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

In the matter of an appeal in terms of Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka and in terms of Sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

Complainant

Vs

Devasagayam Fernando *alias* Oliver

Accused

AND NOW BETWEEN

Devasagayam Fernando *alias* Oliver

Accused – Appellant

Vs

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant – Respondent.

Court of Appeal Case No.
CA/0214/2019

High Court of Colombo Case No.
HC 72/18

Before : **P. Kumararatnam, J.**
Pradeep Hettiarachchi, J.

Counsel : Rienzie Arseculeratne, PC with Chamindri Arseculeratne for the Accused – Appellant.
Disna Warnakula, DSG for the Respondent.

Argued on : 17.09.2025

Decided on : 05.12.2025

Pradeep Hettiarachchi, J

Judgment

1. The accused–appellant (hereinafter referred to as "the appellant") was indicted before the High Court of Colombo for possession and trafficking of 3.5 grams of Heroin. At the trial, eight witnesses testified on behalf of the prosecution. The appellant made a dock statement, and two witnesses also testified in support of the defence.

2. At the conclusion of the trial, the learned trial Judge found the appellant guilty of the charges and accordingly convicted him. The appellant was thereafter sentenced to life imprisonment.

   Being aggrieved by the conviction and sentence, the appellant has preferred this appeal.

3. Following are the grounds of appeal urged by the appellant.
   a. The learned High Court Judge has failed to consider infirmities which cast doubt on the prosecution case;
   b. The learned High Court Judge accepted the evidence of PW1 and PW2 before considering the defense evidence;
   c. The learned High Court Judge has failed to consider the that the prosecution could not provide the evidence of custody of productions from 08.02.2017 to 21.03.2017; and
   d. The learned High Court Judge failed to apply the same yardstick that he applied to the prosecution to the defense evidence.

4. According to the prosecution, the raid that led to the arrest of the appellant was conducted based on information received by PW1 while he was on routine patrol duty with several police officers, including PW2 to PW10.

5. They left the station on 07.02.2017 at 9.00 a.m. in the Jeep bearing No. 64-1065, driven by PC 40878 Rewatha. At around 1.20 p.m., they arrested a suspect in possession of cannabis and handed him over to the Keselwatta Police. According to PW1, at approximately 6.45 p.m., he received the information that ultimately led to the arrest of the appellant. The information received was that a person named Oliver, residing at Aduruppu Veediya, Kadireshan Road, was proceeding towards Jampatah Street to deliver Heroin to a customer.

6. Around 1.20 p.m., they arrested a suspect in possession of cannabis and handed him over to the Keselwatta Police. According to PW1, at approximately 6.45 p.m., he received the information that led to the arrest of the appellant. The information received was that a person named Oliver, residing at Aduruppu Veediya, Kadireshan Road, was proceeding towards Jampatah Street to deliver Heroin to a customer.

7. The officers were waiting on Kadireshan Road near the Vellakkani Church when they observed a person approaching from the opposite direction. Upon stopping and searching him, they discovered a parcel of heroin concealed beneath his sarong. After questioning the appellant, they proceeded to search his residence, though nothing illegal was found therein. Thereafter, the officers, along with the appellant, proceeded to Sew Gunasekara Pawning Center at Maradana to weigh the substance. Subsequently, the productions were sealed, and the officers returned to the Aduruppu Weediya Police Station, where the appellant and the productions were handed over.

8. Subsequently, the appellant together with the productions was produced before the learned Magistrate of Maligakanda. Upon an application made to the Magistrate, the productions were referred to the Government Analyst for examination and report.

Whether the learned High Court Judge has failed to consider the infirmities which cast doubt on the prosecution case?

9. During the cross-examination of PW1, it was revealed that the officers were equipped with a scale and sealing instruments when they departed on routine patrol. However, according to PW1, after the arrest of the appellant, they proceeded to Sew Gunasekara Pawning Shop to weigh the substance, this too occurred at approximately 10.30 p.m. If the officers had indeed been in possession of a scale, it remains unclear why there was a need to resort to a pawning shop at that hour merely for weighing the production. No plausible explanation was forthcoming in this regard.

10. It was also established in evidence that the odometer reading of the vehicle used by the police team was not recorded by PW1. PW1 stated that the odometer had been out of order. If that were the case, he should have at least made a contemporaneous note to that effect. However, the evidence demonstrates that no such entry was made by PW1, or by any other officer who participated in the raid.

11. It is also evident that prior to the arrest of the appellant, the officers had arrested another suspect in the Keselwatta area and handed him over to the Keselwatta Police. It is significant to note that PW1 had not made any entry or note concerning that arrest. According to PW1, the team left on routine patrol at 9.00 a.m. The arrest in the Keselwatta area was made at 13.00 hours, and the appellant was subsequently arrested at 20.00 hours. However, no record or note was made regarding the time at which the information concerning the appellant was received. There are certain inconsistencies and discrepancies as to the time spent by the raiding party during that period.

12. In a raid of this nature, it is of paramount importance to maintain notes pertaining to the important events which led to the arrest. In the present case, there is a significant time gap between the first arrest and the arrest of the appellant. The prosecution version is that they were patrolling the area and had communication with their informants. In the absence of the odometer reading of the vehicle in which they travelled and accurate notes it is difficult to ascertain the truth of the prosecution version.

13. The other important fact to be noted is that the raiding party never searched any of the occupants present at the appellant's residence. According to the evidence, subsequent to the arrest they proceeded to the appellant's residence and conducted a search, but nothing illegal was found. Strangely, none of the occupants were subjected to a

search. Furthermore, no notes were made with regard to the time at which the appellant's residence was searched.

14. This omission further exacerbate the deficiencies in the prosecution's narrative. In a proper and diligent search following a narcotics arrest, it is standard procedure to search not only the suspect's residence but also any individuals present therein, as they too may be in possession of contraband or may have knowledge of its whereabouts. The failure to do so, coupled with the absence of any record of the time at which the appellant's residence was searched, weakens the reliability of the investigation and casts further doubt on the integrity of the prosecution's version of events.

15. It is also noteworthy that there exists a significant omission in the chain of custody of the productions. According to the prosecution, the productions were handed over to the Magistrate's Court by PC 55637 Balasuriya and were accepted by a production clerk named T. L. Kosala. However, Kosala did not testify at the trial. Instead, another production clerk, Konagama (PW15), gave evidence by referring to the production register maintained during the relevant period. According to PW15, there was no indication as to whether the seal was intact. Moreover, PW15 was not present when the productions were handed over to PC Balasuriya, nor was he present when they were handed over to the court. Thus, the prosecution was unable to establish the custody of the productions for the period between 08.02.2017 and 21.03.2017. Nevertheless, the learned High Court Judge has erroneously stated that all officers who handled the productions had testified.

16. The importance of proving the inward journey of the chain of productions was considered in ***Witharana Doli Nona vs. Republic of Sri Lanka (CA 19/19),*** Sisira De Abrew J., observed that:

> *"It is a recognized principle that in drug-related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. The prosecution must prove that the productions taken from the accused appellant were examined by the government analyst. To prove this, the prosecution must prove*

all the links of the chain from the time it was taken from the accused-appellant to the Government Analyst's department."

17. J.A.N de Silva J., (as he then was) in ***Perera vs. AG [1998] 1 SLR 378*** opined that;

"It is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the Analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the Analyst. Therefore, it is correct to state that the most important journey is the inward journey because the final analyst report will depend on that. The outward journey does not attract the same importance."

18. In light of the foregoing, the cumulative effect of the procedural irregularities, omissions, and contradictions in the prosecution evidence creates a serious doubt as to the credibility of the alleged recovery and the circumstances surrounding the arrest of the appellant. The lack of contemporaneous notes, the unexplained failure to record the odometer readings, the conflicting accounts between PW1 and PW2, the decision to weigh the production at an external location despite allegedly carrying a scale, and the omission to search the occupants at the appellant's residence collectively diminish the reliability of the prosecution's case. In these circumstances, it would be unsafe to base a conviction solely on such compromised evidence, and any lingering doubt must necessarily operate in favour of the appellant.

19. In the case of ***Anthony Michael Morril vs. Attorney General CA 26/06,*** decided on 25.05.2010, Sarath De Abrew, J, has stated,

"...In assessing the testimonial trustworthiness of this witness, the learned trial judge had failed to employ the yardstick of the test of Probability and Improbability which is a sine qua non in assessing the evidence of a trained police witness, which teat if it had been property used, would have created serious doubts as to the credibility of the said police witness. It is a cardinal rule in our criminal law that every person charged with an offence is entitled to a fair trial and shall be presumed innocent until he is proved guilty. This presumption of innocence should be operative until the learned trial judge had perused and analyzed the entirety of the evidence led in the case, that of the

prosecution as well as that of the defense. Before arriving at a conclusion whether the chargers are proved beyond reasonable doubt, there is sacred duty cast on each trial judge to examine the defense evidence, and come to a conclusion whether a reasonable doubt is generated by the defense, the benefit of which should necessarily accrue to the accused person. There is an imperative duty cast on every trial judge to impose separate sentence on each charge an accused person is found guilty of.

20. It is also significant to note that the learned trial Judge, having analyzed the prosecution evidence, concluded that a strong case had been established against the appellant in respect of the two charges set out in the indictment. In my view, however, this approach is not the most appropriate. The learned trial Judge ought to have undertaken a holistic analysis, evaluating both the prosecution and defense evidence together, rather than compartmentalizing the prosecution evidence in isolation.

21. In ***James Silva vs Republic [1980] (2) Sri L.R***., it was held that:

There is a serious misdirection in law. It is a grave error for a trial judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence.

22. Furthermore, this Court cannot lightly overlook the basis upon which the learned trial Judge rejected the defence evidence. The observations made by the learned trial Judge at page 40 of the impugned judgment indicate that he had pre-judged the case even before analysing the defence evidence. It can also be observed that the testimony of the defence witnesses, although subjected to cross-examination, does not reveal any significant inter-se contradictions. While it is true that they are family members of the appellant, that fact alone should not serve as a ground to reject their testimony unless there exist inherent improbabilities on the face of their evidence.

23. The appellant's dock statement was corroborated by the defence witnesses. During cross-examination of the prosecution witnesses, it was put to them that the appellant had been arrested at his residence and not at Kadireshan Street as alleged by the

prosecution. In the circumstances, the infirmities in the prosecution evidence, when considered alongside the defence version, undoubtedly cast a reasonable doubt on the prosecution case. Accordingly, such doubt must be resolved in favour of the appellant.

24. Considering the totality of the evidence, the defence version gains credibility, and at the very least, a complete rejection of the defence evidence would not be justified. This is a situation where the defence has successfully created a reasonable doubt in the prosecution's version. Specifically, a doubt arises as to the mode of detection and the manner of recovery as narrated by the prosecution. The Trial Judge failed to properly appreciate this aspect, which operates in favour of the appellant.

25. Furthermore, it is interesting to note that the learned High Court Judge himself reached the conclusion that the dock statement and the evidence of the defence witnesses were deliberately designed by the appellant to create doubt with regard to the prosecution's case, and hence, the defence version could not be accepted.

26. During the trial, both PW1 and PW6 stated that, while on patrol, they arrested a suspect with narcotics and handed him over to the Keselwatta Police. However, both witnesses failed to corroborate that assertion, as no notes or records were made in that regard. The defence, in cross-examination, emphasized this omission, as it clearly calls into question the credibility of the testimonies of PW1 and PW6.

27. Nevertheless, the learned High Court Judge disregarded this point and concluded that it had no relevance to the present case, further suggesting that the burden lay upon the defence to prove the contrary if the arrest was disputed. In my respectful view, this approach is erroneous in law. When the prosecution asserts a fact but fails to establish it through credible evidence, the defence cannot be burdened with proving a negative. The obligation lies upon the prosecution to prove what they allege, and not upon the accused to disprove what has not been sufficiently established.

28. For the reasons set out above, I am of the view that the prosecution has failed to establish the charge against the appellant beyond reasonable doubt. The conviction entered and the sentence imposed by the learned High Court Judge cannot therefore

stand. Accordingly, the appeal is allowed. The conviction and sentence are hereby set aside, and the appellant is acquitted of all charges.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree,

Judge of the Court of Appeal