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/ 0145/2024
High Court of Colombo
Case No. HC/2213/2020

Mohamed Naseem Mohamed Nazar
alias Mohamed Haseen Mohamed
Nazar alias Gowa Nazar

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 Heellage for the Appellant.** **Janaka Bandara, DSG for the Respondent.**
ARGUED ON	**:**	**22/10/2025**
DECIDED ON	**:**	**11/11/2025**

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) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for the Possession and Trafficking of 3.57 grams of Heroin (Diacetylmorphine) on 07th of January 2016 in the High Court of Colombo.

Following the trial, the Appellant was found guilty of both charges and the learned High Court Judge of Colombo had imposed a sentence of life imprisonment on both counts on 09th of October, 2023.

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 face the test of credibility and probability.
2. The learned High Court Judge had failed to adduce reasons for rejecting the dock statement.

PW1/SI Sampath who was attached to the Slave Island Police Station, had received information from his private informant that a person called Nazar and Supur had gone to bring Heroin and that they are coming to Slave Island in a lorry bearing the number (No. PU 026). Acting on that information, the police team had gone to Slave Island in a van belonging to a friend of PW1. At about 17.45 hours, PW1 had received a call from his informant about the arrival of Nazar to Slave Island. The police team after spotting the lorry, had blocked the lorry using the van and had arrested the Appellant after finding some substance, suspected to be Heroin, concealed in the knot of the sarong of the Appellant.

The substance was weighed at a jewellery shop and the gross quantity weighed about 80 grams. The Appellant and the Heroin were brought to the police station, sealed and handed over to the reserve police officer at 21.35 hours.

PW2, PC 70751 Udawatta was called to corroborate the evidence given by PW1.

The Government Analyst confirmed that the substance sent for analysis contained 3.57 grams of pure Heroin (Diacetylmorphine).

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 made a dock statement denying the charges. The defence took up the position that when they were returning to Kurunegala, he was arrested by the police.

In criminal cases, the prosecution bears the burden of proof in proving a case beyond reasonable doubt against the accused in that respective case. In such a situation, not only must the prosecution prove the case beyond a reasonable doubt, but it must also be proved with clear cut evidence that the offence was, in fact, committed by the Appellant.

As the 1st and 2nd grounds of appeal are interconnected, I will consider them jointly hereinafter.

Firstly, the learned Counsel for the Appellant contended that the Learned High Court Judge has failed to consider the credibility and the probability of the prosecution version.

In the case of **Wickremasuriya v. Dedoleena and Others** 1996 [2] SLR 95 Jayasuriya J held that;

> *"A judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."*

His Lordship further held that;

> *"If the contradiction is not of that character, the Court ought to accept the evidence of witnesses whose evidence is otherwise cogent, having regard to the Test of Probability and Improbability and having regard to the demeanour and deportment manifested by witnesses. Trivial contradictions which do not touch the core of a party's case should not be given much significance, specially when the probabilities factor echoes in favour of the version narrated by an applicant"*

In Iswari Prasad v. Mohamed Isa 1963 AIR (SC) 1728 at 1734 His Lordship held that;

> *"In considering the question as to whether evidence given by the witness should be accepted or not, the court has to examine whether he is, in fact,*

an interested witness and to inquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is -whether there is a ring of truth surrounding his testimony."

Justice Mackenna "Discretion," The Irish Jurist, Vol. IX (new series), 1 at 10 has said;

"When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to me the more probable, the plaintiff's or the defendants, and If I cannot say which, I decide the case, as the law obliges me to do in the defendant's favour."

Guided by the above cited judgments and academic literature, I shall now consider the first ground of appeal advanced by the Appellant in this case.

According to PW1, he had used a van belonging to one of his friends. PW1 was unable to reveal the name of the friend at the trial. He admitted that a statement was not recorded from his friend. The reason given by PW1 is that the identity of his friend would be revealed to the Appellant.

However, PW1 had admitted that the Appellant was taken to the jewellery shop and to the police station in the van belonging to his friend. The relevant pages are re-produced below:

Pages 93-94 of the brief.

ප්‍ර : එතකොට ඔබලා මේ අත්අඩංගුවට ගැනීමට ගියේ වෑන් රථයෙන් ?

උ : එහෙමයි.

ප්‍ර : ඒ වෑන් රථය කාගේ ද ?

උ : එය මගේ මිතුරෙක්ගේ වෑන් රථයක්.

ප්‍ර : කවුද ඒ මිතුරා ?

උ : මිතුරා සම්බන්ධයෙන් මම සටහන් කරලා නැහැ.

ප්‍ර : එතකොට සාක්ෂිකරු මිතුරාගේ වෑන් රථයේ අංකය කුමක්ද ?

උ : අංකය සටහන් කරලත් නැහැ.

ප්‍ර : මිතුරාගෙන් ප්‍රකාශයක් ලියාගත්ත ද මේ වැටලීමට අදාලව මෙහෙම වෑන් රථයක් ඉල්ල ගන්නවා කියන තත්ත්වය සම්බන්ධයෙන් ?

උ : නැහැ.

ප්‍ර : එතකොට සාක්ෂිකරු ඔය වෑන් රථයට ඉන්ධන සපයා ගත්තේ කොහෙන්ද සාක්ෂිකරු ?

උ : ඒ අවස්ථාවේ දී ඉන්ධන තිබුණා.

ප්‍ර : ඉන්ධන කීයක් තිබ්බද කියලා බැලුවද සාක්ෂිකරු ?

උ : බැලුවේ නැහැ.

Although, PW1 stated that they had blocked the lorry by using the van and the van had stopped face to face with the lorry, according to PW2, the van was stopped 15-20 feet away from the lorry. The relevant portions are re-produced below:

Pages 54 and 156 of the brief.

ප්‍ර : මහත්මයා ඒ වාහනය දැක්කාම ඔබ මොකක්ද ඊලඟට ගත්ත පියවර ?

උ : ඊට පස්සේ මං මිතුරට කිව්වා ස්වාමීනි වාහනය හරස් කරන්න කියලා.

ප්‍ර : සාමාන්‍යයෙන් දල වශයෙන් කොච්චර විතර දුරක් තියෙද්දි ද ඒ වාහනය දැක්කේ ?

උ : සාමාන්‍යයෙන් ස්වාමීනි මීටර් 50 ක් වගේ දුරින්.

ප්‍ර : දැන් ඔබ ඔය මිතුරාට වාහනය හරස් කරන්න කියලා උපදෙස් දුන්නාම එය පිළිපැද්ද ද ඒ මිතුරා ?

උ : එහෙමයි ස්වාමීනි.

ප්‍ර : කොහෙමද වාහනය හරස් කිරීම සිද්ධ කලේ ?

උ : වෑන් රථයේ මුහුණ ලොරි රථයේ මුහුණට තියලා හරස් කලා ස්වාමීනි.

ප්‍ර : දැන් එතකොට ඔය විනාඩි දාහත විස්ස ඇතුලත අර වෑන් එකයි ලොරියයි කොහේද තිබුනේ ?

උ : වෑන් රථය නම් පාරෙන් වම් පැත්තට වෙන්න අයින් කරලා තිබුනේ, ලොරි රථය අපි නවත්වපු තැනම තමා තිබුනේ ස්වාමීනි.

According to PW1, the substance was wrapped in a white coloured paper which was not marked by the prosecution. Contradicting this, PW2 had not stated about a white paper in his evidence. The relevant pages are re-produced below:

Pages 59 of the brief.

ප්‍ර : මොනව හරි අනාවරණයක් වුණා ද ඒ පුද්ගලයා සන්තකයේ තිබිලා ?

උ : එහෙමයි ස්වාමීනි. ලොරි රථය අසලදී ඔහුව පිටතින් පරීක්ෂා කලා. එහිදී ඔහු ඇද සිටි සරමේ ගැටයක තබා රදවා ගෙන සිටි සුදු පාට කොළයක ඔතන ලද ලා දුඹුරු පැහැති කුඩු අඩංගු කට ගැට ගසන ලද රෝස පාට සේලෝපේන් කවරයක් මා විසින් සොයා ගත්තා ස්වාමීනි.

The learned High Court Judge has also not considered whether there was a white coloured paper with the production.

According to PW1, after sealing the production he with his team had returned to the police at 19.00 hours. But according to PW2, who was called to corroborate the evidence of PW1, they had returned to the police station at 18.25 hours. The relevant pages are re-produced below:

Pages 94 and 166 of the brief.

ප්‍ර : එතකොට නැවත ස්ථානයට පැමිණියේ කීයටද සාක්ෂිකරු ?

උ : පැය 19.00 ට පමණ.

ප්‍ර : පොලිස් ස්ථානයට යනකොට වෙලාව කීයද ?

උ : 18.25 විතර.

The learned High Court Judge has not considered this time difference in his judgment.

It is very important to consider at this stage whether the above-mentioned discrepancy in drug related matters causes any reasonable doubt over the prosecution case as claimed by the Appellant. To consider this issue it is very important to discuss the approach adopted by Higher Courts in respect of handling evidence pertaining to drug related matters.

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...."*

The considered grounds of appeal have merit, which certainly disturb the judgment of the learned High Court Judge.

The failure of the witnesses to pass the test of credibility and probability, as well as the inter se contradictions of the prosecution witnesses are substantial, which would vitiate the conviction.

In the second ground of appeal, the Appellant complains that the learned High Court Judge had not given reasons for rejecting his dock statement in his judgment. Although the dock statement of an accused has less evidential value, our courts have never hesitated to accept the same when it poses a doubt on the prosecution case. In this case I believe it is very important to consider the dock statement of the Appellant.

In **Don Samantha Jude Anthony Jayamaha v. The Attorney General** CA/303/2006 decided on 11/07/2012 the court held that:

> *"Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because*

it needs to be considered in the totality of the evidence that is in the light of the evidence for the prosecution as well as the defence."

In **Kathubdeen v. Republic of Sri Lanka** [1998] 3 SLR 107 the court held that:

"It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt."

In the case of **The King Vs. W. P. Buckley 43 NLR 474**, it was stated by Howard, C.J.:

"*In arriving at a verdict of guilty, the majority of the jury must have viewed the evidence in sections accepted and convicted the appellant on those parts that were satisfactory and disregard those facts that pointed to the improbability of the story put forward by the Crown. The jury should have viewed the evidence as a whole. If they had done so, we are of opinion that they must have had a reasonable doubt as to the guilt of the appellant. The verdict is in our opinion, unreasonable, in as much as taken as a whole the evidence does not support the conviction."*

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

"…the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable," the case

is proved beyond reasonable doubt, but nothing short of that will suffice".

The position of the Appellant in the present case was that he was arrested when he had come to Slave Island to load a mattress into the lorry. At that time, he was taken into custody along with the lorry. I am of the opinion that, not considering the dock statement of the Appellant in its correct perspective, is a serious lapse in this case.

The learned DSG in keeping with the highest tradition of the Attorney General's Department, stated that the shortcomings highlighted by the learned Counsel for the Appellant, go substantially into the core of the case.

As the grounds of appeal raised by the Appellant have merit, I set aside the conviction and the sentence dated 09/10/2023 imposed on the Appellant by the learned High Court Judge of Colombo. Therefore, he is acquitted from the charges.

Accordingly, the appeal is allowed.

The Registrar of this Court 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