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

In the matter of an Appeal made under 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.

Court of Appeal No:
CA/HCC/0048/2020

High Court of Colombo
Case No: HC/7540/2014

Dasanayake Mudiyanselage Wasantha Kumara

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL	:	**Neranjan Jayasinghe with Randunu Heellage and Imansi Senarath for the Appellant.** **Wasantha Perera, DSG for the Respondent.**
ARGUED ON	:	**03/07/2024**
DECIDED ON	:	**08/10/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Colombo under Sections 54(A) (b) and 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for the Trafficking and Possession of 11.54 grams of Heroin (diacetylmorphine) on 18th April 2013.

Following the trial, the Appellant was found guilty on both counts and the learned High Court Judge of Colomb imposed the death sentence for both counts on 05/03/2020.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The learned Counsel for the Appellant informed this court that the Appellant has given his consent to argue this matter in his absence. At the hearing, the Appellant was connected via Zoom platform from prison.

The following Grounds of Appeal were raised on behalf of the Appellant.

1. The learned High Court Judge had failed to take into consideration material contradictions in the evidence of the prosecution witnesses.
2. The learned High Court Judge had failed to take into consideration that the version of the prosecution fails the test of probability.
3. The learned High Court Judge had arrived at the wrong conclusion that the prosecution had proved the chain of productions.
4. The learned High Court Judge had erroneously rejected the dock statement and the learned High Court Judge had expected the Appellant to prove his case by calling witnesses and thereby shifted the burden on the Appellant to prove his innocence.

In this case, the raid was conducted based on specific information received. The raid was headed by PW1 with six male and one female police officer from the Police Narcotics Bureau. Each of them including the Government Analyst has been named as witnesses in the indictment. The prosecution had called PW1, PW7, PW8, and PW10 and marked productions P1 to P14 in support of their case. The Government Analyst's qualifications were admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979.

When the defence was called, the Appellant had made a dock statement and closed the defence case.

As the Appellant absconded after making his statement from the dock, evidence was led under Section 241(1) of the Code of Criminal Procedure Act No.15 of 1979 to conclude the matter in absentia of the Appellant. As such,

only the prosecution had made closing submissions in this case. But the Appellant was very well represented until the conclusion of the case. The Judgment was delivered on 05.03.2020 and he was arrested and produced on 20.07.2020.

Background of the case.

On 18/04/2013 PW1 SI/Delgahapitiya attached to the Police Narcotics Bureau Colombo had conducted a raid acting based on information received from PW7 PC 74811 Rathugamage. PW7 had received an information from his personal informer that the Appellant was selling Heroin at a place called Cardernanawatta, in the Borella Police area. After meeting the informer close to the place of arrest, PW1 and PW7 had arrested the Appellant close to his house. Upon searching him, a cellophane bag with some substance was recovered from his right-side trouser pocket. Upon the substances in the parcel recovered from the Appellant reacting for Heroin (diacetylmorphine), he was arrested at 11.30 hours and subjected to further investigation. As the investigation revealed that his house was situated in Serpentine Road, Borella, the police party had gone to the Appellant's house and firstly PW7 had searched the Appellant and found Rs.317,000/- from his left side trouser pocket. Although the house was searched, they were not successful in recovering any illegal substances. But the police team had been able to recover Rs.297,000/- and some jewelleries from an almirah used by the Appellant's wife. As such, the Appellant's wife Mangalika Samanthi too were arrested along with the recovery. Thereafter, the police party had returned to the Police Narcotics Bureau at 13:30 hours, sealed the production, entered the same in the production register and handed over the Appellant to the reserve duty officer at that time. But the sealed Heroin parcel was handed over to PW8 on the following day, as he was not available in the Bureau. Until such time, the sealed production was in the custody of PW1.

Thereafter, PW7 was called to give evidence to corroborate the evidence of PW1 and it was followed by the evidence of the Government Analyst and PW8.

Although the wife of the Appellant was arrested along with Rs.297,000/- and gold jewelleries, she was released along with the cash and the jewelleries.

In this case, although a preliminary objection was raised with regard to the appeal being out of time by the learned Deputy Solicitor General, it was not persuaded due to the Gazette Notification No. 2175/2 dated 12.05.2020 which had extended the appealable time period due to the Covid pandemic.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person and this burden never shifts. Hence an accused person has no burden to prove his case unless he pleads a general or a special exception in the Penal Code.

In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 held:

> *"A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences in relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions…."*

In **the Attorney-General v. Rawther** 25 NLR 385, Ennis, J. states thus: [1987} 1 SLR 155

> *"The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt".*

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

> *"…the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice".*

As the 1st and 2nd appeal grounds raised by the Appellant are interrelated, the said grounds will be considered together in this case.

The role of probability is pivotal in persuading the judge on specific points, as higher probabilities increase the likelihood of the judge being convinced. Probability plays a crucial role in criminal investigations, aiding in the evaluation of the relevance of different types of evidence. In order to accuse someone "beyond reasonable doubt," it is essential to possess substantial evidence. To achieve this, certain assumptions must be made to draw conclusions. The likelihood of these assumptions being accurate is precisely termed the principle of probability in legal contexts.

In this case, police officers had conducted the raid upon the information received by PW7. According to the informant a person has been selling Heroin close to a house with an assessment No. 145/25. PW1 admitted that even though he had said that the information revealed a person called Wasantha selling Heroin, in his notes he had not entered the name Wasantha.

It must be mentioned here that the utilization of informants in Sri Lankan criminal cases are quite common. Law enforcement officers often use informants to try to fabricate cases against someone they believe is guilty of a crime. Hence, quite understandably, the Judiciary faces quite an arduous task when it comes to verifying the reliability of an information.

PW7, who received the information, had not put any notes of meeting the informant, establishing the identity of the Appellant and the place where they had met the informant etc. PW7 admitted that he only entered the notes as follows:

Page 202 of the brief.

ප්‍ර : ඔයාගේ සටහනේ තියෙන්නේ **"මත් ද්‍රව්‍ය ජාවාරම්කරු ගැවසෙන 145 - 25 සර්පන්ටයින් පාර, බොරැල්ල දෙසට අපි ගමන් කළා"** එහෙමනේ තියෙන්නේ සටහනේ ?

උ : එහෙමයි ස්වාමීනි.

Both PW1 and PW7 had stated that they had met the informant at Cardernana Watta and all walked in very close proximity to the Appellant before the informant left the place. The learned Counsel strenuously argued that this raises serious probability issues as usually the informant never appears in public to indicate the culprits to the police officers. In this case as per PW1 and PW7, the informant had walked with them until they were very close to the place where the Appellant was standing. Considering the above cited portion of the brief, a doubt had been created as to whether PW1 and PW7 actually met the informant at Cadernana Watta prior to the arrest of the Appellant.

According to PW1, the Appellant was arrested in front his house. But contradicting PW1, PW7 had stated that he was arrested at the entrance of the Cadernana Watta. The relevant portion is re-produced below:

Page 201 of the brief.

උ : කාදල් නනා වත්තේ ඉඳිරියට යනකොට 145 - 25 ඔහුගේ නිවස තියෙන පාර තියෙනවානේ ගරු ස්වාමීනි. ඒ පාරේ හැරෙන හන්දියේ තමයි මේ සැකකරු සිටියේ ස්වාමීනි.

ප්‍ර : ඔබතුමා හන්දිය කියලා කියන්නේ මේ කාදල් නානා වත්තෙන් ගිහිල්ලා වමට හැරෙන්න ඕනේ ?

උ : එහෙමයි ස්වාමීනි.

According to the prosecution, the Appellant had possessed 249 currency notes amounting to Rs.317,000/-in his trouser pocket. When PW1 and PW7 had checked him, they had only found the Heroin parcel from his right-side trouser pocket. But they had not detected anything in the possession of the Appellant until they checked him when they were inside his house. The relevant portion is re-produced below:

Page 127 of the brief.

ප්‍ර : මම අහන ප්‍රශ්නයට උත්තර දෙන්නේ නැහැනේ. පාරේදී ඔයා දැන ගත්ත ද අනෙක් සාක්කුවේ සල්ලි තිබ්බා කියලා ?

උ : නැහැ ගරු උතුමාණනි.

The contention of the defence is that the Appellant was not arrested as stated by PW1 and PW7, but was arrested at his house and that all the money was recovered from his house. This had been properly suggested to PW1 by the defence. The relevant portion is re-produced below:

Pages 153-154 of the brief.

ප්‍ර : මම තමුන්ට යෝජනා කරනවා ඔය තමුන් කියපු විදියට සල්ලිත් එක්ක විත්තිකරුව නිවස ඉදිරිපිට සිට අත් අඩංගුවට ගත්තා කියලා අමූලික අසත්‍යයක් කියලා ?

උ : ප්‍රතික්ෂේප කරනවා ගරු උතුමාණෙනි.

ප්‍ර : මම යෝජනා කරනවා මෙම විත්තිකාරයා නිවසේ ඉන්න කොට තමුන්ලා කට්ටිය ගිහිල්ලා ගෙදර ඒ තිබ්බිච්ච මුදල් දැකලා මේ මනුස්සයව අත් අඩංගුවට ගත්තා කියලා ?

උ : සම්පූර්ණයෙන් ප්‍රතික්ෂේප කරනවා ගරු උතුමාණෙනි.

ප්‍ර : මම යෝජනා කරනවා මහත්තයා මෙම විත්තිකරු සන්තකයේ කිසිම මත්ද්‍රව්‍ය ප්‍රමාණයක් තිබුණේ නැහැ කියලා ඔයගොල්ලන් අත් අඩංගුවට ගද්දි ?

උ : විත්තිකරු සන්තකයේ මත්ද්‍රව්‍ය ප්‍රමාණයක් තිබ්බා ගරු උතුමාණෙනි.

The explanation given by the Appellant is that he had raised the money after selling a vehicle to repair his house. It is very pertinent to note that PW1 and PW7 had also recovered some gold jewelleries and Rs.297,000/- from the Appellant's wife's almirah and arrested the wife of the Appellant as well. Although she was arrested, she was discharged from the case and the money Rs.297,000/- and her jewelleries were returned after accepting her explanation. The prosecution had not elicited any explanation as to on what basis they had released the money and jewelleries to the wife of the Appellant when she was released from this case.

Judges formulate their judgments based on the information presented to them during court proceedings, including verbal arguments, written submissions, and supporting documents provided by the parties through their legal representatives. They meticulously examine the facts presented and evaluate the evidence that has been entered into the court record. Ultimately, their decisions are based on an objective analysis of the law and the evidence presented, rather than subjective personal beliefs. Relying on personal beliefs would introduce significant bias into the judicial process,

undermining the fairness and impartiality that are fundamental principles of the legal system.

The profound duty of the trial court is to consider the evidence placed by the prosecution and the defence on equal footings to arrive at its finding.

In **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

> *"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".*

The burden of proof is usually on the person who brings a claim in a dispute. It is often associated with the Latin maxim *semper necessitas probandi incumbit ei qui agit*, a translation of which is: "The necessity of proof always lies with the person who lays charges."

It is commonly acknowledged that shifting a legal onus onto the accused with respect to an element of an offence that is essential to culpability is an encroachment on the presumption of innocence, and more difficult to justify. Shifting the burden of proof on such an issue involves the possibility of unfair conviction.

The **Irish Human Rights and Equality Commission** has argued before the Supreme Court that a law that reverses the burden of proof on to an accused person, thereby putting a legal burden on them to disprove an element of an offence, interferes with their right to a fair trial as protected by the Constitution.

Sinéad Gibney, Chief Commissioner of the Irish Human Rights and Equality Commission stated:

> *"Given its importance to the integrity of the justice system, a reversal of the burden of proof, particularly in a criminal case where the accused person's right to liberty is at stake, must always be subject to the highest tests and exist within the parameters set by the Constitution.*

Article 13(3) of our Constitution enshrines the concept fair trial. The Article states:

> "Any person charged with an offence shall be entitled to be heard, in person or by an Attorney-at-Law, at a fair trial by a competent court".

To determine whether you are innocent or guilty, the concept of fair trial plays a vital role. A fair trial is a universally recognised human right. Fair trials help to establish the truth and are vital for everyone involved in a case. It is a cornerstone of democracy, helping to ensure fair and just societies.

In this case the learned High Court Judge in his judgment at page 293 of the brief stated as follows:

Page 293 of the brief.

කෙසේ වුවද, විත්තිකරු ළඟ වාහනයක් තිබුණා බවට හෝ ඔහුගේ වාහනය විකුණූ බවට හෝ රත්තරං බඩු විකුණූ බවට හෝ පිළිගත හැකි කිසිඳු සාක්ෂියක් විත්තිකරු විසින් ඉදිරිපත් කර නැත.

This portion of the judgment clearly demonstrate that the Appellant had not been afforded a fair trial.

In this case the raid was conducted on an information received. Further, the raid conducted and the recovery of productions have failed to pass the test of probability in this case. If the learned Trial Judge had examined the

evidence presented from the correct perspective, he would have been inclined to accept the testimony provided by the Appellant.

Further, the Appellant was not afforded a fair trial as guaranteed in the Constitution.

Guided by the above cited judicial decisions, I conclude that the 1st, 2nd and 4th grounds advanced by the Appellant have very serious impact on the prosecution case. As such, the 3rd ground of appeal is not considered in this appeal.

As the prosecution had failed its duty to prove this case beyond reasonable doubt, I set aside the conviction and sentence imposed by the learned High Court Judge of Colombo dated 05/03/2020 on the Appellant. Therefore, he is acquitted from this case.

Accordingly, the appeal is allowed.

The Registrar of this Court is directed to send this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL