

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

In the matter of an Appeal made under
Section 331(1) of the Code of Criminal
Procedure Act No.15 of 1979 read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

**Court of Appeal Case No.
CA/HCC/ 0351/2019
High Court of Colombo
Case No. HC/6787/2013**

Vidanage Prasanna Indika Perera

Accused-Appellant

vs.

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

Complainant-Respondent

BEFORE : **P. Kumararatnam, J.
K. M. G. H. Kulatunga, J.**

COUNSEL : **Ershan Ariaratnam for the Appellant.
Udara Karunathilake, SSC for the
Respondent.**

ARGUED ON : **06/03/2025**

DECIDED ON : **04/04/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred as the Appellant) was indicted by the Attorney General under Sections 54(A) (b) and 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking and Possession of 3.83 grams of Heroin (Diacetylmorphine) on 22nd of September 2011 in the High Court of Colombo.

Following the trial, the Appellant was acquitted from the first count and found guilty on the second count. The learned High Court Judge of Colombo has imposed a sentence of life imprisonment on 25th of April, 2019.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The learned Counsel for the Appellant informed this court that the Appellant has given consent for this matter to be argued in his absence. During the argument he has been connected via Zoom platform from prison.

The Appellant has raised the following grounds of appeal in this case.

1. Whether the Learned High Court Judge has failed to consider the probability of prosecution version.
2. The Learned High Court Judge has failed to consider the defence version.
3. The prosecution has failed to consider the inward journey.

PW1/SI Gayantha who was attached to the Police Narcotics Bureau, Colombo-01, had received information from his private informant that a person will be engaged in trafficking drugs at the Bambalapitiya Railway Station. He had received this information on 22/09/2011 at 06:25 hours. Having selected 07 other officers to accompany him, they had left the Bureau together and reached the railway station at 07:00 hours. While they were on patrol, at about 09:30 hours the private informant of PW1 had informed them that the stake-out will not be successful.

When the team was about to leave Bambalapitiya, PW9 Mahinda received an information from his private informant that a person called “Badowita Chaminda” is coming to Ramakrishna Road in Wellawatta carrying Heroin to deliver to another person. The informant had told PW9 to go towards the petrol shed situated on Ramakrishna Road. PW1 and PW9 alighted from the van they were travelling in and walked towards the filling station and met the informant. After waiting for some time, the informant had showed them a person wearing a short sleeve shirt and a pair of trousers walking towards Ramakrishna Road. When PW1 and PW9 had checked the said person, they had found a parcel from his trouser pocket with some substance in it, believed to be Heroin. That person being the Appellant in this case was arrested immediately. Thereafter, the team had proceeded to the Police Narcotics Bureau and arrived there at 11:20 hours. At the Police Narcotics Bureau, the weight of the substance was measured to be 10.500 grams and the production was sealed in front of the Appellant. After sealing, the production was handed over to PW7 SI/Rajakaruna under production No.80/2011 on 24.09.2011. Until such time, the said production was kept in the personal locker of PW1.

PW9, PC 9036 Mahinda who received the information was called to corroborate the evidence given by PW1.

PW8 the Government Analyst confirmed that the substance sent for analysis contained 3.83 grams of pure Heroin (Diacetylmorphine).

After closing the case for the prosecution, as the evidence led by the prosecution warranted the presence of a case to be answered by the Appellant, the learned High Court Judge called for the defence. The Appellant gave evidence from the witness box and denied that he possessed Heroin at the time of his arrest.

In every criminal case the burden is on the prosecution to prove the case beyond a reasonable doubt against the accused person. In a case of this nature the prosecution not only need to prove the case beyond a reasonable doubt but should also prove, with cogent evidence that the Appellant had committed the offence.

As the 1st and second grounds of appeal are interconnected, I will consider them jointly hereinafter.

Firstly, the learned Counsel for the Appellant contended that the Learned High Court Judge has failed to consider the probability of the prosecution version.

In the case of **Wickremasuriya v.Dedoleena and others** 1996 [2] SLR 95 Jayasuriya J held that;

“A judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate”

His Lordship further held that;

“If the contradiction is not of that character, the Court ought to accept the evidence of witnesses whose evidence is otherwise cogent, having regard to the Test of Probability and Improbability and having regard to the demeanour and deportment manifested by witnesses. Trivial contradictions which do not touch the core of a party’s case should not be

given much significance, especially when the ‘probabilities factors’ echoes in favour of the version narrated by an applicant”

In Iswari Prasad v. Mohamed Isa 1963 AIR (SC) 1728 at 1734 His Lordship held that;

“In considering whether evidence given by a witness should be accepted or not, the court has to examine whether he is, in fact, an interested witness and to inquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is -whether there is a ring of truth surrounding his testimony.”

