

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

In the matter of an Appeal made under section
331 of the Code of Criminal Procedure Act No.
15 of 1979.

Court of Appeal Case No:

CA/HCC/151-22

HC of Kegalle Case No:

HC 4050/19

Warshakoon Mudiyanseelage Wasantha Jagath
Kumara

Accused—Appellant

v.

The Attorney General
Attorney General's Department,
Colombo 12.

Respondent

Before: **Menaka Wijesundera, J.**
 B. Sasi Mahendran, J.

Counsel: Ershan Ariaratnam for the Accused-Appellant
 Jayalakshi De Silva, SSC for the Respondent

Written 09.03.2023(by the Accused-Appellant)

Submissions: 07.06.2023(by the Respondent)

On

Argued On: 27.07.2023

Decided On: 02.10.2023

Sasi Mahendran, J.

The Accused Appellant (hereinafter referred to as "the Accused") was indicted before the High Court of Kegalle for the possession and trafficking of 7.45 grams of Heroin (Diacetylmorphine) under Section 54A(d) and 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984.

Prosecution led evidence from four witnesses, and marked its productions P1 to P15, The Accused had given evidence from the evidence box. After the trial, the Learned High Court Judge found the Accused guilty on both counts, convicted, and the death sentence was imposed.

Being aggrieved by said judgment and sentence this appeal was preferred by the Accused.

The following are the grounds of appeal led by the Learned Counsel for the Accused

- i. The Learned High Court Judge has failed to consider the prosecution case is improbable.
- ii. The Learned High Court Judge has failed to consider the Appellant's evidence.
- iii. The Learned High Court Judge has cast an unwarranted burden on the Defense case.

The facts of the case are briefly summarised as follows:

PW1, IP Sumanasekara, upon receiving information from a private informant on the 14th of August 2017 regarding a suspicious individual (the Accused) loitering in the area, led a team of officers to the scene. While the team wore civilian clothes, PW1 was in uniform. They departed the police station at 16:55 hours, heading towards Dadigama temple—a kilometre away—in a private vehicle. Upon arriving at the destination at 17:00 hours, amidst rice fields, he spotted an individual on a motorcycle on the side road. Based on the description received earlier— an individual wearing a shirt and pants—and the suspicious behavior noted, PW1 concluded that this was the person in question. They parked the van near the Accused. According to PW1, the Accused appeared agitated and fearful upon seeing PW1 in uniform. Subsequently, PW1 proceeded to search him, discovering a large grocery bag and another bag containing 18 small bags of a white

substance packed in small portions in the left side pocket of his trousers. He examined the discolored substance and, feeling his nose become stuffy, identified it as heroin based on his expertise. Upon inquiry, the Accused was arrested at 17:20 hours, and the bags were taken into custody. Meanwhile, the motorcycle was driven by P.S 57416 Lalith (PW3) to the police station. They then visited a jewelry shop, placed the white substance on tissue paper, and weighed it. The substance weighed 15 g and 970 mg. Subsequently, he wrapped the substance in tissue paper, placed it along with the 18 bags in separate envelopes, sealed them, and transported them to the police station. At the station, the substance wrapped in tissue paper was entered as P.R No. 406/17 and handed over to the Production Reserve Officer P.C 14051 Ranasinghe (PW6) at 18:10 hours. The motorcycle bearing no. WP-TX 3411, its keys, and other productions were marked as P.R No. 407/17. During cross-examination, PW1 admitted to not recording the vehicle number nor providing details concerning the van used in the raid. When queried, he explained the omission as a measure to maintain the vehicle's privacy. He recalled that post-raid, while en route back, PW2 sat in the front seat of the van, with PW1, the Accused, and the rest of the officers occupying the backseats. The motorcycle was taken into custody by PW3. He confirmed that the substance was weighed in the presence of the other officers and the Accused, before proceeding to the police station. It was acknowledged that the time taken post-arrest and the time spent at the jewelry shop for weighing the substance were accurately accounted for, affirming that the raid was properly conducted. Considering the evidence provided by PW1, we find his testimony truthful and consistent, making him a reliable witness whose evidence can be accepted.

On the 4th of September 2020, the defense counsel admitted the following facts under Section 420 of the Criminal Procedure Code:

1. The production entered as P.R No. 406/17 was properly sent to the Government Analyst Department without breaking the Chain of Custody.
2. The Government Analyst report concerning the analysis of the production was accepted.

PW2, S.I Hidurangala, corroborated the account of PW1, noting that on the 14th of August 2017, he was briefed by PW1 about a suspicious individual near Dadigama Temple. Along with a team of officers, they departed the police station at 16:55 hours. His testimony effectively aligned with PW1's regarding the arrest, search, and discovery of 18 pink small bags containing heroin from the Accused's left trouser pocket. Post-arrest,

they, alongside the Accused, visited a jewelry shop where PW1 weighed the substance, which totaled 15g and 970mg. Subsequently, the Accused's motorcycle bearing no. WP-TX 3411 was taken into custody by PW3.

In cross-examination, PW2 acknowledged traveling in a private vehicle, albeit without recalling its number, citing its private ownership as the reason. He confirmed the seating arrangements during the raid, and post-raid, which corroborated with PW1's account. Additionally, he detailed the arrest and subsequent actions, including the weighing of the substance. He mentioned that the journey to the jewelry shop took around 10 to 15 minutes due to road conditions, and the subsequent processes, including returning to the police station, took about 15 to 20 minutes, although he could not confirm the exact duration. The defense's claim of three motorcycles being used for the raid, and the apprehension of the Accused was refuted by PW2.

In this case, evaluating the credibility and testimonial trustworthiness of the witnesses is a question of fact, not law. We find no contradictions that undermine the core of the case as recounted. PW2 displayed no discrepancies throughout his testimony, leaving no room for disbelief. In our view, the evidence presented by PW1 and PW2 has been thoroughly corroborated, and we accept the aforementioned prosecution witnesses' evidence as creditworthy. Upon analyzing these witnesses' testimonies, it is evident that they participated in the aforementioned raid and bore witness to the events as they unfolded.

The Accused's version

The Accused, under oath, recounted that on the relevant day, he left his wife's house for work at 5:00 a.m. Later, at 1:35 p.m., he arrived at a communication center situated at Nelum Deniya to repair his mobile phone. He then decided to visit Dedigama Temple to see the Chief Monk about “වෙදකම” and traveled there on his motorcycle. Upon arrival at 2:00 p.m., he parked his motorcycle inside the temple premises and waited for around 10 minutes for the Chief Monk. During this waiting period, he was walking around the temple. After meeting with the Chief Monk and as he was preparing to leave, he was approached by a group of officers who arrived on three motorcycles. He was then summoned to the Police Station by the O.I.C., although he was clueless about the unfolding situation. Another officer took his bike to the Police station while he was escorted between two officers to the same location. At the station, the O.I.C. questioned

the Accused about a temple bell theft and allegedly assaulted him. The Accused also claimed that his money and mobile phone were confiscated.

Interestingly, the contention regarding the theft was not brought up with the prosecution witness, which seems unusual.

Furthermore, the Accused mentioned that he was detained at 4:30 p.m., and his wife was summoned to the police station concerning his bail but then left; this aspect was not interrogated by the Defense Counsel either. The Accused staunchly denied all accusations levied against him and dissociated himself from any heroin-related incidents. It is peculiar that the Chief Monk of the Dedigama Temple was not summoned to testify on behalf of the Accused, which could have provided more insight into the Accused's narrative.

Upon examining the Accused's evidence, it does not generate any doubt concerning the recovery of the heroin; it only presents a flat denial. This failure to address crucial details in the unfolding events considerably undermines the credibility of their case. The Accused's discourse primarily revolved around the theft allegation and his wife being called to the police station—facts not conveyed to the Prosecution by the Defense. This lack of attention to key details does not arouse any suspicion towards the prosecution's case, as perceived by this Court.

The Accused's primary grievance was that the Learned High Court Judge allegedly erred in applying the test of probability, leading to a potentially flawed conclusion.

What is probability according to **E.R.S.R. Coomaraswamy, in The Law of Evidence Volume II Book 02 on Page 1052, the test of probability** is described as follows:

“Sir Thomas Bingham points out that if too much attention has over the years been paid to the demeanour of the witness in guiding the trial judge to the truth, too little has perhaps been paid to probability. One thing may be regarded as more likely to have happened than another, with the result that the judge will reject the evidence in favour of the less likely.”

In **Wickremasuriya v Dedoleena and Others (1996) 2 S.L.R. 95**, His Lordship **Jayasuriya J.** observed that;

“A Judge, in applying the test of Probability and Improbability, relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate.”

This case was relied upon by Justice Achala Wengappuli in, **Chaminda Jeewan Ratnayake v. A.G, CA No. 185/2016 decided on 28-09.2018.**

In the case at hand, the Prosecution has provided clear evidence concerning the manner in which the raid was conducted. Upon reviewing the evidence presented to the Learned Trial Judge, it appears that the Prosecution has offered ample evidence substantiating the raid. PW2 meticulously outlined the journey to the designated location and the return trip, a narrative corroborated by PW1's testimony, leaving us with no grounds to doubt its veracity. We concur with the Learned Trial Judge's assessment in deeming the Prosecution's account as credible and plausible.

Delving into the judgement rendered by the Learned Trial Judge, it becomes evident that all material evidence presented during the trial by both sides was thoroughly examined. The testimony offered by the Accused was also scrutinized and duly weighed by the Learned Trial Judge, who further articulated the rationale behind discrediting the defense's version of events.

Given the aforementioned considerations, it is my finding that the Accused has not succeeded in persuading this court that the conviction in question is unattainable based on the evidence presented before the trial court. Consequently, this court opts to dismiss the appeal, upholding the original sentence and conviction.

The appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL