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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/ 0012/2018  
High Court of Balapitiya  
Case No. HC/866/2006**

Daluwathumulla Gamage Mallika

**Accused-Appellant**

**vs.**

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

**Complainant-Respondent**

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

**COUNSEL** : **Asthika Devendra with Kaneel Maddumage  
for the Appellant.  
Riyaz Bary DSG for the Respondent.**

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**ARGUED ON** : **13/02/2023**

**DECIDED ON** : **31/03/2023**

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**JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellant (hereinafter after referred to 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 possession and trafficking respectively of 5.3 grams of Heroin on 14<sup>th</sup> March 2004 in the High Court of Balapitiya.

After trial, the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed life imprisonment on both counts on 26<sup>th</sup> of February 2018.

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 to argue this matter in her absence due to the Covid 19 pandemic. During the argument she was connected via zoom from prison.

**On behalf of the Appellant following Grounds of Appeal are raised.**

1. The prosecution has failed to establish the chain of production beyond reasonable grounds.
2. Evidence of PW1 and PW3 are contradictory.

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3. The recovery of a parcel containing 680 packets of Heroin inside Appellant's brassier is not probable/possible.
  4. Whether it is safe to convict only on the evidence of PW3.
  5. Whether the Learned High Court Judge failed to consider the contradictions of the prosecution case.
  6. Whether the Learned High Court Judge properly considered the defence case.

**Background of the case.**

On 14/03/2004 IP Vijith Jayantha attached to Ambalangoda Police Station had received information from one of his informants about the trafficking of Heroin by a lady named Mallika and she was coming in a three-wheeler bearing No.SP GE-3341. He with 07 other police officers attached to Ambalangoda Police Station had left for the raid immediately as per the information. The team went to Sangaraja Junction, which is situated 50-75 meters away from the police station. As the station vehicle was not available at that time, the team left in a private vehicle owned by one of the friends of PW1. When they positioned themselves on the Galle Road, PW1 had seen the said three-wheeler coming from Colombo towards Galle. As per the direction the team had stopped the three-wheeler and PW1 had identified the Appellant who was seated on the rear of the vehicle.

As the place of arrest was not suitable to check a female, the Appellant was brought to the Ambalangada Police Station and was checked by PW3. A parcel was found underneath her brassier which consisted about 36 plastic bags. Upon further check PW1 had found 680 packets in different colours inside those 36 bags. As the substance in those packets reacted for Heroin, the Appellant was arrested, and the production was handed over to the reserve police officer after an initial sealing.

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On the following day, PW1 with some other police officers had gone to the Balapitiya Hospital to weigh the production. As the scale was not in order, the team had gone to Polwatta Hospital, but the pharmacist was on leave on that day. Hence, the weighing finally had been done at Borakanda Hospital. The substance weighted to be 10.500 grams.

PW3, WPC 434 Dayawathie was called to corroborate the evidence given by PW1.

After the conclusion of the prosecution case, the defence was called, and the Appellant had given evidence from the witness box under oath. She admitted the arrest but denied recovering any illegal substance from her possession on that date.

In every criminal case, the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person. In the case of this nature the prosecution not only need to prove the case beyond reasonable doubt but also ensure, with cogent evidence that the inward journey of the production has not been disturbed at all-material points.

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 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 where the identity of the good analysis for examination has to be proved beyond reasonable doubt. A prosecutor should take pains to ensure that the chain of events pertaining to the productions that had been taken charge from the Appellant from the time it was taken into custody to the time it reaches the Government Analyst and comes back to the court should be established”.*

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In **Perera V. Attorney General [1998] 1 Sri.L.R 378** it was held:

*“the most important journey is the inward journey because the final analyst report will depend on that”.*

In **Witharana Doli Nona v.The Republic of Sri Lanka CA/19/99** His Lordship Justice Abrew remarked thus;

*“It is a recognized principle that in drug related cases the prosecution must prove the chain relating to the inward journey. The purpose of this principle is to establish that the productions have not been tampered with. Prosecution must prove that the productions taken from the accused Appellant was examined by the Government Analyst”*

Therefore, proving the chain of custody is a very important task for the prosecution. If investigating officers do not do their duty properly, the chain of custody can be successfully challenged at the trial. This is because the prosecution always relies on evidence gathered by police officers in cases of this nature. Just because the law enforcement found drugs on an accused, it does not mean that he can be convicted.

In the first ground of appeal, the Counsel for the Appellant argued that the prosecution has failed to establish the chain of production beyond reasonable doubt in this case.

According to prosecution, after the arrest of the Appellant, she was taken to Ambalangoda Police Station and was subjected to a body search by PW3. According to PW3 the substances were recovered underneath her brassier. This had been intimated to PW1 immediately. Thereafter, PW1 had done an initial sealing in front of the Appellant and handed over the production to PW09, PS 976 Ariyaratna under PR No.182 on the date of detection. On the same day PW09 had handed over the same to PW4, PS Munasinghe. The relevant portion is re-produced below:

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(Page 189 of the brief)

ප්‍ර : මෙම උප සේවයේ රාජකාරි කරන අවස්ථාවේ දී ලැබුණු භාණ්ඩ සම්බන්ධයෙන් ඔබ යම් කිසි ක්‍රියා මාර්ගයක් ගන්නද ඉන් අනතුරුව ?

උ : එහෙමයි උතුමානෙහි.

අම්බලන්ගොඩ පොලිසියේ නඩු භාණ්ඩ භාරව හිටියා අංක 39 මුණසිංහ මහත්මයා. එම හිලධාරියාට නඩු භාණ්ඩ ඒ වෙලාවෙම භාර දුන්නා. එම සේවය භාර මුණසිංහ මහත්මයා. ඒ හිලධාරියා ඒ ස්ථානයේ සිටියා. මම එයාට භාර දුන්නා.

ප්‍ර : මේ ආකාරයට නඩු භාණ්ඩ ස්ථානයට භාර දීමෙන් අනතුරුව ගබඩා කිරීම සිදු කරන්නේ කොයි ආකාරයෙන් ද ?

උ : මම භාරයේ ඇති භාණ්ඩ ආරක්ෂිත පෙට්ටියේ තැන්පත් කරන්නේ. ඊට පසුව එම අවස්ථාවේදී අංක 39 මුණසිංහ මහත්මයාට භාර දුන්නා කාමරයේ තිබිලා.

ප්‍ර : ඔබ ඔය රාජකාරියට අමතරව වෙනත් රාජකාරි කටයුත්තක නිරත වුණාද ?

උ : නැහැ.

But according to PW4, PS 39 Munasinghe he had not received PR No.182 from anybody. But he confirmed that he only took over the production under PR No.183. (The three-wheeler and two keys.) The relevant portion is re-produced below:

(Page 243 of the brief)

ප්‍ර : 182 ලේඛණ ගත කළ නඩු භාණ්ඩ මොනවාද ?

උ : මම ඒ ගැන දන්නේ නැහැ.

ප්‍ර : නඩු භාණ්ඩ කාටද භාරදුන්නේ ?

උ : උපසේවයට භාර දුන්නා.

ප්‍ර : තමා 182 යටතේ කිසිවක් භාරගන්නද ?

උ : නැහැ ස්වාමිණි.

ප්‍ර : නඩු භාණ්ඩ මොනවත් භාරගන්නද ?

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උ : භාර ගන්නා.

ප්‍ර : ඒ කුමක් ද භාරගන්නේ ?

උ : 183 යටතේ තිබුණ අංක එස්. පී. ඩී. ඊ. 3341 දරණ රතුපාට ත්‍රිකෝණ රටය සහ යතුරු දෙක භාරගන්නා.

The above re-produced portions of evidence of PW9 and PW4 clearly shows a missing link after the Heroin was handed over to the reserve under PR No.182 by PW1.

On the following day of the raid, as the production needed to be weighed, PW1 entered the Heroin packets under PR No.188 and took over from PW9. The relevant portion is re-produced below:

(Page 115 of the brief)

ප්‍ර : ඔබ ප්‍රකාශ කර සිටියා සැකකාරිය සමඟ මෙම නිලධාරීන් රැගෙන හෙරොයින් ප්‍රමාණය කිරීම ගැනීම සඳහා මුද්‍රා තැබූ කවරය සමඟ පිටව ගියා කියා ?

උ : එහෙමයි ස්වාමිනි.

ප්‍ර : ඔබ ඒ අවස්ථාවේ මෙම හෙරොයින් ප්‍රමාණය දේපල කුචිතාන්සි අංක 188 ට ඇතුළත් කර ලබා ගන්නේ කුමන නිලධාරියෙකුගෙන්ද ?

උ : ඒ අවස්ථාව වන විටත් පොලිස් සැරයන් 976 ආරියරන්හි උප සේවයේ සිටියා. එම නිලධාරියා ගෙන් භාර ගන්නේ.

Although PW1 stated that he took over the quantity of Heroin from the custody of PW9 on 15/03/2004, the day after the raid, PW9, in his evidence did not state that he handed over the quantity of Heroin to PW1 on 15/03/2004. According to PW9, by that time the Heroin was in the custody of PW4. But PW4 had clearly stated that he did not receive any production under PR No.182 from anybody. This is another glaring contradiction pertaining to the chain of production in this case.

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According to PW1, after weighing the Heroin, the production was entered under PR No.190 and handed over to PW11, PS 22677 Somasiri who was the reserve officer on 15/03/2004. Further, PW1 went on to say that he handed over the production to the Magistrate Court on 15/03/2004. PW11 does not state that the productions were taken over from him by PW1 to hand over the same to the production clerk of the Magistrate Court on 15/03/2004. This discrepancy also led to doubt the prosecution evidence.

The relevant portion is re-produced below:

(Page 198 of the brief)

ප්‍ර : සාක්ෂිකරු, ඔබ විසින් මේ භාණ්ඩ භාර ගැනීමෙන් අනතුරු ව ගන්නා ලද පියවර කුමක් ද?

උ : මා භාරයේ උප සේවයේ තබා ගන්නා. ආරක්ෂිත පෙට්ටියක් තිබෙනවා උප සේවයේ මේ භාරදෙන නඩු භාණ්ඩ හා අවි ආරක්ෂිත ව තබන්න. එහි තමයි තබන්නේ.

ප්‍ර : කොහේද ඔය ආරක්ෂිත පෙට්ටිය තියෙන්නේ ?

උ : උප සේවයට ඇතුළු වෙනකොට ම දකුණු පැත්තේ තියෙන්නේ.

(Page 199 of the brief)

ප්‍ර : එතකොට මහත්මයා කියන විදියට මහත්මයා භාණ්ඩ භාර ගත්තේ විපින් මහත්තයාගෙන්. ඒ කුමන දිනයක ද ?

උ : 2004.03.15 වන දින.

ප්‍ර : කීයට ද භාණ්ඩ භාර දුන්නේ ?

උ : පැය 15.30ට ස්වාමිනි.

ප්‍ර : මොනවාද ගෙනලෑ දන්න භාණ්ඩ ?

උ : ස්වාමිනි, මුද්‍රා තබන ලද කවර 03 ක් තමයි මට භාර දුන්නේ. එයින් එක් ලිපි කවරයක, හෙරොයින් ග්‍රෑම් 10 යි, මිලිග්‍රෑම් 500 ක් අඩංගු ව තිබුණා. අනෙක් ලිපි කවරයේ, හෙරොයින් අඩංගු ව තිබූ වර්ණාවත් කොළ කැබලි ද, අනෙක් කවරයේ හෙරොයින් කිරා බැලීමෙන් පසු ඖෂධවේදියා විසින් හිකුත් කරන ලද වාර්තාව අඩංගු ව තිබුණා.



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ප්‍ර : ඒ තුන නමයි මහත්මයා විසින් භාර ගන්නේ ?

උ : එහෙමයි ස්වාමිණි.

ප්‍ර : මහත්මයා කළේ ගෙනලූ දුන්න භාණ්ඩ භාර අරගෙන, ආරක්ෂිත පෙට්ටියේ දාපු එක ?

උ : එහෙමයි ස්වාමිණි.

The chain of custody is the most important of evidence in a drug related trial. The prosecution has the paramount duty to prove that it is the same production recovered at the time of detection. The main reason is to establish that the evidence, which is related to the alleged crime, was collected from the accused and was in its original condition rather than having been tempered with or planted deceitfully to make someone else guilty. Handling of production evidence is a lengthy process but the court necessitates it for the adjudication of the case. This proves the integrity of production which had been recovered and until it reaches to the Government Analyst Department.

The defence can challenge the chain of custody evidence by questioning whether the evidence presented at trial is the same evidence as what was collected from an accused person. If there is any discrepancy in the chain of custody of a production and the prosecution is unable to prove who had the custody of production until it reached the analyst, the chain of custody stands broken.

The Appellant takes up the position that the amount of Heroin which had been mentioned in the indictment was not recovered from her. But she admits that she was arrested on the date mentioned in the indictment.

Considering the evidence highlighted above of PW1, PW9, PW4 and PW11 there is a missing link from the very inception of handing over the production to reserve police officer, which had not been explained by the prosecution. Without a proper chain of custody, drugs do not come in as evidence. The

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discrepancies highlighted above cannot be ignored lightly, as the entire case rests on the cogent and unambiguous evidence pertaining to the chain of production.

Although there is a missing link in the production from very inception of the investigation, the Learned High Court Judge in his judgment stated that the production was in the custody of PW1 from the time it was taken for weighing until it was handed over to the Magistrate Court. The relevant portion is reproduced below:

(Page 307 of the brief)

මෙම භාණ්ඩ උප සේවයෙන් ඉවත් කළ අවස්ථාවේ සිට අධිකරණයට භාරදෙන අවස්ථාව දක්වා පැමිණිල්ලේ පළමු සාක්ෂිකරු භාරයේ තිබූ බවට ද හෙළිකර ඇත.

In this case, the prosecution has failed to establish the custody of the production chain beyond reasonable doubt. As this is a substantial fact, and this ground alone is sufficient to vitiate the conviction in this case. Hence, it is not necessary to consider the remaining grounds of appeal.

Even though this case is sent for re-trial, the prosecution will not be able to rectify the breaking of the chain of custody.

In **Asrappulige Neel Rohan Gomes v. The Attorney General CA/276/2007** decided on 03/04/2013, the court held that:

*“... But the court cannot use its discretion in the interest of justice in this case. In the event this case is sent back for fresh trial, the court is encouraging slackness on the part of the investigation and the prosecution. The court is not only allowing the prosecution to fill gaps in the prosecution case it is also encouraging the investigators to do now and what he should have done at the time of the investigation. It is a bad precedent, and unfair by the accused”.*

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Due to the aforesaid reasons, I set aside the conviction and the sentence dated 26/02/2018 imposed on the Appellant by the learned High Court Judge of Balapitiya. Therefore, I acquit her from both charges.

Accordingly, the appeal is allowed.

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

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**