

**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/0039/2023

Sandanam Anthony Joseph

Accused-Appellant

High Court of Colombo
Case No: HC/207/2018

Vs.

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

Complainant-Respondent

BEFORE : **P. Kumararatnam, J.**
K. M. G. H. Kulatunga, J.

COUNSEL : **Neranjana Jayasinghe for the Appellant.**
Hiranjana Peiris, SDSG for the Respondent.

ARGUED ON : **12/03/2025**

DECIDED ON : **29/04/2025**

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 Possession and Trafficking of 33.25 grams of Heroin (diacetylmorphine) on 20th September 2016.

After the trial, the Appellant was found guilty on both counts by the Learned High Court Judge of Colombo who thereby sentenced him to life imprisonment on 8th December 2022.

Being aggrieved by the aforesaid conviction and sentence, the Appellant referred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given his consent to argue this matter in his absence. At the hearing, the Appellant was connected via zoom platform from prison.

The following Grounds of Appeal were raised on behalf of the Appellant.

1. The case for the prosecution does not satisfy the test of probability.
2. The rejection of the defence evidence was on a wrong premise.

In this case the raid was conducted based upon specific information that was received by the Police Narcotics Bureau. The raid was headed by PW1 along with a team of police officers from the Bureau in Colombo-01, all of whom have been named as witnesses in the indictment including the relevant Government Analyst. The prosecution had called PW1, PW7, PW10 and PW13 to give evidence and closed their case. The production chain had been admitted under Section 420 of the Code of Criminal Procedure Code. The prosecution marked productions P1-P12 in support of their case.

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

Background of the case albeit briefly is as follows:

On the 20th of September 2016 PW7 had received information that a person called “Anton” from the Dematagoda area is carrying Heroin to a “Watta” close to De Lasalle Junction in a three-wheeler bearing No. HQ 2899 and the informant who had alerted the police had asked them to rush to the spot. Acting on that information a police team headed by PW1 had left the Police Narcotics Bureau around 13:40 hours and reached the place of raid at about 14:10 hours. PW1 and PW7 were in civil dress while others were clad in police uniform. The team had reached and parked/halted 20 meters away from the De Lasalle junction. After meeting the informant, PW1 and PW7 had placed themselves near the Muthuwella playground and the other officers who were in police uniform had been placed near the gate of the school. The distance between each of them were about 5 meters.

Upon seeing the particular three-wheeler described by the informant, as per the order of PW1, PW8 had signalled it to stop. The vehicle was made to park on the side of the road. PW1 had observed that there was nobody in the three-wheeler except the driver. When PW1 and PW7 had checked the Appellant who was the driver of the vehicle, according to the officers, he had panicked. Thereafter, he was subjected to a body search and the police officers found a small parcel in the from right side pocket of the Appellant's pair of shorts. PW1 had taken the parcel into his custody and inspected the same. The parcel contained some brown coloured substance. As it reacted for Heroin (Diacetylmorphine) the Appellant was arrested immediately. When the Appellant was handcuffed, he had tried to escape from police custody. The team has returned to the Police Narcotics Bureau at about 16:00 hours.

The substance was weighed at the Police Narcotics Bureau and was found to be about 70.400 grams. The production was sealed and handed over to PW10 who was then in charge of the production which was numbered 20/2016.

In every criminal case the burden is on the prosecution to prove the commission of the offence by the accused beyond a reasonable doubt. Hence, an accused person has no burden to prove his case unless he pleads a general or a special exception set out in the Penal Code.

In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 held:

“A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences in relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions....”

In **the Attorney-General v. Rawther** 25 NLR 385, Ennis, J. states thus:
[1987} 1 SLR 155

"The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt".

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 appeal grounds raised by the Appellant are interrelated, the grounds will be considered together in this case.

Probability plays a crucial role in persuading a judge on specific points, as the higher the probability of an assumption, the greater the likelihood of convincing the judge. Probability is highly significant in criminal investigations, where it is utilized to evaluate the relevance of different types of evidence. In order to accuse someone "beyond a reasonable doubt," it is essential to have strong evidence, which often involves making certain assumptions to draw conclusions. The likelihood of these assumptions being true is specifically referred to as the principle of probability in legal terms.

According to the information the policemen were called to the place of arrest immediately. According to PW7 he had received the information at 12:40 hours. PW1 was informed at about 12:50 hours. The team had left the Bureau at 13:40 hours. Even though the informant requested that the policemen rush to the sight, the police had taken nearly one hour to leave the Bureau. Further, the defence had brought to the notice of the Court that the time at which the information had been received had been overwritten and the time of the entry made at 12:20 hours had been altered to state as 12:40 hours. Hence, the learned Counsel for the defence contended that if the information had been received at 12:20 hours where the police were requested to rush to the site, it is highly improbable for PW7 to take 30 minutes to inform PW1 about the information.

Police officers' notes are frequently regarded as critical forms of evidence, particularly in criminal proceedings. Even minor alterations to these records can raise concerns regarding the credibility of the documentation and the intent. As a result, most law enforcement institutions implement stringent policies that regulate how and when officers may amend their notes.

In absence of any plausible explanation, an alteration, if highlighted, definitely affects the integrity of the investigation conducted by the police. Therefore, disregarding the highlighted time alteration has caused great prejudice to the Appellant.

The defence had never stated that the person who was in the three-wheeler escaped when four police officers surrounded the three-wheeler. The position of the defence is that the person who was seated at the back of the three-wheeler escaped after seeing the police officer who signalled for the three-wheeler to be stopped by the roadside. The learned High Court Judge had mixed up the evidence of the prosecution and the defence and on that misdirection had rejected the defence evidence.

The profound duty of the trial court is to consider the evidence placed by the prosecution and the defence on equal footings to arrive at its finding.

In **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

“A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done”.

In this case, the Learned High Court Judge had not considered the probability factors in conjunction with the defence's evidence. The rejection of defence's evidence without proper analysis had caused great prejudice to the Appellant.

The burden of proof is usually on the person who brings a claim in a dispute. It is often associated with the Latin maxim *semper necessitas probandi incumbit ei qui agit*, a translation of which is: "the necessity of proof always lies with the person who lays charges."

The learned defence Counsel brought to the notice of this Court that the officers engaged in the raid were later taken into custody on allegation of carrying Heroin. Hence, the allegation that there is a possibility that they had only produced a small quantity of Heroin and had concealed the rest.

Law enforcement institutions are entrusted with a diverse set of rules and regulations that must be followed in order to maintain a high degree of integrity within police departments and to prevent oversights. Where this does not function well, law enforcement officers may become prone to careless behaviour and unlawful activities (**Handbook on Police Accountability, Oversight and Integrity- Criminal Justice Handbook Series**).

Considering the two grounds of appeal discussed above, the irregularity and the failure occasioned in this case cannot be rectified by this court as they have caused great prejudice to the Appellant.

As the prosecution had failed in its duty to prove this case beyond a reasonable doubt, I set aside the conviction and sentence imposed by the Learned High Court Judge of Colombo dated 08/12/2022 on the Appellant. Therefore, he is acquitted from this case and the appeal is allowed.

The Registrar of this Court is directed to send this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

K. M. G. H. Kulatunga, J.

I agree.

JUDGE OF THE COURT OF APPEAL