondent**

**Before :** **A.L. Shiran Gooneratne J.**

**&**

**K. Priyantha Fernando J.**

**Counsel :** Anil Silva, PC with Dale Gunaratne for the Accused-Appellant.

Harippriya Jayasundara, SDSG for the Respondent.

**Written Submissions of the Accused-Appellant filed on:** 17/04/2017

**Written Submissions of the Complainant-Respondent filed on**:06/02/2018

**Argued on** : 11/02/2019

**Judgment on** : **19/03/2019**

**A.L. Shiran Gooneratne J.**

The Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Colombo on two counts, under Section 54A (b) and Section 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance (as amended by Act No. 13 of 1984) for trafficking and possession of 18.79 grams of heroin. Upon conviction on both counts, the Appellant was sentenced to death.

When this case was taken up for argument, the following grounds of appeal were raised by the Counsel for the Appellant;

(a) did the learned high court judge misdirect himself regarding the identity of the marked productions.

(b) did the learned trial judge misdirect himself when he failed to consider the inherent defects in the prosecution case.

(c) did the learned high court judge reject the dock statement of the accused unreasonably.

The case for the prosecution in brief is that, on a tip off, the Appellant was arrested by the officers attached to the Police Narcotic Bureau (PNB) whilst in possession of the said illegal substance at the Orugodawatta- Kaduwela, No. 143 bus stand.

IP Liyanage, (PW1) who led the raiding party together with PS 27706 Kumarasinghe, (PW2), had met the informant at No. 143 bus stand. On information received, the Appellant and a person who was in the company of the Appellant was arrested. On a search carried out on the Appellant by PW1, 11 parcels of heroin concealed in the rear left side trouser pocket of the Appellant was discovered. The person who was in the company of the Appellant was also searched and he too was discovered in possession of 11 parcels of heroin. According to evidence of PW1, the parcels of heroin recovered from the Appellant and the person who accompanied him were separately weighed and separate Production Record (PR) numbers and Grave Crime Record (GCR) numbers were attached, before handing over custody of the productions to Sub inspector, M.B.

Samarakoon (PW4). PW4 had thereafter forwarded the productions to the Government Analyst (GA) on 17/05/2007.

PW4 states that, he took custody of parcel marked PR 12/2007 consisting of 11 smaller parcels of deferent weights marked K1 to K11. He also states that at the same time he took custody of another parcel marked PR 13/2007. The parcel attached to PR 12/2007 was handed over to the GA by this witness. The Counsel for the defence pointed out that the GCR number 30/07 attached to PR 12/2007, has been altered as GCR number 29/07. The said alteration had been noted by the witness when the production was handed over to him. The trial judge has observed that number 30 written on the production had been struck off and number 29 substituted.

The learned counsel for the Appellant contends that the said alteration creates a doubt regarding the productions recovered from the Appellant, since a similar number of parcels were recovered from the person who was arrested together with the Appellant.

PW1 in his evidence clearly states that, the alteration had been made before he took over custody of the productions. PW1 in whose custody the productions were prior to PW4 receiving the productions was not questioned about the said alteration. The objection raised by the Appellant is based on the fact that a similar number of parcels were recovered from two accused at the time of detection, which could raise a doubt as to which parcel was recovered from which accused.

On this point, we observe that there were two officers in whose custody the two parcels were kept to avoid any uncertainty. The two parcels which were separately recovered were attached with two separate PR and CGR numbers and contained three separate official rubber seals, the left finger print of the accused and the signature and the official rubber seal of the officer in whose custody the productions were kept. Therefore, we do not see any confusion regarding the identity of the marked productions which would prejudice the interest of justice.

The Counsel for the Appellant has drawn attention of Court to the following items of evidence, which are termed as inherent defects of the prosecution case as the 2nd ground of appeal.

(1) PW1 did not account for Rupees 1,400/- in his possession at the time of detection.

The Appellant contends that there is a probability that the unaccounted personal money carried by this witness may have been spend on two three wheelers in which the raiding party arrived at the scene of detection. PW1 denies this contention. The evidence is that, the police party arrived at the place of detection in an unmarked police jeep. PW1 has explained in detail that an officer of a raiding party should account only for money that is taken from the PNB and personal money carried need not be accounted for and need not form part of the notes kept by the respective officer. According to PW1, part of the money carried by him was spent on refreshments on the officers of the raiding party.

(2) In some instances, Reference to PR number 112/07 has been written as 12/2007.

The learned high court judge has observed that in some instances PR number 112/07 has been written as PR number 12/07 and has attributed the said infirmity to typographical error. The said infirmity was never put to the witness but has been brought to the attention of Court at the conclusion of witness evidence in the written submissions filed of record on behalf of the accused.

(3) The date on the covering letter addressed to the GA creates a doubt about the date of detection.

The date on which the raid was carried out by the PNB is not disputed by the defence. PW 4 has stated that the production identified as PR number 12/2007, relating to this case was handed over to him on 16/05/2007, and was intern handed over to the GA on 27/05/2007. The counsel pointed out that the date which appear on PR 12/2007 is 15/05/2007. However, PW 4 maintained in his evidence that production marked, PR 12/2007 was handed over to the GA on 27/05/2007. It was also pointed out that the covering letter sent by the PNB is dated 11/05/2007. The GA in her evidence has admitted that the said production was received by her from the custody of PW4 on 27/05/2007, and covering letter marked CD/1048/07, was issued to PW4, which had reference to the connected case against the Appellant pending in the Magistrate's Court of Maligakanda. She also explained that the reference to the date 11/05/2007, appearing in the covering letter is illegible and she is unable to comment whether the date indicated is 11/05/2007 or 16/05/2007.

The discrepancy in the date and the PR number relates to documents which are marked in evidence.

> *"evidence should not be confused with proof. As soon as a document, an invoice is produced for the inspection of the court it becomes evidence, it could be acted upon, when it is proved, when it is found acceptable and then it is to be considered in conjunction with other items of evidence"*
>
> ***(M/s. Parry confectionery Ltd. V. Food Inspector, Ulunderpet, 1989 Cr LJ 642, 646: (1989) 1 Crimes 88)***

(4) The investigators by passed Neil's house (the person who was arrested along with the Appellant who was in possession of a lager quantity of heroin) and went on to search the house of the Appellant.

The progression of an investigation is a matter to be decided by the investigator. Therefore, for no valid reason, simply to discard the evidence of the investigator for progressing in a chosen direction of investigation is unjust, to say the least.

We observe that the learned trial judge when dealing with the aforesaid issues has taken into consideration all facts in issue arising out of evidence given by the respective witnesses and also has analyzed the said evidence with the weight of the entirety of the evidence led in this case. We also note that the trial

judge who delivered the judgment had the opportunity of observing the demeanor and deportment of each and every witness before arriving at his conclusions. Since, the trial judge had the opportunity of seeing the witnesses, his decisions on questions of fact should not be lightly disturbed and in the circumstances, we do not see any reason to find that such conclusions are ill founded.

The learned trial judge has completely rejected the dock statement given by the Appellant and has given reasons for doing so.

The Appellant submitted that he was arrested by the officers of the PNB, when he was at home and also stated that the raiding party arrived on two three-wheelers. The learned trial judge in the evaluation of the dock statement has commented that, when PW1 was cross examined it was put to him that the PNB officers arrived at the house of the Appellant together with a suspect arrested by them and that the Appellant assaulted PW1, at the time of arrest. However, in the dock statement the Appellant had failed to state any of the said occurrences which the Appellant took up in cross examination. The stand taken by the counsel for the defence was that due to the assault on PW1, the accused was falsely implicated to the commission of this offence. This position too was not taken up by the Appellant in his statement from the dock. Taking into consideration, the contradictory positions taken up by the Appellant, we are of the view that the trial judge was correct in rejecting the dock statement.

For all the above reasons, we uphold the conviction and sentence and dismiss this appeal.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**K. Priyantha Fernando, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**