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/0174/2023

Asitha Kumara Satharasinghe

High Court of Colombo
Case No: HC/7685/2014

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 Harshana Ananda,Pandula Helage and S.Iman for the Appellant.**
Shanaka Wijesinghe, ASG, PC for the Respondent.

ARGUED ON : **13/05/2024**

DECIDED ON : **09/08/2024**

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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 Trafficking and Possession of 123.67 grams of Heroin (diacetylmorphine) on 18.06. 2013.

After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo had imposed a sentence of life imprisonment on both counts on 04/05/2023.

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. Learned High Court Judge had failed to evaluate the evidence of PW1 and PW8 and there by failed to take into consideration that the evidence of PW1 and PW8 fails the tests of credibility and probability.
2. Learned High Court Judge had rejected the defence evidence on unreasonable grounds.

In this case the raid was conducted based on information received. The raid was headed by PW1 with 19 male Special Task Police Officers from the Colombo Head Quarters. All have been named as witnesses in the indictment including the Government Analyst. The prosecution had called PW1, PW8, PW19, and PW22 and marked productions P1 to P37 in support of their case. Handing over the productions to the reserve police officer, taking the productions to the Court and handing over the productions to the Government Analyst were admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979.

When the defence was called, the Appellant gave evidence from witness box, called one witness on his behalf, and closed the defence case.

Background of the case.

According to PW1 IP/Kulasekera attached to Special Task Force of the Colombo Head Quarters, upon an information, they had organized a raid to apprehend a person carrying Heroin. According to the information received by PW8 SI/Roshan from his personal informer, that the said person was enroute to Maliban Junction. PW8 had received the information in the

morning and the raiding party had left the Colombo STF Head Quarters around 11:15 hours. PW1 and three other STF personnel had proceeded to Maliban Junction in a car while other STF officers who travelled in a Cab were stationed near the Dehiwala Overhead Bridge. According to PW1, the informant had given the description of the person and he was arrested at 12:30 hours at Maliban Junction.

The same informant had furnished further information regarding another person trafficking Heroin in a three-wheeler bearing No. WPYU-0372 who was expected near the Kaduwela Bus Stand. While the STF Officers waited near Kaduwela Bus Stand till 15:30 hours, such a three-wheeler was not observed thereabouts.

At that time the informer renewing his information, called PW8 and informed that the person is expected near Millenium Food Centre situated along Piliyandala Road, Maharagama around 17:30 hours. PW1 and PW8 waited in the car which was parked near the Food Centre. At about 17:30 hours the Appellant had arrived in the three-wheeler numbered WPYU-0372 and inadvertently parked it facing the car in which the STF personnel were stationed.

When the Appellant was searched, two parcels with some substances were found to be in his left and right-side trouser pockets. Rs.65000/- in cash and a purse were also recovered from the Appellant. Upon searching the three-wheeler, another parcel with some substance, a digital scale and two live bullets were found in a secret chamber behind the rear seat. As the substances in the parcel recovered from the Appellant reacted for Heroin (diacetylmorphine) he was arrested at 17:30 hours by PW1.

Upon further information provided by the informer, the STF officers had checked a grocery shop nearby and a digital scale was recovered from under a table. The owner, namely Dilummika, was also arrested at 17:50 hours. Thereafter, the STF officers had gone to the Police Narcotics Bureau at 20:15

hours, sealed the productions, entered the same under PR No. 115/2013 to 120/2013 and handed over the Appellant, Dilummika and the productions to PW19 at 23:45 hours.

Thereafter, PW8 was called to give evidence to corroborate the evidence of PW1 and it was followed by the evidence of the Government Analyst and PW19.

The burden of proof usually lies upon 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." Hence an accused person has no burden to prove his case except where he pleads a general or a special exception in the Penal Code, where he will then be required to bring evidence to prove the defence.

Therefore, a person can only be convicted based on cogent and unambiguous evidence as that 'presumption of innocence' is the hallmark and glory of our system of criminal justice.

Further, in a drug related prosecution, the evidence adduced by both the prosecution and the defence should be considered very carefully to avoid anybody taking undue advantage. Establishment of high degree of probability is an indispensable requirement in all drug related prosecutions.

