

**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, read with Article 138 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka.

**CA/ HCC/ 216/2019**

**HC/ COLOMBO/ 8384/2016**

The Democratic Socialist Republic of Sri  
Lanka.

**COMPLAINANT**

V.

Kanapathe Jegam

**ACCUSED**

**AND NOW BETWEEN**

Kanapathe Jegam

**ACCUSED-APPELLANT**

V.

The Hon. Attorney General  
Attorney General's Department

Colombo 12.

**COMPLAINANT-RESPONDENT**

**BEFORE** : **K. Priyantha Fernando, J. (P/CA)**  
**Sampath B. Abayakoon, J.**

**COUNSEL** : Asitha Vipulanayake for the Accused-  
Appellant.  
Janaka Bandara, SSC for the Respondent.

**WRITTEN** : Tendered on behalf of the Accused -  
**SUBMISSIONS** Appellant on the 21<sup>st</sup> May 2020.  
Tendered on behalf of the Respondent on the  
12<sup>th</sup> August 2020.

**ARGUED ON** : 07/07/2021

**DECIDED ON** : 16/09/2021

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**K. Priyantha Fernando, J. (P/CA)**

1. The accused appellant (hereinafter referred to as appellant) was indicted in the High Court of Colombo on one count of trafficking and one count of being in possession of 129.6 grams of heroin, punishable in terms of sections 54a(b) and 54a(d) of Poisons, Opium and Dangerous Drugs Ordinance respectively.

2. After the trial the learned High Court Judge, upon conviction, sentenced the accused to death.
3. Being aggrieved by the above conviction and sentence the appellant has preferred the instant appeal.
4. At the argument stage the learned counsel for the appellant urged the following grounds of appeal.
  - 1) The learned Trial Judge has failed to properly evaluate the evidence adduced at the trial.
  - 2) The learned trial Judge has failed to give due regard to the doubts in the case for the prosecution.
  - 3) The learned Trial Judge has failed to give due consideration to the dock statement made by the appellant.

#### **Facts in brief**

5. According to the evidence by the main witness for the prosecution (PW1) who led the team of police officers who arrested the Appellant, on the day of the incident, a team of police officers had been on traffic duty on the *Delkanda-Rattanapitya* road close to the *Delkanda* Junction. PW1, as the OIC of the traffic branch of the *Mirihana* police station, had gone to *Delkandain* the motor cycle with another police officer at about 11.30pm. When he was on the road with the other officers doing traffic duties, he had seen a person walking from the direction of *Delkanda* junction towards *Rattanapitiya*. That person had tried to divert his direction upon seeing the police officers. He has ordered the other officers to arrest him. Upon searching the person (Appellant), they had found in his trouser pocket, two polythene bags tied together. They have suspected the contents in the polythene bags to be heroin. During the scuffle when they arrested the appellant, one police officer had got injured in his leg. Later, after taking steps to weigh the illegal substance, they had produced the appellant before the Magistrate and had taken steps to hand over the productions to the Government Analyst.
6. Ground of appeal 1 and 2 will be discussed together. The main argument put forward by the learned counsel for the appellant was that there is a discrepancy between the number of polythene bags said to have been found by the police in

the possession of the appellant and that was submitted to the government analyst. In that, it is submitted that according to PW1, police have found and taken into custody two bags, and according to the government analyst there had been five bags.

7. It is important that the prosecution proves beyond reasonable doubt that the same productions that were taken into custody by the police from the appellant were analyzed by the government analyst.
  
8. According to the evidence of the PW1, he has detected two polythene bags tied together in the appellant's trouser pocket. He has identified the same in Court at the trial. The evidence of the government analyst (PW13) was that she received the two polythene bags. However, inside the bags there had been the substance that she analyzed. In her evidence she had clearly stated that inside one of those bags was another bag which contained the illegal substance and inside the other bag there were two bags that contained the substance. In her evidence she said;

“පැ.01.Xලකුණ දරණ පාර්සලය විවෘත කළ විට එය තුළ පැ.1 ලකුණ දරණ කවරයක් තිබුණා උතුමාණනි. මුද්‍රා තබන ලද කවරයක්. එම මුද්‍රා තබන ලද පැ.01 ලකුණ දරණ කවරය තුළ රෝස පැහැති ප්ලාස්ටික් පැකට්ටු දෙකක් සහ ලේබලයක් තිබුණා. එම රෝස පැහැති ප්ලාස්ටික් පැකට්ටු දෙක තුළ පැකට්ටුවක් එක් රෝස පැහැති බැගයක් අනෙක් පැකට්ටුව තුළ තවත් රෝස පැහැති බැග දෙකක් තිබුණා. ඉන් ඇතුළතම තිබුණු බැගය තුළ තමයි මේ දුඹුරු පැහැති කුඩා අඩංගුව තිබුණේ උතුමාණෙනි.

