

**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/0172/2019**

Mohamed Ibrahim Mohamed Jiffry

**High Court of Colombo**  
**Case No: HC/7637/2014**

**Accused-Appellant**

**Vs.**

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

**Complainant-Respondent**

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

**COUNSEL** : **Neranjana Jayasinghe with Harshana Ananda and Imansi Senarath for the Appellant.**  
**Maheshika Silva, DSG for the Respondent.**

**ARGUED ON** : **30/07/2024 and 02/08/2024**

**DECIDED ON** : **05/12/2024**

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**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) (b) and 54 (A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking and the Possession of 04.40 grams of Heroin (Diacetylmorphine) on 11<sup>th</sup> January 2013.

Following the trial, the Appellant was found guilty on both counts and the learned High Court Judge of Colombo imposed the death sentence for both counts on 20/06/2019.

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 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 prosecution version fails test of credibility and probability.
2. The learned High Court Judge wrongly refused the evidence of defence witnesses.
3. The Appellant was denied a fair trial.

In this case, the raid was conducted based on specific information received. The raid was headed by PW1 with six male police officers from the Police Narcotics Bureau. Each of them including the Government Analyst has been named as witnesses in the indictment. The prosecution had called PW1, PW6, PW9, and PW11 and marked productions P1 to P14 in support of their case. The Government Analyst's qualifications were admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979.

When the defence was called, the Appellant had made a dock statement, called five witnesses, and closed his case.

**Background of the case albeit briefly is as follows.**

On 11/01/2013 PW1 SI/Udara attached to the Police Narcotics Bureau of Colombo had conducted a raid acting based on information received from PW6 PC 70731 Weerasinghe. PW6 had received information from his personal informer that the Appellant was coming in a green coloured three-

wheeler with Heroin said to have purchased from a place in Maligawatta. As per the information, the Appellant was to arrive at Awwalsaviya Watta in the Grandpass Police Division. After meeting with the informer, PW1 and PW6 had arrested the Appellant close by who had come in a three-wheeler as expected according to the information received. Upon searching him, a cellophane bag with some substance was recovered from underneath his underwear. Upon the substances in the parcel recovered from the Appellant reacting for Heroin (diacetylmorphine), he was arrested at 14:00 hours and subjected to further investigation. As the investigation revealed that his house was situated in Awwalsaviya Road, Grandpass, the police party had gone to the Appellant's house. Firstly, PW6 had searched the Appellant's house and found a cardboard box containing 1305 sachet packets which were identified as consisting of Hans drug. Thereafter, the police party had returned to the Police Narcotics Bureau at 18:10 hours, sealed the production and entered the same in the production register. The substances weighed about 300 grams. The sealed Heroin parcel was handed over to the production officer PW9 IP/Rajakaruna on the following day, as he was not available at the Bureau. Until such time, the sealed production was in the custody of PW1.

Thereafter, PW6 was called to give evidence to corroborate the evidence of PW1 and it was followed by the evidence of the Government Analyst and PW9.

Usually, the burden of proof lies with 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." Hence an accused person has no burden to prove his case unless he pleads a general or a special exception 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 grounds of appeal raised by the Appellant are interrelated, the said grounds will be considered together in this case.

The prosecution will often rely on evidence in the form of witnesses in order to strengthen their claims. Witnesses are used to testify to seeing a person committing a crime or who are able to place the suspect at the time and or location of the crime. Experts fall into a separate and special category of witnesses as they rely mainly on their expertise in a given field in order to shed light on obscure or ambiguous aspects of a case.

However, it must be kept in mind that although alleged witnesses may testify as to what they allegedly witnessed, it is up to the Judge or the Jury to assess the credibility of the witness and therefore to confirm whether they can be relied on.

The role of probability is pivotal in persuading the judge on specific points, as higher probabilities increase the likelihood of the judge being convinced. Probability plays a crucial role in criminal investigations, aiding in the evaluation of the relevance of different types of evidence. In order to accuse someone "beyond reasonable doubt," it is essential to possess substantial evidence. To achieve this, certain assumptions must be made to draw conclusions. The likelihood of these assumptions being accurate is precisely termed the principle of probability in legal contexts.

In this case, police officers had conducted the raid relying upon the information received by PW6. According to the informant a person was suspected to have purchased Heroin from Maligawatte and to be travelling to Awwalsaviya Road in a green coloured three-wheeler.

It must be mentioned here that the utilization of informants in Sri Lankan criminal cases are quite common. Law enforcement officers often use informants to attempt to fabricate cases against someone they believe is guilty of a crime. Hence, quite understandably, the Judiciary faces a dilemma

and it becomes quite an arduous task when it comes to verifying the reliability of an information.

Throughout the trial, the defence took up the position that PW1 and PW6 had arrested a person called Rizwan before the arrest of the Appellant. It was further contested that the Appellant was arrested at his residence upon the information provided by Rizwan and at the Awwalsaviya Road as claimed by the prosecution. When this position was put to PW1 and PW6 by the defence, the duo had vehemently denied that they arrested Rizwan before they arrested the Appellant. The relevant portion is re-produced below:

Page 151 of the brief.

ප්‍ර : මහත්මයා ඔය කියන දවසේ මහත්මයා වෙනත් වැටලීම් රාජකාරි සිදු කළා ද වෙනත් පුද්ගලයන් අත්අඩංගුවට ගැනීමක් සිදු කළා ද ?

උ : නැහැ උතුමාණනි.

Page 297 of the brief.

ප්‍ර : මහත්මයාලා 2013 ජනවාරි 11 වෙනි දිනට පෙර දින හෝ ඒදින උදේ කාලයේ දී අත්අඩංගුවට ගන්නා ලද මොහොමඩ් නිලාබ්දින් මොහොමඩ් රිසාන් කියන පුද්ගලයා සමඟ පැමිණ මේ තැනැත්තා නිවසේ සිටිය දී ඔහුගේ පෙත්වා දීම මත අත්අඩංගුවට ගත්තේ කියලා මම මහත්මයාට යෝජනා කරනවා ?

උ : ප්‍රතික්ෂේප කරනවා උතුමාණනි.

Although PW1 and PW6 denied the arrest of a person called Rizwan, the Officer-in-Charge of the Police narcotics Bureau and the Registrar of the Colombo Magistrate's Court who were called as defence witnesses confirmed the arrest of a person called Rizwan just before the Appellant was arrested.

Defence witness CI/Hiriyadenya, Officer-in-charge of the Police Narcotics Bureau admitted that before the arrest of the Appellant PW1 had arrested a person called Rizwan who was produced to the Magistrate Court of Colombo-02 under number B/9025/2002/2013. This was endorsed by the defence witness Kottearachchi, the then Registrar of the Magistrate Court Colombo number 02. The relevant portions are re-produced below:

Page 452 of the brief.

- ප්‍ර : සම්පූර්ණ නම මොකක් ද ?
- උ : මොහොමඩ් නිලාබ්දින් මොහොමඩ් රිස්වාන්.
- ප්‍ර : දැන් මහත්මයා මේ තැනැත්තා අත්අඩංගුවට ගැනීම සම්බන්ධයෙන් වැටලීම් භාර නිලධාරියා ලෙස කටයුතු කරලා තියෙන්නේ කවුද බී වාර්තාවට අනුව ?
- උ : පොලිස් පරීක්ෂක උදාර නිලධාරියා.
- ප්‍ර : කවදා ද දිනය ?
- උ : 2013. 01. 11 වන දින.
- ප්‍ර : මහත්මයා ගරු මහේස්ත්‍රාත් අධිකරණයට ඉදිරිපත් කල දිනය කවද්ද ?
- උ : 2013. 01. 12 දින.
- ප්‍ර : කුමන මහේස්ත්‍රාත් අධිකරණයට ද මේ තැනැත්තා ඉදිරිපත් කළේ ?
- උ : අලුත් කඩේ මහේස්ත්‍රාත් අධිකරණ අංක 02 ට.

Page 456 of the brief.

- ප්‍ර : අද දිනයේ සාක්ෂි දෙන්න නියමිතව තිබෙන අදාල නඩු ගොනුව මහත්මයා ගරු අධිකරණයට ගෙනත් තිබෙනවා ද ?



- උ : එහෙමයි.
- ප්‍ර : එහි නඩු අංකය මොකක් ද මහත්මිය ?
- උ : 25167/2/13.
- ප්‍ර : එහි පැමිණිලිකරු වශයෙන් සඳහන් වෙන්නේ කවුද මහත්මිය ?
- උ : ස්ථානාධිපති පොලිස් මත් ද්‍රව්‍ය කාර්යාංශය කොළඹ - 01.
- ප්‍ර : එම නඩු වාර්තාවේ විත්තිකරු වශයෙන් සඳහන් වෙන්නේ කවුද ?
- උ : නිලාබ්දින් මොහොමඩ් රිස්වාන්.

Even though PW1 and PW6 had denied that they had arrested a person called Rizwan before they arrested the Appellant, the learned High Court Judge had come to the conclusion that PW1 and PW6 had not denied that they had arrested Rizwan. The relevant portion is re-produced below:

Page 521 of the brief.

එම බී වාර්තාවලට අනුව රිස්වාන් නැමැත්තා වැල්ලම්පිටිය පසුකර අංගොඩ දෙසට යතුරු පැදියකින් ගමන් කරමින් සිටිය දී අත්අඩංගුවට ගෙන ඇති බව එහි සඳහන් වේ. මෙම නඩුවේ පැ. සා. 01 සහ පැ. සා. 06 එම වැටළීමට ද සහභාගී වී ඇත. මෙම අධිකරණයේ හරස් ප්‍රශ්න අතරතුර දී සාක්ෂිකරුවන් දෙදෙනා රිස්වාන් නැමැත්තෙකු එම දින අත්අඩංගුවට ගැනීම ප්‍රතික්ෂේප කර නැත. ඔවුන්ගේ ස්ථාවරය වී ඇත්තේ මෙම විත්තිකරු අත්අඩංගුවට ගැනුනු වැටළීම අතරතුර දී එනම් පස්වරු 02.30 ට පිටත්ව පැය 18.10 ට පැමිණි කාලය අතරතුර දී රිස්වාන් නැමැත්තෙකු අත්අඩංගුවට ගෙන නැති බවය. එම කරුණ මෙම ඉදිරිපත් කර ඇති බී වාර්තා සහ නඩු වාර්තාවේ ඇති විස්තර සමග පරස්පරයක් හෝ නොගැළපීමක් මතු වන්නේ ද නැත.

This is a clear misdirection which certainly affect the right to a fair trial guaranteed under the Constitution of Sri Lanka.

It is the evidence of PW1 that the substances were recovered from the underneath of the Appellant's underwear. But this position was contradicted by PW6 who was near the Appellant when PW1 recovered the parcel. According to PW6 the contraband was recovered between the underwear and the trouser zip of the Appellant. As PW1 and PW6 stood together and recovered the Heroin from the Appellant, their evidence cannot contradict on this crucial point. This had escaped the attention of the learned High Court Judge when he delivered the judgment.

The contention of the defence is that the Appellant was not arrested as stated by PW1 and PW6, but was arrested at his house after he was shown to the police by a person called Rizwan. This had been properly suggested to PW1 and PW6 by the defence. Although this position was denied by PW1 and PW6, the defence witnesses endorsed the contention that a person called Rizwan was arrested before the arrest of the Appellant. The learned High Court Judge had come to the conclusion that that PW1 and PW6 had admitted the arrested of Rizwan prior to the Appellant. This is a clear misdirection which certainly affect the outcome of the case.

Judges formulate their judgments based on the information presented to them during court proceedings, including verbal arguments, written submissions, and supporting documents provided by the parties through their legal representatives. They meticulously examine the facts presented and evaluate the evidence that has been entered into the court record. Ultimately, their decisions are based on an objective analysis of the law and the evidence presented, rather than subjective personal beliefs. Relying on personal beliefs would introduce significant bias into the judicial process,

undermining the fairness and impartiality that are fundamental principles of the legal system.

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”.*

The learned Counsel for the Appellant drew the attention of this court to the questioning directed at the defence witnesses by the learned High Court Judge.

In **Sisilinona v Balasuriya** [2002] 1 SLR 404 the Court held that:

*“The court must not question the witness in the spirit of beating him down or encourage him to give answers accepting the position put to the witness- It appears that the intention of the trial judge had been not to ascertain the truth of the matter but to obtain contradictions which he did. In the circumstances the conclusions arrived at by the trial judge are untenable.”*

In **The Queen v David Perera** 66 NLR 553 the Court held that:

*“A judge is not entitled to put leading questions, the answers to which are calculated to prejudice the accused. Further, he must not ask questions in*

*such manner or in such great number as to encroach upon the functions of a Counsel who appears in the case.”*

In **Gamage v Attorney General and Others** [2020] 1 SLR 44 Samayawardena, J. held that:

*“Judges are not above the law. They cannot do anything they think right. Although section 439 of the Criminal Procedure Code, sections 164-165 of the Civil Procedure Code, and section 165 of the Evidence Ordinance seemingly give unfettered discretion to the trial judge to question witnesses, this is not so. These provisions are intended to be used by judges sparingly and cautiously, not as a rule but as an exception with the ultimate objective of ascertaining the truth, not to fill in the gaps of the case of either the prosecution or defence.”*

Article 13(3) of our Constitution enshrines the concept fair trial. The Article states:

*“Any person charged with an offence shall be entitled to be heard, in person or by an Attorney-at-Law, at a fair trial by a competent court.”*

To determine whether you are innocent or guilty, the concept of fair trial plays a vital role. A fair trial is a universally recognised human right. Fair trials help to establish the truth and are vital for everyone involved in a case. It is a cornerstone of democracy, helping to ensure fair and just societies.

In this case the learned High Court Judge from the Court had directed voluminous questions to the defence witnesses. Thereby treated the defence witnesses indifferently. This is an act which certainly affect the concept of fair trial afforded to the Appellant.

In this case the raid was conducted on information received. Further, the raid conducted and the recovery of productions have failed to pass the test of probability in this case. If the learned Trial Judge had examined the evidence presented from the correct perspective, he would have been inclined to accept the testimony provided by the Appellant.

Guided by the above cited judicial decisions, I conclude that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> grounds advanced by the Appellant have very serious impact on the prosecution case.

As the prosecution had failed its duty to prove this case beyond reasonable doubt, I set aside the conviction and sentence imposed by the learned High Court Judge of Colombo dated 20/06/2019 on the Appellant. Therefore, he is acquitted from this case.

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**