

**IN THE COURT OF APPEAL OF THE DEMOCRETIC 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 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.*

**Court of Appeal No:**

CA/HCC/0008/2020

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

**High Court of Colombo**

**Case No:** 270/2019

Gamage Arachchige Nilmini

**ACCUSED**

**AND NOW BETWEEN**

Gamage Arachchige Nilmini

**ACCUSED-APPELLANT**

**Vs.**

The Attorney General

Attorney General's Department

Colombo 12

**RESPONDENT**

**Before** : Sampath B Abayakoon, J.  
: P. Kumararatnam, J.

**Counsel** : Rienzie Arseculeratne , P.C. with Eranga  
Yakandawala for the Accused-Appellant  
: Janaka Bandara D.S.G. for the Respondent

**Argued on** : 05-05-2022

**Written Submissions** : 24-02-2021 (By the Accused-Appellant)  
: 01-04-2021 (By the Respondent)

**Decided on** : 16-06-2022

**Sampath B Abayakoon, J.**

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo on one count of possession of 3.21 grams of diacetylmorphine, commonly known as Heroin on 12<sup>th</sup> March 2018, which is a prohibited substance to possess, and an offence punishable in terms of Poisons Opium and Dangerous Drugs Ordinance.

She was also charged for trafficking the said amount of Heroin at the same time and at the same transaction, which is also an offence punishable in terms of the same Ordinance.

After the trial, she was found guilty for the charge of possession of Heroin while she was acquitted of the charge of trafficking by the learned High Court Judge of Colombo by his judgement dated 07-02-2020 and accordingly, sentenced to imprisonment for life.

Being aggrieved, the appellant preferred this appeal challenging the conviction and the sentence imposed on her.

At the hearing of the appeal, the learned President's Counsel for the appellant raised the following grounds of appeal for the consideration of the Court.

- (1) The learned trial judge failed to consider the inherent improbabilities of the story of the prosecution.
- (2) The learned trial judge failed to reason out the conflicting entries regard to the weight of the Heroin recovered and what was received by the Government Analyst Department.
- (3) The learned trial judge was misdirected in law by reaching the conclusion that the prosecution has proved the case beyond reasonable doubt before the consideration of the defence evidence.
- (4) The learned trial judge was misdirected as to the facts of the case when he decided that there are no contradictions as to the evidence of PW-01 and PW-02, despite the fact that there were several contradictions.
- (5) The learned trial judge shifted the burden of proof to the appellant when considering the dock statement of the appellant.
- (6) The learned trial judge failed to consider the credibility of the evidence of PW-01 in the judgment.

**Facts in brief: -**

PW-01, Sub Inspector of Police Danushka was serving in the Wellawatta Police Vice Prevention Unit on 12-03-2018. He has left the unit at 9.00 a.m. on the mentioned day with his team of officers on routine vice prevention duty. While travelling from Grandpass towards Borella at around 14.05 hours, he has received an information from one of his personal informants that a woman called Nilmini is engaging in selling of Heroin on T20 road, about 30 meters away from the Buddha Statue located near the railway crossing of the Baseline Road. It had taken about 20-25 minutes for the team to reach the place, and

after stopping the vehicle some distance away, PW-01 accompanied by Police Sergeant Presanna, PC 67952 Kulartne and WPC 9555 Pradeepa has gone towards the direction mentioned by the informant. He has then seen a female as described by the informant on the road, about 10 meters away from him. After confronting her and identifying them as police officers he has informed the female that they have an information that she is having Heroin and to handover it. She has denied that she has any Heroin. Claiming that she only has money with her, she has taken out some money from her left-hand side trouser pocket and shown to PW-01. At that time PW-01 has observed that she is having something in her right-hand side trouser pocket as well. When ordered by him to take out what she is having in that pocket, she has taken out a pink-coloured parcel. Upon inspection, it has been found that it carries several small packets with brown coloured powder. PW-01 has identified the said powder as Heroin through his experience. Accordingly, he has arrested the said female whom he has identified as the appellant. After her arrest, the appellant has been taken to her house which was about 7 meters away. The witness has been very specific that he did not order the WPC who was with him to body search the appellant or searched her house, as he was of the opinion that no purpose would be served in doing so. It has been found that the appellant was carrying 106 packets of heroin in her possession. The amount found in her possession was Rs. 7800/-. After temporary sealing the productions, PW-01 has gone to the Modara police in order to weigh the Heroin. After separating the Heroin from the packets and weighing in the presence of the appellant it has been found that she was carrying 9620 milligrams of Heroin.

The position of the appellant has been that she was never arrested near her home. It was her contention that while at home, the police party came and searched the house and although they could not find any illegal substances she was arrested and the money belonging to her mother which she has earned

by selling ‘කඩයප්පයන්’ was taken away. It was also her position that she was not taken to the Modara police as claimed, but only to the Borella police.

PW-02 Sub Inspector Presanna who was a police sergeant at that time relevant to the detection has given evidence to corroborate the evidence of PW-01. His evidence has been similar to that of the PW-01 as to how the arrest was made and the recovery of the productions from the possession of the appellant. His evidence also reveals that the Rs. 7800/-, allegedly recovered from the appellant was in the following denominations.

- 500 rupee notes        04
- 100 rupee notes        41
- 50 rupee notes         06
- 20 rupee notes         19
- 10 rupee notes         30
- Two bundles of coins for a value of 16 rupees.

There had been no dispute as to the custody of the production after the raid and the fact that it was properly handed over to the Government Analyst for identification. Although it was the evidence of the PW-01 that when he weighed the Heroin, it had a weight of 9620 milligrams (9.620 grams), it was the evidence of the Government Analyst (GA) that when weighed under laboratory conditions, the real gross weight was found to be 9.591 grams. A pure quantity of 3.210 grams of Heroin has been identified by the GA after the analysis.

The evidence of PW-14 who was the Registrar of the Maligakanda Magistrate Court to whom the productions had been handed over reveals that although facts have been reported on 13-03-2018 under case number B6726/18, that Heroin and money in a sum of 7800/- had been recovered from the possession of the appellant as money earned by trafficking of Heroin, the said amount of

money had not been handed over to the production room on that day. Subsequently, the said money had been produced in Court on 11-04-2018 and had been released to the mother of the appellant through a Court order as the police had no objection to the release of the money to her without any conditions.

When a defence was called for at the conclusion of the prosecution evidence, the appellant has chosen to make a dock statement while she has called her mother as a witness on her behalf. It was her statement that she was at her home with her father, mother and three children on the day of the arrest and although some police officers came to her house and searched it, they could not find anything illegal. Initially, they wanted to take away her father, but took her into custody after one of the police officers received a phone call, and taken to the Borella police was her position. It was also her position that she was forced to place her fingerprints on the productions which were not found with her and was never taken to the Modera police as claimed by the witnesses. She has explained the money alleged have been found in her possession saying that the money belonging to her mother, which she has earned by selling ‘කඩයප්පන්’ was taken from her home by the police.

The mother of the appellant Kadirawelu Chandra had given evidence on behalf of the appellant and has explained what happened on that day which was similar to the version of the appellant. It was also her position that the money taken away by the police from her house were money belonging to her, which she hard earned by selling ‘කඩයප්පන්’ She has stated that the police had no objection for the release of the money to her when she made a claim before the Magistrate through her lawyer and the money was released back to her as a result.

### **Consideration of the Grounds of Appeal**

The learned President's Counsel in his submissions brought to the attention of the Court several pieces of evidence which he terms as highly improbable for which the attention of the learned High Court Judge has not been drawn. It was his contention that not searching the appellant when she was found with Heroin despite the presence of a female police officer and not searching the house of the appellant after she was taken to the house are questionable conduct given the normal practices of the police in such a situation. He was also of the view that there was no plausible explanation by the prosecution for agreeing to release the money allegedly taken from the possession of the appellant on the basis of money earned through selling of Heroin. It was his view that only plausible explanation can be the stance of the appellant and her mother as to what happened when the appellant was arrested, which the learned Judge should have considered in favour of the appellant. The learned President's Counsel pointed to several other instances of evidence, he termed as evidence that create reasonable doubt as to the credibility and trustworthiness of the prosecution witnesses.

Under the circumstances, it was his submission that the appeal of the appellant should succeed as the prosecution has failed to prove its case beyond reasonable doubt and the appellant has provided a reasonable explanation as to the evidence against her, which has created a reasonable doubt about the case of the prosecution.

Making his submissions before the Court on behalf of the Attorney General, the learned Deputy Solicitor General (DSG) agreed that although he is in a position to counter most of the points taken by the learned President's Counsel, he is not in a position to justify the release of the money allegedly recovered from the possession of the appellant to her mother. He agreed that it has created a shadow of doubt over the story of the prosecution of which the benefit should invariably go to the appellant as argued correctly before the Court. After

considering the evidence of both the prosecution and the defence in its totality, the learned DSG agreed that he is in no position to defend the conviction against the appellant.

At this juncture this Court would like to express our appreciation to the learned DSG for expressing his views on the matter with the interests of justice in mind.

As contended correctly, I am of the view that most of the points urged by the learned President's Counsel are matters that can be counted. However, I find that there can be no reason for the police to release the money if it was taken into custody from the appellant while having 106 packets of Heroin in her possession. According to the evidence, she has been taken into custody on the road with the Heroin and an amount of money in various denominations as described before. If that was so, there is no justification in releasing the money to the mother of the appellant as it would provide good evidence of trafficking against the appellant before a Court of law.

In a criminal case it is the trite law that a trial judge needs to look at the evidence of the prosecution as well as that of the defence before coming to a finding against an accused.

It was held in the case of **Don Samantha Jude Anthony Jayamaha Vs. The Attorney General, C.A. 303/2006 decided on 11-07-2012** that;

*“Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of evidence that is in the light of the evidence for the prosecution as well as the defence.”*

In the matter under appeal, the position of the appellant has been that she was not arrested while on the road, but at her house and the money taken from the house belongs to her mother. She has been consistent in that regard. The evidence of the mother of the appellant was also consistent to that of the



appellant that it was her money that was taken by the police who came into the house on that day. If one looks at the evidence in its totality without compartmentalizing, it becomes clear that the version of events as stated by the appellant and her witness is more probable given the behaviour of the police when the mother of the appellant claimed the money before the Magistrate before whom the appellant was produced. This appears that it is the very reason why the learned High Court Judge acquitted the appellant from the charge of trafficking of Heroin preferred against her.

For the reasons as given above, I am unable to agree with the learned High Court Judge's conclusion that the defence of the appellant was a concocted defence. I am of the view that if looked at in its correct perspective, there was sufficient evidence before the learned trial judge to accept the explanation of the appellant as a one that creates a doubt as to the case of the prosecution.

In addition, I find that the learned High Court Judge has somewhat shifted the burden of proof to the appellant when he determined that the appellant failed to prove certain facts as claimed by her, although the learned High Court Judge was very much mindful that it was the duty of the prosecution to prove their case.

In the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148**, it was held:

*“As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt.”*

In the case of **Karunadasa Vs. Officer-in-Charge, Motor Traffic Division, Police Station Nittambuwa (1887) 1 SLR 155** it was stated by Perera, J. that;

*“It is an imperative requirement in a criminal case that the prosecution must be convincing, no matter how weak the defence is, before the Court is*

*entitled to convict on it. It is necessary to borne in mind that the general rule is that the burden is on the prosecution, to prove the guilt of the accused. The prosecution must prove their case apart from any statement made by the accused or any evidence tendered by him. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The rule is based on the principle that every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed.”*

For the reasons as discussed above, I am of the view that this is not a conviction that can be allowed to stand. Hence, I set aside the conviction and the sentence imposed on the appellant. Accordingly, allowing the appeal, I acquit the appellant from the charge she was convicted before the High Court.

Appeal allowed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal