

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

In the matter of an Appeal under and in terms of Section 331(1) of the Code of Criminal Procedure Act No.15/1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A.No. HCC 0284/2012
H.C. Colombo No. HC 2129/2004

Kathaluwa Hewage Dhammadika
Swarnamali

Accused-Appellant

Vs.

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

Complainant- Respondent

BEFORE : **ACHALA WENGAPPULI, J.**
DEVIKA ABEYRATNE, J.

COUNSEL : Rienzie Arasacularatne P.C. with T. Punchihewa,
Namal Karunaratne and C. Arasacularatne for the
Accused-Appellant.
Haripriya Jayasundara S.D.S.G for the respondent

ARGUED ON : 06.02. 2020 and 07.02.2020

DECIDED ON : 26.06., 2020

ACHALA WENGAPPULI, J.

The accused-appellant was indicted before the High Court of Colombo for being in possession of 3.8 grams of Heroin and trafficking in of said quantity of Heroin. After trial she was found guilty to the said two counts and was sentenced to death in respect of her two convictions.

Being aggrieved by the said conviction and sentence, the Appellant seeks to set aside her convictions on the following grounds of appeal;

- i. the trial Court accepted the evidence of prosecution witness IP *Liyanage* and of the corroborating witness SI *Buddhika* before considering or analysing the defence evidence,
- ii. the trial Court failed to consider the inherent improbability of the story of the prosecution,

- iii. the trial Court has acted in violation of Section 203 of the Code of Criminal Procedure Act No. 15 of 1979, in delivering its judgment,
- iv. the trial Court permitted the prosecutor to elicit evidence of bad character and considered it in the judgment,
- v. the trial Court had compartmentalised the evidence with regard to each witness in its evaluation instead of compositely considering the evidence presented before it,
- vi. the trial Court;
 - a. rejected the evidence given by the Appellant before considering the same,
 - b. unreasonably discredited the accused appellant's evidence that her mother made a complaint to Human Rights Commission on account of the failure to visit her in remand owing to illness,
 - c. misled itself on facts in holding that the accused-appellant failed to mention the name of the Buddhist monk who treated her mother when in fact she mentioned it in her evidence,
 - d. failed to consider the fact that the accused-appellant refused to place her signature during sealing of productions on the ground that Heroin was not detected from her.

In view of the grounds of appeal reproduced above, it is helpful to consider the evidence presented before the trial Court by the parties at least in summary form before this Court makes an attempt to consider them.

The prosecution relied mainly on the evidence of IP *Liyanage* and SI *Buddhika* in relation to the detection of Heroin from the possession of the accused-appellant. The evidence of these two witnesses are to the effect that in the morning of 8.11.2002, one of the private informants of IP *Liyanage* had conveyed information about a woman dealing in narcotics. He left the Police Narcotics Bureau with a team of officers, which included SI *Buddhika* and a woman constable, at about 11.15 a.m. IP *Liyanage* met his informant at a halfway point who indicated to him that the woman he mentioned would return soon with Heroin. IP *Liyanage* then walked along the road near *Kettarama* Stadium with SI *Buddhika* and the informant. They reached a point near a three-wheeler park and waited for about 25 minutes. The informant had thereafter left them, having pointed out a woman who was coming in their direction.

The two officers then questioned the accused-appellant who appeared restless. She had a brown paper bag with her and when examined, the officers found it contained seven packets of cellophane bags. Each of these seven cellophane bags contained small metal foil packets containing Heroin. There were 510 such metal foil packets in total. The gross weight of these packets was 10 grams and 200 milligrams.

When the productions were sealed at the PNB, the accused-appellant refused to place her thumb impression and therefore the officers have sought that the productions be endorsed by the Magistrate of *Maligakanda* Magistrate's Court.

The prosecution also led the evidence of the Government Analyst and other witnesses who were involved with the custody of productions.

During cross examination it was suggested to IP *Liyanage* that he had introduced Heroin that had been recovered from two other persons to the accused-appellant. He denied the suggestion. It was elicited through the same witness that the mother of the accused-appellant has made a complaint to *Maligawatta Police* regarding the illegal arrest of her daughter on 18.11.2002 alleging that the arrest was made after releasing two other suspects.

When the trial Court ruled that the accused-appellant had a case to answer, she opted to give evidence under oath.

The accused-appellant claimed that she was arrested in the morning at her home when she was feeding her child. She was told that the officers needed to record her statement and taken to the police vehicle. She saw the officers releasing two persons who were in the vehicle and at that point of time her mother had rushed in whilst at PNB she was asked to sign her statement and place her thumb on the parcels. She refused to do both. When she was produced before the Magistrate's Residence she explained the reason for her refusal to place her thumb. Her mother had subsequently complained to the Human Right Commission about her arrest but could not follow up the complaint due to her illness.

During her cross-examination, the accused-appellant admitted that she was arrested earlier on under a similar allegation where it is claimed that she was forced to sign on the production. She admitted that the complaint to Human Rights Commission was dismissed due to her mother's absence. It was suggested that the circumstances averred in the affidavit by her mother annexed to her bail application is contradictory to her evidence in Court. It was also suggested that due to contradictory positions, the accused-appellant did not call her mother to

give evidence on her behalf. She denied these suggestions. She was also suggested that her refusal to place thumb impressions, and lodging complaints were mere tactical moves adopted by her in relation to this case. She admitted regularly attending to the other case and had given instructions to her Attorney in that case.

It is in this backdrop, this Court ventures to consider the grounds of appeal as urged by the learned President's Counsel.

One of the contentions advanced on behalf of the Appellant that the trial Court accepted the evidence of prosecution witness IP *Liyanage* and of the corroborating witness SI *Buddhika* before considering or analysing the defence evidence, is in fact based on the repeated finding made by the trial Court at the end of evaluation of each witness, that it had found the prosecution proved the credibility of the witnesses beyond reasonable doubt.

The peculiar style of presentation of the judgment, adopted by the trial Court, is the reason for this complaint. The trial Court, having summarised the evidence of all the witnesses who gave evidence before Court in separate segments and then considered the same for credibility by applying the time tested methods of assessing credibility. Then at the end of each of the witnesses summary and evaluation, the trial Court stated the impugned finding that the prosecution had proved the credibility of that particular witness beyond reasonable doubt. It is clear upon perusal of the judgment that the finding of each witness is credible does not in any way mean that the prosecution has proved its allegation beyond a reasonable doubt. This is confirmed as the trial Court had in a separate segment considered the evidence whether it proved the

charges. The said statement, made in respect of each of the prosecution witness merely confirms the fact that the trial Court found that witnesses' testimony as truthful and reliable and nothing more.

The appellant had raised another ground which revolves around the same issue. Having relied on the judgment of *James Silva v The Republic of Sri Lanka* (1980) 2 Sri L.R. 167, the Appellant complained that the trial Court had compartmentalised the evidence with regard to each witness in its evaluation instead of considering the evidence presented before it as a whole and thereby acted contrary to the principles enunciated in the said judgment.

It is noted above that the trial Court had considered the evidence of each witness individually in its presentation. However, the trial Court, in evaluating credibility of the prosecution witness IP *Liyanage* (at page 21 of the judgment and page 345 of the brief), referred to the fact that it had already decided to disbelieve the Appellant's evidence "for the reasons stated in evaluation of her credibility". The trial Court had dealt with the credibility of the Appellant only at the very end of the segment (at page 37 of the judgment and page 361 of the brief) during which it considered the credibility of all witnesses, including that of the Appellant. By then, it had referred to evidence of all the prosecution witnesses.

This is a clear indication that the trial Court did in fact considered "...all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalising" and asked itself the question whether as a prudent man, in the circumstances of the particular case, believes the accused guilty of the charge or not guilty as per the judgment of *James Silva v The Republic of Sri Lanka* (supra).

If one follows the sequence in the presentation as appeared in the judgment, the trial Court could not have decided the credibility of the evidence of the Appellant, even before it had fully dealt with the evidence of the 1st prosecution witness, IP *Liyanage*, in its presentation, unless it had already considered the material before Court in its totality and already completed the task of determining which evidence to accept as truthful and reliable and which evidence to reject. The only way the trial Court could pronounce that it had already decided to reject the Appellant's evidence, whilst engaged in the process of evaluation of the evidence of IP *Liyanage* in its presentation, is to have them considered as a whole and arriving at its conclusions. The presentation of the several considerations the Court had taken in to account in the body of the judgment is a subsequent step to the mental process of considering the evidence in totality. These two are distinct and separate exercises.

The contention of the Appellant that the trial Court has failed to consider the inherent improbability of the story of the prosecution was based on the following factors as highlighted by the learned President's Counsel;

- i. IP *Liyanage* received information about a woman engaged in Heroin trade from his informant on his way and only after arriving he received definitive information,
- ii. There were 11 police officers in the vehicle, but only two proceeded to carry out the detection,
- iii. IP *Liyanage* said they were in uniform waiting for the arrival of the appellant with a bag containing Heroin,

- iv. The out entry of IP *Liyanage* speaks of the fact that he is leaving for a detection involving “යැකකරුවන්” whereas he only arrested the Appellant, but the entry supports her claim there were others who were already arrested,
- v. Disparity in productions. The Government Analyst failed to count the metal foils, 7 cellophane bags turning 5 cellophane bags, the alterations on the parcel creates a doubt as to the genuineness of the productions, PR – two parcels (A and B) not explained, GCIB not explained

The probability of the prosecution case is challenged by the Appellant by placing reliance on the conduct of the detecting officer. The fact that there was no clear information conveyed to him in at the initial stage by the private informant could be understood easily as the agreement was that the informant to personally lead the officers to the woman who was involved in the Heroin trade. The inclusion of a woman police constable in the team supports the initial information about a woman. The number of officers who left the PNB office and only two of them took part in the detection cannot be considered as an improbability without that aspect being probed during cross-examination. In the absence of an explanation by the witness, if this Court were to consider the probability or improbability on inferred explanations, it would be a mere conjectural exercise.

The passing reference by IP *Liyanage* that they were in uniform cannot make the entire prosecution case an improbable one since SI *Buddhhika* said only

one of the officers was in uniform. In relation to the reference of “සැකකරුවන්” in his out entry, the witness said that was his usual way of making notes. When he was suggested that entry was due to multiple suspects to be arrested the witness denied and the matter was not probed any further by the Appellant.

In view of these considerations, the ground of appeal based on improbability of the prosecution fails. However, the contention in relation to integrity of productions, being a vital aspect of the prosecution's case, needs separate treatment.

Learned President's Counsel submitted that the evidence in relation to integrity of productions are unreliable and casts a doubt as to the genuineness of the productions. In elaborating the factual basis of his submission, learned President's Counsel referred to the evidence of IP *Liyanage* as well as Ms *Rajapakse*, the Deputy Government Analyst.

It was also highlighted that when the productions were produced to the reservist after sealing, it was entered in the productions register under reference P.R. No. 92/2005, whereas when the covers of the productions were examined in trial Court, it was found that the P.R. number has been altered to read as 93/2005. During cross-examination it was elicited that there were alterations that appeared on the parcels without any signature of the person who made the alterations. The evidence is that at the time of detection there were 7 cellophane parcels but when in giving evidence only five such were available. In relation to

510 metal foils and the number of cellophane parcels there was no confirmation from the expert witness who merely said she did not count them. In these circumstances, it was contended on behalf of the Appellant that the prosecution has failed to prove the identity of productions.

In her reply, learned Senior Deputy Solicitor General refuted the Appellant's claim and submitted the prosecution has properly explained the difference in P.R. numbers and the number of cellophane parcels by referring to the relevant evidence in the proceedings before the trial Court.

The difference in the P.R. numbers is due to the fact that the productions were initially entered under P.R. 92/2005, but when the Appellant refused to place her thumb impression, they were taken before the Magistrate who had signed on the sealed envelopes. Then only they were handed over to the reservist under P.R. 93/2005. Initially there were two sealed envelopes and once they were signed by the Magistrate, they were put in another envelop and was sealed. It was this envelop that had been entered as P.R. 93/2005. Copies of the relevant pages of the productions register were tendered to Court and the description of P.R. 93/2005 contains the witness's explanation and only one envelop was in fact handed over. This claim was supported by the Government Analyst, who labelled the two sealed envelopes as "A" and "B" which were found in the sealed outer envelope, marked P.R. 93/2005

. As to the disparity of 7 pink coloured cellophane bags, IP *Liyanage's* evidence revealed that he had used one of the seven bags to collect all the Heroin packeted in metal foils. Then he used another cellophane bag to put the 510 empty metal foils. This explains why only five empty cellophane bags. The

Government Analyst in the report had merely referred to these bags and metal foils as "many" metal foils and "many" plastic bags. She admitted in her evidence she did not count either of these items.

This Court, having examined the evidence, is inclined to hold with the submissions of the learned Senior Deputy Solicitor General that the prosecution had adequately explained the highlighted disparities before the trial Court to its satisfaction.

The complaint that the trial Court has acted in violation of Section 203 of the Code of Criminal Procedure Act No. 15 of 1979, in delivering its judgment should be considered next.

The trial against the Appellant commenced on 24.11.2010 and the prosecution has closed its case on 26.09.2011. The trial Court called for the defence on the same day. The Appellant commenced her case on 29.11.2011 and closed on the same day with her evidence. The parties have made submissions on 24.04.2012 and the judgment was to be pronounced on 28.06.2012. On that day judgment was re-fixed to 18.09.2012 and on that day the proceedings indicate that the case record was forwarded to High Court No. 4 from High Court No. 7 only on that day and the judgment was re-fixed again on 02.10.2012 on which day it was pronounced in open Court convicting the Appellant.

It was contended by the Appellant that the trial Court had acted in violation of the provisions of Section 203 of the Code of Criminal Procedure Act

No. 15 of 1979 and the judicial precedents which emphasised there should not be an undue delay. In this instance there was a delay of more than five months.

In *Dabare v Republic of Sri Lanka* (2009) 1 Sri L.R. 92, when it was highlighted that there was delay of almost seven months to pronounced the judgment of the trial Court, *Sisira de Abrew J* emphasised that;

"... it is the duty of the trial judge to deliver his judgment within the time period stipulated in Section 203 of the CPC. If he can't do so, he must state his reasons for his inability and should deliver it within a reasonable time. The superior Court can then examine the reasons and decide whether his inability is justified or not. Failure to comply with Section 203 of the CPC or postponing judgments without reasonable grounds would lead to erosion of public confidence in the judicial system and also would lead to laws delay. As I pointed out earlier, noncompliance of Section 203 of the CPC in the instant case has not occasioned a failure of justice."

Hence this Court is of the view that the delay of few months, has not occasioned a failure of justice in this instance in view of the long trial roll in Colombo High Courts.

Having considered the grounds of appeal in relation to the prosecution case, it is time this Court considers the complaints against the rejection of the case for the Appellant. It was contended that the trial Court;

- a. rejected the evidence given by the Appellant before considering the same,

- b. unreasonably discredited the accused-appellant's evidence that her mother made a complaint to Human Rights Commission on account of the failure to visit her in remand owing to illness,
- c. misled itself on facts in holding that the accused appellant failed to mention the name of the Buddhist monk who treated her mother when in fact she mentioned it in her evidence,
- d. failed to consider the fact that the accused-appellant refused to place her signature during sealing of productions on the ground that Heroin was not detected from her.

The stage and the circumstances under which the trial Court had reached the decision to reject the Appellant's evidence was already considered in the light of the judgment of *James Silva v The Republic of Sri Lanka* (supra). The trial Court had in fact considered the reasons attributed by the Appellant as to her conduct in not placing her thumb impression on the productions and also the fact that her mother complained to Human Right Commission in assessing her credibility.

In applying the test of spontaneity and consistency, the trial Court considered these two items of evidence and after a lengthy analysis, and arriving at the conclusion that it accepts the prosecution claim that these were due to

tactical reasons to ward off any imposition of criminal liability. In arriving at this conclusion the trial Court had considered that the claim of introduction was not consistently made. The Appellant, when she was first produced before the Magistrate, had only said that nothing was found from her. But her claim before the trial Court was that IP *Liyanage* introduced the quantity of Heroin taken from two others on her, after releasing them in her presence.

The trial Court decided to accept the prosecution challenge on the Appellant's evidence also on the basis that, although her mother made complaints to the police as well as to the Human Rights Commission, neither her mother nor the Appellant took any steps to pursue them thereafter. She was enlarged on bail after few months and was free to pursue her claim of illegal arrest if she was interested in it. Her husband also could have continued with the complaints but no action was taken despite the serious allegation of possessing Heroin. It is evident that the trial Court's decision not to treat her evidence as a truthful account of the events that took place was based also on the demeanour and deportment of the Appellant when she gave evidence.

The credibility of a witness is a question of fact and when the trial Court had based its conclusion of that question of fact on its evaluation of evidence as well as demeanour and deportment of the witness, this Court has repeatedly indicted that it is extremely reluctant to interfere with such a finding of fact. In view of these considerations, this Court finds no reason to interfere with this finding of fact by the trial Court.

The contention that the trial Court had allowed evidence of bad character of the Appellant to be led in evidence and acted on it needs a closer examination. It was pointed out that during cross examination of the Appellant by the prosecution, evidence of another pending case in relation to a similar offence was elicited and permitted by the trial Court and the trial Court had exacerbated its initial error in allowing that evidence to be led, by considering the same in its judgment against the Appellant.

It is to be noted that the fact that had been elicited is that the Appellant is only accused of a similar offence and not that she was convicted of a similar charge. It appears that the learned prosecutor was eager to challenge the Appellant's position that she refused to place her thumb impressions on the basis that Heroin was not detected from her possession, by showing that she has prior knowledge of the sealing process and raised this issue in order for her to utilise it during the trial for tactical reasons .

In *Peter Singho v Werapitiya* 55 NLR 155, the appellant had relied on his good character and as such the prosecution was entitled to challenge it by eliciting bad character as per Section 54 of the Evidence Ordinance. Having considered the material before Court, it was decided by Gratian J (sitting alone) that;

"The accused had advisedly taken the risk of putting his "good character " in issue. It was, therefore, open to the prosecution, if they could, to prove his " bad character " under section 54 of the Evidence Ordinance. Instead of doing so they suggested to him in cross-examination (and he was forced to admit) that there was

pending against him at the time a criminal case in which he was charged with forgery.

"*The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is irrelevant; it goes neither to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness*". **Maxwell v. D. P. P.**(1935) A. C. 309. This principle was reaffirmed by Lord Simon in **Stirland v. D.P.P.**(1944) A. C. 315, "*It is no disproof of good character*" he said, "*that a man has been suspected or accused of a previous crime. Such questions as 'Were you suspected ?' or 'Were you accused ?' are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has expressly sworn to the contrary*".

The pending case against the Appellant is clearly an irrelevant item of evidence of bad character as it did not qualify to be admitted under *Explanation 1* of Section 54 of the Evidence Ordinance as per *Law of Evidence by E.R.S.R. Coomaraswamy* (vol. 1, p.705). Thus, this Court agrees with the learned President's Counsel that the evidence in relation to the pending case against the Appellant was wrongly allowed to be led by the trial Court. Then the question arises if such evidence of bad character was admitted, whether it necessarily vitiates the conviction ?

The judgment of *Arumugam v Range Forest Officer* (1986) 2 Sri L.R. 398 considered this very issue. It was an appeal where the ground of appeal was raised upon the basis that the trial judge had permitted inadmissible evidence of the accused's bad character, that the accused had been convicted of an offence previously, into the record and this was prejudicial to the accused's right to getting a fair trial.

The Court has held thus;

"In Peter Singho v. Werapitya (55 NLR 155) Gratiaen, J sat alone while in King v. Perera (42 NLR 526) a different judicial attitude was adopted. Howard, C.J. sat with Soertsz, J. who agreed that in a case where evidence of bad character of the accused had been given in a trial before a District Judge, it was not fatal to a conviction as there was ample other evidence to convict the accused and the Judge was not influenced by the fact of the accused's bad character.

I do not think that any of the judges who sat in these two cases wished the judgment to lay down an inveterate principle of law. Their views have to be considered in the background of the cases before them. I am prepared however to state that a mere misreception of evidence (even of bad character) will not necessarily vitiate the conviction especially if the rest of the evidence placed before the court (like in this case) was of a satisfactory nature."

In view of reasoning in this precedent, this Court must then consider the question, in this particular instance, whether the trial Court had merely allowed the irrelevant item of evidence into its record or had used it in its judgment in finding the Appellant's guilt as she complains.

Perusal of the impugned judgment reveals that the trial Court made two reference to the earlier incident where the Appellant was already facing a charge. In the narration of her evidence it is mentioned that she has a pending case, which is understandable since it's a mere reproduction of her evidence in summary form. The other instance where this item of evidence was referred to is at the evaluation of the trial Court of the Appellant's evidence. In that instance the reference made by the trial Court confines to the fact that on that earlier occasion she had placed her thumb impression in sealing the parcels due to physical assault.

The trial was taken before a Judge of the High Court, and not before a jury is also a relevant factor in this context. Undoubtedly the learned trial Judge was aware of the prohibition in Section 54 of the Evidence Ordinance and the conviction is clearly based on the large volume of evidence properly received. Since there was not even of a hint of prejudice caused to the Appellant as a result of the complained misreception of evidence or that the misreceived items of evidence was utilised in finding her guilty, this Court is of the considered view that the misreception will not vitiate the otherwise sound conviction.

This Court is of the view that the several grounds of appeal raised by the Appellant are without merit. Therefore, the conviction of the Appellant on both counts are affirmed. Her appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL