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.

Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT

CA/177/2010
H/C Colombo case No. 1054/2002

Ranasinghe Arachchige Lionel alias Ariyapala

ACCUSED

And,

Ranasinghe Arachchige Lionel alias Ariyapala

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**
H.C.J. Madawala J

Counsel: J. Tenny C. Fernando for the Accused-Appellant

Shanil Kularatne
~~Dilan Ratnayake~~ SSC for the AG

Argued on: 16.10.2015, 20.10.2015

Written Submissions on: 27.11.2015, 30.11.2015

Judgment on: 26.02.2016

Order

Vijith K. Malalgoda PC J

Accused-appellant to the present appeal Ranasinghe Arachchige Lionel alias Ariyapala was indicted before the High Court of Colombo under section 54 A (d) of the Poisons Opium and Drugs Ordinance as amended by Act No. 13 of 1984 for possession of 2.3 grams of Heroin at Peliyagoda.

After trial before the Judge, the accused-appellant was found guilty on the Indictment and was sentenced to life. Being dissatisfied with the above conviction and sentence the accused-appellant has preferred this appeal.

During the appeal before us the Learned Counsel for the accused-appellant raised the following grounds of appeal.

1. Has the Learned Trial Judge erred in law by failing to consider Senerathne's evidence as not credible enough to prove the case beyond reasonable doubt in the absence of evidence of chief investigating officer

2. Has the Learned High Court Judge addressed his mind to the effect of the fact that Senarathne has admitted that he read notes of Thennakoon in contrary to section 159 (2) of the Evidence Ordinance which has caused immense prejudice and that itself creates a reasonable doubt?

3. Learned Trial Judge has failed to give due consideration to the fact that inward journey of the production has not been proved beyond reasonable doubt by the prosecution.

4. Learned Trial Judge has failed to consider the lengthy dock statement made by the accused-appellant in the proper context which clearly creates a reasonable doubt on the prosecution case.

5. Failure of the prosecution to adduce evidence of chief investigation office or witnesses to affirm the position of the prosecution, which has curtailed the ability of the defence to attack the veracity of the witnesses and there by denied a fair trial.

6. Learned Trial Judge erred in law by imposing burden on the accused-appellant to prove his defence (where it was not the defence) which is clearly misdirection of law and fact, both caused miscarriage of justice.

Before considering the above grounds of appeal raised by the Learned Counsel for the accused-appellant I would like to first discuss the prosecution case as presented by the state before the High Court.

At the High Court trial the prosecution had led the evidence of the following witnesses

1. PC 30762 Senarathne
2. Deputy Government Analyst Sakunthala Tennakoon
3. IP Dayananda
4. Sub Inspector Kulasena
5. PS 13775 Nandasena

It was revealed during the trial that the chief investigating Officer of this detection, SI Dinesh Tennakoon was not available to give evidence since he had vacated post and had gone abroad at the time the case was taken up for trial.

According to the evidence of witness Senarathne, he had received the information with regard to the present detection from his private informant and had recorded the said information in his pocket note book and thereafter produced the same before SI Dinesh Thennakoon. The said information to the effect "Lionel alias Ariyapala of old Kandy Road, Peliyagoda had left to bring some Heroin. He will come back between 11- 12 and he can be shown when he is returning" was received by him at 9.17 hours on 11/04/2001.

On the Directions of SI Tennakoon a police party led by SI Tennakoon, comprising of PC Senarathne, PS Pushpakumara. PC Bandara, PC Ranil, PC Ovitigala, PC Amarasinghe and PC Somaweera had left the Police Narcotic Bureau at 9.40 hours along with the informant.

The Jeep in which they were travelling was stopped at the Thotalanga Police Barrier and the witness along with SI Tennakoon and the informant got down from the Jeep and went up to Sithijaya timber mill on the old Kandy road by a three-wheeler. Around 11.45 the informant pointed out the person called Lionel and went inside the timber mill to avoid being seen by the suspect. Thereafter SI Tennakoon stopped the person, divulge the identify of them and searched the person. A light green cellophane bag was recovered from his waist between the sarong and the body with a brown colored powder. The arrest was made by SI Tennakoon with the assistance of the witness, got down the jeep near the timber mill and returned to the Police Narcotic Bureau around 12.30 pm.

After return to the Police Narcotic Bureau the production which was in the custody of SI Tennakoon was weighed and tested in the presence of the accused and thereafter sealed them with SI Tennakoon's private seal and thumb impression of the suspect. On the instructions of SI Tennakkon the witness had made the relevant entries on the sealed parcel in his hand writing. The said production was handed over to PS Kulasena by SI Tennakoon in his presence and the witness had identified the signature of SI Tennakoon in the productions register. The witness had signed as a witness to the said entry. Witness had identified the entries he made and the production during his evidence.

Sakunthala Tennakoon, the Deputy Government Analyst was called as the next witness by the prosecution and she had given evidence with regard to the parcel she received for examination as follows;

ප්‍ර:- ඒ හාන්ඩ විශ්ලේෂණයට ගත් අවස්ථාවේ එම කවරය ඔබ පරීක්ෂා කර බැලුවාද?

උ:- එහෙමයි

ප්‍ර:- කවරය මොන තත්වයේද පැවතුනේද?

උ:- කවරය මුද්‍රා කර තිබුනා මුද්‍රා යහපත් තත්වයෙන් තිබුනා

ප්‍ර:- එම මුද්‍රා මොන ආකාරයේ මුද්‍රාද?

උ:- මුද්‍රා වර්ග දෙකක් තිබුනා. උප පොලිස් පරීක්ෂක තෙන්නකෝන් මහතාගේ පුද්ගලික මුද්‍රාවෙන් සහ සැකකරුගේ මාපට ඇඟිලි සලකුණකින් සටහන් කර තිබුනා

ප්‍ර:- එම කවරයේ කිසියම් සටහන් තිබුනාද?

උ:- එහෙමයි

ප්‍ර:- මොනවාද?

උ:- හෙරොයින් ග්‍රෑම් 18 මිලිග්‍රෑම් 300 ක් අඩංගු පාර්සලය L 01 වශයෙන් සලකුණුකර මුද්‍රා තබන ලද ලිපිකවරය. කොළඹ මහේස්ත්‍රාත් උසාවි අංක 05 නඩු අංක PR 80/01, 2001.04.11 IIB 274/83 GCR 28/01 පොලිස් මත්ද්‍රව්‍ය කාර්‍යාංශය සැකකරු රණසිංහ ආරච්චිගේ ලයනල් නොහොත් ආරියපාල.

She had finally identified 2.3 grams of Diacetyl Morphine from the 18.5 grams of Brown Powder which was inside the said parcel.

In order to establish the inward production chain the prosecution had led the evidence of IP Dayananda who had handed over the production to the Government Analyst. According to him the

productions were received with seals of SI Tennakoon and the thumb impression of the suspect intact from PS Nanadasena on 12.04.2001 at 12.30 pm and thereafter handed over the parcel to the Government Analyst Department on 23.04.2001.

According to the evidence of SI Liyanarachchi he received the sealed parcel and the suspect from SI Tennakoon on 11.04.2001 at 13.10 hours and handed over the parcel to PS Nandasena on 12.04.2001 at 6.35 hours PS. Nanadasena in his evidence confirmed receiving the production from SI Liyanarachchi at 6.35 hours and handing over it to IP Dayananada at 10.45 hours. Both those witnesses confirmed that seals of SI Tennakoon and the thumb impression of the suspect were intact when the parcel was received by them and handed over to the next officer.

At the conclusion of the prosecution case the rights of the accused was explained to the accused when calling the defecne and the accused had opted to make a statement from the dock. It is observed by the court that the accused had given a lengthy dock statement which runs in to 32 typed pages. This court intends to consider this statement at a later stage of this Judgment.

Out of the several grounds of appeal raised on behalf of the accused-appellant 1st, 2nd and 5th grounds of appeal raised by the Learned Counsel points at one single issue, that is the admissibility and the evidentiary value of the evidence given by witness Senarathne.

As admitted before this court, the chief investigating officer Sub-Inspector of Police Dinesh Tennakoon was not available to give evidence in this case. In the absence of any other witness to corroborate the evidence the prosecution has totally relied on the evidence of Senarathne.

In the case of ***The Attorney General V. Mohomed Saheeb Mohamed Ismath CA 87/97 (Court of Appeal minutes dated 13.07.1999)*** Jayasuriya J observed that " There is no requirement in law that evidence of a police officer who has conducted an investigation in to a charge of illegal possession of Heroin, should be corroborated in regard to material particulars emanating from an independent

source, section 134 of the Evidence Ordinance states that, 'No particular number of witnesses shall in any case be required for the proof of any fact."

In the case of ***Devunderage Nihal V. The Attorney General SC Appeal 154 /10 (Supreme Court minutes dated 12.05.2011)*** Suresh Chandra J after considering several judgments on the same issue had observed that "Therefore it is quite clear that unlike in the case where an accomplice or a decoy is concerned in any other case there is no requirement in law that the evidence of a police officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars. However, caution must be exercised by a trial judge in evaluating such evidence and arriving at a conclusion against an offender. It cannot be stated as a rule of thumb that the evidence of a police witness in a drug related offence must be corroborated in material particulars where police officers are the key witnesses. If such a proposition were to be accepted it would impose an added burden on the prosecution to call more than one witness on the back of the Indictment to prove its case in a drug related offence however satisfactory the evidence of the main police witness would be."

As observed by this court, witness Senarathne had received the first information with regard to the present detection from his private informant and recorded the same in his pocket note book. Thereafter brought to the notice of the said information to Sub-Inspector Dinesh Tennakoon, who decided to carry out the raid. Witness had accompanied SI Tennakoon with his informant up to the place where the detection took place, and had assisted Tennakoon to search and arrest the suspect. He had seen the recovery being made and thereafter came back to the Police Narcotic Bureau and engaged in testing and sealing process on the instructions of SI Dinesh Tennakoon and entered details on the sealed parcel from his own hand writing. Therefore when the production was handed over to the reserve he signed as one of the witness to the productions Register. Thereafter it is clear that from the time the information received, witness Senerathne was actively involved in the investigation up to handing over of the production and the suspect to the reserve. Under these circumstances this court will have no

reason to reject the evidence of witness Senarathne or decide that his evidence is insufficient to establish this case unless the evidence of witness Senarathne is found to be unsatisfactory in nature.

Whilst challenging the evidence of witness Senarathne, the learned Counsel for the accused-appellant submitted that the evidence given by witness Senarathne is contrary to the provisions in section 159 (2) of the Evidence Ordinance. It was the positions of the Learned Counsel for the accused-appellant that a reasonable doubt arises as to how Senarathne gained knowledge with regard to very specific matters only IP Tennakoon would have known. Therefore it was argued that this witness, while giving evidence prior to coming in to court had gone through notes of IP Tennakoon which is contrary to section 159 (2) of the Evidence Ordinance and the Trial Judge should have discarded such evidence.

When going through the said argument, I observe that the counsel had raised the said objections without properly understanding the provisions of section 159 (2) of the Evidence Ordinance.

Section 159 (2) of the Evidence Ordinance reads thus;

> "The witness may also refer to any such writing made by any other person, and read by the witness within the time afore said, if when he reads it he knew it to be correct."

As observed by me earlier in this judgment, witness Senarathne had worked very closely with SI Tennakoon from the inception of this inquiry and therefore the prosecution could have made use of this provisions to in fact refresh the memory of the witness under the provisions of section 159 (2) but what I observe in his evidence is that the witness had always tried to refrain from giving evidence with regard to specific matters only IP Tennakoon would have known. One area the Learned Counsel highlighted during his argument before us was the contents of the out entry. Witness Senarathne in his evidence had given names of all officers assisted the raid and other administrative measures from his memory and his subsequent notes, but when specific questions were put to him he has refrained from answering those questions.

(Page 89 of the brief)

ප්‍ර:- තොරතුරු ගැන එම පිටවීමේ සටහන් මෙනවද යොදා තිබුනේ?

උ:- එය මා විසින් යොදනලද සටහනක් නොවේ උප පොලිස් පරීක්ෂක තෙන්නකෝන් මහතා විසින් යොදා තිබෙන්නේ

ප්‍ර:- මම තමන්ට යෝජනා කර සිටිනවා ඔය පිටවීමේ සටහනේ ඔය තොරතුරු පිළිබඳව සටහන් කර නොමැති බව

උ:- එය තෙන්නකෝන් මහතා විසින් යොදා තිබෙන්නේ ඒ සම්බන්ධයෙන් පරීක්ෂා කර බලා පිළිතුරු ලබාදීම අවශ්‍යය

However, when analyzing the evidence given by witness Senarathne this court is of the view that the said witness had given credible evidence in all material points. As raised by the Learned Counsel for the accused-appellant the exact amount paid for the three-wheeler by SI Tennakoon and failure by witness Senarathne to say to which direction the three-wheeler proceeded after dropping them at Sithijaya Timber Mill, this court is reluctant to consider as important lapses in the evidence of witness Senarathne since these areas does not go to the root of the case.

As observed by this court witness Senarathne was subject to lengthy cross-examination by the defence but his evidence on all material points remained unchallenged. It was the contention of the Learned Counsel for the accused-appellant that the Learned Trial Judge had misdirected himself when he accepted the evidence of the sole witness when the defence was deprived of contradicting his evidence with the evidence of other evidence, in the absence of any other witness being summoned by the prosecution. I see no merit in this argument for several reasons. Firstly I observe that the court had not curtailed the defence when they continued with the cross-examination of the sole witness. We observe that he was firm, credible and trustworthy. Secondly section 134 of the Evidence Ordinance does not require a particular number of witnesses for the proof of any fact. When the evidence before the trial

judge is credible and can be acted upon without any hesitation I see no reason for the judge to look for further material. Therefore I see no merit in this argument.

