

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

**In the matter of an Appeal in terms of Section 331
of the Cade of Criminal Procedure Act No. 15 of
1979**

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs,

Bulathwelage Upendra Premarathne,

No.34/2, Baseline Mw,

Borella.

CA/288/2006

ACCUSED

H.C Colombo Case No 1382/2003

And,

Bulathwelage Upendra Premarathne,

No.34/2, Baseline Mw,

Borella.

ACCUSED-APPELLANT

Vs,

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT- RESPONDENT

**Before : Vijith K. Malalgoda PC J (P/CA) &
H. C. J. Madawala**

Counsel: Amila Palliyage with Eranda Sinharage for the Accused-Appellant,
Dappula de Livera PC, ASG for the A.G.

Argued On: 14.09.2015, 15.09.2015

Order On: 13.11.2015

Order

Vijith K. Malalgoda PC J (P/CA)

The Accused-Appellant was indicted before the High Court of Colombo for procession of 0.896 grams of Heroin, an offence punishable under section 54A (d) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No 13 of 1984.

The arrest pertaining to this case was carried out by the officers of the Police Narcotic Bureau and IP Nihal Perera and PC 17377 Ranil from the Police Narcotic Bureau had given evidence at the trial with regard to the said arrest.

The prosecution version of this case can be summarized as follows,

On 31st July 2001 when IP Nihal Perera was at the Police Narcotic Bureau, at 15.40 hours PC17377 Ranil had informed him of an information he received through an informant. The said information refers to a drug dealer from Kithulwatta Lane, Borella.

The said information was recorded in the packet note book of PC Ranil and being satisfied with the said information IP Nihal Perera decided to carry out a raid with the assistance of PC Ranil and a team of Police Officers from the Police Narcotic Bureau. At 15.50 hours a Police Party consist of SI Amunugama, SI Rangajeewa, PC 29082 Kulathunga, PC 17377 Ranil, PC 38219 Ruwanpura and PC 17857 Pradeep left the Police Station in a police vehicle driven by Police Driver 34521 Herath. They first went near the main gate of the General Cemetery, Borella and met the informant of PC Ranil. IP Nihal Perera and PC Ranil had got down from police vehicle in order to meet the informant.

The information PC Ranil has received from the informant was that Upendra of Kithulwatte Lane will go out with a quantity of drugs and the informant could show him, once he is leaving with the drugs. The informant accompanied the two Police Officers, IP Nihal Perera and PC Ranil and proceeded on the Kithulwatta Lane up to a garage. Opposite the garage was a flat and the garage was adjacent to a house. The house had a separate entrance to the road. There were people moving around and the two Police Officers along with the informant remained for sometime in that area.

A person came out from the entrance of the house which was adjacent to the garage and the informant pointed out the said person as the drug dealer. The two Police Officers rushed up to the entrance of the said house and searched the person who came out.

IP Nihal Perera had recovered a pink coloured cellophane bag from the right hand of the said person. Inside the bag, there was a powder which they suspected as Heroin and the said person was arrested after explaining the reasons for his arrest.

After the said arrest IP Nihal Perera had got down the police vehicle and thereafter returned to the Police Narcotic Bureau.

The productions were weighed and sealed at the Police Narcotic Bureau after the field test which conformed that the suspected powder contained Heroin. The weight of the said parcel was 11 grams and 500 milligrams.

The main argument of the counsel for the Accused-Appellant before this court was that "the Learned High Court Judge had erred in law by failing to consider the evidence of the Accused-Appellant which creates a reasonable doubt on the prosecution case."

It is important to note at this stage that the counsel for Accused-Appellant did not challenge the evidence of the two prosecution witnesses who carried out the said investigation and also the custody of production and the production chain. Therefore I will not be dealing with the said evidence at this stage.

The Accused-Appellant preferred to give evidence from the witness box and during his evidence he took up the position that he was having a garage at no. 69, Kithiulwatta Lane and his house was adjacent to the said garage. There was no gate to the said garage but there is an entrance to the house from the garage, from the back side of his house. Opposite the garage and his house was a three storied flat.

On 31st July 2001 around 10.00 am a jeep came near his house and the garage and same people got down from the jeep had entered his house as well as the garage. At that time he was involved in removing a gear box from a vehicle and IP Nihal Perera who came up to him, had ordered him to stand up. At the same time they recovered a packet of Heroin from a person who was working in his garage. The said person is a drug addict. They assaulted the said employee as well as the Accused-Appellant and took him to the Police Narcotic Bureau without even allowing him to change his cloths.

After recording a statement from him, he was forced to place his thumb impression to an envelope. The Learned Trial Judge in his judgment at pages 217 to 219 considered the evidence given by the Accused-Appellant on oath. I observe that the Learned Trial Judge was mindful of the evidence given by the Accused-Appellant on oath and had referred to his evidence to the effect that the police party had searched one of the employees of the Accused-Appellant and recovered a packet of Heroin from his custody, that he knew IP Nilhal Perera prior to the detection over an incident between a woman and IP Nihal Perera, IP Nihal Perera was not in good terms with him over the above incident, and also several Police Officers entered his house and garage on this occasion and observed the fact that none of those incidents were suggested to any of the witnesses by the Accused-Appellant. The Learned High Court Judge has observed them as vital lapses in the defence and further observed that the said vital information has come out only in the evidence of the Accused-Appellant for the 1st time.

When referring to the above, Learned Trial Judge had further observed that the above version is not supported by any evidence led at the trial and this was challenged by the Learned Counsel for the Accused-Appellant and submitted that the Accused-Appellant is not bound to prove anything before court and therefore learned Trial Judge had I misdirected himself by imposing an additional burden on the Accused- Appellant. I observe that the Learned Trial Judge had not sifted the burden on this occasion or imposed an additional burden on the Accused- Appellant but, only referred that the said material is coming forward for the 1st time without any proof and therefore that cannot be consider as a misdirection by the Learned Trial Judge.

I observe that the Learned Trial Judge had correctly rejected the evidence given by the Accused-Appellant and in the absence of any other grounds of Appeal, I see no reason to interfere with the decisions of the Learned Trial Judge to convict the Accused-Appellant.

Learned Additional Solicitor General submitted that the Accused-Appellant was imposed the minimum sentence by the trial judge and in view of the previous conviction admitted, the court should have imposed a heavy sentence on him. Based on the above submission he moved court to consider enhancing the sentence already imposed.

However I observe that the Learned Trial Judge when imposing the sentence, was mindful of the fact that the Accused-Appellant had committed this offence during the suspension of a conviction in Magistrate Court, Maligakanda case No. 31964 and made order the said sentence of 12 months R I to operate. We see no reason to interfere with the sentence already imposed by the Learned Trial Judge.

I therefore dismiss this Appeal.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE COURT OF APPEAL

Appeal is dismissed.