IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an appeal against the Order of the High Court under Section 331 of the Code of Criminal Procedure Act No. 5 of 1979 as amended.

CA (HCC) No: 0262/17

HC No: 6158/12

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Fir Mohomad Fais alias Selvi

ACCUSED

AND NOW BETWEEN

Fir Mohomad Fais alias Selvi

ACCUSED-APPELLANT

Vs.

Honorable Attorney General,
The Attorney General's Department,
Colombo 12

RESPONDENT

BEFORE	:	K. K. Wickremasinghe, J. K.Priyantha Fernando, J.
COUNSEL	:	Saliya Peiris PC for the Accused-Appellant Sudarshana de Silva DSG for the Respondent
WRITTEN SUBMISSIONS	:	Accused-Appellant on 11.06.2018 Respondent on 17.09.2018
DECIDED ON	:	13.02.2020

K.K.WICKREMASINGHE, J.

The Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Colombo on the following counts:-

(1) On or about 04.09.2009 for keeping in possession 3.44 grams of heroin and thereby committing an offence punishable under section 54 A(d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

(2) In the course of the same transaction by trafficking 3.44 grams of heroin and thereby committing an offence punishable under section 54 A(d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

At the conclusion of the trial, the Learned High Court Judge convicted the Appellant on the first count and sentenced him to life imprisonment on 20.06.2017. The Appellant was acquitted and discharged on the second count.

The instant appeal is arising in pursuant to the conviction and sentence of the Appellant.

Following grounds of appeal were raised by the Appellant against the conviction;

(1) That the Learned Trial Judge has unreasonably disregarded the discrepancies in the evidence of the prosecution.
(2) That the Learned Trial Judge has not considered the fact that the chain of custody has raised a reasonable doubt in the case against the Appellant.
(3) That the Learned Trial Judge has not considered the version of the defence at all times.

Facts of the case in brief

PW1, the OIC Hiriyadeniyage Lestly Chandrasiri Hiriyadeniya of the Police Narcotic Bureau was the main investigating officer who conducted the raid in question was based on an information received by IP Paul from a suspect called one Amir who was arrested on the previous date. The raid was conducted on 04.09.2009 and 14 Police Officers have participated in the raid.

After checking the police officers and the two vehicles which were taken for the raid, they have left the Police Narcotic Bureau to Borella. A parcel of heroin was recovered from suspect Amir's house. Recovered heroin was kept in the custody of IP Dharmasuriya.

Soon after the above raid, the team of Police Officers had left to Juliyana Hotel at Kollupitiya, based on an information received by IP Paul from one of his private informants. IP Sanath who was also attached to the Police Narcotic Bureau had assisted the raid as per a request made by PW01 to the Police Narcotic Bureau.

Two Pakistani nationals were arrested with narcotics from that place. The productions were kept in the custody of IP Ruwan and PS 27740 Sanath.

Based on an information received from the arrested Pakistani nationals, the team of Police Officers had proceeded to Slave Island to arrest the Appellant. The Appellant was arrested at 12.25 hours while he was inside a three wheeler parked at Wekanda road. Another person who was standing near a three wheeler was also arrested with narcotics. The Appellant and the narcotics recovered from the Appellant were kept in the custody of PS 30204 Bandara(PW2).

Thereafter they had left to Battaramulla to arrest another suspect based on the information revealed from Appellant.

Heroin taken into custody by PW1 from the Appellant was weighed at the Police Narcotic Bureau. Weight of the content was recorded as 9.8 grams and the pure quantity of heroin appeared to be 3.44 grams as per the Government Analyst report.

First ground of appeal

The Learned Counsel for the Appellant submitted that there are discrepancies and omissions with regard to the evidence given by the main investigating officer in charge of the raid (PW01) and the police officer who was in charge of the alleged amount of heroin taken into custody from the Appellant (PW2).

Attention of Court was drawn to the testimony of PW1 where he states that he tested the substance taken into custody and identified it as heroin and the respective weights of heroin were measured at a shop in Battarammulla prior to going to the Police Narcotic Bureau (page 79 of the Brief).

Whereas in the evidence of PW2 he does not mention about weighing the heroin at a shop in Battaramulla before going to the Police Narcotic Bureau.

The Learned High Court Judge in his judgment (page 252 of the Brief) had accepted the version of PW1.

In this backdrop it is pertinent to evaluate whether the said discrepancy goes to the root of the case and thereby creating a doubt in the case of the prosecution. Whether benefit of such doubt should be given to the accused.

However, when perusing the evidence in chief of PW1 it is clear that measures had been taken by PW1 to keep the heroin intact by assigning one police officer for each suspect to hold the custody of heroin recovered from each suspect.

In the instant case the heroin recovered from the Appellant was kept with PS 30214 Bandara (PW2). (Page 76 of the Brief)

It is evident that the Learned High Court Judge considered the version of both PW1 and PW2 with regarded to the weighing of productions and arrived at the conclusion that the credibility of PW1 was not attacked by cross examination.

In ***Karunaratne Vs. Attorney General*** (2005) 2 SLR at page 240, rejecting certain minor discrepancies raised by the learned counsel for the Appellant, Balapatabendi J cited the case of ***UP Vs MK Anthony*** (1984 2 SCJ 236) with approval which in that case it was held that *"where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors."*

Moreover in the case of ***Mohamed Niyas Naufer and Others Vs. Attorney General*** SC Appeal 01/2006 Shiranee Thilakawardene J held that "*When faced with contradictions in witness testimonial, the court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness. It was further held that too great significance cannot be attached to minor discrepancies or contradictions as by and large a witness cannot be expected to possess a photographic memory and to recall the exact detail of an incident."*

It was further held in the abovementioned case that,

"Therefore court should disregard discrepancies and contradictions, which do not go to the root of the matter and shake the credibility and coherence of the testimonial as a whole. The mere presence of such contradictions therefore, does not have the effect of militating against the overall testimonial creditworthiness of the witness, particularly if the said contradictions are explicable by the witness. What is important is whether the witness is telling the truth on the material matters concerned with the event"

In *Oliver Dayananda Kalansuriya alias Raja Vs. Republic of Sri Lanka* CA 28/2009 it was held that

"It is an accepted principle that a criminal case cannot be proved with mathematical accuracy as it has to be proved by the evidence given by human witnesses. Thus discrepancies, errors and contradictions are bound to occur. If

they do not create a reasonable doubt in the prosecution case court should disregard them."

In ***State of Uttar Pradesh Vs. M.K Anthony*** (1984) SCJ 236/ (1985) CRI.L.J 498/499 the Indian Supreme Court held *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of the evidence by the trial Court and unless there are reasons weightily and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."*

It is essential to conduct an in-depth analysis of both the case of the prosecution and defense and the totality of the evidence should be considered rather than considering evidence in isolation from the other evidence.

This concept was affirmed in the case of ***James Silva Vs. Republic of Sri Lanka*** **1980 2 SLR 167-176** his Lordship Justice Rodrigo and Parinda Ranasinghe J agreeing held that

" a satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the court adduced by the prosecution and 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"

In light of the abovementioned case laws and observations of the learned High Court judge it appears to be that the said discrepancy does not go to the root of the case to create a reasonable doubt in the case of the prosecution.

Therefore, the first ground of appeal shall fail.

Second ground of appeal

The submission of the learned Counsel for the Appellant was that the learned High Court Judge has not considered the fact that the chain of custody has raised a reasonable doubt in the case against the Appellant.

The learned Counsel for the Appellant further submitted that different quantities of heroin were taken into custody from different suspects on the same date of the raid, PW1 failed to give an account of the amounts of heroin taken into custody from each suspect. In addition to that, it was submitted that PW 01 did not take steps to temporary seal the amounts of heroin recovered from each suspect separately.

The learned Counsel for the Appellant has contended that PW01 in his evidence he failed to explain as to how the possession of production recovered from the Appellant was exchanged between PW01 and PW02.

Though it is stated so by the counsel it is apparent from evidence that after the arrest of the Appellant, the production recovered from him was kept with PW2.

Soon after returning to the Police Narcotic Bureau the productions were weighed by PW1.Thereafter the productions were sealed and the Appellant's left thumb impression and signature was placed. The sealed productions were then handed over to IP Rajakaruna(PW3). This version is corroborated by PW1 and PW2. The productions were handed over to PW1 from PW3 on 05.09.2009 and the productions were handed over to the Government Analyst on 9.9 2009 to the Government Analyst under CD 3018/19.

The learned High Court Judge had addressed this issue in the judgment and held that although PW1 had not mentioned that he had the possession of the production, the fact that the production was handed over to IP Rajakaruna is corroborated by the evidence of PW2. Therefore, a doubt in the chain of production does not arise and it is very well established by the evidence.

Accordingly the second ground of appeal shall fail.

Third ground of appeal

The learned counsel for the Appellant contended that the defence took up same stance during the case of the prosecution and in the dock statement.

Therefore it was submitted that the learned High Court Judge had failed to give due regard to the Appellant's dock statement and the suggestions which were made to the prosecution witnesses make the judgment bad in law.

In cross examination suggestions were put to the witnesses to the effect that the Appellant was used as an informant by the police officers who conducted the raid and the Appellant was falsely implicated and heroin was introduced to him after the arrest (page 115 and 116 of the Brief). When considering the dock statement, it is evident that the statement corresponds to the suggestions. However, this consistency alone cannot be utilized to decide whether to accept or deny the dock statement.

In the case of ***Don Shamantha Jude Anthony Jayamaha Vs. Attorney General*** **(CA 303/2006 and C.A.L.A 321/06)**, it was held that,

"Finally having considered the case for the prosecution as well as the dock statement it is only then the learned Judge can decide whether or not the dock statement is sufficient to create a doubt in the case for the prosection. One cannot isolate or disregard the prosecution case completely and consider only the dock statement in deciding whether the dock statement is sufficient to create a doubt provided it is so obvious that the dock statement is only a bear denial or is irrational or palpably false in which case it could be rejected without even considering the evidence for the prosecution....

It was further held,

> *"Failure to evaluate a dock statement in the proper perspective shall not ipso facto vitiate a conviction if the dock statement is*
>
> *a) A bare denial*
> *b) Palpably false and unbelievable"*

Following case was also referred in the above mentioned Royal Park case as follows,

Simonge Ekanayake Vs. The Attorney General **C.A. 129/2005 C.Anuradapura 142/200** *it was held that even though the Trial Judge has not considered the dock statement, if no miscarriage of justice had taken place due to the lapse of the Trial Judge and there is material to say that the dock statement is palpably false then findings of the original court should be overturned.*

Thereby it can be concluded that the dock statement has not imposed any doubt in the prosecution case and the prosecution has proved the case beyond any reasonable doubt.

The Learned High Court Judge in the judgement provides an extensive analysis of the dock statement and it demonstrates that the Learned Trial Judge had considered the dock statement. An analysis of the law with regard to dock statement is followed by an analysis of such statement to the case before the learned High Court Judge.

The Learned High Court Judge had firstly arrived at the conclusion that the prosecution had proved the case beyond reasonable doubt and secondly evaluated the dock statement of the Appellant (page 260 -261 of the Brief). The intention of such analysis was to find out whether the dock statement would amount to create a doubt in the case of the prosecution.

The Appellant in his dock statement had not mentioned about any previous enmity between him and the police officers which would infer that he was falsely implicated.

The dock statement was rejected on the basis that it failed to create a doubt in the case of the prosecution.

Therefore, I see no merit in the third ground of appeal of the Appellant and I am of the view that the conclusion of the Learned High Court judge is well within law. In the above premise the 03rd ground of appeal should therefore fail.

Hence, I find no reason to interfere with the judgment of the learned High Court Judge.

Accordingly I affirm the conviction and the sentence imposed by the Learned High Court Judge.

Appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL