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

*In the matter of an Appeal under and in terms of Section 320 of the Code of Criminal Procedure Act No. 15 of 1979.*

**Court of Appeal No:**

CA/HCC/0088/2022

**High Court of Colombo**

**Case No:** 372/2019

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

1. Latheef Ihusan
2. Shinaz Mohamed

**ACCUSED**

**AND NOW BETWEEN**

Latheef Ihusan

**ACCUSED-APPELLANT**

**Vs.**

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT-RESPONDENT**

| | |
|---|---|
| Before | : Sampath B. Abayakoon, J. |
| | : P. Kumararatnam, J. |
| Counsel | : Shavindra Fernando, P.C. with Mirthula Skandarajah for the Accused-Appellant |
| | : Sudharshana de Silva, S.D.S.G for the Respondent |
| Argued on | : 12-01-2024 |
| Written Submissions | : 25-11-2022 (By the Accused-Appellant) |
| | : 10-01-2023 (By the Complainant-Respondent) |
| Decided on | : 29-04-2024 |

**Sampath B. Abayakoon, J.**

The first accused-appellant (hereinafter referred to as the appellant), along with another, both of whom are Maldivian Nationals were indicted before the High Court of Colombo for committing the following offences.

1. On or about 22-04-2016 at Bambalapitiya, within the jurisdiction of the High Court of Colombo, the 1st accused (the appellant) did commit an offence by possessing 265.31 grams of the dangerous drug Diacetylmorphine, commonly known as Heroin, which is a dangerous drug prohibited to possess in terms of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Amendment Act No. 13 of 1984, and thereby committed an offence punishable in terms of the said Ordinance.
2. At the same time and at the same transaction, the 1st accused committed the offence of trafficking the same quantity of the dangerous drug Diacetylmorphine, commonly known as Heroin, and thereby committed an offence punishable in terms of the said Ordinance.

3. At the same time and at the same transaction as mentioned in the 1st count, the 2nd accused did commit the offence of possessing 69.08 grams of Diacetylmorphine, commonly known as Heroin, which is a dangerous drug prohibited to possess in terms of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Amendment Act No.13 of 1984, and thereby committed an offence punishable in terms of the said Ordinance.
4. At the same time and at the same transaction, the 2nd accused committed the offence of trafficking a dangerous drug, by trafficking the mentioned 69.08 grams of Diacetylmorphine, commonly known as Heroin, and thereby committed an offence punishable in terms of the said Ordinance.

When the indictment was read over to the two accused, both of them, including the appellant have pleaded not guilty to the charges, and after the trial, the learned High Court Judge of Colombo of the judgment dated 11-02-2022, has found the appellant guilty of the 1st and the 2nd count preferred against him. The 2nd accused indicted has been acquitted on the basis that there was insufficient evidence to prove the 3rd and the 4th count preferred against him beyond reasonable doubt.

After having considered mitigatory as well as aggravating circumstances, the learned High Court Judge has sentenced the appellant to life imprisonment on both counts.

Being aggrieved by the said conviction and sentence, the appellant has preferred this appeal.

Before considering the grounds of appeal urged on behalf of the appellant, I find it appropriate to briefly summarize the facts placed before the trial Court by the prosecution and the defence taken up by the accused in the case for better understanding of the judgment.

## Facts in Brief

PW-01 was the officer who led the team that conducted the raid which led to the arrest of the two accused indicted before the High Court.

She was attached to the Police Narcotic Bureau (PNB) and had concluded 14 years of service at the Bureau by the time relevant to this raid. At that time, she had been functioning as the Officer-in-Charge of the Data Coordination section of the South Asian Regional Drug Unit of the PNB.

On 04-04-2016, she has received a written instruction from the Director of the PNB assigning her to investigate about a Maldivian National called Ihusan Latheef, informing that he has arrived in Sri Lanka and is dealing with drugs. She has marked the said letter as P-01 at the trial. Accordingly, having commenced her investigations, she has reported facts to the Magistrate's Court of Negombo as she was of the view that the said Maldivian National may attempt to depart Sri Lanka through the airport with the drugs.

While conducting her investigations, she has received another written instruction from the Director of the PNB on 21-04-2016 informing that along with the earlier mentioned person, two other persons, namely Mohamed Shinaz and Mohamed Fazloon, who also are Maldivian Nationals are involved in drug trafficking and to investigate further. She has been provided with photographs of all three suspects, their passport numbers and some other relevant details. The PW-01 has marked the 2nd letter received from the Director as P-02, and the additional information provided with it as P-02A.

While conducting her investigations in this regard, she has come to know that the person called Mohamed Fazloon has been already in Sri Lanka, but the person called Ihusan Latheef has returned to Maldives, but would be coming back to Sri Lanka on 21-04-2016. This information has been provided to her by Sub-Inspector Weerakkody, whom she assigned to conduct further investigations in this matter.

Since she knew from her experience as a PNB officer that generally, Maldivian Nationals do not bring dangerous drugs to Sri Lanka, but what they do is trafficking dangerous drugs out of Sri Lanka, she has decided not to apprehend the suspect while returning to Sri Lanka, but has directed her Assistant Officers to do surveillance on the said suspect.

Her intention had been to track down the places where the suspects would stay in Sri Lanka and to observe their actions. Although the mentioned Ihusan Latheef has come to Sri Lanka on the mentioned date, the PNB officials have failed to obtain specific information as to where he went on that day. However, on the same night of 21-04-2016, she has come to know that the said suspect Ihusan Latheef is staying at the Pearl City Hotel in Wellawatta. Although she has taken steps to inquire whether the mentioned suspects are carrying dangerous drugs or what their intentions may be, PW-01 has not been able to get specific reliable information on that.

Subsequently, around 17 hours on 22-04-2016, she has received instructions to conduct a raid at the Pearl City Hotel. Accordingly, she has assembled a team of police officers attached to PNB, including another a female officer. After giving them necessary instructions and following the due procedure in that regard, PW-01 has left with her team of officers to conduct the raid.

All of them had been dressed in civilian clothing. She has used a civilian vehicle used by the PNB to travel to the location. Four other officers had travelled in two motor bikes. They have left the PNB at 19.45 hours and had reached the Pearl City Hotel at 20.05 hours and had parked the vehicles they were using at the common vehicle park situated in front of the hotel. Although she has earlier mentioned that the hotel was situated in Wellawatta, in fact, the location of the hotel had been in Bambalapitiya and the hotel was an eight storied building.

After their arrival, two other police officers sent by the Director of the PNB have also come and joined the raiding party. The two officers had come in a three-wheeler. After stationing themselves at the car park, SI Weerakkody who had

contacts with the private informant in relation to the drug deal had contacted him and has come to know that the two suspects they were looking for, namely Ihusan Latheef and Mohomad Shinaz are not in the hotel, and the informant does not know where they went.

Accordingly, PW-01 has decided to wait until they return and search them. By that time, it was about 20.30 hours in the night, and PW-01 had stationed two police officers at the entrance of the hotel from the Bauddhaloka Mawatha and two other officers at the entrance to the hotel from Jayasinghe Edward Road. She has stationed two other officers in the private car park and had instructed two others to do surveillance near the hotel. She has also stationed two officers who were with her near the traffic colour lights close to the entrance from Bauddhaloka Mawatha towards Galle road and Dehiwala area.

After the said arrangement, PW-01, along with IP Subodha, PC-61771 Gunasekara and WPC Thilini has gone inside the hotel and had met the Manager of the hotel at 20.40 hours. She has informed the purpose of their visit to him and had come to know that the said suspects are occupying the room 710 of the hotel.

After having received the assistance of the management of the hotel, PW-01 and the officers accompanying her had waited in the lobby of the hotel pretending that they were there to meet someone. After waiting for nearly an hour, IP Subodha has signaled towards the entrance of the hotel from Bauddhaloka Mawatha, where she had observed the two suspects for whom they were looking for coming towards the hotel. She has observed that the suspect whom she identified as Ihusan Latheef was carrying a tulip bag and having something similar to a box inside the bag.

At the trial, the witness has identified him as the 1st accused indicted, namely the appellant. She has identified the other person who accompanied the appellant as the 2nd accused indicted. The tulip bag the appellant was carrying had markings of a duty-free shop. The PW-01 and her team has confronted the

two persons in the lobby of the hotel and informed them that they were from the PNB and that they would be searched. When the appellant was asked for the bag, he had reluctantly handed it over to PW-01. Inside the bag, there had been a red-coloured box with a Bata mark, and when opened, PW-01 has found two parcels with brown-coloured powder in a transparent polythene cover. Upon inspection, she has determined that the brown-coloured powder contained Heroin.

Accordingly, PW-01 has arrested the appellant. After the arrest, she has found that the person who accompanied him was Shinaz Mohamed, the 2nd accused indicted.

Upon questioning, she has come to know that they were occupying room 710 of the hotel which they already knew. PW-01 and her officers have gone to the 7th floor along with the two suspects and has ordered the 2nd accused to open the room. Initially, he had refused, but later he has taken out the key card from his pocket and had opened the door.

While inside the room, among other things, PW-01 has seen a travelling bag. At that time, she was having the substance recovered from the appellant in her custody. IP Subodha has searched the travelling bag which was a medium sized bag. PW-01 has found the Maldivian National Identity Card belonging to the 2nd accused inside the purse found in the travelling bag. When she opened the outer zipper of the bag, she has found clothes, and after removing the clothes, another zipper has been found towards the bottom of the bag. When IP Subodha has opened the zipper, a parcel covered in a tulip cover between the two handles of the bag has been found. Inside the parcel, PW-01 has found three smaller parcels covered in polythene bags, and a brown-coloured powder has been observed in all three.

Having been satisfied that the travelling bag belongs to the 2nd accused, PW-01 has proceeded to arrest him as well for possessing and trafficking of Heroin.

She has taken charge of the second quantity of the substance found and kept it separately under her custody. The witness has explained the steps she took to keep them separate.

After the arrest of the two suspects, the 2nd accused indicted has settled the hotel charges, and the raiding party has returned to the PNB around 23.05 hours together with the arrested suspects, and the relevant productions that were taken into custody.

The witness has weighed the first two parcels recovered from the custody of the appellant after marking them as L1 and L2 respectively. She has found 624 grams in the parcel marked L1, and 333 grams in the parcel marked L2. The witness has taken steps to mark the three parcels found in the travelling bag belonging to the 2nd accused indicted, as S1, S2 and S3. She has found 72 grams, 96 grams and 129 grams of the substance respectively. Thereafter, she has taken the necessary steps to seal the productions and hand over the productions to the production keeper of the PNB at 6.35 hours on 23-04-2016. She has identified the relevant productions at the trial.

When PW-01 was subjected to cross-examination, it had been suggested to her that she came to know that the two Maldivian Nationals were staying in a hotel named Pearl Garden Hotel situated near the Katunayake Airport. She has denied that suggestion and has stated that they could not follow the 1st accused appellant when he arrived at the airport from overseas and they lost track of him, but only came to know that he came to Colombo via the expressway. She has stated further that since it had been their experience that Maldivian Nationals do not bring drugs into the country, she did not take steps to arrest the appellant when he came to the country.

It clearly appears from the line of cross-examination that the learned Counsel who represented the appellant at the High Court trial has taken a hint from the investigating notes of PW-01, and that was the reason to suggest that the surveillance was done at the Pearl Garden Hotel near the airport, and also the

reason to suggest that the Heroin taken from the said hotel was introduced to the two accused.

The witness has clearly explained her notes stating that their initial information was that the appellant is staying at the Pearl Garden Hotel, which is situated adjacent to the Pearl City Hotel at Bambalapitiya. Later PW-01 and her team has come to know that both the hotels were managed under the same management and the appellant had been staying in the Pearl City Hotel and not in the Pearl Garden Hotel.

PW-01 has been strenuously cross-examined about the CCTV footages that may be available at the hotel and the casino the appellant and the other accused has claimed that they went, apparently in an attempt to establish that the prosecution was hiding something.

The witness has stated that she is telling the truth as to what happened, and she did not obtain CCTV camera footages from the hotel as there was no necessity for her to obtain them.

The prosecution has called the earlier mentioned Police Inspector Subodha, to corroborate the evidence of PW-01. His evidence has been similar to that of PW-01 in relation to the information received, investigations carried out and the arrest of the two accused indicted. He too has denied similar suggestions made to him by the learned Counsel who represented the appellant and the other accused where it had been suggested to him that the Heroin was introduced and no such arrest was made in the manner claimed by the prosecution.

At the trial, the defence has admitted that the productions were in a properly sealed state and the chain of the production. The fact that the productions were handed over to the Government Analyst and the pure quantity of Heroin as mentioned in the Government Analyst Report, and the Report of the Government Analyst has also been admitted. The procedures adopted by the Government Analyst in that regard also has been admitted. The said admissions had been recorded in terms of section 420 of the Code of Criminal Procedure Act. The

Government Analyst Report and the two memorandums issued by the Government Analyst had been marked through the Court Interpreter.

Once the prosecution case was concluded, the learned High Court Judge has decided to call for a defence where the appellant and the 2nd accused has made dock statements, and a witness has also been called on behalf of the appellant.

In his dock statement, the appellant has admitted that he and the 2nd accused were arrested in the reception area of the Pearl City Hotel situated in Bambalapitiya. He has stated that he was arrested when he and the 2nd accused returned from Bally's Casino, and has claimed that he did not have in his possession a Bata shoe box in a tulip bag as stated by the witnesses.

It had been his position that he was questioned about Heroin brought in the previous day, but he denied the allegation. After that, he was taken to the room where he was staying and there was nothing belonging to the 2nd accused in his room.

He has claimed that while they were being questioned, he overheard the PNB officials talking about the Pearl Garden Hotel, which he knew as a hotel situated near the airport frequented by Maldivian Nationals. He has claimed that he came to know that Heroin was detected from the Pearl Garden Hotel, and he believes that the PNB officers thought that he brought Heroin to the country and kept it hidden in the Pearl Garden Hotel, and because of that, he and the 2nd accused was unreasonably arrested and charged in this manner. He has denied any wrongdoing.

The 2nd accused who was later acquitted has stated in his dock statement that his friend, the 1st accused was staying at the Pearl City Hotel situated near the Bambalapitiya junction, and during that time, he was living at his sister's house situated in Dehiwala. He has claimed that his friend left to Maldives suddenly, and told him that he is returning, and to arrange for a room through another friend. He has claimed that on 21-04-2016, he came to know that the appellant

has returned and had come to the Pearl City Hotel, and thereafter, both of them went to Bally's Casino and returned in the night.

He has claimed that the appellant had nothing in his possession, but both of them were arrested at the hotel reception by the PNB officials. Although nothing was found with them, they were arrested and the travelling bag which belongs to the 1st accused was taken by the PNB officials, and they were taken to the PNB. The 2nd accused has admitted that it was he who settled the bill of the hotel. He has claimed that his purse was in his possession when they were arrested and nothing belonging to him was found from the travelling bag of the appellant. He has denied the charges against him.

On behalf of the defence, the Registrar of the Negombo Magistrate's Court has been called to give evidence. It has been suggested to her that a lawyer has made an application on 29-06-2016 for the Court to call for CCTV camera footages of the Pearl City Hotel, which the Registrar has confirmed. It has been suggested to the Registrar that the learned Magistrate has issued summons on the 28-07-2016 to Bally's, which the Registrar has confirmed, and the said summons have been marked as V-01. A letter sent by the learned Magistrate to the University of Colombo has been marked as V-02, where the learned Magistrate has called for a report of a compact disc sent along with the letter to the said university.

After calling the evidence of the Registrar, the defence case has been closed.

**The Grounds of Appeal**

Although several grounds of appeal have been urged in the written submissions filed on behalf of the appellant, the learned President's Counsel who represented him at the hearing of this appeal submitted the following grounds of appeal for the consideration of the Court.

1. The failure of the learned trial Judge to even consider the dock statement of the 2nd accused, which totally corroborate the 1st accused's dock statement which stated that at the time the 1st accused

was arrested, no bag was recovered in his possession. By not considering that as evidence, which was favourable to the accused-appellant, grave prejudice was caused to him rendering the judgment of the High Court Judge fundamentally flawed, and the said fact of not considering the 2nd accused evidence vitiates the conviction.

2. Under the aforesaid circumstances, did the accused-appellant not received a fair trial guaranteed under The Constitution.
3. The dock statement of the accused was rejected unfairly by the learned trial Judge.

It was the position of the learned President's Counsel that the letters marked P-01 and P-02 where PW-01 has received written instructions in relation to the investigation was to the effect to apprehend the suspects mentioned in the letters when they arrive in the country. But according to the evidence, the police did not arrest any suspects as instructed, but has waited in the hotel lobby and had arrested them. It was his position that a doubt arises as to why the investigating officer did not follow the instructions given to her.

The learned President's Counsel also suggested that the best evidence would have been the CCTV footages as to the incident, and not taking steps to obtain the said footages by the prosecution has created a doubt as to the story of the prosecution. It was his view that this failure by the prosecution should be held in favour of the appellant in terms of section 114(f) of the Evidence Ordinance.

The learned President's Counsel found fault with the prosecution for not calling any witness from the hotel where the appellant was arrested, to verify the story of the prosecution. The learned President's Counsel made submissions that the learned High Court Judge's decision not to analyze the dock statement of the 2nd accused who was acquitted of the charges, was an erroneous decision based on a misdirection as to the relevant law. He made extensive submissions to claim that because of this alleged failure to consider the dock statement of the 2nd

accused in favour of the appellant who was the 1st accused indicted, a fair trial has been denied for the appellant.

The learned Senior Deputy Solicitor General (SDSG) submitted several decided cases of our Superior Courts as to the manner in which a dock statement should be considered by a trial Court, and the value that can be attached to it.

He was of the view that a dock statement made by one accused cannot be used against another accused in the same case, either to corroborate or discredit the accused. It was his position that the learned High Court Judge has come to a correct determination in that regard.

In relation to the claim that the CCTV footages had not been obtained by the prosecution, it was his position that the prosecution did not rely on such footage but on evidence available to them in that regard. However, he brought to the notice of the Court that the management of the hotel where the arrest was made has informed the Magistrate's Court that they no longer have the recordings relevant to that day, as it has been removed from the system by an automatic process. He has also explained the controversy as to the Pearl City Hotel and the Pearl Garden Hotel. It was submitted by the learned SDSG that there had been no material contradictions or omissions in relation to the evidence by the prosecution witnesses and there was no reason for the prosecution witnesses to concoct a false story against the appellant and the 2nd accused both of whom are Maldivian nationals.

The learned SDSG moved for the dismissal of the appeal on the basis that the grounds of appeal urged have no merit.

**Consideration of the Grounds of Appeal**

As the three grounds of appeal are interrelated and mainly based on the alleged decision by the learned trial Judge not to consider the dock statement by the 2nd accused indicted, and also on the premise that the dock statement of the

appellant was unfairly rejected, I will now proceed to consider those grounds of appeal together.

I am in no position to agree with the contention of the learned President's Counsel that PW-01, without following the written instructions given to her by the superior officer, has conducted this raid, and therefore, there is a doubt as to the evidence in that regard.

It is clear from the letters marked P-01 and P-02 that the Director of the PNB has communicated the information received by him to PW-01 who was the then Officer-in-Charge of Data Coordination section of the South Asian Regional Drug Unit of PNB. It is clear that by passing this information to her, the Director of the PNB has authorized her to conduct the relevant investigations as she thinks fit.

Being an experienced officer, she has determined that since Maldivian Nationals generally do not bring Heroin into the country, but only take them out of the country, not to apprehend the appellant at the airport, but to have him under police surveillance after his arrival. It is in that process the appellant and the 2nd accused had been apprehended at the lobby of the Pearl City Hotel situated near the Bambalapitiya junction.

The appellant and the 2nd accused indicted has never denied that the arrest was made at the hotel lobby as claimed by the prosecution witnesses. In fact, the appellant and the other accused indicted has admitted the fact that the appellant had been in Sri Lanka but left the country, and had returned on the 21-04-2016 as found out by PW-01 in her investigations. There had been no denial that the appellant was staying at the hotel where the raid took place. There is no denial that PW-01 and her team searched his room after their arrest and took a travelling bag into their custody. There has been no denial, but an admission that after the arrest, the hotel bill was settled by the 2nd accused, who was acquitted after the trial.

The only denial had been to the effect that no Heroin was found in the manner claimed by the prosecution witnesses and the appellant did not carry a bag which contained Heroin, and the travelling bag belongs to the appellant, not to the 2nd accused as claimed.

As I have stated before, it clearly appears that the suggestions made to PW-01 that, in fact, the Heroin was found at a hotel named Pearl Garden Hotel situated near the airport had been based on what the PW-01 has stated in her notes as to a hotel named Pearl Garden, to build up a defence based on her notes and not based on actual facts.

It is trite law that in a criminal case, it is up to the prosecution to prove the case against an accused beyond reasonable doubt and an accused has no burden. It is sufficient for an accused to create a reasonable doubt as to the evidence placed before the Court or to provide a reasonable explanation as to the evidence against him.

In the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148,** it was held:

> "*As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt.*"

In the case of **Narender Kumar Vs. State of Delhi (NCT of Delhi, AIR 2012 SC 2281,** it was held:

> *"Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of the defence. However great the suspicion against the accused and however strong the morel belief and conviction of the Court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for the offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence*

*against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt."*

In the case of **Karunadasa Vs. Officer-in-Charge, Motor Traffic Division, Police Station Nittambuwa (1887) 1 SLR 155**, it was stated by **Perera, J.** that;

*"It is an imperative requirement in a criminal case that the prosecution must be convincing, no matter how weak the defence is, before the Court is entitled to convict on it. It is necessary to borne in mind that the general rule is that the burden is on the prosecution, to prove the guilt of the accused. The prosecution must prove their case apart from any statement made by the accused or any evidence tendered by him. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The rule is based on the principle that every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed."*

In the case of **The Queen Vs. M.G. Sumanasena 66 NLR 350**, it was held:

*"In a criminal case suspicious circumstances do not establish guilt nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence"*

However, it is also well-settled law that a reasonable doubt that needs to be considered in a criminal trial should not be based on fanciful doubts.

In the case of **State of Punjab Vs. Karnail Singh (2003) 11 SCC 271**, it was held:

"*Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape, than punish an innocent. Letting guilty escape is not doing justice according to law. Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an*

*imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. Vague hunches cannot take place of judicial evaluation. 'A Judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties.' (Per Viscount Simon in Stirland Vs. Director of Public Prosecution (1944 AC(PC) 315) quoted in State of U.P. Vs. Anil Singh (AIR 1988 SC 1998). Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.*"

I am unable to find anything suspicious about the PW-01's decision not to strictly follow the instructions given to her in the letter marked P-01. As an investigating officer, it was her duty to determine what would be the best cause of action under the given circumstances. She has determined that no purpose would be served by searching a Maldivian National who is coming into the country as her experience has been to the effect that, what drug traffickers do is take the dangerous drugs out of the country.

Her subsequent steps in relation to the investigations conducted amply demonstrates the investigations and the actions taken by the PW-01 in this regard.

Although the learned President's Counsel submitted that the best evidence would have been the CCTV footages as to the incident, I am not in a position to agree with that contention either. In this case, the prosecution has given best evidence before the Court by calling the officers who were engaged in the raid

and arrested the appellant as well as the other accused indicted. Although the CCTV footages of the incident may have corroborated the incident further, obtaining the CCTV footage was not a requirement in proving the case.

This is a matter where the appellant has admitted that the PW-01 and her team waited for them in the lobby of the hotel and arrested them when they entered the hotel, and the only difference being the PW-01's assertion that he did not have a bag carrying a shoe box containing Heroin.

I am of the view that, that was a matter that needs to be looked at in the totality of the evidence. In my view, the evidence of the prosecution cannot be doubted merely on speculation in that regard. Besides that, it has been submitted to the trial Court that the said CCTV footages were not available when the said footages were requested on behalf of the appellant and the other accused, and the said footages have been deleted under the normal procedures of the hotel management.

I am in no position to hold that fact in favour of the appellant in terms of section 114(f) of Evidence Ordinance.

In the similar manner, I am of the view that since the raid and the arrest has been an admitted fact apart from the claim that the appellant had no drugs in his possession, there was no necessity for the prosecution to call a witness from the hotel management who may have witnessed the incident, since it was not the quantity that matters but the quality of the evidence.

Having made the above observations as to the submissions made by the learned President's Counsel in relation to the other issues raised at the hearing of this appeal, I will now focus my attention to the main grounds of appeal urged on behalf of the appellant.

When called for a defence at the conclusion of the prosecution case, the appellant as well as the second accused indicted has decided to make statements from the dock.

It is well-settled law that a dock statement made by an accused person can be treated as evidence subjected to the infirmities it carries, such as the statement is not a statement made under oath or subjected to the test of cross-examination.

**E.R.S.R Coomaraswamy** in his book, ***The Law of Evidence*****, Volume II (Book 2) at page 528,** having referred to English cases on the subject of the value that can be attached to an unsworn statement before such statements from the dock was abolished in England by section 72 of the Criminal Justice Act of 1982 states;

> "The defendant who made an unsworn statement, instead of giving evidence enjoyed considerable advantages, such as:
>
> a. The absence of cross-examination;
> b. He was not liable to be prosecuted for perjury, since he was not sworn;
> c. He could freely attack prosecution witnesses without any attack on his own character, convictions, and dispositions;
> d. He could incriminate the co-defendant and damage him, since the latter could not give evidence in rebuttal, although the Jury would have been warned to ignore this against the co-defendant.
>
> The English Judges sought to neutralize these advantages as follows:
>
> a. They gave directions to Juries by asking them, "Why did the accused elect to make an unsworn statement? Could it be that he was reluctant to put his evidence to the test of cross-examination? If so, why? He has nothing to fear from unfair questions since he would be protected by his Counsel and by Court.
> b. As will be seen, the Court even went to the extent of stating that the dock statement cannot prove facts not otherwise proved by the evidence and that it is not evidence.

c. They also said that it was not necessary to read out the unsworn statement in the summing-up, if the Jury was reminded of it, and that the Judge need not give the Jury a copy of the statement."

The position in Sri Lanka as to the value that can be attached to a dock statement by an accused was considered in the case of **The Queen Vs. Kularatne (1968) 71 NLR 529.**

The Court referred to **The King Vs. Vellayan Sittambaram (1918) 20 NLR 257** and to **The Queen Vs. Buddharakkita Thero (1962) 63 NLR 433** and expressed their agreement with the view taken in the latter case that the unsworn statement must be treated as evidence subject to its infirmity referred to therein. The Court held that the Jury must be directed that:

a. The statement must be looked upon as evidence, subject to the infirmity that the accused had deliberately refrained from giving testimony, and therefore, was not subject to an oath or cross-examination;
b. If they believe the unsworn statement, it must be acted upon;
c. If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed; and that it should not be used against another accused.

In the case of **Srilal de Silva and Another Vs. The Republic of Sri Lanka (1988)1 SLR 299**, it was held:

1. *The evidence led of the contents of the information was hearsay evidence and could not be used to infer knowledge on the part of the first accused.*
2. *An unsworn statement made by an accused from the dock (dock statement) should not be used against another accused in the same case.*

In the case under appeal, the main contention by the learned President's Counsel was that the dock statement made by the 2nd accused indicted was not considered by the learned trial Judge in favour of the appellant to determine that it favours the version of events narrated by the appellant in his dock statement.

It is my considered view that a dock statement given the infirmities it carries cannot be considered either in favour of a co-accused or against him. That has been the consistent view expressed by our Superior Courts as to the weight that can be attached to a dock statement.

The case of **Rex Vs. Liyanage Simeion (1949) 40 C.L.W, 6** was a case decided on the same point. This was a case where two accused were charged with murder of a person on whose body was found with several incised injuries, only one being fatal, and the first accused was convicted of the charge, while the second was acquitted by the jury, and there was no evidence to eliminate the fact that the second accused may have caused the fatal injury.

**Held:**

1. *That the offence committed by the 1st accused was one of attempted murder.*
2. *That the statement made by an accused person from the dock cannot be taken into account in considering the case against his co-accused.*

For the reasons considered as above, I find no basis to find fault with the learned High Court Judge in his decision to consider the dock statement made by the 2nd accused-appellant only if it becomes necessary in relation to the charges preferred against him. I find that the learned High Court Judge has well analyzed the evidence of the prosecution and the stand taken by the appellant in the judgment.

In fact, even if the learned High Court Judge considered the dock statement of the 2nd accused, it would not have made any difference to the determinations of the learned High Court Judge. The learned High Court Judge has considered the evidence placed before the Court by the prosecution against the 2nd accused indicted and has come to a firm finding that the prosecution has failed to prove that the 2nd accused had the knowledge of the quantity of Heroin recovered from the room, and the prosecution has failed to prove that the 2nd accused had the conscious possession of Heroin.

The learned High Court Judge has decided to acquit the 2nd accused on that basis. It becomes necessary for the learned High Court Judge to consider the defence taken up by the 2nd accused if he finds that the prosecution has established a strong *prima facie* case against the 2nd accused in order to determine whether the 2nd accused has created a reasonable doubt or has provided a reasonable explanation as to the facts against him. Since there was no determination that a strong *prima facie* case has been established against him, I find that the learned High Court Judge has correctly determined that it would not be necessary for him to analyze the dock statement made by the 2nd accused indicted.

I find no merit in the argument that the said decision has denied a fair trial towards the appellant.

The next matter that needs the attention of this Court is whether it can be stated that the learned High Court Judge has rejected the dock statement of the appellant unfairly as claimed in the 3rd ground of appeal argued before this Court.

The judgment of the learned High Court Judge amply demonstrates that the dock statement has been considered along with evidence placed before the Court and also the stand taken on behalf of the appellant when the relevant prosecution witnesses were giving evidence.

The learned High Court Judge has considered the claim about PNB officials discovering Heroin from a hotel called Peral Garden Hotel at Katunayake and whether such a contention has any probability, and has rightly concluded the probable reasons behind such a contention by the accused in the case. It has also been considered whether the alleged failure by the prosecuting authority to lead CCTV camera footage evidence in its correct perspective in order to come to a firm finding has created a doubt as to the prosecution case.

It was only after analyzing the evidence in its totality, the learned High Court Judge has come to a finding that the 1st and the 2nd count preferred against

the appellant has been proved beyond reasonable doubt on the basis that the appellant had in his exclusive possession, the quantity of Heroin mentioned in the 1st and the 2nd count.

Having considered the gross weight of the substance found and the pure quantity of Heroin which amounts to 265.31 grams, the learned High Court Judge has correctly determined that this was not a user quantity and anyone who possesses such a quantity, it should be for trafficking purposes, for which I find no reason to disagree.

Accordingly, the appeal is dismissed for want of merit. The conviction and the sentence dated 11-02-2022 is affirmed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal