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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.

**Court of Appeal Case No.  
CA/HCC/ 0260/2017**

The Democratic Socialist Republic of  
Sri Lanka.

**High Court of Colombo  
Case No. HC/8073/2015**

**Complainant**

**Vs.**

Dona Mudiyanseelage Dona Nilanthi  
Niroshini

**Accused**

**Now And Between**

Dona Mudiyanseelage Dona Nilanthi  
Niroshini

**Accused-Appellant**

**Vs.**

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

**Respondent**

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

**COUNSEL** : **Razik Zarook, PC with Rohana Deshapriya**  
**and Chanakya Liyanage for the Appellant.**  
**Hiranjana Peiris, SDSG for the Respondent.**

**ARGUED ON** : **11/08/2023**

**DECIDED ON** : **22/11/2023**

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### **JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellant (hereinafter after referred to as the Appellant) was indicted by the Attorney General under Sections 54A (b) and 54A (e) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for possession and trafficking respectively of 2.15 grams of Heroin on 17<sup>th</sup> January 2015 in the High Court of Colombo.

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After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed life imprisonment on both counts on 05.05. 2017.

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 had given consent to argue this matter in her absence due to the Covid 19 pandemic. During the argument she was connected via zoom from prison.

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

1. The Learned Trial Judge has failed to consider that the prosecution relating to the raid and arrest of the Appellant lacks credibility and is improbable.
2. The Learned Trial Judge has erred by failing to consider that the prosecution has not proved the nexus between the Heroin allegedly taken into custody and what was produced in Court.
3. The Learned Trial Judge has come to the wrong finding that the prosecution has proved the charges against the Appellant beyond reasonable doubt.

**Background of the case.**

On 17.01.2015, PW5, PC 22369 received an information that one Nilanthi who lives in the yellow painted two storied house to the right side of the three-way junction on Serpentine Road in Borella would be bringing Heroin. PW1, IP Subodha, after receiving this information organized the raid by selecting 09 officers attached the Police Narcotics Bureau, Colombo-01. PW1

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had also telephoned PW10, WPC 2981 Akila to get ready for the raid. As PW10 was at police single quarters, Modera, the team first left for Modera to accompany PW10, Akila. When the team was stationed at the Dematagoda Bridge the informant had called PW5 and given the description of the clothes the appellant was wearing and also stated that the Appellant was coming in a red coloured three-wheeler. No registration number or the direction it was coming not given.

The raiding team then came to the Serpentine Road passing the prison and stopped near the Sumathi Children's playground. As per the direction of PW1, PW5 and PW4 walked ahead and looked for a red three-wheeler. As they were approaching coming to the railway crossing, a red coloured three-wheeler came from the direction of the prison, turned and stopped at a concrete laid by-lane next to the railway crossing. As the description given by the informant matched, PW1 and PW10 had discreetly followed the Appellant at a distance of 10 meters after receiving the call from PW5. As the Appellant entered the yellow painted house at the three-way junction, PW1 and PW10 also entered the house simultaneously and arrested her.

In a criminal trial, the primary task in front of the prosecution is to gather evidence and to collect these, there must be assumptions which help to finally get access to the evidence, so these assumptions are based on the principle of probability. Also, is a prerequisite in criminal cases to prove the case beyond reasonable doubt. So, it further enhances the use of Principle of Probability. This principle holds a very important role when it comes to convincing the judge on specific point as more the probability of the assumption, more will be chances for the jury to get convinced.

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**In Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 His Lordship held that;

*“In considering whether evidence given by a witness should be accepted or not, the court has to examine whether he is, in fact, an interested witness and to inquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is -whether there is a ring of truth surrounding his testimony.”*

Although, the second information was received at 7.20am on the day of the raid, no solid information was received regarding the whereabouts of the Appellant. A doubt arose upon the evidence given by PW1 as he had waited at the Dematagoda Bridge without proceeding towards the house of the Appellant, the location he knew with certainty.

Further, the raiding team did not know neither the registration number of the three-wheeler nor the direction it is coming from at that time. As thousands of red coloured three wheelers are in service in Colombo City every day, without any clue, eying a particular red coloured three-wheeler, I consider it to a highly impossible task. In this case, the situation got worst as the prosecution had failed to investigate the involvement of the red coloured three-wheeler in which the Appellant said to have arrived on that day.

Further, the informant had not disclosed from where the Appellant was coming and her final destination. Hence, proceeding towards the Appellant's house raises a doubt over the genuinity of the raid.

Although, PW1 had said in the examination-in-chief that the informant had disclosed the name of the Appellant (Nilanthi), but in the cross examination he had said that PW5 who received the information did not mention the name of the Appellant.

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According to PW1, when the Appellant alighted from the three-wheeler, PW5 was about 10 meters away from him and she could see him from the place where he was standing. In contrary, PW5 had said that when the Appellant alighted from the three-wheeler, he did not see where PW1 and PW10 were standing. These contradictory positions taken by PW1 and PW5 certainly fails the test of probability.

In the dock statement, the Appellant took up the position that no hand bag was recovered from her and the police had searched her sister's hand bag which was found in the almirah. The defence witnesses also endorsed this position of the Appellant.

PW10, Akila who had gone into the house with PW1 had failed to identify the hand bag marked and produced as P8. Further, she had failed to answer the question as to which part of the body of the Appellant the hand bag was recovered from. On perusal of the evidence given by PW10, it is quite clear that she had given evasive evidence with regard to the hand bag.

Due to above highlighted inter se and per se contradictions of prosecution witnesses, I conclude in favour of the first ground of appeal that the prosecution's story lacks credibility and probability.

As other two appeal grounds are interconnected, I do wish to address those grounds in this judgement.

In every criminal case, the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person.

Taking the reasons above into consideration, the prosecution's story regarding the arrest and detection of Heroin from the Appellant is highly improbable. The Learned High Court Judge should have given due consideration to the evidence led in this trial.

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Due to the aforesaid reasons, I set aside the conviction and the sentence dated 05/05/2017 imposed on the Appellant by the learned High Court Judge of Colombo. Therefore, I acquit her from both charges.

Accordingly, 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**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**