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

In the matter of an Appeal in terms of 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/0178-0179/2018

High Court of Colombo

Case No: HC/7556/13

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Wawalage Uthum Prasanna Rosairo *alias* Malli
2. Umagiliya Kankanamge Daminda Priyashantha *alias* Baba

ACCUSED

AND NOW BETWEEN

1. Wawalage Uthum Prasanna Rosairo *alias* Malli
2. Umagiliya Kankanamge Daminda Priyashantha *alias* Baba

ACCUSED-APPELLANTS

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Rienzie Arsecularatne, P.C. with Chamindri Arsecularatne, Thilina Punchihewa for the 1st Accused Appellant
	: Darshana Kuruppu with B. Thilakaratne for the 2nd Accused-Appellant
	: Janaka Bandara, D.S.G. for the Respondent
Argued on	: 27-11-2023
Written Submissions	: 13-12-2022 (By the 1st Accused-Appellant)
	: 29-04-2019 (By the 2nd Accused-Appellant)
	: 14-02-2020 (By the Respondent)
Decided on	: 05-04-2024

Sampath B. Abayakoon, J.

The accused-appellants (hereinafter sometimes referred to as the 1st appellant or the 2nd appellant) were indicted by the Hon. Attorney General before the High Court of Colombo of the indictment dated 12-09-2014 in the following manner.

1. That the 1st accused committed an offence punishable in terms of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Amendment Act No. 13 of 1984 by trafficking 20.28 grams of Diacetylmorphine, which is commonly known as Heroin, at Maligawatta within the jurisdiction of the High Court of Colombo, on or about 23-01-2013, and thereby committed an offence punishable in terms of the above-mentioned Ordinance.
2. At the same time and at the same transaction, the 1st accused had in his possession, the earlier mentioned quantity of Diacetylmorphine, and thereby committed an offence punishable in terms of the Poisons, Opium and Dangerous Drugs Ordinance as amended.
3. At the same time and at the same transaction as mentioned in count 1, the 2nd accused aided and abetted the 1st accused to commit the offence of trafficking of Heroin, and thereby committed an offence punishable in terms of the Poisons, Opium and Dangerous Drugs Ordinance as amended.

The 1st accused mentioned in the indictment is the 1st appellant, while the 2nd accused mentioned is the 2nd appellant.

It appears that on 18-01-2016, the name of the 2nd appellant had been amended to be read as Umagiliya Kankanamge Daminda Priyashantha *alias* Baba. When the indictment was read over to the accused-appellants, both of them had pleaded not guilty and the trial has commenced on the same day.

PW-01 who was the police officer who conducted the raid in this regard has concluded his evidence-in-chief on 04-03-2016 and after the conclusion, the prosecution has moved to amend the indictment.

The learned Counsel who represented the accused-appellants had objected to the indictment being amended as sought on the basis that it would entirely change the complexion of the charges against the accused-appellants. However, the amendment had been allowed by the learned High Court Judge.

The prosecution has amended the indictment on 29-07-2016 in the following manner.

1. Count 1 – on the 2nd line, by removing the word යුෂ්මතා and by replacing it with the word යුෂ්මතුන්, and by replacing the word වරදකරු in line 10 of the charge by the word වරදකරුවන්.
2. Count 2 – by replacing the word යුෂ්මතා, which appears in line 1 with the word යුෂ්මතුන්, and by replacing the word වරදකරු that appears in line 9 with the word වරදකරුවන්.

Accordingly, it appears that the prosecution has amended the 1st and the 2nd count in the indictment to show that both the accused-appellants had jointly engaged in the offence of trafficking and possessing the quantity of Heroin mentioned in the charges.

As a result, the original 3rd count which was the count preferred against the 2nd appellant had been removed from the indictment.

It appears from the proceedings of that day, although the amendment has been made to the indictment, which has changed the complexion of the indictment, the said amendment has not been read over to the accused-appellants requiring them to plead to the amended charges.

Even though the prosecution has informed the Court that the evidence-in-chief of PW-01 was concluded on 04-03-2016, it appears that after the amendment, the prosecution has led further evidence of PW-01.

Several other witnesses have concluded their evidence thereafter, and on 02-06-2018, the prosecuting State Counsel has made yet another application to amend the indictment on the basis that in the 1st amendment, although the word යුෂ්මතා

was replaced with the word යුෂ්මතුන්, the original 1st and 2nd counts which referred to the 1st accused as the offender has not been deleted. Therefore, it had been sought to amend the two counts to that effect.

The said amendment had been allowed, and the 1st and the 2nd count had been amended by deleting the word පලවන and adding the word චූදිතයන් in both the counts.

The amended charges had been read over to the accused-appellants, and they have pleaded not guilty to the charges. With the said amendment, the prosecution has closed the case and after the defence being called, the accused have made dock statements.

Accordingly, the matter has been fixed for the judgment on 10-07-2018 by the learned High Court Judge, after allowing both parties to file written submissions, apart from their oral submissions.

However, on 10-07-2018, the learned High Court Judge has recorded the following observation;

> "මෙම නඩුවේ නීන්දුව සූදානම් කරමින් සිටින අතරතුරදී සහ විත්තියේ ලිඛිත සැලකිරීම් පරිශීලනය කිරීමේදී අපරාදය වූ ස්ථානය සම්බන්ධයෙන් දෝෂයක් ඇති බව මාගේ අවධානයට යොමු වී ඇත. එවැනි දෝෂයක් නිරීක්ෂණය කලවිට අපරාධ නඩු විධාන සංග්‍රහ පනතේ 167 වගන්තිය ප්‍රකාරව සංශෝධනයක් කිරීමට මෙම අධිකරණයට බලය ඇත. ඒ අනුව මා පැමිණිල්ලේ උගත් නීතීඥවරියට මෙම කාරණාව අවධානයට යොමුකර පැමිණිල්ල මෙම චෝදනාව සංශෝධනය කිරීමට බලාපොරොත්තු වන්නේදැයි විමසා සිටිමි."

This has prompted the prosecuting State Counsel to realize the serious discrepancy as to the place of the offence mentioned in the indictment and what was stated by PW-01 in his evidence.

The indictment states that the offence was committed at Maligawatta, whereas the evidence had been on the basis that the offence was committed at Horton Place, Colombo 07.

The prosecuting State Counsel has urged the Court to make the necessary amendment to the charges in terms of section 167 of the Code of Criminal Procedure Act in order to bring the charges in line with the evidence led before the Court in relation to the place of the offence.

The learned Counsel who represented the accused-appellants before the High Court has vehemently objected to the indictment being amended at the stage of the judgment, claiming that this would affect their defence and would gravely prejudice the accused-appellants.

However, the learned High Court Judge by pronouncing a separate order in this regard has determined that the Court has the power to amend or alter any indictment or charge any time before the judgment is pronounced, and it is necessary for the Court to consider if an amendment is made, whether it would prejudice the accused or cause damage to the defence position taken up at the trial.

It has been determined that the prosecution version has been that the incident happened as Horton Place near a building called Mel Medura and the defence has never taken up the position that they were not arrested there or they were at a different place. It has been determined further that no material prejudice would be caused to the accused-appellants by amending the charge. Accordingly, the charges have been amended, and after the amended charges were read over to the appellants where they have pleaded not guilty, the learned High Court Judge has allowed the accused-appellants to cross-examine the relevant witnesses in that regard, if they find it necessary.

Having taken time to consider whether to cross-examine the relevant witnesses, it has been informed to the Court by the learned Counsel who represented the accused-appellants that it would not be necessary.

Thereafter, pronouncing his judgment on 30-07-2018, the learned High Court Judge has found both the accused guilty of the 1st and the 2nd count.

After having allowed the accused-appellants to make submissions in mitigation, and allowing them to address the Court in terms of section 280 of the Code of Criminal Procedure Act, the learned High Court Judge has pronounced death sentence on both the accused-appellants.

It is against this conviction and the sentence that the accused-appellants have preferred this appeal.

Before moving into the grounds of appeal urged, I would now briefly summarize the evidence led before the trial Court.

Facts in Brief

PW-01 who was the Officer-in-Charge of the police team, which conducted this raid. He was attached to the Police Narcotic Bureau (PNB) during the time relevant to this detection.

On 23-01-2013, another officer attached to the PNB, namely PC-63501 Jayawardena, has received an information where he has informed the same to PW-01 around 7.00 a.m. After inspecting the note made by the said PC-63501 in his field notebook and endorsing it, PW-01 has informed his Officer-in-Charge and has organized the raid which led to the arrest of the appellants.

He has arranged for seven officials including the Police Constable who provided the information to conduct the raid, and after following due procedure, PW-01 and his team has left the PNB at 8.00 a.m. in two vehicles. They have reached the Horton Place roundabout and have parked the car and the cab in which they were travelling near the fuel station situated at the roundabout. After being informed of their position, the informant has come around 8.45 a.m. and had met PW-01 and PC-63501.

The PW-01 in his evidence has stated that the information received by PC-63501 was to the effect that the Heroin trafficking transaction will take place near a place called Mel Medura in Colombo 07, and a person called Baba who lives in Maligawatta area will deal the transaction and he may have already left the

Maligawatta area, and for them to wait nearby so that he can provide additional information.

According to PW-01, it was with the said information that he and his team arrived near the fuel station.

After having a discussion with the informant, PW-01 has informed the officials who were in the cab to move away from that place and wait near the Independence Square until further instructions. Thereafter, PW-01 and PC-63501 has gotten into the car and had waited until 9.30 in the morning.

At that time, the informant had returned in his motorcycle and had instructed them to move to the vehicle park situated in front of Mel Medura and had informed that there is sufficient cover for them to wait discretely. Accordingly, he and the officers who were in the car has moved to the mentioned car park and had themselves stationed there.

At page 119 of the appeal brief, PW-01 explains how they were stationed at the car park in the following manner.

> "ගරු උතුමාණෙනි හෝර්ටන් ප්‍රදේශයේ ප්‍රධාන මාර්ගයේ පෙනෙන පරිදි පාරේ රථය නවත්තලා වාහනයේ මුහුණ ප්‍රධාන පාර දෙසට යොමු කරලා තමයි අපි වාහනය නතර කලේ පාර දිස්වෙන ආකාරයට ස්වාමිනි. අප රථයේ සිටින විට ප්‍රධාන පාර අපට පෙනෙන ආකාරයෙන් තමයි අපි රථය ස්ථානගත කලේ ස්වාමිනි."

It had been his evidence that the informant was also with them, and he observed the main road meticulously while waiting near the main road.

There had been two other vehicles parked at the vehicle park at that time. Around 10.15 in the morning, a three-wheeler has come and stopped in front of Mel Medura and they have observed the person who drove the vehicle taking a call. At that point, the informant has come hurriedly towards their vehicle and had informed them that the person called Baba will come out from the house situated at the right side of the car park and will come to the road.

After a while, a person wearing a green-coloured t-shirt and a black and white three-quarter trouser has come near the three-wheeler. After informing that it was Baba, the informant has hidden himself in the vehicle park.

PW-01 has been very specific that the three-wheeler was parked about 5 – 6 meters away from their car and that they could observe very clearly what was happening near the three-wheeler. They have observed that the person who came near the three-wheeler taking a parcel out of his right-side pocket of the trouser and handing it over to the person seated in the driver's seat of the three-wheeler.

At that point, PW-01, along with PC-63501 and PC-12810 has reached the three-wheeler and had informed that they were from the PNB. PW-01 has observed that the person inside the three-wheeler attempting to hide the parcel, but PW-01 has taken charge of it. They have managed to prevent the person who was on the road from escaping.

After that, PW-01 has opened the parcel and has realized that it contains Diacetylmorphine or Heroin through his long years of experience as a PNB officer. Accordingly, PW-01 has arrested the driver of the three-wheeler for possessing and trafficking Heroin. He has identified him as the 1st accused-appellant.

After the arrest, he has instructed PC-12810 to search the other person and has found Rs. 22,800/- in his possession. Accordingly, he has also been arrested on the charge of trafficking and possessing of Heroin. PW-01 has identified the 2nd accused-appellant as the said person.

After the arrest, he has got down the cab, and based on the information received upon questioning the arrested suspects, he has searched two security huts situated at No. 62, Horton Place, Colombo 07. He has come to know that the 2nd suspect arrested was staying in the security huts. The house situated at No. 62 was unoccupied, and one Priyantha was the security guard in charge of the house. PW-01 has recorded a statement from him in that regard. Based on the questioning, the police team had gone to Maligawatta area looking for another person, but have been unable to locate him.

The suspects, along with the Heroin found, and the three-wheeler had been taken to the PNB where the quantity of Heroin recovered had been weighed in front of the suspects. It had been found that the said substance had a total weight of 93 grams and 900 milligrams. Thereafter, PW-01 has taken due procedural steps to seal the Heroin found and to handover the said production along with the money, the three-wheeler, and other productions to the relevant production officers.

At the trial, the witness has produced and marked the Heroin allegedly recovered from the possession of the accused-appellants and other relevant productions.

When PW-01 was subjected to cross-examination by the defence, he has maintained the initial position that their car was parked in such a manner that the front of the car was facing the main road so that they can observe the road properly. He has specifically replied to the suggestion that he was unable to see what was happening in front of him that it was not so, and he and his team of officers clearly observed the parcel being handed over by the 2nd accused-appellant to the 1st accused-appellant.

He has also stated that when he saw the 2nd accused-appellant for the first time, he was walking from the direction of Borella towards the three-wheeler, but did not see from where he came to the road.

However, under constant cross-examination as to the way the vehicle was alleged to have been parked in the car park of Mel Madura, PW-01 appears to have changed his earlier stance in that regard.

At page 338 of the brief, he has stated as follows;

> ප්‍ර. මහත්මයලා රථය නතර කරන අවස්ථාවේ තවත් කැබ් රථයක් හෝ කාර් රථයක් නවත්තලා තිබුණා කිව්වා?
>
> උ. එහෙමයි.
>
> ප්‍ර. ඒවා කොහොමද නතර කර තිබුණේ.

උ. දිග අතට තමයි නතර කර තිබුනේ. ඒවායේ මුහුණ කොයි අතට තිබුණාද කියා මට මතක නැහැ, පාරට සමාන්තරව තමයි දාලා තිබුණේ. අපේ වාහනයේ මුහුණ පාර පැත්තට දාලා, දකුණු පැත්තේ පාර පේන විදියට තමයි නතර කර ගත්තේ.

ප්‍ර. මම යෝජනා කරනවා, මැල් මැදුරේ රථ ගාලේ මහත්මයා කියන විදියට රථ කිසිවක් නවත්තන්න බැහැ. මැල් මැදුරේ වාහන නවත්තන්න ඕනේ, මැල් මැදුර පැත්තට මුහුණ දාලා. මහත්තමයා කියපු ආකාරයට හරස් අතට මුහුණ දාලා නවත්වන්න බැහැ කියා මා යෝජනා කරනවා.

උ. මා කිසිම අවස්ථාවක හරස් අතට මාගේ වාහනය නතර කළා කීවේ නැහැ. පාර පේන ආකාරයට වාහනය නතර කළා කියා තමයි මම කීවේ.

ප්‍ර. පාරට මුහුණලා කියන්නේ?

උ. පාර පේන ආකාරයට. මුහුණලා කියා කීවේ නැහැ.

It appears that after realizing that the defence Counsel was well aware of the geography of the location, the PW-01 has changed his earlier stand. Thereafter, he has maintained the position that in fact, their vehicle was parked parallel to the road that runs through Horton Place roundabout towards Borella. He has admitted that when the vehicle was parked in such a manner, the person nearest to the road would be the driver of the vehicle, and he was seated to the left side of the driver.

This shows that the stand taken up throughout by the learned Counsel for the accused was correct as to the alleged parking of the vehicle.

The witness has stated in his evidence that the three-wheeler came and parked right in front of the car park. It is now clear that the building called Mel Medura and its car park is located on the right side of the road when one travels from Horton Place roundabout towards Borella. In the way the witness has given evidence, it shows that the three-wheeler has come from the direction of Horton Place roundabout towards Borella from the left-hand side of the road and had crossed the road and parked it right in front of the car park, but on the main road.

At page 342 of the appeal brief, the witness has stated as follows;

> ඌ. ආවේ රෝන් සයිඩ්ද කියලා මට කියන්න බැහැ. වාහනය නවත්වලා තියෙනවා බැලුවම ඇත්තටම රෝන් සයිඩ් එකේ. පැහැදිලිව කිවුවොත් වම් පැත්තට ඉදිරියට එන මාර්ගයේ වම් පැත්තෙන් තමයි වාහන ගමන් කරන්නේ. දකුණු පැත්තේ තමයි මේ මැල් මැදුර පිහිටලා තියෙන්නේ. දකුණට අරන් තමයි නවත්තන්න ඕනේ.
>
> ප්‍ර. වාහනයේ මුණ තියෙන්නේ කීන්සි පාර පැත්තට?
>
> ඌ. ඔව්.
>
> ප්‍ර. වාහනයේ පිටු පස්ස තියෙන්නේ හෝටන් වටරවුම පැත්තට?
>
> ඌ. එහෙමයි.

It had been the position of the 1st accused-appellant that he was arrested around 9.30 p.m. on the night of 22-01-2013 when he arrived at No. 62, Horton Place residence at the request of the 2nd accused-appellant who often used to obtain his services as a three-wheeler driver.

It had been his position that after the arrest, he was severely assaulted, blindfolded, and was kept at the same place until the following day and was taken to the PNB along with the 2nd accused-appellant. It had been suggested by him that no Heroin was found or no such raid was conducted in the manner stated by PW-01, which the witness has denied saying that the raid was conducted as stated, and the arrest was made.

The stand taken up by the 2nd accused-appellant had been similar to that of the 1st accused-appellant where he too has denied that he was arrested in the manner as claimed by the witness.

Under cross-examination, changing his earlier stance, the PW-01 has stated that he was seated in the front seat of the vehicle next to the driver of the vehicle and he and his officials could very well see what was happening on the main road.

The witness who has given evidence at the trial to corroborate the evidence of PW-01 has been PC-12810 Nahinna (PW-03).

It is noteworthy to mention that PC-63501 Jayawardena, the officer who allegedly received the information, as well as a person who took part in the raid right from the beginning until the end, has not been called as a witness.

PW-03 has given evidence as to the actions he and his team took to arrest the accused-appellant. He has stated that after being informed by the informant to come to the vehicle park of Mel Medura, the vehicle was stopped facing its front side towards the Mel Medura. He has stated that once parked in that manner, Horton Road can be seen from the right-hand side of the driver. Thereafter, he has narrated what happened as stated by PW-01, and has stated that it was he who detained the person who was on the road and searched him, where he recovered money amounting to Rs. 22,800/- from his possession.

He has corroborated the PW-01 as to the steps they took after the arrest of the appellants and the way the productions and the suspects were handed over to relevant officials of the PNB and also the way the Heroin was weighed.

It appears that his evidence as to the way the car was parked was similar to the stand of PW-01 when he admitted under cross-examination as to the way the vehicle was parked and their positioning until the arrest was made.

In this action, the Government Analyst who analyzed the substance sent to the Government Analyst Department has confirmed that the pure quantity of Heroin found in the sample was 20.28 grams.

There had been no challenge as to the chain of custody of the productions and the Officer-in-Charge of the production room of the PNB has given evidence in that regard.

After the conclusion of the prosecution evidence and after having considered the evidence placed before the Court, the learned High Court Judge has decided to

call for a defence from both the appellants. Both of them have made dock statements.

The 1st accused-appellant in his dock statement has stated that he worked as a three-wheeler driver in a three-wheeler owned by a relative of the 2nd accused, and he used to take family members of 2nd accused on various hires frequently. It was his stand that he received a call from the 2nd accused appellant on 22-01-2013 to come to a house in Horton place and he reached the said house around 7.40 p.m. in the night. He has met the 2nd accused appellant and had seen two male friends of him and two other females in the house. It had been his position that the 2nd accused appellant gave him money and informed him to go and bring meals, a bottle of arrack and cigarettes. The 1st accused appellant had gone with one of the persons named Ajith, who were in the house, and when he returned after purchasing the stuff the 1st accused wanted him to bring, some persons detained him near the gate of the house, blindfolded and assaulted him. After some time, they have removed his cover and he has seen the persons who were inside the house when he left it, were also detained.

According to him, they were kept there until the next morning, namely 23-01-2013, and the two friends of the 2nd accused and the two females had been released. The 1st accused-appellant and the 2nd accused-appellant were kept inside the house until the evening, and they were taken to Maligawatta area, and thereafter taken to the PNB. At the PNB, a statement was recorded from him and he was produced at the Maligakanda Magistrate's Court on the following day.

He has denied the evidence of PW-01 and 03 that they were arrested in the manner the witnesses claimed and had stated that these are completely fabricated charges against them.

The dock statement of the 2nd accused-appellant had been that he has worked in Dubai since 2006 and upon returning to the country in 2010, went to Oman and worked there. During the time relevant to this incident, he was in Sri Lanka after returning from Oman, and during that period, he had issues in his family

life. Since there was a dispute with his wife that arose on January 17th or 18th, he left his house and went to live with a friend named Priyantha, who was looking after a house situated in Horton Place. He stayed there for a few days and on 22nd January, his friend Priyantha went on leave and his assistant Ajith was the person who was in charge of the house, which was an unoccupied old house.

In the evening of 22nd January, he organized a party in the house and two of his friends and two females came to the house. Thereafter, he phoned the 1st accused-appellant and instructed him to bring some food. About 15 minutes after the 1st accused-appellant left with Ajith, some persons came and detained them.

The persons who came questioned him as to who lives in Maligawatta, and he stated that he is the one who is living in Maligawatta. They questioned him about one Faizer, to which he informed that he is unaware of such a person. By that time, all of them were blindfolded and in about 45 minutes' time, he heard the three-wheeler returning.

After sometime, their blindfolds were removed, and kept them handcuffed until the next morning.

On the following day, his two friends and the two females were released and the appellants were taken to Maligawatta area, and from there, to the PNB. He has claimed that no money was recovered from his possession and the money was recovered from his purse, which was inside the travelling bag that he brought to the house when he came there after his dispute with his wife. He has claimed that no Heroin was recovered and the version of events narrated by the prosecution witnesses is a complete fabrication against them.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel who represented the 1st accused-appellant urged the following grounds of appeal for the consideration of the Court.

1. The several amendments to the indictment turning the course of the trial to a different direction has caused prejudice to the 1st accused-appellant.
2. The learned High Court Judge failed to appreciate that the prosecution deliberately refrained from calling PC-63501 Jayawardena (PW-04) who allegedly received the information.
3. The learned High Court Judge failed to consider several items of evidence, which caused a reasonable doubt as to the case of the prosecution.
4. The learned High Court Judge failed to appreciate that in view of the defence taken in the case that the arrest did not take place on 23-01-2013 but on 22-01-2013, the evidence gives credence to the defence position.
5. The learned High Court Judge failed to consider that PW-01 and PW-03 who gave evidence as main witnesses are suspects in a murder case over a death occurred at the PNB, which should have been considered in relation to their credibility.
6. The learned High Court Judge failed in his duty by determining that PW-01 and PW-03 as truthful witnesses prior to considering the defence evidence and thereby misdirected in law.

The learned Counsel for the 2nd appellant informed the Court that he will be relying on the grounds of appeal urged by the learned President's Counsel on behalf of the 1st accused-appellant

Consideration of the Grounds of Appeal

Since the grounds of appeal urged by the learned Counsel mainly revolves around the question of probability of the story narrated by the prosecution witnesses as to the manner in which they have allegedly conducted the raid and arrested the accused- appellants, I find it appropriate to consider the test of

probability before deciding to consider other grounds of appeal in detail, if necessary.

However, as the 1st ground of appeal is on the basis that the manner in which the indictment was amended several times causing prejudice to the accused-appellants, I would like to comment on that matter before proceeding to consider the question of probability.

This is a matter where the initial indictment had three counts. The 1st and the 2nd count were against the 1st accused on the basis that he possessed and trafficked Heroin on 23-01-2013 at Maligawatta, and the 3rd count had been against the 2nd accused on the basis that he aided and abetted the 1st accused to commit the offences mentioned in the 1st and the 2nd count.

After the conclusion of the evidence-in-chief of PW-01 who was the main witness, the prosecution has made the first amendment to the indictment to include the 2nd accused as well in relation to the 1st and the 2nd count, apparently on the basis that they jointly possessed and trafficked Heroin. Accordingly, the 3rd charge had been dropped against the 2nd accused.

It was only at a very later stage of the trial, the prosecution has realized that though the indictment was amended on the basis that both the accused committed the crime, in fact, the two amended charges specifically refer to the 1st accused, even though it has been changed to be read as යුෂ්මතුන්.

I find that these two amendments are substantial amendments to the indictment effected after the prosecution evidence in that regard had been concluded to suit the evidence led at the trial. The 3rd amendment has been made after the matter was set for judgment by the learned High Court Judge.

It appears that in their submissions before the High Court at the conclusion of the trial, the appellants have taken up the position that in the indictment, the charges against them were on the basis that they committed the crime in

Maligawatta, whereas the evidence led before the High Court did not support such a position.

The proceedings on 10-07-2018, where the matter was set for judgment originally clearly show that the above-mentioned fact had been discovered only at the stage of preparing the judgment and that was also because of the stand taken up by the appellants in their written submissions.

The relevant note made by the learned High Court Judge as I have stated earlier clearly shows that the prosecution had been unaware about the material failure in the charges as to the place of the offence. It was only after being made aware of this fact, the prosecution had made an application to amend the indictment again, to suit the evidence led before the Court by replacing the place of the offence as Horton Place, Colombo 07.

The learned High Court Judge in his order in that regard has determined that, since the appellants have not taken up a position that they were not arrested at Horton Place and the cross-examination has also been on the same basis, there is nothing to determine that the appellants will be prejudiced or their defence would be affected by allowing an amendment of this nature and hence, the amendment has been allowed.

The section under which the Court may alter the charge or charges is section 167 of the Code of Criminal Procedure Act No. 15 of 1979. In the Code of Criminal Procedure Ordinance No. 15 of 1898, the corresponding section was section 172.

The relevant section 167 reads as follows;

> **167. (1) Any Court may alter any indictment or charge at any time before judgement is pronounced or, in the case of trials before the High Court by a jury, before the verdict of the juries return.**
>
> **(2) Every such alteration shall be read and explained to the accused.**

(3) The substitution of one charge for another in an indictment or the addition of a new charge to an indictment and in a Magistrate's Court the substitution of one charge for another or the addition of a new charge shall be deemed to be an alteration of such indictment or charge within the meaning of this section.

The above-mentioned section 167 clearly provides for an amendment to the charge before the judgment is pronounced. It also provides that it is up to the Court to decide on that depending on the relevant facts and circumstances since the words used had been **"any Court may alter."**

Since the learned High Court Judge has allowed the amendment in terms of section 167 of the Code of Criminal Procedure Act, and has also given reasons for using his discretion, I will not proceed to comment any further on the matter.

However, I would like to cite the judgment of **Nagalingam J.** in the case of **John Perera Vs. Weerasinghe 53 NLR 158** referred by the learned Deputy Solicitor General (DSG) in his submissions before this Court, which I find would be of use.

This was a case where the complainant moved to amend the charges filed before the learned Magistrate of Gampaha in terms of section 172 of the Code of Criminal Procedure Ordinance 1898 that was in existence then. The learned Magistrate has refused the application. The application has been made to the learned Magistrate before the trial proper has commenced.

It was held on appeal that,

"The prosecutor has been careless and negligent to the extreme that there can be little doubt. The question, however, is whether the learned Magistrate was right in refusing to accede to the application to amend the charges. No reasons have been given, except that the defence strongly objects to the amendment. Under section 172 of the Code of Criminal Procedure, power is vested in a Court to alter a charge at any time before judgment is

pronounced. There can be little doubt that this is a discretionary power that is vested in the Court, but such a discretion must be exercised judicially. Had the learned Magistrate given any reasons save that the defence strongly objects, it would have been possible to test whether the discretion has in fact been properly exercised. In the present state of the record, it is not possible to do so, and I have to consider the question anew.

The principle underlying the grant or refusal of an application to amend was laid down in a very early judgement of this Court in the case of The Queen Vs. Sinno Appu 1 (7 S.C.C. 51) in which Fleming, A.C.J. laid down the proposition that an amendment should not be refused by the Judge unless it is likely to do substantial injustice to an accused. In the same case Lawrie, J. expressed the view that the "Judge should be ready to listen to and willing to adopt any amendment which will have the effect of convicting the guilty or of acquitting the innocent." I have had no arguments addressed to me on behalf of the respondent to indicate that any substantial injustice or prejudice other than legitimate is likely to be caused to him by reason of the amendment being allowed. Furthermore, when I consider that the charges relate to the commission of offences by a person holding public office, I am less reluctant to refuse the amendment."

The above citation clearly shows that although section 167 of the Code of Criminal Procedure Act provide for an amendment for the charge at any time before the judgment, it is a privilege that should be allowed depending on the facts and the circumstances of the case, and it should not cause any prejudice to the accused person or should not amount to denying a fair trial towards such a person.

It is abundantly clear that the initial intention of the Hon. Attorney General when drafting the indictment had been to indict the 1st accused-appellant for possessing and trafficking of Heroin and the 2nd accused-appellant for aiding and abetting. It becomes clear that the indictment had been later amended

changing the complexion of the indictment. In the manner the three amendments had been sought, it clearly establishes the fact that the prosecution had been conducted in a careless manner, which has resulted in amendments at several stages of the trial.

I observe negligence of the highest order by the prosecution throughout the trial as a result of the unawareness of the defects of the indictment. I am of the view that when exercising the discretion granted in terms of section 167 of the Code of Criminal Procedure Act, trial Judges should draw their attention to the relevant aspects, the facts and the circumstances, in order to make sure that carelessness and negligence should not be rewarded in a trial at the stage of pronouncing of the judgment.

Be that as it may, since the main arguments presented in this appeal were on the question of probability, I will now proceed to consider whether the story narrated by the prosecution witnesses as to the conduct of the raid and the arrest of the appellants can be considered cogent enough and probable, as decided by the learned High Court Judge, or whether it has created a reasonable doubt as to the incident, which should have been considered in favour of the accused-appellants.

It is settled law that in a criminal case, an accused person has no obligations and it is the prosecution who should prove their case beyond reasonable doubt against the accused. The prosecution cannot rely on the weaknesses of the defence, and any fact, which favours the version of the accused and also favours the version of the prosecution should be considered in favour of the accused.

At this juncture, I am also reminded of the judicial decision of **Martin Singho Vs. Queen 69 CLW 21** where it was held;

> *"Even if the jury declines to believe the appellant's version, he was yet entitled to be acquitted on the charge if his version raised in their mind a reasonable doubt as to the truth of the prosecution case."*

In the case of **SC Appeal No. 99/2007 decided on 30.07.2009**, it was held:

> *"What needs consideration now is when the evidence led for the prosecution in this case is closely scrutinized, whether it could be satisfied that prosecution had discharged the burden of proving the case beyond reasonable doubt. If not, the Appellant is liable to be acquitted of the charges. The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness in the defence, and when the guilt of the accused is not established beyond reasonable doubt, he is liable to be acquitted as a matter of right and not as matter of grace or favour.*

In the case of **Alim Vs. Wijesinghe (S.I. Police, Batticaloa) 38 CLW 95**, it was held that,

> *"Where the same facts are capable of an inference in favour of the accused and also an inference against him, the inference consistent with the accused's innocence should be preferred."*

It is well-settled law that if the accused decides to make a dock statement when called for a defence, even such a dock statement has to be considered as a form of an evidence subjected to the infirmities it carries due to the fact that it was not evidence given under oath or subjected to the test of cross-examination.

In the case of **Queen Vs. Kularatne (1968) 71 NLR 529**, it was held that while jurors must be informed that such a statement must be looked upon as evidence subjected however to the infirmities that the accused's statement is not made under oath and not subjected to cross-examination.

Held further;

1. *If the dock statement is believed, it must be acted upon to,*
2. *If it raised a reasonable doubt in their minds about the case of the prosecution, the defence must succeed and;*
3. *It must not be used against another accused.*

It was held in the case of **Don Samantha Jude Anthony Jayamaha Vs. The Attorney General, C.A. 303/2006** decided on 11-07-2012 that,

> *"Whether the witness of the defence or the dock statement is sufficient to create a doubt cannot be decided in vacuum or in isolation, because it needs to be considered in the totality of evidence, that is in the light of the evidence for the prosecution as well as the defence."*

It is trite law that in a criminal case, a trial Judge has to consider prosecution as well as defence evidence in its totality without compartmentalizing it.

Our Superior Courts have consistently laid emphasis on the duty to consider the evidence as a whole, irrespective of whether the trial was held before a jury or Judge. In the case of **The King Vs. Appuhamy 37 NLR 281**, it was stated that "*One has to look at the whole case*". A similar approach was adopted by the Court of Criminal Appeal in **King Vs. Buckley 43 NLR 474**, which imposed a duty on the jurors that they should view the evidence as a whole. The judgments of **King Vs. De Silva 41 NLR 337**, **King Vs. Perera 41 NLR 389,** and **The Queen Vs. Abadda 66 NLR 397** had adopted a similar view.

In **James Silva Vs. Republic of Sri Lanka (1980) 2 Sri L.R. 167**, it was clearly stated that;

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

With the above legal principles in mind, I will now consider whether the prosecution evidence has passed the test of probability and whether there can be any justification in the manner the learned High Court Judge analyzed the relevant issues in favour of the prosecution version of events.

PW-01 in his evidence in chief has given specific evidence to say that he and the other officers who were in the car, came and parked their vehicle in the car park of Mel Madura in a way that the front side of the vehicle was facing the main road. This suggests that PW-01 who was in the front seat of the vehicle from the left-hand side of the driver, and the other officers who were inside the vehicle could very clearly see what was happening on the main road in front of them.

If that could be believed, the trial Court could safely assume that PW-01 and the other officer who gave evidence had a clear view of the road so that what they say as to what unfolded before them could also be believed.

However, under cross-examination and under constant questioning as to the geography of the car park, PW-01 has completely changed his position to say that the vehicle was parked parallel to the main road in the car park of Mel Medura and it was the driver of the vehicle who was nearest to the road, and since he was seated next to the driver from the left side of him, he had to look at the road by turning and through the driver's side glass of the door. I am of the view that this creates a grave doubt as to the truthfulness of the utterances of PW-01 and also the subsequent evidence of PW-02 who has spoken in line with the subsequent evidence of PW-01 stating that their vehicle was parked parallel to the road.

In that context, it appears that if the vehicle was parked parallel to the road and the front side of the car was facing the Mel Madura building, the car park entrance being a narrow entrance, the view of the main road that can be obtained from such a position would not be a wide view of the main road.

The evidence of the PW-01 had been that the three-wheeler which came from the direction of Horton Place roundabout towards Borella from the left-hand side of the road turned towards the right-hand side of the road and parked the vehicle right in front of the entrance to the car park, and he observed that the driver was taking a call to someone.

I find it hard to believe that in a busy road like this, where vehicles travel both ways, and vehicle parking is not allowed on the road, a drug trafficker who comes from the correct side of the road, would come across the road and park his vehicle in a manner anyone can see it as parked facing the towards the wrong direction of the road. He could have easily stopped the vehicle on the correct side of the road which belongs to him, and make the call if he so wishes, without attracting undue attention from anyone. I find that it is quite probable that by saying that the 1st appellant came across the road and parked the vehicle just in front of the entrance to Mel Medura, the prosecution witnesses are attempting to show that they were able to clearly observe what he was doing at a close range. I find that the probability of such a thing not happening is more towards the version of events as narrated by the defence at the trial.

Another matter that needs attention is the evidence where PW-01 says that the informant who was with them waited in the main road about 5-6 meters away from their car expecting the arrival of the 2nd accused named Baba. It was his evidence that after the three-wheeler came and parked near the entrance, which obviously should be near the place where the informant was looking at the road, he came near the car and identified the person who came near the three-wheeler as Baba and discretely left the place.

This is an incident alleged to have happened in the broad day light according to the evidence of prosecution witnesses. If the informant was stationed in the manner the prosecution witnesses say, it would have exposed him to the driver of the three-wheeler, who was the 1st accused-appellant, as well as the person who allegedly came near the vehicle, namely the 2nd accused-appellant.

There is a high possibility that either both of them or one of them could see the informant while standing near the main road or even talking to the persons in the car. It clearly appears that the informant was a person well known at least to the 2nd accused-appellant whom he has referred to as 'Baba' and provided the

information that he is the person carrying the Heroin and coming from Maligawatta area.

It is highly improbable to believe that an informant who provides regular information to PNB would take such a risk to expose himself in the manner the witnesses claim, knowing very well the dangerous consequences he will have to face if the drug traffickers come to know that he is a police informant.

Another matter that needs attention is the information that is alleged to have been provided by the informant. According to PW-01, the information had been to the effect that a person called Baba, who has been later identified as the 2nd accused-appellant would be bringing Heroin to be delivered near a place in Horton Place. The prosecution witnesses have waited for a considerable period of time near the fuel station at the junction expecting further information from the informant.

The evidence had been to the effect that the informant came in his motorbike and spoke with the witnesses. Subsequently, it had been stated that the informant came again and informed that the 2nd accused-appellant will be coming out from a building nearby to make the delivery. It shows that the 2nd appellant had been inside the building as stated by the informant. If the initial information had been to the effect that the 2nd accused is going to leave Maligawatta area to deliver Heroin and the informant was on the lookout for his whereabouts, what was the reason for the informant to fail to notice that the 2nd accused-appellant came and went inside the house or how he came to know that the 2nd accused-appellant was already inside the house, are questions that need to be considered.

The consistent stand taken up by the appellants had been that they were arrested while being inside the house No.62, Horton Place on the night of the previous day, namely 22-01-2013, and were held in detention at the house until the next day. It had been the position of the appellants that the other persons with them were released and both of them were detained after questioning about

a person called Faizer, and that they were later taken to PNB where the drugs were introduced to them.

The 2nd accused-appellant has explained the alleged recovery of money from his possession stating that it was recovered not in the manner stated by the witnesses, but from his travelling bag, which he took to the house when he came there few days before the incident to stay with the watcher of the house.

As I have stated before, the evidence led in a case has to be taken in its totality, including the stand of the defence. I am not in a position to agree with the learned High Court Judge's observation that several persons including the raiding party could not have stayed in a security hut of the house overnight and the version of events as narrated by the accused-appellants in their dock statements cannot be believed and is a concocted story. I am also unable to agree with the analysis of the evidence by the learned High Court Judge to justify the prosecution evidence as to the improbability factors of the version of events narrated by the prosecution witnesses.

I am of the view that if taken in the correct perspective, there was ample basis to conclude that the evidence of the prosecution has not passed the test of probability and was not cogent enough to determine that the prosecution has proved the case beyond reasonable doubt against the accused-appellants.

I find that, if taken as a whole, the version of events as taken up by the appellants at the trial are more probable than that of the evidence of the prosecution, which should be a factor that should have been considered in favour of the appellants.

I am of the view that this was a case where there was a reasonable doubt as to the evidence narrated by the prosecution, where such a reasonable doubt should have been held in favour of the accused-appellants.

For the reasons as considered above, I find that this is a conviction and a sentence that cannot be allowed to stand. I am of the view that considering the

remaining grounds of appeal would not be necessary, as the appeal should succeed on the considered ground of appeal alone.

Accordingly, I set aside the conviction and the sentence dated 30-07-2018 pronounced by the learned High Court Judge of Colombo and acquit the two accused-appellants from the charges preferred against them.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal