

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

LANKA

In the matter of an Appeal 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.

CA Case No: HCC/359/2019

HC of Colombo Case No:

HC 672/18

The Democratic Socialist Republic of Sri
Lanka

Complainant

Herath Mudiyanseelage Thushara alias
Kalu Thushara
No.101/168/A3, kelanithissa Ama
Weragodalla
Wellampitiya.

Accused

AND NOW BETWEEN

Herath Mudiyanseelage Thushara alias
Kalu Thushara
No.101/168/A3, kelanithissa Ama
Weragodalla
Wellampitiya.

Accused-Appellant

(Currently at Welikada Prison)

Vs.

Attorney General

Attorney General's Department

Colomo 12

Complainant-Respondent

Before: B. Sasi Mahendran, J.

Amal Ranaraja, J.

Counsels: Kalinga Indatissa , PC with Rashmini Indatissa and Razan Salih
for the Accused-Appellant
Sudarshana De Silva, SDSG for the State

Written 23.05.2025(by the Accused Appellant)

Submissions : Not filed (Respondent)

On

Argued On: 19.05.2025 and 27.05.2025

Judgment On: 09.07.2025

JUDGMENT

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as the "Accused") was convicted under Sections 54A(b) and 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984. On 10th December 2019, the High Court of Colombo found the Accused guilty of possession and trafficking of 25.77 grams of Diacetylmorphine (heroin).

The prosecution led evidence from nine witnesses and produced exhibits marked P1 through P11 before concluding its case. The Accused made a dock statement in his defence. At the close of the trial, the Learned High Court Judge found the Accused guilty on both counts and sentenced him to life imprisonment.

Facts of this case may be briefly summarized as follows:

According to Witness No. 01, he had taken part in numerous anti-narcotic operations. On 11th May 2017, he received intelligence from a personal informant indicating that the accused, Thushara, was allegedly transporting heroin from the Ragama and Delgoda areas to the Sedawaththa area via Kelaniya, using a motorcycle bearing the registration number BDQ-0800.

PW1 documented this information in his official pocket notebook on 12th May 2017 at 06:30 hours. He promptly relayed the intelligence verbally to his senior officers and proceeded to organize a raid. At 06:45 hours the same day, PW1 departed from the Unit with a team of officers, including PC 31733, PC 8507, PC 50305 (or PC 30305), PC 81716, and PC 9000. The outer entry was officially recorded at 06:45 hours.

At approximately 09:30 hours, PW1 met with the informant near the Thewatta Church turn-off and held a discussion that lasted approximately an hour and a half. During this meeting, the informant reiterated that the accused was transporting heroin by motorcycle from Delgoda to Sedawatta Thudugala. Following this, PW1 contacted the Officer-in-Charge (OIC) via phone and dispatched two officers—PC 77008 Balagolla and PC 83860 Nuwan—to the Sedawatta area on motorcycles.

Acting on PW1's instructions, the officers proceeded to the Thudugala Road turn-off and took up strategic surveillance positions. They were directed to alert PW1 should the red Pulsar motorcycle bearing number BDQ-0800 be seen approaching from any direction. Meanwhile, PW1, accompanied by officers PS 8507 Pushpakumara and PC 81716 Samantha, stationed themselves in a three-wheeler parked along Thudugala Road, facing the main road. They maintained this position from 11:00 to 14:00 hours.

At around 14:00 hours, PW1 received information from officer Abeywickrama that the motorcycle was approaching Thudugala. Acting swiftly, PW1 instructed Abeywickrama to follow the accused, while directing the three-wheeler to proceed to the beginning of Thudugala Road. Thereafter, a person came to the area on a motorcycle bearing number BDQ-0800, wearing a full-face helmet. Abeywickrama and another officer came from behind the motorcycle and the three-wheeler where PW1 was inside, passed the motorcycle, and stopped in a way that intercepted it.

Accordingly, PW1 and the other officers stopped the motorcycle. PW1 introduced himself as an officer from the Organized Crime Prevention Division and switched off the motorcycle and took it into custody.

PW1 has asked the accused to remove the helmet and asked for his name. He remained silent for some time and introduced himself as Thushara. PW1 observed that the accused appeared visibly frightened while being questioned. The accused was wearing long trousers and a sleeveless T-shirt. PW1 instructed the uniformed officer to secure the area while he, together with officers Abeywickrama and Pushpakumara, proceeded to check the accused. While the accused remained seated on the motorcycle, PW1 conducted a body search from head to toe and felt a suspicious item like a parcel in the right pocket of the trousers.

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ප්‍ර : මොනවද ඔහු ඒ අවස්ථාවේදී ඇදගෙන සිටියේ ?

උ : දිග කලිසමක් සහ අත්කොට කලිසමකින්.

ප්‍ර : කොහොමද එම හනත්තාව පරීක්ෂා කළේ?

උ : එම පුද්ගලයා බයිසිකල් ඉදගෙන සිටියදීම මා ඔහුගේ හිස සිට පහලට ස්පර්ශ

කරමින් පරීක්ෂා කළා.

ප්‍ර : ඒ පරීක්ෂා කිරීමේදී ඔබට මොකද්ද අනාවරණය උනේ?

උ : එසේ පරීක්ෂා කිරීමේදී ඔහු අද සිටි දිග කලිසමේ දකුණු පැත්තේ සාක්කුවේ යම්කිසි පාර්සලයක් වැනි දෙයක් තියෙනවා මගේ අතට අහු උනා ස්වාමීනි. මම ඇත දාලා සාක්කුවට එම පාර්සලය ගත්තා ස්වාමීනි. අරගෙන මා එය ඇතුලත පරීක්ෂා කළා. එම බ්‍රවුන් ජෙපර් බෑගයක් අරගෙන මා එය ඇතුලත පරීක්ෂා කළා. එම බ්‍රවුන් ජෙපර් බෑගයක් තිබුනේ. එක ඇතුළේ ලා රෝස පති සෙලොපෙන් කවරයක් තිබුනා.

ප්‍ර : මොන සාක්කුවේ තියෙනවා කියලද එම පාර්සලය ඔබට අනාවරණය උනේ?

උ : මෙම සැකකරු අද සිටි කලිසමේ දකුණු පස සාක්කුවේ.

PW1 discovered a brown paper bag containing a pink cellophane wrapper, which was tightly sealed at the opening. Upon unwrapping and inspecting its contents, he observed a brown powdery substance. Drawing upon his prior experience, PW1 suspected the substance to be heroin and promptly informed the other officers. The suspected heroin was found to be stored in two pink bags.

The accused was apprehended at 14:00 hours. At the time of arrest, he had Rs. 500 and his driving license. At 14:40 hours, the officers proceeded to search the accused's residence; however, no illegal items were discovered. According to PW1, the parcel was properly weighed, sealed, documented in the production list, and subsequently forwarded to the Government Analyst for examination.

However, upon careful analysis of PW1's testimony, considerable doubt arises regarding the plausibility of searching while the accused remained seated on the motorcycle. Such a method appears unnecessary under the circumstances and casts significant doubt on PW1's account of how the search was executed. The credibility of his version of events is therefore questionable.

Section 11(b) of the Evidence Ordinance reads as follows;

"Facts not otherwise relevant are relevant –

(b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

The central issue in this appeal is whether the testimony of PW1 is improbable. If that is the case, it would suggest that the Learned High Court Judge did not adequately apply the test of probability to the prosecution's case.

According to Murray's English Dictionary, probability means "the appearance of truth or likelihood of being realized, which any statement or event bears in the light of present evidence."

Sarkar and Monohara, in their book "SARKAR ON EVIDENCE" (Fifteenth Edition), on page 71, stated that;

"...probability is meant the likelihood of anything being true, deduced from its conformity to our knowledge, observation, and experience. When a supposed fact is so repugnant to the laws of nature that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible."

According to **E.R.S.R. Coomaraswamy**, in "**The Law of Evidence Volume II Book 02**" on **Page 1053**,

"The test of improbability has been described as essential inconsistency. There may be facts which may show it to be impossible or so highly improbable as to justify the inference that it never occurred."

In **Wickremasuriya v Dedoleena and Others [1996] 2 S.L.R. 95**, on page 98, His Lordship **Jayasuriya J.** observed that;

"A Judge, in applying the test of Probability and Improbability, relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."

A similar situation with regard to high improbability was considered by Her Ladyship

Deepali Wijesundera J in Selvanayagam Carmel Jenova Vs. The Attorney General, CA

Case No. 107/2011 decided on 13.10.2021 and held that;

"The grounds of appeal urged by the learned counsel for the appellant are as follows. That the version of the prosecution is highly improbable and that the learned High Court Judge had failed to apply the test of probability and improbability in evaluating the evidence. The appellant's counsel submitted that it is highly improbable to believe that when six police officers were searching a small house for the appellant to take address alleged to have contained heroin in the pocket and put it in to a bucket. If the appellant took the said dress from the clothes line and put it into a bucket as claimed by the prosecution this would have drawn their attention to the dress which is not the conduct of a wrong doer. I find this improbable. There are more than enough places in a house to conceal such articles."

Upon a careful review of the testimony of PW1, it appears highly improbable that the search, as described, could have resulted in the recovery of the substance from the accused's pocket. Applying both the test of probability and improbability to the facts presented, it becomes clear that the prosecution's narrative lacks credibility.

In light of the foregoing, we are of the considered view that the prosecution has failed to prove its case beyond a reasonable doubt. Accordingly, we set aside both the conviction and the sentence, and the Accused-Appellant is hereby acquitted.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL