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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article 138 (1) of the Constitution of the Democratic socialist Republic of Sri Lanka and Section 14(b) of the Judicature Act No 2 of 1978 as amended

HCC 345-346-19

HC of Colombo Case NO: HC-254-2017

The Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Vs

Mohommed Osahir Mohammed Gadafi

No: D/03/02 Abdul Hameed Street

Colombo 12

ACCUSED

And now in Between

Mohommed Osahir Mohammed Gadafi

No: D/03/02 Abdul Hameed Street

Colombo 12

(Presently on remand prison)

ACCUSED -APPELLANT

Vs

The Democratic Socialist Republic of Sri Lanka.

COMPLAINAT- RESPONDENT

Before: **B. Sasi Mahendran, J.**
Amal Ranaraja, J

Counsel : Palitha Fernando, PC with Randunu Heellage for the 1st Accused-Appellant
Neranjana Jayasinghe with Pravindika Kularathne for the 2nd Accused- Appellant
Shanil Kularatne, ASG, for the Respondent

Written Submissions: 23.09.2020 (by the Accused-Appellant)

On 27.04.2021 (by the Respondent)

Argued On: 06.03.2026

Judgment On: 19.05.2026

JUDGEMENT

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Colombo for being in possession and trafficking Heroin under Section 54A (b) and (d) of the Poisons, Opium and Dangerous Drugs Ordinance No. 13 of 1984 as amended.

At the trial, the prosecution presented evidence through nine witnesses and marking productions P1-P7 and thereafter closed its case. The Appellant, in his defence, made a dock statement.

Upon conclusion of the trial, the Learned High Court Judge, by judgment dated 11.10.2019, found the Appellant guilty and imposed the death sentence.

Being dissatisfied with both the conviction and the sentence imposed by the Learned High Court Judge, the Appellant preferred an appeal before this Court, articulating the following grounds in support of his challenge.

1. There had been a total inadequacy in the analysis of the case for the prosecution in the light of the defence taken up.
2. The infirmities of the case for the prosecution and the obvious improbabilities have not been adequately considered by the Learned High Court Judge.

3. The Learned High Court Judge has not considered the evidence led on behalf of the defence adequately to conclude whether it raises a reasonable doubt on the version of the prosecution.
4. The Learned High Court Judge failed to set out the reasons adequately for rejecting the defence version in preference to the prosecution version as required by section 283(2) of the Code of Criminal Procedure Act.
5. Due to one or more of the reasons set out above, the Accused Appellant had been denied a fair trial guaranteed by Constitutional provisions.

The principal defence advanced by counsel for the appellant was that the conduct of PW1 was not probable.

The facts and circumstances of this case are as follows;

According to the testimony of PW1, Manjula Sanath Kumara, on 7th January 2016, he was engaged in official duties together with other officers, utilizing a private van. The witness stated that he could not recall the registration number of the van, which he explained belonged to one of his friends. He further testified that he and the officers departed from the police office at 21:30 hours.

During the course of these duties, PW1 received information from a private informant that an individual named Gaddafi, approximately forty years of age, was transporting a parcel of heroin from Wellampitiya for delivery to another person. The informant described the suspect as wearing brown trousers with balloon pockets and a blue short-sleeved shirt, and indicated that he was expected to travel through the Kettarama garbage dump. Acting upon this information, PW1 and the team proceeded in the van from the Kettarama temple to the front entrance of the dump. PW1 was stationed at this location, where he observed the individual described by the informant approaching

As the appellant approached the temple gate where the officers were stationed, PW1, together with PW2, intercepted him. At that moment, PW1 observed that the appellant was dressed in the very attire described by the informant. Upon

introducing themselves, the officers inquired into his identity, which was confirmed to be Mohammed Gaddafi. According to the testimony, a search was immediately conducted. During this search, PW1 discovered two brown parcels contained within a pink cellophane envelope, located in both pockets of the appellant's trousers. The contents were identified as heroin.

A further search revealed a sum of Rs. 28,000 in the appellant's possession. The appellant was thereafter placed under arrest at approximately 23:20 hours. He was subsequently taken to the Police Narcotics Bureau at around 23:50 hours, with the productions remaining in the custody of PW1 until they were formally handed over. After the productions were weighed using an electronic scale. It was observed that the powder contained in both parcels amounted to 321 grams and 690 milligrams. The productions were thereafter properly sealed. At 00:45 hours, under PR No. 26/16, the productions were brought to the Maligawatta Police Station with the Appellant and handed over to PW3, PC 64809 Herath. The statement of the suspect was subsequently recorded by this witness at 06:40 hours on 08.01.2016.

During cross-examination, the witness confirmed that the time of departure was recorded as 21:30 hours in the VIB book. He further stated that other records maintained at the police station could be examined and produced if required. Accordingly, upon the request of the defense, the witness was directed to produce the relevant books on the following day.

It was admitted that, according to the records in his possession, he had left the office at 8.30 a.m. on 07.01.2016 and returned at 21.15 hours on the same day.

Page 137 of the brief,

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The witness stated that, instead of Itikaka, a person named Priyadarshana alias Abdul Rahuman and another individual named Mohammed Rizvi were arrested at 7.32 p.m. The witness categorically stated that after arriving at the Maligawatta Police Station at 20.15 hours, he left again at 21.30 hours.

When the accused was cross-examined regarding the manner of travel, the place of detention, the time of arrest, and the vehicle used, the defense specifically questioned the witness about the absence of recording the mileage and the number of the vehicle. Further, the witness stated that the police department had not paid for the van used in the raid, and that it was a vehicle obtained through personal funds. The witness explained that private vehicles are sometimes used in order to avoid identification and that since the location of the raid was only about one kilometer from the police station, no high cost was involved.

It was further put to the witness that it was improbable to claim that the appellant came on foot when there was a possibility of a three-wheeler being used along Apple Watta Road. The witness explained that when a three-wheeler is used to deliver a parcel of heroin, the driver would inevitably become aware of the transaction, and therefore, smugglers often act in such a manner. The incident in question occurred at midnight. The defence suggested that, based on information obtained from one suspect, Rizvi, who was arrested during a morning raid, the Appellant was subsequently arrested while having lunch at his residence with his son. This suggestion was denied by the witness. The issue before this Court is whether the version of PW1 is probable.

It should be noted that on the second occasion, the officer left at 21.30 p.m. without having received any specific information and after a 12-hour duty. The purpose of such a departure is unclear. Moreover, when leaving, he stated that he had spent his own money on the vehicle used. According to the informant, the appellant is said to have arrived in a three-wheeler and then proceeded on foot. The question arises as to how the informant could have known these details late at night.

Further, during the first arrest, the productions were not taken to the Police Narcotics Bureau for weighing but instead brought directly to the police station. On the second occasion, however, the productions were weighed at PNB, yet no explanation was provided for this action. The absence of a reasonable explanation raises serious doubts as to the probability of the prosecution's version of events.

Section 11(b) of the Evidence Ordinance reads as follows;

> "Facts not otherwise relevant are relevant –
>
> > (b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

The primary issue for consideration in this appeal is whether PW1's witness testimony is improbable. If so, the Learned High Court Judge failed to consider the test of probability regarding the prosecution's version.

Probability, in the context of legal matters, is defined as follows:

According to Murray's English Dictionary, probability means "*the appearance of truth or likelihood of being realized, which any statement or event bears in the light of present evidence."*

Sarkar and Monohara, in their book "***SARKAR ON EVIDENCE"*** (Fifteenth Edition) on page 71, state,

> *"...probability is meant the likelihood of anything being true, deduced from its conformity to our knowledge, observation, and experience. When a supposed fact is so repugnant to the laws of nature that no amount of*

evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible."

According to E.R.S.R. Coomaraswamy, in "**The Law of Evidence Volume** II Book 02" on Page 1053,

"The test of improbability has been described as essential inconsistency. There may be facts which may show it to be impossible or so highly improbable as to justify the inference that it never occurred."

In ***Bharwada Bhoginbhai Hirjibhai vs State of Gujarat*** 1983 AIR HC 753; A.P. Sen and M.P. Thakkar J observed that,

"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

In ***Wickremasuriya v Dedoleena and Others*** [1996] 2 S.L.R. 95, on page 98, His Lordship Jayasuriya J. observed that;

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

A similar situation with regard to high improbability was considered by Her Ladyship Deepali Wijesundera J in ***Selvanayagam Carmel Jenova Vs. The Attorney General,*** CA Case No. 107/2011 decided on 13.10.2021 and held that;

"The grounds of appeal urged by the learned counsel for the appellant are as follows. That the version of the prosecution is highly improbable and that the learned High Court Judge had failed to apply the test of probability and improbability in evaluating the evidence. The appellant's counsel submitted that it is highly improbable to believe that when six police officers were searching a small house for the appellant to take address alleged to have contained heroin in the pocket and put it in to a bucket. If the appellant

took the said dress from the clothes line and put it into a bucket as claimed by the prosecution this would have drawn their attention to the dress which is not the conduct of a wrong doer. I find this improbable. There are more than enough places in a house to conceal such articles."

When we analyse the evidence of PW 1, he has stated that on the day in question, he left the police station at 8.15 a.m. to conduct raids, made several arrests, and returned at 8.15 p.m. Later, he claimed that he left the station again at 9.30 p.m., and there is no explanation or specific information as to why he had to go again. It should be noted that in his examination-in-chief, he did not assert that he had been continuously on duty from 8.00 a.m. until 8.15 p.m.; this fact only emerged during cross-examination.

It should be noted that is highly improbable that a police officer would work for twelve consecutive hours and then, within an hour, resume duty for another assignment. Such conduct might be conceivable if urgent information had been received, but according to his own evidence, the information regarding the Accused Appellant was received only at 11.30 p.m., while he was already on mobile duty. This improbability should have been carefully weighed by the Learned High Court Judge, but he has failed to do so.

Serious doubts also arise regarding the vehicle allegedly used for mobile duty. It is stated that a private vehicle was used for the raid, yet the number of the vehicle was not recorded. Though Departmental regulations require mileage to be noted, no such entry exists. Sub Inspector Manjula even claimed that he paid for the van with private funds. These irregularities cast grave suspicion on the prosecution's version and lend further weight to the defense position that the arrest did not occur as alleged.

Upon applying the test of probability and the test of improbability to the aforementioned facts, it becomes evident that the evidence presented through the prosecution narratives cannot be deemed credible.

The other point to consider is the rejection of the evidence of the Appellant by the Learned Trial Judge. The Learned High Court Judge rejected the evidence of the

Appellant on the basis that the Appellant has the burden to prove the facts he has stated.

The Accused Appellant gave evidence on oath and explained that he was at his residence in Wellampitiya, having lunch with his son, when he received a telephone call from Razmi, a suspect who had been arrested earlier that morning by the police. Razmi inquired about his whereabouts, and upon being told that the Appellant was at home, Razmi said he would come there. About half an hour later, the Appellant received another call, and when the door was opened, Razmi appeared along with five others, who then arrested him.

Our Courts have given the following guidelines with regard to the evaluation of the evidence by the Trial Judge.

1. If the evidence of the accused is believed, it must succeed.
2. If the evidence of the accused creates a reasonable doubt in the prosecution case, the defence of the accused must succeed.

However, in the instant case, our view is that the Learned Trial Judge has failed to consider the guidelines set out above. Nevertheless, the Judge failed to properly appreciate the testimony of the Appellant and his son, who both stated that the arrest took place at their residence in Wellampitiya immediately after the two calls were received from the suspect.

As I pointed out earlier, there are reasonable doubts in the prosecution's case. But the Learned Trial Judge simply rejected the Appellant's version without giving reasons.

When I consider all these matters in entirety, I am of the view that the Prosecution has not proved its case beyond reasonable doubt, and improbabilities demonstrate that the prosecution's narrative lacks credibility and should not have been accepted without careful scrutiny.

Thus, we set aside both the conviction and the sentence and acquit the Accused Appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL