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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Court of Appeal Case No.
CA/HCC/0201/2020
High Court of Colombo
Case No. HC 101/99

Complainant

Vs.

Raphael Jayaseelath Fernando.

Accused

AND NOW BETWEEN

Raphael Jayaseelath Fernando.

Accused-Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

BEFORE : P. KUMARARATNAM, J.
K.M.G.H. KULATUNGA, J.

COUNSEL : Shavindra Fernando, PC with Natasha Wijeyesekara and Nimesha Wanaguru for the Accused-Appellant.
Sudharshana De Silva, SDSG for the Respondent.

ARGUED ON : 10.03.2025

DECIDED ON : 08.05.2025

K.M.G.H. KULATUNGA, J.

JUDGEMENT

1. The accused-appellant (hereinafter also referred to as the appellant) was charged and indicted for the possession of 1006 grammes of heroin on or about 14.12.1998 at Pettah punishable under Section 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance. Upon a trial before Judge the appellant was convicted and sentenced to death on 24.09.2020. The appellant has preferred this appeal against the said Judgement and sentence.

2. The facts of this incident may be summarized as follows. On 14.12.1998, a group of Police Narcotics Bureau (PNB) officers led by IP Amarajith acting on information received by IP Amarajith had conducted a raid and apprehended the appellant allegedly with approximately 2 kilogrammes of heroin (gross amount). As IP Amarajith was not available to give evidence, the prosecution led the evidence of PW-2, PC 25141 Gunaratne and PW-5, SI Sumanadasa on the main raid and of the chain production (initial stage). The prosecution version as narrated by the said witnesses is that they led by IP Amarajith and proceeded to Main Street,

Pettah and upon meeting the informant they proceeded to Kochchikade Fish Market. From Main Street Pettah, the raiding party in civvies proceeded on foot to the Kochchikade Fish Market. After about 20 minutes wait, the informant upon pointing out the appellant and left. The appellant was walking with a large shopping bag which IP Amarajith had searched and found approximately 2 kilo grammes of powder which was initially identified as being heroin. This was around 10 am. Thereafter, the Police party had proceeded to Wattala and searched a house of a relation of the appellant. However, nothing was found at that house. Then, they have returned to Main Street and parked their vehicle close to Titus Stores and were waiting for a person named Sadees. Having waited until 12:10 pm as the said person did not arrive, the house of the appellant at Vivekananda Road had been searched and then the police party had returned to the PNB around 1.15pm, where the productions were weighed and sealed by IP Amarajith.

3. As opposed to this accused himself had given evidence and called two witnesses. The sum total of the defence evidence is that the appellant was arrested near the fish stall but denies the recovery of any narcotic from his possession. Upon questioning the appellant admits going to that house of one Francis Vass in Wattala and states that the police party when they returned from that house had in their possession a pink colour bag. Then, they have returned to Pettah upon searching his house they have returned to the PNB. These are the competing version of the prosecution and defence.

4. The main ground of appeal of the appellant is the failure to prove the chain of production as to the inward journey. It was submitted that IP Amarajith upon recovering the production had it in his custody until it was brought to the PNB and sealed. In

the absence of IP Amarajith, the evidence of the chain of custody as well as the main raid was led through PW-2 and PW-5. The absence of main raiding officer will not *per se* invalidate or will not make the proof of such raid inadmissible. In the normal course of events, the scheme of the Evidence Ordinance will require the best evidence to be led. It will be the evidence of IP Amarajith. When this matter was taken up for trial, IP Amarajith was not available. In these circumstances, if there be other witnesses who are privy and has witnessed such witness are competent to give evidence and such evidence if admitted will be sufficient to prove even a raid of this nature. Such evidence is direct testimony of persons who have seen and perceived by their own senses the raid and recovery. PW-2 and PW-5 have been members of the raiding party. They have been present with IP Amarajith from the very inception until the return and sealing of the production. Therefore, these two witnesses are eye witnesses to the events and happenings, the raid and recovery of this case. Such direct evidence is sufficient to prove the fact in issue of this case, the possession of heroin by the appellant.

5. However, the challenge as to the inward journey of the chain of production is based on a fifteen-minute duration when both PW-2 and PW-5 were not with IP Amarajith. The appellant's main argument is that the inward journey contains a lacuna in respect of this 15-minute period. The learned Trial Judge at page 771 has observed as follows. "යම් අවස්ථාවකදී මත්ද්‍රව්‍ය කුඩා ප්‍රමාණයක් අත්අඩංගුවට ගනු ලැබූ විටක එම මත්ද්‍රව්‍ය උප සේවයට භාර දෙන තෙක් එම අත්අඩංගුවට ගනු ලැබූ නිලධාරියාගේ කලිසමේ හෝ කමිසයේ සාක්කුවක තබා ගැනීම බොහෝවිට සිදුවන දෙයකි. එවැනි අවස්ථාවකදී නඩු භාණ්ඩ අනෙක් නිලධාරීන්ට දර්ශනය නොවේ. එබැවින් පැ .සා . 2 සහ 5, ටයිටස් ස්ටෝර්ස් අසලට ගිය අවස්ථාවේ ඔවුනට අමරජීත් නිලධාරියා දර්ශනය නොවූ පමණින් නඩු භාණ්ඩ අත්අඩංගුවට ගැනීමේ සිට රස පරීක්ෂක වෙත භාර දීම දක්වා වූ අදාළ භාරය සම්බන්ධයෙන් වූ දාමය බිඳ වැටී ඇති බවක් නිගමනය කල නොහැක."

6. Accordingly, the Trial Judge has been of the view that when small quantities of narcotics are recovered during a raid such officer usually keeps the recovered item in his trouser or shirt pocket. In such circumstances, the other witnesses may not see the production physically. The Trial Judge has been of the view that similarly PW-2 and PW-5 whilst near Titus Stores may not have seen the production. This, the Trial Judge holds would not amount to breach of the chain evidence of the inward journey.

7. The importance of proving the inward journey of the chain of productions was considered in **Witharana Doli Nona vs. Republic of Sri Lanka** (CA 19/19), Sisira De Abrew J., observed that:

> *"It is a recognized principle that in drug-related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. The prosecution must prove that the productions taken from the accused-appellant were examined by the government analyst. To prove this, the prosecution must prove all the links of the chain from the time it was taken from the accused-appellant to the Government Analyst's department."*

Then J.A.N de Silva J., (as he then was) in **Perera vs. AG** [(1998) 1 SLR 378] opined that;

> *"It is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the Analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the Analyst. Therefore, it is correct to state that the most important journey is the inward journey because*

the final analyst report will depend on that. The outward journey does not attract the same importance."

8. As stated above an eye witness may be able to establish the chain of production. This is in effect proof by direct evidence. As proving of any fact, it is also possible to be prove the chain of production inferentially by circumstantial evidence. I am of the view that even the chain of productions may be proved by circumstantial evidence. One such instance may be when there are several reserve officers who have had custody of the production and if one such officer is not available the chain may be proved by the evidence of other witnesses who had possession prior to and after, such officer, provided that both of previous and subsequent officers clearly testify that the seals were intact. Then, may be if the sealing officer confirms that the seals placed by him were duly there in that form, at a point of time anterior to the time such non available officer handled the production. This is possible if on the proved circumstances the only inference is that the seals were intact, and there is no possible opportunity to tamper. The whole requirement and necessity to prove the chain is to satisfy court that the very production that was recovered from the appellant was forwarded to the Government Analyst in that form and that there was no room for tampering. That being the legal position, reverting back to the facts of the present appeal, the issue is the absence of direct evidence as to the inward journey of the chain during the time IP Amarajith had possession of the same.

9. When the team of officers arrived and parked near the Titus Stores PW-2 and PW-5 were with IP Amarajith. PW-2 and PW-5 at a particular point of time has left the jeep and was not with IP Amarajith. The accused in his evidence states that IP Amarajith himself left the jeep. Therefore, there is a lack of direct evidence

as to the custody of the production during that time. That being so, let's consider if there are sufficient circumstances to inferentially establish the chain. The learned Trial Judge proceeds on the basis that when small quantities of narcotics are recovered such raiding officer keeps it in his shirt or trouser pocket. Then, other witnesses may not see. As stated above, the quantity is 2 kilo grammes of a powder. According to PW-2, the substance was recovered in a bag which was thereon in the custody of IP Amarajith. The witness referred to the same as a large sized bag (විශාල ප්‍රමාණයේ බෑග් එක). In the normal course of events 2 kilo grammes of a powder or substance similar to that which is referred to as "කුඩු" by the witnesses would be substantial in volume. Therefore, it would *per se* not be possible to have such a parcel or a bag in a normal size pocket. Therefore, the observation of the Trial Judge does not appear to be relevant or consonant with the item recovered during this raid. A pink bag of large size would be certainly visible. Therefore, there is a certain amount of uncertainty as to the custody of the productions during the said 15 minutes.

10. The allegation of the defence is one of introduction upon the arrest of the appellant. The police party had then searched a house at Hekitta Road, Wattala. Then, once again returned to a place at Pettah and was on the lookout for another person. Then, they also search the house of the appellant. There are certain inconsistencies and discrepancies as to the time spent near Titus Stores and the time of arrival and departure from the various places between the witness evidence. When considering the totality of the evidence, if a large quantity of narcotics was found and detected from the appellant is it probable and realistic to proceed to Wattala and then to come back to Pettah in the hope of arresting another? This uncertainty requires to be considered along with the position taken up by the accused in his sworn

evidence. The appellant's position is that he was apprehended at his fish stall. As for the prosecution, the appellant was apprehended when he was walking towards the police party who was waiting with the informant. It is common ground that a sum of Rs. 61,000.00 was in the possession of the appellant. The police party had handed over this to another. This item of evidence is significant in considering the probability of the prosecution version in conjunction with the defence of introduction. If the appellant was apprehended walking along a road and a large quantity of heroin was recovered along with Rs. 61,000.00, isn't it normal and natural for the said money to taken as a production? Isn't it evidence of possible trafficking? In contrast the prosecution position is that it was handed over to a person who was there. This has the potential of leading to the inference that the appellant was apprehended on suspicion initially but the recovery was made later from another place. This is just the position suggested and taken up by the defence. Considering the totality of the evidence, this gives credence to the defence version and in the least a total rejection of evidence of the defence would not be possible. This is a situation where the defence evidence is able to create a reasonable doubt in the version of prosecution. To be precise a doubt is created as to the mode of the detection and the manner of recovery as narrated by the prosecution. The Trial Judge had failed to appreciate this aspect which is in favour of the appellant.

11. Similarly, the prosecution has failed to established the inward journey of the chain of production. The learned Trial Judge has failed to appreciate and consider these two aspects in that light. If these two aspects were so considered, no reasonable Court could have come to the findings of guilt as done by the Trial Judge. In the above circumstances, it is not safe to allow the conviction to stand. The learned Trial Judge has erred and misdirected himself

in respect of these vital evidential issues. Accordingly, the said grounds of appeal are well founded and are sustained.

12. In these circumstances, the conviction and sentence are both set aside and the accused-appellant is accordingly acquitted.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J.

I agree.

JUDGE OF THE COURT OF APPEAL