

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

**S.C.Appeal :154/10  
C.A.Appeal No.125/08  
H.C.Galle : 2136**

The State  
Complainant

**Vs**

Devunderage Nihal  
Accused

**AND**

Devunderage Nihal  
Accused-Appellant

**Vs**

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

Complainant-Respondent

**AND BETWEEN**

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

Complainant-Respondent-Appellant

**Vs**

Devunderage Nihal

Accused-Appellant-Respondent

**Before :** J.A.N. de Silva CJ,  
Saleem Marsoof J,  
R.K.S.Suresh Chandra J.

**Counsel:** Jayantha Jayasuriya DSG with Shanaka Wijesinghe SSC for  
Complainant-Respondent-Appellant.  
Accused-Appellant-Respondent absent and unrepresented.

**Argued on:** 21<sup>st</sup> March 2011  
Written submissions tendered on 8<sup>th</sup> April 2011 for Complainant-  
Respondent-Appellant.

**Decided on:** 12<sup>th</sup> May 2011

## **R.K.S.Suresh Chandra J,**

This is an appeal from the judgment of the Court of Appeal. The accused was indicted in the High Court of Galle under Section 54(a)(c) of the Opium, Poisons and Dangerous Drugs Act for being in unlawful possession of 9.91 grams of heroin which offence was committed on or about the 27<sup>th</sup> of January 2000. He was found guilty of the offence and was convicted and sentenced to life imprisonment.

The Accused appealed against the said conviction and sentence to the Court of Appeal and the Court of Appeal set aside the conviction and sentence and acquitted him on the ground that only one witness who took part in the raid where the accused was arrested had given evidence. The Attorney General filed an application for Special Leave to Appeal against the judgment of the Court of Appeal and this Court on 28<sup>th</sup> October 2010 granted leave on the following questions of law when the application was supported after notice to the accused who was absent and unrepresented:

7. (a) Is the judgment of the Court of Appeal contrary to law and to the weight of evidence led in the case ?

(b) Did the court of appeal unnecessarily burden the prosecution by holding that in drug related offences where raids are conducted by trained officers, it is fair to require for corroboration?

(c) Did the Court of Appeal err in holding that “where the raids are conducted by trained officers, corroboration is required as it is only then that the defence would have the opportunity to challenge the veracity or the credibility of the prosecution witnesses to contradict the version of the prosecution”?

(d) Did the Court of Appeal misdirect itself and adduce an extra burden on the prosecution by holding that “the prosecution should provide the defense with the opportunity to contradict the version of the prosecution” ?

(e) Has the Court of Appeal drawn an adverse inference and thereby misdirected itself by holding that “the officials conducting raids are more often than not resourceful in strategy and inevitably experienced with lot of ingenuity and cunning.”?

(f) Is the view expressed by the Court of Appeal that “ a witness may bear the stamp of innocence yet he may turn out to be a calculated liar especially so when such witness happens to be a trained senior police officer” a misconception when facts in the instance case are not supportive of such a conception and a contention?

(g) Did the Court of Appeal misdirect itself by holding that “it was a little difficult to understand how the trial judge could be satisfied with the evidence of only one of the main witnesses who really took part in the arrest of the appellant especially in drug related offences where police officers are the key witnesses”?

The prosecution led the evidence of IP Jayamanne who had led the raid. They had proceeded to the location where the accused had been and the accused on seeing the Police approaching him had attempted to run away whereupon IP Jayamanne and PS Punchisoma had chased the accused and apprehended him and on being searched IP Jayamanne had found a parcel containing 18.6 grams of substance which on subsequent analysis by the Government Analyst had revealed the presence of 9.91 grams of heroin. PC Ranasinghe who had been in the team led by IP Jayamanne also gave evidence. The Accused made a dock statement where he admitted being arrested by the Police Officers but denied having in his possession a parcel which contained heroin. No material contradictions or omissions were marked in the evidence of the prosecution.

Since the Accused admitted the arrest by the Police Officers the only question at issue was as to whether he was in possession of a substance containing heroin which was denied by him in his dock statement. The learned High Court Judge was satisfied with the evidence led by the prosecution and found the accused guilty and convicted him.

In the appeal before the Court of Appeal, the Court of Appeal did not fault the judgment of the High Court on any substantive matter as far as the judgment of the High Court was

concerned, as regards the analysis of the evidence and assessment of the evidence, but stated that “It is difficult to understand how a trial judge could be satisfied with the evidence of only one of the main witnesses who really took part in the arrest of the appellant especially in drug related offences where police officers are the key witnesses.”

This observation would be on the premise that in a drug related offence arising from a raid by the police, the prosecution has to corroborate the evidence of any member of the raiding party in order to bring about a conviction. In the present case IP Jayamanne who led the raid and who was mainly responsible in arresting the accused and found heroin in his possession had given evidence and the other Police Officer, Punchisoma, who assisted him in arresting the accused had not been called to give evidence, though he was listed as a witness. This would bring about a situation where in a drug related offence the prosecution has to corroborate the evidence of the main witness or any witness which leads to the arrest of the accused in possession of drugs.

It is a well established principle that the prosecution is not required to lead the evidence of a number of witnesses to prove its case. In a similar case as the present instance, Jayasuriya J in *A.G. v Mohamed Saheeb Mohamed Ismath* C.A.87/97 Decided on 13.7.1999 stated that “There is no requirement in law that evidence of a Police Officer who has conducted an investigation into a charge of illegal possession of heroin, should be corroborated in regard to material particulars emanating from an independent source. Section 134 of Evidence Ordinance states that “No particular number of witnesses shall in any case be required for the proof of any fact. The principle had been applied in the Indian Supreme Court where the conviction rested solely on the evidence of a solitary witness who gave circumstantial evidence in regard to the accused’s liability. The Privy Council upheld the conviction entered by the trial Judge and adopted the Judgment of the supreme court in *Muulluwa v State of Madhya Pradesh* AIR 1976 S.C.198. This principle has been adopted with approval and applied in the judgment of *G.P.S.Silva J. in Wallimunige John v The State* 76 NLR 488. *King v N.S.A. Fernando* 46 NLR 255. The principle affirmed is that testimony must be weighed and not counted. Justice Vaithyalingam dealing with a bribery charge laid down for the future legal fraternity the principle that even in a bribery case, that there is no legal requirement for a sole witness’s evidence to be corroborated. No evidence even of a police officer who conducted a raid upon a bribery charge is required by law to be corroborated. *Gunasekera v A.G.* 79 NLR 348”.

In *Walimunige John v State*, it was stated that “The question whether the failure of the prosecution to call a witness on the back of the indictment could be made the subject of adverse comment by the defense and whether a trial Judge should direct the jury that they are free to draw an adverse inference from the failure to call such a witness are allied questions which are also inextricably bound up with the discretion exercisable to a prosecutor to decide which of the available witnesses he should call for a proper presentation of the case. These two identical questions came up for consideration during the very formative years, as it were, of this Court before *Soertsz J* associated with *Keuneman J* and *de Kretser J* in the case of *King v Chalo Singho* 42 NLR 269. In a characteristically illuminating judgment *Sourtsz J* has examined section 114(f) of the Evidence Ordinance as

well as a large number of Indian and English commentaries and decisions on the question and has laid down with clarity and precision the answers to these questions. This decision has indeed facilitated our task in deciding on the correct approach to this question. It would appear that different Judges had, prior to the establishment of the Court of Criminal Appeal, taken somewhat divergent views as to whether a prosecution should call every witness on the back of the indictment or at least tender for cross-examination those whom he did not call. Consequently, an appropriate occasion arose in this case to review the entire position.

On the question whether a prosecutor is obliged to call all the witnesses on the back of the indictment or at least to tender those not called for cross-examination, that court decided to follow the principle enunciated in *King v Seneviratne* 38 NLR 221 and summed up the decision as follows: "It must, therefore, be regarded as well-established now, that a prosecutor is not bound to call all the witnesses on the indictment, or to tender them for cross-examination. That is a matter in his discretion, but in exceptional circumstances, a Judge might interfere to ask him to call a witness, or to call a witness as a witness of the court. It must, however, be said to the credit of prosecuting counsel today, that if they err at all in this matter, they err on the side of fairness."

The above principle was approved and adopted by the Full Bench of the Supreme Court in *Ajith Fernando and others v the Attorney General* 2004 1 SLR 288.

It would be relevant to consider the position of the evidence given by an accomplice, where according to section 114(b) of the Evidence Ordinance, such evidence is unworthy of credit, unless he is corroborated on material points. In *Beddewela v Albert* 42 NLR 136 it was held that a decoy or a spy is on a different footing from an accomplice so far as the rule of practice regarding corroboration is concerned, but that their evidence should be probed and examined with great care. This principle has been followed in *Lyris Silva v Karunaratne* 48 NLR 110, *Ariyaratne v Food & Prince Control Inspector* 74 NLR 19, *Wickramadasa v The Food and Prince Controller* 78 NLR 3.

Therefore it is quite clear that unlike in the case where an accomplice or a decoy is concerned in any other case there is no requirement in law that the evidence of a Police Officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars. However, caution must be exercised by a trial Judge in evaluating such evidence and arriving at a conclusion against an offender. It cannot be stated as a rule of thumb that the evidence of a police witness in a drug related offence must be corroborated in material particulars where police officers are the key witnesses. If such a proposition were to be accepted it would impose an added burden on the prosecution to call more than one witness on the back of the indictment to prove its case in a drug related offence however satisfactory the evidence of the main police witness would be.

In my view the Court of Appeal erred in setting aside the conviction and sentence of the accused and that of the questions of law 7(a) to (g) referred to above, on which leave was granted by this Court, answering question 7(g) in the affirmative would suffice to dispose of this appeal as the said question encompasses the main issue that was argued in appeal.

In the above circumstances the Judgment of the Court of Appeal is set aside and the judgment of the High Court of convicting the accused and sentencing him for life is affirmed. The High Court is directed to summon the accused and take appropriate steps regarding the said conviction and sentence.

**JUDGE OF THE SUPREME COURT**

**J.A.N.DE SILVA CJ,**

I agree.

**CHIEF JUSTICE OF THE SUPREME COURT**

**SALEEM MARSOOF J,**

I agree.

**JUDGE OF THE SUPREME COURT**