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

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

C.A.No.321/2015

H.C. Colombo No. 5166/2010

Gampola Vithanage Samantha Kumara alias Wele Suda

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI J.

COUNSEL : Anura Maddegoda P.C. with Nihal Gunasinghe, Amila Palliyage, Asela Muthumudalige and Nadeesha Kannangara for the Accused-Appellant.

Chethiya Goonesekera D.S.G. for the Respondent

ARGUED ON : 30th January, 2019, 31st January, 2019,

15th February, 2019, 21st February, 2019,

06th March, 2019 & 07th March, 2019 .

DECIDED ON : 05th April, 2019

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ACHALA WENGAPPULI, J.

This is an appeal by the Accused-Appellant *Gampola Vithanage Samantha Kumara* alias *Wele Suda,* (hereinafter referred to as the "Appellant") against his conviction for the counts of possession and trafficking in 7.05 grams of heroin on or about 04.12.2008 at *Mt. Lavinia* and the sentence of death imposed by the High Court of *Colombo*. The Appellant invoked the appellate jurisdiction of this Court, seeking to set aside his conviction and sentence of death.

The indictment presented by the Hon. Attorney General, in its original form, had named the Appellant as the 1st accused, while one *Devamullage Malith Sameera Perera* alias *Amila* was named as the 2nd accused. Therefore, the allegation by the prosecution against the two accused at that stage was that they jointly possessed and trafficked the said quantity of heroin.

Pending trial, the 2nd accused had died, whilst being incarcerated in *Welikada* Jail allegedly due to a riotous situation that erupted there.

It appears from the proceedings of 18.05.2015, that the prosecution sought to amend the indictment with the said change of circumstances, by the addition of the words "දැනට මියගොස් සිටින දෙවන චූදිත දේවමුල්ලගේ මලිත් සමීර පෙරේරා සමග" and instead of the word " යුෂ්මතුන්" insertion of the word "යුෂ්මතා". However, the amended indictment only contained the insertion of the word "යුෂ්මතා". This ambiguous position was noted by the trial Court and the learned Prosecutor offered a clarification for the basis of liability as reflected in the proceedings of 10.08.2015.

Thus, it is clear that the case against the Appellant was presented by the prosecution not on the basis of joint possession and trafficking but on the basis of his individual act of possession and trafficking .

The prosecution case is IP *Rangajeewa,* who was attached to Police Narcotics Bureau at that time, had received information from one of his private informants at about 8.30 a.m. on 04.12.2008, which he recorded on page 194 of his Pocket Note Book. The information disclosed that the Appellant has planned the packeting of heroin in a house at *Maharagama* and is waiting near a culvert at *Attidiya* with one of his associates called

Amila who will come there riding a motor cycle bearing registration number WPMO 2532. The informant also conveyed information about another group of individuals who would join these two.

Rangajeewa conveyed this information to his superiors and upon their direction, made preparation to conduct a raid. He directed SI *Wijesinghe* to prepare a team of officers. They left their office with a team of three other police constables and a police driver in a van bearing registration number HD 2726. The team set off for the raid at about 10.00 a.m. and as they reached C*olpetty*, the informant had rung up *Rangajeewa* to convey the information that the Appellant and *Amila* have left for *Mt. Lavinia* Courts at about 9.15. The Said informant further disclosed that upon reaching the Courts, the Appellant had gone inside while *Amila* too had left in the direction of *Watarappola Road. Rangajeewa* then instructed his informant to follow them. When the team reached *Dehiwala* junction, the informant had rung up for the 3rd time to inform *Rangajeewa* that *Amila,* having returned from *Watarappola* Road went again in the direction of the sea. It was clarified by the prosecution that *Watarappola* Road is on the opposite side of *Mt. Lavinia* Courts, which is situated on the sea side of the *Galle* Road. With this information, *Rangajeewa* decided to turn to Hotel Road from *Galle* Road. They travelled along the Hotel Road and upon arriving at the intersection of College Avenue, observed a motorcycle bearing number WPMO 2532 was parked along the Hotel Road. They have reached there at about 10.30 a.m. *Rangajeewa* saw a male person seated on the parked motorcycle and while wearing a *"full face helmet"* he was also carrying a spare helmet.

Upon seeing the motorcyclist, *Rangajeewa* instructed his driver to turn the vehicle from the intersection to its right, and proceeded along the other part of the College Avenue, that leads up to the sea shore. They stopped the vehicle about 50 meters away from that intersection. *Rangajeewa* then got off from the vehicle and walked towards the intersection with SI *Wijesinghe*. They have positioned themselves in a way they could have a clear view of the motorcyclist. A little later, *Rangajeewa* saw the Appellant, whose identity was known to him due to the latter's detention at PNB some time back, coming down College Avenue, whilst engaged in a telephone call on his hand phone.

The motorcyclist then started the engine of his motorcycle and the Appellant had walked up to him. The motorcyclist had taken out a parcel from his back pack. The parcel which could be kept in the clenched fist of a person was then given to the Appellant. The Appellant was intercepted by *Rangajeewa*, when he was about to wear the helmet. SI *Wijesinghe* then helped out the motorcyclist who had toppled over with his motor cycle.

When *Rangajeewa* took the parcel from the Appellant's hand, he saw a light blue cellophane bag inside of it. Its top was tied into a knot. To examine its contents, *Rangajeewa* had to untie its knot. The parcel had some brown coloured powder as its contents, and upon smelling and inspection of the substance, *Rangajeewa* suspected it to be heroin with his experience. He put the parcel into his left trouser pocket.

He had then arrested the Appellant and the motorcyclist for possession of and trafficking in heroin at about 10.50 a.m.

The party has then set off to *Madiwela* house of the Appellant in the van, with PC 50142 *Asela* following them with the motorcycle, that had been taken charge after the arrest of its rider. Having reached the premises at 33/25, *Obewatta* Road, *Madiwela*, *Rangajeewa* conducted a search of the two storied house which was being renovated at that time. *Rangajeewa* has issued a receipt confirming the arrest of the Appellant to one of the inmates of this house, *Bogahawattage Siriyawathie*, who was identified as one of the Appellant's aunts.

The search of that house yielded nothing, and the party then set off to *Kalubowila* in order to carry out a search of a relatively small upstair house of the 2nd Accused, who was arrested along with the Appellant. There too the Police made no recoveries. After the two searches, the party returned to their office at 2.45 p.m., subsequent to refuelling the vehicle at *Narahenpita*.

When *Rangajeewa* tested the contents of the parcel with the test kit it was positive for heroin and it had a gross weight of 84.2 grams. He thereafter retied the knot which he untied at the time of initial inspection. The parcel was sealed at that stage in the presence of the Appellant, after obtaining his signature on the identification tag. The 2nd Accused was also present at the time of sealing the parcel.

The productions were handed over by *Rangajeewa* to the Reservist of PNB SI *Samarakoon* on 07.12.2008 at 10.30 a.m., keeping them in his personal locker since its sealing on 04.12.2008. *Samarakoon* handed over the production to Ms *Kanchana Ratnapala* of the Government Analyst Department on 08.12.2008 under reference No. C.D. 3605/08 and Senior

Assistant Government Analyst Ms K. T. *Chandrani* commenced her chemical analysis of its contents on 18.05.2009. Her analysis and report indicated the parcel had a gross weight of 84.2 grams. The brown powder had a gross weight of 82.46 grams and the analysis revealed it contained 7.05 grams of pure heroin.

The Prosecution led the evidence of SI *Wijesinghe* who assisted *Rangajeewa* in the detection of heroin and also of the Officer-in-Charge of the PNB, Chief Inspector *Ludowyk*.

When the High Court ruled that there was a case to answer the Appellant gave evidence under oath denying the charge while claiming it is an introduction after arresting him near the Court premises. He was subjected to a lengthy cross examination by the prosecution.

The trial Court, in delivering its 135-page judgment on 14.10.2015 convicted the Appellant on both counts. He was sentenced to death and in the allocutus the Appellant has reiterated his claim of introduction.

At the hearing of the appeal, learned President's Counsel for the Appellant contended that he was denied a fair trial and the protection of the presumption of innocence by the High Court of *Colombo*. He relied upon the following factors in support of that contention;

a. the prosecution has failed to prove its case beyond reasonable doubt,
b. the trial Court failed to properly evaluate the prosecution evidence for its credibility,
c. prosecution has failed to establish joint possession,
d. prosecution has failed to prove the identity of productions,

e. the trial Court misdirected itself when it rejected the evidence of the Appellant, which was given under oath, by not affording equal weight the Court had attached to prosecution evidence.

f. the trial Court was prejudiced with the adverse media publicity the Appellant received.

The ground of appeal based on the applicability of the provisions of Section 109 of the Code of Criminal Procedure Act No. 15 of 1979 was not urged before us during the hearing of the Appeal but brought up only with the written submissions which only meant to highlight the "material points" taken up before us and supporting judicial precedents. Thus, there was no oral submissions in support of this ground of appeal and no reply by the Respondent.

Of the several grounds the Appellant has urged before us in support of his appeal, the complaint that the prosecution has failed to prove its case and the failure of the trial Court to properly evaluate the prosecution evidence could conveniently be dealt simultaneously to avoid repetition of some of the relevant considerations.

Learned President's Counsel founded his argument that the prosecution has failed to prove its case, on the following factors:-

i. the allegation against the Appellant is a total fabrication by *Rangajeewa* as indicative by the facts that there was no identity of the production detected off the Appellant by the detecting officer. To impress upon this Court of this point, the Appellant invited our attention to page 172, where *Rangajeewa*

admitted that the he did not make any entries on the sealed envelope.

ii. the absence of any signature or thumb impression of the 2nd Accused in the identification tag, that had been included in the sealed parcel sent for analysis is a clear indication that he was never there at the time of sealing and is in support of the Appellant's claim that he was not arrested

iii. the prosecution has also failed to produce several other items said to have been taken charge by the officers at the time of the alleged arrest of the Appellant,

In support of the contention that the trial Court has failed to properly evaluate the evidence presented by the prosecution, learned President's Counsel relied on the following factors:-

i. the prosecution version of events that led to the detection is improbable,
ii. the trial Court failed to take note of a material contradiction in the evidence of *Rangajwa* and *Wijesinghe,*
iii. it was the position taken by the State that *Rangajeewa* entered false entries in the information books.

The contention of the Appellant that *Rangajeewa* did not make any entries on the envelope which contained the detected parcel of heroin

would not make him disentitled to make a positive identification of the same. The reason being, he has delegated that task to SI *Wijesinghe* who fulfilled it in his presence. *Rangajeewa* recognised his own signature and date which appeared on the same envelope along with the signature of the Appellant. The Appellant has identified his signature on the envelope (marked as P3A).

In order to impress upon the falsity of the prosecution version of events, the Appellant relied heavily on the fact that beyond the point of sealing there was no evidence in relation to the 2nd Accused before the trial Court. *Rangajeewa* admittedly failed to obtain the thumb impression of the 2nd Accused on the identification tag although he obtained it from the Appellant, who relies on that fact to challenge the reliability of the evidence of the said witness.

The death of the 2nd Accused occurred when the trial against both of them was pending before the High Court. At that time the trial Court had already decided to proceed with the trial in the absence of the Appellant as it was satisfied that he had absconded after his enlargement on bail. When *Rangajeewa* was giving evidence before the trial Court, the case against the 2nd Accused had already abated due to his death and with the subsequent amendment to the indictment, the trial proceeded on the basis of individual criminal liability of the Appellant. It could well be due to this reason, learned Prosecutor had not probed into this serious lapse by the witness, in the process of sealing the productions which they claim in the "*joint possession*" of both, seeking an explanation from *Rangajeewa* the only person who could provide one.

If the 2nd Accused was alive and after trial was found guilty to the two counts along with the Appellant on the basis of joint possession and joint trafficking, certainly there is merit in what the Appellant submitted. As already noted, after the amendment, the trial proceeded on the basis of the Appellant's individual liability. The trial Court had proceeded to consider the case against the Appellant also on that basis. Therefore, the mere absence of the 2nd Accused's thumb impression or signature on the identification tag does not give rise to a reasonable doubt about the integrity of the production, owing to the claim that it is an "introduction".

The Appellant also contended that the absence of thumb impression or the signature of the 2nd Accused is a clear indication that he was never there at the time of sealing the envelope and it is a factor which is in support of the Appellant's claim that he was not arrested under the circumstances that the prosecution claims. However, the Appellant himself admits that the 2nd Accused was arrested by the PNB Officers, thus negating any significant impact that could result from this lapse by *Rangajeewa.*

The contention of the Appellant, that the evidence of the prosecution in relation to the detection is improbable, is based upon following factors:-

i. that it is not probable to reach *Mt. Lavinia* from Fort, within the time span of thirty minutes, with busy *Galle* Road traffic,
ii. the arrest was made in front of the three wheel stand situated along College Avenue and therefore it is more probable that

the Appellant, who needed to get into a three wheeler taxi to have come there.

iii. *Rangajeewa* knew that the Appellant was due to arrive at the Magistrate's Court of *Mt.. Lavinia* since the case filed by PNB against him was to be called on that day and therefore *Rangajeewa's* claim of a private informant giving out the details of his planned packeting of heroin is a total fabrication.

The improbability of reaching *Mt. Lavinia* in thirty minutes would obviously depend on the intensity of vehicular traffic along the direction of the journey. It is stated that *Rangajeewa* received information about the Appellant's planned activity by 8.30 a.m. As the Learned Deputy Solicitor General submitted, the party left their office only about 10.00 a.m. It is common knowledge by that time in the morning, office and school traffic peak was over. Besides, the officers have travelled out of *Colombo* and not towards *Colombo*. In such a situation, it is not possible to reject the evidence presented by the prosecution on a mere estimation of the intensity of vehicular traffic in the absence of specific evidence to justify such a view.

In relation to the improbability of the version of events relied upon by the prosecution, the Appellant contended that, when considered in the light of the claim of the Appellant that his arrest was made in front of the three wheel stand which is located along College Avenue and not near the Hotel Road intersection as claimed by the prosecution, it is more probable that he was arrested near the taxi stand as he needed to get into a three wheeler taxi in order to return home after the Court case.

The prosecution version is that the Appellant walked along College Avenue until he reached the place where the 2nd Accused was waiting for him with a parcel of heroin. The Appellant, in his evidence claimed that he was walking along College Avenue to go to the taxi stand, when he was stopped by *Rangajeewa* who wanted him to accompany them to record a statement. When the Appellant suggested to *Rangajeewa* that he was arrested near the taxi stand, the witness rejected it.

When the Appellant gave evidence, it was suggested that he need not walk down College Avenue to secure a taxi and all he needed to do was to wait along *Galle* Road to flag down one. It was also suggested to the Appellant by the prosecution that he was arrested near the intersection, he denied it.

The incident of detection and arrest as spoken to by the prosecution took place near the intersection, but along Hotel Road. Clearly the place of arrest as claimed by the two sides differs to each by few meters. It is claimed by the prosecution, the Appellant, having walked up to the 2nd Accused who arrived there on a motorcycle with an extra helmet, had received a parcel containing heroin just before his detection and arrest.

If the prosecution were to fabricate a false version of events, suppressing what actually happened at the time of arrest, there must be a compelling reason for such a fabrication. Shifting the place of arrest by few meters down the College Avenue will not place the prosecution at any advantage over the Appellant. If *Rangajeewa* wanted to concoct a story against the Appellant, he could well have done that. But in this instance, the involvement of the 2nd Accused who brought in several other items of

productions into the detection. Therefore the shifting of place of arrest does not place the prosecution at an advantage nor it places it at a disadvantage. The detection could still be made at the taxi stand.

However, the prosecution evidence is that after the detection, *Rangajeewa* instructed one of his officers to follow them on the motorcycle taken charge from the 2nd Accused after his arrest. The Appellant, although claimed in his evidence, that the 2nd Accused was already arrested and kept in the van, however, admitted in his examnation in chief that the motorcycle followed them on their journey to the Bureau after the detection and thereby lending credence to the prosecution's claim that it was taken into their possession along with the detection and arrest. Nowhere in the Appellant's version did a motorcycle ever feature. Only the prosecution claimed that the 2nd Accused arrived at the intersection in a motorcycle where they were eventually arrested.

The other improbability that was highlighted by the Appellant is based on the fact that *Rangajeewa* knew that the Appellant was due to appear before the Magistrate's Court that morning and therefore the alleged role of the informant is clearly a concoction by the witness. This position was not suggested to *Rangajeewa* by the Appellant during cross examination. After SI *Wijesinghe*'s evidence was concluded, the parties recorded certain admissions under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979. One of the admissions so recorded was that the Appellant was arrested in *Mt. Lavinia* "area". In the said admission

there was no reference to a Court case to which the Appellant was named as a suspect, and it was due to be called on that day.

In making the submissions in support of this point, the Appellant relied on the inference that *Rangajeewa,* being an officer attached to PNB, should have known that the case against the Appellant was filed by PNB was to have called on that day.

This contention needed to be considered against the backdrop of the relevant evidence to this point that had been placed before the trial Court. *Rangajeewa,* in planning the detection upon the information provided by his private informant, was anticipating a situation where the Appellant along with several others would engage in packeting of heroin at a place in *Maharagama* and at the time of receiving information, the Appellant was seen near *Attidiya* culvert.

The informant, by two of his subsequent calls, has shifted the location of the Appellant to *Mt. Lavinia* Courts. This change of location took place only after the police party left their office. Nowhere in the evidence has a reference been made that the Appellant had a Court case to attend. There is no evidence that the Appellant was produced before the *Mt. Lavinia* Court by *Rangajeewa* or any of his team mates at any point of time .

It would certainly be categorised as mere conjecture if the trial Court was to consider any possibility that has no evidentiary support either in favour of the prosecution or the defence. Hence, the contention advanced by the Appellant is not sufficient to create a reasonable doubt in the prosecution case.

The trial Court, after considering the totality of the evidence presented before it decided to reject the version of events as narrated by the Appellant and opted to accept the prosecution evidence as a truthful and reliable account of what happened there at the time of detection.

The Appellant complained about the failure of the prosecution to lead other items that had been taken charge at the time of his arrest. He relied on ***Premaratne v Republic of Sri Lanka*** [1998] 3 SLR 341 in support of this contention.

In ***Premaratne v Republic of Sri Lanka*** (ibid) this Court, having noted that the officer to whom the accused has surrendered the key to the padlocked bag, in which heroin was found, and the chief house holder, in whose house the said bag was recovered, were not called by the prosecution, held that;

> *"There was a noteworthy lacuna in the prosecution case in that no evidence has been led in regard to the other items that were contained in the bag marked as P4. The truth or otherwise of Sumanadasa's could have been tested and evaluated had such evidence been led and if material was elicited about the other contents of the bag alleged to belong to the accused-appellant."*

When the reasoning of this judgment is considered in relation to the circumstances of the appeal before us, we are not inclined to hold with the Appellant that the failure to mark the several items that had been taken charge by the Officers of PNB from the possession of the Appellant and

the 2nd Accused at the time of their arrest would cast a serious doubt about the evidence for the below mentioned reasons.

The list of items are listed out by the witness *Mohottige* who was the Court clerk in charge of productions in the Magistrate's Court of *Mt. Lavinia.* The list of productions consists of parcel sealed by the Government Analyst, a motorcycle and its ignition key, a revenue licence, a drivers licence, an insurance certificate, a deposit slip, a distribution list, five SIM cards, a back pack with some clothes, and a bank card. These items had been handed over to the Court Registry by SI *Samarakoon* of PNB on 11.12.2008.

Admittedly the prosecution did not mark any of these items as productions, although they have itemised them in the indictment as the productions they intend to produce at the trial.

In its judgment, the trial Court considered marking of these items as productions as a meaningless exercise since they are not relevant to the determination of the fundamental issue that must be decided by it. We are in agreement with this view. These production items, if at all, are relevant to add credence to the prosecution evidence. Those items could add consistency and probability to the version of events the prosecution presented. There were no items among these that the Appellant relied on in support of his position. Hence, the non production of these items under these circumstances, could not be equated with that of the situation considered under ***Premaratne v Republic of Sri Lanka*** (supra) .

In supplementing this ground of appeal, the Appellant submitted that the trial Court has failed to consider the material inconsistencies in

the prosecution case. The Appellant invited attention of this Court to the said inconsistencies. One such inconsistency referred to by the Appellant is in relation to the house of the 2nd Accused. The inconsistency relates to how many stories it had. This being a trivial inconsistency will not shake the witness's testimony on its credibility. The other inconsistency highlighted by the Appellant is that *Rangajeewa* did not state that he handed over the productions to *Samarakoon.* In fact *Rangajeewa* said in evidence that he handed over the productions to *Samarakoon* on 07.12.2008 at 10.30 a.m. *Smarakoon* confirms this fact in his evidence.

In dealing with the credibility of these witnesses, the trial Court was mindful of the fact that they are trained and experienced officers and that is a factor it should take note of. In fact the trial Court stated so in its judgment.

The Appellant, in a rather strange attempt to impeach the credibility of *Rangajeewa,* sought to rely on a submission made by the prosecutor in a case where the said witness was apparently cited as a suspect. Learned President's Counsel for the Appellant tendered a photo copy of the said submissions in which apparently a reference had been made to an instance where *Rangajeewa* has made a false entry to show that he was in *Chilaw* when he was seen near *Nalanda* College, Colombo.

There was no objection by the Learned Deputy Solicitor General to this attempted introduction of new material without following the procedure laid down in Section 351 of the Code of Criminal Procedure Act No. 15 of 1979.

We do not think it is appropriate for this Court to consider a submission of a prosecutor in an unrelated case, in determining the issue whether the trial Court has arrived at a correct decision to accept *Rangajeewa's* evidence as truthful and reliable account. This kind of unorthodox methods should be discouraged and frowned upon sending out a clear message to stem a possible influx of similar applications. The matter referred to by the Appellant is still pending before a Court of law on one hand and on the other, it is manifestly unreasonable by the witness, to challenge his credibility in his absence without affording an opportunity to offer his explanation.

The ground of appeal of the Appellant that the prosecution failed to establish joint possession is clearly a misconceived one. In the preceding paragraphs we have dealt with this issue in different contexts. Clearly the prosecution presented its case before the High Court alleging the Appellant as the only accused with its amendment to the indictment upon the death of the 2nd Accused. The word "යුෂ්මතූන්" was amended to read "යුෂ්මතා". The trial Court, at the very commencement of its judgment, clearly indicate that the trial has proceeded on an allegation of conscious and exclusive possession of heroin of the Appellant and not on joint possession. Therefore, the failure to lead evidence in relation to the 2nd Accused and failure to consider the evidence that had been placed in relation to the 2nd Accused by the trial Court has no relevance to the appeal by the Appellant against his conviction which was based on individual liability.

Learned President's Counsel for the Appellant relied heavily on the ground of appeal that the prosecution failed to prove the identity of productions.

It was urged before us that after opening the cellophane bag by untying its top, *Rangajeewa* had put it in his trouser pocket without retying the knot. He has retied the top of the cellophane bag only at the point of its sealing at the PNB. This was after inspecting two houses and spending several hours in carrying out further investigations. Thus, the learned President's Counsel stressed the point that due to this fault on the part of the detecting officer, the integrity of the production was gravely compromised.

In addition, it was contended that after the sealing of the envelope on 04.12.2008, it was kept in the personal locker of *Rangajeewa* without handing it over to the Reservist of the PNB, SI *Samarakoon*. The envelope was eventually handed over to *Samarakoon* by *Rangajeewa* only on 07.12.2008 at 10.30 a.m. The learned President's Counsel was critical on the conduct of the prosecution for its failure to clarify from *Samarakoon* during his evidence as to the reason why the envelope could not be taken charge on 04.12.2008 itself, but sought to introduce hearsay explanation through CI *Ludowyk*, who was not the Officer-in-Charge at that time, by producing entries made by *Samarakoon*.

Learned President's Counsel relied on another alleged gap in the production chain by placing reliance on the judgment of ***Kunja v Attorney General*** in CA 92/2007 - decided on 06.07.2018 where this Court thought it fit to interfere with the conviction, upon the failure of the prosecution to

lead the evidence of the officer who received the productions at the Government Analyst Department from the Police officer. It was contended that the officer who received the parcel at the Government Analyst Department, Ms *Ratnapala* from SI *Samarakoon* was not called by the prosecution before the trial Court, and thereby causing a break of an "*essential link*" in the production chain.

In relation to Court proceedings, learned President's Counsel highlighted that the parcel containing heroin, marked as P5, was never shown to and identified by the Additional Government Analyst Ms. *Chandrani* who claims to have analysed its contents and issued a report. The Appellant relied on the reasoning of the judgment in ***Premaratne v Republic of Sri Lanka***(1998) 3 Sri L.R. 341 in support of his contention.

Further it was submitted by the Appellant that during the trial it was elicited from the Police Officers that the substance they claimed to have detected from the Appellant appeared at that point of time as brown powder is not found in the parcel shown to them in Courts. Instead what was found there appeared as a black sticky Tar like substance. The Appellant was critical of the attempt by the prosecution in offering a clarification to the transformation in appearance of the substance, through the partisan Police witnesses, when an expert's opinion could have been easily presented before the trial Court for its consideration.

In countering the submissions of the Appellant in respect of the delay in sealing and the failure to place a knot, Learned Deputy Solicitor General submitted that during the four-hour gap between the detection and sealing of the parcel containing heroin, there was no opportunity for

any other person to tamper with the production since it remained in the exclusive personal custody of *Rangajeewa.* He further submitted if *Rangajeewa's* evidence is accepted as credible in respect of the detection, then his evidence in relation to the custody of productions is also equally acceptable.

He added that *Samarakoon* who reported to work as PNB Reservist on 04.12.2008, had left for *Wellawaya* on that day to attend Court and only upon his return on 07.12.2008 the sealed parcel that had been kept in the personal locker of *Rangajeewa* was handed over. Here again, the evidence of *Rangajeewa* on the safe custody of productions is acceptable if his evidence is believed on the detection. It was also submitted by the Respondent that the explanation of gradual transformation of the brown powder into a tar like substance is based on the experience of the officers who are regularly involved with the handling of such substances and the prosecution merely relied on the change of physical appearance of the substance rather than its chemical composition, when it led that evidence before the trial Court.

Before this Court ventures to consider the submissions of the parties on this particular ground of appeal in the light of the evidence presented before the trial Court, it is appropriate to undertake a survey of the principles laid down by relevant judicial precedents in relation to the matters that should be proved in support of the production chain.

In ***Perera v Attorney General*** (1998) 1 Sri L.R. 378, it was held that:

> *"It is a recognised 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 Government Analyst. Therefore it is correct to state that the most important journey is the inwards journey because the final Analyst report will be depending on that. The outward journey does not attract the same importance."*

Delivering the Judgment of ***The Queen v Kularatne*** 71 NLR 529, the Court of Criminal Appeal observed that *"... the identity of productions must be accurately proved by direct evidence, which is available, and not by way of inference."*

It appears that these judgments have laid down somewhat of an inflexible and absolute rule in proving the identity of productions and its proper custody.

In English Courts, the question of proof of *"chain evidence"* and the applicable considerations are spelt out, by adopting a more pragmatic approach as seen in a relatively recent judgment of the Court of Appeal in ***DPP v Hawkins*** [2014] IECCA 36, which states thus:

> *"No doubt, in very many cases, the prosecution wish to exercise a counsel of prudence, whereby everything that is capable of mathematical proof will be testified to in that way. This approach, however, does not mean that there is any*

higher standard in criminal cases than that the jury should be satisfied of the provenance of relevant exhibits beyond reasonable doubt and that such facts as are proven beyond reasonable doubt must ultimately be analysed as to whether these prove the guilt of the accused persons beyond reasonable doubt on any or more counts. There can be some instances where the writing of an appropriate name and number on a bag may suffice to establish its provenance to that standard. The failure to call a chain of evidence in between to explain to the jury how that physical evidence came to be in one place when it was found to be an another may not otherwise be necessary. In circumstances where gaps are left by the prosecution, however, these may be such that a reasonable doubt as to the provenance of physical evidence, or their relationship to the proof of the offence, may be absent."

A similar and more accommodative approach was adopted in local jurisdiction as well when one considers the following judicial precedents.

The judgment of ***Prins v Sabaratnam*** 34 N.L.R. 164 deals with a situation where opium and *"ganja"* was detected at *Skinner* Road and the productions were sealed at *Kotahena* Police Station only on the next day. Rejecting the contention advanced by the Appellant on the procedure adopted by the Police in sealing them, *Jayawardene,* J. was of the opinion that:

"After examining authorities, I am of the opinion that there is no imperative or inflexible rule that the articles or things seized should be sealed immediately after seizure in the presence of the accused and before they are removed to the Police Station. The delay in sealing, and informalities in the manner in which the search is conducted, are circumstances to be weighed in the consideration of the case and often diminish the weight of the evidence given as to the possession of the incriminating articles, and have seriously affected the credit to be attached to the evidence in many cases. They do not however preclude the admission of such evidence. it seems desirable, nevertheless, that the articles found should be sealed, wherever practicable, immediately after search in the presence of the accused and before removal to the Police Station. Failure in this respect is not an irregularity fatal to a conviction for unlawful possession, provided that the oral evidence is otherwise satisfactory."

The judgment of a divisional bench of this Court in ***Hultes v Attorney General*** (1989) 1 Sri L.R. 204, considered the question of any discrepancy in the weight and size of the production in a case where possession of heroin was alleged and concluded that they are insufficient to cast a doubt on the evidence of identity of productions.

We must consider the grounds of appeal on the identity of productions, as raised by the Appellant, in the light of the above principles.

The claim by the Appellant that the failure of *Rangajeewa* to maintain the "integrity of the substance" when he took the parcel off the Appellant

poses a serious challenge to the credibility of the production chain needs to be considered first.

This complaint stems from the evidence that *Rangajeewa* did not put a knot after examining the brown powder that was found inside the cellophane bag until he returned to his station after four hours since its detection. The Appellant, in his cross examination of *Rangajeewa* only suggested that he had nothing in possession at the time of his arrest. During his evidence before the trial Court, the Appellant testified that after his arrest near the Courts, he was taken in the van to pump fuel at *Narahenpita*, and thereafter brought back to *Badowita* of *Watarappola* area. Having stopped the vehicle in front of a house, *Rangajeewa* climbed to its roof, after a brief telephone conversation with someone, and picked up a parcel. When the Appellant was produced before the Officer-in-Charge of PNB later in the day, he was told there was heroin.

Thus, it is clear that the Appellant's position is that the parcel containing the prohibited dangerous drug was retrieved from a roof top and was later produced to PNB along with him. The Appellant thereby implies that the parcel containing heroin was introduced on him by *Rangajeewa* whilst being produced at the PNB.

Irrespective of the Appellant's position, the prosecution must prove that what had been analysed by the Government Analyst had been recovered from the exclusive and conscious possession of the Appellant beyond reasonable doubt.

In order to establish this important fact in issue, the prosecution presented oral evidence of *Rangajeewa, Wijesinghe* and *Samarakoon* who

have made contemporaneous records of the detection, sealing, custody and handing over of the prohibited substance.

It is obvious, the prosecution relies on the oral evidence of *Rangajeewa* and *Wijesinghe* to establish the conscious and exclusive possession of 7.05 grams of heroin by the Appellant. As the Learned Deputy Solicitor General submits, if their evidence is accepted by the trial Court in relation to the detection as truthful and reliable account of the sequence of events, then *Rangajeewa's* evidence that he kept the untied parcel of heroin in his trouser pocket until its presentation to the PNB after retying the knot and sealing it with the signature of the Appellant also should be accepted in support of the integrity of the substance. The Appellant did not challenge the evidence of the prosecution that the integrity of the substance of the parcel that had been taken from his possession was compromised by introduction of some other substance.

Similarly, the same logic applied to the period in which the sealed parcel was kept in the personal locker of *Rangajeewa* until it was handed over to the Reservist *Samarakkon* three days later.

Having carefully examined the available evidence on the point, we are satisfied beyond reasonable doubt that the integrity of the substance was not compromised during the brief period it was kept in the trouser pocket of *Rangajeewa* before it was properly sealed and the three-day period during which it was lying in his personal locker. We further hold that there was no basis *"for any suspicion that there had been an opportunity for tampering or interfering with the production till they reach the Government Analyst"* as per ***Perera v Attorney General*** (supra). The prosecution is

bound only to establish proper custody beyond reasonable doubt and not on absolute proof.

The fact that the prosecution has failed to call the Assistant Government Analyst Ms. *Ratnapala* to whom the sealed envelope was handed over by SI *Samarakoon* on 08.12.2008, in the light of the pronouncement of the judgment of ***Kunja v Attorney General*** (supra) should be considered next.

In the said judgment *Wickremasinghe* J stated that " *...one K.P. Chandrani had handled productions at a subsequent stage of inward journey and she had not been called to give evidence. Therefore, the prosecution had failed to establish the chain of the custody of production beyond reasonable doubt.*" Her Ladyship was guided by the unreported judgment of ***Nilam v Attorney General*** - CA 98/2002 where it has been held that "*... the prosecution cannot escape from the responsibility of proving the inward journey of the production beyond any reasonable doubt and establish the inward journey in order to show that the productions were never tampered with at any stage of the inward journey which is much more significant and relevant than the outward journey.*"

The circumstances that are presented in relation to the instant appeal are clearly different to that of ***Kunja v Attorney General*** (supra). The prosecution presented clear and unambiguous evidence before the trial Court, until Ms. *Chandrani* opened the envelope to commence her analysis of its contents on 18.05.2009, its seals were intact as it was received by Ms. *Ratnapala* on 08.12.2008 from SI *Samarakoon* of PNB. Unlike in ***Kunja v Attorney General,*** the prosecution has presented Ms. *Chandrani's* evidence by calling her as a witness.

After consideration of the above, one other matter raised by the Appellant remains to be considered. That is the complaint by the Appellant that although the Government Analyst had analysed the contents, the prosecution had failed to prove P5 through the expert witness. The prosecution marked the substance inside the cellophane bag as P5 through *Rangajeewa.* At the time of the trial, the said substance appeared as a wad of tar although at the time of detection it appeared as a quantity of brown powder. *Rangajeewa* provides an explanation to this transformation in appearance of the substance he detected. According to the witness, the brown powder, over the passage of time, transforms itself into a substance like tar. He therefore claims to have identified P5 with the help of the envelope which contained his signature and the identification tag which also contained signatures of him and the Appellant.

The Government Analyst, in her evidence also identified the same identification tag and envelope by her signatures placed on them. She inserted her signatures (P2X) on these items at the time of her analysis. She also identified the blue cellophane bag in which the substance she analysed was found (P4) on which also she has placed her signature. She identified her signature on the identification tag (P3) that had been inserted along with the blue cellophane bag containing heroin. She confirms that after analysis of the substance using several chemical tests, it was concluded that the brown powder contained 7.05 grams of pure heroin.

It is correct that the prosecution has failed to identify the heroin (now turned to a wad of tar) through the expert witness since P5 was not shown to her. It is the consistent practice of all prosecutors that the quantity of heroin is shown to the expert witness and elicit evidence as to

its identification. Perhaps due to an oversight, the learned prosecutor has not shown P5 to the expert witness.

In the circumstances, this Court must now decide the effect of that failure in relation to the prosecution case.

As referred to in the preceding paragraphs, the substance that had been shown before the trial Court to *Rangajeewa* has undergone physical changes and therefore does not appear to be the substance he detected in the possession of the Appellant in appearance. The brown powder that was there at the time of detection has now transformed itself into a wad of tar like substance. In its strict sense, if not for the associating documentary evidence which contained his signature and handwriting, even *Rangajeewa* might not be able to identify P5. Similarly even if P5 is shown to Government Analyst Ms *Chandrani*, she would identify P5 only, with such supporting documentary evidence. When considered in the light of the said reasoning, although it is highly desirable for the prosecution to have the P5 identified by the expert witness as the substance that he or she has analysed, the mere non-identification of the substance does not necessarily affect the prosecution case adversely. Clearly there was evidence before the trial Court that Ms. *Chandrani* has identified the cellophane bag in which the substance was contained and its identification tag. This evidence is sufficient to decide the fact in issue before the trial Court

In expanding his submissions on this point, learned President's Counsel complained that the trial Court had quite mistakenly considered that P5 was proved by the prosecution through the expert witness. Clearly it is an erroneous assumption that P5 was identified by the expert witness

on the part of the trial Court. However, in view of the above-mentioned considerations, we are of the view that this erroneous conclusion reached by the trial Court would not have any adverse effect on its judgment, since clearly it had not prejudiced the Appellant. Hence, we hold that non-identification of P5 by the expert witness, does not create a reasonable doubt as to the identity of the production. There is no possibility of the Appellant's interests being prejudiced due to this obvious lapse on the part of the prosecutor and the mistaken view of fact by the trial Court.

Another complaint, connected to the same issue, presented before us by the Appellant was that the tar like substance has not been explained through the expert while an attempt was made through *Rangajeewa* to explain the transformation in appearance of the substance detected. The evidence of the witness reveals that he too received specialised training in the detection and identification of the dangerous drugs including heroin. He claims to have field experience, over a period of seven years, as an officer of the PNB.

In any event, he has claimed that brown powder would over the years transform itself into a tar like substance and in this particular instance too, the production marked P5 has undergone that natural transformation. The prosecution did not elicit from this witness of the chemical details of this transformation but limited it to the mere physical changes that occur to brown powder containing heroin, over time. Therefore, we do not consider the evidence of *Rangajeewa* as a scientific explanation for the changes that had taken place in the substance he has detected some seven years back. It would have been most appropriate if the prosecution has provided a scientific explanation for the appearance of

the substance in P5, through the opinion of an expert, under Section 45 of the Evidence Ordinance. This attempt by the prosecution to provide an explanation through *Rangajeewa* is something akin to a police officer smelling the barrel of a gun and stating that it had been fired recently. It is a mere observation that needed no expertise in a particular field.

Moving our attention to the evidence of the Appellant that had been placed before the trial Court, learned President's Counsel contended that it has misdirected itself to reject the evidence of the Appellant, which was given under oath, by affording unequal weight with the evidence of the prosecution, thereby acting contrary to the principle laid down in the unreported judgment of this Court, ***Sisira Bandula alias Mahatun v Attorney General*** CA 122/2006 - decided on 09.10.2014, where *Gooneratne* J observed that;

> *"It is very unfortunate that this Court has to observe that the trial Judge has not considered and given his mind to the defence case properly. If there were contradictions, it is the duty of the trial Judge to deal with them in the same manner he dealt with the prosecution case and decided as to whether such infirmities go to the root of the defence case. The prime duty of the trial Judge is to weigh the evidence correctly and decide whether the defence case is capable of creating a reasonable doubt in the prosecution case. Instead he has allowed himself to be influenced by importing his personal knowledge. However good or bad the witness or whether he has a bad track record should be forgotten and not the*

deciding factor. Trial Judge should only concentrate on the evidence before Court."

It is submitted that the trial Court did not consider the Appellant's evidence on its credibility and if acceptable whether it would create a reasonable doubt in the prosecution case. It was also contended that the trial Court has compared the prosecution case along with that of the Appellant, an approach that had been frowned upon by this Court in ***James Silva v The Republic of Sri Lanka*** (1980) 2 Sri L.R. 167, with the following pronouncement;

> *"It is a grave error of law for a trial Judge to direct himself that he must examine the tenability and the truthfulness of the evidence of the defence in the light of the evidence led by the prosecution. Our criminal law postulates a fundamental presumption of legal innocence of every accused till the contrary is proved. This is rooted in the concept of legal inviolability of every individual in our society, now enshrined in our Constitution. There is not even a surface presumption of truth in the charge with which an accused is indicted. Therefore to examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence."*

The trial Court, in its impugned judgment has considered the prosecution and defence evidence for its credibility and then arrived at the

conclusion that the evidence of the Appellant is unworthy of any credit and rejected the same. In relation to the prosecution evidence it has arrived at the conclusion that they are worthy of credit and therefore could be acted upon. In view of the complaint by the Appellant that his evidence was rejected on the *"unequal"* consideration, we consider it appropriate at this juncture to examine the reasoning of the trial Court in rejecting his evidence.

In its 135-page judgment, the trial Court has devoted 56 pages to consider the evidence of the Appellant which has spread over 532 pages of proceedings. The trial Court has applied the tests of spontaneity, consistency and probability in evaluating the Appellant's evidence in order to determine his testimonial trustworthiness. The trial Court noted that the Appellant's evidence is inconsistent, improbable and false. Learned President's Counsel was critical that during the Appellant's evidence, the prosecution has cross examined as if the matter before Court was a *"money laundering charge"* and as a result, many irrelevant considerations were brought in as evidence which tended to cloud the mind of the trial Judge.

The Appellant was admittedly subjected to a session of intense cross examination by the prosecution which continued over several days.

Coomaraswamy in his treatise ***The Law of Evidence*** (Vol.II, Book 2, page 722) identifies two categories upon which cross examination of a witness is to be conducted. He states that *"facts which are relevant to the issue"* and *"facts which affect the credibility of the witness"* as those two categories. He further lays down the following 10 areas (at p.723) under

which the cross examination as to facts affecting credibility could be conducted since *"relevance to credit is a very elastic concept"*;

> *"(a) The knowledge of the witness of the facts to which he testifies and his means of knowledge;*
>
> *(b) His Intelligence, and powers of memory and perception;*
>
> *(c) His disinterestedness or bias;*
>
> *(d) His integrity;*
>
> *(e) His veracity;*
>
> *(f) His understanding of the fact he is bound to speak the truth by his oath or affirmation;*
>
> *(g) His opportunities of observation;*
>
> *(h) His reasons for recollection or belief;*
>
> *(i) His experience and any special circumstances affecting his competency to speak to the particular case,*
>
> *(j) The errors, omissions, contradictions, and improbabilities in his testimony."*

The Appellant, although founded his complaint on general terms, citing them as irrelevancies, however did not make any specific references to evidence. When the cross examination of the Appellant is considered it has spread from the detection to his acquisition of considerable wealth

consisting of houses in the more affluent residential areas of *Colombo* city within a comparatively short span of time, a fleet of luxury vehicles and millions of Rupees in cash kept in lockers of commercial banks, which he attributed to as income derived from the sale of his share of coconuts from a 15 acre estate, sale of eggs and pineapple. He also claims his wife was engaged in money lending business which yielded a substantiate profit He was cross examined on his stint of self-exile in India and Pakistan due to perceived threat to his life from then Member of Parliament *Duminda Silva* with whom he maintained a relationship which deteriorated when he wanted his money back. During cross examination, the Appellant, in order to impress upon Court of the nature of his relationship with *Duminda Silva*, claimed that Silva introduced him to another Member of Parliament *Sarana Gunawardana*, in order to secure a contract for a fuel distribution depot, during the period during which their relationship flourished. He was also cross examined on his knowledge about the continuing drug trafficking activities of one *Siddique* in India whilst being under his care.

Given the accepted broader view of its scope, the approach adopted by the prosecution in cross examination of the Appellant could not be faulted, if it had not transgressed beyond the limitations that have been imposed in order to protect an Accused in his capacity as a witness for the defence. There were no such complaints by the Appellant.

The specific instance that was highlighted by the Appellant was that the prosecution cross examined him on the detection only once which could be found at p. 1027 although he was cross examined extensively on many other matters. However, a closer examination of the proceedings of the Appellant's evidence revealed that this is not the case. The prosecution

has cross examined the Appellant on the incident at pages 897, 1007, 1012 and 1022, in addition to page 1027.

It is our view that the rejection of the Appellant's evidence as false by the trial Court is justified. In doing so it has considered them under the accepted tests on credibility.

The fact in issue before the trial Court was whether the Appellant consciously and exclusively possessed 7.05 grams of heroin on 04.12.2008 at *Mt. Lavinia.*

The Appellant, in his evidence claimed that his arrest did not take place at the place where the prosecution alleged, but at a point several meters up in the College Avenue near the taxi park. In relation to the detection, his position is he did not possess any heroin, and it was introduced to him at the PNB by *Rangajeewa,* who retrieved a parcel from a roof top of a house in *Badowita.* He further elaborated that when he was kept in front of that house one of his aunts had given him a bottle of water to drink. He further claimed that the 2nd Accused, having already been arrested by PNB Officers, was there in the van when he was put into it after his arrest near the taxi park.

It is strange that the Appellant did not put any of these positions he had explained so descriptively in his evidence in relation to the detection by *Rangajeewa* and the arrest of the 2nd Accused when the learned defence Counsel cross examined *Ranjeewa* and *Wijesinghe.* This evidence is important to decide the fundamental fact in issue before the trial Court. He only suggested to *Rangajeewa* that he was arrested near the park. No

suggestion was made to *Wijesinghe* on the introduction of drugs, except to suggest that nothing was recovered from the Appellant at the time of his arrest. Therefore, the claim of introduction of drugs is clearly an afterthought by the Appellant, when he raised it at the very end of the trial for the first time.

The complaint by the learned President's Counsel was that the trial Court has compared the evidence of the prosecution and defence in deciding his guilt erroneously as per the judgment of ***James Silva v The Republic of Sri Lanka*** (supra).

In consideration of the manner of presentation of evidence in the judgment by the trial Court, we are of the view that it adopted the following approach, that had been recommended by the said judgment, in following decision of the Privy Council in ***Jayasena v The Queen*** 72 N.L.R. 313.

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalising and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charges or not guilty.*

The contention that the trial Court was prejudiced with the adverse media publicity the Appellant received has no merit. It has not been brought to the notice of the trial Court of any such adverse media references to the Appellant during the pendency of his trial. The trial

against the Appellant has proceeded before a Judge and in the absence of a jury, whose members lack any legal training unlike professional Judges. This ground would have some relevance if the trial was before a Jury.

In the concluding paragraphs of the judgment under the heading "චෝදනාවන් ඔප්පු වී ඇතිබව", the trial Court has considered the issue whether the Appellant had the conscious and exclusive possession of heroin and having satisfied itself of that issue, proceeded thereafter to convict him on the two counts. This conviction is based on the evidence of the witnesses who have given evidence before the trial Judge who delivered the judgment. In accepting their evidence as truthful and reliable, the trial Court had clearly had the benefit of observing the demeanour and deportment of the witnesses when they gave evidence before it.

When a trial Court decides a question of fact and credibility of witnesses, on that demeanour and deportment the Appellate Courts are slow to interfere with such determinations, as per the judgment of ***Attorney General v. Theresa*** (2011) 2 Sri L.R. 292.

The several grounds of appeal as raised by the Appellant are therefore clearly without merit.

This prosecution relied on the judgment of ***Ekanayaka v Attorney General*** CA 203/2013 - decided on 02.09.2015, cited the judgment of ***Prasad and Another v State (Delhi Administration)*** where it was iterated that:

"A criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties."

It is our view that the trial Court has adequately fulfilled its duty by the Appellant, the State and the society at large in arriving at a finding that has evidentiary support. We concur with the conclusion of the trial Court that the prosecution has proved its case beyond reasonable doubt. Accordingly, we affirm the conviction of the Appellant and the sentence of death imposed on him.

The appeal of the Appellant is therefore dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL