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

In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Mohamed Saafi Mohamed Niswar.

Court of Appeal
Case No. CA 142/2012

Accused

Vs.

And Now Between

Mohamed Saafi Mohamed Niswar.

Accused-Appellants

High Court of Colombo.
Case No. HC 2034/ 2004.

Vs,

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Thurairaja PC, J &**
A.L. Shiran Gooneratne J

Counsel : Dharmasiri Karunaratne Attorney-at-Law for the Appellant.

Lakmali Karunanayaka SSC for the Respondent.

Written Submissions : Accused Appellant - 15th February 2016.

Complainant Respondent-not filed.

Argued on : 16th July 2018.

Judgment on : 9th August 2018.

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JUDGMENT

S. Thurairaja, PC. J

The Accused-Appellant (hereinafter called and referred to as "the Appellant") was indicted under Section 54A (d) and (b) of the Poisons, Opium and Dangerous Drugs Act for possession and trafficking respectively. After the trial before the High Court Judge of Colombo he was found guilty on both counts and imposed a life sentence.

Being aggrieved with the said conviction and sentence the Appellant preferred this appeal and submits following grounds.

I. Section 4(1)(d) of the International Convention on Civil and Political Rights Act is violated by the trial Judge.
II. The evidence were not properly evaluated by the Learned Trial Judge.
III. Section 126(a) of the Code of Criminal Procedure Act was misinterpreted by the Learned Trial Judge.

Prosecution led the evidence of Assistant Superintendent of Police Priyantha Liyanage, Police Sergeant Mahagamage Kapila Indrajith Senaratne, Government Analyst Kokawela Pathirage Chandrani and Inspector of Police Asanga Kumarasiri Jayamanne.

It will be appropriate to understand the facts of the case before we proceed further. According to the available evidence the facts reveals as follows.

As per the prosecution, on 30/10/2002 an information was received from an informant of PC Priyantha 37501 that a person called Niswar would be bringing heroin near to Rahumaniya Hotel at Wellampitiya area between 10.30 to 11.30 p.m. (page 69).

Accordingly, on receipt of information, it was recorded by the Police Narcotic Bureau (PNB), a team was assigned, preliminaries were observed and team left the Police Narcotic Bureau around 09.25 p.m. (page 71). They went near to a Filling Station at Rosemead Lane to meet the informant there.

Having met the informant, the team arrived to Rahumaniya Hotel. Whilst they awaited the arrival of the accused-appellant, the informant pointed out a person who was coming from the round-about towards Rahumaniya Hotel who carried a parcel on his right hand. ASP Priyantha Liyanage quickly went there and ordered to stop to that person and informed him of his identity and searched. The search of the parcel he carried, found a substance of heroin packet, and a box which contained a scale and a bundle of cellophane bags and his identity was revealed and found that accused-appellant residing at No.125/1B, Lansiyawaththa, Wellampitiya. As stated above, this recovery resulted in his arrest at 11.15 p.m. His house was also searched soon thereafter but no incriminative substance was found in that house.

The position of the Accused was that on 30/10/2002, he was at home when some officers came and inquired about heroin. Then the PNB arrested him and assaulted. In that moment, some officers from the Wellampitiya Police were come and then they got to know that they are from PNB and left that place. According to the Accused's version, Wellampitiya Police came to his residence because they had received a telephone call from a lady nearby his house that someone had come to the Accused's house and assaulted him.

At the trial, the prosecution led the evidence on the raid, detection and arrest, scientific evidence on the identification of narcotics and evidence in relation to the chain of productions of the drugs recovered from the possession of the accused.

When SI Liyanage was giving evidence, learned defence counsel suggested to him that SI Liyanage assaulted the accused-appellant and arrested the accused-appellant when he was in his home. But he rejected that and stated that those injuries were happened when they searched in the upstairs of the house because the stair case

was very much slippery. The defence has called Doctor Dhammika Wasanthi Ariyaratne to give evidence and confirmed the injuries on the Appellant.

Considering the nature of the ground of appeal it was decided to consider all three grounds together.

The 1st and 3rd ground referred to one issue namely that the Appellant was not given an opportunity to bring a witness of his choice.

International Covenant on Civil and Political Right Act No.56 of 2007 (hereinafter referred to as the ICCPR Act). The Section 4(1) of the ICCPR Act stated as;

> *A person charged of a criminal offence under any written law, shall be entitled*
>
> *(d) To examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him;*

Section 126A of the Code of Criminal Procedure Act stated as;

> *(1) No person shall be entitled during a trial on indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has—*
>
> *(a) stated such fact to the police at the time of his making his statement during the investigation; or*
>
> *(b) stated such fact at any time during the preliminary inquiry; or*
>
> *(c) raised such defence, after indictment has been served, with notice to the Attorney-General at any time prior to fourteen days of the date of commencement of the trial:*
>
> *Provided however, the Court may, if it is of opinion that the accused has adduced reasons which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but prior to the conclusion of the case for the prosecution, to raise the defence of alibi.*

(2) The original statement should contain all such information as to the time and place at which such person claims he was and details as to the persons if any, who may furnish evidence in support of his alibi.

(3) For the purposes of this section "evidence in support of an alibi" means evidence tending to show that by reason of the presence of the defendant at a particular place or in particular area at a particular time he was not, or was not likely to have been, at the place where the offence is alleged to have been committed at the time of the alleged commission.

On perusing the trial brief, I find that the Appellant had made a detailed dock statement and called a Judicial Medical Officer to give evidence on his behalf. He then attempted to call to his wife to adduce evidence regarding the defence of *alibi*. As provided in Section 126(a) a defence of *alibi* should be taken up in a procedure spelled out in the relevant section. The indictment was forwarded him on 7th October 2004 and the trial commenced in 2009. It was concluded in 2012. The Appellant was represented by competent Attorney-at-law. The Appellant never took steps to take a defence of *alibi* under section 126A. Hence the decision of the High Court Judge on the basis of the relevant section is acceptable. Therefore we dismiss these two grounds of appeal.

The Appellant submits that the Learned Trial Judge has not properly considered the evidence before him. The Judgment of the Learned Trial Judge contains in 23 pages. He had gone through the evidence of each and every witness considered and recorded his findings in his judgment. He carefully analyse the statement made by the Accused- Appellant from the dock. Further he had considered the evidence of the Judicial Medical Officer. These two evidence were compared with the evidence submitted by the prosecution and come to a reasonable finding.

Considering the Judgment of the Learned Trial Judge in the light of the available evidence before the trial court, it is my view that the finding is reasonable and warranted by the facts of the case. Therefore I have no reason to interfere with the finding of the Learned Trial Judge.

Accordingly we find all three grounds of the Appellant fails on its own merits.

The Appellant had possessed 210 grams of brown colour powder which was suspected as Heroin at the time of the arrest. Further he had a weight-scale with weights. On a chemical examination the Government Analyst had found 51.2 grams of pure Dicetyl Morphine contended in that brown powder. The facts reveals that the Appellant had possessed and trafficked the said substance.

According to the section 54 of the of the Poisons, Opium and Dangerous Drugs Act any person who possessed more than 2 grams of Heroin (Dicetyl Morphine) shall be punished with death or lifetime imprisonment.

In this case he possessed of 51.2 grams which is much higher than the maximum level. Therefore we invited to both counsels to address the Court.

In **Dhananjay Chatterjee vs. State of West Bengal [1994 2 SCC 220]** it was held that,

> *"the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in*

view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment".

In **Sevaka Perumal etc vs. State of Tamil Nadu (AIR 1991 SC 1463)**

"Undue sympathy to impose inadequate sentence would do harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured the injured would the resort to private vengeance. It is, therefore, the duty of every court to awards proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. "

The legislatures were mindful of the gravity of the offence. That is why they have provided Capital Punishment for this offence. It is rarely a Capital Punishment is provided in our legal system. Therefore when a Judge impose a sentence he should be mindful of the intention of the legislature.

In this case the Learned Trial Judge had considered the gravity of the offence and conceded that this is a serious offence. But he had stated as follows.

"මෙහිදී මරණ දඬුවම ක්‍රියාත්මක කිරීම අධිකරණය සතු කාර්යයක් නොවන අතර, එය වෙනත් ආයතනයකට පවරා ඇති කාර්යයක් වන බව සඳහන් කරම. දැනට ලංකාවේ මරණ දඬුවම නියම කළ විශාල සංඛ්‍යාවක් සිටින අතර, ඔවුන් මරණ දඬුවමට නියම නොවී බන්ධනාගාරයක් තුළ විශාල තදබදයක් ඇති කරමින් සිටින බවද මෙම අවස්ථාවේ නිරීක්ෂණය කරම. එබැවින් මරණ දඬුවම විඳිමට සිටින අයවළුන් සංඛ්‍යාවට තවත් අයෙකු එක්කොට නඩු වාර්තාවවට පමණක් වන දඬුවමක් ලබාදීම කිසියේත් ප්‍රායෝගික නැත. එබැවින් විත්තිකරු හට ලබාදිය හැකි අනෙක් දඬුවම වන ජීවිතාන්තය දක්වා බරපතල වැඩ ඇති සිර දඬුවම් ලබාදීම ය. එවැනි. අවස්ථාවක මරණ දඬුවම නියම වූ අයවළුන් මෙන් නොව, ඔහුට රජයෙන් සපයා දෙන ආහාර පාන වෙනුවට ඔවුන්ගෙන් වැඩ ගැනීමේ හැකියාව බන්ධනාගාර නිලධාරීන් සතු වේ."

The translation states as follows: *"execution of death penalty is not a duty of the Judiciary and it is vested with another institution of the government. I have observed, there is a huge row for death penalty, and it creates a problem in the prison also. So, neither I' am going to put another person to that huge row nor to punish a person with a sentence that limited to the case record. So, I' am going to move to the other sentence, namely lifetime rigorous imprisonment because, in that situation accused has to work for his foods provided by the government.*

It is my humble view that the judiciary should not interfere with the duty of the Executive. It is appropriate for the trial judge to consider the facts before him and to make considered decision of imposing a sentence. In the present case it is my view that the reasons given to impose minimum sentence is not appropriate. Therefore considering the gravity of the offence I vacate the sentence of life imprisonment and impose death sentences on the 1st and 2nd counts.

We direct the Judge of the High Court of Colombo to act under Section 280 of the Code of Criminal Procedure Act and to pass the death sentence accordingly.

Appeal Dismissed.

Sentences enhanced.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL