

**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 Case No.
CA/HCC/ 0094/2018**

The Attorney General
Attorney General's Department
Colombo-12

**High Court of Colombo
Case No. HC/6961/2013**

Complainant

1. Mohammed Majeed Mohammed
Nazar
2. Mohammed Riyal Mohammed
Aslam

Accused

Vs.

Mohammed Majeed Mohammed Nazar

Accused-Appellant

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

Complainant-Respondent

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

COUNSEL : **Faisz Musthapha, PC with K.Thilakaratne**
for the Appellant.
Janaka Bandara, DSG for the Respondent.

ARGUED ON : **08/07/2024**

DECIDED ON : **15/10/2024**

JUDGMENT

P. Kumararatnam, J.

In the 1st count of the indictment the above-named Accused-Appellant (hereinafter referred as the Appellant) and the 2nd Accused were jointly indicted by the Attorney General under Section 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for the Trafficking of 5.39 grams of Heroin (Diacetylmorphine) on 26th July 2012 in the High Court of Colombo.

In the second count the Appellant was indicted under Section 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking of 5.39 grams of Heroin (Diacetylmorphine) on the same transaction.

In the third count the 2nd Accused was indicted for aiding and abetting the Appellant to commit the offence mentioned in the 2nd count.

Following the trial, the Appellant was found guilty for 1st and 2nd counts and the learned High Court Judge of Colombo has sentenced him to life imprisonment for both counts on 21st March, 2018.

The 2nd Accused was acquitted from the 1st and 3rd counts for want of evidence.

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 consent for this matter to be argued in his absence. During the argument he has been connected via Zoom platform from prison.

The Appellant has raised following appeal grounds in this case.

1. Evidence given by PW1 and PW2 is contradictory and thereby failed the test of credibility.
2. Amendment made to the Government Analyst Report was not explained by the prosecution.

PW1/SI Wijesinghe who was attached to the Police Narcotic Bureau had received information about drug trafficking using a red coloured three-wheeler. He had received this information from one of his reliable informants. As per the information, he and his team had gone near St. Anthonys Church, Kochchikade and remained there for some time. But the mission was aborted as the informant had communicated that the afore-mentioned suspect would not be carrying drugs on that day. As such, he had decided to move away from the location. While they were moving, PW2 had received an information from his personal informant that the Appellant was coming in a red coloured there-wheeler bearing No. GQ 9762 to Kimbula Ela area to hand over drugs

to another person. As such, they had gone to Kimbula Ela area. He had not put an entry in his pocket note book at that time. He had met the informant near Bogaha Junction and had arrested the Appellant who was the driver of the three-wheeler and the 2nd Accused who was in the rear seat of the three-wheeler at the Kimbula Ela Junction. The 2nd Accused was arrested as he tried to flee the scene.

Upon searching both of them, a parcel was recovered from the right-side trouser pocket of the Appellant. At that time, he was wearing a blue coloured trouser. The parcel contained some substances which reacted for Heroin (Diacetylmorphine). As such both had been arrested for the trafficking of Heroin. The investigation had further revealed suspicious information regarding person called Ubayatulla in the Wanawasala area and the team had gone there in search of him but could not apprehend such a person. As such, they had returned to the Bureau at 12:10 hours. At the Bureau the weight of the substance was observed to be 20 grams and the production was sealed in front of the Appellant and the 2nd Accused. After sealing, the production was handed over to PW4/IP Rajakaruna under production No.197/2012 on the following day. Until such time, the production was in the custody of PW1. The three-wheeler had also been taken into police custody.

The officers had not taken any endeavour to check the Appellant's house.

PW2, PC 50142 Asela who was a member of the raiding team, was called to corroborate the evidence given by PW1.

The Government Analyst's Report was admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979. The prosecution marked productions P1 to P18 in support of their case.

After closing the case for the prosecution, as the evidence led by the prosecution warranted the presence of a case to be answered by the

Appellant, the learned High Court Judge called for the defence. The Appellant and the 2nd Accused had made dock statements and closed their case.

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

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 **Girija Prasad (dead) by LRs. v. State of M.P.**, AIR [2007] SCW 5589 (2007) 7 SCC 625, it was observed:

“It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence”.

In **Vadivelu Thevar v. State of Madras** AIR 1957 SC 614 it was observed on Page 619, as under: -

"Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact".

In the first ground of appeal the Appellant contends that the evidence given by PW1 and PW2 is contradictory and thereby failed the test of credibility and probability.

In **Kumara De Silva and two others v The Attorney General** [2010] 2 SLR 169 the Court held that:

"Credibility of a witness may be impugned by employing the tests of probability and improbability consistence and inconsistency, interestedness and disinterestedness and spontaneity and belatedness."

The Appellant in this case gave a dock statement and took up the position that he was arrested at his residence at about 9.30 pm upon the police being informed by the 2nd Accused who was acquitted from the case. He had then been questioned about a person called Ubayatulla and had been taken to a place said to be Ubayatulla's house. As Ubayatulla was not found at the premises, both had been taken to the Police Narcotics Bureau and charged as afore-mentioned by PW1 and his team. At the time of his arrest, his three-wheeler was stationed near his house.

According to the prosecution, the first information was received by PW1 about an unknown person who has been using a red coloured three-wheeler for drug trafficking. The reliability of this information is highly doubtful as red three-wheelers in Colombo City are innumerable and a very common sight which makes apprehending a drug trafficker using a red coloured three-wheeler without the availability of a registered number is a herculean

task. As such, the first information ended up in a failure. Although the prosecution placed this evidence, PW1 had failed to produce documentary evidence in support of receiving the 1st information.

While the police team was returning, another information of drug trafficking, using a red coloured three-wheeler with the registration number was received by PW2. Based on the information the Appellant was arrested. Quite strangely, the officers had failed to conduct a search of the Appellant's house. Instead of searching his house, the police team had taken the Appellant to Kelaniya area to show the house of a person called Ubayatulla. As he was not at home the police party had returned to the Bureau.

The sequence of events narrated by the prosecution clearly supports the stance taken by the Appellant in his dock statement.

The Government Analyst Report was marked as P17. Although the Government Analyst Report was admitted under Section 420 of CPC, an amendment had been done with regard to the name of the Magistrate Court which had not been explained by the prosecution.

In an appeal it is the profound duty of the Appellate Court to consider all the evidence presented by both parties in the trial. If the evidence presented by the prosecution is cogent and passes all the tests, the court has no difficulty whatsoever to act on the same and affirm the conviction of the Appellant. But, if the prosecution fails to adduce cogent and consistent evidence, then the court has no option but to award the benefit of the doubt to the Appellant.

In ***Lal Mandi v. State of West Bengal*** (1995) 3 SCC 603, the Court opined that:

“In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused”.

In this case PW2 had received information pertaining to the arrest of the Appellant. PW2 was a member of the team selected by PW1. The prosecution had called PW1 first and then called PW2 to corroborate the evidence of PW1. Hence, their evidence should be accurate and cannot go wrong or contradict on material points.

Bradford Smith, Law Commission, WWW.smithlitigation.com 2014 states that:

“Good police note taking is important for two reasons. First, it invariably bolsters the credibility of the police officer giving evidence. Second, it promotes the proper administration of criminal justice by facilitating the proof of facts. Conversely, sloppy police note-taking can be devastating to the credibility of the officer giving evidence and seriously, it not fatally, undermine the successful prosecution of the case”.

In a case of this nature, the police are the principal source of all information that subsequently becomes evidence in a criminal prosecution. The police, as the investigative arm of the state, have the primary responsibility for acquiring such evidence accurately without any contradictions and ensuring the probability and credibility of the evidence.

In this case the prosecution had failed to prove that PW1 had received the 1st information beyond reasonable doubt. Further the mention of a red coloured three-wheeler in both the information received raises a serious doubt. Although the stance of the prosecution was that the Appellant had been in procession of the Heroin when he was apprehended, the Officers had failed to examine his house following his arrest. Instead of checking the Appellant’s house, he was taken to Wanawasala area to investigate a person called Ubayatulla. But no evidence was presented as to what further action was taken in respect of locating the said Ubayatulla.

Further, the amendment done to the Government Analyst Report was not explained. No evidence was presented as to who amended the Government Analyst Report. As the Government Analyst Report is a very crucial piece of evidence in a drug case, its contents cannot be doubted.

Considering the grounds of appeal advanced by the Appellant, the learned Trial Judge should not have rejected the defence evidence in this case as I consider the defence evidence is more than sufficient to create a reasonable doubt in the prosecution case. As the evidence presented by the Appellant creates a reasonable doubt over the prosecution case, I set aside the conviction and sentence imposed on the Appellant by the learned High Court Judge of Colombo on 21/03/2018. Therefore, he is acquitted from both charges.

Accordingly, the appeal is allowed.

The Registrar is directed to send a copy of 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