ඒ අනුවයි මහත්මිය ඔබ ග්‍රොසරි බැග 05ක් අනාවරණය කර ගත්තේ කිව්වොත් හරිද?

එසේය උතුමාණනි.”

9. The evidence of PW1 was that he detected two polythene bags tied together, when he sniffed it smelt like heroin. It is clear that the government analyst (PW 13) who identified the same bags in court had found the other 3 bags inside the two main bags. I do not find any discrepancy between the evidence of PW1 and PW13 on the identity of the polythene bags and that there is no doubt created that PW 13 has analyzed the substance that contained in the same two bags detected by PW1 from the appellant's custody.
  
10. It is the contention of the learned counsel for the appellant that if he was carrying heroin in his possession, the appellant would not have come towards the police officers who were in uniform. The prosecution story is improbable

and the version of the defence that the heroin was introduced to the appellant is more probable.

11. The learned High Court Judge has carefully considered this issue and has given good and sufficient reasons in paragraph 24 of his judgment for accepting the version of the prosecution and rejecting the defence version. Further, it was the evidence of the two prosecution witnesses who testified on the raid, that the appellant on seeing the police officers tried to evade or divert the route. Hence, there is no improbability in the version of the prosecution. The two police officers who testified in High Court have given their evidence without any inconsistency and have corroborated each other.
12. When the case is solely based on the evidence of police officers who conduct the raid, it is important that their evidence is considered with great caution. However, a court should not reject the evidence of a witness, merely because they are government servants, or they are interested in the success of the prosecution.
13. In case of *Devundarage Nihal V. The Attorney General SC Appeal 154/2010 (03.10.2019)*, His Lordship Justice Aluwihare PC. referring to a passage from *Sir John Woodruff and Amir Ali (Law of Evidence 1<sup>st</sup> edition. Vol. 1 page 601-603)* said;

*“A Court cannot reject the evidence of witnesses, merely because they are government servants, who, in the course of their duties or even otherwise might have come into contact with investigating officers and who might have been requested to assist investigating agencies. Even in cases where officers who, in the course of their duties, generally assist the investigating agencies, there is no need to view the evidence with suspicion as an invariable rule. ...”*
14. In the instant case the officers who conducted the raid including PW1 were not attached to the narcotics division, vice squad or crime branch, but were on traffic duty. They have searched the appellant because of the suspicious behavior of the appellant. It is not improbable for the Police officers to be

suspicious when a person walks at midnight along the road and try to avoid and divert the route, as the police witnesses had testified. The learned High Court Judge has considered this aspect sufficiently in paragraphs 23 and 34 of his judgment.

15. It is the trial Judge who has the opportunity to see the demeanor and deportment to assess the credibility of a witness.

16. In case of *Fradd V. Brown & company Ltd.* (20 N.L.R. Page 282) Privy Council held:

*“It is rare that a decision of a judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in question of veracity, so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance”.*

17. In the instant case the evidence of all witnesses was recorded before the same High Court Judge who concluded the case and delivered the judgment. Thus, he had the opportunity to observe the demeanor and deportment of all witnesses. The learned High Court Judge has well considered the evidence adduced at the trial and given good and sufficient reasons to conclude that the witnesses for the prosecution who conducted the raid to be credible. Hence, the grounds of appeal No. 1 and 2 should fail.

18. The learned counsel for the appellant submitted that the learned Trial Judge has failed to consider the dock statement made by the appellant. However, on perusal of the judgment it is clear that this ground has no merit. The learned High Court Judge has considered not only the statement made by the appellant from the dock, but also the position taken by the appellant in cross examination of the prosecution witnesses. In paragraphs 26 to 32 of his judgment the learned High Court Judge has discussed the statement made by the appellant from the dock at length and given sufficient reasons to reject the version of the appellant. I see no reason to interfere with the conclusion of the learned High Court Judge and ground of appeal No. 3 also should necessarily fail.

19. The Learned High Court Judge has also sufficiently considered all the factors when deciding on the sentence.
20. Hence, the appeal is dismissed. The conviction and the sentence imposed by the learned High Court Judge is affirmed.

Appeal dismissed.

**PRESIDENT OF THE COURT OF APPEAL**

**Sampath B. Abayakoon, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**