

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

**In the matter of an Application under  
and in terms of Section 331 of the  
Code of Criminal Procedure Act No. 15  
of 1979 as amended.**

The Democratic Socialist Republic of  
Sri Lanka

**Complainant**

**CA HCC 215/2020**  
Colombo High Court No.  
HC 8195/16

Vs.

1. Welliden Sunendra Kumar alias Short
2. Suleiman Pakeer Mohamad Numan

**Accused**

**AND NOW BETWEEN**

1. Welliden Sunendra Kumar alias Short

**Accused-Appellant**

Vs.

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

**Complainant-Respondent**

**Before:**    **Sampath B. Abayakoon, J.**  
                 **Amal Ranaraja, J.**

**Counsel:** Shanaka        Ranasinghe,        P.C.        with        Niroshan  
                 Mihindukulasuriya for the Accused-Appellant.

Anoopa De Silva, D. S.G for the State.

**Argued on:**    08.10.2024

**Decided on:** 04.12.2024

### **JUDGMENT**

#### **AMAL RANARAJA, J**

1. This is an action where two accused were indicted before the *High Court of Colombo*. The charges against the two accused reads as follows;

- a) On or about 14<sup>th</sup> of February 2015 at *Wellawatta*, you did traffic 9.77 grams of Diacetyl Morphine, 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, you did possess 9.77 grams of Diacetyl Morphine, 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.

2. The accused have pleaded not guilty to the charges and the matter has proceeded to trial.
3. At the conclusion of the trial, the Learned High Court Judge by her judgment dated **23.10.2020**, has found the 1<sup>st</sup> accused guilty to both charges preferred against him, and sentenced him to life imprisonment in respect of each charge. The 2<sup>nd</sup> accused has been found not guilty and acquitted from both charges.

The 1<sup>st</sup> accused-appellant (hereinafter referred to as the “appellant”) being aggrieved by the judgment and the sentencing order dated **23.10.2020** has preferred the instant appeal to this Court. He has prayed that the impugned judgment and the sentencing order be set aside.

4. **Grounds of appeal urged by the Appellant are as follows;**

- (1) Has the Learned High Court Judge misdirected herself in law in casting a burden on the accused-appellant to rebut the prosecution case?
- (2) Has the Learned High Court Judge failed to consider a vital contradiction in PW1’s evidence?
- (3) Has the Learned High Court Judge failed to consider the fact that the prosecution’s case fails the test of probability?
- (4) Has the Learned High Court Judge failed to come to a proper conclusion with regard to the dock statement of the appellant as per the guidelines set out by your Lordship’s Court?

### **Facts in Brief**

5. PW1 (S.I. *Ruwan Kumara*), PW2 (PC 12810 *Nahinna*), PW3 (PC 64085 *Matara Arachchi*), PW5 (PC 73165 *Dinesh*) and two other officers; i.e PC 52373 *Wijeraj* and F.P.C.2981 *Akila* have been attached to the narcotics bureau of the Police department at the relevant period of time and they have been assigned to the unit which conducted raids at the narcotics bureau.
6. At about 12.00 hrs on 14.02.2015, PW2 has received a tip off from a private informant of his, regarding a person named, *Wellidan Sunendra Kumar alias Short*, who was due to engage in a transaction pertaining to the sale of a narcotic substance at a location in *W. A. De Silva Mawatha, Wellawatta*. He has been further informed that the suspect would travel in a threewheel scooter to the relevant destination and such transaction was due to take place between 14.00 hrs and 15.00 hrs on that day.
7. PW2 has notified PW1 regarding the tip off he received from his private informant. PW1 has decided to conduct a raid and for that purpose PW1 has gathered a team of officers which included PW2, PW3, PW5 and two other officers named in paragraph 5 above. PW1 has made an out note and left the bureau with the team of officers in vehicle bearing **registration no. HD2729**, driven by PC 49466 *Abeywickrama*.

8. The team had proceeded along the *High Level* road, and arrived at a location close to where the building known as '*Velasitha Niwasa*' was situated. Thereafter, PW2 has got in touch with his informant over the phone, the informant has arrived at the place where the vehicle was parked and got into it. The team of officers together with the informant have proceeded along *Havelock* road and arrived at the *Pamankada* junction.
9. The *Pamankada* junction being a 'T-junction', the vehicle in which the team of officers together with the informant travelled, has made a right turn on to *W. A. De Silva Mawatha*. They have proceeded along *W. A. De Silva Mawatha* for a short distance and made a U-turn; upon making such U-turn, the officers have observed in the locality a bookshop. The officers have been informed by the informant that the transaction referred to in the tip off would take place close to that location.
10. Thereafter, the team of officers with the informant have travelled towards the *Pamankada* junction again and made a left turn and got onto *Havelock* road. After proceeding a short distance on that road, the vehicle has come to a halt.

PW1, PW2, PW5 and the informant have stepped out of the vehicle and proceeded on foot towards the *Pamankada* junction again. They have thereafter positioned themselves on the opposite side of the bookshop on *W. A. De Silva Mawatha* and engaged in further surveillance activity.

The informant has been with PW1, while PW2 and PW5 have positioned themselves individually a little distance away from PW1 and the informant. After some time, they have been informed by PW3 who was in the vehicle in which they travelled in, about the threewheel scooter referred to by the informant, approaching *W. A. De Silva Mawatha*. The threewheel scooter has had in it a passenger in addition to its driver. The threewheel scooter had made a right turn at the *Pamankada* junction, gone pass PW1, the informant, PW2 and PW5 proceeded along *W. A. Silva Mawatha* for some distance, made a U-turn and stopped at a location close to the bookshop. At that moment, PW1 has requested the informant to leave the scene, while PW1, PW2 and PW5 had crossed the road and gone to the location where the threewheel scooter was parked. PW1 with the help of PW5 has searched the passenger and seized a parcel from the possession of the passenger. PW1 has identified the substance in the parcel to be a narcotic.

11. PW1 has questioned the passenger, the details narrated by the passenger has confirmed the fact that he was the person referred to by the informant. The passenger together with the driver of the threewheel scooter have been arrested.
12. Subsequently, the team of officers have as narrated in the evidence of PW1 and PW2 gone to the residence of the suspect (the passenger) in *Dematagoda*, searched the residence but have not found anything illegal, therein.

13. Thereafter, the suspects with the parcel and other productions including the three-wheel scooter have been taken to the narcotics bureau. Basic tests have been conducted on the substance to identify the nature of the narcotic. Tests have revealed that it was a heroin mixed powder. The parcel containing the heroin mixed powder has been placed in an envelope, sealed and handed over to the production officer of the bureau upon it being registered. The rest of the items brought to the bureau as productions have been registered, handed over to the officer on reserve duty. The sealed envelope containing the parcel with the heroin mixed powder has thereafter been sent to the government analyst department for tests. PW10 has run detailed tests on the substance and confirmed it to be a heroin mixed powder and prepared an analyst report accordingly.

#### **Application of the Test of Probability to the Prosecution's Case**

14. An informant is a person who provides crime-related information to law enforcement authorities. They are a vulnerable category of people. Due to their vulnerability, the identity of an informant is concealed at all times. An informant would be vulnerable to harm by a criminal, a person who deals or is connected to a criminal. Due to such vulnerability, law enforcement agencies at all times take precautions to not divulge the identity of an informant. The law enforcement agencies 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 a criminal or a person connected to a

criminal. In some instances, security is also provided to an informant.

15. In the instant case, PW1 and PW2 in their evidence have stated that the informant was taken along with them to a location close to the place where the transaction in narcotics was going to take place. In fact, it is their testimony that the informant was with PW1 when the threewheel scooter in which the appellant travelled in went past them. Such an incident discloses a situation where the law enforcement authorities have not taken action to protect the identity of an informant, which is not normal or is unusual.

16. Further, *W. A. De Silva Mawatha*, in *Wellawatta* has two ends. One is the *Pamankada* junction end, on *Havelock* road and the other is the *Galle* road end. The threewheel scooter in which the appellant travelled has entered *W. A. De Silva Mawatha* from the *Pamankada* junction end on *Havelock* road. To arrive at the location close to the bookshop mentioned in the tip off, the threewheel scooter has proceeded a short distance on *W. A. De Silva Mawatha* towards the *Galle* road, and made a U-turn and stopped at a location close to the bookshop. However, if it continued to proceed on *W. A. De Silva Mawatha* without making a U-turn, it would have gone onto *Galle* road, and disappeared from the sight of PW1, PW2 and PW5. In those circumstances, PW1, PW2 and PW5 would not have been able to search the appellant for a narcotic substance. It is also stated in evidence that when the threewheel scooter made a turn into *W. A. De Silva Mawatha*, it travelled pass the locations where PW1, PW2 and PW2 had positioned themselves. In those circumstances, it would



be natural in normal course of things for PW1, PW2 and PW5 to stop the threewheel scooter at the first given opportunity and search the persons who were riding in it. PW1, PW2 and PW5 have not acted in that manner. They have also not explained the reasons for not doing so. The actions of PW1, PW2 and PW5 reveal a situation of just obeying rules or requests by superior officers without a purpose.

17. In the case of **Anthony Michael Morril vs. Attorney General [CA 26/06]**, decided on 25.05.2010], Sarath De Abrew, J, has stated,

*“...In assessing the testimonial trustworthiness of this witness, the learned trial judge had failed to employ the yardstick of the Test of Probability and Improbability which is a sine qua non in assessing the evidence of a trained police witness, which test if it had been properly used, would have created serious doubts as to the certainty of this witness.”*

18. In **Wickremasuriya vs. Dedoleena and Others [1996] 2 SLR 95 at page 98**, F. N. D. Jayasuriya, J, has stated,

*“A Judge in applying the Test of probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct in human beings both ingenious and those who are less talented and fortunate.”*

19. Further, the Learned Presidents Counsel for the appellant has also contended that, “the testimony of a police officer is no more acceptable or credible than the evidence of a lay witness and in fact, unlike an unbiased, independent lay witness, a police officer has an interest in the successful conclusion of a prosecution”.

The Learned Presidents Counsel has also drawn the attention of this Court to “**Law of Evidence**” by **E. R. S. R. Coomaraswamy, Volume 2, Book 1** (at page 395) where it is stated that,

*“In great many cases, the police agents are as a rule unreliable witnesses. It is always in their interest to secure a conviction in the hope of getting a reward. Such evidence ought, therefore, to be received with great caution and should be closely scrutinised, particularly where their evidence is the only corroborating evidence for the evidence of the accomplice, as in bribery cases...”*

20. In the case of **Nallaperuma Danuka Roshan vs. Attorney General** [CA 216/15, decided on 12.10.2017], Dehideniya, J, has stated,

*“...in the present case also the only witness is a police officer, trained in conducting narcotic raids. Therefore, his evidence has to be scrutinized closely”.*

21. Furthermore, in the case of **Sinnaiya Kalidasa vs. Attorney General** [CA 128/2005, decided on 07.09.2010], Ranjith Silva, J, has stated,

*“By the same token the same principles should apply and guide the judges in the assessment of the evidence of excise officers in narcotic cases. Judges must not rely on a **non-existent presumption of truthfulness and regularity** as regards the evidence of such trained Police or excise officers.”*

22. As the testimony of PW1 and PW2 is as discussed above, their narrations are bizarre or unusual. The narrations being bizzare, it is apparent that an improbable account of events that have supposedly taken place have been stated by PW1 and PW2. When evaluating the testimonial trust worthiness of PW1 and PW2, the Learned High Court Judge has failed to direct her attention to the matters discussed above and employ the test of probability and improbability in that regard. If such a test had been employed, a serious doubt would have been created as to the certainty of the testimony of PW1 and PW2. The Learned High Court Judge has misdirected herself when she failed to employ such a test to arrive at a finding on the testimonial trustworthiness of PW1 and PW2.

### **Failed to consider a vital contradiction?**

23. PW1 in his evidence in chief has stated that he searched the appellant and took into his custody a parcel of some substance, thereafter ascertained the substance to be a narcotic. And the

nature of the narcotic to be a heroin mixed powder. The parcel according to him was made using a pink coloured plastic bag with a knot on top. However, the same witness on another occasion has stated that the parcel was made using a blue coloured plastic bag and such blue coloured plastic bag was in a second plastic bag which was pink in colour. The pink coloured plastic bag had been the one visible to a person who took possession of the parcel.

24. PW1 accordingly has contradicted himself per-se on that fact. The contradiction being in regard to the interpretation of the parcel which contained the substance which was ascertained to be narcotic in the nature of a heroin mixed powder, such contradiction is a material one in our view. The Learned High Court Judge in the impugned judgment has disregarded such contradiction on the basis that it is a typo. However, the Learned Presidents Counsel for the appellant has drawn attention of this Court to the fact that the proceedings have been corrected prior to the date the matter was fixed for judgment and to the fact that the prosecution has not made any attempt to correct the same if it was a typo as the Learned High Court Judge has concluded. It is further contended that there is no basis to arrive at a conclusion as the Learned High Court Judge has done and therefore misdirected herself in that regard.

25. In ***K. Padmatillake alias Sergeant Elpitiya vs. The Director General, Commission to Investigate Allegations of Bribery or***

**Corruption [SC Appeal 99/2007, S.C. Minute Dated 30.07.2009]**, Chandra Ekanayake, J, has stated,

*“It has to be stressed here that credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the judge. When witnesses make inconsistent statements in their evidence either at one stage or at 2 stages, the testimony of such witnesses is unreliable and in the absence of special circumstances, no conviction can be based on the testimony of such witnesses. On the other hand one cannot be unmindful of the proposition that Court cannot mechanically reject the evidence in criminal cases it would be of importance to quote what Sir John Woodroffe & Amir Ali had to say in their work on Law of Evidence – 18<sup>th</sup> Edition-Vol. 1 at page 471:-*

*“No hard and fast rule can be laid down about appreciation of evidence. It is after all a question of fact and each case has to be decided on the facts as they stand in that particular case. Where a witness makes two inconsistent statements in his evidence with regard to a material fact and circumstance, the testimony of such a witness becomes unreliable and unworthy of credence.””*

26. Further, since I have dealt with the second and third grounds of appeal as set out above, a need would not arise to consider the

remainder of the grounds of appeal. Therefore, I refrain from doing so.

27. It has been concluded that an improbable account of events that had supposedly taken place have been narrated, by PW1 and PW2 at the trial. Hence the credibility of those witnesses are in issue. The probability of the prosecution establishing its case beyond a reasonable doubt is remote. Having considered the above, we are of the view that this is not a fit case to order a retrial.

28. The Accused-Appellant is acquitted of the charges preferred against him.

29. The Registrar of this Court is directed to communicate this judgment to the *High Court of Colombo* for compliance.

*Appeal allowed.*

**Judge of the Court of Appeal**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**Judge of the Court of Appeal**