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/0331/2019

High Court of Balapitiya
Case No. HC 2064/2017

Nannethithi Harsha Nalin Kumara

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL	:	**Tenny Fernando with Pasindu Silva for the Appellant.** **Harippriya Jayasundara, PC, ASG with Anoopa De Silva, DSG Chamodi Gunasekera and Tharushi Kulasinghe for the Respondent.**
ARGUED ON	:	**18/02/2026**
DECIDED ON	:	**19/05/2026**

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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 Balapitiya as follows:

1. On or about 30.01.2016 the Appellant was indicted for being in possession of 5559.7 grams of Heroin (Diacetylmorphine) which is an offence punishable under Section 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.
2. In the course of the same transaction, the Appellant was indicted for trafficking 5559.7 grams of Heroin, which is an offence punishable

under Section 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

3. In the course of the same transaction, the Appellant was indicted for being in possession of 1.100 kilograms of Cannabis Sativa L (Ganja) which is an offence punishable under Section 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.
4. In the course of the same transaction, the Appellant was indicted for trafficking 1.100 kilograms of Cannabis Sativa L (Ganja), which is an offence punishable under Section 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

After the trial, the Appellant was found guilty on all counts and the learned High Court Judge of Balapitiya had sentenced him to death on counts No. 01 and 02 and had imposed a sentence of 01-year rigorous imprisonment each on counts No.03 and 04 on 18/10/2019. The prosecution had called 05 witnesses and had marked productions P1 to P17.

Being aggrieved by the aforesaid conviction and sentence, the Appellant had 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 the Zoom platform from prison.

<u>On behalf of the Appellant the following Grounds of Appeal were raised.</u>

1. The deliberate failure of the prosecution to call a material witness who had received the 1st information regarding the raid.
2. The learned High Court Judge had misdirected himself by completely ignoring to evaluate the dock statement of the Appellant.

3. The learned High Court Judge had misdirected himself with regards to the ruling, as well as Section 27(1) of the Evidence Ordinance which is relevant in this case.

Background of the case.

According to PW1, IP Willorarachchi, he was attached to the Ambalangoda Police Station when this raid was conducted. According to him the first information about the Appellant was received on 30.01.2016 from PW13, PS 64746 Ranasinghe about his possession of Heroin. PW13, who is an intelligence officer, had transmitted the information to PW1 immediately. Acting upon this information, he had arranged 13 police officers as well as himself and PW13 for the raid. Several police officers were clad in uniform and others were attired in civil dress. When PW13 transmitted the information to him, he had instructed PW13 to enter the same in his pocket note book and to obtain a signature from his superior officer. The team had left the police station at 15.45 hours in a police jeep and in a private van. PC 72711 Chandana had driven the private van. PW1 and PW13 had travelled in the van with the others. The van had proceeded up to a place called Parrot Junction as per the information. Thereafter, they had proceeded up to the Usmudulawa Junction. On their way, the informant had also gotten into the van. The police jeep was stopped at the Urawatta Junction.

The van had proceeded up to the railroad and stopped. At that time, PW13's informant had also gotten in to the van. They had remained in the van till 17.00 hours. At that time PW1 and his team had spotted a person clad in a black coloured three quarter and a red coloured T-shirt. After having seen the person, PW1 had directed the informant to leave the van. Thereafter, PW1 and PW3 had walked up to the person shown by the informant and after revealing their identity, PW1 had checked the bag the person was carrying at that time.

Inside the bag, PW1 had observed a parcel wrapped in two polythene sheets. When he checked the contents in the parcel, he found a certain brown coloured substance which tested positive for Heroin (Diacetylmorphine). At 17.15 hours the Appellant was arrested and loaded into the van in which PW1 and his team had travelled in. At that time a short statement of the Appellant was recorded. Upon the statement of the Appellant, another parcel was recovered at his mother-in-law's house. When he was arrested, he was handcuffed. The Appellant had taken the key from the louvers of the kitchen door and had opened the door of the room. Inside the room, two parcels suspected to be drugs were recovered from under a bed upon his statement. Inside one parcel, PW1 had found 17 parcels of brown coloured substances, which tested positive for Heroin (Diacetylmorphine). In the second parcel, Cannabis Sativa L (Ganja) was found. Thereafter, the house was subjected to a thorough search with the help of Police Kennel. As nothing more was recovered in the house, the police party had left for Asiri Manufacturing Company, Ambalangoda to weigh the production. The weighing process had commenced at 19.00 hours. In the first parcel which was recovered, the substances weighed about 1.24 Kilograms. The substances in the 17 parcels weighed about 20.052 kilograms. The productions had been entered into PR Register under No. 171-175/16.

On 01.02.2016, PW1 had taken the productions to the Government Analyst Department for analysis. According to the Government Analyst Report, a total of 5.73366 kilograms of Heroin had been detected. Additionally, the Appellant had possessed 1.100 Kilograms of Cannabis Sativa L.

PW3 was called to corroborate the evidence given by PW1.

"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 **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."

In the case of **The Attorney-General v. Rawther 25 NLR 385**, Ennis, J stated that:

"*The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt*".

Further, in the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 it was 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 this case, the information had been received by PW13 and was transmitted to PW1 immediately. PW1 had not taken any endeavour to record the same in his pocket note book. Instead, PW1 had directed PW13 to record this in his note book and to get the signature of his supervising officer as PW13 is

an intelligence officer that functions separately from the Ambalangoda Police Station. But PW1 had acted on this information and conducted the raid.

As stated above, although PW13 is an important witness in this case, he was not called to give evidence in this case. Although he is an intelligence officer, he had participated in the raid team and had met the informant before the arrest of the Appellant. Further, he had travelled with the Appellant after his arrest in the same van. Hence, he is an essential witness in 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, 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, PW13, the person who received the information about the trafficking of Heroin, 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.

In the judgment, the learned High Court Judge had commented on this issue in a prejudicial manner at page 444 of the judgement. The relevant portion is re-produced below:

Page 444 of brief.

හෙරොයින් සන්තකයේ තබාගැනීමේ නඩුවක දී එක් සාක්ෂියක් පමණක් වූව ද මෙහෙයවීම ප්‍රමාණවත් වේ. අධිකරණ පූර්ව නිදර්ශනයන් ඒ සම්බන්ධයෙන් ඉදිරිපත්ව ඇත. මෙම නඩුවේ දී වැටලීමට සහභාගී වූ පොලිස් නිලධාරීන් තිදෙනෙකුම සාක්ෂි දී ඇති නමුත්, පැ.සා. 01 ට තොරතුර ලබාදුන් නිලධාරියා සාක්ෂියට නොකැඳවීම පැමිණිල්ලේ සාක්ෂිවල විශ්වාසනීයත්වය හීනකරනු ලබන බවට චූදිත ගෙනඑනු ලබන ස්ථාවරය සළකා බැලීමේ දී විශේෂයෙන්ම මෙම සාක්ෂිකරු බුද්ධි අංශයේ සේවය කරනු ලබන අපරාධ පිළිබඳ තොරතුරු එක්රැස්කිරීමේ රාජකාරියෙහි නියුක්ත වන එනම් අනන්‍යතාවය හෙලිනොවන අයුරින් රහසිගතව කරනු ලබන රාජකාරියක නියුක්ත වන නිලධාරියෙකු බව පැමිණිල්ලේ සාක්ෂිකරුවන්ගෙන් ඉදිරිපත්ව තිබීම හේතුවෙන් එකී සාක්ෂිය නොකැඳවීම කෙරෙහි සැකසහිත භාවයක් අධිකරණයේ මනස තුළ උද්ගත නොකරවයි. ඒ අනුව චූදිතගේ එකී ස්ථාවරය ප්‍රතික්ෂේප කරමි.

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 to be a clear misdirection.

In appreciating the evidence of PW1, PW2 and PW3, the learned High Court Judge in her judgment stated that PW1, PW2 and PW3 had given believable evidence, as their evidence was not subjected to cross examination. The relevant portion of the judgment is re-produced below:

Page 436 of the brief.

උප පොලිස් පරීක්ෂක දුමින්ද චන්ද්‍රලාල් (පැ.සා. 03) සාක්ෂි දෙමින් ඉහත කී වැටලීමට සූදානම්වීම, පිටව යාම, වැටලීම සිදුකළ ආකාරය, භාණ්ඩ කිරාමැන බැලීම, උපසේවයට භාරදීම සහ සටහන් යෙදීම පිළිබඳ පැ.සා. 01 හා පැ.සා. 02 ගේ සාක්ෂිය තහවුරු කරමින් සාක්ෂි දී ඇත. එකී සාක්ෂිකරුවන්ගෙන් කිසිදු හරස් ප්‍රශ්නයක් නොඇසීම හේතුවෙන් විශ්වාසනීයත්වය තහවුරු වී ඇත.

But upon perusal of the case record, the evidence given by PW1, PW2 and PW3 were subjected to lengthy cross examinations by the defence and correctly suggested their stance to the above-mentioned witnesses. (Pages 160-178- cross examination of PW1, Pages 239-263 cross examination of PW2 and Pages 374-388 of the appeal brief).

This clearly demonstrates that the learned High Court Judge had only considered the examination-in-chief of the evidence of PW1, PW2 and PW3 to come to her conclusion. Hence, I conclude that this is a clear misdirection which certainly affects the prosecution's case.

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

> *"(4) 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."*

Additionally, in the case of **Walimunige John v. The State (1973)** it was stated that:

> "*The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the ' prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution.*"

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.

The Appellant complains that the learned High Court Judge had not given reasons for rejecting his dock statement in her 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's 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."*

Further, in the case of **Queen v. Kularatne** it was held that:

"'*We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the Jury must be so*

informed. But the Jury must also be directed that — (a) If they believe the unsworn statement, it must be acted upon; (b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed; and (c) That it should not be used against another accused."

Although the learned High Court Judge had considered the dock statement of the Appellant in her judgment, she has arrived at her 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. Had the learned High Court Judge considered the dock statement in its correct perspective, she could not have arrived at the conclusion that the Appellant is guilty as charged.

In this case 8 Suspects were arrested initially. This includes the Appellant and the skipper of the trawler. But 2nd to 8th Suspects were discharged on the advice of the Hon. Attorney General.

In the final ground of appeal, the learned Counsel contended that the learned High Court Judge had misdirected himself in respect of the ruling to Section 27(1) of the Evidence Ordinance which is relevant in this case.

According to Section 27(1) of the Evidence Ordinance-

> "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The Supreme Court in the case of **Somaratne Rajapakse Others v. Hon. Attorney General** (2010) 2 Sri L.R. 113 at 115 stated that:

> *"A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been*

discovered would be permitted in evidence. 'There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery made in terms of Section 27 of the Evidence Ordinance discloses that the information given was true and that the Accused had knowledge of the existence and the whereabouts of the actual discovery."

In the case of **The Attorney-General v Potta Naufer & Others (2006)**, it was further established that:

"*The principle underlying section 27 of the Evidence Ordinance is that the danger of admitting false confession is taken care of as the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.*"

The learned Counsel for the Appellant strenuously argued on the fact that the statement that led to the discovery of Heroin includes a confessional part which is illegal that is " හෙරොයින් පාර්සලය බිරිඳගේ මව වන පද්මලතා යන අයගේ දැනට මා පදිංචි නිවසේ සාලය ඉදිරිපිට මැද කාමරයේ ඇති ඇඳ යට නිල් පාට පොහොර උරයක දමා තිබෙනවා මට පෙන්වන්න පුලුවන්.

In this case the Appellant was charged for possession and trafficking of Heroin and Cannabis Sativa L. Both items were recovered from the bag. Hence, the prejudicial portion of his statement should have been edited before being marked in the trial.

In this case the above-mentioned portion of the Appellant statement contains the word "Heroin" which is in my view inadmissible and highly prejudicial as it clearly displays the confessionary portion of his statement.

For the reasons stated above, I am of the view that there is merit in the grounds of appeal urged by the learned 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 the learned High Court Judge of Balapitiya dated 18/10/2019 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 Balapitiya along with the original case record.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL