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**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 of the Constitution of the  
Democratic Socialist Republic of Sri  
Lanka.

**Court of Appeal Case No.  
CA/HCC/ 0440/2017  
High Court of Colombo  
Case No. HC/5174/2010**

Balan Gunasingham alias Sinna

**Accused-Appellant**

**vs.**

The Hon. Attorney General  
Attorney General's Department  
Colombo-12

**Complainant-Respondent**

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

**COUNSEL** : **Neranja Jayasinghe for the Appellant.  
Chehtiya Gunasekera, ASG for the  
Respondent.**

**ARGUED ON** : **20/06/2022**

**DECIDED ON** : **22/07/2022**

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## **JUDGMENT**

### **P. Kumararatnam, J.**

The above-named Accused-Appellant (hereinafter referred as the Appellant) was indicted by the Attorney General under Sections 54(A) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for the Possession and Trafficking of 3.92 grams of Heroin (Diacetylmorphine) on 30<sup>th</sup> April 2009 in the High Court of Colombo.

Following the trial, the Appellant was found guilty on both counts and the learned High Court Judge of Colombo has imposed a sentence of life imprisonment for both counts on 16<sup>th</sup> of October, 2016.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The learned Counsel for the Appellant informed this court that the Appellant has given consent for this matter to be argued in his absence due to the restrictions of the Covid 19 pandemic. During the argument he has been connected via Zoom platform from prison.

### **The Appellant has raised following appeal grounds in this case.**

1. Evidence given by PW1 and PW2 is contradictory and thereby failed the test of credibility.
2. Evidence of the defence was rejected on unreasonable grounds.

PW1/SI Wijesinghe who was attached to Police Narcotic Bureau had received information from a reliable informant that a person called “Sinna” will be engaged in trafficking drugs in the Gothatuwa area on 30/04/2009. He had received this information at 06:20 hours and had reported the same to his

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superior officer and arranged the raid. Having selected five other officers, they had left the bureau around 06:50 hours after completing all formalities. First the team had reached Borella and picked up the informant and had proceeded to Gothatuwa for the raid as per the information. Although they had reached Gothatuwa at 08:25 hours the officers had remained in their vehicle till the arrest of the Appellant who was said to have alighted from the Gothatuwa bound bus at 14:30 hours. As the informant confirmed the identity of the Appellant, he was arrested and the substances had been recovered from his possession which reacted for Heroin (Diacetylmorphine).

Thereafter, the team had gone to the Appellant's house to intimate the arrest of the Appellant to his kith and kin. At his house, the receipt pertaining to the arrest of the Appellant was handed over to his brother and the team returned to the bureau at 15:10 hours. At the bureau the weight of the substance was observed to be 10 grams and the production was sealed in front of the Appellant at 16:00 hours. After sealing, the production was handed over to PW4/IP Rajakaruna under production No.153/2013.

Even though the team had gone to the Appellant's house the officers had not endeavoured to check his house.

PW2, PC 8595 Weerasuriya who was a member of the raiding team, was called to corroborate the evidence given by PW1.

After closing the case for the prosecution, as the evidence led by the prosecution warranted the presence of a case to be answered by the Appellant, the learned High Court Judge called for the defence. The Appellant gave evidence under oaths and called three witnesses in support of his case.

In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person.

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In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 held:

*“A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences in relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions....”*

In **Girija Prasad (dead) by LRs. V. State of M.P.**, AIR [2007] SCW 5589 (2007) 7 SCC 625, it was observed:

*“It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence”.*

In **Attorney General v. Devunderage Nihal** [2011] 1 SLR 409 the court held that:

*“There is no requirement in law that a particular number of witnesses shall in any case be required for the proof of any fact. Unlike in a case*

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*where an accomplice or a decoy is concerned, in any other case there is no requirement in law that the evidence of a Police Officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated on material particulars.*

*However, caution must be exercised by a trial Judge in evaluating such evidence and arriving at a conclusion against an offender. It cannot be stated as a rule of thumb that the evidence of a Police witness in a drug related offence must be corroborated in material particulars where Police officers are the key witnesses”.*

In **Vadivelu Thevar v. State of Madras** AIR 1957 SC 614 it was observed on Page 619, as under: -

*" Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact”.*

In the first ground of appeal the Appellant contends that the evidence given by PW1 and PW2 is contradicted and thereby failed the test of credibility.

In an appeal it is the profound duty of the Appellate Court to consider all the evidence presented by both parties in the trial. If the evidence presented by the prosecution is cogent and passes all the tests, the court has no difficulty whatsoever to act on the same and affirm the conviction of the Appellant. But, if the prosecution fails to adduce cogent and consistent evidence, then the court has no option but to award the benefit of the doubt to the Appellant.

In **Lal Mandi v. State of West Bengal** (1995) 3 SCC 603, the Court opined that:

*“In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible*

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*on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused”.*

In this case PW1 had received information and organized the raid. PW2 was a member of the team selected by PW1. The prosecution had called PW1 first and then called PW2 to corroborate the evidence of PW1. Hence, their evidence should be accurate and cannot go wrong or contradict on material points.

**Bradford Smith**, Law Commission, [WWW.smithlitigation.com](http://WWW.smithlitigation.com) 2014 states that:

*“Good police note taking is important for two reasons. First, it invariably bolsters the credibility of the police officer giving evidence. Second, it promotes the proper administration of criminal justice by facilitating the proof of facts. Conversely, sloppy police note-taking can be devastating to the credibility of the officer giving evidence and seriously, it not fatally, undermine the successful prosecution of the case”.*

In a case of this nature, the police are the principal source of all information that subsequently becomes evidence in a criminal prosecution. The police, as the investigative arm of the state, have the primary responsibility for acquiring such evidence accurately without any contradictions.

Under this ground of appeal, the Counsel for the Appellant submits that the evidence given by PW1 and PW2 contradict in material nature regarding the time of departure from the Police Narcotic Bureau, the time of arrest of the Appellant and the time of arrival of the raiding team to the Police Narcotic Bureau after completing the raid.

According to PW1 he had testified that on 30/04/2009 they left the Police Narcotic Bureau at 6.50 a.m. but according to PW2 it was around 7.10 a.m.

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As per the evidence of PW1, the time of arrest was at 02.30 p.m. while the evidence given by PW2 it was around 1.30 p.m.

According to PW1 the arrival time to the bureau was at 03.10 p.m. but PW2 stated it was at 03.50 p.m.

Further, the Appellant's Counsel contended that according to PW2, he together with PW1 had waited near a shop at about 5.00 p.m. till the Appellant had come there and departed from there at about 06.55 p.m. to come to the bureau. But according to PW1 they had reached the bureau at 03.10 p.m. This contradictory position of the witnesses, raises suspicion and according to the defence Counsel and it is impossible for the occurrence of events as described by the prosecution witnesses.

Although the above noted time differences between PW1 and PW2 raises suspicion and affect the credibility of the prosecution witnesses, the learned High Court Judge in his judgment stated that the above noted time differences may have occurred as a result of the conversion and comparison of the said times in and between both twelve-hour and twenty-four-hour formats. In the absence of any clarification or correction by the prosecution regarding the time difference, I too agree that the learned Trial judge should not have placed the reasoning stated above in his judgment. Hence, it's quite apparent, that the learned Trial Judge acted on his own assumptions in deciding this point in the absence of any plausible clarification by the prosecution. Hence, the Appellant succeeds in his first ground of appeal.

In the second ground of appeal the Appellant contends that the evidence of the defence has been rejected on unreasonable grounds.

The Appellant during the course of evidence stated that he is a three-wheeler driver and earns a daily wage by transporting people for hire. On the day of the incident, he had gone on a hire with a person called "Nadeepa" who lived in the same area. Nadeepa told him to stop at a place called "Kajugahawatta Junction" and after alighting from the three-wheeler and when Nadeepa was

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preparing to pay his hire fee, suddenly four unknown persons had arrived and attempted to apprehend Nadeepa. As Nadeepa escaped arrest, the four persons had taken the Appellant in to their custody after their introduction, threatened and demanded the Appellant to bring back Nadeepa for his release. As per the Appellant his arrest was witnessed by the defence witness Srimathi, whose house is situated close to the place of arrest. She was called to give evidence on behalf of the Appellant to establish his arrest on 30/04/2009.

Defence witness Kamalika, a Grama Niladhari of the area confirmed the existence of a person called Nadeepa after marking Electoral Registers as V1 and V2, which had been admitted by the prosecution.

As submitted by the prosecution after the arrest the Appellant was taken to his house to inform his family members of his arrest. The receipt of arrest was handed over to his brother Ramasamy Balasingham.

Balasingham was called as the defence witness. In his evidence he stated that on the date of the incident the police had come to his house and handed over his brother's three-wheeler and told him to produce a person called Nadeepa to the police to secure his brother's release. However, rather remarkably, the house of the Appellant was not subjected to a search by the police team.

The learned High Court Judge had rejected the defence evidence and proceeded to convict the Appellant in this case.

In his judgment at page 494 of the brief, the Learned High Court Judge states:

කෙසේ හෝ විත්තියේ සාක්ෂි වලට අනුව කිසිදු අවස්ථාවක දී මෙම නදීප යන අය සම්බන්ධයෙන් ස්ථිර සාර තොරතුරක් මෙම අවස්ථාවේ පොලිසියට ලබා දීමට කටයුතු කර නැත. නම සහෝදරයා බේරා ගැනීමට තිබූ එකම මාර්ගය වෙත බාලසිංහම් යොමු නොවීම සහ එවැනෙකු සම්බන්ධයෙන් සොයා බැලීමට උත්සහයක් හෝ නොතිබීම සාමාන්‍ය කටයුතු අතරේ විය නොහැකි දෙයකි. එපමණක් ද නොව මෙම නඩුව සම්බන්ධයෙන් නදීප නමැත්තා සාක්ෂියට කැඳවා ගැනීමට



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උත්සහයක් හෝ දරා නැත. ඔහු සම්බන්ධයෙන් පදිංචි ස්ථානයක් සහ විස්තර වින්ඩිය සතුව දැන ගෙන තිබුණේ වුවද, සාක්ෂිකරුවෙකු වශයෙන් නම් කර කැඳවා ගැනීමට ද උත්සහයක් කර නැත.

In criminal cases the burden always rests upon the shoulder of the prosecution to prove the case beyond reasonable doubt. The Appellant is not required to prove his innocence but if he decides to plead a general or special exception of the Penal Code, then the Appellant has a duty of establishing that the case of the Appellant comes within such exceptions. This burden is imposed under Section 105 of the Evidence Ordinance.

In **H.M. Mahinda Herath v. The Attorney General** CA/21/2003 in Appellate Court Judgments (Unreported) 2005 at page 35-39 the court held that:

*“Where it was held that in a criminal case burden is always on the prosecution to prove the charge levelled against the accused beyond reasonable doubt. The trial judge must always bear in mind that the accused is presumed to be innocent until the charge against the accused is proved beyond reasonable grounds”.*

The learned Counsel for the Appellant referring to the above-mentioned portion of the judgment submits that the learned High Court Judge has cast an extra burden on the Appellant to prove his innocence which is alien to the standard of proof in criminal case. He further submits that this is a clear misdirection which certainly vitiates the conviction of the Appellant.

The wording of the above cited portion of the judgment very clearly demonstrates, that the learned High Court Judge had reversed the burden of proof on the Appellant which is not in accordance with the basic rules of criminal prosecution. Hence, this ground of appeal also has merit.

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Considering the grounds of appeal advanced by the Appellant, the learned Trial Judge should not have rejected the defence evidence in this case as I consider the defence evidence is more than sufficient to create a reasonable doubt in the prosecution case. As the evidence presented by the Appellant creates a reasonable doubt over the prosecution case, I set aside the conviction and sentence imposed by the learned High Court Judge of Colombo dated 16/10/2017 on the Appellant. Therefore, he is acquitted from both charges.

Accordingly, the appeal is allowed.

The Registrar is directed to send a copy of this judgment to the High Court of Colombo along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**