

**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

**CA/HCC 0468/2017**

**HC/ COLOMBO/ 7850/2015**

Kumaravel Yoganadan alias Yoga

**Accused-Appellant**

**vs.**

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

**Complainant-Respondent**

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

**COUNSEL** : **Udara Zoysa for the Appellant.**  
**Hernjan Pieris SDSG for the Respondent.**

**ARGUED ON** : **21/06/2023**

**DECIDED ON** : **08/09/2023**

\*\*\*\*\*

## **JUDGMENT**

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

The above-named Accused-Appellant (hereinafter after referred as the Appellant) was indicted by the Attorney General before the High Court of Colombo under Sections 54(A) (b) and 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession and Trafficking respectively of 25.34 grams of Heroin on 09<sup>th</sup> July 2013.

After the trial the Appellant was found guilty only for 2<sup>nd</sup> count and the Learned High Court Judge of Colombo has imposed life imprisonment on 2<sup>nd</sup> count on 13<sup>th</sup> of December, 2017. Further, the money which had been recovered at the time of his arrest was ordered to be confiscated by the State.

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 his absence due to Covid 19 pandemic restrictions.

On behalf of the Appellant following Grounds of Appeal were raised.

1. That there is a discrepancy in the weight of Heroin recovered from the Appellant and the Government Analyst Report.
2. The Learned High Court Judge has failed to evaluate the contradictions and improbabilities of the prosecution case.
3. That the Learned High Court Judge has cast burden on the Appellant.

According to PW1, IP/Chandana, attached to Police Station Maligawatta, he carried out a series of raid at 'Mahawatta' located within the local limits of Grandpass Police Station on an information received from their informants relating to drug related activities. Among the information, the arrest of the Appellant was a specific one received by the IP/Chandana. Nine police officers took part in the operation.

As the first raid which was carried out at 9.00 hours did not yield any results, the team had proceeded and had come to 'Ingurukade' Junction and proceeded to 'Mahawatta' area on foot. IP/Chandana and SI Majula had taken the lead.

According to PW1, Sugath seeing their approach a person who behaved in a suspicious manner and who tried to leave the place was caught by the PW2 SI/Manjula. The Appellant was taken into his house and searched by PW2. Upon the search his body, a pink coloured parcel was found underneath his underwear in which they found separate parcels which contained small 600 packets which they suspected to containing Heroin (Diacetylmorphine).

Further, a search was conducted near the residence of the Appellant and the police party had found cash amounting to Rs.214410/- packed in a tulip bag hidden under a pottery shack just outside the Appellant's house. The Appellant's identity was only revealed after his arrest, even though the police had received a specific information about the Appellant.

The recovered contraband was temporarily sealed using an envelope. Thereafter, it was taken to the van along with the Appellant under the custody of PC 74428 Isuru and under the supervision of PC 74385 Sunil.

Thereafter, the police party had conducted series of raids and arrested multiple suspects with substance suspected to be Heroin. According to police, all necessary precaution had been taken to prevent any mixing up of substances.

Finally, the Appellant, all other suspects and the productions recovered from them were taken to a pawning centre named Sew Gunasekera to weigh the productions. The substances recovered from the Appellant weighed about 80 grams. Thereafter, all suspects including the Appellant and the recoveries were handed over to the police reserve PC 52047 at Maligawatta Police Station.

The parcel pertaining to the Appellant had been registered under production No. 13/2013 and was produced to Maligakanda Magistrate Court with the Appellant. Productions had been kept in the police station under different reserve duty officers before being taken to Magistrate Court, Maligakanda. After obtaining court order, the productions had been handed over to Government Analyst Department on 08/08/2013.

The prosecution led 04 witnesses excluding the Government Analyst, marked productions and closed the case. The Government Analyst Report was admitted under Section 420 of Code of Criminal Procedure Act. Thereafter, the defence was called and the Appellant made a dock statement and closed the case.

In his dock statement, the Appellant took up the position that he was never in possession of any dangerous drugs as claimed by the prosecution. In his contention the drugs were introduced to him by the 1<sup>st</sup> and 2<sup>nd</sup> witnesses. When he refused and agitated, he had stated that he was assaulted by the PW1 and PW2.

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 the 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”.*

In the first ground of appeal, the Appellant takes up the position that there is a discrepancy in the weight of Heroin recovered from the Appellant and the Government Analyst Report. The Counsel for the Appellant contends that the Learned Trial Judge misdirected himself by failing to analyse the weight discrepancy which disturbs the production chain. Further submits that this is a substantial fact, the prosecution will have to prove beyond reasonable doubt.

Although, the Government Analyst Report was marked as an admission under Section 420 of the CPC, as pointed out by the Counsel for Appellant, the defence has only admitted the contents of the report but not the chain of the production. The relevant portion is re-produced below:

Pages-218-219 of the brief.

**පැමිණිල්ල විසින් කියා සිටින්නේ :-**

ගරු උතුමාණනි නඩු භාණ්ඩ පොලිස් ස්ථානයේ මුදා නැබීමෙන් පසුව මහේස්ත්‍රාත් අධිකරණය දක්වා ගෙන යාමත්, ඉන්පසුව නැවතත් මහේස්ත්‍රාත් අධිකරණයේ සිට රස පරීක්ෂක වෙත ගෙන යාමත්, රස පරීක්ෂක පරීක්ෂා කිරීමෙන් පසුව ගරු මහාධිකරණය වෙත ගෙන යාමත් යන කරුණු වින්තිය විසින් හඬ නොකරන බැවින් අපරාධ නඩු විධාන සංග්‍රහයේ 420 වගන්තිය යටතේ පිළිගැනීම් වශයෙන් සටහන් කරන මෙන් ඉල්ලා සිටිනවා.

**නියෝගය**

නඩු භාණ්ඩ දාමයට අදාල ඉහත සඳහන් කරුණු අපරාධ නඩු විධාන සංග්‍රහයේ 420 වගන්තිය යටතේ පිළිගැනීම් ලෙස සටහන් කරමි.

**පැමිණිල්ල විසින් කියා සිටින්නේ :-**

ගරු උතුමාණනි සී.සී. 3831/13 දරණ සංදේශයෙහි සඳහන් කරුණු සහ එන් 5589/2013 ( සී.සී. 3831/13) දිනය 22.11.2013 දරණ ආණ්ඩුවේ රස පරීක්ෂක වාර්තාවේ සඳහන් කරුණු වින්තිය විසින් හඬ කිරීමක් නොකරන්නේ නම් එකී කරුණු මෙම ගරු අධිකරණයේ අපරාධ නඩු විධාන සංග්‍රහයේ 420 වගන්තිය යටතේ පිළිගැනීම් ලෙස සටහන් කර ගන්නා ලෙස ගෞරවයෙන් ඉල්ලා සිටිනවා.

**වින්තිය විසින් කියා සිටින්නේ :-**

එම කරුණු හඬ නොකරන බව වින්තිය වෙනුවෙන් කියා සිටී.

**නියෝගය**

ඒ අනුව රස පරීක්ෂක වාර්තාවේ අන්තර්ගත කරුණු අපරාධ නඩු විධාන සංග්‍රහයේ 420 වගන්තිය යටතේ පිළිගැනීමක් ලෙස සටහන් කරමි.

According to chief investigation officer IP Chandana, the substance found in the possession of the Appellant was weighed using an electronic scale used in the pawning centre. He had chosen this option considering that the weighing machines used in the pawning centre were registered and accurate.

In the parcel recovered from the Appellant weighed about 80 grams of substance.

However, when the productions were taken to the Government Analyst Department, a notable difference had been noted in the parcel. According to the Government Analyst Report which had been marked as P27 in the High Court Trial, the weight of parcel mentioned as 85.43 grams. This is 5.43 grams in excess to the original weight. Hence the Appellant argues that the weight difference creates a serious doubt in the prosecution case.

In **Faiza Hanoon Yoosuf v Attorney General** CA/121/2002 it was held that:

*“In effect the first ground of appeal is that the prosecution failed to establish the nexus between the Heroin detected and what was produced in court. In court, the prosecution must prove the chain of custody. This must be done by establishing the nexus between the heroin detected and what was handed over to the Government Analyst for examination and report. The prosecution must prove that, what was subjected to analysis is exactly the same substance that was detected in that particular case. In this regard the inward journey of the production plays a dominant role and is most significant”.*

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

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

When this Court invited the Respondent to explain regarding weight discrepancy transpired from the evidence, the Senior Deputy Solicitor General following the best traditions and highest standard admitted the weight discrepancy in the production and further added that he is unable to explain the reason.

In this regard, the Learned High Court Judge in his judgment had made general comments about weight discrepancies in cases of this nature. In absence of the evidence led regarding this particular point; the comment made by the Learned High Court has no doubt caused great prejudice to a fair trial. The relevant portion is re-produced below:

Page 277 of the brief.

43.1 එසේම අත්අඩංගුවට ගත් අවස්ථාවේදී භාණ්ඩ වල බර ග්‍රෑම් 85.43 ක් පමණ වී ඇති අතර රස පරීක්ෂකවරයා විසින් හෙරොයින් ශුද්ධ බර නිර්ණය කිරීමේදී එකී බර ග්‍රෑම් 25.34 ක් බව තහවුරු කර ඇත. වෙනත් ද්‍රව්‍ය සමඟ මෙම හෙරොයින් මිශ්‍ර වී තිබීම නිසා අත්අඩංගුවට ගන්නා අවස්ථාවේදී බර ප්‍රමාණය වැඩි වීම සිදුවිය හැකිය. හෙරොයින් සම්බන්ධ සෑම හඬුවකම වාගේ අත්අඩංගුවට ගන්නා අවස්ථාවේදී බර ප්‍රමාණයට වඩා හෙරොයින් ශුද්ධ බර ප්‍රමාණය අඩු වන බව නිරීක්ෂණය කළ හැකි කරුණකි. මේ අනුව මෙවැනි විශාල හෙරොයින් ප්‍රමාණයක් හඳුන්වාදීමද කිසිසේත්ම සිදුවිය නොහැකි බව බව පැහැදිලි කරුණකි.

This situation has further aggravated by failure to call the Government Analyst to give evidence. Hence, no doubt, this has created a very serious doubt on the prosecution case.

In the Second ground of appeal, the Counsel contends that the Learned High Court Judge has failed to evaluate the contradictions and improbabilities of the prosecution case.

According to the evidence given by PW1 and PW2, after the arrest of the Appellant, six more arrests had been done and recovered Heroin. Hence, it is utmost importance that the productions recovered are handed over without being mixed up.



According to the prosecution, the Appellant was the first to get arrested on 09.07.2013. He was arrested at 10.45 am. Thereafter, PW1 temporary sealed the Heroin purportedly recovered from the Appellant in a long envelope where he claimed that he mentioned the Appellant's name on the cover, which was then dated, signed and sealed by him. The reason behind this precautionary step is clear as many more arrest and recoveries were expected on that day.

The relevant portion of evidence given by PW1 is re-produced below:

Page 72 of the brief.

- ප්‍ර : චූදිතව 2013.07.09 වන දින නීති විරෝධී හෙරොයින් සන්නකයේ තබා ගැනීම සහ ජාවාරම් කිරීම සම්බන්ධයෙන් අත්අඩංගුවට අරගන්නට පස්සේ අර හඬු භාණ්ඩය සම්බන්ධයෙන් ඔබ ගන්න ක්‍රියාමාර්ගය කුමක්ද ?
- උ : මා අත්අඩංගුවට ගන්නා ලද මෙම හෙරොයින් කිරා ගන්නාතුරු නාවකාලික මුද්‍රාකිරීමක් සිදු කළා. මා රැගෙන ගිය හඬු භාණ්ඩ මුද්‍රා තැබීමේ උපකරණ අතර තිබූ දිග ලියුම්කවරයකට මෙම හඬු භාණ්ඩ දමා සැකකරුගේ නම සහ මාගේ අත්සන සහ දිනය යොදා මෙම හඬු භාණ්ඩ මුද්‍රා තැබීම සිදු කලා.

But it was later revealed that no such precautionary measures were adopted by PW1 according to the testimony of PW5 PC 74428 Isuru. According to him, no such descriptions were to be found on the temporary sealed envelope apart from the two seals which was marked by the prosecution.

The relevant portion of evidence of PW5 ids re-produced below:

Pages 234-235 of the brief.

(මේ අවස්ථාවේදී පැ. 12 සාක්ෂිකරුට පෙන්වා සිටීමට අවසර පතා සිටී)

- ප්‍ර : දැන් ඔබට මූලික සාක්ෂියේදී මගේ රජයේ උගත් මිතුරා පැ. 12 යනුවෙන් ලියුම්කවරයක් පෙන්වා සිටියා ?
- උ : ඔව් ස්වාමිනි.
- ප්‍ර : ඔබ මොකක් විදියටද ඒ ලියුම් කවරය අඳුන ගත්තේ ?

- උ : සැකකරු සන්නකයේ තිබූ හෙරොයින් නාවකාලිකව මුදා නැඹු පාර්සලය ස්වාමිනි.
- ප්‍ර : දැන් බලන්න සාක්ෂිකරු මේක දිනා බලල කියන්න මේකේ කුමන සලකුණු ඔස්සේ ද ඔබ අදහ ගන්නේ ඒ ලිවුම් කවරය කියලා ?
- උ : ස්වාමිනි මුදා දෙකක් පමණක් යොදා තිබෙන හින්ද අදහ ගත හැකි.
- ප්‍ර : බලන්න මේකේ සැකකරුගේ නමක් තිබෙනවාද?
- උ : නෑ ස්වාමිනි.
- ප්‍ර : චන්දන මහත්මයාගේ නමක් තිබෙනවාද ?
- උ : නෑ ස්වාමිනි.
- ප්‍ර : දිනයක් තිබෙනවාද ?
- උ : නෑ ස්වාමිනි.
- ප්‍ර : දැන් බලන්න මම ඔබට යෝජනා කරනවා මේ ලිපි කවරය අදහ ගන්න කිසිම සලකුණක් මේ ලිවුම්කවරයේ නෑ කියලා ?
- උ : මුදා දෙකක් පමණක් තිබෙනවා ස්වාමිනි.

This clearly shows that PW1 was handling the substances recovered from the Appellant and other suspects arrested in a dangerous and unsafe manner. This position of the Appellant clearly supports the weight discrepancy in the substance recovered from the Appellant and sent to the Government Analyst Department for analysis. Hence, this ground also has merit.

In the final ground, the Appellant contends that that the Learned High Court Judge has cast additional burden on the Appellant.

In a criminal trial, it is incumbent on the prosecution to prove the case beyond reasonable doubt. There is no burden on the Appellant to prove his innocence. This is the “Golden Thread” as discussed in **Woolmington v. DPP** [1935] A.C.462. In this case Viscount Sankey J held that:

*“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt..... If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner.....the prosecution has not made out the case and the prisoner is entitled to an acquittal.*

The Learned Trial Judge in his judgment at pages 281-282 (51<sup>st</sup> paragraph) had stated as follows:

Pages 281-282 of the brief.

51.0 විච්චිකරු කියන ආකාරයට ඔහුට අත්අඩංගුවට ගන්නා විට ඔහු සිටියේ ඔහුගේ භාර්යාවගේ සහෝදරයාගේ නිවසේය. ඒ අවස්ථාවේදීද සහෝදරයා වන සෙල්වම් නැමති අය නිවසේ සිටි බව කියයි. එසේ නම් කිසිදු අපහසුවකින් තොරව සෙල්වම් නැමති අය විච්චිය වෙනුවෙන් සාක්ෂියට කැඳවා මෙම තත්වය සනාථ කිරීමට හැකියාව තිබිණි. එසේ නමුත් එම සෙල්වම් නැමති අය හෝ අඩු වශයෙන් විච්චිකරුගේ භාර්යාව හෝ මෙම කරුණ සනාථ කිරීම සඳහා සාක්ෂියට කැඳවා නැත.

The above quoted portion of the judgment is clear indication that the Learned High Court Judge had reversed the burden of proof on the Appellant, which is unknown to the criminal prosecution. Hence, this ground also has merit.

The evidence placed by the prosecution with regard to inward journey creates a serious doubt on the conviction against the Appellant. Further, the evidence given by prosecution witnesses consists of contradictions and improbabilities. Reversing the burden on the defence has denied a fair trial to the Appellant.

Considering all three appeal grounds, it certainly affects the root of the case. Therefore, we set aside the conviction and sentence imposed by Learned High

Court Judge of Colombo dated 13/12/2017 on the Appellant. Therefore, he is acquitted from the 2<sup>nd</sup> charge.

Accordingly, the appeal is allowed.

The Registrar of this Court is directed to send a copy of this judgment to 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**