

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

**In the matter of an Appeal in terms of
Section 331(3) of the Code of Criminal
Procedure Act No. 15 of 1979 read with
Article 139 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.**

Democratic Socialist Republic of
Sri Lanka.

Complainant

Court of Appeal No.
CA/HCC/445/19

Vs.

High Court of Colombo Case No.
HC 5686/2011

Thimbiripolage Nalin Peiris

Accused

AND NOW BETWEEN

Thimbiripolage Nalin Pieris

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **B. Sasi Mahendran, J.**
 Amal Ranaraja, J.

Counsel: Amila Palliyage with Sandeepani Wijesooriya, Sovani Udugampola, Lakitha Waksihta Arachchi and Subaj De Silva for the Accused-Appellant.

Wasantha Perera, D.S.G., for the Respondent.

Argued on: 26.11.2024

Decided on: 06.03.2025

JUDGMENT

AMAL RANARAJA, J.

1. The accused-appellant (hereinafter referred to as the “appellant”) has been indicted in the *High Court of Colombo*. The charge in the indictment is as follows;

That on or about 16th of August 2008, at *New Ferry Road, Colombo 02* within the jurisdiction of this Court, the appellant possessed 6.9 grams of cocaine without a license from the director or without permission and thereby committed an offence punishable under section 54A(d) of Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

2. The Learned High Court Judge has caused the indictment and the annexures to be served on the appellant. The appellant thereafter has pleaded not guilty to the charge and the matter has been taken up for trial. At the conclusion of the trial, the Learned High Court Judge has found the appellant guilty of the

charge, convicted and has sentenced the appellant to a term of life imprisonment.

3. The appellant being aggrieved by the disputed judgment and the sentencing order has preferred the instant appeal to this Court.

Grounds of Appeal

4. The appellant has urged the following grounds of appeal:
 - i. The prosecution failed to prove the inward journey of the production and the Learned Trial Judge erred in law by failing to consider material discrepancies and missing links of the chain of custody.
 - ii. The Learned Trial Judge erred in law by rejecting the defence evidence in the wrong premise.
 - iii. The evaluation of the defence evidence in light of the evidence led by the prosecution amounts to a reversal of presumption of innocence.

The case of the prosecution

5. PW1 (C.I. *Liyanage*) and PW3 (P.S. 27391 *Ragitha*) being police officers have been attached to the *Central Narcotics Bureau* at the time in issue. The office of such bureau has been situated at the “*Vilasitha Niwasa*” building in *Kirulapone, Colombo*.
6. Around 08.15 hrs on 16.08.2008, an informant of PW1 has come to his office and tipped him off with regard to an incident in which the appellant was involved in a transaction in narcotics at a location in *Kompannya Veediya*, together with his nephew named *Dulip Pieris*. PW1 has decided to conduct a

raid. PW1 has gathered a team of officers which included PW3 for such purpose. PW1 has thereafter made an 'out-note' and proceeded to the location mentioned by his informant together with the team of officers and the informant. When PW1, the team of officers and the informant reached the location about 09.00 hrs, the informant pointed out to PW1, the house of the appellant and moved away. PW1, PW2, PW3 and PS 32840 *Saman* have thereafter entered the house of the appellant. PW1 has accosted the appellant in the house. On the directions of PW1, the house of the appellant has been searched. PW3 has been directed to search a cupboard. The relevant cupboard had been secured with a padlock. The appellant has purportedly opened the padlock using a key which was in his possession. Thereafter, PW 3 has proceeded to search the same and in the process has handed over a white coloured plastic bag which was in the cupboard to PW1. PW1 has proceeded to examine the contents therein. The white coloured plastic bag had consisted of a plastic bottle and five parcels. The plastic bottle has had in it a plastic bag. The plastic bag has contained 11 other transparent snap close bags. There had been a white colour powdered substance in those transparent snap close bags. The five parcels have contained a yellowish brown colour powdered substance.

7. PW1 through the smell, texture and the nature of the white coloured powdered substance has determined it to be a cocaine mixed powder. The yellowish brown coloured powdered substance to be a heroine mixed powder. Thereafter, the appellant has been arrested at 09.20 hrs for committing an offence under the **Poisons, Opium and Dangerous Drugs Ordinance** as amended.
8. PW 1 has directed PS 32840 *Saman* to record a statement of the wife of the appellant. Upon the statement being recorded, the officers have left the house together with the appellant at about 09.55 hrs and travelled to the residence

of the nephew of the appellant in *Battaramulla*. When they arrived at the particular house, PW1 along with some other officers and the appellant have gone into it. PW1 has proceeded to question a male of a foreign nationality who was in the house. PW 1 has also directed PW 2 to search the laptop bag and a suitcase that were in the possession of the male. PW2 has retrieved a plastic bottle and two parcels from the suitcase. The plastic bottle and the parcels had contained a powdered substance which PW1 has proceeded to determine to be a heroine mixed powder. PW1 has thereafter arrested the male and another female in that house. At 13.45 hrs, the team of officers together with the suspects and the appellant have left the house in *Battaramulla* and reached the *Fort Police Station* at 14.25 hrs. At the *Fort Police Station*, the five parcels containing the yellowish brown powdered substance have been marked "N1 to N5". Thereafter they have been placed in a transparent polythene bag, thermally sealed and deposited in an envelope with a label. The envelope has been sealed. The envelope containing the parcels marked "N1 to N5" has been marked "A1".

9. The white colour powdered substance in the 11 transparent snap close bags emptied into another small transparent polythene bag, the second transparent polythene bag thermally sealed and such polythene bag with its contents marked "N6". The empty transparent snap close bags which contain the white colour powdered substance placed in another transparent plastic bag and such bag marked "N7". The bags marked "N6" and "N7" have thereafter been deposited in an envelope with a label. The sealed envelope has been marked "A2". The white coloured plastic bag and the plastic bottle in which the 11 transparent snap close bags were in have also been deposited in a separate envelope with a label. The envelope sealed and marked "A3".
10. Consequent to the productions being sealed as aforesaid, the envelopes marked "A1", "A2", "A3" have been registered in *Sri Lanka Police* property

receipts bearing numbers 8/2008, 9/2008, and 10/2008 respectively. The envelopes marked “A1”, “A2” and “A3” have thereafter been handed over to PW4 (PS 49265 *Sunil*), the reserve officer on duty at that time at the particular police station at about 18.10 hrs on 16.08.2008 by PW1.

The defence case:

11. The appellant has maintained that the narcotics recovered from the possession of the male in the house of his nephew, was introduced and the appellant falsely implicated to the offence set out in the charge in the indictment.
12. In a case of this nature, the prosecution has to establish the inward journey of the productions beyond a reasonable doubt i.e. the productions handed over to the reserve of a particular police station were in proper and safe custody until such productions were handed over to the government analyst for analysis. Proper and safe custody would mean that there was no opportunity to tamper or interfere with the productions.
13. In ***Perera vs. The Attorney General [1998] 1 SLR 378***, J. A. N. De Silva, J, as he was then, has stated.

“It is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the Analyst. Therefore, it is correct to state that the most important journey is the inwards journey because the final Analyst report will depend on that. The outward journey does not attract the same importance.”

14. The sealed envelopes marked “A1”, “A2” and “A3” have been sitting at the reserve of the *Fort Police Station* from 18.10 hrs on 16.08.2008 to 11.00 hrs on 18.08.2009. PW5 (PS 7404) has at 11.00 hrs on 18.08.2008 collected the three sealed envelopes from the officer on duty in the reserve of the *Fort Police Station* and taken them to the government analyst department to be handed over for analysis.
15. The prosecution has led the evidence of PW1, PW4, PW5, PW7, PW8, PW9 and PW10 to establish the inward journey of the productions. However, when one examine the testimony of PW4 (PS 49265 *Sunil*) and PW10 (PC 3409 *Jayathileke*), it is clear that both of those officers have stated that each individual officer himself handed over the sealed envelopes marked “A1”, “A2” and “A3” to PW5 at 11.00 hrs on 18.08.2008. Unfortunately, PW5 has passed away, hence the prosecution has not been able to summon to Court PW5 to testify and clear such discrepancy. Further, though the prosecution has had an opportunity to call an officer in whose custody the notes of PW5 were in, to testify in Court by referring to such notes to clear the discrepancy, the prosecution has failed to do so.
16. In those circumstances, the discrepancy referred to above still exists, therefore, the prosecution has failed to establish the inward journey of the productions beyond a reasonable doubt.
17. Further, the prosecution has also attempted to assert that the appellant was the only person who had access to the cupboard searched by PW3. Such an attempt has been made by the narrative that the cupboard was secured with a padlock and that the appellant has had in his possession the key to unlock the padlock.

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උ : එක ඉබ්බි යතුර දැමීමා තිබුනනේ.

18. If a padlock had been utilised to secure the cupboard the powdered substance was stored in, the prosecution has failed to produce in Court as a production the padlock used for such purpose. The prosecution has also failed to explain as to why it was unable to produce the relevant padlock as a production. Such a lacuna cuts across the prosecutions' case and neutralize the narrative of PW1 and PW3.
19. It has also been revealed that the particular house to which PW1 and his officers went initially was occupied by several people. The wife and the children of the appellant have been living in that house in addition to the appellant. In that backdrop, PW1 has testified that the wife of the appellant brought to his notice that the cupboard concerned was exclusively utilised by the appellant. The prosecution has also relied on that piece of evidence to establish the fact that the powdered narcotics substance that was purportedly retrieved from the cupboard was in the exclusive possession of the appellant. Thereby, the prosecution has attempted to bring as evidence a mere narrative of a fact that is in dispute in the case. In those circumstances, the statement referred to by PW1 would be hearsay and inadmissible as evidence.
20. Hearsay evidence in its legal sense is evidence given by a testifying witness of a statement made on some other occasion when it is intended as evidence the truth of what was asserted (*vide Halsbury's Laws of England, 4th edition, section 53, page 39*).
21. In pursuit of Justice, the evaluation of evidence is of paramount importance. A legal system relies on both prosecutorial and defence evidence to construct a narrative surrounding a case. It is crucial to view the evidence as an interconnected web rather than a compartmentalise sequence. This holistic evaluation not only fosters a more accurate understanding of the facts but also minimises biases that may arise from considering one side in isolation. By analysing the evidence collectively, a Court can uphold the principles of

fairness and justice, inherent to a legal system. The Learned High Court Judge has misdirected himself in this regard.

22. The Learned High Court Judge in those circumstances has acted on conjecture rather than evidence in determining that the powdered substance was in the exclusive possession of the appellant.

23. Therefore, the Learned High Court Judge has erred when he concluded that the powdered substance was found in the exclusive possession of the appellant. Further, the Learned High Court Judge has also not drawn his attention to the discrepancy in the evidence with regard to the inward journey of the productions.

24. This particular offence has been purportedly committed in the year 2008. 16 long years have passed since. Therefore, this Court finds that it does not seem just to call upon the appellant to defend himself again after such an unconscionable lapse of time.

In ***Queen vs. G. K. Jayasinghe* 69 NLR 314 at page 328**, Sansoni J, has stated,

“...we have considered whether we should order a new trial in this case. We do not take that course, because there has been a lapse of three years since the commission of the offences, and because of our own view of the unreliable nature of the accomplice’s evidence on which alone the prosecution case rests.

We accordingly direct that the judgment of acquittal be entered.”

25. Hence, this is not a fit case to order a new trial.

26. Due to the circumstances set out above, I set aside the impugned judgment together with the sentence and acquit the appellant. *Appeal allowed.*

27. The Registrar of this Court is directed to communicate the judgment to the *High Court of Colombo* for compliance.

Judge of the Court of Appeal

B. SASI MAHENDRAN, J.

I agree.

Judge of the Court of Appeal