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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979

Court of Appeal Case No.
CA/HCC/0016/2021

Suriya Arachchige Ruwan Dhammika Gunawardena

High Court of Colombo
Case No. HC 8046/2015

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam, J.**
B. Sasi Mahendran, J.
M. C. B. S. Morais, J.

COUNSEL : **Priyantha Nawana, PC with Neranjan Jayasinghe and Ravihansa Wijesinghe for Appellant.**
Sudharshana De Silva, S. D. S. G. for the Respondent.

ARGUED ON : **11/06/2025**

DECIDED ON : **29/08/2025**

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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 in the High Court of Colombo as follows:

1. The Appellant was indicted for trafficking 343.08 grams of Heroin punishable under Section 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.
2. In the same transaction the Appellant was indicted for being in possession of 343.08 grams of Heroin punishable under Section 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

The date of the offence depicted in the indictment is 21.09.2014. Originally, he was indicted for the trafficking of and for being in possession of 404.92 grams of Heroin. But on 13.09.2016 the indictment was amended and the quantity of Heroin was brought down to 343.08 grams.

After the trial the Appellant was found guilty on all counts and the learned High Court Judge of Colombo had sentenced him to life imprisonment on 09/03/2021. The prosecution had called 08 witnesses and marked productions X1 to X29.

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 was connected via zoom platform from prison.

On behalf of the Appellant the following Grounds of Appeal were raised.

1. Evidence of prosecution witnesses failed the test of credibility and probability.
2. Prosecution had failed to prove the exclusive possession and the chain of custody of the productions.
3. Learned High Court Judge had rejected the evidence of the defence on unreasonable grounds.
4. Learned High Court Judge was misdirected on law especially on the application of Section 134 of the Evidence Ordinance and the Burden of Proof.

Background of the case.

According to PW1, IP Priyadharshana, he was attached to the Borella Police Station when this raid was conducted. According to him the first information about the Appellant was received on 25.08.2014 and the raid was conducted on 21.09.2014.

According to PW1, the police team had used two private vehicles for this raid. The car in which PW1 and PW4 travelled was driven by PW9. The three-wheeler in which PW2 and PW5 travelled was driven by PW6.

The police team had left the Borella Police Station at 14:40 hours and reached Mihindu Mawatha in Mount Lavinia which was located on the left side of the Colombo-Galle main road, from their direction of arrival. At about 15:30 hours a van bearing No.253-3358 stopped on the main road to turn to Mihindu Mawatha. Upon observing this, PW1 instructed the officers in the three-wheeler to block the van as soon as it entered Mihindu Mawatha. PW4 stepped out of the car to stop the van when it approached the three-wheeler, but it drove through a gap that was there in front of it. Then PW1 and PW4 had proceeded to shoot at the van, but it had continued moving forward without stopping. PW1 and PW4 had got into the car and followed the van. About 150 meters from the place of incident, there was a four-way junction and due to another car, which entered the road obstructing the van, the van slowed down. At that time, PW1 had seen a parcel being thrown out of the van to a plot of land on the right side of the road. Then a person on the land had picked up the parcel and he had thrown it back at the van which had missed and had landed on the road instead. Then PW1 had directed PW4 to collect the parcel and PW1 had chased behind the van with PW9. Another 1 km down the road, the van was overtaken and the Appellant was arrested and was taken to the four-way junction. At the junction PW4 had handed over a plastic bag which contained 06 bags of Heroin.

Further investigation was conducted and a statement was recorded from the wife of the Appellant at his residence. PW1 had then gone to the Dehiwala Police Station upon a message received to the effect that a Heroin parcel and a scale had been discovered at the place of the shooting. After that the team had come to the Borella Police Station and a search was done in the van. According to PW1, another parcel was found concealed in a small chamber

near the step of the van. Thereafter, the productions were handed over to PW11 after sealing. On 23.09.2014 PW1 had taken the productions to the Dehiwala Police Station which were taken into custody by the police officers there. Thereafter, the productions had been sent to the Government Analyst for analysis.

Reasonable doubt is legal terminology referring to insufficient evidence that prevents a judge from convicting a defendant of a crime. In a criminal case, it is the duty of the prosecution to convince the judge that the defendant is guilty of the crime with which he has been charged and, therefore, should be convicted. The phrase "beyond a reasonable doubt" means that the evidence presented and the arguments put forward by the prosecution establish the defendant's guilt so clearly that they must be accepted as fact by any rational person.

In **Woolmington v DPP** (1935) the Court ruled that in criminal cases, the burden of proof is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt. The defendant is presumed innocent until proven guilty, and it is not for the defendant to prove his innocence.
In the first ground of appeal the Learned Counsel contended that the evidence of prosecution witnesses failed the test of credibility and probability.

In **the Attorney General v Sandanam Pitchai Mary Metilda** S.C. Appeal No. 79/2008 decided on 06.05.2010 the Supreme Court held that:

> *"When considering the testimonial creditworthiness of Matilda, it is important to bear in mind established principles on witness credibility which may guide the Court in assessing the facts in situation where conflicting evidence is presented. The Court must be conscious of the fact that not all witnesses are reliable. A witness may fabricate or provide a distorted account of the evidence through a personal interest or through genuine error (Vide, Emson, Evidence, 3rd Edition, 2006).*

A key test of credibility is whether the witness is an interested or disinterested witness. Rajaratnam J. in Tudor Perera v. AG (SC 23/75 D.C. Colombo Bribery 190/B – Minutes of S.C. Dated 1/11/1975) observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (Vide, Halsbury Laws of England 4th Edition para 29). Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness (Vide, Hasker v. Summers (1884) 10 V.L.R. (Eq.) 204 – Australia; Leefunteum v. Beaudoin (1897)28 S.C.R. 89) - Canada).

The overall consistency of evidence is a further test of creditworthiness. Consistency is not just limited to consistency inter se but also consistency with what is agreed and clearly shown to have occurred (Vide, Bhoj Raj v. Sita Ram, AIR 1936 PC 60). The Court may also determine credibility based on the relative probability of the defence version taking place in light of the evidence before Court."

According to PW1, when the van entered Mihindu Mawatha and the police team tried to stop the van, it proceeded without stopping. As such the police opened fire but could not stop the van. At that time, PW1 had not seen anything being thrown out from the van. PW1 had only seen a bag being thrown when the van reached a four-way junction. But according to the Dehiwala Police, they had recovered a parcel and a scale at the place of shooting. But this was not witnessed either by PW1 or PW4 who shot at the van when it proceeded without stopping.

Next, according to PW1, when the van reached the four-way junction, he had seen a parcel being thrown to a land situated on the right side of the road. Then a person on the land had picked up the parcel and he had thrown it back at the van which had missed and fallen on the road instead. This had been seen by the witnesses.

It should be noted the alleged parcel of Heroin is last seen by the witnesses in the hands of the person who picked up and threw back at the van.

PW1, in his evidence told Court that the statement of the person who picked up and threw the parcel back to the van, had been recorded but he was not called to give evidence by the prosecution. Considering the circumstances of this case he is an essential witness, because it connects the Appellant with the Heroin said to have been recovered from the road. Without his evidence, the Heroin parcel said to have thrown out of the van cannot be connected to this case.

Witnesses are a critical part of criminal trials. Strong testimony from even one good witness can sometimes make or break the prosecution's case. To arrive at a fair decision, all essential evidence must be produced by the prosecution.

In **Stephen Seneviratne v The King** [1936] 3 All ER 36 at 46 where Lord Roche said:

> *"Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution."*

Considering the above cited judgment, the person who threw the parcel back towards the van, of course, is an essential witness and the prosecution should have called him to give evidence. Not calling the said witness to give evidence has caused great prejudice to the Appellant.

Further, a police officer called SI/Weerasinghe from the Dehiwala Police Station had gone to the place of shooting and with the assistance of the people of the area, recovered another parcel of Heroin which weighed 100 grams, a digital scale and some polythene bags which also have been accrued to the Appellant. Further, to prove this recovery, no witnesses from the Dehiwala Police Station were called by the prosecution.

The learned High Court Judge in his judgment at page 589-590 of the brief analysed the defence position in this regard as follows:

Page 589-590 of the brief.

චූදිත වෙනුවෙන් තර්ක කරනු ලබන්නේ වෑන් රථයෙන් විසිකලේ යැයි කියනු ලබන පාර්සලය බිම වැටුනු අවස්ථාවේදී ඒ අසල සිටි පුද්ගලයෙකු විසින් එය අහුලාගෙන වෑන් රථයට දමා ගැසූ බවට පැමිණිල්ලේ සාක්ෂි වලින් පවසා සිටිය ද අසල සිටි පුද්ගලයා සාක්ෂියට කැඳවීමට පියවර නොගැනීම තුළ පැමිණිල්ලේ සාක්ෂි අංක 01 හා 04 ගේ සාක්ෂි තහවුරු වී නැති බවයි.

එම පුද්ගලයාගේ ප්‍රකාශයක් දෙහිවල පොලිසියේ නිලධාරීන් විසින් සටහන් කරගත්තේය යැයි පැමිණිල්ලේ සාක්ෂි අංක 01 පැවසුවද එම පුද්ගලයා සාක්ෂිකරුවෙකු වශයෙන් කැඳවීමට පැමිණිල්ල පියවර ගෙන නැත. මෙහිදී සලකා බැලිය යුතු වන්නේ එම පුද්ගලයා කැඳවීමට පියවර නොගැනීම මෙම නඩුව කෙරෙහි කෙසේ බලපාන්නේ ද යන්නයි.

එම පුද්ගලයා සාක්ෂිකරුවෙකු වශයෙන් කැඳවූවද ඔහුට පැවසිය හැකිවන්නේ වෑන් රථයකින් විසිකරන ලද පාර්සලයක් නැවත එම වෑන් රථය දෙසට ඔහු විසින් දමාගසන ලද බව පමණි.

එබැවින් පැමිණිල්ලේ සාක්ෂි අංක 01 සහ පැමිණිල්ලේ සාක්ෂි අංක 04 ගේ සාක්ෂි මෙම අධිකරණය විශ්වාස කරන්නේ නම් එකී පුද්ගලයා සාක්ෂියට නොකැඳවීම මෙම නඩුවේ සාක්ෂි කෙරෙහි බලපෑමක් ඇති නොකරයි. අනෙක් අතට පැමිණිල්ලේ සාක්ෂි අංක 01 සහ පැමිණිල්ලේ සාක්ෂි අංක 04 ගේ සාක්ෂි මෙම අධිකරණය විශ්වාස නොකරයි නම් එහිදී චූදිත නිදොස් විය යුතු අතර එවන් අවස්ථාවකදී ද එම පුද්ගලයා සාක්ෂියට නොකැඳවීම නඩුවට බලපෑමක් ඇති නොකරයි.

The analysis of the learned High Court Judge regarding the failure of the prosecution to call an essential witness to give evidence has caused great prejudice to the Appellant and I consider it is a clear misdirection.

Further, both PW1 and PW4 confirmed of presence of two military personnel at Mihindu Mawatha where the shooting incident had taken place. Though both witnesses thought that there was an army camp situated close-by, they had later realised that only two army personnel were present at that time. But the police had failed to record their statement even though a shooting had taken place. This too raises serious doubts regarding the occurrence of the incident as described by PW1 and PW4. Culmination of all these factors raise reasonable doubts about the probability of the incident and the credibility of the witnesses. Therefore, the 1st ground of appeal has merit.

Chain of custody refers to the documentation that establishes a record of the control, transfer, and disposition of evidence in a criminal case. In drug related cases, the prosecution does not only need to prove the case beyond a reasonable doubt but also ensure, with cogent evidence that the inward journey of the production has not been disturbed at the all-material point.

To prove someone guilty for the possession and trafficking of drugs, a prosecutor must prove that the evidence presented in court is the same evidence that was gathered at the time of the arrest of the accused. They must be able to show that the evidence was handled properly and was not contaminated or tampered with. If law enforcement officers do not handle the recovered evidence in a proper manner, the evidence can be challenged on the grounds that it was tampered with, that test results are faulty or inaccurate, or that evidence was planted at the time of arrest. As the criminal prosecution rely on evidence gathered by police officers, it is typically prosecutors who must establish the chain of custody.

Proving the chain of custody can be difficult. If law enforcement officers do not conduct it in a proper manner, chain of custody can be successfully challenged in a criminal case.

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 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 where the identity of the good analysis for examination has to be proved beyond reasonable doubt. A prosecutor should take pains to ensure that the chain of events pertaining to the productions that had been taken charge from the Appellant from the time it was taken into custody to the time it reaches the Government Analyst and comes back to the court should be established".*

The learned Counsel takes up the position that the learned Trial Judge misdirected himself by failure to analyse the discontinuation of custody in the production chain, which is a substantial fact the prosecution must prove beyond a reasonable doubt and thereby the conviction is bad in law and unsafe.

According to PW1, he had only seen the parcel being thrown out of the van and the parcel was recovered by PW4. But in his evidence at page 134, PW1 had stated that he had instructed one PC Ruwan to retrieve the parcel and to hold it in his custody. According to PW1 no such person participated in the raid. Hence, it is not clear as to how PW4 received the parcel. This missing link was not considered by the learned High Court Judge.

As stated above another parcel was recovered by the Dehiwala Police from the scene of shooting which PW1 and PW4 had not seen.

Although the shooting incident, the recovery of a parcel of Heroin from the road by PW4 and the recovery of a parcel of Heroin by Dehiwala Police at the place of shooting comes under the police division of Dehiwala, the investigation was conducted by the Borella Police Station. To corroborate about the shooting incident and the recovery of the parcel of Heroin at the place of shooting, the prosecution had not called any witnesses to

substantiate this position. But the Heroin parcel recovered from the place of shooting had been amalgamated with the Heroin parcels said to have been recovered by PW4. This raises very serious doubts about the recovery of Heroin as described by the prosecution.

Further, following the alleged arrest and the subsequent recovery of Heroin, the raiding party had returned to the Dehiwela Police Station in the van along with the Appellant, but had not done any examination of the van at the Dehiwala Police Station. According to PW1, the van had been inspected at the Borella Police Station after about five and a half hours of the shooting incident and a Heroin parcel was then recovered from the van. Therefore, I conclude that the prosecution had failed to prove the exclusive possession and chain of custody of the productions in this case beyond a reasonable doubt. The learned High Court Judge had failed to consider these matters which are substantial enough to vitiate the conviction in this case. Hence, I find that this ground too has merit.

In the 3rd and 4th grounds of appeal, the learned President's Counsel had contended that the learned High Court Judge had rejected the evidence of the defence on unreasonable grounds.

The learned President's Counsel citing the following portion of the judgement at page 592 of the brief, contended that the learned High Court Judge before analysing and considering the defence case had come to the conclusion that the prosecution had proved the case beyond a reasonable doubt.

Page 592 of the brief.

ඉහත සඳහන් සියලුම කරුණු සලකා බැලීමේදී පැමිණිල්ල විසින් සන්තකයේ හෙරොයින් ග්‍රෑම් 343.08 ක් සන්තකයේ තබාගෙන සිටියදී අත්අඩංගුවට ගත්තේය යන කරුණා සාධාරණ සැකයෙන් තොරව ඔප්පු කර ඇති බවට මම තීරණය කරමි.

Considering the above portion of the judgment cited, it clearly demonstrates that the Appellant had been deprived a fair trial.

Our Apex Court has given clear guidelines as to the consideration of a dock statement of an accused in a criminal trial.
An accused person has a right to make a statement from the dock. Although the accused cannot be cross examined, the statement has to be considered as evidence.

In **Queen v. Buddharakkita Thero 63 NLR 433** the court held that:

> *"That the right of an accused person to make an unsworn statement from the dock is recognized in our law. That right would be of no value unless such statement is treated as evidence on behalf of the accused, subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination."*

Although the learned High Court Judge had considered the dock statement of the Appellant in his judgment, he has arrived at his own conclusion in dealing with it. This too deprives a fair trial to the Appellant which is guaranteed under the Constitution of the Democratic Socialist Republic of Sri Lanka.

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial. Hence, this ground too has merit.

For the reasons stated above, I am of the view that there is merit in the grounds of appeal urged by the learned President's Counsel in favour of the Appellant. The evidence presented by the prosecution failed to establish that the Appellant is guilty of the charges that were levelled against him beyond reasonable doubt.

Due to aforesaid reasons, I set aside the conviction and sentence imposed by learned High Court Judge of Colombo dated 09/03/2021 on the Appellant. Therefore, he is acquitted from the respective 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

B. Sasi Mahendran, J.

I agree.

JUDGE OF THE COURT OF APPEAL

M. C. B. S. Morais, J.

I agree.

JUDGE OF THE COURT OF APPEAL