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

In the matter of an Appeal in terms of section 331 of the Code of Criminal Procedure Act No- 15 of 1979.

Court of Appeal No:

CA/HCC/0056/21

High Court of Balapitiya

Case No: 1873/16

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Induwadura Anusha de Silva,

Welikanda,

Ahungalle.

ACCUSED

AND NOW BETWEEN

Induwadura Anusha de Silva,

Welikanda,

Ahungalle.

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Harshana Mataraarachchi for the Accused Appellant
	: Udara Karunathilake, S.S.C. for the Respondent
Argued on	: 06-09-2023
Written Submissions	: 02-03-2022 (By the Accused-Appellant)
	: 07-06-2022 (By the Respondent)
Decided on	: 10-01-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Balapitiya for having in her possession, 3.21 grams of Diacetylmorphine, commonly known as Heroin, which is a prohibited drug in terms of Poisons Opium and Dangerous Drugs Ordinance as amended by Amendment Act No. 13 of 1984, and thereby committing an offence punishable in terms of the Ordinance.

She was also charged for trafficking the same quantity, at the same time and at the same transaction.

According to the indictment, the offence has been committed on 23-08-2000 at Ahungalle.

After trial, the appellant was found guilty for both the counts preferred against her of the judgement dated 13-01-2021 by the learned High Court Judge of Balapitiya. Accordingly, she has been sentenced to life imprisonment on both the counts.

Being aggrieved of her conviction and the sentence, the appellant preferred this appeal.

Facts in Brief

This was a detection made by the police officers of the Vice Prevention Unit of Elpitiya Senior Superintendent of Police Division.

PW-01 mentioned in the list of witnesses who was the Officer-in-Charge of the team that made the detection was deceased at the time this matter was taken up for trial. Hence, the prosecution has relied on the evidence of PW-02 and that of PW-04 who accompanied and assisted the PW-01 in the detection to establish the charges against the appellant.

PW-02, Sub Inspector Premalal had been serving as PS19884 in the said Vice Prevention Unit headed by PW-01, PS5736 Perera, during the time relevant to this incident. On 23-08-2000, a police team led by Sergeant Perera that comprised of PW-02 and PW-04 has left the Elpitiya police station on routine vice prevention duty. They have arrested 5 suspects by the time the detection in relation to this case has been made. All of them had been arrested for possessing illicit liquor, and they had been under the custody of the police.

Around 12.45 in the afternoon, the team has come near Ahungalle railway station and had been searching a thicket behind the railway station on a tip off about hidden illicit liquor in the area. Near the area where they were searching, there was a road that runs towards nearby houses. While they were searching the thicket, a female has gone past them walking towards the main road. As the Officer-in-Charge of the police team has observed that the female was walking

suspiciously, he along with PW-02 and a female police officer who was with them, namely, WPC2686, have gone and apprehended the female.

They have observed that she was holding on to something in her right-hand palm. When Sergeant Perera directed her to show her palm, she has been very reluctant, but when forced, she has opened her palm. They have observed that she is having a camera reel container. (දලසේයාපට ආවරණය සඳහා යොදාගන්නා ලද කුඩා ප්ලාස්ටික් කුප්පියක්) When the lid was opened by Sergeant Perera, the witness has observed a brown-coloured powder in a small pink coloured bag inside the container. When inspected, the witness has identified the content as Heroin through his experience. The witness has identified the female who was detected with the substance as the appellant.

Accordingly, she has been arrested, and the plastic container and the content had been temporarily sealed, and taken to a shop called Beruwala Gem Bureau where the brown-coloured powder detected has been weighed using the electronic scale available in the said shop. The contents had shown a gross weight of 8 grams and 404 milligrams. After the weighing, the contents had been sealed again and the appellant, together with the productions detected had been produced to Kosgoda police station.

The witness has identified the productions recovered from the custody of the appellant at the trial.

The stand taken up by the appellant during the trial had been that the container which had Heroin was recovered by the police party in the thicket they were searching, and they came looking for drugs as a result of a petition received by them. It had been the position of the appellant that after the discovery of the container with Heroin, the police party came to the house of the appellant, which was nearby, and arrested the appellant implicating her falsely for the detection.

The witness has denied that the appellant was arrested in the manner suggested by the learned Counsel for the appellant and had insisted that the police party

had no reasons to arrest the appellant falsely, and she was arrested only because she had Heroin in her possession.

PW-04 had been another officer who was in the police party and assisted Sergeant Perera in the detection. He has substantiated the evidence given by PW-02 in that regard, and had stated that when the appellant was arrested, she had in her right-hand palm the container which had the quantity of Heroin. In his evidence, he has stated that when the appellant was stopped and searched, Sergeant Perera was assisted by WPC2686 Sandya who was a member of the raiding party. PW-04 also has identified the relevant productions in Court.

According to the evidence of PW-02, when the appellant was arrested, he has come to know that the appellant was living in the vicinity, because of the fact that some females from a house located nearby came to the place of the arrest.

However, the evidence of PW-04 had been that he was unaware where the appellant was living. It has been suggested to PW-04 that the police party never went to a place called Beruwala Gem Bureau for the weighing of the productions. However, the witness had denied that suggestion insisting that it was weighed as stated in the evidence.

During the trial, the appellant has admitted the report prepared by the Government Analyst in relation to the productions sent to the Government Analyst for analysis, and the fact that the report contained that the pure quantity of Heroin found was 3.21 grams. The appellant also had admitted the production chain. Accordingly, the said admissions had been recorded in terms of section 420 of the Code of Criminal Procedure Act.

After the prosecution case was closed, having considered the evidence led against the appellant, the learned High Court Judge has decided to call for a defence from her.

The appellant has made a dock statement. In her dock statement she has taken up the stand that on the date of the incident, she went to her mother's house

and while there, some persons came to the house and called her. When she came out, they identified themselves as police officers and said that they found some drugs in the thicket nearby and arrested her and took her to the Kosgoda police station. She has denied that she had anything in her possession and had claimed innocence of the charge.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

1. There were *inter se* contradictions between the evidence of PW-02 and 04, and the learned High Court Judge has failed to consider them as relevant.
2. WPC2686 Sandya who was a member of the police party had not been called as a witness, and that creates a doubt as to the prosecution evidence.
3. The probability of the alleged incident as narrated by the witnesses.
4. The learned High Court Judge was misdirected as to the alleged place of arrest.
5. The learned High Court Judge who heard the case remanded the appellant during the trial because she could not bring her Counsel to Court, and she was granted bail only under the directive of the Court of Appeal, which has resulted in a denial of a fair trial towards the appellant.

Consideration of The Grounds of Appeal

As the grounds of appeal number 1 to 4 are interrelated, I will now proceed to consider them collectively.

However, before considering the said grounds of appeal, I find it appropriate to consider the 5th ground of appeal, where it is alleged that no fair trial was afforded to the appellant as a result of her being remanded during the trial.

I find that the trial of this matter has been commenced on 21-09-2017 and the evidence in chief of PW-02 had been concluded on that day.

Rather than cross-examining the witness, the learned Counsel for the appellant has moved for a date for cross-examination of the witness, which has resulted in the case being postponed to 13-03-2018. However, it is apparent from the case record that the case has gone down several occasions, mainly on applications made on behalf of the appellant, and various Counsel had appeared for her at various times.

The learned High Court Judge, being frustrated of the case being dragged on in this manner has decided to remand the appellant on 01-10-2019 and take the matter forward. Still, the matter could not be taken up for further trial until 29-06-2020.

During the intervening period, the appellant has filed an application in revision before the Court of Appeal, challenging the learned High Court Judge's decision to remand her, and upon a directive from the Court of Appeal, the appellant has been released on the same bail conditions imposed upon her earlier.

The above factual situation clearly provides that although the appellant has been remanded during the pendency of her case, since there was no evidence led during that period, there was no denial of fair trial towards her. Therefore, I am in no position to agree that no fair trial was afforded to her, and do not find merit in the 5th ground of appeal urged by the appellant.

The alleged *inter se* contradiction the learned Counsel speaks about relates to whether the witnesses knew beforehand the house where the appellant lived. I am unable to find any contradiction in that regard as it is clear that both witnesses have stated the same.

The evidence of the PW-02 had been that neither he nor any other officer who took part in the detection knew where the appellant lived, but assumed that she is living nearby as several persons came out of a house nearby when they

arrested the appellant. However, he has given evidence that he knew the area well, being an experienced police officer.

The evidence of PW-04 had been the same, the only difference being that he has not explained any further as to how he assumed where the house of the appellant situated. Probably, because, such a question was not put to the witness by the Counsel who represented the appellant at the trial.

I am unable to find any discrepancy as to the place of arrest as well. The prosecution evidence has been that the appellant was arrested while she was walking suspiciously on the nearby road from the place where the police officers were looking for hidden illicit liquor. The evidence of the prosecution witnesses had been consistent as to the place of arrest,

I find no basis to conclude that the position taken up by the appellant has created any doubt as to the place of arrest.

For the reasons considered as above, I find no basis for the 1st and the 4th grounds of appeal.

I will now proceed to consider whether the defence taken up by the appellant has created any doubt as to the prosecution case when the ground of appeal in relation to the probability is considered.

It is trite law that the evidence in a case should be considered in its totality and not in its isolation.

In the Privy Council judgement in **Jayasena Vs. Queen 72 NLR 313,** it was held:

> *"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 defence in its totality without compartmentalizing and, ask himself whether a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

The learned Counsel for the appellant contended that the failure of the prosecution to call WPC2686 Sandya who has taken part in the raid as a major drawback for the prosecution's case. He was of the view that it has created a presumption in terms of section 114 of the Evidence Ordinance that, if called, her evidence would have been contrary to the evidence of the other witnesses as to what really happened. It was his position that this fact in itself creates a reasonable doubt as to the prosecution case.

The view of the learned SSC in this regard was that the prosecution has called the necessary witnesses to prove its case and it is not necessary to call all the witnesses listed in an indictment to prove a case against an accused.

He cited the case of **Devundarage Nihal Vs. A.G., S.C. Appeal 154/2010 decided on 03-01-2019** in support of his contention.

The relevant section 134 of the Evidence Ordinance reads thus;

> **134. No particular number of witnesses shall in any case be required to the proof of any fact.**

Considering the relevant section 134 of the Indian Evidence Act which is identical to that of section 134 of our Ordinance, **Buwaneka Aluvihare, J.** in the case of **Devundarage Nihal Vs. A.G. (supra)** cited the Indian case of **Vadivelu Thewar Vs. State of Madras SIR SC 614** where the Indian Supreme Court observed,

> *"On consideration of the relevant authorities and the provisions of the Indian Evidence Act 1872, the following propositions may be safely stated as firmly established.*
>
> 1. *As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.*

2. *Unless corroboration is insisted upon by statute, Court should not insist on corroboration, except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence,*
3. *Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon the facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes."*

In the case of **King Vs Chalo Singho 42 NLR 269**, **Soertsz, J.** stated,

> *"It must, therefore, be regarded as well-established law, that a prosecutor is not bound to call all the witnesses on the indictment or to tender them for cross-examination. That is a matter in his discretion. But in exceptional circumstances, a Judge might interfere to ask him to call a witness or to call a witness as a witness of the Court."*

In **Walimunige John Vs. The State 76 NLR 488**, it was held,

> *"The prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross-examination. Further, it is not incumbent on the trial Judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114(f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all.*
>
> *The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witnesses' evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct*

a jury that the failure to call such witness give rise to a presumption under section 114(f) of the Evidence Ordinance."

In the appeal under consideration, it is not that the prosecution has called a single witness to prove their case. Two police officers who took part in the raid has been called by the prosecution. The mentioned WPC2686 Sandya is not a listed witness in the indictment. It is clear from the evidence of the witnesses that her contribution to the actual detection was very minimal. When Sergeant Perera wanted the appellant to open her palm and show what she was carrying, initially she has hesitated, it had been the evidence of the witnesses that it was with reluctance that the appellant agreed to open the palm.

According to the evidence of PW-04, WPC Sandya has assisted Sergeant Perera to persuade the appellant to open her palm. Subsequent to the discovery of the reel container, WPC Sandya has searched the appellant which was an action done after the actual detection was made.

As I have considered before, her evidence does not constitute a missing link in the evidence of the prosecution. I find no basis to conclude that not calling WPC Sandya amounts to creating a suspicion as to the detection made by the police.

I am of the view that the probability of an incident as narrated by witnesses has to be considered by taking the evidence, be it of the prosecution or the defence, in its totality, and not by taking portions of evidence in its isolation.

When considering the evidence of the prosecution as a whole, it is clear that they have gone near the place where the detection was made to look for hidden illicit liquor in a thicket behind the railway station. Although they were in civics, the fact that they were police officers may have been visible to any onlookers because of what they were doing at that time. Under such circumstances, the police officers being trained and experienced officers in observing people, it was very much possible for witnesses to suspect the appellant in the way she is alleged to have behaved when passing the police officers who were looking for illicit liquor.

I find that it was quite probable for the witnesses led by Sergeant Perera to pursue the appellant, stop her, and search her. According to the witnesses, when they stopped her, they have observed that she was holding something in her right-hand palm. Upon inspection, it has been found that she is having a film roll container, which was something commonly available during that period as digital camera technology was rare at that time. Such a container is something that a person can easily hold in the hand.

The gross quantity of the substance found inside the container was 8.404 grams. Although such a quantity may sound small nowadays, in the year 2000, this would amount to a relatively large quantity of a dangerous drug.

The evidence of the witnesses as to the place of residence of the appellant is very much probable as against the contention of the appellant, where she states that police officers came to her house and arrested her after finding the drug hidden in the thicket.

I do not see any probability in the version of events taken up by the appellant, as I do not find any reason for a drug trafficker to hide a drug in a thicket after putting it in a small container. I do not find any reason for the police party to accuse the appellant if she was innocently inside her mother's house when the detection took place on the road.

I do not find any basis to conclude that the police party went to the appellant's house based on a petition received by them. The evidence led in the case does not suggest any basis to believe that receiving a petition was the reason for this raid. The evidence has clearly established that the detection had been while the police officers were engaged in vice prevention duties, and not having conducted a planned raid in relation to the appellant.

For the reasons as considered above, I am of the view that the evidence of the prosecution witnesses was quite probable, cogent and trustworthy.

The defence taken up by the appellant has not created any doubt as to the evidence of the prosecution.

Therefore, for the reasons considered as above, I find no merit in the grounds of appeal urged on behalf of the appellant.

Accordingly, the appeal is dismissed for want of merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal