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

In the matter of an application for
special leave to appeal from an order of the
Court of Appeal in terms of Article 128 of
the Constitution.

S.C. Appeal No. 79/2008
S.C. (Spl.) L.A. No. 153/2008
C.A. No. 161/2004
H.C. Colombo No. 818/2004

The Attorney General,
Attorney General's Department,
Colombo 12.
Respondent-Petitioner

Vs.

Sandanam Pitchi Mary Theresa,
No. 65/05,
Gardinar Thomas Cooray Mawatha,
Avariyawatte,
Wattala.
Accused-Appellant-Respondent

BEFORE : **Ms. S. TILAKAWARDANE.J**
SRIPAVAN.J &
IMAM.J

COUNSEL : Palitha Fernando, A.S.G., with P.C Sarath Jayamanne,

D.S.G., for the appellant (A.G.).

Gayan Perera with Ms. Prabha Perera for the accused-appellant-respondent.

ARGUED ON : 10.09.2009.

WRITTEN SUBMISSIONS OF THE APPELLANT TENDERED ON : 06.10.2009.

WRITTEN SUBMISSIONS OF THE RESPONDENT TENDERED ON : 23.11.2009

DECIDED ON : 06.05.2010

Ms. S. TILAKAWARDANE.J

An application for Special Leave was preferred by the Respondent Petitioner Appellant, the Attorney General, (hereinafter referred to as the Appellant) against the Judgment of the Court of Appeal dated 30/05/2008 wherein the conviction and the sentence imposed against the Accused Appellant Respondent (hereinafter referred to as the Respondent) was set aside.

This Court granted Special Leave to Appeal on 18/09/08 on the following questions of law.

1. Did the Court of Appeal err in law by holding that "there was no reason to reject the evidence of the defence witness Matilda?"

2. Did the Court of Appeal err in law by holding that the prosecution has not proved its case beyond reasonable doubt without considering the prosecution evidence?
3. Did the Court of Appeal err in law by the failure to evaluate and consider the prosecution evidence and or the submissions made on behalf of the prosecution (State) in the Court of Appeal?
4. Did the Court of Appeal err by relying upon observations made by their Lordships of the demonstration conducted by an Officer of Court in the Court of Appeal?

The Respondent was indicted in the High Court for the allegations of possessing and trafficking, 45.72 grams of heroin, punishable under section 54 (a) and (c) of the *Poisons Opium and Dangerous Drugs Ordinance*. In the High Court she was convicted under count 1 for possession, and imposed a sentence of life imprisonment, and was acquitted under count 2 for trafficking.

In terms of the submissions made, it is important at the outset of the case to consider the evidence that was presented in the High Court and whether on the relevant and admissible evidence the final count of possession was proved beyond reasonable doubt.

The Respondent was at the time admittedly in occupation of a room at 65/5, Cardinal Cooray Mawatha, Averriwatte, Wattala. Ostensibly her residence in this house which belonged to her brother was to facilitate the care of his children. Admittedly she had 4 children of her own and one was being educated in London at the time.

According to the detecting officer of the Police Narcotics Bureau (hereinafter referred to as the PNB), the detection took place at De Vos Lane in Colombo pursuant to information provided by an informant, who had pointed out the Respondent. According to SI Tennakoon who apprehended her, at the time of her arrest the Respondent was carrying a black bag, a fact which was not contested. This bag according to the detecting

officer contained a shopping bag containing 130,460 currency notes (9 Rs 1000/- notes, 22 Rs 500/- notes,105 Rs200/- notes, 484 Rs 100/- notes, 501 Rs 50/- notes, 507 Rs 20/- notes and 587 Rs 10/- notes. Under this there was a till (referred to by both parties at times as a tin, which contained a shopping bag inside which there were 2868 wrapped packets of, what was later proved to be Heroin. When collected together the total weight of the heroin was indisputably 172.600 grams.

The officer further testified that subsequently the officers of the PNB had searched the house the Respondent was residing in and recovered a small weighing scale and 3 weights of 20, 50, and 100 grams from under her bed. There was no challenge to the procedure by which the productions were sealed, tested and subsequently duly produced in the High Court. These productions, perceived in open court, were examined by the High Court judge as is evident from his judgment dated 19.11.2004.

The Respondent however denies the prosecution version of events and claims that she was arrested at her residence at Wattala. Both the Respondent and her sister, Matilda testified at the trial that Heroin was not recovered from the Respondent's possession. All that was recovered from the residence of the Respondent was Rs. 130,460 which she claimed to be the proceeds from the sale of a three wheeler.

The evidence of Matilda, the Respondent's sister, was assessed by the Judge of the High Court in his Judgment and the evidence on the factual issues in the case were carefully considered, evaluated along with the general principles of law on assessment of witness credibility/ testimonial trustworthiness. The learned High Court judge rejected the version put forward by Matilda as improbable in light of the totality of the evidence presented to the Court. The Court of Appeal however, took a different view and placed considerable weight on the evidence of Matilda, which the Court believed to have created a reasonable doubt in the prosecution case.

When considering the testimonial creditworthiness of Matilda, it is important to bear in mind established principles on witness credibility which may guide the Court in assessing the facts in a situation where conflicting evidence is presented. The Court must be conscious of the fact that not all witnesses are reliable. A witness may fabricate or provide a distorted account of the evidence through a personal interest or through genuine error (Vide, Emson, *Evidence,* 3rd Edition, 2006).

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 preferred 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). Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness (Vide, *Hasker v. Summers* (1884) 10 V.L.R. (Eq.) 204 – Australia; *Leefunteum v. Beaudoin* (1897)28 S.C.R. 89) - Canada).

The overall consistency of evidence is a further test of creditworthiness. Consistency is not just limited to consistency inter se but also consistency with what is agreed and clearly shown to have occurred (Vide, *Bhoj Raj v. Sita Ram*, AIR 1936 PC 60). The Court may also determine credibility based on the relative probability of the defence version taking place in light of the evidence before Court.

With respect to the currency notes found with the accused, the Court of Appeal accepted the defence version that the money was from the proceeds of the sale of a three wheeler. The Court surmised hypothetically, that the use of small value currency

notes would be reasonable on the basis that the three-wheeler was purchased by an owner or driver of a three wheeler.

The High Court had rejected Matilda's evidence that the money was found in the respondent's cupboard and that it was the proceeds from the sale of a three wheeler. The Respondent initially, when she was produced before the magistrate, claimed the money as her own, but later shifted her testimony to state that the money belonged to her brother. The High Court held that if the money did indeed belong to the Respondent's brother, it was unlikely no doubt considering the quantum of the money, that it would be kept in her cupboard. The High Court also reasonably concluded that, the fact that the money was almost entirely in small value currency notes made it unlikely to have been obtained from the sale of a vehicle.

The witness Matilda had come forward for the first time in five years to give evidence in support of her sister, the Respondent. Generally, the spontaneity or the promptness in which a witness makes a statement to the police would accrue in favor of the creditworthiness of the witness, as it precludes the time needed for deliberate fabrication. It is relevant that the evidence disclosed that the witness has two previous convictions and two pending cases before the High Court on drug related offences.

Considering the relationship between the witness and the Respondent and the probability of her version being true in light of the independent evidence presented to court on the facts of the case, I find that the learned High Court has fittingly rejected the testimony of Matilda as not worthy of credit..

The next ground of Appeal is that the Court of Appeal has failed to consider the probative value of the evidence led on behalf of the Appellant. The Respondent highlighted contradictions in the statements of the two PNB officers. In the first instance, the officers statements on meeting the informant differ, in that according to SI

Tennakoon, the junior officer got down from the vehicle and met the informant, before introducing him, whereas prosecution witness number 3, stated that both officers got down and met the informant and that they both knew the informant. On the recovery of scales and weights from the Respondent's residence, both officers claim to have made the recovery from under the Respondent's bed. Similar contradictions also appear with respect to the payment of the three wheeler fare from Orugodawatta, where they met the informant to De Vos Lane where the detection took place.

Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance (Vide, *Boghi Bhai Hirji Bhai v. State of Gujarat*, AIR 1983 SC 753).

Witnesses should not be disbelieved on account of trifling discrepancies and omissions (Vide, *Dashiraj v. the State* AIR (1964) Tri. 54). When contradictions are marked, the judge should direct his attention to whether they are material or not and the witness should be given the opportunity of explaining that matter (Vide, *State of UP v. Anthony* AIR 1985 SC 48; *A.G. v. Visuvalingam* 47 NLR 286). It is dangerous to presume or assume that because two witnesses contradict each other, one of them must be a false witness and reject the testimony in its entirety. The judge has a duty to probe into whether the discrepancy occurred due to a lack of observation or defective memory or a dishonest motive (Vide, Colin Thom'e J in *Bandaranaike v. Jagathsena* 1984 2 Sri LLR 397).

In *State of UP v. Anthony* the Indian Supreme Court stated that 'while appreciating the evidence of a witness, the approach must be whether the evidence...read as a whole appears to have a ring of truth'. The Court went on to elaborate further that 'Minor discrepancies on trivial matters not touching the core of the case, hyper technical

approach by taking sentences torn out of context here or 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'.

Basnayake CJ in *Queen v. Julius* (1963 65 N.L.R 505) observed 'that in applying the maxim of *Falsus in uno, falsus in omnibus* (he who speaks falsely on one point will speak falsely upon all) it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment must be distinguished from deliberate falsehood'.

In the instant case, the Court of Appeal considered the contradictions appearing in the testimony of the chief prosecution witnesses, particularly with respect to the recovery of scales from the Respondent's residence. The Court found that the contradictions and shifting testimony of the two PNB officers, created a serious dent in the testimonial trustworthiness of the prosecution witnesses.

The High Court dealing with this evidence in its analysis had concluded that the contradictions were due to honest mistakes by the police officers and did not affect the root of the case. The court noted that both officers had ample opportunity to correct their versions and ensure that their statements matched in every respect. No such collusion on the part of the detecting officers is apparent from the evidence before the Court. The court observed further, that human beings are not computers and that it would be dangerous to disbelieve the witness and reject evidence based on small contradictions or discrepancies.

Police officers are not infallible observers and may like any other witness make honest mistakes. However, they differ from eye witnesses generally in that their training and

experience encourages them to be more observant and to focus on detail and there is no reason why this shouldn't be taken into account when assessing the reliability of their evidence (Vide, *R v. Tyler* (1992)96 Cr App R 332(CA) pp.342-3). It is clear that the contradictions in the prosecution case are the product of human error and not due to any dishonest intent. Such slight discrepancies cannot be deemed to affect the probability of the Prosecution case in the totality of the probative value of the evidence presented on behalf of the prosecution.

Furthermore, both sides accept that the police officers are strangers to the Respondent and have no motive to fabricate a case against her. The prosecution witnesses were official witnesses with no personal interest in the arrest of the Respondent. In *Ajith Singh v. State of Panjab* (1982 Cr.L.J 522) the court rightly observed that '*... The significant thing herein is that these official witnesses are not held to have any animus or hostility against the petitioner'.* Unlike in the case of Matilda, both prosecution witnesses are independent and have faced no allegations of a possible motive to present false evidence against the accused.

There is also a general disposition in courts to uphold official, judicial and other acts rather than render them to be inoperative. Illustration D to Section 114 of the Evidence Ordinance contains the presumption that judicial and official acts have been regularly performed or done with due regard to form and procedure (Vide, *Dharmatilake v. Brampy Singho* (1938)40 NLR 497; *Hapuganoralage Menikhamy v. Podi Menika* (1978)79 II NLR 250; *Nishan Singh v. State* AIR 1955 Punj. 65). While the presumption is used sparingly in criminal cases, it will be presumed even in a murder case that a man acting in public capacity has properly discharged his official duties, until the contrary is proven (Vide, *R v. Gordon*, (1789)1 Leach 515).

Finally, with respect to the appreciation of evidence by the Court of Appeal, the Respondent submits that the Court of Appeal examined the productions by placing the

till inside the polythene bag in order to understand the possibility or probability of the evidence which was marked at the trial. Based on the demonstration of evidence conducted by an officer of the court, the Court of Appeal concluded that it was highly improbable that a person transporting Heroin would do so in such a prominent manner. The court therefore favored the Respondent's version that the detection had not in fact taken place at De Vos place as the Appellant suggests but rather that the money alone was recovered from the Respondent's residence in Wattala.

Credibility is a question of fact, not of law. Appellate judges have repeatedly stressed the importance of the trial judges' observations of the demeanor of witnesses in deciding questions of fact (Vide, *R. v. Dhlumayo* (1948)2 SALR 677 (A); *Merchand v. Butler's Furniture Factory* (1963)1 SALR 885). No doubt the Court of Appeal has the power to examine the evidence led before the High Court. However, when they go so far as to conduct a demonstration of the evidence, they observe the material afresh and run the risk of stepping into the role of the original court (Vide, *King v. Endoris* 46 NLR 498; *Alwis v. Piyasena Fernando* 1993 (1) SLR 119; *Fradd v. Brown and Co Ltd*; *Attorney General v. D. Senevirathne* 1982 (1) SLR 302). The trial judge has a unique opportunity to observe evidence in its totality including the demeanor of the witness. Demeanor represents the trial judges' opportunity to observe the witness and his deportment and it is traditionally relied on to give the judges findings of fact their rare degree of inviolability (Vide, Bingham, '*The Judge as Juror*' 1985 p.67).

Lord Loreburn in *Kinloch v. Young* (1911) SC (HL)1 observed that '...this house and other courts of appeal have always to remember that the judge of first instance has had the opportunity of watching the demeanor of witnesses – that he observes, as we cannot observe the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any court of appeal. Even the most minute study by a court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say'.

Similarly, Lord Pearce in *Onnassi v. Vergottis* ((1968)2 Lloyds' R.403) stated that 'one thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial judge has, except on rare occasions, a very great advantage over an appellate court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a court of appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial judge and the court of appeal has not been occasioned by any demeanor of the witnesses or truer atmosphere of the trial (which may have eluded the appellate court) or by any other of those advantages which the trial judge possesses'.

Appellate courts are generally slow to interfere with the decisions of inferior courts on questions of fact or oral testimony. The Privy Council has stated that appellate court should not ordinarily interfere with the trial courts opinion as to the credibility of a witness as the trial judge alone knows the demeanor of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candor or with doubtful plausibility and whether after careful thought or with reckless glibness; and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross examination (Vide, *Valarshak Seth Apcar v. Standard Coal Company Limited* AIR (1943)PC 159). But where the matter is one of inference from evidence, and the evidence is not well balanced the appellate court will set aside the finding of the trial court if it is against the weight of evidence (Vide, *Sris Chandra Nandi v. Rakhalananda* (AIR) 1941 PC 16).

As rightly pointed out by the Appellant in terms of Section 351 (a) of the Code of Criminal Procedure while an appellate court may exercise its discretion to call for the productions, its power is conditional upon it being *necessary or expedient in the interest of justice.* Section 329 of the Code of Criminal Procedure Act stipulates that calling fresh evidence by an appellate court must occur only in very rare instances. Thus according to

the unreported case (No.CA 1161/82 dated 13/09/1989) cited by the Appellant this piece of evidence being available at the stage of the original hearing precludes the Court of Appeal from recalling it as fresh evidence.

Having considered the evidence and testimonies adduced on by both sides, and applying the several tests to determine testimonial creditworthiness, this Court finds that the proximity of the cash to the heroin packets recovered, the scales and the weights are all circumstantial evidence which when taken cumulatively result in a compelling body of evidence having significantly strong probative evidential value on the charge of possession with intent to supply, and proves the case of the prosecution beyond a reasonable doubt.

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 state is not obliged to disprove every speculative scenario consistent with the innocence of an accused– R v. Paul [1977]1 SCR 181.

In view of the facts elicited by the prosecution and indeed the real evidence discovered by the officers conducting the investigation, it cannot be said that the factual conclusion drawn by the trial judge are either unsupported or unreasonable.

This court accordingly allows the Appeal of the appellant, sets aside the judgment of the Court of Appeal dated 30.5.2008 and upholds the conviction and sentence of the High Court dated 19.11.2004. No costs.

The decision of this Court is to be communicated forthwith to the High Court to notice the Respondent and impose the sentence given in the judgment of the High Court dated 19.11.2004.

JUDGE OF THE SUPREME COURT

<u>SRIPAVAN.J</u>

I agree.

JUDGE OF THE SUPREME COURT

<u>IMAM.J</u>

I agree.

JUDGE OF THE SUPREME COURT