

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

**In the matter of an Appeal under and in
terms of Section 320 of the Code of
Criminal Procedure Act No. 15 of 1979
of the Constitution.**

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

Complainant

CA HCC 195/2019

High Court of Colombo
Case No. HC 7843/2015

Vs.

Syed Ibrahim Mohomed Uvais

Accused

AND NOW BETWEEN

Syed Ibrahim Mohomed Uvais

Accused-Appellant

Vs.

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

Complainant-Respondent

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

Amal Ranaraja, J.

Counsel: Shavindra Fernand, P.C. with Thivanka Attygalle, Mirthula Skandarajah and Rishnie Fernandopulle for the Accused-Appellant.

Jayalakshi De Silva, S. S.C. for the State.

Argued on: 21.03.2025

Decided on: 28.03.2025

JUDGMENT

AMAL RANARAJA, J.

1. The Accused-Appellant (hereinafter referred to as the “Appellant”) has been indicted in the *High Court of Colombo* in High Court of Colombo Case No. 7843/2015.

2. The charges in the indictment are as follows;

a) On or about 04.04.2014, at *Maligawaththa*, you did traffic 693.9 grams of heroin, an offence punishable in terms of Section 54 A (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984.

b) During the course of the same transaction, the appellant did possess 693.9 grams of heroin without a license or permission of the director, an offence punishable in terms of Section 54 A (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984.

Case of the prosecution

3. PW1 (IP *Jayamanne*) PW2 (SI *Saman*), PW3 (SI *Mahinda*), PW4 (PS50146 *Richard*), PW 5 (PC22369 *Priyantha*), PW6 (PS 60418 *Samatha*) and PW7 (PS 61228 *Weerasinghe*) have been attached to the narcotics bureau of the police department at the relevant period of time.
4. At about 09.30 hrs on 04.04.2014, PW5 has received a tip from a private informant of his regarding an incident involving the transport of a narcotic substance in the *Wellampitiya* area. PW5 has informed PW1 about the tip he received. PW1 has decided to conducted a raid, gathered a team of officers which included those named above, made an out-note and the officers have proceeded to the *Wellampitiya* area. The team of officers gathered by PW1 have travelled to the *Wellampitiya* area in three vehicles i.e. two threewheel scooters and a motorcycle.
5. PW1 and PW5 have met the informant of PW5 at a location close to the *Wellampitiya* bridge and obtained further information regarding the person

named in the tip. Though the officers have thereafter engaged in surveillance activity anticipating the arrival of the person named in the tip, no arrest has been made. The team of officers have left the location they were in at *Wellampitiya*, at 15.20 hrs.

6. When the team of officers were travelling back to the bureau, PW5 has received a second tip. The team of officers have thereafter proceeded to the bus stand in *Wellampitiya*. PW1 and PW5 have proceeded to meet the informant of PW5 at about 18.20 hrs. The informant has appraised PW1 and PW5 regarding another incident of a narcotic substance due to be transported in a three-wheel scooter and has offered to point out to the officers the particular three-wheel scooter when it went pass the area the informant and the team of officers were at that time. Then, PW1, PW5 and the informant have positioned themselves at a location close to a bridge while the rest of the officers have continued to remain at a location close to the bus stand.
7. At about 22.50 hrs, the informant has pointed out to a three-wheel scooter that was proceeding from the direction of *Kaduwela*. PW1, PW5 together with the other officers have thereafter gone after the particular three-wheel scooter. When the three-wheel scooter which the officers were going after reached a location in *Seeyawatha* in *Maligawaththa*, the driver of the three-wheel scooter has got off the same and started walking towards a house.

PW1 has with the assistance of the other officers stopped the driver and PW1 has proceeded to examine a black coloured plastic bag that was in his possession. The black coloured plastic bag had contained four silver coloured foiled bags each of those foil bags had had in them two transparent plastic bags. One enclosed in the other. The inner most transparent bag had contained a brown coloured powdered substance. PW1 has proceeded to identify the brown coloured powder substance to be a heroin mixed powder through the smell, texture, colour and the nature of such powdered substance. PW1 has kept in his safe custody the parcels containing the heroine mixed powder, questioned the driver, who was the appellant and proceeded to arrest him. Upon the arrest of the appellant the officers have searched the house of the appellant and discovered a small weighing scale. Consequent to searching two other houses situated at *Wennawatta, Wellampitiya* and in *Bomiriya, Kaduwela*, PW1 and the team of officers have returned to the bureau with the appellant.

8. When the officers returned to the bureau, the parcels containing a heroin mixed powder has been weighed, sealed and handed over to PW10 (IP *Rajakaruna*), the production keeper at the bureau. PW10 has thereafter handed over the parcels containing heroin mixed powder to the *Government Analyst Department* for analysis. The *Government Analyst* has conducted tests and prepared a report. Such report has been marked as “ඡ්-44”.

Case of the accused

9. On 04.04.2014, the appellant has travelled to the *High Court* in *Avisawella* to stand surety to a person named *Lalitha*. After the formalities were concluded, he has returned to *Colombo* and had been driving his threewheel scooter when he has stopped at a location close to the *Samantha Cinema Hall* in *Dematagoda*. Subsequently, some persons have blind folded the appellant, taken him into an isolated area and questioned the appellant about a place in which the mistress of *Lalitha* had hid a narcotic substance. When the appellant answered that he did not know of such a place, he has been assaulted. The blind fold thereafter has been removed and the appellant taken to two houses situated in the *Wanniwatha* area in *Wellampitiya*. Purportedly, a parcel containing a narcotic substance has been found in the second house and the appellant falsely implicated of being in possession of such parcel.
10. The appellant has pleaded not guilty to the charges in the indictment hence the matter taken up for trial before the High Court Judge. At the conclusion of the trial, the Learned High Court Judge has convicted the appellant of the charges and sentenced him to death.
11. The appellant being aggrieved by the impugned judgment and the sentencing order dated 05.03.2019 has preferred the instant appeal to this Court.

12. When the matter was taken up for argument, the Learned President's Counsel for the appellant has urged the following grounds of appeal;

- i. Is the prosecution version inherently impossible?
- ii. Did the Learned High Court Judge err in using a different yardstick in analysing the prosecution's case as against the defendant's case?
- iii. Did the Learned High Court Judge err in coming to the conclusion that the prosecution version is more probable than the defence version?
- iv. Did the Learned High Court Judge err in rejecting the dock statement without proper reasons?
- v. In those circumstances, did the appellant receive a fair trial in the High Court.

13. The appellant has been produced before the Learned Magistrate of *Maligakanda* for the first time on 05.04.2014 together with a certificate to the effect that it was necessary to detain the appellant in police custody for the purpose of further investigations. The Learned Magistrate, has made order allowing such application and permitted the appellant to be kept in

police custody until 10.04.20014. When the appellant was produced before the Learned Magistrate again on 10.04.2014, the appellant has complained that he had been taken into custody at a location close to the *Samantha Cinema Hall*. Further, as divulged through the evidence of PW5 prior to the appellant being produced before the Learned Magistrate on 10.04.2014, the appellant has been produced before a *Judicial Medical Officer* for examination. The report has revealed that the appellant had suffered injuries.

14. PW1 and PW5 have testified that the appellant suffered those injuries when the officers tried to subdue the appellant when he tried to resist arrest. The Learned High Court Judge, has given credence to the testimony of the prosecution witnesses and not to that of the appellant, though the facts were capable of an inference in favour of the appellant's innocence.

In ***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.”

15. Further, the second tip relevant to the appellant has been received by PW5 at approximately 18.20 hours on 04.04.2014. In that instance, the informant has volunteered to point out to the officers, the particular three-

wheel scooter which was being used by the appellant to transport a narcotic substance. PW1, PW5 and the informant have thereafter positioned themselves at a location close to a bridge in the *Wellampitiya* area after 18.20 hrs. The informant having had very little information with regard to the three-wheel scooter that the appellant was going to use to transport a narcotic substance, he would have had to pay attention to each and every black coloured threewheel scooter that went pass them. The informant would have had to engage in such an exercise until 22.50 hours i.e. for a period of four hours or more. Further, it being night time, the street lamps had been switched on. Though the street lamps would have illuminated the road, the interior of vehicles travelling along such road would not have been illuminated by the light that stemmed from those street lamps. Being unaware of the registration number of the particular three-wheel scooter, the informant would have had to identify the particular three-wheel scooter through its occupant. When no evidence has been led to establish the fact that the interior of the particular three-wheel scooter was illuminated, it is uncertain as to how the informant identified the appellant when the appellant was driving the particular three-wheel scooter in such circumstances.

16. Further, the officers have gone after the threewheel scooter driven by the appellant for an extended period of time that night. The officers at that time have travelled in two threewheel scooters and a motor bike. It being night time, appellant would have been dazzled by the headlights of the vehicles the officers travelled in, thereby the attention of the appellant drawn to

those vehicles. The prosecution has failed to explain the precautions taken by the officers engaged in the raid to prevent such an occurrence.

17. The officers have also not attempted to stop the three-wheel scooter driven by the appellant at the earliest opportunity. PW1, explaining the related incident has stated that the officers wanted to ascertain the identity of the source engaging in the transaction with the appellant. Such an explanation is uninspiring as the appellant could have been arrested, thereafter questioned and the necessary information extracted from the appellant.

18. The testimony of PW1 and PW5 being as discussed above, their narratives are strange, peculiar, odd and unusual. The conduct of PW1 and PW5 do not harmonize with the conduct expected of such officers, it is apparent, that an improbable account of events that have supposedly taken place have been narrated by PW1 and PW5.

19. An informant is a person who provides crime-related information to law enforcement officers. They are a vulnerable category of persons. Due to their vulnerability, the identity of an informant is concealed at all times. An informant would be vulnerable to harm by an offender, a person who deals or is connected with/to an offender. Due to such vulnerability, law enforcement officers at all times take precautions to not divulge the identity of an informant. The law enforcement officers do so by not taking an informant to a crime scene, by not divulging personal details or the identity

of an informant when giving evidence in a Court of law and by not exposing an informant to an offender or a person connected to an offender. In some instances, security is also provided to an informant.

In the instant case, PW1 and PW5 in their evidence have stated that the informant was with them at a location by the side of a road in which the appellant was expected to travel on. In fact, it is their testimony that the informant was with them when the three-wheel scooter which the appellant drove went past them. Such an incident discloses a situation where the law enforcement officers have not taken action to protect the identity of an informant, which is not normal and is unusual.

20. The narratives of PW1 and PW5 are implausible based on the reasons discussed above. The arguments present are not convincing and the evidence should not be acted upon. However, the Learned High Court Judge has misdirected himself when he concluded that the prosecution witnesses are creditworthy and it was safe to act on their testimony.

21. A period of nine years have lapsed since the offence has been purportedly committed. Therefore, it does not seem just to call upon the appellant to defend himself again after such an unconscionable lapse of time.

In ***The 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.”

22. Having considered the above, I am of the view that this is not a fit case to order a re-trial.

Due to the reasons stated above, I set aside the conviction and the disputed sentencing order and acquit the appellant of the charges preferred against him.

Appeal allowed.

23. 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