

**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/0074/2022**

Mohammad Niaz Mohammad Imtiaz  
alias Amuz

**High Court of Colombo  
Case No: HC/8065/2015**

**Accused-Appellant**

**Vs.**

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

**Complainant-Respondent**

**BEFORE : Sampath B. Abayakoon, J.  
P.Kumararatnam,J.**

**COUNSEL** : **U.R.De Silva, PC with Hiruni Ruberu and Malki Hennadige for the Appellant.**  
**Wasantha Perera, DSG for the Respondent.**

**ARGUED ON** : **26/01/2024**

**DECIDED ON** : **13/05/2024**

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**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 Trafficking and Possession of 3.17 grams of Heroin (diacetylmorphine) on 11<sup>th</sup> March 2015.

After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colomb imposed life imprisonment on both counts on 20/07/2021.

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 due to the Covid

19 pandemic. 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. Learned High Court Judge had not adequately considered the probability of the story narrated by the prosecution.
2. Learned High Court Judge had shifted the burden on the Appellant to prove his innocence.

In this case, the raid was conducted with a specific information received. The raid was headed by PW1 with seven male and one female police officer from the Colombo Crime Division, Colombo-09. Each of them including the Government Analyst has been named as witnesses in the indictment. The prosecution had called PW1, PW3, PW9, and PW14 and marked productions P1 to P9 in support of their case. The Government Analyst's qualifications were admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979.

When the defence was called, the Appellant had made a dock statement and closed the defence case.

**Background of the case.**

On 11/03/2015 PW1 IP/Chandana attached to the Colombo Crime Division had received information from his personal informer that the Appellant was coming from Seevalipura to Gimhana Restaurant Dematagoda with Heroin. He had received the information at about 21.10 hours and the raiding party had left the Colombo Crime Division within five minutes i.e. 21.15 hours and had come near Gimhana Restaurant and waited in anticipation of arrival of the Appellant. According to PW1, the informant had given the description of the Appellant and the dress he was wearing. As per the description, the Appellant had walked towards the restaurant and was arrested by the police team headed by PW1. Upon search, a cellophane bag with some substance was recovered from his right-side trouser pocket. Upon the substances in

the parcel recovered from the Appellant reacted for Heroin (diacetylmorphine), he was arrested at 21.55 hours and subjected to further investigation. As the investigation revealed that his house was situated in Uswetakeiyawa, the police party had gone to the Appellant's house and did a search but not successful in recovering any illegal substance. On the way the police party went to the Cargill's Food City, Peliyagoda Branch and weighed the substance which showed 8.120 grams with the envelope used for temporary safekeeping.

Thereafter, the police party had returned to the station at 23.30 hours, sealed the production, entered the same under PR No. 22/15 and handed over the Appellant and the production to PW9 who was the reserve duty officer at that time.

Thereafter, PW3 was called to give evidence to corroborate the evidence of PW1 and it followed by the Government Analyst and PW9.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person and this burden never shifts. Hence an accused person has no burden to prove his case unless he pleads a general or a special exception in 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”.*

As the appeal grounds raised by the Appellant are interrelated, the grounds will be considered together in this case.

The role of probability is pivotal in persuading the judge on specific points, as higher probabilities increase the likelihood of the judge being convinced. 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.

In this case, police officers had conducted the raid upon the information that the Appellant was coming to Gimhamna Restaurant from Seevalipura. They set off from the police station within five minutes of receiving the information. Prior to leaving the station, PW1 had checked the police team which consisted about seven male and one female officer. Further, PW1 had said that he checked the van which was used for the raid.

The Learned High Court Judge in her judgment, also doubted regarding the preparation and setting off for raid in five minutes time of the information.

But she had used her imaginary explanation in favour of the prosecution. The relevant portion is re-produced below:

Page 215 of the brief.

මුලින්ම අප්‍රමාදින්වයේ පරීක්ෂණය සැලකීමේදී පැමිණිල්ලේ සාක්ෂි වලින් අනාවරණය වී ඇත්තේ, මෙම තොරතුරු 2015.03.11 වන දින පැය 21.10 ට පමණ ලද බවත්, ඒ අනුව 21.15 ට, ඒ වනවිට ඔවුන් රැඳී සිටි කොළඹ අපරාධ විමර්ශන කොට්ඨාශයෙන් පිටත් වූ බවයි. මෙතරම් ඉක්මණින් නිලධාරීන් කණ්ඩායමක් සාමාන්‍යයෙන් වැටලීමකට යාමට පෙර පරීක්ෂා කිරීම් වලට ලක්වීමෙන් පසු පිටත් වී ගියාද යන්න බැලූ බැල්මට ප්‍රශ්නගත අවස්ථාවකි. නමුත් තොරතුරු ලැබුණේ පැය 21.10 ට පමණ බවට සටහන් කර තිබීම තුළින් එය නිවැරදි තත්ත්වයට, පැය 21.10 ට ලැබුණාය යන්න තීරණය කළ නොහැක. ඒ අනුව යම් විනාඩි ගණනකට පෙර එය ලැබී තිබුණා විය හැක.

Judges formulate their judgments based on the information presented to them during court proceedings, including verbal arguments, written submissions, and supporting documents provided by the parties through their legal representatives. They meticulously examine the facts presented and evaluate the evidence that has been entered into the court record. Ultimately, their decisions are based on an objective analysis of the law and the evidence presented, rather than subjective personal beliefs. Relying on personal beliefs would introduce significant bias into the judicial process, undermining the fairness and impartiality that are fundamental principles of the legal system.

The police team involved in the raid was not a special team created to combat drug menace. Hence, considering the time consumed for the preparation of the raid (five minutes) after receiving information, it is highly improbable to do such a preparation as described by the prosecution.

As per the information received, the Appellant was supposed to come from Seevalipura. But after his arrest he was taken to Uswetakeiyawa to check his house. No action was taken to check his Seevalipura house or conduct any investigation as per the information received. This too raises serious doubt regarding the probability of the raid as described by PW1.

PW1 had not taken prompt action either to do a temporary sealing or weighing the substance. Immediately after arrest, the Police party had gone to Uswetakeiyawa, which is a place far away from the place of arrest. On their return from Uswetakeiyawa, at Peliyagoda, steps had been taken to weigh the substance from the Peliyagoda Cargill's Food City outlet. The gross amount weighed about 8.120 grams. Weighing such a meagre amount in a Cargill's Food City raises very serious doubts as most of the items sold at the said supermarket over 250 grams. This also raises a significant doubt on the precise weight of the heroin.

The Learned High Court Judge in considering the probability test, convinced that leaving in five minutes time for the raid raises doubt to some extent. Despite arriving at this conclusion, she failed to grant the benefit to the Appellant.

The profound duty of the trial court is to consider the evidence placed 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 instance, although the Learned High Court Judge harboured doubts regarding the probability factors of the case, she nonetheless neglected to grant the benefit to the Appellant.

The burden of proof is usually on the person who brings a claim in a dispute. It is often associated with the Latin maxim *semper necessitas probandi incumbit ei qui agit*, a translation of which is: "The necessity of proof always lies with the person who lays charges."

It is commonly acknowledged that shifting a legal onus onto the accused with respect to an element of an offence that is essential to culpability is an encroachment on the presumption of innocence, and more difficult to justify. Shifting the burden of proof on such an issue involves the possibility of unfair conviction.

The **Irish Human Rights and Equality Commission** has argued before the Supreme Court that a law that reverses the burden of proof on to an accused person, thereby putting a legal burden on them to disprove an element of an offence, interferes with their right to a fair trial as protected by the Constitution.

Sinéad Gibney, Chief Commissioner of the Irish Human Rights and Equality Commission stated:

*"Given its importance to the integrity of the justice system, a reversal of the burden of proof, particularly in a criminal case where the accused person's right to liberty is at stake, must always be subject to the highest tests and exist within the parameters set by the Constitution."*

Article 13(3) of our Constitution enshrines the concept fair trial. The Article states:

"Any person charged with an offence shall be entitled to be heard, in person or by an Attorney-at-Law, at a fair trial by a competent court".

To determine whether you are innocent or guilty, the concept of fair trial plays a vital role. A fair trial is a universally recognised human right. Fair



trials help establish the truth and are vital for everyone involved in a case. It is a cornerstone of democracy, helping to ensure fair and just societies.

In this case the Learned High Court Judge in her judgment at pages 15 and 17 (pages 216 and 218 of the brief) stated as follows:

Page 216 of the brief.

එලෙස යෝජනා ලෙස ඉදිරිපත් කරන කරුණු ඔප්පු කිරීම සඳහා සාක්ෂිකරුවන් කැඳවීම වූදින වෙනුවෙන් ගතයුතු පියවරකි. නමුත් එවැනි කිසිදු පියවරක් ගෙන නොමැත. හුදෙක් යෝජනා පමණක් මෙම නඩුවේදී නගා ඇත. ඒ අනුව සැලකීමේදී පැමිණිල්ල ඔවුන්ගේ සාක්ෂි ඒකාකාරී ලෙස ඉදිරිපත් කිරීම තුළින් ඒකාකාරීත්වයේ පරීක්ෂණය හොඳින් සමත් වී ඇති බව තීරණය කර සිටී.

Page 218 of the brief.

මෙම වූදින සමග භාර්යාව රැගෙන ගියා නම්, ඇයව සාක්ෂි ලෙස කැඳවා එකී කරුණු තහවුරු කිරීමට වූදින වෙනුවෙන් පියවර ගත යුතු වේ. නමුත් එවැනි කිසිදු පියවරක් නොගැනීම තුළින් වූදින ඉදිරිපත් කරන එකී කරුණ සම්බන්ධයෙන් තදබල සැකයක් උද්ගත වේ. වූදින වෙනුවෙන් හරස් ප්‍රශ්න නැගීමේදී එක් අවස්ථාවක යෝජනා කොට ඇත්තේ, වූදිනව, භාර්යාව සහ ඔහුගේ දියණිය ත්‍රිරෝද රථයෙන් පැමිණෙන අවස්ථාවේදී අත් අඩංගුවට ගත් බවයි. නමුත් දියණිය හෝ භාර්යාව සාක්ෂි ලෙස කැඳවා නොමැත.

These portions of the judgment clearly demonstrate that the Appellant had not afforded a fair trial.

In this case the raid was conducted on an information received. Further, recovery and weighing the production has failed to pass the probability test in this case. If the Learned Trial Judge had examined the evidence presented from the correct perspective, she would have been inclined to accept the testimony provided by the Appellant.

Further, the Appellant was not afforded a fair trial as guaranteed in the Constitution.

Guided by the above cited judicial decisions, I conclude that the appeal grounds advanced by the Appellant has a very serious impact on the prosecution case.

As the prosecution had failed in its duty to prove this case beyond reasonable doubt, I set aside the conviction and sentence imposed by the Learned High Court Judge of Colombo dated 20/07/2021 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**

**SAMPATH B. ABAYAKOON, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**