

**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 of the  
Criminal Procedure Code Act No.  
15 of 1979.

The Democratic Socialist Republic  
of Sri Lanka.

**COMPLAINANT**

**Vs.**

1. Mabula Marapperuma  
Arachchilage Priyantha  
Priyadarshana,
2. Rankoth Gedera Upul  
Priyantha.

**ACCUSED**

**CA HCC No. 157/2018  
H.C Colombo No. 7125/2014**

**AND NOW BETWEEN**

Mabula Marapperuma  
Arachchilage Priyantha  
Priyadarshana,  
Dorawaka

**ACCUSED-APPELLANT**

**Vs.**

The Democratic Socialist Republic  
of Sri Lanka.

**RESPONDENT**

**BEFORE** : Achala Wengappuli J. &  
Dr. Ruwan Fernando J.

**COUNSEL** : Rasika De Silva for the Accused-  
Appellant

Chethiya Goonesekera, Deputy  
Solicitor General for the  
Respondent

**WRITTEN SUBMISSIONS** : 04.06.2019 (by the Accused-  
Appellant)

05.07.2019 (by the Respondent)

**ARGUED ON** : 17.12.2019

**DECIDED ON** : 07.02.2020

**Dr. Ruwan Fernando, J.**

**Introduction**

[1] The Accused-Appellant and the 2<sup>nd</sup> Accused were indicted in the High Court of Colombo for attempting to commit Criminal Breach of Trust on or about 05.11.2008 in respect of fertilizers owned by the Ceylon Fertilizers Company valued at Rs. 367,500/- and entrusted to them by the

Ceylon Fertilizers Company for transportation, an offence punishable under section 390 of the Penal Code read together with section 490 of the Penal Code.

### **The Trial**

[2] At the trial, the prosecution led the evidence of the following witnesses in support of its case:

1. Inspector of Police, Kalansooriya Archchige Rohana Mahesh (PW5);
2. Punya Sri Jayakody, Manager of the Warehouse Complex of Ceylon Fertilizers Company (PW8);
3. Piliduwa Paranahewage Vishwajith, an Employee of the Ceylon Fertilizers Company (PW3); and
4. Inspector of Police S.M.Chandra Deeptha Kumara Abeysinghe (PW9).

[3] The Accused-Appellant and the 2nd Accused made dock statements and called P.C. Irugal Bandara Prasanna Sanjeeva, a Police Officer attached to the Peliyagoda Traffic Police Division in support of their defence.

### **Conviction & Sentence**

[4] After trial, the learned High Court Judge by his judgment dated 28.06.2018 found the Accused-Appellant guilty of the charge and sentenced him to a term of 3 years rigorous imprisonment. In addition, the learned High Court Judge ordered the Accused-Appellant to pay a fine of Rs. 400,000/- and in default, to a term of 1-year rigorous imprisonment. The 2<sup>nd</sup> Accused was, however, found not guilty of the charge and therefore, he was acquitted by the learned High Court Judge.

## **Appeal**

[5] Aggrieved by the said judgment and sentence, the Accused-Appellant has preferred this appeal to this Court challenging the judgment pronounced and sentence imposed on the Accused-Appellant.

## **Facts**

[6] The facts relevant to the charge on which the Accused-Appellant was found guilty are briefly summarized as follows:

[7] On a tip off received by the Officer in Charge of the Organized Crime Division on 05.11.2018 about an attempt to steal fertilizer bags owned by the Government, IP Rohana Mahesh and a team of Police Officers had carried out a raid at Nuge Road in Peliyagoda. When IP. Rohana Mahesh approached the Nuge Road in Peliyagoda, a parked Container Lorry bearing Registered No. W.P.L.D.3895 was seen close to the 'Kekala' shrubs with lights switched off and the Driver (Accused-Appellant) and the Assistant (2nd Accused) were engaged in unloading fertilizer bags. He had seen unloaded 15 fertilizer bags close to the 'Kekala' shrubs and another 35 bags close to the Container Lorry. He had found the broken Metal pieces of the Customs Seals, Iron Cutting Scissor, Iron hammer and a knife which had been used to break open the Sealed Container on the ground near the Container Lorry. When documents were asked for, the Accused-Appellant had given him bills produced by the Customs and 6 unused seals to the Police Officer.

[8] He had taken charge of the broken pieces of metal seals marked P1 and P2, Iron Cutting Scissor marked P3, 6 unused seals given by the Accused-Appellant to him marked P5-P10, the upper part of a Customs Seal marked P11, 50 fertilizer bags marked P4, balance 450 fertilizer bags that were found inside the Container Lorry, the Container Lorry and the

knife. Out of 50 fertilizer bags, one such fertilizer bag had been marked by the prosecution at the trial as P12. Each fertilizer bag weighed 50 kgs and carried the details including ‘Mahinda Chinhanaya’ in Sinhala and ‘Government Subsidiary Fertilizer for Agricultural Development and Agrarian Services Development’.

[9] The Manager of the Warehouse Complex of Ceylon Fertilizer Company, Mr. Punya Sri Jayakody who visited the scene after the raid had confirmed that (i) 10-15 fertilizer bags were seen on the Nuge Road close to the parked Container Lorry and similar number of fertilizer bags were also seen on the road about 15 meters away from the said 10-15 fertilizer bags; (ii) the Driver and the Assistant of the Container Lorry were present at the scene; (iii) fertilizer bags in question were imported from abroad by the Ceylon Fertilizers Company for agricultural purposes under the ‘Mahinda Chinhanaya Subsidy Program’; (iv) the contract of transportation of the said bags was entrusted to the A.M.T. Transport Services to be transported to the Warehouse in Hunupitiya; (v) they were sealed by the Country that exported the fertilizer bags and the Driver had no authority to open the Seals or stop the Container Lorry while being transported to the Warehouse and in case of any stoppage, the Company must be kept informed; and (vi) the route of transportation was the Peliyagoda and Negombo roads through Thotalaga and therefore, there was no need for the Container Lorry to go to Kelaniya Road. He had identified the fertilizer bags imported by the Ceylon Fertilizers Company marked P4.

[10] Piliduwa Paranahewage Vishwajith who was handling Fertilizers at the Colombo Port had entrusted the imported fertilizer bags to A.M.T. Transport Services to be transported to the Warehouse in Hunupitiya by the Container Lorry in question. According to him, (i) when the fertilizer

bags arrived at the Colombo Port, they were sealed by the Customs at the Colombo Port after they were loaded into the Container Lorry; (ii) the fertilizer bags in question were transported by Container Lorry bearing Registered No. WP LD 3895; (iii) after he received an information from Mr. Jayakody, at about 10.30 -11.30 p.m., he visited the Peliyagoda Police Station and identified 50 fertilizer bags kept in the Police Garage and other fertilizer bags at the Police Station; (iv) a bag of fertilizer was valued at Rs. 7500/- and the entire value of 50 bags was Rs. 367,500/-. He had identified the fertilizer bag marked P4.

[11] The Accused-Appellant, and the 2nd Accused made dock statements denying the charges against them and called a Traffic Police Officer who stated that on 05.11.2008, he stopped a Lorry due to a defect in its head lamps and issued the Temporary Driving License at Oliyamulla and not at the Police Station.

### **The Law**

[12] The offence of Criminal Breach of Trust is defined in Section 388 of the Penal Code as follows:

*“Whoever, being in many manner entrusted with property, or with any domination over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits ‘criminal breach of trust’.*

[13] The essential ingredients to prove a charge under section 388 are:

1. Entrustment with property or dominion over property; and
2. Either
  - (a) Dishonest misappropriation or conversion to his own use; or
  - (b) Dishonest user or disposal, or
  - (c) Willfully suffering any other to do 2 (a) or (b).

[14] Criminal Breach of Trust may be committed by various persons and the Penal Code provides for different degrees of punishment for Criminal Breach of Trust depending on the status of the person who commits it. If it is committed by a carrier, wharfinger or warehouse-keeper, it is an offence dealt with under Section 390 of the Penal Code as in the present case and is punishable with a particular kind of sentence.

[15] In the present case, the charge is an attempt to commit the Criminal Breach of Trust under section 390 read with section 490 of the Penal Code and thus, if the Accused-Appellant is proved to have attempted to commit the offence of Criminal Breach of Trust, there would be no difficulty in finding the Accused-Appellant guilty of the offence of attempting to commit the Criminal Breach of Trust.

[16]The learned High Court Judge has considered the evidence of the prosecution in detail and come to the conclusion that the prosecution has established beyond a reasonable doubt that (i) the Accused-Appellant being the Driver of the Container Lorry was entrusted with the fertilizer bags in question; and (ii) the Accused-Appellant had attempted to dishonestly misappropriate or convert to his own use or dispose of 50 fertilizer bags valued at Rs. 367,500/- and thereby attempted to commit Criminal Breach of Trust within the meaning of Section 390 of the Penal Code read with section 490 of the Penal Code. The learned High Court

Judge has also rejected the dock statement of the Accused-Appellant, and concluded that the dock statement of the Accused-Appellant did not create any reasonable doubt on the prosecution case.

[17] At the hearing of this appeal, no submission was made by the learned Counsel for the Accused-Appellant before this Court that the Fertilizer bags in question were not entrusted to the Accused-Appellant by the Ceylon Fertilizers Company to be transported to the Warehouse of the Ceylon Fertilizers Company in Hunupitiya by the Container Lorry bearing Registered No. WPLD 3895.

### **Grounds of Appeal**

[18] When this matter was taken up for argument on 17.12.2019, the learned Counsel for the Accused-Appellant submitted that the conviction should be set aside on the following grounds:

1. The learned High Court Judge had erred in law by failing to consider that the evidence of the main witness, IP. Rohana Mahesh is not credible enough to prove the charge beyond reasonable doubt in view of the fact that there were a number of contradictions *per se* and *inter se* in his evidence;
2. The learned High Court Judge had failed to consider that the prosecution failed to adduce evidence of another witness to corroborate the evidence of the solitary witness, IP Rohana Mahesh by calling SI. Sampath who accompanied IP. Rohana Mahesh in the raid, which deprived the defence of the opportunity to attack the veracity of the said solitary witness and thereby denied a fair trial;

3. The learned High Court Judge had failed to give due consideration to the fact that the chain of productions had not been proved by the prosecution beyond reasonable doubt;
4. The learned High Court Judge had failed to consider the dock statement made by the Accused-Appellant in the proper context which created a reasonable doubt on the prosecution case.

### **Decision**

#### **Ground of Appeal-1**

##### **Failure to consider that the contradictions *per se* and contradictions *inter se* in the evidence of IP Rohana Mahesh**

[19] At the hearing, the learned Counsel for the Accused-Appellant submitted that the learned High Court Judge had failed to consider that the evidence of IP Rohana Mahesh was not credible to prove the charge beyond a reasonable doubt against the Accused-Appellant in view of the number of material contradictions *per se* and contradictions *inter se* in his evidence. The learned Counsel for the Accused-Appellant highlighted 5 contradictions *per se* in the evidence of IP Rohana Mahesh and contradictions *inter se* of his evidence with that of Jayakody and Vishwajith.

[20] I shall now consider the 5 contradictions highlighted by the learned Counsel for the Accused-Appellant during the hearing of this appeal:

###### **(i) Contradiction with regard to the time of the receipt of the information**

[21] IP Rohana Mahesh had stated in his evidence in chief that the information was first received over the telephone on 05.11.2008 at 14 hours about an attempted theft of fertilizer bags in the Peliyagoda area.

Under cross examination, he had stated that the information was received by S.I Sampath at about 21 hours.

ii. Contradiction with regard to who received the information

[22] IP Rohana Mahesh had stated in evidence in chief that the information was first received by him from one of his and SI Sampath's known informants over the telephone, but under cross examination, he had stated that the information was first received by SI Sampath.

iii. Contradiction with regard to the second information

[23] IP Rohana Mahesh had stated in examination in chief that when the Police Party arrived at the Peliyagoda roundabout, they received another information and under cross examination, he had stated that after they entered the Nuge Road in Peliyagoda, no information was received by them.

iv. Contradiction with regard to the Police party waiting for one hour until they received the second information with regard to the location of the Lorry

[24] IP Rohana Mahesh had stated in examination in chief that the raiding party waited for 1 hour at a place closer to the Peliyagoda roundabout until they until they received the information about the exact location of the lorry (page 64). Under cross examination, he had stated that when they entered the Nuge Road, they saw the Lorry in question was parked near the Nuge Road close to 'Kekala' shrub. (p. 111).

v. Contradiction with regard to the number of unloaded fertilizer bags

[25] IP Rohana Mahesh had stated in evidence that 50 fertilizer bags had been unloaded by the Driver and the Assistant (page 67) whereas Jayakody

had stated in evidence that 10-15 fertilizer bags were lying on the ground (p. 141) and similar number of fertilizer bags were found some distance away from the parked Lorry.

[26] The learned High Court Judge has correctly observed that there is a contradiction with regard to who first received the information and the time of the receipt of the information either by IP Mahesh or SI Sampath and the time of the information received by Jayakody and Vishwajith who arrived at the scene after the raid. He had, however, taken the view that the discrepancy with regard to who received the information and the time of the information were not material contradictions so as to affect the testimonial trustworthiness of IP Rohana Mahesh.

[27] The learned High Court Judge had further held that the discrepancies in the evidence of Jayakody and Vishwajith with regard to the time of information and arrival at the scene were not due to dishonesty or falsity of their evidence but due to defective memory as the incident had taken place 7-8 years ago. His observations at pages 206, 222-223 of the Appeal Brief are as follows:

මෙම සාක්ෂිකරුවන් තිදෙනාගේ සාක්ෂි වෙත් වෙත්ව සලකා බැලුමේදී පිළිගත හැකි බව තිරණය කර ඇති මා පොදුවේ වම සාක්ෂිකරුවන්ගේ සාක්ෂි සලකා බලා කිසියම් හෝ සැලකිය යුතු පරස්පරයක් හෝ නොගැලුපිමක් ඔවුන්ගේ සාක්ෂි අතරතුර දී මතු වන්නේ දැයි දැන් සලකා බලමි. මෙම සාක්ෂිකරුවන් තිදෙනාගේ සාක්ෂි පොදුවේ සලකා බැලුමේ දී විශ්වාසී සහ පයකොට්ඨී යන අය වැට්මික් සිදු වී ඇති බවට දැනුම් දීම, ලැබුණු වේලාව සහ මෙම ස්ථානයට පැමිණී වේලාව, පොලිස් සාක්ෂිය සමග සලකා බැලුමේ දී නොගැලුපිමක් නිරීක්ෂණය කළුමි. පොලිස් සාක්ෂියට අනුව රාත්‍රී 11.30 ට පමණ මෙම වැට්මික් සිදු කර ඇති. එසේ වුව ද විශ්වාසී යන සාක්ෂිකරු රාත්‍රී 10.00 ජ්‍ය 11.30 ජ්‍ය අතර මෙය දැනී ගත් බව ප්‍රකාශ කර ඇති. පයකොට්ඨීගේ සාක්ෂියේ ද මෙම කරුණු සම්බන්ධයෙන් යම් සූල වෙනසක් නිරීක්ෂණය කළුමි. පොදුවේ සලකා බැලුමේ දී මෙම වෙනස මෙම වෙනස සාක්ෂි දීමේ ද මෙම වෙනස මෙම සාක්ෂිකරුවන් දෙදෙනා හිතාමතා අසත්‍යක් ප්‍රකාශ කිරීම මත නොව සිද්ධියෙන් වසර 07 ක් හෝ 08 ක් ගත වීමෙන් අනතුරුව නැවත සාක්ෂි දීමේ ද මතකයේ වූ ස්වභාවික ද්‍රව්‍ය වීම මත මතු වුවක් බව

තිරණය කරමි. ඒ හැර වෙන කිසිදු සැලකිය යුතු නොගැලපීමක් මෙම අය අත්ර මතු වී නැත (page 206).

මෙම නඩුවේ ප.ස) 05 ගේ සාක්ෂියට පහුව පය 23.30 ට පමණ මෙම වැවලිම කිදු කර ඇත. එසේ වුව ද ප.ස) 03 සහ ප.ස) 08 පයකොඩි යන දෙදෙනාගේ සාක්ෂිවල ද ඔවුනට තොරතුර ලැබුණු වේලාවන් වම ස්ථානයට පැමිණි වේලාව සම්බන්ධයෙන් යම් නොගැලපීමක් මා නිරීක්ෂණය කළේමි. විය්වහින් යන අය 10.30 ත් 11.00 ත් අතර බවට යම් අවස්ථාවක සඳහන් කර පසුව රාත්‍රි 10.00 ට තොරතුර ලැබුණු බව ප්‍රකාශ කරයි. පයකොඩි ද තොරතුර ලැබුණු වේලාව මෙම ස්ථානයට පැමිණිම සම්බන්ධයෙන් නොගැලපීමක් මතු ව ඇත. මෙම නඩුවේ ද මෙම නොගැලපීම මතු වී ඇත්තේ ප.ස) 03 සහ 08 සිද්ධියෙන් දේරුක කාලයකට පසුව වනිම් වසර 07 කට හෝ 08 කට පමණ පසුව වන අතර සාමාන්‍ය මත්‍යුහයින්ට ඇතිවන කාලයාගේ ඇවැමෙන් කිදු වන මතකය දේරුවලිම මතු වූ අසන්‍යක් ප්‍රකාශ කිරීම මත මතු වී ඇති නොගැලපීමක් තොවන බව පොදුවේ සියලු සාක්ෂි සළකා බැලීමේද නෙළුදරවි වේ. වනිම් විත්තිකරණන් දෙදෙනා ද වැනි රාත්‍රියේ පොලිඩියෙන් කන්ටේනරය තුළේ පාර හවතා තැබූ තැනක පැමිණිමන් පයකොඩි සහ සුරංග සහ තවත් අයෙකු වම ස්ථානයට පැමිණිම පිළිගෙන ඇත. හඩ කර තැන. එම කරණු මත පැමිණිල්ලේ නඩුම මත කිසිදු හෝ සැකයක් මතුවන්නේ නැති බව තිරණය කරමි (pages 222-223).

[28] It is settled law that in evaluating the evidence of a witness and assessing contradictions, it is necessary to examine the whole of his evidence and ascertain whether the contradiction is weighty or is trivial or it shakes the basic version of the witness and therefore, the Court is not entitled to reject the testimony of a witness unless they go to the root of the case. The principle of the evaluation of the evidence of a witness was more clearly laid down in the case of Best Footwear (Pvt) Ltd and two others vs. Aboosally 1997 (2) Sri L.R 138 in which F.N.D. Jayasuriya J. at page 146 observed as follows:

*"In evaluating the evidence of a witness, a court or tribunal is not entitled to reject testimony and arrive at an adverse finding in regard to testimonial trustworthiness and credibility on the mere proof of contradiction or the existence of a discrepancy. The deciding*

*authority must weigh and evaluate the discrepancy and ascertain whether the discrepancy does go to the root of the matter and shake the basic version of the witness. If it does not, such discrepancies cannot be given too much importance..... before arriving at an adverse finding in regard to testimonial trustworthiness, the judge must carefully give his mind to the contradictions marked and consider whether they are material or not and the witness should be given an opportunity of explaining those contradictions that matter..... the witness should not be disbelieved on account of trivial discrepancies and omissions and the Court should look at the entirety and the totality of the material placed before it in ascertaining whether the contradiction is weighty or is trivial.”*

[29] Thus, the role of a judge in evaluating the evidence of a witness is to direct his mind as to what contradictions matter and what do not and whether they are material so as to affect the credibility of the witness. What the Court has to see however, is whether these variations are material and affect the case of the prosecution substantially as every variation may not be enough to adversely affect the case of the prosecution. It is also important to note that the Court should examine the evidence of a witness in its entirety in order to arrive at a rational conclusion as his evidence cannot be read in part and/or in isolation.

[30] The first and second contradictions only relate to (i) the time of receipt of the information about an attempt to steal fertilizer bags and who first received the information-whether by IP Mahesh or S.I. Sampath and (ii) when Jayakody and Vishwajith received the information about the raid and the time of their arrival at the scene.

[31] The learned High Court Judge has given his mind to the fact that Accused-Appellant has admitted in his dock statement that the Police Party had arrived at the scene and examined the Container Lorry and thereafter, Jayakody and Wharf Clerk Suranga arrived at the scene.

[32] It has transpired in evidence that the Traffic Police had stopped the Lorry in question at about **22.10 hours (10.10 p.m.)** and issued the Temporary Driving Licence to the Accused-Appellant at Periyamulle at about 22.10 hours (10.10 p.m.). The Traffic Police Officer who was called by the defence had clearly stated in evidence that he never asked the Accused-Appellant to come to the Police Station or issued the Temporary Licence at the Peliyagoda Police Station.

[33] However, no material contradictions had been highlighted in the evidence of IP Rohana Mahesh with regard to (i) arrival of the Police Party and the time of the raid at 23 hours and the time of the arrest at 23.30 hours; (ii) the unauthorized opening of the sealed Container at Nuge Road after having broken open the Customs Seals; (iii) the unloading of 50 fertilizer bags by the Accused-Appellant and the Assistant at Nuge Road; (iv) the recovery of broken metal pieces of Customs Seals, an Iron Cutting Scissor and Hammer at the scene; (v) the recovery of New Seals similar to the Customs Seals in the possession of the Accused-Appellant; (vi) identification of the Accused-Appellant and the fertilizer bags.

[34] Accordingly, I am unable to see that the said minor variations as to the timing of the receipt of the information and the timing of the arrival of Jayakody and Vishwajith at the scene can be regarded as giving any advantage to the Accused-Appellant.

[35] With regard to the third and fourth contradictions highlighted by the learned Counsel for the Accused-Appellant, IP Rohana Mahesh had stated

in evidence that when they arrived at the Peliyagoda Roundabout, they waited for 1 hour until they receive further information about the location of the Lorry in question and when they received the correct information about the location of the parked Lorry on Nuge Road, they arrived at Nuge Road and observed that the parked Lorry in question close to the ‘Kekala’ shrubs. Thus, the learned High Court Judge was correct in holding that the said contradictions are not material contradictions that go to the root of the prosecution case.

[36] With regard to the fifth contradiction highlighted by the learned Counsel for the Accused-Appellant, IP Rohana Mahesh had stated in evidence that when he arrived at the Nuge Road, the Driver and the Assistant were engaged in unloading fertilizer bags and he had seen 50 fertilizer bags on the Nuge Road close to the ‘Kekala’ shrub (p. 67). The testimony of Jayakody was that he saw 10-15 fertilizer bags unloaded on the road close to the Container Lorry and the same number of fertilizer bags had been unloaded and fallen 15 meters away from the first found fertilizer bags. His evidence at page 141 and 144 is as follows:

පූ : ඔබ මොකක්ද දැක්කේ?

සි : පොනොර මිටි 10 ක් 15 විලියට ඇදලා තිබුණා. විතන සිට මිට්ර 15 විනාඩින් පොනොර මිටි බාලා තිබුණා. පොලිස්කියෙන් හිටිය. ලොරියේ රියදුරු සහ සහායක හිටිය.

පූ : ඔබ කිවුවා රියදුරු සහ සහායකයා විතන හිටිය කියල.

සි : විහෙමයි.

පූ : තමුන් කිවුවා ලොරිය ආසන්නයේ පොනොර මිටි බාලා තිබුණා කියල.

සි : 10 ක් 12 ක් වගේ මම දැක්කේ.

පූ : තමුන් කිවුවා රට මිට්ර 15 විනාඩින් පොනොර මිටි බාලා තිබුණා කියල.

සි : විහෙමයි.

පූ : විතන කොට්ටම මිටි ප්‍රමාණයක් තිබුණාද?

සි : විතනන් ඒ ගාන වගේ තිබුණේ.

පූ : තමන් ශිල්ල පොනොර බැං පරික්ෂා කරල බැවතද?

සේ : ඔවුන්

[37] Under such circumstances, the learned High Court Judge was justified in holding that the contradictions *inter se* were not shaking basic version of IP Rohana Mahesh as the contradictions were not material contradictions that would affect the testimonial trustworthiness of the witness.

[38] Having regard to the entirety and the totality of the material placed before the Court, the learned High Court Judge had properly evaluated the evidence of IP Rohana Mahesh and correctly held that his testimony is cogent and credible whereas the contradictions are trivial in nature which do not go to the root of the prosecution case.

[39] The Court should also be mindful of the fact that after a considerable lapse of time, as has happened in the present case, it is customary to come across contradictions in the testimony of witnesses. It is common that the true characteristic feature of human testimony is full of infirmities and weaknesses, especially when proceedings are held long after the events spoken to by the witnesses and therefore, a Judge must expect such contradictions to exist in the testimony (Wickremasinghe vs. Dedoleena and Others 1996 (2) SLR 95).

[40] As for the contradictions in the evidence of Jayakody and Vishwajith with regard to the time of the receipt of the raid and time of arrival at the scene, it is natural that contradictions in the human testimony with regard to the exact time of receipt of information and arrival at the scene may exist due to weakness of memory and power of observations when the incident had taken place in 2008. The two witnesses had testified in court 10 years after the incident. However, the learned High Court Judge had correctly observed that their evidence with regard to the identification of the

fertilizers in question, procedure of sealing at the Port by the Customs and handing over the fertilizer bags to the M.A.T. Transport Services of which the Accused-Appellant was the Driver of the Container Lorry bearing Registered No. WP LD 3895 to be transported to the Warehouse in Hunupitiya and the identification of unloaded 50 bags at the scene and the Police Station had not been shaken under the cross examination.

[41] Under such circumstances, I totally agree with the observations made by the learned High Court Judge that contradictions in the evidence of Jayakody and Vishvajith who had arrived at the scene after the raid had occurred due to defective memory and not due to dishonesty or falsity of their evidence when their evidence was recorded long after the events spoken to by the witnesses.

### **Ground of Appeal- 2**

#### **Failure of the prosecution to adduce evidence of another witness to corroborate the evidence of the solitary prosecution witness**

[42] At the hearing, the learned Counsel for the Accused-Appellant argued that the prosecution failed to adduce the evidence of the Police Officer who received the first information and the Trial Court had not considered the failure of the prosecution to call at least one other witness to establish the raid and relied solely on the evidence of IP. Rohana Mahesh to establish the charge against the Accused-Appellant, which deprived the defence from testing the veracity of the evidence of the sole key witness, IP. Rohana Mahesh.

[43] The learned Counsel or the Accused-Appellant argued that since the conviction was based on the evidence of a solitary witness, IP. Rohana Mahesh, the Trial Judge should have exercised caution in evaluating the

evidence of the sole Police witness when the prosecution had failed to adduce the evidence of other Police Officers who took part in the raid. His submission was that in a raid carried out by Police Officers, in order to bring about a conviction, the prosecution has to necessarily corroborate the evidence of the main witness by adducing the evidence of one member of the raiding party.

[44] The Evidence Ordinance lays down in section 134 the specific rule that no particular number of witnesses shall in any case be required for the proof of any fact. The rule, however, attaches more importance, to the quality, than the quantity of evidence as the evidence to be weighted, not counted (Haralal Dos v. Pasupati Charam A.I.R. (1955) & Mulwa vs. State of Madhya Pradesh A.I.R. (19760 SC 989, para 18).

[45] At the hearing, the learned Counsel for the Accused-Appellant heavily relied on the decision of the Supreme Court in the case of Rajapaksha Pathirage Justin Rajapaksha v. Prasanna Rathnayake and others SC/FR 689/2012 decided on 28.03.2016 and submitted that in cases where more police officers have participated in a raid and claim that they found contraband in the possession of the suspect, it is not safe to act only on one police officer's evidence.

[46] I shall now consider the facts of the case relied on by the learned Counsel for the Accused-Appellant and then examine whether the observations made by the honourable Supreme Court are applicable to the facts of this case. Rajapaksha Pathirage Justin Rajapaksha v. Prasanna Rathnayake and others (*supra*) was a fundamental rights cases filed by the Petitioner who was arrested by a team of police officers on 25.05.2012 without giving any reasons and kept in the police cell till 27.05.2012 on false charges and thereafter the Petitioner was produced before Magistrate

on 27.05.2012 on a charge that he was in possession of 6 packets of cannabis, each containing 5 grams.

[47] The 1st Respondent in his statement of objections denied the arrest of the Petitioner and stated that the Petitioner was arrested only on 26.05.2012 by the 3rd, 4th 5th and 6th Respondents on an information that he was in possession of cannabis. The 6th Respondent on 27.05.2012 filed a B report stating that he arrested the Petitioner on 26.05.2012 for being in possession of cannabis and that the 3rd, 4th and 5th Respondents participated in the raid in which the Petitioner was arrested. The 6th Respondent's evidence before the Magistrate's court was however, completely against the stand that he took in his B report filed in the Magistrate's Court. The 6th Respondent has stated in evidence that (i) he did not conduct a raid with the other police officers on 26.05.2012; (ii) he neither arrested the Petitioner nor did he find any cannabis in the possession of the Petitioner on the previous day (25.05.2012); (iii) the 1st Respondent directed him to institute criminal proceedings in court against the Petitioner for being in possession of cannabis ; (iv) he told the 1st Respondent that he could not file a B report in respect of the arrest which he did not do but the 1st Respondent threatened him to the effect that the 1st Respondent would take steps to cancel his appointment in the Police Department if he did not carry out the instructions given by the 1st Respondent; (v) in fear of losing his job, he acceded to the instructions given by the 1st Respondent; (vi) the 1st Respondent gave him 7 packets of cannabis and directed him to state in the B report that one of the said 7 packets had been purchased from the Petitioner and the balance 6 packets had been found in the possession of the Petitioner and on the said instructions of the 1st Respondent, he prepared the B report and produced the Petitioner before the Magistrate on 27.05.2012. The Petitioner was

after considering the evidence of the 6th Respondent discharged the Petitioner of the charge as it has been clearly established *inter alia*, that the Petitioner was not having cannabis in his possession and that a false charge had been fabricated against the Petitioner by the 1st Respondent.

[48] Under such circumstances, Her Ladyship Wanasundere J. observed at page 8 of the judgment as follows:

*"The incident that took place in this case is a good example for the trial judges to remember that the police sometimes arrest people without any reasons and later introduce contraband or similar illegal items to the person arrested to justify the arrest. When the story of the police is false, one police officer may sometimes contradict the other police officer. The Trial Judges must be extremely careful when they are called upon to act only on one police officer's evidence when the police claim that a team of police officers conducted a raid and found contraband in the possession of a suspect or suspect because there can always be an introduction as happened in this case. Therefore, in cases where the police allege that they found contraband in possession of a suspect or suspects, it is safer not to act only on one police officer's evidence if more than one police officer have participated in the raid because if there is an introduction by the police officers as happened in the case, there may, sometimes, be contradictions among the evidence of police officers. In such situations, adjudication of issues in the case becomes easier to courts. I am mindful of the principles laid down in section 134 of the Evidence Ordinance when I make the above observation. But however, courts should not fall into trap of convicting an innocent person by strictly following the principles laid down in section 134 of the Evidence Ordinance. The incident that*

*had taken place in the present case is a classic example that courts should, in appropriate cases, relax the principles laid down in section 134 of the Evidence Ordinance. However, if a police officer who was not assisted by any other police officer searches a person on suspicions and finds contraband or any illegal items in the possession of the said person, the situation discussed above may be different.”*

[49] It would appear therefore, that the facts of the said case are completely different from the facts of the present case and thus, the instant case can be distinguished from the above case. I am of the view that under such circumstances, the observations made by the Supreme Court in the said Fundamental Rights case would not support the Accused-Appellant.

[50] While I agree that the evidence of a sole witness to the incident has to be accepted with an amount of caution and circumspect, there is no burden on the prosecution to provide an accused an opportunity to challenge the veracity or credibility of a police witness in a detection by calling other witnesses who took part in the raid provided however, that the evidence tendered by a solitary witness is credible, reliable, in tune with the case of the prosecution and inspires implicit confidence.

[51] My view on this matter is further supported by the decision of the Supreme Court in the case of Attorney-General vs. Devunderage Nihal, S.C. Appeal No. 154/10 decided on 12.05.2011. The Accused in this case was indicted in the High Court under section 54(a) (c) of the Opium, Poisons and Dangerous Drugs Ordinance for being in unlawful possession of 9.91 grams of heroin and after trial, the Accused was found guilty of the said offence. The Accused appealed against the said conviction and sentence to the Court of Appeal and the Court of Appeal set aside the conviction and sentence and acquitted the Accused on the ground that only

one witness who took part in the raid where the Accused had given evidence.

[52] While setting aside the judgment of the Court of Appeal, Suresh Chandra J. observed at page 5 as follows:

*"Therefore, it is clear that unlike in the case of an accomplice or a decoy is concerned in any other case, there is no requirement in law that the evidence of a Police Officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars. However, caution must be exercised by a trial judge in evaluating such evidence and arriving at a conclusion against an offender. It cannot be stated as a rule of thumb that the evidence of a police witness in a drug related offence must be corroborated in material particulars where police officers are the key witnesses. If such a proposition were to be accepted, it would impose an added burden on the prosecution to call more than one witness on the back of the indictment to prove its case in a drug related offence however satisfactory the evidence of the main police witness would be."*

[53] It has been held in catena of decisions that there is no hurdle in convicting a person on the sole testimony of a single witness in a prosecution, if the Judge is of the view that his evidence is clear and reliable and a conviction can be based on such sole testimony as the principle is that the evidence has to be weighted and not counted (Kusti Mallaiah vs. State of A.P. 2013 Cri. L.J. 3098). Thus, if the testimony of a singular witness, after probing the testimony, is found by the Court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof (Vadivelu Thevar vs. The State of Madras, A.I.R. 1957 SC 614).

[54] In the case of Vadivelu Thevar vs. The State of Madras (supra), it has been further held that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable; (ii) wholly unreliable; and (iii) neither wholly reliable nor wholly unreliable. In the first two categories, there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases as the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony.

[55] Unlike in the case of an accomplice or a decoy, the testimony of a police witness in a police detection cannot be rejected merely because he is police personnel and his testimony should be treated in the same manner as testimony of any other witness. While I agree that the testimony of a sole police witness has to be scanned with caution and circumspect, there is no principle of law that without corroboration by independent witnesses, the testimony of a police witness in a police detection cannot be relied on when the Trial Judge is satisfied that his evidence is entirely reliable.

[56] It is apt to refer to the following statement made by Anand J. in the case of Tahir vs. State of Delhi (1996) 3 SCC 33 at paragraph 6, dealing with a similar question:

*"In our opinion, no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires more careful scrutiny of their*

*evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lead corroboration to their evidence does not in any way affect the creditworthiness of the prosecution case.”*

[57] The obvious result of the above discussion is that the evidence of a sole police officer who carried out a raid can be relied upon and form the basis of conviction when his evidence, with caution and after probing the testimony is reliable and trustworthy as the Evidence Ordinance has laid down the emphasis on value, weight and quality of evidence which determines the adequacy of evidence as had been provided under section 134 rather than on quantity, multiplicity or plurality of witnesses (Veer Singh vs. State of Uttar Pradesh (2014) 1 SCC (Cri) 846). The Test thus is whether the evidence has a ring of truth, is cogent, reliable, credible and trustworthy or otherwise, rather than the quantity, multiplicity or plurality of witnesses (Gulam Sarbar vs. State of Bihar (2014) 2 SCC (Cr) 195).

[58] I am also of the view that an Accused can be convicted on the evidence of a sole witness in a police raid in an appropriate case provided however, that the Trial Judge is satisfied, after probing his testimony that his evidence is reliable, credible, trustworthy and beyond suspicion as the emphasis is on the value, weight and quality of evidence which determines the adequacy of evidence of a witness rather than on quantity, multiplicity or plurality of witnesses.

[59] In the present case, the learned High Court Judge has properly evaluated the testimonial trustworthiness of the prosecution witnesses and

laid emphasis on the value, weight and quality and reliability of IP Rohana Mahesh in recording a conviction against the Accused-Appellant while discharging the 2nd Accused. He had further relied on the circumstantial evidence and the evidence of Jayakody and Vishwajith that connected the Accused-Appellant to the attempted Criminal Breach of Trust in respect of the fertilizer bags owned by the Ceylon Fertilizers Company as follows:

- i. The evidence of IP Rohana Mahesh revealed that (a) the Container Lorry in question was found parked on Nuge Road close to the 'Kekala' shrub with lights switched off and the Driver (Accused-Appellant) and the Assistant (2nd Accused) were engaged in unloading fertilizer bags near the 'Kekala' shrubs; (b) unloaded 15 fertilizer bags were found near the 'Kekala' shrubs and another 35 bags were found close to the Container Lorry; (c) the Customs Seals of the doors of the Container Lorry had been broken open with an Iron Cutting Scissor and Hammer and broken Metal pieces of the Customs Seals were found on the road; (d) the New Seals similar to Customs Seals were found in the possession of the Accused-Appellant and the upper part of the Customs Seal was found near the Container Lorry that connected the Accused-Appellant to the offence with which he was charged by the prosecution;
- ii. The evidence of Jayakody who came to the scene had observed 10-15 fertilizer bags close to the Lorry and another similar number of fertilizer bags little distance away from the said bags, which supported the testimony of IP Mahesh that about 50 bags had been unloaded and kept on the road near 'Kekala' shrubs;
- iii. The Lorry was parked in an isolated place at Nuge Road having switched off the lights and the Customs Seals had been broken open with an Iron Cutting Scissor and Hammer which were found also

- near the Lorry by IP Mahesh with broken metal pieces of Customs Seals;
- iv. The absence of any suggestion to IP Mahesh by the Accused-Appellant while he was testifying with regard to the possession of unused Customs seals in the possession of the Accused-Appellant;
  - v. Jayakody and Vishwajith had identified the fertilizer bags imported by the Ceylon Fertilizers Company to be distributed under the 'Mahinda Chinhanaya Subsidy Fertilizer Distribution Programme' and they had identified 50 fertilizer bags that had been taken into custody by the Police;
  - vi. The testimonial trustworthiness of IP Mahesh, Jayakody and Vishwajith was not affected by the cross examination and no credible reason was suggested on behalf of the Accused-Appellant that he was falsely implicated by IP Mahesh or Jayakody or Vishwajith;
  - vii. Although the reason given by the Accused-Appellant to park the Lorry at Nuge Road at night was to go to the Police Station and collect the Temporary Driving Licence, the said evidence was contradicted by his own witness, P.C. 49014 and therefore, the credibility of the evidence of the Accused-Appellant was clearly shaken by the evidence adduced by the Accused-Appellant as to render it unworthy of belief.

[60] It is to be noted that the Court of Appeal will not lightly disturb the findings of facts, especially with regard to the credibility of witnesses unless the findings are highly unreasonable or perverse. This view is supported by the judgment of the Privy Council in *Fraad vs. Brown & Company Ltd* 20 NLR 282 wherein the Privy Council stated thus:

*"It is rare that a decision of a judge so express, so explicit, upon a point of fact purely, is overruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any Judge of the Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare, in questions of veracity, so direct and so specific as these, a Court of Appeal will overrule a Judge of first instance."*

[61] In Alwis vs. Piyasena Fernando 1993 (1) Sri LR 119 at 122, His Lordship the Chief Justice G.P.S. de Silva observed that "it is well established that the finding of primary facts by the trial judge who hears and sees witnesses are not to be lightly disturbed on appeal.". In Gunewardene vs. Cabral and Others 1980 (2) SRLR 220, Rodrigo J. held that the Appellate Court will set aside inferences drawn by the trial judge only if they amount to findings of fact based on:

- (a) Inadmissible evidence; or
- (b) After rejecting admissible and relevant evidence; or
- (c) If the inferences are unsupported by evidence; or
- (d) If the inferences or conclusions are not rationally possible or perverse.

[62] Applying the principle laid down in the above judicial authorities, I refuse to interfere with the findings of the learned High Court Judge who has properly evaluated the testimony of IP Rohana Mahesh and applied the test of probability, consistency *per se* and consistency *inter se* and weighted his evidence in the context of the above-mentioned tests and held that his evidence is cogent, credible and trustworthy in regard to the raid carried out by him.

[63] The learned High Court has further considered circumstantial evidence emanated from the evidence of Jayakody and Vishwajith and also the recovery of unused Seals similar to Customs Seals, iron Cutting Scissor, Hammer, upper part of a Customs Seal and broken pieces of custom seals to draw the inference that such evidence is consistent with the guilt of the Accused-Appellant. For those reasons, I see no merit in the said ground of appeal.

### **Ground of Appeal -3**

**Failure to give due consideration to the fact that the chain of productions has not been proved by the prosecution beyond reasonable doubt.**

[64] The learned Counsel for the Accused-Appellant submitted at the hearing that although IP Mahesh had detected unused Customs Seals in the possession of the Accused-Appellant, he had failed to seal them and prove the chain of production.

[65] According to the testimony of IP Mahesh, all the productions recovered by him at the scene, including the upper part of a sealing instrument (P11) and 6 unsealed new Customs Seals which were handed over to him by the Accused-Appellant (P5-PP10) were sealed by him at the Police Station and handed over to the reserve under P.R.1158 (pages 100, 103-106). The learned Counsel for the Accused-Appellant, however, drew attention of Court to page 110 of the testimony of IP Mahesh where he had stated that when the productions were shown to him in open Court, the seals had been opened. The relevant part of his evidence at page 110 is as follows:

පු : මහත්මයා අද දින නඩු හාන්චි කිහිපයක් හඳුනා ගත්තා තේදී?

සු : වෙශෙමයි ස්වාමීනි.

පු : සිද්ධිය වන දෙකේ මහත්මයා අත්ස්සිංගලට ගත්ත හාන්චි.

- උ : විහෙමයි ස්වාමිනි.
- පූ : එම නඩු හාන්ඩ මහත්මයා මුදු කිරීමක් සිදු කර දී?
- උ : විහෙමයි ස්වාමිනි.
- පූ : මහත්මයා අද දින නඩු හාන්ඩ කිහිපයක් හඳුනා ගත්තා තේ.
- උ : විහෙමයි ස්වාමිනි.
- පූ : මහත්මයා යෙදුව කියන මුදු ඒ ආකාරයෙන් ම තියෙනවද?
- උ : මුදු විවෘත කර තිබුණේ ස්වාමිනි.

[66] Perusal of the proceedings at page 95 of the Appeal Brief reveals that the parcel containing productions was opened in Court and IP Mahesh had identified the productions including the unsealed Custom Seals in open Court and they were marked accordingly as P5 to P10 (page 95, 104-105). Although he had stated that the Seals had been opened when he identified the productions in open Court, no further evidence had been elicited from IP Mahesh as to whether the Seals of the parcel containing the entire productions were opened for the purpose of identification of productions in open Court or the Seals on the productions marked P5-P10 had been removed by someone before they were identified by him in open Court.

[67] On the other hand, the dock statement of the Accused-Appellant is silent on the productions marked P5-P10 as correctly observed by the learned High Court Judge at page 218 of the judgment as follows:

වපමතුක් ද නොව මුල් අවස්ථාවේ දී ප.ස. 05 ප්‍රකාශ කර ඇත්තේ මෙම 01 වන විත්තිකරු ලෙරිය තුළ ඔහු සහ්තකයේ තිබී රිසිට් පත්, මිත ලේඛන සහ ප. 05.06.07.08.09.10 වගයෙන් ලකුණු කර ඇති පාවිච්ච නොකරන ලද ඊරු මුදු තවත් කොටස් දෙකකින් යුතු හාටිතා නොකළ මුදු හාර දුන් බව ය. එම කරුණ මුල් අවස්ථාවේ දී ප්‍රතික්ෂේප කර නැති අතර ප්‍රකාශයේ දී හෝ ඒ සම්බන්ධයෙන් කිසිවක් සඳහන් කර නැත. ඊරු මුදු සහ සහ්තේනරය මුදු කිරීමේ අලත් මුදුවන් විත්තිකරු සහ්තකයේ තිබීම මෙම නඩුවේ විත්තිකරුට එරෙහිව ඇති වැදගත් සාක්ෂියක් වේ. අදාළ නඩු හාන්ඩ ද ලකුණු කර ඇත. විසේ වුවද මෙම විත්තිකරු තමාගේ සහ්තකයේ විය නොතිබුණු බව හෝ එම සාක්ෂිය ප්‍රතික්ෂේප කිරීමක් මෙම ප්‍රකාශයේ සිදු කර නැත.

[68] For those reasons, I am of the view that no reasonable doubt had been created in the prosecution case with regard to the recovery or sealing of productions marked P5-P10 or the chain of productions as clearly observed by the learned High Court Judge in his judgment.

#### **Ground of Appeal-4**

##### **Failure to consider the dock statement**

[69] I shall now consider the 4th ground urged by the learned Counsel for the Accused-Appellant that the learned High Court Judge has not considered the lengthy dock statement made by the Accused-Appellant.

[70] The following principles are applicable in considering the dock statement made by an Accused.

1. If the dock statement is believed, it must be acted upon;
2. If it raises a reasonable doubt about the case for the prosecution, the defence must succeed;
3. Dock statement of one of the Accused should not be used against another accused (Vide- The Queen v. Kularatne 71 NLR 529).

[71] I shall now summarize the dock statement of the Accused-Appellant as follows:

[72] The Accused-Appellant denied the prosecution case from the dock and said that:

- a. he collected the Container at about 9.30 p.m. from the Colombo Port and at gate 7, it was sealed by the Security Officers of Customs in the presence of a Custom Officer and a Wharf Clark and thereafter, a Custom Pass and a Seal were given to him;

- b. while he was driving the Container Lorry towards Hunupitiya Fertilizer Stores, the Traffic Police stopped the Lorry at Oriyamulla on the ground of malfunctioning of rear signal lights;
- c. as the Driving License was taken into custody by the Police, he was asked by the Police Officer to come to the Police Station to collect a fine payment form;
- d. as there was other place to park the Lorry, he parked the Lorry at Nuge Road and went to the Peliyagoda Police Station; (v) after collecting the fine payment form, he returned to the place where the Lorry was parked and saw a Yellow Coloured Van parked next to the Lorry with Police Officers around it;
- e. the Police Team wanted to open the Container but he refused and gave the telephone number of the Wharf Clerk to the Police Team who contacted the Wharf Clerk over the phone;
- f. thereafter, the Police Team obtained a Scissor from a nearby workshop and broke open all three seals of the Container;
- g. when the seals were broken open, 5-6 fertilizer bags fell down from the Container and he requested the Police team to give him a letter stating that the Container was checked by the Police Team but they refused to issue such a letter;
- h. at that stage, one Jayakody, Wharf Clark and one Suranga arrived at the scene;
- i. usually, two persons cannot unload the fertilizer bags from the container as the doors of the tank should be opened 2 hours before unloading so that ammonia smell would go away by that time;
- j. if 50 bags were unloaded as claimed by the Police, about 2  $\frac{1}{2}$  tons from the whole weight will be reduced from the whole consignment;
- k. the Police brought the Lorry and unloaded 50 bags to the Police Station and arrested him and the Assistant;

- l. although he requested the Police to issue him a document stating that an inspection was carried out by the Police, the Police refused to issue such a document;
  - m. the Police loaded the bags into the Container and took them with the Lorry to the Police Station, unloaded 50 bags and arrested them;
- (xiv) Jayakody is an Officer who was interdicted over fraudulent acts and he was falsely framed to cover up fraudulent activities of others.

[73] The 2nd Accused had also made a dock statement in similar terms. The learned High Court Judge has rejected the dock statement of the Accused-Appellant, and held at pages 217-220 of the brief that the dock statement of the Accused-Appellant was not capable of creating a reasonable doubt in the prosecution case for the following reasons:

- a. The main defence of the Accused-Appellant was that (i) as his Driving License was taken into custody by a Traffic Police Officer, he parked the Container Lorry near Nuge Road and went to the Peliyagoda Police Station to obtain a Temporary Driving Licence; (ii) when he returned to Nuge Road, a Police team had arrived and searched the Container without his consent by breaking open Customs Seals by using an Iron Scissor borrowed from a nearby Workshop.
- b. Although the Accused-Appellant called the Traffic Police Officer (P.C. 49014), to establish this position, the Traffic Police Officer contradicted the version of the Accused-Appellant, and the Assistant and testified to the effect that he issued a Temporary Licence marked V1 only at Peruyamulle at 22.10 hours but he never informed the Accused-Appellant to come to the Police Station or issued the Temporary Licence at the Police Station;

- c. The Temporary Driving Licence marked V1 established the evidence of the defence witness P.C. 49014 that the Temporary Driving Licence had been issued at 22.10 hours. The Accused-Appellant never clarified the said evidence of his own witness in re-examination and therefore, the Accused-Appellant's position that he parked the Lorry on Nuge Road in order to go to the Peliyagoda Police Station for the purpose of collecting a Temporary Driving Licence is improbable, inconsistent and false with the evidence of his own witness;
- d. Although the Accused-Appellant took up the position in his dock statement that the Police Team brought an Iron Scissor from a nearby workshop and broke open the Customs Seals of the Container and then, 5-6 bags fell down on the ground, the above important position taken up by the Accused-Appellant in his dock statement had not been put to the prosecution witness, IP. Mahesh, which made the Court to conclude that the said position of the Accused-Appellant in the dock statement is an afterthought;
- e. According to the evidence of IP. Rohana Mahesh, the Accused-Appellant had given him unused New Custom Seals marked P5-P10 but he Accused-Appellant had not challenged the recovery of the said important piece of evidence from his possession or denied the possession of New Customs Seals or handing them over to IP. Rohana Mahesh in his dock statement;

[74] The learned High Court Judge has properly analysed and considered the dock statement of the Accused-Appellant in detail, applied the above-mentioned principles and given reasons for the rejection of the dock statement of the Accused-Appellant and the Assistant. Having considered all the above-mentioned matters, I am of the view that the dock statement

is not credible nor does it create any reasonable doubt in the prosecution case and therefore, the learned High Court Judge has correctly rejected the dock statement of the Accused-Appellant.

[75] For those reasons, I hold that the Accused-Appellant had failed to satisfy this Court on any ground urged on his behalf or that a miscarriage of justice had occurred. In these circumstances, I see no reason to interfere with the conviction of the Accused-Appellant. Accordingly, I uphold the conviction of the Accused-Appellant.

### **Sentence**

[76] The learned High Court Judge has imposed a sentence of 3 years R.I. and a fine of Rs. 400,000/- and in default 1-year rigorous imprisonment. The learned High Court Judge has imposed a sentence of 3 years for the following reasons:

- i. The offence has been committed in respect of fertilizer bags that had been imported by the Ceylon Fertilizers Company to be distributed to the poor farmers under the Government Subsidy Programme and the State had spent a large sum of money for the said purpose. The attempt to commit the said offence by removing fertilizer bags valued at Rs. 367,500/- entrusted to the Accused-Appellant to be transported to the Warehouse of the Ceylon Fertilizers Company under such circumstances must be regarded as an act of grave nature which deserves a custodial sentence;
- ii. The Accused-Appellant being a carrier had illegally parked the Container Lorry with fertilizer bags in a place with no light with the intention of causing wrongful gain for his benefit by removing the Customs Seals placed by the Customs Officers at the Port of

Colombo and unloaded 50 fertilizer bags valued at Rs. 367,500/- at the time of the raid;

- iii. The Accused-Appellant was found in his possession of new Customs Seals similar to the broken pieces of Customs Seals and there was no reasonable explanation whatsoever, as to how the Accused-Appellant had in his possession New Customs Seals and other similar seals;
- iv. The Accused-Appellant had planned to re-seal the Container after removing fertilizer bags for his own benefit by using Seals similar to the Customs Seals;
- v. The offence of this nature was a well-planned act and detection of this types of well-planned acts are difficult, but the detection was made possible due to the timely action taken by the Police Team that conducted the raid while he was directly engaged in unloading fertilizer bags owned by the Ceylon Fertilizers Company;
- vi. The Court must not only take into consideration the rights of the criminal, but also the rights of the victim of the crime and the society at large while considering the imposition of an appropriate punishment.

[77] It is necessary for this Court to first look at the particular punishment stipulated for the offence that was committed by the Accused-Appellant. The Accused-Appellant was indicted for attempting to commit Criminal Breach of Trust in respect of fertilizers owned by the Ceylon Fertilizers Company valued at Rs. 367,500/-, an offence punishable under section 390 of the Penal Code read together with section 490 of the Penal Code.

[78] The punishment for the Criminal Breach of Trust under section 390 of the Penal Code is an imprisonment of either description for a term which may extend to 7 years and a fine. Section 490 of the Penal Code stipulates the punishment for attempting to commit offences punishable by imprisonment as follows:

*“Whoever attempts to commit an offence punishable by this Code with imprisonment, or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of either description provided for the offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence or with both.”*

[79] Section 303 (1) of the Criminal Procedure Code provides that the following matters are to be considered before passing a sentence and the way the sentence is to be suspended:

- (a) The maximum penalty prescribed for the offence in respect of which the sentence is imposed;
- (b) The nature and gravity of the offence;
- (c) The offender's culpability and degree of responsibility for the offence;
- (d) The offender's previous character;
- (e) Any injury, loss or damage resulting directly from the commission of the offence;
- (f) The presence of any aggravating or mitigating factor concerning the offender;
- (g) The need to punish the offender to an extent in a manner, which is just in all circumstances;

- (h) The need to deter the offender or other persons from committing offences of the same or of a similar character;
- (i) The need to manifest the denunciation by the court of the type of conduct in which the offender was engaged in;
- (j) The need to protect the victim or the community from the offender;
- (k) The fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or
- (l) A combination of two or more of the above.

[80] Section 303 (2) of the Criminal Procedure Code refers to the following instances where a sentence of imprisonment cannot be suspended:

- (a) A mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed; or
- (b) The offender is serving or is yet to serve, a term of imprisonment that has not been suspended; or
- (c) The offence was committed when the offender was subject to a probation order or a conditional release or discharge; or
- (d) The term of imprisonment imposed or the aggregate terms of imprisonment where the offender is convicted for more than one offence in the same proceedings, exceeds two years.

[81] Having considered the above-mentioned statutory provisions, I shall now consider the authorities that show the manner in which mitigating and aggravating factors have been considered before a sentence is determined by a Court.

[82] In this regard, I wish to place on record that it is the duty of the trial court to impose a proper sentence having regard to the nature of the offence and the manner in which it was committed by the offender. It is settled law that (i) the imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal; (ii) the Court must not only keep in view the rights of the criminal, but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment (Dhananjay Chatterjee v. State of W.B. (1994) 2 SCC 220).

[83] In the case of Attorney General v. H. N. de Silva 1956 (57 N.L.R. 121) Bassnayake A.C.J. observed that "In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender". Bassnayake A.C.J. further held that a Judge should, in determining the proper sentence consider:

- (i) the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged;
- (ii) the effect of the punishment as a deterrent and consider to what extent it will be effective;
- (iii) if the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment;
- (iv) the difficulty in detection; and
- (v) the public welfare of the State should outweigh the previous good character, antecedents and age of the offender.

[84] In the case of Attorney-General v. Mendis (1995) 1 Sri LR 138, the following factors were considered in sentencing:

1. the gravity of the offence;
2. the punishment provided in the statute;
3. the punishment to be deterrent;
4. the effectiveness of the sentence;
5. the nature of the offence on which the offender has been found guilty of;
6. the difficulty in detection;
7. the nature of the loss to the victim;
8. the profit accrued to the accused in the event of non-detection;
9. the point of view of the accused;
10. the interest of the society;
11. the mechanism and manipulation resorted by the accused;
12. the effect of committing the crime;
13. the persons who are affected by the crime;
14. the ingenuity with which it has been committed;
15. the involvement of others in committing the crime.

[85] In my view, the learned High Court Judge was justified in imposing a custodial sentence having considered the matter of sentence both from the point of view of the public and the offender, the nature of the offence on which the Accused-Appellant had been found guilty, the gravity of the offence, including the following factors in sentencing the Accused-Appellant for a term of 3 years rigorous imprisonment:

- i. The Accused-Appellant being entrusted with 500 fertilizer bags to be transported to the Warehouse of the Ceylon Fertilizers Company at Hunupitiya had deviated the route, parked the Container Lorry without light, removed the Customs Seals illegally and dishonestly unloaded 50 fertilizer bags from the Container to be used for his own benefit in violation of the direction of the Ceylon Fertilizers Company prescribing the mode in which such trust to be discharged to cause loss to the Ceylon Fertilizers Company;
- ii. The Accused-Appellant was arrested by the Police Team while he was directly engaged in unloading 50 fertilizer bags in the night illegally by removing Customs Seals with an Iron Scissor and a knife and if not for the timely detection made by the Police Party, he would have removed all unloaded fertilizer bags causing financial loss to the Ceylon Fertilizers Company and ultimately, to the Government of Sri Lanka who spent a larger sum of money in respect of the said Subsidy Programme;
- iii. Although all the unloaded fertilizer bags imported by the Ceylon Fertilizers Company were recovered by the Police, the Accused-Appellant being a carrier of fertilizer bags had unloaded and attempted to remove at least 50 fertilizer bags valued at Rs. 376,000/- illegally with the intention of causing wrongful gain of fertilizer bags to the Accused-Appellant and wrongful loss to the said Company by unlawful means of fertilizer bags, to which the Accused-Appellant was not legally entitled;
- iv. The profit accrued to the Accused-Appellant in the event of non-detection would have been more than Rs. 376,000/- and the financial loss or damage resulting directly from the commission of the offence to the Ceylon Fertilizers Company and/or ultimately to

- the State in the event of non-detection would have been more than Rs. 376,000/-;
- v. The mechanism and manipulation resorted to by the Accused-Appellant to commit the offence revealed that he had carefully planned the entire operation at night/in hours of darkness by forcibly breaking open the Sealed Container by using an Iron Scissor and a knife and removing 50 fertilizer bags from the Container. He had further planned to re-seal the Container after unloading and removing the fertilizer bags for his own benefit with fraudulently made Seals with the words ‘Sri Lanka Customs’ which he, being only a driver of the Container Lorry was not legally authorized to keep in his possession;
- vi. The persons who would also be ultimately affected by the offence, in the event of non-detection would have been poor farmers who relied heavily at that time on subsidized fertilizer programme introduced by the State while the Accused-Appellant would have wrongfully gained by unlawful means of fertilizer bags to which he was not legally entitled;.
- [86] I am of the view that, having regard to the nature and gravity of the offence, mechanism and manipulation resorted to by the Accused-Appellant, the ingenuity with which the offence had been committed, the profit that would have been accrued to the Accused-Appellant in the event of non-detection and the wrongful loss to the Ceylon Fertilizers Company and/or the State in the event of non-detection and the public perception and interest of the society deserve a custodial sentence to be imposed on the Accused-Appellant as correctly decided by the learned High Court Judge.

[87] Accordingly, I see no reason to interfere with the sentence imposed on the Accused-Appellant by the learned High Court Judge.

### **Conclusion**

[88] For those reasons, I affirm the conviction and the sentence imposed on the Accused-Appellant and dismiss the appeal.

**JUDGE OF THE COURT OF APPEAL**

**Achala Wengappuli, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**