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

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

The Hon. Attorney General

Attorney General's Department

Colombo 12

Plaintiff

Court of Appeal No:

CA/HCC/148/18

High Court of Colombo

HC/6765/2013

Vs.

Kandage Pushpa Jayantha Perera

Accused

AND NOW BETWEEN

Kandage Pushpa Jayantha Perera

No. 36/35, Nawaloka Udayanpura,

Oliyamulla,

Wattala.

Accused– Appellant

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent

Before : Menaka Wijesundera J.

K.M.G.H Kulatunga J.

Counsel : Rienzie Arsecularatne, PC with T. Punchihewa, P. Gamage, Himashi Silva and Erandi Pathiranage for the Accused-Appellant.

Janaka Bandara, DSG for the State.

Argued on : 18.11.2024

Decided on : 11.12.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgement dated 29/06/2018 of the High Court of Colombo.

The accused-appellant, hereinafter referred to as the appellant, has been indicted for the possession and trafficking of 2.18 grams of heroin. At the end of the trial the appellant had been convicted for both. The appellant being aggrieved by the said conviction and sentence had preferred the instant appeal. The following grounds of appeal were raised by the appellant,

1. The trial judge not considering the improbability of the prosecution story

2. Contradictions in the evidence of PW-01 and PW-02 not being considered by the trial judge
3. Inward journey of the productions not being considered by the trial judge
4. The pink colour covering which contained the four parcels of heroin not being produced as a production by the prosecution.
5. The trial judge deciding the merits of the case before considering the defence.
6. Dock statement of the appellant not being considered by the trial judge.

The main raiding officer that is PW-01 had said in evidence that on the 28th of December 2010 on an information received he had arranged a group of police officers to go on a raid pertaining to this case at 1800 hours in a private van, which belonged to his brother, they had left to the food city at Peliyagoda. The information they received was that a young boy would come in a red t-shirt.

As they were waiting inside the food city in Peliyagoda, a person in a red t-shirt had come and they had gone out and PW-01 had searched him. Upon searching he had found a pink colour bag hidden in his underpants. The said pink coloured bag had contained two blue coloured parcels and two pink coloured parcels. They had suspected the substance inside the said bags to be heroin. As such, the suspect had been arrested and the productions had been taken into custody. Thereafter, they had gone to the Police Narcotics Bureau at 20:30 and had weighed the productions. Upon weighing the productions, they had found a gross quantity of 25.510 grams of a substance, which they suspected to be heroin. The PW-01 had further said that after weighing the productions, he had put the two pink colour bags and the blue coloured bags into an envelope and had sealed the same but he had not revealed any evidence as to the pink colour covering which had the four bags. The said pink colour covering had not been produced in court as well.

In cross-examination, at page 124-126 of the brief, he had said that the main the pink coloured covering which had contained the four small bags had not

been handed over to the production clerk by him. At 20:30 he had handed over the envelope which contained the four bags, to PC 81970 Suresh but not the initial pink coloured covering.

It also has to be noted at this point that PW-01 had not taken into custody any personal belongings of the appellant.

At this point, the learned President's Counsel appearing for the appellant, brought to the notice of court that it is very improbable that the raiding officers had not taken any personal belongings of the appellant, who was walking on the streets and he further said that it further substantiates the position of the defence that he was taken into custody at home and not while walking on the streets.

The learned President's Counsel for the appellant further raised the issue that the prosecution failing to mark the initial pink coloured covering, which had contained the four bags, also raises a doubt with regard to the credibility of the evidence of PW-01.

Another point raised by the learned counsel for the appellant is that although PW-01 has spoken of only 1 envelope being used in the sealing of productions, in the *PR book it has been noted as 2 envelopes.*

Thereafter, the prosecution has led the evidence of PW-02, who had assisted PW-01 and has corroborated with PW-01, but he had said that the driver who drove the van did not have a driving license. This also the learned President's Counsel submitted as a contribution to the improbability of the story of the prosecution.

He too had been lengthily cross-examined, and it has been suggested to the witness that he never participated in the raid. This witness too has admitted in evidence that PW-01, by mistake, had not taken it into custody; the initial pink covering, which had contained the four bags of narcotics. In the evidence of PW-02, it has revealed that there was a small white colour paper, which was

inserted into the envelope which contained the four bags of heroin. But this is contrary to the evidence of PW-01.

Thereafter, the prosecution had led the evidence of the Government analyst. The Government analyst had said that they received the productions on 09.02.2011. At the time of receipt of the production, the seals had been taped.

But at this stage it has to be noted that at page 219 in the brief, the court has recorded an admission under section 420 of the Criminal Procedure Code that the defense is not challenging the evidence of PC 86797 Premashantha that productions were handed over to the Government analyst on 11.02.2009.

The evidence of PC 86797 Premashantha says that he handed over the productions to the Government analyst on the 9th of January 2011 at 9.30. He has been cross-examined very lengthily and even in cross-examination he had said the same thing.

The production registry of the Magistrates Court has recorded the date on which the productions had been handed over to the Government Analyst as being the 8th of February, 2011.

Therefore, there are three positions with regard to the receipt of the productions by the Government analyst.

The learned counsel for the appellant submitted that this discrepancy with regard to the date of handing over of the productions to the Government analyst in the prosecution case poses a doubt in the credibility of the witnesses in the case for the prosecution.

Thereafter, the prosecution has taken steps to lead the evidence pertaining to the chain of productions, which consisted of the evidence of Police constables Sampath Kumara, Udayanga and Premashantha.

Upon the closure of the prosecution case, the defence had been called and the appellant has made a statement from the dock, in which he had said that while

he was at home a group of police officers had come to his house and had taken him in a white van and had got his signature on certain documents. Further, he has completely denied the charge.

Upon the conclusion of the prosecution and the defence, the learned trial judge had convicted the appellant for both charges and has sentenced accordingly.

The learned counsel for the appellant stated that the trial judge has failed to consider the above mentioned improbabilities, the contradictions, the prosecution failing to mark the pink colour bag, which contained the parcels of heroin and the dock statements of the appellant.

Upon perusal of the judgement, the learned trial judge has considered the fact that the initial pink covering, which had contained the four parcels of heroin, not being produced in court, at page 297 of the judgment, but he has concluded that the mere non production of the said cellophane cover does not create a doubt in the case of the prosecution.

But it is the opinion of this court that the initial pink covering, which had contained the four parcels of heroin, is a vital production for the case of the prosecution. The non production of it creates a doubt with regard to the witnesses who conducted the raid.

According to the evidence led above there is a discrepancy in the date on which the productions have been handed over to the Government analyst. But this too the learned trial judge has considered but has said that it has not caused any doubt in the case for the prosecution.

But in the opinion of this court, there are three positions with regard to the date on which the productions have been handed over to the Government analyst, which is a very important item of evidence in the inward journey of the productions in the case of the prosecution. If there is no clarity in the date on which it has been handed over to the Government analyst, it invariably creates

a doubt on the case of the prosecution and its credibility with regard to the witnesses.

We are mindful of the observation made by Justice J.A.N De Silva in **Perera v Attorney General 1998 (1)** SLR page 379 held that;

> *"it is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the Analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the Analyst. Therefore, it is correct to state that the most important journey is the inwards journey because the final Analyst report will depend on that. The outward journey does not attract the same importance."*

It was further held by Justice Sisira De Abrew in the case of **Witharana Doli Nona v The Republic of Sri Lanka CA 19/99**,

> *"It is a recognized principle in drug related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. Prosecution must prove that the productions taken from the accused-appellant was examined by the Government analyst. To prove this, the prosecution must prove all the links of the chain from the time it was taken from the possession of the accused-appellant to the Government Analyst's Department."*

Furthermore, the appellant had been arrested according to the prosecution while riding a motor bike on the road. But his dock statement and his defence is that he was arrested at home. The raiding officers have failed to take into custody any item of his personal belongings, which creates a doubt as to whether he was really arrested at the place that the prosecution witnesses

alleged or otherwise. The learned trial judge has completely failed to consider this possibility.

The counsel for the appellant has also raised the issue that the investigating officers travelling in a private van with an unlicensed driver is also a great improbability, which has not crossed the mind of the trial judge. In the judgment of the trial judge, he has considered this fact but has concluded that it has not a caused a reasonable doubt in the case of the prosecution.

But it is the opinion of this court that it is highly unlikely that a private van with an unlicensed driver would be used for a matter of this nature.

In the instant matter, when considering the discrepancies and contradictions in the prosecution witnesses evidence and the dock statements made by the appellant, this court would like to direct its attention to the case of **James Silva Vs. Republic of Sri Lanka 1980 (2) SLR 167**, where Justice Rodrigo stated that,

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the court adduced whether by the prosecution or by the defense in its totality without compartmentalizing and, ask himself whether as prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not - see the Privy Council Judgement in Jayasena vs. Queen 72 NLR 313."*

Therefore, upon considering the above mentioned items of evidence and the law pertaining to the same, it is the considered view of this Court that the prosecution, which has the sole duty of proving its case beyond a reasonable doubt, has failed to do so due to the above mentioned discrepancies in the case for the prosecution.

As such, the conviction and the sentence imposed by the trial judge is hereby set aside and the instant appeal is allowed.

Judge of the Court of Appeal

Hon. K.M.G.H Kulatunga

I agree.

Judge of the Court of Appeal