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

SC Appeal 129/2017
SC SPL LA 132/2016
CA Appeal 12/2015
HC 6153/2012

In the matter of an Application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs,

Arumugam Sebesthiyan

Accused

And Now

Arumugam Sebesthiyan

Accused-Appellant

Vs,

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

Complainant-Respondent

And now between

Arumugam Sebesthiyan

Accused-Appellant-Appellant

Vs,

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

Complainant-Respondent-Respondent

Before: **Justice Vijith K. Malalgoda, PC**
Justice A.H.M.D. Nawaz
Justice Achala Wengappuli

Counsel: Amila Palliyage with Tharindu Rathwatte and Mrs. S. Udugampola and Ms. Sandeepani Wijesooriya for the Accused-Appellant-Appellant

Dilan Ratnayake, SDSG for the Hon. Attorney General

Argued on: 18.05.2023

Decided on: 12.03.2024

Vijith K. Malalgoda PC J

The Accused-Appellant-Appellant (hereinafter referred to as 'Appellant') who was indicted before the High Court of the Western Province holden in Colombo on two counts for Possession and Trafficking of 2.42 grams of Diacetyl Morphine, had appealed to the Court of Appeal against the Judgment of the High Court when the learned High Court Judge convicted him of both counts and sentenced him for life. Their lordships of the Court of Appeal by order dated 06.06.2016 dismissed the appeal and affirmed the conviction and the sentence imposed by the High Court. The Appellant, being dissatisfied with the said decision, had sought special leave from this Court on several grounds.

When this matter was supported before the Supreme Court on 14.06.2017, this Court granted special leave on questions of law referred to in paragraphs 12 (i), 12 (ii), 12 (iii) and 12 (iv) of the Petition dated 15.07.2015 and also on two additional questions raised by the Counsel when supporting the matter before the Supreme Court.

The six questions of law considered by this Court when granting special leave are as follows;

1. Has the learned trial Judge erred in law by failing to evaluate the evidence of the defence from the correct perspective?
2. Has the learned trial judge erred in law by rejecting the defence on the wrong premise?
3. Has the learned trial judge erred in law by failing to consider that the defence evidence suffices to create a reasonable doubt on the prosecution's case?

4. Did their lordships err in law by failing to consider the grounds of appeal raised on behalf of the Petitioner?
5. Has the learned trial judge erred in law, by failing to consider the discrepancy in the chain of custody?
6. Has the learned trial judge erred in law by perusing the investigation notes and referring to them in the impugned judgment of the learned trial judge?

The questions of law referred to above are based on three areas namely, the defence evidence, chain of custody, and the procedure followed by the trial judge. However as observed by this Court, all four questions of law referred to in paragraph 12 of the Petition were based solely on the defence evidence, and in fact, the appeal before the Court of Appeal was argued only on those issues. At the time this appeal was supported for special leave, this Court permitted the Appellant to add two additional questions from the other two areas referred to above.

In those circumstances, I will reduce the questions of law that are to be considered in the instant appeal to the following three questions.

1. Has the prosecution failed to establish the chain of custody (inward journey) beyond a reasonable doubt?
2. Has the Learned judge erred in law by perusing the notes of the Police officer and referring them in the impugned judgment under sec 110 of the Criminal Procedure Code?
3. Has the Learned judge erred in law by rejecting the defence in the wrong premise?

Consideration of facts;

The Police Inspector, Rangajeewa (PW2) after receiving a tip off, that a person called Sebastian was getting ready to go to Bandaranayakepura in Rajagiriya to prepare heroin packets for trafficking, arranged for a raid with a team of police officers. For that purpose, he prepared two vehicles of which one was a jeep and the other was a three-wheeler. As per the prosecution evidence, it was revealed that the Jeep stopped at Sri Jayewardenepura Road around 3.20 p.m. and PW2 with 2 other police sergeants namely Fernando and Ajith proceeded in the three-wheeler and turned to Sarana Mawatha and stopped near the election commissioner's office so that the intersection was visible.

At 06.25 pm PW2 spotted the Appellant coming towards the police officers. As Appellant got closer to the three-wheeler, PW2 had got off and held him. When the Appellant was searched, PW2 found a light pink cellophane bag in the Appellant's hand which contained a brown-coloured powder that was identified by PW2 to be heroin.

While denying the version of PW2, the Counsel for the Appellant in the trial court suggested that the arrest of the accused was made at the Nawala junction consequent to a phone call given by PW2 requesting the accused to come. However, the Appellant giving evidence at the trial stated that when

he was at home, the police officers had taken him near Nawala Caters and had told him to show one Chutti who sells heroin and when the Appellant could not assist the Police, he was arrested. Thereafter he had been taken to the Police station and was asked to sign a statement. The wife of the Appellant had also given the evidence as a defence witness and stated that the Appellant was arrested by PW2 when he was at home on 22.05.2022.

Has the prosecution failed to establish the inward journey of prosecution beyond a reasonable doubt?

Chain of custody refers to the process that tracks the movement of evidence through its collection, safeguarding, and analysis lifecycle by documenting each person who handled the evidence, the date/time it was collected or transferred, and the purpose for the transfer. In ***Witharana Doli Nona vs Republic of Sri Lanka,***[1] his Lordship Sisira De Abrew noted 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*

The importance of the inward journey has been stated in ***Perera vs AG***[2]as follows;

> *It is a recognized principle that in this case of nature, the prosecution must prove that the production had been forwarded to the analyst from proper custody, without allowing room for any suspicion that there had been any 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.*

[1] (CA 19/19)
[2] (1998 1 SLR 378)

In ***Mahasarukkalige Chandrani vs AG***[3] Court observed,

> *Government Analyst Report which is the principal evidence in a drug offense is entirely dependent on the inward journey of the production chain and therefore, there is a duty cast on the prosecution to establish the inward journey of the production with reliable evidence. In this regard, it is important to note that, calling a witness who was at a police reserve to establish that he was functioning as a reserve officer during the particular time is not sufficient to establish a production chain but he has to give evidence confirming that the production referred to the said case was properly received by him and handed over by him in good condition*

As contended by the Learned Counsel for the Appellant, the prosecution has failed to establish the chain of custody beyond reasonable doubt due to two reasons; firstly, as per the evidence of PW2 and SI Samarakoon (PW5), PW2 took charge of the substance that had been recovered from the appellant in this matter at the time of the arrest and the productions were duly sealed and handed over to SI Samarakoon on the following day around 3.40 p.m. Until such time the sealed productions were in the custody of PW2.

PW5 in his evidence confirms that after production was handed over by PW2 with seals on the parcel intact, on 23.06.2010 he kept the productions in his custody until it was handed over to C.P. Kumarapedi, of the Government Analyst Department from whom he received the receipt marked P5 which is the confirmation of official acceptance of the production by Government Analyst. Senior Assistant Government Analyst Ms. Rajapaksha in her evidence confirms the handing over of the production to the Government Analyst by PW5 and goes on to give an analysis of the production she received under the Government Analyst Report which is marked as P6. It could be said that the analyst receipt that PW5 received from the Analyst department which has already been submitted to the court itself could be admitted as a piece of primary evidence under sec 62 of the Evidence Ordinance that is sufficient to establish the chain of production even without having to call Ms. C.P. Kumarapedi as a witness.

However, as submitted by the learned Counsel for the Appellant, concerning the process that took place in the Police Narcotic Bureau, Shanthi Fernando (PW3) who took part in the raid as well as the sealing process has given a slightly different version which reads as follows;

> ඒ නඩු බඩු පොලිස් පරීක්ෂක සමරකෝන් මහතාට බාරදෙන තෙක් පොලිස් පරීක්ෂක රංගජීව මහතා බාරයේ තබාගත් නඩු බඩු සැකකරු ඒ වගේම උපසේවයේ යෙදී සිටි පොලිස් සැරයන් කුමාරසිංහ නිලධාරියාට බාර දුන්නා.

[3] (CA 213/2009 C.A.M. 30.09.2016)

In the evidence given by PW2 during the cross-examination, he clearly said, that he had entrusted the personal belongings of the suspect to the reserve officer.

ප්‍ර: ඊට අමතරව ඔබ සැකකරු සන්තකයේ තිබූ පෞද්ගලික බඩු බාහිරාදිය ඔබ උප සේවකට බාර දී තිබෙනවාද?

උ: එහෙමයි.

ප්‍ර: මොනවද ඒ බඩු?

උ: ශ්‍රී ලංකාවේ වලංගු මුදල් රු 100 ක්ද සෝනි එරික්සන් වර්ගයේ ජංගම දුරකථනයක්ද එම සිම්පතද අංක 681983716 දරන ජාතික හැඳුනුම්පතද සැකකරු දේපල කුවිතාන්සි අංක 65/10 යටතේ ඉදිරිපත් කළා.

On the other hand, it is very much clear from the evidence of PW5, that he received the productions, the sealed envelope from PW2 on 23.06.2010, and thereafter handed over the same to the Government Analyst on 29.06.2010. If the production was handed over to the reserve officer Kumarasiri by PW2 as argued by the learned Counsel for the Appellant, PW5 will have to take over the production not from PW2 but from Kumarasiri. However, PW5 had given clear evidence on this issue and we see no reason to reject the evidence of PW5.

On this note, it could be said that in the instant case prosecution has established the inward journey of the prosecution beyond reasonable doubt.

Has the Learned judge erred in law by perusing the notes of the Police officer and referring them in the impugned judgment?

The Learned trial judge referred to the investigating officers' notes to ascertain whether there was a contradiction between the two main witnesses. Having observed the investigation notes, the learned trial judge concluded that there was no such contradiction.

According to sec 110(3) of the Criminal Procedure Code, the court has the power to use a recorded statement in the course of investigation to '*assist it in a trial*' but not as evidence. On the other hand sec 110(4) of the Criminal Procedure Code states as follows;

> *Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial.*
>
> *Save as otherwise provided for in section 444 neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them*

merely because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply

Jayawardene J. commenting on the use of the notes of investigating officers in ***King v Soysa***[4] stated that '*A Judge is not entitled to use statements, made to the police and entered in the Information Book, to corroborate the evidence of the prosecution.'* Similarly, In *Pavlis Appu v Don Davit*[5] where at the close of a case, the Police Magistrate reserved judgment, noting that he wished to peruse the information book, it was held that the use of the information book for the purpose of arriving at a decision was irregular.

However, Justice Sisira De Abrew in ***Brian Anthony Samuel and Others vs AG,***[6] despite the error done by the trial judge in pursuing the Information Book and deciding on the issue, contended that,

When I consider the evidence led at the trial I hold the view that the above misdirection has not occasioned a miscarriage of justice. I, therefore, decide to act on the proviso to section 334 of the Criminal Procedure Code which reads as follows: "Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

Sec 436 of the Criminal Procedure Code states as follows,

Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account –

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during the trial or in any inquiry or other proceedings under this Code; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice

Since in the instant case, the misdirection of the trial judge had no bearing on the judgment or caused any prejudice to the parties, as observed by Sisira de Abrew J in the case **of *Brian Anthony***

[4] 26 NLR 324.
[5] 32 NLR 335
[6] CA 60-61 A-B/2008 (C.A.M. 11.02.2013)

Samuel and Others vs AG *(supra)* this Court should not interfere with the decision of the learned trial judge.

Has the Learned judge erred in law by rejecting the defence on the wrong premise?

At the trial before the High Court, Appellant Arumugam Sebastian gave evidence from the witness box and called his wife Velu Ramani to give evidence on his behalf.

During his evidence the Appellant took up the position that PW2 had searched his house on 20.06.2020 but did not arrest him on that day, on 22.06.2020 he was arrested at his house and taken near Nawala Caters and wanted him to show one Chutti. Since he did not know who Chutti was, he could not show him to the officers and thereafter he was taken to the PNB. The fact that the Accused-Appellant was arrested at his residence was confirmed by his wife when she was giving evidence.

The witness's position that he did not know Chutti was contradicted by him under cross-examination in the following manner;

ප්‍ර: එතකොට චූටි කොහේද ඉන්නේ?

උ: ඒ 60 වත්තේ.

ප්‍ර: කොහේ වත්තේද ඉන්නේ?

උ: අපේ වත්තේ.

ප්‍ර: අපේ වත්තේ කියන්නේ කොහේද?

උ: අරුනෝදය මාවතේ.

ප්‍ර: අරුනෝදය මාවත කොහේද තිබෙන්නේ?

උ: රාජගිරියේ.

.....

ප්‍ර: අරුනෝදය මාවතේ ඉන්නවා කියලා තමා දන්නවද?

උ: ඔව්.

ප්‍ර: වෙන කොහේවත් ඉන්නවා කියල කිසි දෙයක් දන්නේ නැහැ?

උ: නැහැ.

ප්‍ර: ඉතින් මහත්තයාව රංගජීව මහත්තයා නාවලට එක්කන් ගියා කියලා නේද කිව්වේ?

උ: එයා එක්කන් ගියා. රංගජීව මහත්තයා කිව්වා එහේ ඉන්නව කියලා.

However, the above position taken by the Accused-Appellant was not suggested to PW2 when he was giving evidence but what was suggested to him was recorded in the proceedings as follows;

ප්‍ර: මම මහත්තයාට යෝජනා කරනවා ඒ විත්තිකරුට මහත්තයා දුරකථන ඇමතුමක් ලබා දී නාවල හන්දියට ආපු වෙලාවේ විත්තිකරුව අල්ලාගත්තා කියලා?

උ: එම යෝජනාව ප්‍රතික්ෂේප කරනවා.

ප්‍ර: විත්තිකරුට බලකලා හෙරොයින් නඩුවක් අල්ලා දුන්නොත් එහෙම නැවත නඩුවක් පවරන්නේ නැහැ කියා ඒ යෝජනාවට එකඟවුනේ නැති නිසා හෙරොයින හඳුන්වා දුන්නා?

උ: එම යෝජනාව තරයේ ප්‍රතික්ෂේප කරනවා.

The learned trial judge has rejected the evidence of the Appellant and his wife for two reasons; firstly, the position taken up in the defence evidence has not been suggested to the prosecution witness, and secondly in contrast to the position suggested to the prosecution witnesses, the Appellant has taken up a contradictory position in his evidence and therefore defence evidence ought to be rejected.

In the instant case, Learned Counsel for the Respondent contends that the trial judge had the advantage of all the witnesses being led before him and therefore had the opportunity of observing the demeanor and deportment of all the witnesses. Whilst referring to the decision *d* in ***Alwis v Piyasena Fernando***[7] Learned Counsel for the Respondent further contends 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'* In ***R v. Paul***[8] 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.*

Similarly, in ***Gunasiri and 2 others v Republic of Sri Lanka,***[9] Sisira De Abrew J. has stated that

> *It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted.*

[7] 1993 1 SLR 119
[8] [1977]1 SCR 181
[9] [2009] 1 SLR 39

Moreover, there are patent inconsistencies in the Appellant's version which poses questions about his credibility. As already referred to in the evidence given by the Appellant under cross-examination when Police officers asked him to show where one 'chutti' was, the Appellant took the position that he could not show where chutti was as he did not know. However, the Appellant admitted having known where Chutti lives in detail. The defence taken by the Appellant is solely supported by the Appellant's wife.

In ***AG vs Sanadanam Pitchy Mary Theresa***[10] Shiranee Thilakwardene J. commenting on the credibility of a witness stated as follows;

> *A key test of credibility is whether the witness is an interested or disinterested witness. Rajaratnam J. in Tudor Perera v. AG (SC 23/75 D.C. Colombo Bribery 190/B – Minutes of S.C. Dated 1/11/1975) observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be referred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (Vide, Halsbury Laws of England 4th Edition para 29).*

Considering the ulterior motives that could have an influence on the evidence of the Appellant's witness owing to the close relationship between the Appellant's witness and the Appellant, it seriously casts doubt upon the probability of her version being true against the independent evidence presented to the court by prosecution witnesses, who were official witnesses with no possible personal interest in the arrest of the Appellant.

In the said circumstances it is observed that there are no serious flows relating to the manner in which the learned trial judge analyzed the evidence and the premise upon which the prosecution version was accepted over the Appellant's version.

For the above reasons, we see no basis to interfere with the findings of the Court of Appeal. The conviction and the sentence imposed by the trial judge based on the evidence placed before the trial court is affirmed.

The appeal is dismissed. No costs.

Judge of the Supreme Court

Justice A.H.M.D. Nawaz,

I agree,

[10] *AG vs Sanadanam Pitchy Mary Theresa* (n 6).

Judge of the Supreme Court

Justice Achala Wengappuli,

I agree,

Judge of the Supreme Court