It was further argued by the accused-appellant that the prosecution in this case had failed to establish the inward journey of the production. In this regard I am mindful of the decision in ***Perera V. Attorney General 1998 (1) Sri LR 378*** where J. A. N. de Silva J (as he was then) held that "The most important journey is the inwards journey because the final analyst report will depend on that."

In this regard the accused-appellant had not challenged the entire production chain but challenged two entries made by witnesses Nandasena and Dayananda and argued that due to the said inaccuracies, the prosecution had failed to establish the production chain.

According to the evidence of witness Nandasena he handed over the production to SI Dayananda on 12.04.2001 at 10.15 hours where as SI Dayananda in his evidence stated that he took over the production on 12.04.2001 at 12.30 hours from PS Nandasena.

As observed by this court every witness who summoned to give evidence in order to establish the production chain including the Deputy Government Analyst Sakunthala Tennakoon confirmed that all the seals in the parcel were intact at the time the productions were received by them. From the evidence of witness Nandasena it is clear that he handed over the production to SI Dayananda and in turn SI Dayananda confirms that he received the production in fact from PS Nandasena but the only issue is the time different entered by them. The main purpose of establishing the production chain in a drug related case is to establish that no opportunity was available to interfear with the production when it is in custody. This is mainly established through change of hands and if the changes of hands are established through reliable evidence, this court is not inclined to declare that the prosecution has failed to establish the production chain meanly due to the said inaccuracy.

As observed by this court earlier in this Judgment, the accused-appellant had made a long statement from the dock. In the said dock statement he referred to several allegations against the officers of the

Police Narcotic Bureau including the 2nd witness for the prosecution. Even though he does not referred to who this second witness was, in his evidence it appears that by referring to 2nd witness he had referred to witness Senarathne.

During the cross-examination it was suggested to the said witness Senarathne that, the police party came to arrest the son of the accused-appellant namely R. Chamila Suranga but since he was not at home, the suspect was arrested, even though it was also suggested to the witness at an earlier stage of the cross-examination that the witness did not take part in raid.

However in his dock statement, he referred to the conduct of the 2nd witness who came to his house, including assaulting him and thereafter arresting him on a plan of the mistress his own son. We observe that none of these issues were put forward before the witness when he was under cross-examination.

Learned High Court Judge after considering the above dock statement observed that the accused-appellant had taken up the defence of alibi in his dock statement. In his dock statement the position taken up by the accused-appellant with regard to his arrest was that he was taken in to custody at his son's house on the instigation of his son's mistress. When witness Senarathne was under cross-examination the defence took up the position that the accused was arrested since his son who deals with drugs was not at home when the police raided the place.

However, the arrest took place was according to the defence not near Sithijaya Timber Mill as stated by the prosecution witness. In this regard the Learned High Court Judge had concluded that this is a defence of alibi since the suspect denies the fact that he was arrested near Sithijaya Timber Mill, but accused admits that he was arrested by police around the same time at a different place.

In a defence of alibi, the position taken up by the accused is that, since he was elsewhere at that time, he could not have committed the offence as explained by the prosecution. In the present case the position taken up by the accused is quite different. He denies the fact that he was arrested near

Sithijaya Timber Mill, but states that he was arrested around the same time by the same officers near his son's house. We cannot agree with the contention of the Learned High Court Judge that the accused had taken up a defence of alibi in the present case. Therefore with regard 4th and 6th ground of appeal taken up by the accused-appellant, I am of the view that the Learned High Court Judge had misdirected himself with regard to the defence taken up by the accused-appellant, but I conclude that no prejudice had been caused to the accused-appellant from the above misdirection for the reasons that the Learned High Court Judge after concluding that the accused-appellant had taken up a defence of alibi had proceeded to evaluate the dock statement and subsequently come to a conclusion to reject the dock statement for deferent reasons.

As I observed by me earlier in this judgment the dock statement made by the accused-appellant was contradictory to the defence taken up by the accused-appellant during the trial and therefore I see no reason to reject the decision taken up the Learned High Court Judge in rejecting the dock statement.

For the reasons discussed above, I see no merit in this appeal and therefore decide to dismiss this appeal. Appeal is dismissed Conviction and the Sentence is Affirmed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL