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.

The Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0231/2017
High Court of Colombo
Case No. HC 6869/13

Complainant

Vs.

Dilshan Wandyl.

Accused

AND NOW BETWEEN

Dilshan Wandyl.

Accused-Appellant

Vs.

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

Respondent

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

COUNSEL : Amila Palliyage with Sandeepani Wijesooriya, Savani Udugampola, Lakitha Wakishta Arachchi and Subaj De Silva for the Accused-Appellant.
Wasantha Perera, DSG for the Respondent.

ARGUED ON : 28.01.2025

DECIDED ON : 28.02.2025

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

JUDGEMENT

Introduction

1. The accused-appellant stood indicted in the High Court of Colombo with two counts for trafficking and possession of 3.85 grammes of heroin punishable under the Poisons, Opium, and Dangerous Drugs Ordinance. After trial, by the judgement dated 15.03.2017, the accused-appellant was convicted for count No. 02 that of possession and was sentenced to life imprisonment but acquitted of count No. 01 (trafficking). Being aggrieved by the said judgement and sentence, the accused-appellant (hereinafter also referred to as the 'appellant') has preferred this appeal. Both parties have filed their respective written submissions which appear to be very brief.

Grounds of Appeal

2. However, when this matter was taken up for argument, the counsel for the appellant reformulated and raised the following grounds of appeal:

1) The trial judge erred in law by failing to assess the credibility of the evidence of PW-01 as the said evidence is neither accepted nor rejected.
2) The dock statement was erroneously rejected on the basis of the evidence of PW-01.
3) The trial judge had failed to take into consideration the probability factors.

Facts

3. The salient facts of this case as emanating from the prosecution evidence is as follows. On 13.07.2011, a group of Police Officers attached to the Wolfendhal Street Police Station led by PW-01 SI Wijesiri were on a routine mobile patrol. Four Policemen were in a Police trishaw and two were following on a motorcycle. Whilst on mobile duty, PW-01 has received information from an informant that a person dressed in a pair of black trousers and a brown t-shirt, was near a telephone booth in the vicinity preparing to traffic in narcotics. The team of Officers having identified the said person, has approached and searched the accused and recovered a parcel of heroin from his possession. PW-01 has caused the same to be forwarded to the Government Analyst, who has confirmed that the substance recovered from the appellant contains 3.85 grammes of pure heroin.

4. The chain of production and the fact that the substance so forwarded was examined by the Government Analyst were admitted under the Section 420 of the Code of Criminal Procedure Act and thus, no further proof is required by virtue of Section 58 of the Evidence Ordinance.

5. The defence position as suggested to PW-01 is that the accused was arrested elsewhere beyond the Wolfendhal Street Police area, namely, at Pepiliyana, and a substance recovered from another had been apportioned

and introduced to the appellant as well as the other person. This was also the position taken up in his dock statement at the end of the trial.

According to the dock statement, the accused does state that two persons arrived on a motorcycle and also there was a trishaw and that he was pushed into the trishaw, and that this happened at Pepiliyana. His position is that at this point, he received a call on his phone and that person came shortly thereafter to Pepiliyana. A substance was then recovered from the said person, which was subsequently apportioned, and a gross sum of 10.520 grammes was introduced to the appellant. The facts being so, I will now proceed to consider the grounds of appeal.

Grounds of Appeal No. 01 and No.2

6. Grounds of Appeal No. 01 and No.2 will be considered together as they are inter connected and are overlapping. They are that, *the trial judge erred in law by failing to assess the credibility of the evidence of PW-01 as the said evidence is neither accepted nor rejected;* and *the dock statement was erroneously rejected on the basis of the evidence of PW-01.*

7. The counsel for the appellant argued that the prosecution had led only one witness and that *calling of one witness is not lawful*. That being so, he developed his argument and submitted that the trial judge had completely failed to evaluate the credibility of PW-01. In formulating the first ground of appeal, the counsel for the appellant did submit that the failure to assess credibility is an error of law. He further argued and submitted that the judgement as formulated by the learned trial judge is not in conformity with the provisions of Section 283 (1) of the Code of Criminal Procedure Act. His argument is that the trial judge had determined that the defence of the accused is untenable in light of the evidence led by the prosecution. In support of his argument, the counsel for the appellant relied on the following dicta in ***James Silva vs. The Republic*** 028 SLLR 1980.

> *"It is a grave error of law for a trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the defence in the light of the evidence led by the prosecution. Our criminal law postulates a fundamental presumption of legal innocence of every accused till the contrary is proved. This is rooted in the concept of legal inviolability of every individual in our society, now enshrined in our Constitution. There is not even a surface presumption of truth in the charge with which an accused is indicted. Therefore, to examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence".*

8. The learned trial judge has summarised the evidence of PW-01 as well as the dock statement. He has then adverted to the admission under Section 420 in respect of the chain of productions and the examination by the Government Analyst. Finally, at pages 11 and 12 of the judgement, the learned trial judge had proceeded to evaluate the evidence. In evaluating the evidence, the learned trial judge has considered the evidence including the defence version in its totality. No doubt, there appears to be no compartmentalised evaluation of the prosecution and defence evidence separately. Upon considering the evidence in its totality, the learned trial judge had clearly identified the crux of the defence position, namely that it was an introduction, and the arrest had taken place at a different place, and that this was a false introduction. Being mindful of this defence position, the learned trial judge had considered primarily the probability of this defence assertion. Having considered the times of leaving the Police Station, receiving the information, and the arrest, he had come to a clear finding that in view of the timeframes, an introduction and an arrest at a different place as suggested is highly improbable and cannot be. The learned trial judge has, in a concise form, clearly dealt with the probability of the evidence of both the prosecution and the defence. Considering the evidence of PW-01, I also observe that in cross-examination, the meter

readings of the trishaw had been elicited by the defence. According to the notes, at the point of leaving the Police Station the meter reading has been 43,835 and upon the return as 43,849. This indicates a total journey of about 14 kilometres, which appears to be consistent with the areas and time they have spent travelling as narrated by PW-01. In addition to that, the number of officers and the mode of conveyance (trishaw and motorcycle) have been admitted by the accused and is not in dispute. In the normal course of events, it is highly improbable, that the raiding party could have accommodated two others in a trishaw, when there were four occupants already. Therefore, on a consideration of the totality of the evidence, the finding of the learned trial judge that the evidence of PW-01 is probable and realistic, and the defence position is highly improbable. Also, that the timeframes clearly vitiate the possibility of an introduction as suggested by the defence is a reasonable and a correct conclusion that the trial judge could have arrived at on the evidence available. To that extent, though it is formulated in an ingeniously summarised form unique to the trial judge, I observe that the conclusion is reasonable and correct.

9. The Court of Appeal in **James Silva vs. The Republic** (supra) agreeing with the dicta of the Privy Council in **Jayasena vs. The Queen** 72 NLR 313 (PC), held that,

> *"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 compartmentalising and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

Rejection of the Dock Statement

10. As stated above, the trial judge has considered the totality of the evidence including the defence suggestions and the dock statement and then applying the probability test rejected the defence version. The trial judge has embarked upon this exercise adopting a unique style of his own. This certainly is not a rejection of the dock statement on a mere comparison with the prosecution version. The rejection is on the application of the test of probability and improbability upon considering the totality of the evidence. The learned trial judge has not separately considered if the evidence of the accused creates a reasonable doubt in the prosecution case by examining the defence by itself. The burden all along is on the prosecution to prove the charge of possession by the accused beyond reasonable doubt. The trial judge has been mindful of this and the rejection is on the application of the test of probability and improbability upon considering the totality of the evidence. Thus, I see no apparent flaw in the method adopted by the trial judge and certainly no miscarriage of justice has occurred. However, I will now endeavour to consider if the rejection of the dock statement is reasonable and correct.

11. In short, the defence position is that the appellant was apprehended elsewhere in another jurisdiction at *Pepiliyana* or *Nedimala*. The appellant claims that he was on a motorcycle. However, he does not state or suggest as to what was done with his motorcycle. Secondly, he claims that another person was also arrested shortly thereafter. The Appellant admits that there was a three-wheeler and a motorcycle used in this raid. He had not challenged that there were six officers namely two on the motorcycle and four in the three-wheeler. The appellant's version is that both were apprehended together. If that be so it is highly improbable that two others could have been bundle into the three-wheeler. Therefore, the version advanced by the dock statement is *per se* inherently improbable.

This is exactly the conclusion arrived at by the trial judge in rejecting the dock statement. He tags his findings to the timelines as given by the investigating officer. What is relevant is that the findings are reasonable and the conclusion is correct and in accordance with the evidence.

12. There is a complaint that the prosecution led only the evidence of one witness who participated in the raid. In the normal course it may be desirable and fair for prosecution to summon at least two witnesses. This will certainly afford a greater opportunity for the defence to raise and elicit *inter se* inconsistencies and contradictions. Police witnesses as we know, are in the category of trained witnesses who also have the benefit of their notes. It is almost a herculean task to elicit a contradiction from such a witness. It is this that makes it desirable in considering the overall fairness to call at least two witnesses. It is then that the defence will have the opportunity to challenge the veracity or the credibility of the prosecution witnesses and thus contradict the prosecution version. My concern is that the defence should be provided with the opportunity to contradict the witnesses and it is not an issue of corroboration.

13. In this backdrop the counsel for the appellant also submitted that calling a single witness is not lawful. It is now well settled law that it is not the number of witnesses but the quality of the evidence and that the prosecution is not under any legal obligation to call multiple witnesses. This was considered in **A.G. vs. Devundarage Nihal** [S.C. Appeal No. 154/10 Decided on: 12th May 2011] and held that;

> "*Therefore, it is quite clear that unlike in the case where an accomplice or a decoy is concerned in any other case no requirement in law that evidence of police officer who conducted in an investigation or raid in the arrest of an offender need to be corroborated in material particulars. However, caution exercised by a Trial Judge in evaluating such evidence and arriving at a conclusion against an offence cannot*

be stated as a rule of thumb that the evidence of police witness in a drug related offence corroborated in material particulars where police officers are the key witness. If such a proposition to be accepted it would impose an added burden on the prosecution to call more than one witness back of the indictment to prove its case in a drug related offence however satisfactory the evidence of the main police witness would be."

14. As stated above this debate was finally put to reast by R.K.S. Suresh Chandra J, in the aforesaid decision of **A.G vs. Devundarage Nihal** (supra). This is now hardened into a principle that the prosecution is not required to lead the evidence of a number of witnesses to prove its case. Ninian Jayasuriya J., in **A.G. v Mohamed Saheeb Mohamed Ismath** [C.A.87/97 decided on 13.7.1999] in a similar case, opined that,

"There is no requirement in law that evidence of a Police Officer who has conducted an investigation into a charge of illegal possession of heroin, should be corroborated in regard to material particulars emanating from an independent source…"

15. In the instant matter the evaluation as engaged by the trial judge, it appears that the acceptance of the prosecution evidence as well as the rejection of the defence is based primarily on the test of probability and improbability. It is found that, as for the prosecution evidence is concerned the timelines are extremely probable and the travel milage records of the three-wheeler namely 43,835 on leaving and 43,839 on arrival are also consistent and in consonance with the timeframes as deposed to by PW-01. It is approximately 14 km. It is in evidence that the Wolfendhal Police area consists of around 8 sq/km (*vide* evidence at page 82). Travelling 14 km during the aforesaid period of time within the jurisdiction of the Wolfendhal Police is highly probable and realistic. On the above premises,

I see no merit in the 1st and the 2nd grounds of appeal raised on behalf of the appellant.

Ground of Appeal No. 03

16. As for the ground of appeal No. 03, as discussed above the trial judge has extensively considered and applied the probability test. As demonstrated above and my further analysis based on the probability test buttresses and confirms that the findings of learned trial judge are reasonable and correct. Accordingly, I see no merit in ground No. 03 either.

Duty of an Appellate Court

17. An Appellate Court exercises a jurisdiction to examine the effect of the point/s raised in appeal. The defects or insufficiency in the evidence and errors of law and procedure are required to be tested and considered in the context of the totality of the case and trial. Upon so endeavouring if the Appellate Court is satisfied that the conviction is unsafe and there is a miscarriage of justice then intervention is warranted in law. However, the Appellate Court will not step into shoes of the trier of fact nor revisit the evidence afresh and substitute its own findings.

18. On an appeal from a conviction by a judge alone where the issue is whether the verdict is unreasonable, an appellate court must determine whether the verdict is one that a properly instructed jury or judge could reasonably have reached. *The question whether a verdict is reasonable is one of law; whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence"* [vide **R. v. Burke**, 1996 CanLII 229 (SCC)]. It is now settled that the Appellate Court must show great deference to the

assessment of witness credibility by the trier of fact given the advantage it has in seeing and hearing the witnesses evidence.

19. In **Alwis v. Piyasena Fernando** [(1993) 1 SLR 119] it was opined that '*It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not lightly disturbed in appeal*'. Then in **R v. Paul** [[1977]1 SCR 181] it was observed that, "*There is simply no jurisdiction in an appellate court to upset trial findings of fact that have evidentiary support. A court of appeal improperly substitutes its view of the facts of a case when it seeks for whatever reason to replace those made by the trial judge. It is also to be noted that the state is not obliged to disprove every speculative scenario consistent with the innocence of an accused.*"

Conclusion

20. In the present appeal, the inferences drawn and conclusion arrived are reasonable and is in accordance with the evidence. In the above premises, and for the reasons assigned we find that the arguments advanced for the appellant are misconceived and not sustainable. Accordingly, we see no merit in this appeal.

    Accordingly, the appeal is dismissed and the conviction and sentence are hereby affirmed.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J.

I agree.

JUDGE OF THE COURT OF APPEAL