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**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/0062/2018**

Mohammed Himash Nisham

**High Court of Colombo  
Case No: HC/5828/2011**

**Accused-Appellant**

**vs.**

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

**Complainant-Respondent**

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

**COUNSEL** : **Sandeepani Wijesooriya for the Appellant.  
Riyaz Bary, DSG for the Respondent.**

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**ARGUED ON** : **09/12/2022**

**DECIDED ON** : **17/02/2023**

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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) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for the possession and the trafficking of 18.24 grams of Heroin (diacetylmorphine) on 09<sup>th</sup> August 2010.

After the trial, the Appellant was found guilty on both counts and the learned High Court Judge of Colombo has sentenced him to death for each count on 03/01/2018.

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 consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he has been connected via Zoom platform from prison.

**On behalf of the Appellant the following Grounds of Appeal are raised.**

1. The Learned High Court Judge erred in law by failing to consider that both inter se and per se contradictions between the evidence of PW1 and PW2 which create a reasonable doubt and thereby the conviction is unsafe.

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2. The Learned Trial Judge has failed to analyse the improbability of the prosecution version of the case and thereby conviction is unsafe.

**Background of the case.**

In this case the raid was conducted upon the receipt of specific information by PW1. The raid was conducted by a team of police officers from the Police Narcotics Bureau headed by PW1. All members of the team had been named as witnesses in the indictment including the Government Analyst. The prosecution had called PW1, PW2 and PW8 Government Analyst and closed the case. The prosecution had marked productions P1(1-7) and P2-P8 during the trial.

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

On 09/08/2010 PW1, IP/Rangajeewa attached to the Police Narcotics Bureau had received an information about the trafficking of Heroin by a person called Nisham. The informant had revealed that the Appellant would start of selling Heroin on that day at a place called “Sinna Dupatha” which is situated between Borella Megazine Road and Wanathamulla area. Acting on that information PW1 had arranged a team comprising 07 officers attached to the Police Narcotics Bureau and left the police station at 10:15 hours. Before the departure, all the officers who had been selected for the raid were fully searched by PW1 to confirm that the said officers were not carrying any illegal substance with them. The team had left the police station in a van bearing No. HE-2306. Also notified his superior officer about this intended raid.

Going according to the information received, they had left the Police Narcotics Bureau and proceeded towards Rajagiriya. While they were in the vehicle for about 1 hour and 50 minutes, PW1 had received another call from the informant and he had informed that the Appellant had started to sell Heroin in the house of a lady called Jayanthi. Also informed that the Jayanthi

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was spying. Thereafter, the team went towards the Serpentine Flats in their vehicle stopped few meters before the Serpentine Flats. Only PW1 and PW2 had alighted from the vehicle, crossed the railway road and entered the house of Jayanthi. As PW1 knew Jayanthi's house previously, he directly entered her house without any difficulty. At there, he had seen the Appellant sitting on a chair and Jayanthi standing next to him. After a struggle, the Appellant was searched and found a cellophane cover from right side pocket of the Appellant's pair of shorts. When he removed the cover, some brown coloured substance was found inside the parcel. As it reacted for Heroin the Appellant was arrested immediately. Cash Rs.28,300/- was also recovered from the Appellant. Jayanthi was also arrested on the charge of aiding and abetting the Appellant. Nothing found in the house or in the custody of Jayanthi.

The Appellant and Jayanthi were brought to the Police Narcotics Bureau thereafter. The substance weighed in the presence of the Appellant at the Police Narcotics Bureau. The parcel had contained 44 grams of substance. Thereafter the productions had been sealed in the presence of the Appellant.

After entering notes, PW1 had handed over the productions and the Appellant to the reserve police officer SI/Samarakoon. The Heroin parcel was entered under production No.89/10 and the money recovered from the Appellant was entered under production No.90/10.

PW2, SI/Chandana Prasad had given evidence to corroborate the evidence of PW1.

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 innocents unless he pleads a general or a special exception in the Penal Code.

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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 first and second grounds of the appeal are interconnected, the said grounds will be considered together in this appeal. In the first ground of appeal the Appellant contends that the Learned High Court Judge erred in law by failing to consider that both inter se and per se contradictions between the evidence of PW1 and PW2 which create a reasonable doubt and thereby the conviction is unsafe and in the second ground he further contends that the Learned Trial Judge has failed to analyse the improbability of the prosecution version of the case and thereby conviction is unsafe.

According to PW1, the team consisted 08 officers including him and all had been individually checked by PW1 to confirm that they were not carrying any substance. (Page 80 of the brief.)

According to PW2, 09 police officers had participated in the raid. (Page 161 of the brief.)

This discrepancy cannot be a result of lack of observation or defective memory as the police officers are required to put entries in the information book at the end of each and every raid they conduct.

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In describing the dress, PW1 told court that the Appellant was wearing a green coloured long pair of shorts and a butter-coloured T-shirt at the time of his arrest. The relevant portion is re-produced below:

(Page 88 of the brief.)

ප්‍ර : එම පුද්ගලයා මොනවා ද ඇඳගෙන සිටියේ ?

උ : කොළ පාටට හුරු දිගු කොට කලිසමක් බටර් පාටට හුරු ටී ෂර්ට් එකක්

But at the cross-examination PW1 had contradicting himself stated that the Appellant was wearing a red coloured T-shirt at the time of his arrest. The relevant portion is re-produced below:

(Page 128 of the brief.)

ප්‍ර : කවුද මහත්මයා ඉස්සෙල්ලාම දැක්කේ දොරෙන් ඇතුළු වෙන කොටම ?

පී : රතු පාට ටී ෂර්ට් එකක් සහ කොළ පාටට හුරු දිගු කොට කලිසමක් ඇඳ ගත් පුද්ගලයෙක් සාලේ පුටුවක වාඩි වෙලා ඉන්නවා.

According to PW1, when he entered the house with PW2, the Appellant who was seated on a chair tried to proceed to the kitchen of the house. The relevant portion is re-produced below:

(Pages 87-88 pf the brief.)

ප්‍ර : මහත්මයා එම ස්ථානයට ලගවෙලා මොකක්ද ගත්ත පියවර ?

උ : මම ක්ෂණිකව නිවසට ඇතුල් වුනා. ඇතුල් වුනාම පුද්ගලයෙක් ඉඳගෙන සිටියා පුටුවක මගේ මතකයේ හැටියට සැටි එකක් වගේ ඒ එක්කම එහා පැත්තේ කාන්තාවක් සිටගෙන සිටියා. මාව දැක්ක ගමන් පුද්ගලයා නැගිටලා කුස්සිය පැත්තට යන්න උත්සහා කලා. මම ඔහුව රඳවා ගත්තා.

At the cross examination PW1 said that the Appellant only stood from the chair and not tried to escape. The relevant portion is re-produced below:

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(Pages 129 of the brief.)

ප්‍ර : දැන් මහත්තයා ගෙට ඇතුල් වුණා ගමන්ම මේ පුද්ගලයා ප්‍රභවය ඉස්සෙල්ලාම ගියේ ?

පි : මම ගෙට ඇතුල් වෙහ කොටම මේ කහ පාට ටී ෂර්ට් එකක් ඇඳ සිටි පුද්ගලයා පුටුවෙන් එක් වරම හැරී සිටියා. ඒ හින්දා මම ඔහුව ඉස්සෙල්ලාම රඳවා ගන්නා.

According to PW1, he had recovered parcel from the front right-side pocket of the pair of short of the Appellant. The relevant portion is re-produced below:

(Page 89 of the brief.)

උ : මම ඔහුව පරීක්ෂා කලා මුලින්ම ඔහු ඇඳ සිටිය කලිසම පරීක්ෂා කරනු ලැබුවා. ඔහුගේ කොට කලිසමේ ඉදිරිපස දකුණු පැත්තේ සාක්කුවේ සෙලොගෙන් කවරයක් තිබුණා එහි කට ගැටගසා තිබුණා.

But PW2, in his evidence stated that the parcel was recovered from right, side- pocket of the shorts.

(Page 171 of the brief.)

ප්‍ර : කොහේ තිබ්ලාද සොයා ගත්තේ ?

උ : කලිසම් සාක්කුවේ තිබ්ලා. දකුණු කලිසම් පැති සාක්කුවේ තිබ්ලා.

PW1 had recovered some cash from the possession of the Appellant at the time his arrest. It was counted at the place of arrest.Rs.28,300/-was found in his possession. The relevant portion is re-produced below:

(Page 90 of the brief.)

ප්‍ර : එම මුදල් ගණනය කර බැලුවාද කොපමණ මුදල් සංඛ්‍යාවක් තිබුණා ද කියලා ?

උ : එහෙමයි උතුමාණනි.

ප්‍ර : එම මුදල් ප්‍රමාණය කොපමණ ද ?

උ : රු. 28,300/- ක මුදල් ප්‍රමාණයක් තිබුණා.

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This position was contradicted by PW2. According to him the money was counted at the Police Narcotics Bureau. Relevant portion is re-produced below:

(Page 172 of the brief.

ප්‍ර : එතනදීම ගණන් කිරීමක් කලාද ?

උ : එතනදීම ගණන් කිරීමක් කලේ නැහැ ස්වාමිනි. කාර්යාංශයට ඇවිල්ලා තමයි ගණන් කරලා අංකගත කලේ.

PW2 under cross-examination stated that he had checked Jayanthi's house along with other officers who came to the house after the arrest of the Appellant and Jayanthi. Relevant portion is re-produced below:

(Page 236 of the brief.)

ප්‍ර : මහත්මයා මුතුන් කලේ නැහැ ?

උ : මම කලේ නැහැ ස්වාමිනි. මම පසුව අනිත් නිලධාරීන් පැමිණි පසු ගේ පරීක්ෂා කිරීමක් කලා ස්වාමිනි, නිලධාරීන්ගේ සහාය ඇතුළුව.

At the end of his cross-examination, PW2 contradicting his earlier position denied that he checked the house of Jayanthi. Relevant portion is re-produced below:

(Page 243 of the brief.)

ප්‍ර : රංගදිව මහත්මයා විත්තිකරුවා මංවු දාලා එවුවට පස්සේ මහත්මයා නිවස පරීක්ෂා කිරීමක් කරා ද?

උ : මම පරීක්ෂා කිරීමක් කළේ නෑ ස්වාමිනි.



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PW1 in describing the road which lead to Jayanthi's house, stated that vehicles could not reach up to her house. In the cross-examination witness confirmed that other police officers had reached Jayanthi's house on foot after the arrest of the duo. The relevant portions are re-produced below:

(Page 121 of the brief.)

ප්‍ර : ඔය නතර කල තැන සිට ඔය ජයන්තිගේ නිවසට යන්න ප්‍රධාන මාර්ගයක් තියෙනවද ?

උ : නැහැ.

ප්‍ර : කෙසේ ද ගමන් කලේ ?

උ : ඒ මහල් නිවාස අතරින් අඩි පාරක් තියෙනවා. දුම්රිය මාර්ගයට ගොඩවීමට. ඒ දුම්රිය මාර්ගයට ගොඩ වූ පසු නැවත මාර්ගයට පිවිසෙනවාත් සමඟ එතන සිට වම් අත පැත්තේ ජයන්තිගේ ගෙදර තියෙන්නේ.

ප්‍ර : එතනට වාහනයක් ගමන් කරන්න පුළුවන් මාර්ගයක් නැහැ

උ : නැහැ.

(Page 153 of the brief.)

ප්‍ර : ඒ නිලධාරීන් ඔය විත්තිකාරව අත් අඩංගුවට ගත්ත නිවස ළඟටම වාහනයෙන් පැමිණියාද?

උ : නිලධාරීන් ආවේ මගේ මතකයේ හැටියට පා ගමනින්.

PW2, who was called to corroborate the evidence of PW1 took up the position that the police vehicle had come close to the house of Jayanthi, in which all had returned to the Police Narcotics Bureau. The relevant portion is re-produced below:

(Page 175 of the brief.)

ප්‍ර : කොහොමද පිටත්ව ගියේ ?

උ : පීපී රථයෙන් පිටත්ව ගියේ.

ප්‍ර : පීපී රථයට ඇවිද ගෙනද ගියේ ?

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උ : නිවස අසලටම පිටි රටිය පැමිණියා.

The above highlighted portions of evidence of PW1 and PW2 cannot be considered as trivial contradictions. The *inter se* and *per se* contradictions highlighted are strong challenge to the prosecution version. They certainly attack the root of the matter very strongly.

In the book **Sarkar on Evidence, 15<sup>th</sup> Edition** at page 112 states:

*“Minor discrepancies are possible, even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence. [Sidhan v. State of Kerela [1986] Cri LJ 470, 473(Kerala)]. But discrepancies in the statements of witnesses on material points should not be passed over, as they seriously affect the value of their testimony (Brijlal v.Kunwar, 36A 187: 18CWN 649: A1914PC38).The main thing to be seen in whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however, no such benefit will be available to it. (Krishna Pillai Sree Kumar v. State of Kerala A [1981] SC 1237,1239).”*

In **The Attorney General v.Sandanam Pitchai Mary Theresa** [2011] 2 SLR 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 whether they are true material to the facts in issue”.*

In all detection cases the police detectives maintain records. When they are call upon by the prosecution to testify in court, they are allowed to use their notes to refresh their memory. Hence, their evidence cannot consist *inter se* or *per se* contradictions as they give systematic evidence regarding the

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particular incident. If their evidence consists inter se or per se contradictions and which affects the root of the case, their credibility become questionable.

The Learned High Court Judge in his judgment at pages 265-266 held that the evidence given by PW1 and PW2 sans any contradiction in their evidence. The relevant portion is re-produced below:

(Pages 265-266 of the brief.)

විවිධ පැතිකඩ එනම් සටහන් වල සාමාන්‍යයෙන් යොදන්නේ නැති සුළු කාරණා සම්බන්ධයෙන් ද එනම් පීපී රථය නැවතු නැත සිට නිවසට ගමන් ගත් මාර්ගය එම මාර්ගයේ වාහනයක් ගමන් ගත නැතිද සහ නිවස තුල සිටි කාන්තාව ඉදගෙන සිටීම සහ වින්තිකරු නැගිට පැනයාමට උත්සහ කිරීම ඇතුළු කාරණා සම්බන්ධයෙන් මෙම සාක්ෂිකරුවන් දෙදෙනා කිසිදු සැලකිය යුතු වෙනස්කමක් හෝ පරස්පරයක් නොමැතිව ඒකාකාරීව සාක්ෂි දී ඇත.

The above highlighted portion in the judgment is a clear indication that the Learned High Court had not considered and analysed the evidence given by PW1 and PW2 properly.

According to PW1, he had received a specific information that a person called Himash and a lady called Jayanthi were involved in selling drugs at a place called Sinna Dupatha.

But PW2, in his evidence categorically said that he was unaware about the identity of the persons until he was directed to enter Jayanthi's house. Hence, the Counsel submits that this leads to serious doubt about the happening of the incident as described by the witnesses.

Next the Counsel argued that although a specific information had been received about involvement of a female called Jayanthi, PW1 had failed to include a female police officer to the team. Hence, she further argues that the incident described by PW1 and PW2 fail the test of probability.

Probability test is a prerequisite in criminal trials to prove the case beyond reasonable doubt. In this case the conduct of PW1 is highly questionable which certainly not pass the probability test.

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In this case PW1 and PW2 are the key witnesses and experienced police officers. Their evidence is not clear and not matched on material points discussed above. Their evidence is tainted with much ambiguity and uncertainty which definitely affects the root of the case. Hence, the appeal grounds advanced by the Appellant have very serious impact on the prosecution case.

Taking into consideration, all these circumstances, I am of the view that the conviction of the Appellant cannot be allowed to stand as the prosecution had failed 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 03/01/2018 on the Appellant. Therefore, he is acquitted from this case.

Accordingly, the appeal is allowed.

The Registrar of this Court is directed to send a copy of 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**