Probability holds a very important role when it comes to convincing the judge on a specific point as more probable one of the two or more possibilities are, where then there will be a better chance 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.

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

In this case, police officers had conducted the raid upon an information that the Appellant was expected at Maliban Junction, Ratmalana. They set off from the STF Head Quarters and reached Ratmalana in a car and a cab. A person was arrested there and when they were returning via Attidiya Road, the informant had given second information to PW8 that the Appellant is enroute to Kaduwela in a three-wheeler bearing No. WP YU-372. Hence the team proceeded to Kaduwela. Although they had waited at Kaduwela till 15:30 hours, the three-wheeler did not turn up. At that time PW8 had received third information that the Appellant is expected near Millenium Food Centre on the Maharagama-Piliyandala Road. The Cab was stationed near YMCA Maharagama and PW1 and P8 had proceeded in a car with three other officers to Millenium Food City. According to PW1 they had arrived at the Millenium Food Centre at 17:25 hours while PW8 had stated that they arrived at 14:00 hours. PW1 further contradicted his own evidence saying that they reached Millenium Food Centre at 16:00 pm. The contradictory evidence regarding arrival time is given much significance in this case, as the informer had given three pieces of information. As such the contradictory evidence given by PW1 and PW8 regarding the arrival time certainly affects the probability of events which had been heavily relied on by the prosecution.

According to PW1 first they had gone to Maliban Junction in Ratmalana. From there the police party had gone to Kaduwela and finally they had arrived at Maharagama. As per the ODO meter of the Cab, it had run 112 Km for the entire operation. Considering the distance between Bauddhaloka Mawatha to Maliban Junction, Maliban Junction to Kaduwela, Kaduwela to Maharagama and then from Maharagama to Police Narcotics Bureau, the distances covered by the cab is excessive. No plausible explanation was adduced by the prosecution to iron out the excessive mileage. This too raises

doubts about the probability of the events as described by the prosecution witnesses.

According to the prosecution, another Heroin parcel, two live 9mm bullets and a scale were detected from a secret chamber in the rear of the three-wheeler. The Learned High Court Judge relied heavily on this recovery to come to arrive at his decision. But the prosecution had failed to produce the three-wheeler during the trial. The Learned High Court Judge had considered this evidence in favour of the prosecution merely because of the failure of the defence to direct questions to the relevant prosecution witnesses regarding non-production of the three-wheeler. The relevant portion of the judgment is re-produced below:

Pages 577-578 of the brief.

චූදිත පදවාගෙන පැමිණි ත්‍රීරෝද රථයේ ව්‍යාප ලෙස සකස් කරන ලද රහස් කුටියක තිබී හෙරොයින් පාර්සලයක් සොයා ගත් බව මෙම සාක්ෂිකරුගේ සාක්ෂියෙන් අනාවරණය වේ. අදාල ත්‍රීරෝද රථය මහේස්ත්‍රාත් අධිකරණය විසින් බැඳුම්කරයක් මත මුදා හරින ලද තැනැත්තා එය මෙම අධිකරණය වෙත ඉදිරිපත් කිරීමට අපොහොසත් විය. ඒ අනුව ඔහුගේ බැඳුම්කරය රාජසන්තක කිරීමට පියවර ගන්නා ලදී. එබැවින් ත්‍රීරෝද රථය නඩු විභාගයේදී නඩු භාණ්ඩයක් ලෙස ඉදිරිපත් කිරීමේ ප්‍රායෝගික හැකියාවක් පැමිණිල්ලට නොතිබිණ. අනෙක් අතට ත්‍රීරෝද රථයේ ව්‍යාප ලෙස සකස් කරන ලද රහස් කුටියක් නොතිබූ බවට හරස් ප්‍රශ්න ඇසීමේදී චිත්තිය විසින් පැමිණිල්ලේ සාක්ෂිකරුවන්ට හුදු යෝජනාවක් පවා සිදුකර නැත. මෙවන් පසුබිමක් යටතේ ත්‍රීරෝද රථයේ ව්‍යාප ලෙස සකස් කරන ලද රහස් කුටියක් තිබුණේය යන කරුණ නොපිලිගැනීමට කිසිදු හේතුවක් මා හට නොපෙනේ.

The importance of adducing real evidence in a criminal trial is very important when oral evidence refers to the existence of any material thing. In this case as stated above a three-wheeler with a secret chamber had been referred to by the prosecution witnesses, but they had failed to produce the same at the trial.

Section 60 of the Evidence ordinance states:

"Oral evidence must, in all cases whatever, be direct; that is to say–

(1) If it refers to a fact which could be seen it must be the evidence of a witness who says he saw that fact;

(2) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;

(3) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;

(4) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the production of such material thing for its inspection."

The importance of presenting a physical object referred to in evidence in a criminal trial was very extensively discussed in **SC Appeal No.155/14** decided on 28.06.2021 by His Lordship Yasantha Kodagoda, PC, J. The relevant portion of the judgment is re-produced below:

> *According to the law of Evidence, as of right it would not be possible for a party to a criminal or civil case to present a physical object as an item of evidence, on its own standing. This is because it would not come within any one of the four categories of 'evidence' also referred to as 'judicial evidence,' recognized by the law of Evidence, namely 'oral evidence,' 'documentary evidence,' 'contemporaneous audio-visual recordings' and 'computer evidence.' The latter two categories of evidence, namely 'contemporaneous audio-visual recordings' and 'computer evidence' gained recognition in the eyes of the law by the Evidence (Special Provisions) Act, No. 14 of 1995. What is contemplated by 'contemporaneous audio-visual recordings' are recordings of the occurrence of the facts in issue or relevant facts embedded in certain media, and they can take the form of audio recordings, video recordings, audio-visual or video recordings, and still photographs. Section 60 of the Evidence Ordinance which provides that oral evidence must in all cases whatsoever, be direct, provides further, in its second proviso that," if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection". (Emphasis added.) Such material things when produced at a trial are referred to as real evidence. Thus, it would be seen that the law of Evidence has not completely precluded the presentation of physical material as evidence. Therefore, the sequence to be followed in the presentation of a physical object as real evidence would be, first, to present oral evidence regarding the existence or condition of such a physical object, and thereafter, secondly, invite the Court to consider permitting the production of such physical object for inspection. What is important to note is that in terms of section 60 of the Evidence*

Ordinance, once such a material thing is presented to the Court, the function of the Court is to inspect it. That is for the Judge or Jury as the case may be, to directly perceive such an object using his or their own senses. If necessary, the Court may record its observations regarding such material object that was produced. However, as in the case of oral and documentary evidence, a physical object is not ordinarily produced at the trial for the purpose of proving or disproving the existence or non-existence of a fact in issue or a relevant fact. The practice in Sri Lanka is to refer to such items as 'productions'. In most other jurisdictions they are referred to as 'exhibits'. 13 E.R.S.R. Coomaraswamy (Volume I, at page 68) in his monumental work on the Law of Evidence, has stated that though 'real evidence' does not come within the ambit of 'Evidence' under section 3 of the Evidence Ordinance, real evidence is an item of 'judicial evidence' and the judge is called upon to see the thing himself and the knowledge derivable therefrom is generally obtained without the use of any medium. However, in view of the second proviso to section 60 of the Evidence Ordinance which provides for the admission of real / physical evidence, it is necessary to bear in mind that, such evidence in the nature of physical objects are not sui generis (does not stand alone by itself), and is necessarily associated with an item of oral evidence which provides a description of the existence or condition of such physical item. In other words, the Court may in terms of section 60 permit the production of a material object for inspection, only if oral evidence refers to the existence or the condition of any material thing. In the alternative, acting in terms of section 165 of the Evidence Ordinance, the Court may on its own motion order the production of any document or thing in order to discover or to obtain proper proof of relevant facts. Therefore, such evidence (physical / real evidence) in my view will serve the purposes of (i) providing clarity to oral evidence and enable the judge or the jury as the case may be to correctly comprehend the relevant item of oral evidence, (ii) providing corroboration of oral testimony and documentary evidence, (iii) being used

as an aide to the assessment of credibility and testimonial trustworthiness of testimony provided by one or more witnesses, and (iv) being a basis for the Court to determine the cogency or sufficiency of evidence presented in the form of oral and documentary evidence. Thus, an item of real evidence cannot by itself generally be used to 'prove' the facts in issue, which in criminal cases amounts to the constituent ingredients of the offence. In certain situations, a physical object may be produced at a trial for the first time, for the purpose of its identification. That may aid the proof of a fact in issue or a relevant fact. The impact or the legal consequences arising out of the absence of a particular physical item of evidence being presented by the prosecution at a trial will depend on a host of considerations, including the attendant facts and circumstances of the case. In such situations, the principal factor to be taken into consideration is, what purpose, if any, would the prosecution have achieved, had they produced the relevant item of real evidence. As 14 E.R.S.R. Coomaraswamy has put it, "non-production of a physical object, which might conveniently be produced for inspection by the Court, does not render oral evidence respecting the same inadmissible" (Volume II, Book I, page 19). The legal consequences arising out of a doubt being created with regard to the integrity of a physical object that was produced, would be founded upon a consideration of the purpose sought to have been achieved by the party which produced the object. The legal consequences that may arise by a party not producing a material object which was within their control to produce, would be the rendering of nugatory the purpose such party could have achieved by having produced it. It may also affect the cogency of the evidence. There may be situations where the circumstances of the case may justify the judge from drawing an adverse presumption in terms of section 114(f) of the Evidence Ordinance.

Considering above cited Supreme Court Judgment and the importance of tendering material evidence; the non-production of the three-wheeler has certainly caused great prejudice to the Appellant.

According to PW1 the purpose for which the Appellant came to the boutique was to handover heroin to a nearby boutique. But PW8 in his evidence stated that according to the informer, the purpose for his arrival was to weigh the Heroin from a retail shop.

According to the evidence of PW1 and PW8, once the three-wheeler was stopped in front of the car in which the STF Officers were waiting, PW8 had given a call to the informant. Thereafter two STF Officers in civil attire had been sent to approach the three-wheeler driver. Thereafter only PW1 had gone near the three-wheeler. It is in evidence that the two STF Officers who were sent near the three-wheeler were asked to behave as normal people and the Appellant was not blocked by anybody, enabling him to get down from the three-wheeler and to proceed to the boutique. Hence the Counsel for the Appellant contended that it is highly improbable to believe that the Appellant remained inside the three-wheeler without even getting down till all steps were taken by PW1.

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, Curlews 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 the defence witness Wasantha Dilummika was also arrested along with the Appellant by PW1. After his arrest his retail shop was checked by the police. From a cupboard underneath the cashier an electronic scale was recovered during this search. As such, he was arrested and the scale

which had been recovered from his shop was sent to the Government Analyst. According to the Government Analyst Report, traces of Heroin had been detected on the electronic scale recovered from the witness's shop. But he was discharged by the Hon. Attorney General from this case. Although he was discharged, Learned High Court Judge had used the recovery evidence to disbelieve his evidence. The relevant portion of the judgment is re-produced below:

Page 582 of the brief.

එසේනම් මෙම සාක්ෂිකරුගේ කඩය තුල තිබී සොයාගත්තේ යැයි කියන විද්‍යුත් තරාදියේ ද 7හෙරොයින් අංශු තැවරී තිබී ඇත. මෙම සාක්ෂිකරුගේ සාක්ෂියේ විශ්වාසනීයත්වය පිළිබඳ නිගමනයකට එළඹීමේදී මෙම කරුණ ද අමතක කල නොහැක. එමගින් සාක්ෂිකරු සහ චූදිත අතර සමීප සම්බන්ධතාවයක් පැවතියේය යන අනුමිතියට එලඹීම නිවැරදි බව මාගේ අදහසයි. එය නිතැතින්ම මෙම සාක්ෂිකරුගේ විශ්වසනීයත්වයට අහිතකර ලෙස බලපාන බව මට පෙනේ.

As correctly argued by the Defence Counsel, this has caused great prejudice to the Appellant and he was not afforded a fair trial.

In this case the raid was conducted upon receiving three pieces of information. Further, the arrest and recovery of productions has failed to pass the probability test in this case mainly due to the existence of glaring inconsistencies between evidence given by PW1 and PW8 and non-production of the real evidence which was vital to the case. Had the Learned Trial Judge looked into the evidence presented in its correct perspective, he should have accepted the evidence given by the Appellant.

Further, the Appellant had not 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 case.

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 04/05/2023 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

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL