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

In an application for Special Leave to Appeal under and in terms of Articles 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General on behalf of the Democratic Socialist Republic of Sri Lanka

Complainant

S.C. Appeal No. 122/2020
S.C. (S.P.L.) L.A. Application No. 50/2019
C.A. Appeal No. C.A. 71-72/2010
H.C. Gampaha Case No. 93/2004

Vs.

1. Ranasinghe Arachchige Kapila Nishantha Perera,
   327/A, Gunarathna Mawatha,
   Makola North, Makola.

2. Suppiah Gamini.

Accused

AND BETWEEN

1. Ranasinghe Arachchige Kapila Nishantha Perera,
   327/A, Gunarathna Mawatha,
   Makola North, Makola.

2. Suppiah Gamini.

Accused-Appellant

Vs.

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

Complainant-Respondent

AND NOW BETWEEN

Ranasinghe Arachchige Kapila Nishantha Perera,
327/A, Gunarathna Mawatha,
Makola North, Makola.

Accused-Appellant-Appellant

Vs.

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

Complainant-Respondent-Respondent

Before: **P. Padman Surasena, J.**

Janak De Silva, J.

Achala Wengappuli, J.

Counsel:

Chamindi Arsecularatne with Himasha Silva for Accused-Appellant-Appellant

Dilan Rathnayake, S.D.S.G. for the Complainant-Respondent-Respondent

Written Submissions:

14.02.2024 by the Accused-Appellant-Appellant

22.01.2024 by the Complainant-Respondent-Respondent

Argued on: 17.01.2024

Decided on: 07.10.2024

Janak De Silva, J.

The Accused-Appellant-Appellant ("Appellant") and another person ("2nd Accused") were charged with possession and trafficking of 1.7 kg. of heroin.

They were convicted after trial and sentenced to life imprisonment by the learned High Court Judge of Gampaha. Both appealed to the Court of Appeal.

The Court of Appeal in an *ex-tempore* judgment, held that it was not a well-considered judgment and hence there was a violation of the principles of a fair trial. The conviction and sentence were set aside and a re-trial ordered.

The 2nd Accused did not prefer any appeal. The Appellant preferred this appeal against the judgment of the Court of Appeal.

Special leave to appeal was granted on the following questions of law:

1. Whether their Lordships of the Court of Appeal erred in law by ordering the Petitioner and the Appellant to face a retrial 18 years after the commission of the offence?
2. Whether their Lordships of the Court of Appeal erred in law by failing to consider that the Appellant has already spent 8 years in remand custody awaiting his appeal to be taken up and in the event of a conviction and sentence being imposed at the retrial, the 8 years already spent by the Appellant in remand custody would be in vain and cannot be compensated?

At the conclusion of the argument, we directed the parties to file written submissions covering the merits of the case as well to enable the Court to decide the course of action to be taken in this case.

The Court of Appeal held that the learned trial judge had stated that the Appellant had not proved his innocence and that there is a reference to the Lucas principle which has no applicability to the case. It is for these reasons that it was held that the judgment of the High Court was not well-considered and in violation of the principles of a fair trial.

The Case for the Prosecution

At the trial, the prosecution led the evidence of four witnesses, PW1, PW2, PW4 and PW5 and marked several productions from P1 to P7, X1 to X5 and H1 to H6.

PW1 was the investigating officer who had at the time of the raid, worked for about 8 to 9 years at the Police Narcotics Bureau ("PNB"). He was the OIC, PNB in 2001 when the detection was made. He testified that on 20.12.2001 he was summoned by the then Director, PNB and introduced to an informant and to get ready for a raid in Makola. The informant said that drug dealers were due to bring some drugs to the Kesel Pandura junction between 16.30 and 17.30.

He thereafter got a team of around 7 officers ready, inspected them and their weapons, the informant, and the jeep they were travelling in to check whether any illegal substances were present. Thereafter, he proceeded to Kesel Pandura junction with the team and the informant and parked the jeep away from the junction to avoid any visibility.

Thereafter, PW1, PW2 and the informant proceeded on foot to the Kesel Pandura junction. There was a bus stand and a three-wheeler park at the junction which was a populated place. About half an hour later, two people came along Gunaratne Mawatha to the main road. The informant pointed them out as the persons dealing with heroin. The informant left the scene thereafter.

One of the persons was carrying a black tulip bag. PW1 and PW2 accosted them and checked it. There were three parcels wrapped in brown coloured gum tape. PW1 pierced all three parcels with a pin and a brown-coloured powder came out. PW1 identified it as heroin from the smell. Thereafter, PW1 arrested the person. The Appellant was identified by PW1 as the person who was carrying the black tulip bag.

Afterwards, PW1 directed PW2 to search the other person. A black coloured electronic weighing scale was recovered from him. It was similar to weighing scales recovered during previous raids. Afterwards PW1 arrested that person as well. The 2nd Accused was identified by PW1 as the person from whose custody the electronic weighing scales were recovered.

PW2 testified corroborating the evidence of PW1.

PW1 further testified on ensuring the sanctity of the chain of productions. This evidence was corroborated by PW2, PW4 (Officer-in-charge of productions at the PNB) and PW5 (Officer from the Government Analyst's department).

Dock Statement of Appellant

The 2nd Accused did not give evidence. Appellant made a dock statement. According to him, he was arrested at his home. At that time his father, mother and brother were at home. The group that came to his house informed his mother that he is

being taken away to record a statement. On the way, he was questioned about another person ("X"). Later he was taken to Maligawatte and then to a house in Kolonnawa. A search of that house was done but nothing was recovered.

Later he was taken to Modara and to the house of X about whom he was questioned earlier. X was not at home. However, a parcel was recovered. Thereafter he was brought to the PNB. He was again questioned about X. About two months later X was arrested and remanded. He was in remand for about 4 months. Later he got bail.

In ***The Queen v. Kularatne and Two Others*** **[71 N.L.R. 529 at 531]** it was held that *when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. But the jury must also be directed that:*

(a) if they believe the unsworn statement it must be acted upon,

(b) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and

(c) that it should not be used against another accused.

The mother and the brother of the Appellant were called to testify on behalf of the Appellant. The mother testified that the Appellant was arrested at home and that the brother was not at home at that time. Only the Appellant, his father and the witness were present. Here there is a material contradiction between the dock statement of the Appellant and the evidence of his mother. Even the brother of the Appellant in his evidence stated that he was not there when the Appellant was

arrested. The mother further testified that she did not see the Appellant for 7 years after his arrest and only saw him again at the trial.

Evaluation of the Evidence

The learned trial judge did not make any adverse findings on the credibility of the prosecution witnesses. It is observed that the learned trial judge had the benefit of listening to and observing all the witnesses who testified at the trial on behalf of the prosecution and the accused. Having had the benefit of observing the demeanor and the deportment of all the witnesses, the learned trial judge is best placed to make an enlightened decision on their credibility.

Moreover, the learned trial judge correctly observed that there were no contradictions or omissions in the evidence presented by the prosecution. He went on to hold that the evidence of the Government Analyst and the Police corroborate each other.

In these circumstances, I see no error in his conclusion that the prosecution has proved its case.

Upon a careful examination of the judgment of the learned trial judge, it is clear that he does not state that the Appellant has not proved his innocence. In fact, he has acknowledged at several places in the judgment (pages 53, 56, 59 and 62) that the burden of proving the case beyond a reasonable doubt is on the prosecution.

Having done so, he has gone on to apply the Ellenborough dictum to the facts and circumstances of the case.

Ellenborough Dictum

In ***Rex v. Cochrane*** **[1814 Gurneys Report 479]** Lord Ellenborough held that:

> *"No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but* ***nevertheless, if he refuses to do so where a strong prima facie case has been made out and when it is in his own power to offer evidence,*** *if such exist in explanation of such suspicious circumstances, which would show them to be fallacious and explicable consistently with his innocence,* ***it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest****."* (emphasis added)

This dictum has been applied in many cases in Sri Lanka. [See ***Inspector Arendstz v. Wilfred Peiris*** **[10 C.L.W. 121 at 123],** ***R v. Seeder Silva*** **[41 N.L.R. 337 at 344],** ***King v. Wickramasinghe*** **[42 N.L.R. 313],** ***King v. Peiris Appuhamy*** **[43 N.L.R. 412 at 418],** ***King v. Endoris*** **[46 N.L.R. 498],** ***Queen v. Seetin*** **[68 N.L.R. 316],** ***Chandradasa v. Queen*** **[72 N.L.R. 160],** ***Beddavithanu v. Attorney-General*** **[(1990) 1 Sri.L.R. 275 at 278],** ***Republic v. Ilangathilake*** **[(1984) 2 Sri.L.R. 38],** ***Aruna alias Podi Raja v. Attorney-General*** **[(2011) 2 Sri.L.R. 44]**].

In ***The Attorney-General v. Potta Naufer and Others*** **[(2007) 2 Sri.L.R. 144 at 202]**, Amaratunge J. rejected the submission that there is no dictum called the dictum of Lord Ellenborough; that the words attributed to Lord Ellenborough is a fabrication by Wills; and that the views expressed by Lord Ellenborough is not a part of the law of Sri Lanka.

The burden of proving the case beyond a reasonable doubt is on the prosecution. There is no burden on the accused to prove his innocence. The Ellenborough dictum does not oust the burden on the prosecution to prove the case beyond a reasonable doubt. It does not place a legal or a persuasive burden on the accused to prove his innocence. However, where the prosecution is able to establish a strong prima facie case and highly incriminating circumstances, an application of this dictum shifts the evidential burden to the accused to explain away these highly incriminating circumstances when he has both the power and opportunity to do so.

As Justice Abbott held in ***Rex vs. Burdett*** **[(1820) 4 B. and A. 95 at 161, 162]**:

> *"No person is to be required to explain or contradict* ***until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction****; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction,* ***if the conclusion to which the prima facie case tends to be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends****."* (emphasis added)

The learned trial judge held (at pages 58, 59 and 60) that the evidence tendered on behalf of the prosecution established a strong prima facie case. In these circumstances, it was incumbent upon the Appellant to explain away the incriminating circumstances.

Moreover, the learned trial judge held (at pages 59 and 60) that the defence had failed to explain away the highly incriminating circumstances. This is the correct exposition of the law.

Upon a careful examination of the judgment of the learned trial judge, it is clear that he does not state that the Appellant had not proved his innocence. In fact, he has acknowledged at several places in the judgment (pages 53, 56, 59 and 62) that the burden of proving the case beyond a reasonable doubt is on the State.

However, the learned trial judge (at page 58) after holding that the prosecution has established a strong prima facie case, stated that in these circumstances, the burden is on the defence to prove their innocence. This is the only place in the judgment where such a statement has been made.

Nevertheless, that comment must not be viewed in isolation detached from the context of the whole judgment. The judgment must be considered as a whole. It has at several places reiterated that the burden of proving the case beyond a reasonable doubt is on the prosecution. Thereafter, the learned trial judge has correctly applied the Ellenborough dictum to the facts and circumstances of the case.

Admittedly there is a reference to the Lucas principle by the learned trial judge. The Lucas principle explains the circumstances in which a lie uttered in or outside Court by an accused may provide corroboration against him. As Lord Lane CJ held in ***R. v. Lucas*** **[(1981) 2 All ER 1008 at 1011]**:

> *"Statements made out of court, for example statements to the police, which are proved or admitted to be false may in certain circumstances amount to corroboration…To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth…Fourthly the statement must be clearly shown to be a lie by*

evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

As a matter of good sense it is difficult to see why, subject to the same safeguard, lies proved to have been told in court by a defendant should not equally be capable of providing corroboration."

No doubt, the reference to the Lucas principle by the learned trial judge is out of context. Nevertheless, I do not think that a judgment must be set aside for every conceivable error in it. It may in fact be a herculean task to find a judgment which is absolutely free from any error. In fact, this is acknowledged in the Constitution.

Jurisdiction of the Court of Appeal

Article 138 of the Constitution confers the jurisdiction on the Court of Appeal to correct all errors in fact or in law committed by the High Court. However, the proviso to Article 138 reads as follows:

"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

The Court of Appeal is directed not to interfere with every judgment, decree or order for any error. It has the jurisdiction to reverse or vary a judgment, decree or order ***only where an error, defect or irregularity therein has prejudiced the substantial rights of the parties or occasioned a failure of justice***.

In ***Sunil Jayarathna v. Attorney-General*** **[(2011) 2 Sri.L.R. 92]** it was held that when considering the proviso to Article 138(1) of the Constitution it is evident that the judgment of High Court need not be reversed or interfered with on account of any

defect, error or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

Furthermore, in ***Kiri Mahaththaya and Another v. Attorney-General*** **[(2020) 1 Sri.L.R. 10 at 21]** Aluwihare J. held:

> *"An Accused would therefore only be entitled to relief if it is shown that the irregularity complained of, had in fact prejudiced the substantial rights of the parties or has occasioned a failure of justice. A mere statement to that effect would certainly not be sufficient, but it must be shown as to how the failure of justice resulted ..."*

This is the same approach taken in interpreting Section 334(1) of the Code of Criminal Procedure Act which reads as follows:

> *"334(1) The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:*
>
> *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. "*

In ***Mannar Mannan v. The Republic of Sri Lanka*** **[(1990) 1 Sri.L.R. 280]** a divisional bench of this Court held that the proviso clearly vests a discretion in the Court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant for the view that the court is precluded from applying the proviso in any particular category of "wrong decision" or misdirection on questions of law as for instance, burden of proof. There is no hard and fast rule that the proviso is inapplicable where there is a non-direction amounting to a misdirection in regard to the burden of proof. What is important is that each case, falls to be decided on a consideration of (a) the nature and intent of the non-direction amounting to a misdirection on the burden of proof (b) all facts and circumstances of the case, the quality of the evidence adduced and the weight to be attached to it.

The legally admissible evidence led by the prosecution has proved the charges against the Appellant beyond reasonable doubt. An application of the Ellenborough dictum then required the Appellant to explain away the incriminating circumstances. The learned trial judge who had the benefit of observing the demeanor and deportment of the Appellant during his dock-statement and the evidence of his mother and brother did not believe them. An objective evaluation of this evidence necessarily requires the trial judge to conclude that the Appellant is guilty.

The two errors of the trial judge in his judgment makes no difference as the conclusion is warranted by law. In these circumstances, there is no error, defect or irregularity in the judgment of the learned trial judge which has prejudiced the substantial rights of the parties or occasioned a failure of justice. Therefore, the

Court of Appeal was wrong in setting aside the judgment of the High Court and ordering a retrial.

In this appeal, the Appellant has invoked the appellate jurisdiction vested in Court by Article 127(1) of the Constitution. This jurisdiction vests power in Court to correct all errors of fact or in law committed by the Court of Appeal at its discretion.

Where the Court of Appeal has exceeded its jurisdiction conferred by Article 138 of the Constitution by correcting an error or errors in fact or in law which has not prejudiced the substantial rights of the parties or occasioned a failure of justice, this Court has the power to remedy the excess of jurisdiction. We informed all parties during the argument to address Court on the merits of the case and gave a further opportunity to file post-argument written submissions as well.

I am mindful that we must give a fair hearing to any party before making any order adverse to his interests. Only the Appellant has appealed against the judgment of the Court of Appeal. The 2nd Accused did not appeal. Hence, Court cannot make any order to the detriment of the 2nd Accused as he has not been afforded a hearing.

For the foregoing reasons, I hold that the Court of Appeal erred in law in setting aside the judgment against the Appellant of the learned trial judge dated 26.03.2010. I set aside the *ex-tempore* judgment of the Court of Appeal dated 07.01.2019 in so far as the Appellant is concerned. I affirm the conviction and sentence imposed on the Appellant.

Appeal dismissed. No costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court