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

In the matter of an Appeal made under Section 331 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/0079-083/2024

High Court of Colombo
Case No: HC/2976/2021

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Warnakulasuriya Chaminda Rohana Fernando
2. Ranasinghe Arachchilage Anton Krishantha Fernando
3. Gajaweera Arachchige Dulaj Ravindu Perera
4. Liyavuruge Suranga Balagngna
5. Warnakulasuriya Tharindu Jayamal Fernando

ACCUSED

AND NOW BETWEEN

1. Warnakulasuriya Chaminda Rohana Fernando
2. Ranasinghe Arachchilage Anton Krishantha Fernando
3. Gajaweera Arachchige Dulaj Ravindu Perera
4. Liyavuruge Suranga Balagngna
5. Warnakulasuriya Tharindu Jayamal Fernando

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL : **Kavithri Hirusha Ubeysekera for the 1st , 2nd ,4th, and 5th Appellants.**
Sarath Jayamanne, PC with Prashan Wickramaratne, Sajeewa Meegahawatta and Dinidu Rathnayake for the 3rd Appellant.
Shanil Kularatna, ASG with Vishwa Wijesuriya for the Respondent.

ARGUED ON : **04/09/2025, 16/09/2025 and 26/09/2025**

DECIDED ON : **21/11/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred as the Appellants) were 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 and under Section 113(b) of the Penal Code read with Section 102 of the Penal Code for Conspiracy of Trafficking of Heroin, Possession and Trafficking respectively of 152.341 kilograms of Heroin (Diacetylmorphine) on 02nd November 2019.

The prosecution had called PW1, PW3, PW5, PW15, PW16, PW17, PW18, PW19, PW22, PW39 and a witness from the Colombo High Court, marked productions P1 to P41 and marked documents and photographs A to H and closed the case for the prosecution.

When the defence was called, the Appellants made dock statements and closed their case.

After the trial, the Appellants were found guilty on all counts and the Learned High Court Judge of Colombo had imposed death sentences on all the Appellants on the 27th of September 2023.

Being aggrieved by the aforesaid conviction and sentence, the Appellants preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellants have given consent to argue this matter in their absence. During the argument they have been connected via the Zoom platform from prison.

Six grounds of appeal have been raised on behalf of the 1st ,2nd, 4th, and 5th Appellants. The grounds are as follows:

1. The learned High Court Judge has failed to consider the grave infirmities in the prosecution's evidence.
2. The exclusive possession has not been proved beyond reasonable doubt.
3. The inward journey of the productions has not been proved beyond reasonable grounds.
4. The failure to consider the credibility of the prosecution witnesses; mainly PW1, PW5 and PW3.
5. The defence evidence has not been properly considered.
6. The conviction and sentence are bad in law.

The 3rd Appellant also raised six grounds of appeal. His grounds of appeal are as follows:

1. The learned High Court Judge has erred in law in finding that the chain of custody was intact.
2. The learned High Court Judge has erred in law in failing to apply the principle of "Conscious Exclusive Possession."
3. The learned High Court Judge has erred in law in finding that there was evidence that established the charges of conspiracy.
4. The learned High Court Judge has erred in law by unjustly shifting the burden of proof onto the Appellant.

5. The learned High Court Judge has erred in law in relying on the evidence of PW1 and PW3 and failing to reject the same based on the test of spontaneity.
6. The learned High Court Judge has erred in law in failing to reject the testimony of PW1 based on the tests of *inter alia* consistency and probability.

As some of the appeal grounds raised by the Learned Counsel for the 1st,2nd,4th and 5th Appellants and the Learned President's Counsel for the 3rd Appellant are inter-connected, this appeal will be decided on the common appeal grounds mentioned below.

1. The learned High Court Judge has failed to consider the grave infirmities in the prosecution's evidence.
2. The learned High Court Judge has erred in law in failing to apply the principle of "Conscious Exclusive Possession."
3. The learned High Court Judge has erred in law in finding that the chain of custody was intact.
4. The failure to consider the credibility of the prosecution witnesses; PW1, PW5, and PW3, and failure to reject their evidence based on the tests of consistency, probability, and spontaneity.
5. The learned High Court Judge has erred in law in finding that there was evidence that established the charge of conspiracy.
6. The learned High Court Judge has erred in law by unjustly shifting the burden of proof onto the Appellant.
7. The defence evidence has not been properly considered and therefore, the conviction and sentence are bad in law.

Background of the case

On 01.11.2019 around 07.00 hours, a Sri Lanka Navy ship named 'Suranimala' set off from the Colombo Port under the command of PW3 Captain Buddhika Liyanagamage. PW1, Lieutenant Udayanga was the

Gunnery Officer attached to 'Suranimala'. While on the move, PW3 had received an information about a suspicious trawler namely 'Buddhima'. He had passed this information to PW1 at about 18.41 hours. The relevant information was communicated to PW3 by the Director of Navy Intelligence.

PW1 had arranged a team for the purpose of intercepting the said vessel. Around 01.30 hours on 02.11.2019, the trawler 'Buddhima' was spotted on the radar of 'Suranimala' close to the location of 06 Degrees 11 minutes North, 78 Degrees 01 minutes East.

At 02.08 hours, on 02.11.2024 the trawler 'Buddhima' was ordered to stop its engine and PW1 with his team had boarded the trawler and had found five fishermen in the trawler. The location of boarding and intercepting the trawler 'Buddhima' by PW1 and his team was 06 Degrees 11 Minutes North, 78 Degrees 03 Minutes at 02.08 hours on 02.11.2024 as it was about 116 nautical miles away from the Galle Light House.

The police team who had entered the trawler had identified the 1st Appellant as the skipper of the trawler. Thereafter, PW1 had checked the trawler with the assistance of Petty Officer Kumara. At that time the other Appellants had been guarded by 6 Navy Personnel who had been on board. When the wooded planks that cover the ice compartment of the trawler were removed, PW1 had found 8 polythene bags with substances suspected to be drugs kept in the ice compartment.

When this was communicated to PW3, upon his instructions, a Navy personnel member had been assigned close to the ice compartment, further, while keeping the 1st Appellant in the trawler, the 2nd to 5th Appellants had been transferred to the Navy Vessel 'Suranimala' for security purposes. The transfer had been done after the detection of the contraband. Afterwards, due to the trawler 'Buddhima' encountering a starting problem, it was towed by the Navy Vessel 'Suranimala' up to the location of 06 Degrees 44 minutes 376 seconds North, 79 Degrees 22 minutes 710 seconds East. In the

meantime, PW1 had informed about the entire incident to the Director of Navy Intelligence. In the meantime, the engine of the trawler had been repaired and had proceeded towards Negombo.

On 03.11.2019 at 17.25 hours in the location of 07 Degrees 17 minutes North, 79-degrees 35 minutes East, a dinghy boat which had approached the trawler 'Buddhima' was also taken into custody, along with two other persons inside this dinghy boat, by PW1.

Thereafter, both the vessel 'Suranimala' and the trawler 'Buddhima' had entered the Colombo Port at 01.52 hours on 04.11.2019. Afterwards, the 8 bags of substances were unloaded to pier No.02 in the presence of the Police Narcotics Bureau officers. The unloading had been done in the presence of the Appellants as well.

In each bag, 25 parcels suspected to be Heroin were detected. Altogether, 200 parcels had been detected. The suspected Heroin had been weighed at the pier and it showed a weight of 224.166 kilograms.

According to the Government Analyst Report, 152.341 kilograms of Pure Heroin had been detected in the substances sent for analysis.

As the 1st and 4th grounds are interconnected, both grounds will be considered together hereinafter. In the 1st ground of appeal, the Learned Counsels contended that the learned High Court Judge has failed to consider the grave infirmities in the prosecution evidence. In the 4th ground of appeal, the learned Counsels argued that the learned High Court Judge had failed to consider the credibility of the prosecution witnesses and failed to reject the evidence of PW1, PW5, and PW3 based on the tests of consistency, probability, and spontaneity.

The Sri Lanka Navy faces significant challenges in detecting drugs at sea, particularly as a result of the country's strategic location and vast ocean territory, due to the Indian Ocean being one of the world's largest and most strategically significant maritime domains. They encounter difficulties as

drug traffickers frequently use this route for drug trafficking by utilising advanced techniques, particularly, by hiding drugs within fishing vessels or using fake compartments, which makes it practically difficult for authorities to detect or inspect drugs. The Sri Lanka Navy would also have to rely on intelligence gathering and specialised training in the detection of narcotics, which would result in the consumption of excessive amounts of time as well as resources. The lack of resources and technological limitations faced by the Navy, further adds to the challenge of detecting narcotics in such situations.

In this case, PW3, the commanding officer of the Navy ship 'Suranimala' had received information on Heroin being trafficked in a multiday fishing trawler namely, 'Buddhima', from the Director of Navy Intelligence. Acting on this information, he had passed the same to PW1, who was the Gunnery Officer of the ship, and his subordinates to track down the said fishing trawler.

PW1 had vividly explained how they intercepted the trawler 'Buddhima' and found eight bags of what was suspected to be drugs hidden in the ice compartment. At the time of detection, all five Appellants were in the trawler. After the recovery, upon the instruction of his superior officer and considering the sensitive nature of the case, he had taken steps to transfer the 2nd to 5th Appellants to the Navy ship 'Suranimala' and had kept the 1st Appellant with them in the trawler 'Buddhima'. This strategy was adopted by the officers considering the delicate nature of the operation, and the security concerns around such a situation.

PW1 and PW3, when giving evidence, had refreshed their memories by referring to the Ship log and the Navigational Notes Book to substantiate their evidence. At the commencement of the trial, copies of the same were handed over to the defence Counsels by the prosecution. (Vide page 969 of the brief). Additionally, PW17, an officer from the Surveyor General's Department was called to establish the route taken by the Navy ship 'Suranimala' to conduct this operation.

Considering the strict and demanding work schedules as well as the substantial responsibilities allocated to Navy officers, it is understood that such a strenuous duty would take up long hours and thus result in the limiting of sleep and rest for such officers. It is also important to note that such workloads may differ from one officer to another, depending on factors such as their rank and specialisation, and further will depend on whether the ship is on a training exercise, deployment, or in port.

The Learned Counsel on behalf of the Appellants brought forward arguments that there was a delay in recording statements of PW1 and PW3, namely a delay of 22 days and 25 days respectively. The Learned Counsel argue that such delays pose a serious doubt regarding the evidence. The delay, although not being explained by the prosecution, was correctly considered by the Learned High Court judge in his judgment, and he has notably, given reasonable grounds as to why he accepted their evidence. (Vide page 1551 para 170 of the judgment).

Further, the Learned Counsel argued that PW1 had not mentioned the exact location where the contraband had been detected. However, when giving evidence, PW1 had clearly given evidence on where he had found the contraband, while giving descriptions about this location as well. The relevant portion is re-produced below:

<u>Pages 1127-1128 of the brief.</u>

ප්‍ර : දැන් තමුන් කිව්වා මේ අයිස් කම්පාර්ට්මන්ට් එක යටයි අයිස් යට තමයි තිබුණේ කියලා මෙම හෙරොයින් ?

උ : අයිස් කම්පාර්ට්මන්ට් එකේ ස්වාමිනී අයිස් දාලා තියෙන සෙක්ෂන් එකේ ලෑලිවල යට තිබ්බේ ස්වාමිනී.

ප්‍ර :දැන් තමුන් පොලිසියට කට උත්තරයක් දුන්නනේ. මත්ද්‍රව්‍ය නාශක කාර්යාංශයට කටඋත්තරයක් දුන්නා. ඒකේ තියෙනවා බහුදින යාත්‍රාවේ ඉදිරිපස ඇති ඇණිය කොටසේ අයිස් කුට්ටිවලට යටින් ලෑල්ලක් තිබුණු අතර, මා විසින් එම කොටස ඉවත් කර පරීක්ෂා කිරීමේ දී පොලිතීන් බෑග් කිහිපයක් තිබුණා කියලා ? ඇණිය කොටසේ අයිස්වලට යටින්

ලෑල්ලක් තිබුණා. ඒක ඉවත් කිරීමේ දී තමයි එතන තමයි මේ හෙරොයින් තිබුණේ කියලා ? තමුන් පොලිසියට දුන් කට උත්තරයේ තියෙනවා. හරිද ?

උ : හරි ස්වාමිනී.

ප්‍ර : තමුන් ගරු අධිකරණයේ කලින් කිව්වේ අයිස් කම්පාර්ට්මන්ට් එකේ අයිස් වලට යටින් කියලනේ?

උ : හරි.

ප්‍ර : දැන් තමුන් පිළිගන්නව ද අයිස් කම්පාර්ට්මන්ට් එකේ අයිස්වලට යටින් නෙමේ ඇණිය කියන කොටසේ අයිස්වලට යටින් තිබුණේ කියලා ?

උ : ස්වාමිනී යාත්‍රාවක අපි බෙදන කොට කොටස් දෙහෙකට බෙදෙනවා ඇණිය සහ අවරය කියලා. ඉදිරිපස තියෙන දේවල් ටික ඇණිය කොටස තමයි සලකන්නේ. පිටුපස ස්වාමිනී අවරය. ඔතන මම ස්පෙසිෆයිඩ් කරලා නැහැ ස්වාමිනී මොකක්ද ලොකේෂන් එක කියන එක. ඇණිය කියන කොට ඉදිරිපස ඒ අපි හිතමු එයාගේ ස්ට්‍රක්චර් එක තියෙන්නේ එයා ඉන්න ඒකට ඉදිරිපස කොටස තියෙන අයිඩියා එකෙන් තමයි සඳහන් කලේ ස්වාමිනී. නැතුව ඇණිය කියන ලොකේෂන් එකේ ස්වාමිනී බෝට්ටුවක අයිස් තියෙන්න බැහැ. ඇණියේ තියන්න පුළුවන් එයාගේ තියෙන ලණු, ඒ වගේ දේවල් තමයි ඒදිනෙදා පාවිච්චි කරන දේවල්. අයිස් කම්පාර්ට්මන්ට් එකක් කියන කොට ඒ ඇණිය කොටසට අයත් වෙනවා මේ ඔතන තියෙන්නේ ස්වාමිනී ටර්මිලොජි එක පිළිබඳ මා විසින් කරන ලද ප්‍රකාශයක්.

Furthermore, it must be noted that, in order to substantiate the prosecution's version, photographic evidence was also presented.

The Learned President's Counsel, who appeared on behalf of the 3rd Appellant and the Counsel appearing on behalf of the other Appellants, argued that, at the time of detection, the productions were not sealed, and that the productions were only sealed at the Police Narcotics Bureau on 04.11.2019. It is pertinent to note, that raiding officers are required to seal the items at the place of recovery while in the presence of the Accused, immediately after the seizure takes place. This must be done in order to ensure the integrity and to prevent any tampering or alteration of the production before reaching the point of judicial scrutiny.

However, it is important to remember that, in this case, the detection of drugs was done in the mid-sea. Further, the total gross weight of the production was 225 kilograms, and such a massive production was packed in 8 separate bags. This contraband then found in the ice compartment with a load of fish. Therefore, it must be understood that it is practically impossible to seal productions at such a crucial time. PW1 and his officers were in the trawler throughout, until the contraband was handed over to PW5. There is no evidence to show that any third party had entered the trawler up until it had reached the harbour. Therefore, the claim that the non-sealing of the production at the time of detection resulted in a prejudice to the Appellant is not correct.

The detected packages of Heroin were marked through PW5 and PW16, the Government Analyst. PW5 had received the Heroin bags from PW1, and the field test was done while in the presence of the Appellants. The bags were not opened at this time. No prejudice had been caused when marking the empty covers as PW1 had given evidence on what he had witnessed at the time of detection of the 8 bags with illegal substances. Thus, I conclude that the learned High Court Judge has very correctly accepted the evidence brought forward by PW1, PW2 and PW5 and was considered to be probable, consistent and spontaneous.

Next, it was argued by the Learned Counsel that the Learned High Court Judge had erred in law in failing to apply the principle of "Conscious Exclusive Possession."

<u>The Elements of Conscious Possession and Exclusive Possession.</u>

Consciousness, in such a context, refers to the knowledge of the accused in respect of the offensive item. Furthermore, exclusive possession would refer to personal and actual possession of an offensive item of the Accused. Under both these categories, in order to establish criminal liability, proof of both control and knowledge is absolutely necessary. Knowledge would refer to the

knowledge an Accused would have of the existence and the nature of the contraband. Whereas, control refers to the control an Accused may have had over the substance in question, which the court ascertains by considering elements such as exclusive control of a location, pattern of use or regular access to such a substance.

In such an instance, it is of utmost importance to note that being physically present in a location where substances are found would not be enough to establish possession, rather, it is necessary to have actual, physical evidence which links the contraband to the Accused along with circumstantial evidence which demonstrates knowledge and control.

In **Banda v Haramanis** 21 NLR 141, it was held that:

> "*Possession to be criminal must be actual and exclusive, for criminal liability does not attach to constructive possession… Where property is found in a house in the possession of more than one inmate, none of them could be said to be in possession of it for the purpose of this offence, unless there is evidence of exclusive conscious control against them".*

This principle was further established in the case of **Muttaiah Siriyalatha Saraswathie vs. Attorney General** (CA No. 212/95, decided on 30.06.1999) where Justice F.N.D. Jayasuriya reiterated that:

> "*The criminal liability attaches only to possession on which is proved to be actual, exclusive and conscious possession on the part of a person.*"

Additionally, in the case of **Sumanawathie Perera vs Attorney General** 1998 (2) SLR 20, the principles set out by Lord Wilberforce in **Warner v Metropolitan Police Commissioner** were considered:

> "*they must consider the manner and circumstances in which the substance, or some thing which contains it, had been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received,*

the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substances"

At the time of the raid, and at the time the Heroin was recovered from the ice compartment, all the Appellants were present and on board the 'Buddhima' trawler. By that point in time, the Appellants had been in the deep sea for approximately 20 days prior to the arrest. The 'Buddhima' trawler had started sailing from Dikovita on 12.10.2019. This trawler had been registered and had an International Fisheries License to fish in the deep sea. In such circumstances, while being in the deep sea, no others, except the Appellants have access to the ice compartment of the trawler. Due to the fact that fish and food items are being stored in the ice compartment, periodical observations are required in order to ensure that sea water is not seeping into the ice compartment. An additional requirement in such situations, would be to clean fish waste and melted ice.

Thus, the Learned ASG has correctly argued that there can be no isolated areas within such a trawler, due to its confined platform in the sea, and due to the crew having access to all the areas within the ship. Moreover, 8 bags which collectively make up for a weight of 225.166 kilograms of substances, cannot, in a practical sense, be carried by one individual and loaded on to the ice compartment by another. Thus, it is quite evident that this is a result of a collective effort by the whole team.

In **Mohamed Iqbal Mohamed Sadath v Hon Attorney General** SC Appeal 110/15, SC Minute of 14.12.2020 the court held that:

> *"Lord Wilberforce, stating that what must be answered is whether in the circumstances the Accused should be held to have possession of the substance rather than mere control, referred to R.S. Wright [Pollock and Wright] "An Essay on Possession in Common Law" [1888 Part III Chapter 1 page 119] where writer had said "The 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they [the jury] must consider the manner and circumstances in which the substance or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it) On such matters as these (not exhaustively stated) they [the jury] must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess or knowledge that he does possess what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance."*
>
> *This observation, in my view is consonant with the view expressed by Lord Wilberforce in the case of Warner [supra] when his Lordship [Wilberforce] stated; "By there, I mean, relating these to the circumstances in which the substance or something which contained it, had been received" [by the Accused] (the emphasis is mine). As such, consideration must be given as to whether the Prosecution has discharged its burden in regard to establishing mens rea presumptively, arising under the circumstances peculiar to the instant case, and if that was so, whether the Accused had discharged the evidentiary burden to negate the same. It must be stated*

that the evidentiary burden on the Accused is to create a reasonable doubt as to the requisite knowledge.

As seen above, in the case of ***Sumanawathie Perera v. Attorney General*** *1998 2 SLR 20 this was clearly established:*

"On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substances"

In this case, there is no contradiction or omission that was noticed by the Learned High Court Judge at the time of the cross examination of the evidence of PW1 and PW3 which challenges the claim of exclusive possession of the contraband detected in the trawler 'Buddhima'. Thus, taking into consideration the relevant circumstances during the time of apprehension of the Appellants, I conclude that the prosecution has adequately proved the conscious exclusive possession of the Appellants in respect of the contraband.

The next ground that the Learned Counsels strongly contended was that the learned High Court had erroneously arrived at the conclusion that the chain of custody of the contraband was intact.

The chain of custody remains an extremely significant process in cases of drug detection. It is absolutely necessary to guarantee to the court of law that the evidence presented is authentic, in other words, that the evidence presented is the exact same contraband that was seized at the crime scene. Such evidence would be in the custody of a person specially designated to handle it, where such evidence must never be unaccounted for. Despite this resulting in a lengthy process, the evidence must be relevant in court. The chain of custody or chain of evidence refers to the continuous possession or

custody of evidence and its movement from the place of discovery (the scene of the crime or a from a person) to its transfer to the laboratory for examination, up until the point at which such evidence is allowed and admitted in the court.

As established above, the detection of drugs in this case was conducted in the mid-sea. After such detection took place, the trawler was in the continuous custody of the Sri Lanka Navy and no outsider had entered the trawler until it had reached the jetty. In addition to this, as the trawler had encountered an engine problem immediately after the arrest had taken place, the Navy had taken steps to tow the trawler until it was repaired. Throughout this period, at all times, the trawler was in the custody of the Sri Lanka Navy.

It is important to mention that during the trial, the evidence of PW1 and PW5 had not been challenged in respect of the identification of the production and its chain of custody during the point of cross examination of PW1 and PW3. It was correctly noticed by the ASG that the Counsel for the 3rd Appellant had not even cross examined PW5. As mentioned above, not a single contradiction or omission in respect of the evidence by PW1, PW3 and PW5 was brought to the court's attention.

Next, the learned President's Counsel strenuously argued that the learned High Court Judge has erred in law in finding that there was evidence that established the charge of conspiracy.

The definition of Conspiracy under Section 113A of the Penal Code states as follows:

1) If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of Conspiracy to commit or abet that offence, as the case may be.

2) A person within Sri Lanka can be guilty of Conspiracy by agreeing with another person who is beyond Sri Lanka for the commission or abetment of any offence to be committed by them or either of them, or by any other person, either within or beyond Sri Lanka; and, for the purposes of this subsection as to an offence to be committed beyond Sri Lanka offence means any act which if done within Sri Lanka would be an offence under this Code or under any other law.

Exception

This section shall not exceed to the case in which the Conspiracy is between a husband and his wife."

In order to establish a conspiracy charge, the prosecution must establish an agreement reached between two or more persons to commit or abet an offence.

In **Halsbury's Law of England,** the English Law as to the Conspiracy has been states thus:

> "Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means."

There is no general form that an agreement must take in order to constitute conspiracy. Many statutes now require an explicit or obvious act which could act as proof of an agreement to commit a felony; however, circumstantial evidence could be examined to deduce the existence of a conspiracy. Therefore, it is not a requirement for the individual conspirators to even know of the existence or identity of all the other conspirators. As such, two persons can be found to have conspired with one another due to the simple act of making separate agreements with a third party.

It was contended by the Learned President's Counsel appearing on behalf of the 3rd Appellant that where a conspiracy charge is alleged, it is absolutely necessary for the prosecution to substantiate such a charge by adducing

distinct and independent evidence which specifically supports the conspiracy. This principle exists to confirm the validity of conspiracy allegations; in other words, it ensures that such accusations of conspiracy are not brought about on the basis of clear and persuasive evidence which directly incriminates the conspirators, and not due to mere speculation or conjecture.

In **State of Maharashtra v Som Nath Thapa** [1996] 4 SSC 659 the Supreme Court of India held that:

> *"The afore said decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself."*

In the case of **The Attorney General Vs. Potta Naufer and Others** (2007) 2 SLR 144, Shirani Thilakawardena, J. observed;

> *With respect to the degree of proof, it has been held in Queen Vs. Liyanage (1965) 61 NLR 193 that the question is not whether the inference of conspiracy can be drawn but whether the facts are such that they cannot reasonably admit any other inference but that of conspiracy. As the evidence in support of a charge of conspiracy is often circumstantial, the actual facts of the conspiracy may be inferred from the collateral circumstances of the case. A charge of conspiracy can often be proved only by an inference of the subsequent conduct of the parties in committing some overt acts, which tend so obviously towards the alleged unlawful results as to suggest that they must have arisen from an agreement to bring them about."*

In **Kehar Singh vs State (Delhi Admin)** AIR1988 SC1883 (Indira Gandhi Assassination Case) the Supreme Court of India summarized the law on the subject as follows;

"Generally, a conspiracy is hatched in secrecy, and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement however, need not be proved. No actual meeting of two persons is necessary, nor it is necessary to prove that the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient."

In **the State of Tamil Nadu v Nalini** [1999] (Rajiv Gandhi assassination case) the Indian Supreme Court held that:

"Criminal Conspiracy is an exception to general law, where intent alone does not constitute crime: Conspiracy is hatched in secrecy or in private, it is rarely possible to establish a conspiracy by direct evidence: All the conspirators need not agree to play active role: Criminal Conspiracy in partnership in crime: Liability is joint and several. It is a continuing offence: the existence and the object of conspiracy are to be inferred from the circumstances and the conduct of the accused".

In **Liyanage v The Queen** 67 NLR 203 the Supreme Court held that:

"There must be proof against each conspirator that he had knowledge of the general purpose of the plot and the common design, though each need not be equally well informed of the details".

In the case of **Mulcahy v. R.** the House of Lords stated:

> *"A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself and the act of each of the parties promise against promise actus contra actum capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means."*

In the case of **Parveen v State of Haryana (2021)**, the Supreme Court held that:

> *"It is fairly well settled, to prove the charge of conspiracy, within the ambit of Section 120-B, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. At the same time, it is to be noted that it is difficult to establish conspiracy by direct evidence at all, but at the same time, in absence of any evidence to show meeting of minds between the conspirators for the intended object of committing an illegal act, it is not safe to hold a person guilty for offences under Section 120-B of IPC. A few bits here and a few bits there on which prosecution relies, cannot be held to be adequate for connecting the accused with the commission of crime of criminal conspiracy."*

After taking into consideration the evidence presented at the trial, it is evident that the prosecution has clearly established the existence of conspiracy by adducing strong circumstantial evidence. The Learned High Court Judge was not misdirected or mistaken in assessing the evidence and finding the Appellants guilty of the charge of conspiracy.

As the 6th and 7th grounds in the common appeal grounds are interconnected, the said grounds will be considered together herein after. In the 6th ground the Learned President's Counsel contended that the Learned High Court Judge has erred in law by unjustly shifting the burden of proof

onto the Appellant. In the 7th ground, the Learned Counsels contested that the defence evidence has not been properly considered and therefore, the conviction and sentence are bad in law.

In **Sumanasena v The Attorney General** (1999) 3 SLR 137 the court held that:

> *"The prosecution has established a strong and incriminating cogent evidence against the accused and the accused, in these circumstances, was required in law to offer an explanation of the highly incriminating circumstances established against him. The accused has failed to give evidence or to make any statement from the dock. In these circumstances, the learned trial Judge was entitled to draw certain inferences which he deemed proper from the failure of the accused to give evidence in explanation of such circumstances…Equally, the principles laid down by Lord Ellenborough in Rex v. Cockraine and by Justice Baron Pollock and Justice Abbott in Rex v. Burdett are applicable to the facts of the instant case. These dicta have been followed with approval and applied in Sri Lanka in King v. Seedar de Silva at 344; Queen v. Seetin at 321 per Justice T. S. Fernando; Chandradasa v. Queen at 162 per Justice Samarawickrema and in Attorney-General v. Baddewitarane ; Republic v. lllangatileke ; Republic v. Gunawardena at 329 (per Justice Collin Thome); Rex v. Gunaratne; Arendtsz v. Wilfred Pieris (per Justice Moseley)."*

In **Dissanayake Rallage Ranasinghe and Another v OIC Warakapola and Another** SC Appeal 39/2011 and 39A/2011 decided on 02.04.2014, His Lordships of the Supreme Court held that:

> *"[Ellenborough's dictum] could be applied in cases where there is a strong prima facie case made out against the Accused and if he refrains from explaining suspicious circumstances attached to him when it is in his own*

power to offer evidence. In such a situation an adverse inference can be drown against him".

Further, in the case of **The Attorney General Vs. Potta Naufer and Others** (2007) 2 SLR 144, it was held:

"In terms of section 134 of the Evidence Ordinance, the criminal charges against an accused can be proved by one witness alone, if the evidence is cogent, convincing, accurate and credible and if on that evidence the ingredients of the charge could be proved beyond a reasonable doubt."

In this case, as there are no contradictions marked and as no omissions have been brought to the attention of the Learned High Court Judge, the evidence given by PW1, PW3, PW5 and other witnesses can be considered to be consistent and probable.

Unchallenged evidence, in situations where the defence had the opportunity to challenge and cross examine the evidence but refrains from doing so, it is presumed that such evidence is admissible, credible and truthful.

His Lordship Sisra de Abrew, J. in the case of **Pilippu Mandige Nalaka Krishantha Thisera Vs. The Attorney General,** CA 87/2005 decided on 17-05-2007 held:

"…. I hold whenever evidence is given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."

In the case of **Sarwan Singh Vs. State of Punjab** 2002 AIR Supreme Court iii 3652 at 3655,3656 it was stated thus;

"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted."

In the case of **Himachal Pradesh v Thakur Dass** at 1983 V.D. Misra CJ held:

> *"Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed."*

Further, in the case of **Vide Motilal v State of Madya Pradesh**, it was held that:

> *"Absence of cross examination of prosecution witnesses of certain facts leads to the inference of admission of that fact."*

In this case, the High Court Judge has very correctly considered the evidence presented by the Prosecution Witnesses. Therefore, I am of the view that the Learned High Court Judge has very accurately applied the Ellenborough dictum in this situation.

The defence evidence includes presenting evidence which challenges the prosecution's case, and includes evidence such as dock statements, witness testimony, alibis, or forensic evidence, which would then have to be evaluated by the judge or jury for its credibility along with the prosecution's evidence in order to ascertain guilt or innocence. Although the defence does not bear the burden of proof, but bears the burden of providing evidence to create reasonable doubt. It is then the court's duty to assess such evidence altogether, without prejudice towards the defence; in essence, the defence must be treated the same way as the prosecution.

The Learned High Court Judge in his judgment at pages 1566-1581 had correctly considered the evidence of the defence and presented reasons as to why he recognized the evidence given by the prosecution and gave it precedence over the evidence of the defence, and as a result, convicted the Appellants as charged in the indictment.

In this case the learned High Court Judge had considered the evidence presented by both parties to arrive at his decision. He had properly analyzed the evidence given by both sides in his judgment. As the evidence adduced by the Appellants failed to create a doubt over the prosecution case, the conclusion reached by the learned High Court Judge in this case cannot be faulted.

As discussed under the grounds of appeal advanced by the Appellants, the prosecution had adduced strong and incriminating evidence against the Appellants. The learned High Court Judge had accurately analyzed all evidence presented by all the parties and come to a correct finding that the Appellants were guilty of the charges levelled against them. Therefore, I dismiss the Appeal and affirm the conviction and the sentence imposed on them on 27.09.2023 by the learned High Court Judge of Colombo.

The Registrar is directed to send this judgment to High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL