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

**In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.**

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

**Complainant**

**Court of Appeal**
**Case No. 235/2012**

**Vs,**

Warnakulasuriya Siril

**Accused**

**And Now Between**

Warnakulasuriya Siril

**Accused-Appellant**

**High Court of Colombo**
**Case No. 1978/2004**

**Vs,**

The Attorney General of the Democratic Socialist Republic of Sri Lanka

**Complainant-Respondent**

**Before** : **S. Thurairaja PC, J &**
**A.L. Shiran Gooneratne J**

**Counsel** : Gayan Perera for the Accused-Appellant
Yasantha Kodagoda PC, ASG with for the Complainant-Respondent

**Judgment on** : **08th June 2018**

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## Judgment

## S. Thurairaja PC J

The accused appellant (hereinafter sometimes referred to as the appellant) was indicted by the Hon. Attorney General for possessing 3 grams of Diacetyl Morphine. The trial proceeded at the High Court of Colombo and the learned trial judge found the appellant guilty.

The appellant being aggrieved with the said judgment the appellant preferred an appeal to the Court of Appeal and submitted the following grounds of appeal:

1. Discrepancies between prosecution witness number 1 and 2 were not considered by the trial judge.
2. The appellant deprived of fair trial by judge referring the information book of the police.
3. Dock statement and the defence witness of the appellant was not considered.

It is noted that the counsel for the appellant moves court to send this case to the High Court for re-trial.

Primarily I wish to consider the second ground of appeal.

The learned trial judge has perused the police notes while writing the judgment to vitiate the contradictions which amount to a misdirection of law.

The learned trial judge has mentioned in his judgement that he referred the police investigation notes for a limited purpose.

Article 13 (3) of the Constitution primarily makes provision for a fair trial, it is strengthened by other laws.

> *(3) Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.*

Code of Criminal Procedure Act (CCPA) 15 of 1979 makes provision for a judge to refer investigation notes for limited purpose.

> *(4)* ***Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial****. Save as otherwise provided for in section 444 neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply :*

*Provided that where a preliminary inquiry under Chapter XV is being held in respect of any offence, such statements of witnesses as have up to then been recorded shall, on the application of the accused, be made available to him for his perusal in open court during the inquiry.*

*(Emphasis added)*

In the present judgement the learned trial judge had clearly understood the provision made under Section 110(4) of the CCPA.

I reproduce the relevant portion of the Judgment and it's translations for easy reference

**අධිකරණය මෙම පරස්පර විරෝධතාවය නඩුවේ මූලයට බලපාන පරස්පර විරෝධතාවයක්ද යන කරුණ ගෙන බැලීම සඳහා අපරාධ නඩු විධාන සංග්‍රහය පනතේ 110 (4) වගන්තිය යටතේ පැ.සා. 4 ගේ විමර්ශන සටහන් පරීක්ෂා කරන්නට යෙදුනි.**

**පැ.සා.4 තම විමර්ශන සටහන්වල හෙරොයින් පැකට් කිරීම සඳහා නිවසට රැගෙන එන අයෙකු පිළිබඳව සටහන් තබා ඇති ආකාරය පෙනී යන හේතුවෙන් පැ.සා.. 1ගේ හා පැ.සා. 4 ගේ සාක්ෂි අතර ඇති එකී පරස්පර විරෝධතාව නඩුවේ මූලයට බලපාන පරස්පර විරෝධතාවයක් ලෙසට නොසලකම්. ( කෙසේ නමුත් විමර්ශන සටහන් සාක්ෂි ලෙස ගත නොහැකි බව සටහන් කර තබම් )**

Translation of the above stands as follows;

*In order to ascertain whether the said contradiction affects the root of the Case, Court tends to examine the Investigation Notes of PW 4, under Section 110 (4) of the Criminal Procedure Code.*

*For the reason that, from the said Investigation Notes of PW 4, it appears that the individual is a person who took Heroin to his residence for the purpose of making packets of the substance, I do not consider that the contradiction in the testimonies of PW 1 and PW4, affect the root of the Case.* ***(However, I wish to record that the Investigation Notes cannot be taken as evidence).***

*(Emphasis added)*

Considering the entire judgment, we find that the learned trial judge has perused the investigation notes to clarify a point which suggested by the counsel for the appellant in the original court. We do not find that the learned trial judge had used the materials in the investigation notes as evidence. Accordingly, we conclude that the act of the trial judge is permissible under Section 110(4) of CCPA therefore we find no merit in this appeal.

Before we proceed to consider the other two grounds it would be prudent to refer the facts of the case briefly.

On the 30th of November 1998 Police Sargent 2269 Weerasinghe who was attached to the Police Narcotics Bureau (PNB) received an information through his private informant that a person taking heroine for packing. Being satisfied with the information he reported to his superior Inspector of Police (I.P) Sunil Padmasiri Perera he then formed up a team consisting of 9 members proceeded to Vauxhall Street, Colombo 2. for the raid. It was around 2235hrs they went to the place around 2215hrs and laid an ambush. The informant also stayed with them. While they were waiting they found three people were coming on the road. The informant identified the present accused and left the scene. Police officers approached all three people and apprehended them. This appellant confronted the PNB official and abused them in obscene language. PNB officials identified themselves and IP Perera searched the appellant and the other two. The appellant was found possessing a brown colour substance subsequently weighed 8.500 grams of powder. The others were searched and found heroine from them too. All were taken to PNB and the formalities like field test, weighing, sealing, recording of statements and producing to courts were followed. PS Weerasinghe who gave evidence corroborated the main substance of IP Perera. Mr. K. Sivaraja Government Analyst gave evidence and said that the parcel received was properly sealed until they opened it. It was found that the parcel contained 8.500 grams of brown colour powder, after analysation they found 3 grams of Diacetyl Morphine (Heroine). Police Constable Dayananda who was a reserve officer at the PNB also gave evidence. When the prosecution closed the case, the appellant made a statement from the dock and said he was not arrested the way the police claim but he was arrested at home. He called his father to give evidence. The father says that the police officials came and arrested his son while at home. Thereafter an official came and asked for shorts of the appellant which he gave.

The counsel for the appellant says that there are discrepancies between the evidence of the first and second witness.

We carefully perused the evidence of both witnesses, first witness IP Piththalapitiye Sunil Padmasiri Perera gave evidence and provided details of the incident. It is noted that he gave evidence after 9 years. There is no contradiction marked on his evidence. The second witness called by the prosecution was PS 2269 Nanadasiri Weersinghe. He was not attached to the PNB in 2009 when he was giving evidence. He had limited access to the information book and he gave evidence before the court. We observe there are certain minute differences like whether the accused persons were seated or standing, where the productions were kept with the investigating officer. But none of these discrepancies can be treated as major and there is no material contradiction which goes to the root of the prosecutions case.

Carefully considering the evidence of these two witnesses we do not find any merit in this ground.

The counsel submits that the dock statement and the defence evidence was not considered. We carefully considered the dock statement and the judgment.

The learned trial judgement has given due consideration to the dock statement. He also observed that the defence taken up by the appellant during the trial and the statement made from the dock does not sail together. We perused the dock statement and find that the appellant submits that he was arrested at home and he was wearing a sarong at that time I am innocent. In his dock statement he did not say that he did not posses the substance that means there is no specific denial by the appellant. This does not mean that the burden shifts on to the appellant but considering the line of defence taken during the trial it's not supported.

Father of the appellant gave evidence at the trial and the learned trial judge has adequately considered the said evidence. Therefore, we do not find any merit in this ground of appeal.

Considering all we find the grounds of appeal of the appellant failed on its own merit therefore we dismiss the appeal.

Considering the sentence, the appellant is given minimum sentence. We do not intend to interfere with the sentence. Therefore, we affirm the conviction and the sentence.

**Appeal Dismissed**

**JUDGE OF THE COURT OF APPEAL**

**A.L. Shiran Gooneratne, J**

I agree,

**JUDGE OF THE COURT OF APPEAL**