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/0084/2022

High Court of Colombo
Case No: HC/623/2018

Pathirana Wasam Don Priyantha alias Sandun

Accused-Appellant

Vs.

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

Complainant-Respondent

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

COUNSEL : **Nihara Randeniya for the Appellant.**
Jayalakshi, SSC for the Respondent.

ARGUED ON : **21/09/2023**

DECIDED ON : **12/01/2024**

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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) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession and Trafficking of 5.03 grams of Heroin (diacetylmorphine) on 12th December 2017.

After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed life imprisonment on the both counts on 09/03/2022.

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 due to the Covid 19 pandemic. 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. Learned High Court Judge erred in law by failing to consider that the prosecution's version did not pass the test of probability.
2. That the prosecution failed to prove the inward journey.
3. Learned High Court Judge based his conclusion on speculations and surmises.
4. Learned High Court Judge erred in law when concluding that the prosecution proved the case beyond reasonable doubt rejecting the defence case.

In this case, the raid was conducted in absence of any specific information received. The raid was headed by PW1 with two police officers from the Grandpass Police Station. All have been named as witnesses in the indictment including the Government Analyst. The prosecution had called PW1, PW2, PW4, and PW5 closed their case. The Government Analyst report was admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979. The prosecution marked production P1-P10.

When the defence was called, the Appellant had given evidence from the witness box and had called two witnesses and closed the defence case.

The prosecution had called a witness in rebuttal.

Background of the case

On 12/12/2017 SI/Niroshan attached to the Grandpass Police Station had gone for a routine mobile patrolling with two police officers in a three-wheeler belonging to a private person. The team had left the police station at about 11.00am. The witness and PW2 were in civil outfits while PW3 was clad in No.02 police uniform. Along with the other items, they had taken sealing instrument instruments with them. First, they had gone to Stacepura, Nawagampura and Sadam Watta but the raid was not successful. The team decided to go on foot patrol along Awwal Saviya Road at about 3.40pm after parking the three-wheeler near Stacepura bridge. At the entrance of Awwal

Saviya Road, the witness had spotted the Appellant who was coming from the Awwal Saviya Road. According to PW1, as the Appellant crossed the other side of the road after seeing the police officers, suspicious arose on the Appellant's behaviour. Hence, the Appellant was stopped for questioning and search. At that time, the police PW1 had observed a pink coloured cellophane bag with something in it in the right-side trouser pocket. PW1 took the parcel into his custody and inspected the same. The parcel contained some brown coloured substance. As it reacted for Heroin (Diacetylmorphine) the Appellant was arrested immediately. He was arrested at 3.50 pm. The Appellant was taken to the Letchumi Jewellers situated in Kosgas Junction to weigh the substance by all three officers. The parcel contained 30400 milligrams of substances. After entering notes, the Appellant and the productions were handed over to the Grandpass Police Station under PR No.5040/2017.

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 it 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 appeal grounds raised by the Appellant are inter-related, the grounds will be considered together in this case.

The test of probability holds a very important role when it comes to convincing the judge on specific points as more the probability of the assumption more will be chances for the judge to get convinced. Probability is of utmost importance during criminal investigation and is used to assess the significance of various types of evidence. To accuse someone "beyond reasonable doubt" it becomes quintessential to have strong evidence and for the sake of that one has to make few assumptions to reach certain conclusions. The possibility of these assumptions to be true is specifically know as principle of probability in legal terms.

In this case, only three police officers had conducted the raid. They had set off from the police station without any specific information. After the arrest, the Appellant was taken to a jewellery shop called 'Letchumi Jewellery' and weighed the substances which took exactly about one hour. The relevant portion is re-produced below:

Pages 111-112. Evidence of PW1

ප්‍ර : දැන් මහත්මයාට කොපමණ වේලාවක් ගියා ද ලෙච්චමි ජුවලරි ආයතනයට ගිහිල්ලා මේ වැඩේ ඉවර කර ගන්න ?

උ : පැයකට ආසන්න ප්‍රමාණයක් ගිහින් තිබෙනවා ස්වාමිණී.

ප්‍ර : පැයක ගියා ?

උ : එසේය ස්වාමිණී.

ප්‍ර : ඇයි පැයක් ගියේ ?

උ : කිරා මැන බැලීම සිදු කලේ එම ස්ථානයේ දී ස්වාමිණී. ඒ කාර්යය සඳහා මා හට පැයකට ආසන්න කාලයක් ගත වුණා.

ප්‍ර : කිරා මැන බැලීමේ කටයුත්තට ද පැයක් ගියේ ?

උ : එසේය ස්වාමිණී.

ප්‍ර : මහත්මයා ගරු අධිකරණයේ විය නොහැකි සාක්ෂියක් දෙනවා කියලා යෝජනා කරනවා ?

උ : නැහැ ස්වාමිණී. එම ස්ථානයට ගිය විගසම මා හට තරාදිය ලබා ගැනීමට හැකියාවක් නැහැ. ඉන්න මිනිසුන්ගෙන් මිදිලා තරාදිය ලබා ගැනීමට ඕන. එම අවස්ථාවේ දී විනාඩි පහක් දහයක ඉන්නට වීමට සිදු වෙන අවස්ථා තිබෙනවා ස්වාමිණී. එම නිසා මෙහෙම සටහන් කරලා තිබෙනවා ස්වාමිණී. 16.00 ට ඇතුළු වුණා ලෙච්චමි ජුවලරි ආයතනයට. 17.00 ට එම ස්ථානයෙන් පිටවුණා කියලා තිබෙනවා ස්වාමිණී.

The gross quantity said to have recovered from the Appellant is 30400 milligrams. To weigh this meagre amount the time taken by the police officers was one hour, which is highly improbable considering the circumstances of the case.

Further, the defence witness Veerasamy Prabash, who has been working in the Letchumi Jewellers for about 23 years had failed to identify the Appellant. This witness admitted that he comes to for work every day, but couldn't identify the Appellant. The evidence given by this witness is very vital as the police officers had taken one hour to weigh the substances at the Letchumi which certainly is an unusual time duration.

The Learned High Court Judge in considering the probability test, convinced that recovering heroin from the Appellant raised a doubt to some extent Although he had come to this conclusion, he had failed to award the benefit to the Appellant. The relevant portion of the Judgement is re-produced below:

Page 279 of the brief.

වියහැකිභාවයේ පරීක්ෂාව මෙවන් නඩුවල දී ඉතාමත් වැදගත් පරීක්ෂාවකි. කෙසේ වෙතත්, මෙම නඩුවේ ප්‍රධාන සාක්ෂිකරුගේ සාක්ෂිය ගත් විට එහි කිසිදු අභව්‍ය තත්ත්වයක් හෝ නිර්මාණය කරන ලද තත්ත්වයක් දක්නට නැත. චූදිත අත්අඩංගුවට ගන්නා අවස්ථාවේ දී හෙරොයින් පාර්සලය හැර වෙන කිසිදු පෞද්ගලික දේපළක් සන්තකයේ නොතිබුණු බව යම්තාක් දුරට සැක මතු කරන තත්ත්වයක් ලෙස පෙනී ගියත්,

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".*

In this case, even though the Learned High Court Judge doubted the probability factors of the case, he had failed to award the benefit to the Appellant.

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 of 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. The fair trial is an internationally recognised human right. Fair trials help establish the truth and are vital for everyone involved in a case. They are a cornerstone of democracy, helping to ensure fair and just societies.

In this case the Learned High Court Judge in his judgment at page 23 (page 285 of the brief) stated as follows:

Page 285 of the brief

චිත්තිකරුගේ දීර්ඝ කාලීන කස්ටර්මර් කෙනෙකු හැටියට මෙම රහිම් නැමැත්තා සාක්ෂියට කැඳවීමට හැකියාවක් ඇත්තේ දැයි විමසීමේ දී චිත්තිකරු පවසන්නේ ඔහු එයිද දන්නේ නැහැ යනුවෙනි. මෙයින් පෙනී යන්නේ චිත්තිකරු විසින් එම අවස්ථාව වනතෙක් මෙම රහිම් නැමැත්තාගේ සාක්ෂිය තම චිත්තිවාචකය තහවුර කිරීමට කැඳවීම සම්බන්ධයෙන් අවම වශයෙන් ඔහු සමඟ සාකච්ඡා කිරීමක්වත් කර නොමැති බවයි. චිත්තිකරුවෙකුට ඍජු සම්බන්ධතාවයක් නොමැති පුද්ගලයෙකු චිත්තිකරු වෙනුවෙන් නඩුවකට මැදිහත් වීමට මැළිකමක් දැක්වීම අධිකරණයට පිළිගත හැකි කරුණකි. එසේ නමුත්, ඔහුගේ සාක්ෂිය ලබා ගැනීමට උත්සාහයක්වත් නොකිරීම එහි වැදගත්කම සැළකූ විට විශ්වාස කිරීමට අපහසු කරුණකි.

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

In **Dyers v The Queen** [2002] 210 CLR 285, the Court held that:

> *"No comment should be made as to the failure of the defense to call a witness who might have been able to assist the defense....If any comment is to be given it is that the jury should not speculate about what a witness not called might have said".*

In this case, the raid was conducted without any specific information. Further, recovery and weighing the production has failed to pass the probability test in this case. Had the Learned Trial Judge looked in to the

evidence presented in its correct perspective, he should have accepted the evidence given by the Appellant.

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

Guided by the above cited judicial decisions, I conclude that the appeal grounds advanced by the Appellant have very serious impact on the prosecution's case.

As the prosecution had failed its duty to prove this case beyond reasonable doubt, I set aside the conviction and the sentence imposed by the Learned High Court Judge of Colombo dated 09/03/2022 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