

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

**In the matter of an Appeal under and in
terms of Section 331(3) of the Code of
Criminal Procedure Act No. 15 of 1979
read with Article 139 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.**

Democratic Socialist Republic of
Sri Lanka.

Complainant

Court of Appeal Case No.
CA HCC 0077/2018

Vs.

High Court of Colombo
Case No.
HC 7521/2014

Don Nuwan Priyantha Nanayakkara

Accused

AND NOW BETWEEN

Don Nuwan Priyantha Nanayakkara

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **B. Sasi Mahendran, J.**
 Amal Ranaraja, J.

Counsel: Rienzie Arsecularatne, P.C. with Namal Karunaratne for the
Accused-Appellant.

Akila Dalpadatu, S.C. for the Respondent.

Argued on: 11.03.2025

Decided on: 04.04.2025

JUDGMENT

AMAL RANARAJA, J.,

1. The Accused-Appellant (hereinafter referred to as the “Appellant”) has been indicted in the *High Court of Colombo* in High Court case no. 7521/2014.
2. The charges in the indictment are as follows;
 - i. That on or about 13.08.2013, at *Sedawatha*, within the jurisdiction of this Court, you did traffic 02.39 grams of Diacetyl Morphine (in other words “heroin”), 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.

- ii. During the course of the same transaction, you did possess 02.39 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.

3. At the conclusion of the trial, the Learned High Court Judge has convicted the appellant of the charges in the indictment and sentenced him to life imprisonment.

4. The appellant being aggrieved by the conviction together with the sentencing order has preferred the instant appeal to this Court.

Case of the prosecution;

5. PW1 (Sub-inspector *Anthony*) has received a tip from an informant on 13.08.2013 regarding an individual trafficking narcotics in the *Sedawatha* area. PW1 has informed his superior at the camp about the

tip. Following his superiors' advice PW1 has left the camp with a team of officers to conduct a raid. Upon receiving further information from the informant, they have set up a road block on the *Wellampitiya* road at the *Katupelalla* area. They have stopped a three-wheel scooter and searched the driver who had been identified as the appellant. During the search, PW1 has recovered a pink plastic bag from the appellants' possession. Inside this bag there had been eight other small packets containing a brown coloured powdered substance. PW1 has identified such powdered substance as a heroin mixed with other materials and taken the appellant into custody.

Case of the appellant;

6. The appellant has categorically denied the narrative surrounding the alleged incident. He has asserted that he has been wrongfully implicated by the police, maintaining that the evidence presented against him is not only inaccurate but also fabricated.

Grounds of appeal;

7. The Learned Counsel for the appellant has urged the following grounds of appeal;
 - i. The prosecutions story is not tenable (improbable).

- ii. A proper adoption of evidence under section 48 of the Judicature Act No. 02 of 1978 (as amended) has not been done by the succeeding High Court Judge.
- iii. The Learned High Court Judge has altered the proceedings on 16.02.2018 and 20.02.2018 without the consent of the prosecution and/or the defence.
- iv. The Learned High Court Judge has failed to consider the significance of the discrepancy as regards to the weight of the substance purportedly recovered by PW1 and of that sent to the Government Analyst for analysis.

8. PW1 (Sub-inspector *Anthony*) being an officer attached to the Police Special Task Force had been tasked with the security of important government officials even though he had not been involved in providing security to a particular official as a personal security officer. Therefore, it is possible that he engaged in raids in addition to his normal duties. PW1 as the officer in charge of the raiding party would have decided the manner in which a raid would be carried out. It would have been the prerogative of PW1 that was relevant. Hence, the decision of PW1 to take

the appellant to the *Narcotics Bureau* instead of the nearest *Police Station* and also not to conduct further investigations to apprehend the original source of the narcotic substance recovered from the possession of the appellant.

9. Further, in **SC APPEAL 139/2019, SC APPEAL 02/2022 and SC/SPL/LA/267/2018** decided on 05.04.2024, Samayawardhena, J, has held that an application as per the provisions in the proviso to section 48 of the Judicature Act No.02 of 1978 (as amended) should be made by the accused concerned for a Court to consider as to whether it should allow such an application. It has been stated by Samayawardhena, J, that,

“As I have already stated, whether or not the accused is represented by a lawyer, under the principal part of section 48, the judge decides whether or not to resummons the witnesses and commence the proceedings afresh. In the High Court trials on indictments, the accused is necessarily represented by a lawyer. For the judge to act upon the proviso to section 48, there must be an application by the accused. The failure to make an application by the accused cannot be

attributed to the judge and quash the entire proceedings, including the judgment pronounced after a protracted trial.”

10. In this instance the appellant has not submitted an application to any of the successor judges requesting that a witness be re-summoned and re-heard. Therefore, the necessity to consider such an application has not arisen. The proceedings do not indicate the fact that such an application has been made by the appellant.

11. Corrections of proceedings could also refer to the rectification of clerical mistakes or inaccuracies that arise during a judicial process. Clerical errors are typographical or transcription errors that may affect the substantive rights of the parties involved.

12. The process of correcting proceedings generally involves the following steps;

- i. The parties in the case or the legal representatives must identify and document the nature of error,

- ii. The aggrieved party typically should file a motion in the Court that presided over the case outlining the specific error and proposed correction,
- iii. Thereafter such motion, supported in the particular Court,
- iv. A hearing may be scheduled if necessary allowing both parties to present their arguments,
- v. The Court shall thereafter render a decision on the motion, either granting or denying the request for correction.
- vi. If granted, the Court can issue an order specifying the corrections to be made and proceed to correct the typographical or transcriptional errors in open Court in the presence of both parties.

13. In the recent proceeding, the Learned High Court Judge has not followed the established process for correcting the proceedings. Proper adherence to a process is crucial in a judicial system; deviations can result in misinterpretations of facts. The failure to comply with a process could

also undermine the integrity of the judicial process and can have serious ramifications for the parties involved.

14. The corrections made by the High Court Judge include to those markings given to items produced as evidence and the gross quantity of the powdered substance purportedly recovered from the possession of the appellant. However, evidence with regard to those items produced and the gross quantity of the powdered substance recovered are stated in the proceedings recorded previously. The Learned High Court Judge has rectified some clerical errors only so that the relevant facts would align with those recorded previously. In those circumstances, the misdirection on the part of the Learned High Court Judge has not occasioned in a failure of justice in the mind of this Court.

15. The Learned Presidents' Counsel has also contended that the Learned High Court Judge has failed to consider the significance of the discrepancy between the weight of the powdered substance recovered by PW1 and the quantity that was recovered by the Government Analyst for analysis. It has also been contended that the Learned High Court Judge has unreasonably through presumptions or assumptions has held that the only way that the discrepancy pertaining to the weight of the

powdered substance could arise as a result of defective weighting arising from the lack of training of the officer concerned without considering that the appellant is not in any way responsible for those lapses on the part of the prosecution.

"ඒ අනුව පැසා 01 කිරු ආකාරයත්, කිරීම සම්බන්ධයෙන් පුහුණු කළ නොතිබීම යන සාක්ෂි හේතුකොටගෙන මෙම වෙනස සිදුව ඇත්තේ කිරීමේදී ඇති වූ අඩුපාඩුවක් හේතුවෙන් වන බවට මෙම පරිවේශනයන් තුළින් ඒකායන ලෙස ගම්‍ය වන එකම අනුමිතිය වන අතර ඒ හැර සාධාරණ ලෙස ගම්‍ය වන වෙනත් අනුමිතියක් නොවන බවට තීරණය කරමි."

[*vide* page 26 of the High Court Judgment dated 20.02.2018]

16. The gross weight of the powdered substance allegedly recovered from the possession of the appellant has been 09.09 grams, while the weight determined by the Government Analyst is only 07.12 grams. The prosecution has failed to explain such discrepancy in this case. The discrepancy is not only significant but it run through the prosecution's case. Such omission also raises critical concerns regarding the prosecution's arguments and overall credibility.

17. An unexplained discrepancy that goes unexplained would undermine the credibility of a party involved in a case as it would not tend to

produce clear and consistent evidence. A Judge could draw adverse inferences from the unexplained discrepancy potentially leading to a decision that favours the opposing party. Further, a Judge may disregard the evidence associated with the discrepancy entirely deeming it unreliable or untrustworthy for making a legal determination. Overall, it is critical to address discrepancies thoroughly to maintain clarity, uphold credibility and ensure just outcomes in legal proceedings. Further, when a Judge bases his decision on presumptions or assumptions that could misrepresent facts leading to an unfair judgment. Assumptions are often based on incomplete information or stereotypes which can lead to misconceptions. Making judgment without a full understanding or evidence can result in misinterpretation of facts. It is important to seek clarity and context before forming conclusion. This allows for fairer and more accurate evaluation of situations.

18. In ***Kumaravel Yoganadan alias Yoga vs. The Hon. Attorney General CA HCC 0468/2017***, P. Kumararatnam, J, has stated,

“...When this Court invited the Respondent to explain regarding weight discrepancy transpired from the evidence, the Senior Deputy Solicitor General following the best traditions and

highest standard admitted the weight discrepancy in the production and further added that he is unable to explain the reason.

In this regard the Learned High Court Judge in his judgment had made general comments about weight discrepancies in cases of this nature. In absence of the evidence led regarding this particular point; the comment made by the Learned High Court has no doubt caused great prejudice to a fair trial...”

19. This incident has occurred in 2013, therefore, it is further noted that 12 years have lapsed since the alleged commission of the offences. Hence, it does not seem just to call upon the appellant to defend himself after an unconscionable lapse of time.

20. In **P. M. Peter Singho vs. M. B. Werapitiya 55 NLR 155 at page 157**, Gratiaen, J, has stated,

“I have anxiously considered whether I should send the case back for re-trial before another Magistrate. The charges against the accused are of serious nature and it may be that, upon the relevant and admissible evidence, his conviction

would have been justified. But we are here concerned with offences alleged to have been committed over four years ago and it does not seem to me just to call upon him to defend himself a second time after such an unconscionable lapse of time. I, therefore, set aside the conviction and acquit the accused.”

21. In ***The Queen vs. G. K. Jayasinghe*** 69 NLR 314 at page 328, Sansoni, J, has stated,

“...we have considered whether we should order a new trial in this case. We do not take that course, because there has been a lapse of three years since the commission of the offences, and because of our own view of the unreliable nature of the accomplice’s evidence on which alone the prosecution case rests.

We accordingly direct that the judgment of acquittal be entered.”

22. Due to the matters discussed above, it is the opinion of this Court that the fourth ground of appeal urged by the appellant has merit. Hence, the decision of this Court to interfere with the impugned judgment together with the sentencing order. I accordingly set aside the conviction together with the impugned sentence and acquit the appellant of the charges in the indictment.

Appeal allowed.

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

Judge of the Court of Appeal

B. SASI MAHENDRAN, J.

I agree.

Judge of the Court of Appeal