Justice Mackenna “Discretion”, The Irish Jurist, Vol. IX (new series), 1 at 10 has said;

“When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to me the more probable, the plaintiff’s or the defendants, and If I cannot say which, I decide the case, as the law requires me to do in defendant’s favour.”

Guided by the above cited judgments and academic literature, now I shall consider the first ground of appeal advanced by the Appellant in this case.

Originally the police team had left for the raid pursuant to an information received by PW1. As it was not successful and when they were about to return, PW9 had received an information that a person named “Badovita Chaminda” is coming to Ramakrishna Road to deliver Heroin to another person. During the trial the witness was not questioned as to whether the Appellant was also known as “Badovita Chaminda”. Even in the indictment this name was not mentioned nor was evidence led to confirm whether the Accused is also known as “Badovita Chaminda”.

The Appellant took up the position that he came in a three-wheeler. According to PW9 the informant had said that the Appellant was coming from

the direction of Dehiwala. Initially the information did not indicate that the Appellant is coming from Dehiwala side. During the cross examination PW9 went on to say that the Appellant is travelling via the flyover. As correctly argued by the learned Counsel for the Appellant, people are not allowed to walk on the flyover, therefore, the position taken by PW9 is highly improbable. Hence, he argues that the defence version is more probable than the prosecution version as only vehicles can be driven on the flyover. Further, it is improbable that a person would come on foot to the Ramakrishna Road, Wellawatta from Badovita.

In the third ground of appeal the Counsel contended that the prosecution has failed to consider the inward journey of the productions.

Proving the chain of production is a very important task for the prosecution in a drug related case. If the investigating officers do not discharge their duty properly, the chain of production can be successfully challenged at the trial. This is because the prosecution always relies on evidence gathered by police officers in cases of this nature.

In **Perera V. Attorney General [1998] 1 Sri.L.R 378** it was held:

“the most important journey is the inward journey because the final analyst report will depend on that”.

In **Witharana Doli Nona v.The Republic of Sri Lanka CA/19/99** His Lordship Justice de Abrew remarked thus;

“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. Prosecution must prove that the productions taken from the accused Appellant was examined by the Government Analyst”

In the above cited judgments, the Court has highlighted the importance of proving the production evidence in a drug related trial.

In this case after the arrest the production which was recovered from the Appellant was held by PW1 until the party went to the Police Narcotics Bureau for weighing the substance. After weighing the production was not handed over to the reserve police officer. Instead, the production was held by PW1 in his personal locker. This I consider is an unusual practice. Once the production is entered in the production register, the same should be handed over to the reserve police officer until it is sent to the Government Analyst Department. According to PW7 CI/Rajakaruna, he had received the production on 24.09.2011 at 09:20 hours from PW1.

Although the production was sent to the Government Analyst through the Magistrate Court of Mount Lavinia under case No. B 2310/2011, when PW7 was giving evidence, he had erroneously mentioned the case No. as B 3370/11. The prosecution has not taken any endeavour to correct the case number. Although the production was handed over to the Government Analyst Department on 30.09.2011, in the Information Book the date was mentioned as 29.09.2011. This contradiction was also not explained by PW7 in his evidence.

It is very important to consider at this stage whether the above-mentioned discrepancy in handling productions in drug related matters cause any reasonable doubt over the prosecution case as claimed by the Appellant. To consider this issue it is very important to discuss the approach adopted by Higher Courts with regard to handling evidence pertaining to productions in drug related matters.

In the case of **Mohamed Nimnaz V. Attorney General CA/95/94** held:

“A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences in relation to drugs, we are

of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions....”

The considered grounds of appeal have merits which certainly disturb the judgment of the learned High Court Judge.

The failure of the witnesses to pass the test of probability and the inter se contradictions of the prosecution witnesses are substantial so as to vitiate the conviction.

Due to the aforesaid reasons, I set aside the conviction and the sentence dated 25/04/2019 imposed on the Appellant by the learned High Court Judge of Colombo. Therefore, he is acquitted from the charge.

Accordingly, the appeal is allowed.

The Registrar of this Court is directed to send this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

K. M. G. H. Kulatunga, J.

I agree.

JUDGE OF THE COURT OF APPEAL