

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

In the matter of an appeal made in terms of Section 331 of the Code of Criminal Procedure Act No.15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Court of Appeal**

**Case No:**

**CA HCC-363/17**

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

**Complainant**

**HC Colombo case No:**

**HC 7661/2014**

-Vs-

Loku Naramgodage Chaminda Jagath

**Respondent**

**And Now Between**

Loku Naramgodage Chaminda Jagath

**Accused-Appellant**

**Vs**

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

**Before** : K.K.Wickramasinghe,J  
Devika Abeyratne,J

**Counsel** : N.Jayasinghe for the Accused-Appellant  
Rohantha Abeysuriya ASG for the AG

**Written Submissions On** : 05.06.2018 (by the Accused-Appellant)  
20.07.2018 (by the Respondent)  
17.08.2020( by the Respondent)

**Argument On** : 02.07.2020, 10.07.2020, 15.07.2020,  
17.07.2020 and 30.07.2020

**Judgement On** : 10.09.2020

**Devika Abeyratne,J**

The accused-appellant was indicted in the High Court of *Colombo* on two counts,for trafficking in 147 grams of heroin and at the same time , place and in the same transaction for being in possession of 147 grams of heroin on 10.06.2013, which are offences punishable under Sec 54 A (d) and 54 A (b) of the Poisons,

Opium and Dangerous Drugs Ordinance as amended by act No 13 of 1984.

The accused pleaded not guilty and after trial the learned High Court Judge by judgment dated 20.11.2017 found the appellant guilty of the two charges and sentenced him to death. Aggrieved by the said judgment the accused appellant (hereinafter sometimes referred to as the appellant) has preferred this appeal.

At the appeal the following grounds of appeal were submitted on behalf of the appellant.

1. Learned High Court Judge had failed to take into consideration the serious contradictory positions taken up by the two main witnesses who participated in the raid namely PW 01 and PW 11- Test of credibility.
2. Learned High Court Judge had failed to apply the test of probability in the correct prospect.
3. Learned High Court Judge had failed to take into consideration that the prosecution had failed to prove the chain of productions.
4. Learned High Court Judge had refused the defence evidence on unreasonable grounds.

The facts pertaining to this case *albeit* briefly are as follows;

The prosecution relied mainly on the evidence of PW 1 SI *Nalawansa* and PW 11 PS *Terence* with regard to the raid and the detection of heroin in the possession of the appellant.

The evidence of SI *Nalawansa* the Officer-In-Charge of the crimes division of the *Mount Lavinia* Police is that he received information from an informant at 3.00 am on 10.06.2013 that a three wheeler transporting heroin was due to arrive in *Aththidiya Perakum Mawatha*. This information is based on an ongoing investigation. He has left the police station after searching the six officers and the vehicle and had reached *Perakum Mawatha* in *Aththidiya* by about 3.30 am and was at that point for about 3 hours till about 6.30 am and then left to *Upananda Mawatha* where they were waiting in anticipation for the three wheeler .

The green coloured three wheeler bearing registered No WP-GU 7462 that came around 8.30 am on *Perakum Mawatha* was identified as the three wheeler they were waiting for, was followed by this team for a distance of about three and a half kilometers for about 45 minutes on several roads without drawing the attention of the three wheeler driver. When the three wheeler was stopping on the 16<sup>th</sup> lane on *Embillawatte* road at about 8.45 am (pg 108), the officers have alighted from the police vehicle and quickly walked to the three wheeler and confronted the driver and taken him in to custody who was about to enter his house carrying a bag. After searching, the police found 4 parcels containing heroin inside

the bag that had the name *Arjuna Jewellers*. After the house of the suspect was searched, the three wheeler has been driven away by officer PC 77489 *Sampath* to the *Mount Lavinia* police station and the accused-appellant was brought to the Police Narcotics Bureau where the heroin was weighed, packed and his left thumb impression was placed on the parcel.

The officer PW 12 Police Sergeant *Jayathillake* who gave evidence for the prosecution who was at the Police Narcotics Bureau reserve that morning has facilitated the machine to weigh the heroin and the cellophane bags to put the heroin but had not participated in any other way.

After having tea there, the officers have left the Police Narcotics Bureau together with the sealed heroin back to *Aththidiya Perakum Mawatha* and the 16<sup>th</sup> lane on *Embillawatte* road to look for the main Suspect (ප්‍රධාන සැකකරු) without success and have returned to the *Mount Lavinia* police station around 23.30 on 10.06.2013 and handed over the suspect and the sealed production to the reserve officer *Manjula Jayasekera* PW 7 on 11.06.2013 at 2.05 under receipt no. 147/13 and 148/13, 149/3,150/13 , 151/13, 152/13 and 153/13.

PW 7 has accepted the production and the suspect and had handed over same on the 11<sup>th</sup> at 6.08 am to PW 9, PC 74775 *Rajapakse* , and he, at 7.43 has handed over same to PC 13578

*Rajapakse* who in return has handed it over to PW 11, PS 41026 Terence who has collected the production entered notes in IB page 47 paragraph 470 in GCBRI 320/63 and finally has handed over to the production clerk of the *Nugegoda* courts *A.D Perera*.

The prosecution led the evidence of the Government Analyst and other witnesses who were involved with the custody of the production. The Government Analyst has testified that the seals were untampered at the time of arrival at the Government Analyst Department. The evidence of PW 1 and PW 11 with regard to the production is corroborated.

The accused-appellant denied that he was arrested as described by the prosecution witnesses. His position was described in the dock statement that some officers from the *Mount Lavinia* Police (PW 1 was not a participant) came around 3.30 in the morning and took him, the wife and her daughter together with the three wheeler to the police station and kept the wife and the daughter for a day and released them, and filed action against him and he is innocent of this offence.

It is to be mentioned here that the person he refers to as his wife *G.Nishanthi Gunawardhane* is not his legal wife, but a married woman with a daughter.( the appellant has left his legal wife) *Nishanthi* is from *Batovita* who was selling rice packets when she met the accused with whom she has been living for about 2

years when he was arrested. They have lived in her house in *Batovita* initially, and about six months prior to the incident, have been renting the downstairs of the house on the 16<sup>th</sup> lane where the appellant was arrested. *Nishanthi's* daughter *Kandage Nilakshi Sandarekha* and *Nishanthi's* sister *Duriyangodage Krishanthi Gunawardhane* have given evidence for the appellant.

The following facts were contended as regards the improbability of the version of the prosecution. That PW 1 who alleges that he received the information at 3.00 am could not have left the police station at 3.00 am itself as he has stated that he searched the six officers and the vehicle before leaving and arriving at *Perakum Mawatha* around 6.20 or 6.30 am; the out entry does not reflect the information received ; as per the information received the number of the three wheeler, the colour or the time of arrival was not mentioned therefore doubt as to how the particular three wheeler was identified; PW 1's evidence being that they first proceeded to *Perakum Mawatha* and after waiting there for a few hours, proceeding to *Upananda Mawatha*, which is not corroborated by PW 11, as he mentions going to *Upananda Mawatha* straight away is contradictory; how a police jeep could have followed the three wheeler for 45 minutes without being noticed and arousing suspicion and therefore, prosecution version not being plausible.

In the above backdrop I will venture to consider the grounds of appeal as urged by the counsel for the appellant.



It is trite law that there is no requirement that the evidence of a police officer who conducted an investigation/ raid need to be corroborated in material particulars. (*Attorney General vs Devundarage Nihal S.C. Appeal 154/100 (C.A.87/97 A.G Vs Mohamed Saheed)*) decided on 13.07.1999.

In the instant case PW 11 who was the driver of the vehicle used in the raid and the officer who handed over the production to the *Nugegoda* Magistrate's Court has been called to corroborate the evidence of PW 1.

SI *Nalawansa* who conducted the raid has clearly evidenced that this raid is pursuant to an investigation that was going on for sometime. In his evidence in chief he has stated that as the information was received at 3.00 am, he searched the officers and the vehicle and left at 3 am, which created a doubt as contended by the counsel for the appellant as one cannot get information and leave at the same time as evidenced by PW1. This point has not been clarified at the trial court. However, at no point has PW 1 stated that the search was not done and no suggestion to that effect had been made by the defence either. It is also to be considered that it will not take a very long time to search an officer at that time in the morning, even if the officers were just frisked. Further, there was no allegation of the drugs being introduced by the police in the instant case. As the roads are presumed to be clear in the morning it can be assumed that they reached *Aththidiya* at about 3.20 am.



It has been noticed in the proceedings that both the prosecutor and the defence counsel have, when an answer is given referring to a particular time by a witness, the counsel leads or suggests the question changing the time that was given in the answer. For example when answer was given that they reached *Perakum Mawatha* at 6.20 the question starts with, at "6.30". Likewise when the answer given in reaching the 16<sup>th</sup> lane is 08.45 am , the question changes the time to "9.00" am, and the witness is led on that time.

In that particular instance, it was suggested that the notes were written by PW 1 at 9.15, after searching the house on the 16<sup>th</sup> lane, and suggestion was made that it could not have been, when considering the fact the witness stating that it had taken about half an hour to search the house. It is clear that this is somewhat misleading the witness.

Although they may seem trivial on the surface, when the evidence relating to time is considered to assess the credibility of the evidence, the counsel have to be mindful of these facts, otherwise it will mislead the witness. In my opinion these are instances that the trial judges should be on alert.

With regard to leaving the police station for the raid, PW 11 has said they were on standby to go out for a search and on the receipt of information to PW 1, they left at 3.00 am. The contention

that this fact establishes that there was no information received from an informant is not tenable.

Although it is correct that there is no narration as such of all the details of the information received by PW 1 regarding the vehicle colour, number and time of arrival he has answered the prosecutors question without any hesitation providing the information received which led to this raid. There was no doubt created about receiving information as PW 1 has reiterated that this raid was pursuant to an ongoing investigation and PW 11's evidence has corroborated this evidence.

PW 11 gave evidence how PW 1 identified the three wheeler when it came on *Perakum Mawatha* and directed him to follow it. He explained how he drove the jeep keeping a distance of about 100 meters and falling back when the traffic was less. This attempt was to avoid attention and not to create suspicion of the three wheeler driver.

PW 11's evidence corroborated the evidence of PW 1 on some material points ,such as being stationed at *Upananda Mawatha*, sighting of the three wheeler, following it, proceeding to 16<sup>th</sup> lane, then observing the arrested accused together with the production, proceeding to Police Narcotics Bureau to weigh the production, and then going back to *Aththidiya* and later *Embillawatthe Road*

and waiting in anticipation of the main suspect and then returning to the Police station in the night.

He too has made notes pertaining to his role in the raid. He at several points has stated that he just followed instructions of PW 1 who was directing him to proceed from place to place and he cannot remember all the details of the roads he travelled that day. Merely because he did not mention being on *Perakum Mawatha*, before going to *Upananda Mawatha*, it cannot be considered that there is contradictory evidence of PW 1 and PW 11 on this point.

The Learned Trial Judge has considered that PW 11 has not mentioned about waiting at *Perakum Mawatha* before proceeding to *Upananda Mawatha*. He has concluded that when the three wheeler was sighted, that both PW 1 and PW 11 have evidenced that the vehicle was stationed at *Upananda Mawatha*. What is relevant and material is where the vehicle was stationed when the three wheeler was sighted.

The learned judge has analysed and assessed the evidence, being careful and cautious to consider the evidence of PW 1 and PW 11 when there are alleged discrepancies which were pointed out in cross examination and has given plausible reasons for arriving at his conclusion in pages 16, 17, 18 ( pages 525 to 527 of the brief) of the judgment.

The learned DSG in page 7 of the Written Submission has referred to the following authorities for consideration of the Court.

***Attorney General V. Sandanam Pitchi Mary Theresa*** (2011) 2 SLR 292, *Shiraanee Tilakawardane*, J. held (at page 303) that whilst internal contradictions or discrepancies would ordinary affect the trustworthiness of the witness' statement, it is well established that the Court must exercise its judgment on the nature and 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, *Bogm Bhai Hirji Bhai V. State of Gujarat*- AIR (1983) SC 753.)

***Sunil V. Attorney-General*** (1999) 3 SLR 191 cited the case of *State of Uttar Pradesh V. Attorney*-1985 AIR SC 48 ".....the witness should not be disbelieved on account of trivial discrepancies especially where it is established that there is substantial reproduction in the testimony of the witness in relation to his evidence before the Magistrate or in the session Court and that minor variation in language used by witness should not justify the total rejection of his evidence."

In the light of the above authorities also it can be concluded that the reasoning of the High Court Judge cannot be faulted in

the assessing of the evidence of PW 1 and PW 11, with which conclusion this Court agree.

There was much debate about where the police vehicle was stationed and how *Perakum Mawatha* and *Upananda Mawatha* were situated and whether the alleged arrival of the three wheeler on *Perakum Mawatha* could have been observed by the prosecution witnesses.

PW 1 has evidenced regarding the position of the *Upananda Mawatha* in the following manner.

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ප්‍ර : එතකොට තමන් කියට ද මුල් අවස්ථාවේ දී ත්‍රිරෝද රථය දැක්කේ

පි : පැය 8.30 ට පමණ.

ප්‍ර : 8.30 ට මේ රථය දකින විට තමන් කොහේද හිටියේ?

පි : අන්තිමය පැරකුම් මාවත හන්දියේ.

ප්‍ර : මොන පාර ත්‍රිරෝද රථයක්ද තිබුණේ ?

පි : කොළ පාර ත්‍රිරෝද රථයක්.

ප්‍ර : එහි අංකය තමන් නිරීක්ෂණය කළාද?

පි : එහෙමයි.

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ප්‍ර : එහෙනම් මහත්මයා කලින් කිවුවේ පැරකුම් මාවතේ කියලා?

පි : පැරකුම් මාවතේ වෙනත් මාර්ගයකින් ඇවිල්ලා සම්බන්ධ වෙන්නෙ.

ප්‍ර : දැන් මහත්මයා කලින් කිවුවානේ ඔහු ඉන්නකොට ත්‍රිරෝද රථය ආවේ පැරකුම් මාවතේ කියල. ඒකද ඇත්ත. ඔය අත්තිඩිය අර බොරලැස්ගමුව ඒ පාරෙන් ආව කියන එකද හරි?

පි : උතුමාණනි. පැරකුම් මාවතේ ඉඳලා අත්තිඩිය ප්‍රධාන පාරට වැටිලා එනනින් තමයි උපනන්ද මාවත තියෙන්නේ.

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ප්‍ර : ඔය ත්‍රිරෝද රථය ආවේ මහත්මයා කලින් පැය දෙකක්ද තුනක්ද හතර කරන් හිටිය පැරකුම් මාවතේ ඉදන්නෙ?

පි : එහෙමයි.

ප්‍ර : දැන් මහත්මයා ඉන්නේ උපනන්ද මාවතේනෙ?

පි : එහෙමයි.

ප්‍ර : උපනන්ද මාවතේ ඉන්නකොට පැරකුම් මාවත පේනවාද?

පි : පේනවා.

ප්‍ර : මහත්මයා දැන් කලින් කිවුවානෙ කිලෝ මීටර් 1/2 ක් විතර තියෙනවා කියල?

පි : පාර දිග තියෙනවා කිලෝ මීටර් 1/2 කටත් වැඩිය.

The evidence elicits that *Perakum Mawatha* and *Upananda Mawatha* are situated close to each other and that the three wheeler could have been sighted from where the Police vehicle was stationed as evidenced by PW 1 and PW 11.

The Counsel for the appellant's position is that *Perakum Mawatha* is ½ Km away from *Upananda Mawatha*. But on a perusal of the evidence it appears that the length of *Perakum Mwatha* is what has been referred to as ½ km in length.

Considering all of the above, the ground of appeal urged about the failure of the learned High Court Judge to consider the contradictions in the evidence of PW 1 and PW 11 is not tenable.

Another ground urged by the counsel is that the learned High Court Judge has failed to consider that the prosecution has failed to prove the chain of production.

PW 1 testified that the appellant was taken in to custody together with the production at about 9 am. PW 11 has not witnessed the actual arrest as he was in the vehicle but a few moments later has witnessed that the suspect had been taken in to custody. It is corroborated about the weighing, packeting and sealing of the production at the Police Narcotics Bureau. PW 12 *Jayathillake* at the Police Narcotics Bureau although not actively participated had corroborated the above.

The production thereafter, has been in the custody of PW 1 until his return to the *Mount Lavinia* police station in the night and handing over same to PW 7 *Manjula* who testified to the receipt of same. Thereafter, it has changed hands to PW 8, PC *Indrasiri*, PC 13578 *Rajapakse* who has handed it over to PW 11, then to the production clerk and then to the Government Analyst Department, where there is



evidence that the production arrived untampered. Thus, I am of the view that there is no merit in that ground of appeal.

It was also submitted for the appellant that the defence evidence has been rejected on unreasonable grounds. In the judgment, pages 22 to 32 refer to the case of the defence where the learned High Court Judge has very carefully assessed the evidence of the accused and the three witnesses who gave evidence on his behalf.

In the Dock statement the appellant has stated that he was assaulted by the police who came to his house at 3.30 in the morning. But the prosecution witnesses were not confronted with this position. The appellant has not denied the evidence that his finger prints were on the production and he has not challenged the evidence. Therefore, no explanation from him how this fingerprints are on the production. His evidence has been that the police took the three of them together with the three wheeler and the following day released the wife and daughter and that he is innocent.

When cross examining PW 1, it was suggested that the police had kept the key to the house of the accused for a few days. (in page 149 of the brief) However, it has not been proved and it does not corroborate with other evidence of the defence witnesses. Witness *Nishanthi* testified that the house was not searched when they were taken away and nothing was mentioned about the police keeping their house key from the other witnesses.

On a perusal of the evidence for the defence it is apparent that the evidence of the defence witnesses has not affected the case for the prosecution. The Learned High Court Judge has adequately considered the evidence and the position taken by the defence that it has been rejected on unreasonable grounds is not tenable.

When considering the totality of the evidence of the prosecution witnesses, there is consistent evidence and no material discrepancies have emerged. The probability factor of the prosecution witnesses have not been affected by the cross examination or the evidence led on behalf of the accused.

In the circumstances, I see no merit in the appeal and there is no reason to interfere in the conviction or the sentence. Therefore, I affirm the conviction and the sentence. Accordingly, the appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

**K.K.Wickremasinghe,J**

I Agree

**JUDGE OF THE COURT OF APPEAL**