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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/ 0005/2022
High Court of Colombo
Case No. HC/7852/2015

Udaya Kumar Suresh Kumar alias Nalinda

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL	:	**Neranjan Jayasinghe with Randunu Heelllage and Imangsi Senerath for the Appellant.** **Wasantha Perera, DSG for the Respondent.**
ARGUED ON	:	**30/10/2025**
DECIDED ON	:	**15/12/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General 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 for Trafficking and Possession of 11.10 grams of Heroin (Diacetylmorphine) on 27th August 2013 in the High Court of Colombo.

Following the trial, the Appellant was found guilty on both counts and the learned High Court Judge of Colombo has imposed a sentence of life imprisonment for both counts on 01.04.2021.

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

The learned Counsel for the Appellant informed this court that the Appellant has given consent for this matter to be argued in his absence. During the argument he has been connected via the Zoom platform from prison.

The Appellant has raised the following grounds of appeal in this case:

1. Evidence of the prosecution witnesses fail the test of credibility.
2. Evidence of the defence was rejected by the Learned High Court Judge on unreasonable grounds.

Background of the case

According to PW1, SI/Ruwan Kumara, the raid was conducted upon an information received by PC 73163 Dinesh who is attached to the Police Narcotics Bureau. Although this information was communicated to PW1, he had not noted down such information in his note book. Instead, the information was noted down by PC 73163 Dinesh, however, he was not named in the list of witnesses in the indictment. As such, the Learned Counsel who represented the Appellant at the trial court had objected to leading the evidence pertaining to receiving the information, on the basis of hearsay evidence. After considering the submissions of both parties, the learned trial judge had disallowed the objection and permitted the prosecution to lead the evidence.

According to the information, a person called Nalinda, was expected to traffic heroin from 'Kotahena Watta' to Sugathadasa Stadium. The informer had further said that he could meet the police officers at a place called 'Galpalliya'. A police team was organised, excluding the police officer who had initially received the information. At 8.30 hours the police team had met the informant at the said place. After obtaining further information, PW1 and PW2 had hired a three-wheeler and gone to inspect the place from where the Appellant was supposed to come from. The informer had accompanied them as well. After ascertaining the 'Watta' the police officers had waited close to a temple called 'Sumithrarama' and the informant had gone to the 'Watta' to provide further information to the police. While waiting, PW1 had received a phone call from the informant that the Appellant is ready to come with one of his relations. When both of them came up to the road, PW1 with the

assistance of PW2, had recovered a parcel from the right-side pocket of the three quarter of the Appellant. Having identified Heroin in the parcel, the Appellant was arrested at 10.45 hours. Although no suspected substance was found from the other person, he was also arrested, on charges of aiding and abetting the Appellant. Upon further inquiry, PW1 had decided to check a house at Angoda and all the police officers had gone to Angoda to inspect a house belonging to a lady named Nalika. As nothing was recovered from that house, the team had returned to the Police Narcotics Bureau at 16.20 hours.

At the Bureau, the production was weighed and it recorded 92.600 grams of substances in the parcel. The production was properly sealed and entered under PR No. 178/2013 was handed over to PW5/IP Rajakaruna.

PW1 and his team had not endeavoured to check the Appellant's house after his arrest.

PW2, SI/ Delgahapitiya who was a member of the raiding team, was called to corroborate the evidence given by PW1.

The defence had admitted the Government Analyst Report and had handed over the production PW5 by PW1 under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979.

After closing the case for the prosecution, as the evidence led by the prosecution warranted the presence of a case to be answered by the Appellant, the learned High Court Judge called for the defence. The Appellant gave a statement from the dock, afterwards the Deputy Registrar of the Colombo High Court was called to produce the MC Record pertaining to this case. In the said record, it was revealed that the Appellant was produced along with another person and he had been discharged from this case.

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

"Reasonable doubt" refers to the legal principle which establishes that insufficient evidence would prevent the conviction of a defendant of a crime. The prosecution bears the weight of proving to the judge the defendant's guilt in respect of the crime with which he has been charged, in order to prove why the defendant should be convicted. Accordingly, in this context, the phrase "beyond a reasonable doubt" indicates that the evidence and arguments brought forward by the prosecution to establish the defendant's guilt must be done so clearly, in a manner that it is accepted as fact by any rational person.

In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 held:

> *"A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences in relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions…."*

In the case of **Kalinga Premathilake Vs. The Director General of the** Commission to Investigate Allegations of Bribery or Corruption, SC Appeal No. 99/2007 decided on 30-07-2009, it was held,

> "*What needs consideration now is when the evidence led for the prosecution in this case is closely scrutinized, whether it would be satisfied that prosecution had discharged the burden of proving the case beyond reasonable doubt. If not, the appellant is liable to be acquitted of the charges. The prosecution must stand or fall on its own legs and it cannot derive any strength from the weaknesses in the defence, and when the guilt of the accused is not established beyond reasonable doubt, he is liable to be acquitted as a matter of right and not as a matter of grace or favour.*"

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

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

In **Attorney General v. Devunderage** Nihal [2011] 1 SLR 409 the court held that:

> *"There is no requirement in law that a particular number of witnesses shall in any case be required for the proof of any fact. Unlike in a case where 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 on 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".

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

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

In the first ground of appeal, the Appellant contends that the evidence of the prosecution witnesses fails the test of credibility.

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

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

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

In the case of **Chandrappa & Ors. v. State of Karnataka**, (2007) 4 SCC 415 it was held:

> "*The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.*"

In this case PW1 had received information from PC 73163 Dinesh, however, PC 73163 Dinesh was not included in the raiding team. According to the information received by PC Dinesh, the Appellant was supposed to come from a place called 'Kotahena Watta'. (Page 90 of the brief)

But according to the evidence given by PW1, nowhere did he mention that he saw the Appellant coming from 'Kotahene Watta'. Instead, he had only mentioned the word 'Watta'. Further PW2 had contradicted both PW1 and PC Dinesh, and stated that the information was that the Appellant was coming from the 'Sumithrarama Watte'. (Page 161 of the brief).

The Appellant took up the position that he was not arrested as claimed by the police. According to him, he was arrested at his residence and introduced to the substance recovered from the second person. He further claimed that, the sole reason for his arrest was the fact that he had given a call to the second person, namely Sandun Niranjana alias Banda, prior to his arrest.

In this case, the information was received by a police officer called Dinesh. He was not called to give evidence by the prosecution. He was not even named in the witness list in the indictment. Had the prosecution called Dinesh to give evidence, the place of arrest could have been established correctly.

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

> *"Question of an adverse presumption under Section 114 (f) arises only where a witness whose evidence is necessary to unfold the narrative is wilfully withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case".*

In this case, not calling PC 73163 Dinesh has caused a vital missing link with regard to the place of arrest of the Appellant. This has further strengthened the defence as the raiding team had not searched the house of the Appellant.

Along with the probable cause for an arrest, the place of arrest must also be clearly established by law enforcement. The characteristics of a location can be a factor that is taken into consideration by officers, however, mere presence in such an area is not sufficient to justify an arrest or search. In this case, it is evident that the prosecution has failed to adequately prove the place of arrest of the Appellant.

PW2 was a member of the team selected by PW1. The prosecution had called PW1 first and then called PW2 to corroborate the evidence of PW1. Hence, their evidence should be accurate and cannot go wrong or contradict each other on material points.

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

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

In the case of **Manu Sharma Manu Sharma v. State** (NCT of Delhi), (2010) 6 SCC 1 it was held:

> *"What is the significance of requiring an investigating officer/officer in charge of a police station to maintain a diary? The purpose and the object seem to be quite clear that there should be fairness in investigation, transparency and a record should be maintained to ensure a proper investigation."*

In cases such as this, the principal source of all information which would become evidence in the criminal prosecution would be the police. Therefore, as the investigative arm of the state, the police bear the primary and mandatory responsibility to acquire such evidence as accurately as possible, without any contradictions.

The learned Counsel for the Appellant submits that the evidence given by PW1 and PW2 contradict each other on material points regarding the place of arrest. According to PW1, the Appellant and the other person were arrested near 'Sumithrarama Temple' when they came to a 'Watta'. According to PW2, the Appellant was arrested while the duo was coming from 'Sumithrarama Watta'. According to the original information, the Appellant was supposed to have come from 'Kotahena Watta'.

Next, the learned Counsel for the Appellant contended that PW1 and PW2 also contradicted each other regarding the existence of a three-way junction near the temple. PW1 in his evidence told the Court that he has no knowledge about the three-way junction. PW2 in his evidence stated that the road that leads to 'Watta' was situated when proceeding straight, after passing the temple.

Considering these contradictory positions taken by PW1 and PW2 regarding the place of arrest, the outcome of the case will most definitely be affected.

Legal provisions and various judicial precedents have made it clear that omissions and contradictions are one of the ways to shake the credibility of

a witness. Contradictions which are significant and relevant in the context of the case would certainly affect the core of the case. It is a question of fact decided upon by the courts.

In **The Attorney General v. Sandanam Pitchai Mary Theresa** [2011] 2 SLR 292 the court held that:

> *"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are true material to the facts in issue".*

In the case of **State of Uttar Pradesh v. M. K. Anthony** [AIR 1985 SC 48] the court held that:

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the: root of the matter would not ordinarily permit rejection of the evidence as a whole.....Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer."*

The above noted contradictory positions between PW1 and PW2 in collaboration with the first information, raises suspicion and affects the credibility of the prosecution witnesses. It is quite apparent, that the learned Trial Judge acted on his own assumptions in deciding this point in the absence of any plausible clarification by the prosecution. Hence, the Appellant succeeds in his first ground of appeal.

In the second ground of appeal, the Appellant contends that the evidence of the defence has been rejected on unreasonable grounds.

The Appellant in his dock statement took up the position that he was arrested at his residence and not on the 'Watta' as claimed by the prosecution. The Appellant also claimed that he was arrested after the police had arrested Sandun with Heroin, and that, based on the information provided by Sadun, he was arrested by the police thereafter. He had suggested his defence to the prosecution witnesses at pages,132,133,144,210, and 211 of the brief.

Defence witness was called to establish the arrest of Sandun in relation to this case and which had been admitted by the prosecution.

As submitted by the prosecution, after the arrest the Appellant was taken to Angoda to check a house belonging to one Nalika. However, rather remarkably, the house of the Appellant was not subjected to a search by the police team.

The learned High Court Judge had rejected the defence evidence and proceeded to convict the Appellant in this case.

In his judgment at pages 299-300 of the brief, the Learned High Court Judge states:

චූදිත විසින් සඳහන් කරන ආකාරයට සඳුන් නැමැති අයගෙන් හෙලි වූ තොරතුරු අනුව සඳුන් නැමැති අයට මත්ද්‍රව්‍ය ලබා දුන් බවට චෝදනා නඟා චූදිතව අත්අඩංගුවට ගත්තේ නම් සහ සඳුන් ළඟ තිබී කුඩු සොයා ගත්තේ නම් නඩු පැවරීමකින් තොරව සඳුන් නැමැති අයව මුදා හැරීමට

කටයුතු කරනු ඇති බව ඒ හා සම්බන්ධව කිසිදු පිළිගත හැකි සාක්ෂියක් නැතුව පිළිගැනීමට නොහැකිය.

සඳුන් නැමැති අයට දුරකථන ඇමතුමක් දුන් පමණින් චූදිතට එරෙහිව නඩු පැවරුවේ නම් ඊට ප්‍රථමයෙන් සඳුන් නැමැති සැකකරු සම්බන්ධයෙන් නීතිමය පියවර ගනු ලබන බව පැහැදිලිය. විත්ති කූඩුවේ සිට ලබා දුන් ප්‍රකාශයේ හෙළි කළ ස්ථාවරය චූදිත නඩුවේ මුල සිටම ගන්නා ලද ස්ථාවරයකි. සමස්ථ නඩුවේ දී ම එම ස්ථාවරය ගෙන තිබුණ ද එය හුදෙක් ප්‍රකාශයක් වූවා මිස පැමිණිල්ලේ සාක්ෂිකරුවන් එකී ස්ථාවරය පිළිගැනීමක් හෝ චූදිත විසින් තම ස්ථාවරය සනාථ කිරීමක් සිදු කර නැත.

In criminal cases, the burden always rests upon the shoulder of the prosecution to prove the case beyond reasonable doubt. The Appellant is not required to prove his innocence, but if he decides to plead a general or special exception of the Penal Code, then the Appellant has a duty of establishing that his case comes within such exceptions. This burden is imposed under Section 105 of the Evidence Ordinance.

In H.M. Mahinda Herath v. The Attorney General CA/21/2003 in Appellate Court Judgments (Unreported) 2005 at page 35-39 the court held that:

> *"Where it was held that in a criminal case burden is always on the prosecution to prove the charge levelled against the accused beyond reasonable doubt. The trial judge must always bear in mind that the accused is presumed to be innocent until the charge against the accused is proved beyond reasonable grounds".*

The learned Counsel for the Appellant, referring to the above-mentioned portion of the judgment, submits that the learned High Court Judge has cast an extra burden on the Appellant to prove his innocence, which is alien to the standard of proof in criminal cases. He further submits that this is a clear misdirection, which certainly vitiates the conviction of the Appellant.

The wording of the above cited portion of the judgment very clearly demonstrates, that the learned High Court Judge had reversed the burden of proof on the Appellant, which is not in accordance with the basic rules of criminal prosecution. Hence, this ground of appeal also has merit.

Considering the grounds of appeal advanced by the Appellant, the learned Trial Judge should not have rejected the defence evidence in this case as I consider the defence evidence to be more than sufficient to create a reasonable doubt in the prosecution case. As the evidence presented by the Appellant creates a reasonable doubt over the prosecution's case, I set aside the conviction and sentence imposed by the learned High Court Judge of Colombo dated 01/04/2021 on the Appellant. Therefore, he is acquitted from both charges.

Accordingly, the appeal is allowed.

The Registrar is directed to send this judgment to the 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