

**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 No:
CA/HCC/0047/2021

Opatha Kankanamge Hemantha

High Court of Colombo
Case No: HC/8435/2016

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL : **Isuru Jayawardane for the Appellant.**
Wasantha Perera, DSG for the Respondent.

ARGUED ON : **16/05/2025**

DECIDED ON : **27/06/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Colombo 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 the trafficking and possession of 2.18 grams of Heroin (diacetylmorphine) on 11th March 2015.

Following the conclusion of the trial, the Appellant was found guilty only under the second count and the learned High Court Judge of Colombo sentenced him to life imprisonment on 06/08/2021.

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 his consent to argue this matter in his absence. At the hearing, the Appellant was connected via Zoom platform from prison.

The following Grounds of Appeal were raised on behalf of the Appellant.

1. Whether the prosecution proved the case beyond a reasonable doubt.

Background of the case albeit briefly is as follows:

In this case, the Appellant was arrested by the Prison Officers attached to the Welikada Prison. According to PW4 - Prison Officer Bernard, he was given instructions by the Chief Jailer to search Ward A3, Room No.49 of the Welikada Prison. He had checked four prisoners inside Room No.49. During the search, a pink-coloured cellophane cover was recovered from the Appellant's waist. When PW4 opened the parcel, he had found 19 white coloured cellophane covers with substances suspected to be Heroin inside them. As per instructions, PW4 had sealed and handed them over to Jailer Upul Chaminda at the Disciplinary Section. Although the Police Narcotics Bureau was informed on the date of detection, the officers from the Police Narcotics Bureau arrived at the prison only on 04.01.2021. They had arrested the Appellant and escorted him to the Police Narcotics Bureau.

The Appellant had given evidence from the witness box and had taken up the position that he was never in possession of Heroin and the Heroin recovered from another person was planted on him by the Prison Officer. He claims that the Prisons Officers were hostile towards him as he had recently conducted a hunger strike in the prison. The Appellant was a serving prisoner at the time of the detection.

In every criminal case the burden is on the prosecution to prove the case beyond a reasonable doubt against the accused person and this burden only shifts in specific circumstances. Hence an accused person has no burden to prove his case unless he pleads a general or a special exception given under the Penal Code.

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....”

In **the Attorney-General v. Rawther** 25 NLR 385, Ennis, J. states thus: [1987} 1 SLR 155

“The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt”.

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

“the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, “of course it is

possible, but not in the least probable,” the case is proved beyond reasonable doubt, but nothing short of that will suffice”.

The role of probability is pivotal in persuading the judge on specific points, as higher probabilities increase the likelihood of the judge being convinced. Therefore, probability plays a crucial role in criminal investigations, aiding in the evaluation of the relevance of different types of evidence. In order to accuse someone "beyond reasonable doubt," it is essential to possess substantial evidence. To achieve this, certain assumptions must be made to draw conclusions. The likelihood of these assumptions being accurate is precisely termed the principle of probability in legal contexts.

Weighing is one of the first steps in an investigation process and has a strong bearing on the final results. In this case the detection was done by a prison officer. According to his evidence after the detection he had simply sealed the contraband without weighing it. This is significant, as the investigation team from the Police Narcotics Bureau had only arrived at the Prison premises on 04.01.2011, five days after the said detection took place. According to PW4, usually, officers from the Narcotics Bureau arrive at least two days following the detection.

In all drug related investigations, the first step taken by the investigation agency after the detection of suspected drugs is to weigh the substance recovered from the suspect. As stated above this is not only a fundamental step but also a very crucial step. The accuracy and the integrity of the production need to be proved beyond a reasonable doubt.

Contradictions, inter se or per se can affect the outcome of a case gravely.

In the case of **AG v. Sandanam Pitchai Mary Theresa** (2011) 2 Sri L.R. 292 the court held that:

“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 of the inconsistency or contradiction and should consider whether they are material to the fact in issue”.

In the case of **K. Padmathilaka alias Sergeant Elpitiya v. The Director General of Commission to Investigate Allegation of Bribery and Corruption** [2010] BLR 67 the court held that:

“Credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the judge. When witness makes an inconsistent statement in their evidence either at one stage or two stages, the testimony of such witness is unreliable.....It is a cardinal principle that unreliable evidence cannot be rendered credible, simply because there is some corroboration material”.

According to PW4, he was only involved in the raid and subsequently, in the sealing of the productions. He had categorically stated that he did not get involved in any of the activities that followed. But a contradictory position was taken by PW1 who had come from the Police Narcotics Bureau. According to him the production was weighed by PW4 and PW5 on the 4th of January. As argued by the Counsel for the Appellant this raises a significant doubt regarding the prosecution’s case.

According to PW4, the raid was conducted on 29th December 2011 and the officers from the Narcotics Bureau came to the Welikada Prison on the following day and recorded his statement. But according to PW1, they had

only received a telephone call from Prison on 04th of January 2012 about the apprehension of an inmate with Heroin. PW1 with PC 22363 Priyantha had visited the prison and conducted the investigations on the same date. This raises a very serious doubt regarding the date of detection. Considering the circumstances of this case, the highlighted contradictions above are very significant and sufficient to affect the core of the case.

The profound duty of the trial court is to consider the evidence placed before it by the prosecution and the defence on equal footings to arrive at its finding.

In **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

“A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done”.

In this case the raid was conducted by the prison officers. The substance was not weighed at the time of sealing by PW4. Further, prosecution witnesses had taken differing views with regard to weighing of the production. Further, it is not clear as to when officers from the Police Narcotics Bureau had received the information. If the Learned Trial Judge had examined the evidence presented from the correct perspective, he would have been inclined to accept the testimony provided by the Appellant.

As the prosecution had failed in its duty to prove this case beyond a reasonable doubt, I hereby set aside the conviction and sentence imposed by the Learned High Court Judge of Colombo dated 06/08/2021 on the Appellant. Therefore, he is acquitted from this case.

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

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL