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/0137/2024

High Court of Colombo
Case No: HC/7302/2014

Chammi Reshmier Perera alias
Shammi Reshmier Perera

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **P. Kumararatnam, J.**
K. M. G. H. Kulatunga, J.

COUNSEL : **Radha M. Kuruwitabandara for the Appellant.**
Anoopa De Silva, DSG with Jehan Gunasekera, SC for the Respondent.

ARGUED ON : **03/02/2025**

DECIDED ON : **28/02/2025**

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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 54A (b) and 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking and being in Possession of 2.6 grams of Heroin (diacetylmorphine) on 26th April 2013.

Following the trial, the Appellant was found guilty for both counts and the learned High Court Judge of Colombo has imposed life imprisonment for both counts on the Appellant on 28/06/2023.

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 Trial Judge has failed to consider the credibility of PW1 in the prosecution case.
2. The learned Trial Judge has failed to consider material contradictions and omissions in the evidence.
3. The learned Trial Judge has misdirected himself on law and in accepting the evidence of PW2 as corroborative evidence and as material evidence at the trial.
4. The learned Trial Judge has failed to provide the advantage of reasonable doubt to the defence.
5. The learned Trial Judge has failed to provide the benefit of Section 114(f) of the Evidence Ordinance for the Appellant.
6. The conviction and sentence are bad in law.

In this case the raid was conducted upon an information received by PW1 IP/Priyadharshana while on routine crime prevention duty. The raid team included four police officers from the Crime Prevention Unit of the Borella Police Station. All have been named as witnesses in the indictment including the Government Analyst. The prosecution had called PW1, PW2, PW8, PW9, PW11, PW13 and 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 productions P1-P10.

When the defence was called, the Appellant made a statement from the Dock and closed the defence case.

Background of the case.

On 26/04/2013 IP/Priyadharshana attached to the Crime Prevention Unit functioned under Borella Police Station had gone for a routine crime prevention duty with 04 police officers in a three-wheeler belonging to the said unit. The team had left the police station around 08:20 a. m. All officers

were clad in civil dress. Another team of police officers had joined them close to the Welikada Prison around 16:20 hours.

Upon receiving a tip off PW1 and other stood in ambush on either side of the Baseline Road, Colombo-09. Whilst the team was preparing for an ambush, a person fitting the description given by the informant had been spotted approaching the Baseline Road. When he reached the place where the police team remained in ambush, PW1 had apprehended the Appellant who tried to struggle and escape. When the Appellant was searched, PW1 had observed a pink coloured cellophane bag with something in it in the right pocket of the shorts he was wearing. PW1 had taken the parcel into his custody and had inspected the same. The parcel contained some brown coloured substance. As it reacted for Heroin (Diacetylmorphine) the Appellant was arrested immediately. The time of arrest was 17:00 hours. Upon reaching the police station around 00:20 hours, PW1 had weighed the parcel at the police station. The weight of the substances showed 20.50 grams. After entering notes, the Appellant and the productions were handed over to reserve police officer of the Borella Police Station under PR No.166/2013. On the following day PW1 took the Heroin parcel from the reserve and again weighed the substance at Sew Gunasekera Pawning Centre in Maradana.

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

Probability holds a very important role when it comes to convincing the judge on a specific point as more the probability of the assumption more will be chances for the judge to get convinced. Probability, it 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 a few assumptions to reach certain conclusions, the possibility of these assumptions to be true is specifically known as principle of probability in legal terms.

In this case, only 04 police officers had conducted the raid. They had set off from the police station without any specific information. According to PW1 he had received the information while on crime prevention duty. According to PW1 he had weighed the substance at Sew Gunasekera Pawn Shop using his personal weighing machine. But he had not given any explanation as to why he weighed twice.

Although the Appellant was arrested at Baseline Road, Colombo-14, PW1 had not taken any meaningful action to search his house nor had the common sensical approach to investigate the person from whom he received the Heroin for sale. This lethargic attitude of the raiding officers will certainly fail the probability test which certainly favours the Appellants claim.

In the present case upon perusal of the judgment delivered by the trial Judge it is manifestly clear that the learned High Court Judge had completely misdirected himself with regard to the admission of the dock statement of an Accused person in a criminal trial. This has caused great prejudice to the Appellant and he had been denied a fair trial. The importance of considering the dock statement had been discussed in several judgments by the Superior Courts. The relevant portion is re-produced below:

Page 263 of the brief.

චූදිත තැනැත්තා විත්තිකූඩුවේ සිට ප්‍රකාශයක් කරමින් සාක්ෂි ලබාදී ඇත. චූදිත තැනැත්තා එවිට දිවුරුමකට / ප්‍රතිඥාවකට යටත්ව සාක්ෂි ලබාදී නැත. චූදිත තැනැත්තා හරස් ප්‍රශ්නවලට භාජනය වෙමින් සාක්ෂි ලබාදී නැත. චූදිත තැනැත්තාගේ සාක්ෂියේ ඇති එම ඌනතාවයන් කෙරෙහි අධිකරණයේ අවධානය යොමු කරමින් එම සාක්ෂි මත පිහිටා කටයුතු නොකිරීමට තීරණය කරනු ලැබේ. ඒ හේතුවෙන් චූදිත තැනැත්තාගේ සාක්ෂිය බැහැර කරනු ලැබේ.

In **Queen v. Buddharakkitha Thero** 63 NLR 433 the court held that:

> *"The right of an accused person to make an unsworn statement from the dock is recognised in our law (King v. Vellayan[10 (1918) 20 N. L. R. 251-at 266.].) That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination'.*

In **Queen v. Kularatne** 71 NLR 529 the court held that:

> *"We are in respectful agreement and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that;*
>
> *a) If they believe the unsworn statement, it must be acted upon.*
> *b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defense must succeed,*
> *c) That it should not be used against another accused".*

In this case the learned High Court Judge had wrongly rejected the dock statement of the Appellant.

The learned Counsel for the Appellant further contended that the learned High Court Judge had wrongly analyzed the defense evidence which caused further prejudice to the Appellant. The relevant portion is re-produced below:

Page 263 of the brief.

හැරත් චූදිත පාර්ශවය වෙනුවෙන් ඉදිරිපත් කර ඇති විත්තිවාචකය පැහැදිලි ආකාරයට පැමිණිලිකාර පාර්ශවයේ සාක්ෂිකරුවන් හරස් ප්‍රශ්නවලට භාජනය කිරීමේ දී ඔවුන් යෝජනා කර සිට නැත. එවිට චූදිත පාර්ශවය වෙනුවෙන් ඉදිරිපත් කර ඇති විත්තිවාචකයේ ඒකාකාරී බවක් දක්නට නැත. එම කාරණාව අධිකරණයේ අවධානයට යොමුව තිබීම මෙසේ චාර්තා කර තබනු ලැබේ

As pointed out by the Counsel for the Appellant, the learned Counsel who defended the Appellant in the trial court had accurately and precisely put up the defence during the cross examination to the relevant witnesses. But quite surprisingly, the learned High Court Judge who wrote the judgment had wrongly arrived at the conclusion that the defence had not put their stance to the prosecution witnesses. This is an incorrect finding on the part of the trial judge. This too led to denial of a fair trial to the Appellant.

The Appellants have a right to a fair trial to determine whether they are innocent or guilty which 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 the development of fair and just societies, and limiting of abuse perpetrated by state authorities.

In **The Attorney General v Segulebbe Latheef and Another** [2008] 1 SLR 225 the Court held that:

> *“The Constitution in Sri Lanka expressly guarantees this right by Article 13(3) which states that; “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.”*
>
> *“The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied."*

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."

To determine whether you are innocent or guilty, the trial judge must consider the evidence presented by both sides with an open mind.

In this case the defence suggested to PW1 that the Appellant was not arrested as described by PW1. Defence further suggested that the Appellant was arrested at the Modera. The Appellant in his Dock Statement too had taken up the position that this was an introduction which he never possessed.

In this case the raid was conducted without any specific information. The information pertaining to this case was received while they were going on routine crime prevention duty. Further, recovery and weighing the production twice has failed to pass the probability test in this case. Further, the defence's case had led to very serious doubt in the prosecution's case.

Had the learned Trial Judge looked in to the evidence presented in its correct perspective, he should have accepted the evidence adduced by the Appellant.

Therefore, considering all the evidence presented in the trial, 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 a reasonable doubt, I set aside the conviction and sentence imposed by the learned High Court Judge of Colombo dated 28/06/2023 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

K. M. G. H. Kulatunga, J.

I agree.

JUDGE OF THE COURT OF APPEAL