

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

In the matter of an appeal under in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979 (as amended) read with Article 138 of the constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:

HCC 135/18

HC of Colombo Case No:

HC 7066/13

Vs.

Unga Kammanthige Sanath Silva

Accused

AND NOW BETWEEN

Unga Kammanthige Sanath Silva

Accused-Appellant

v.

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

Respondent

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

Counsel: R.L. Samarawickrama for the Accused-Appellant
Janaka Bandara, DSG for the Respondent.

Written 27.03.2019 (by the Accused-Appellant)

Submissions:17.04.2019 (by the Respondent)

On

Argued On: 07.09.2023

Decided On: 08.11.2023

Sasi Mahendran, J.

The Accused Appellant (hereinafter referred to as ‘the Accused’) was indicted before the High Court of Colombo for the possession and trafficking of 4.30g 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.

The prosecution led evidence from eleven witnesses and marked its productions from P1 to P9. After the conclusion of the Prosecution’s case, two witnesses led evidence on behalf of the defence including the Accused himself. The High Court Judge found the Accused guilty on both counts, convicted, and sentenced him to life imprisonment.

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

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

1. Conviction is wholly unsafe given the uncorroborated and unsatisfactory nature of the evidence of the main police witness PW1, led by the prosecution.
2. Whether the Learned Trial Judge failed to consider the rules governing the test of probability to the prosecution version.
3. Whether the prosecution failed to establish the chain as to the passage of production from the custody of the accused to the Government Analyst.

4. Whether the learned trial judge has considered only the prosecution evidence and failed seriously to evaluate the evidence given by the defence.

The facts of the case are briefly summarised as follows;

According to PW1, I.P. Devadasan, on the 7th of September 2012, he led a team of police officers and departed from the police station at 7:30 a.m. Their itinerary included visits to areas such as High-Level Rd., Kirulapone Mw., Borella, and Polhengoda as part of their regular routine. At Polhengoda, at approximately 2:40 p.m., they encountered Corporal Kumarasiri (PW15), an Army Officer, and Wijesinghe from the Army intelligence unit, who provided information regarding Sanath (the Accused), who was allegedly involved in the transportation of heroin from the address No. 44 Kithulwatta Borella to Kirulapone.

Upon receiving this information, PW1 requested a Jeep from the officer in charge of the Kirulapone police station. They waited for approximately two hours before commencing their journey to the specified residence. Upon arrival at the destination, PW1 observed the Accused leaving his residence. Upon recognizing PW1, the Accused promptly returned to his premises. PW1 then pursued the Accused into his house, as he was aware that the Accused resided in Kirulapone and had prior acquaintance with both the Accused and his wife (DW1), who was employed at the police station, prior to this raid.

On page 6 of the Appeal brief

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උ : මම මේ සැකකරු කිරුලපන තමයි පදිංචි වෙලා ඉන්නේ ඒ නිසා මම මෙයාව දන්නවා

The Accused was then subjected to a search by PW01, with the assistance of PW2 and PW5. During the search, PW01 discovered that the Accused was holding a pink tulip bag. Upon examining the bag, they uncovered 29 pink shopping bags, each containing 40 packets of a "brown substance" individually wrapped in paper, amounting to a total of 1160 pieces. Based on his expertise, PW01 recognized this substance as heroin (diacetylmorphine).

Having made this discovery, PW01 took possession of the evidence and placed the Accused under arrest. Subsequently, the Army officers left the scene. Following the arrest, they proceeded to a pawn shop to weigh the material, which amounted to 5 grams and 180 milligrams. At the shop, they

dispatched the vehicle. After weighing the substance, they traveled on foot to the police station, where they handed it over under PR. 193/2012 to the reserve officer (PW8), P.C. 33012 Dharmarathne.

During cross-examination by the defense, PW1 stated that they had left the police station at 7:30 a.m. and received the information at 2:40 p.m. from the intelligence officers. Subsequently, he informed the Officer in charge about this. PW1 noted that they were already acquainted with the army officers before this incident, as they had previously participated in raids. He further explained that, although he was unaware of the Accused's involvement in heroin trafficking, he had prior knowledge of the Accused.

PW1 also mentioned that the Accused's wife, DW1, worked at the police station, and he had seen her at the Accused's residence during the arrest. When questioned by the defense about whether DW1 was arrested by PW1, he clarified that while he was aware that she had been taken into custody, he did not carry out the arrest. They arrived at the scene at 4:35 p.m.

On Page 131 of the Appeal brief:

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උ : නැහැ. ඒ ගෙදර අපි හරියටම දන්නේ නැහැ මෙතමනා තමයි තියෙන්නේ කියලා. මෙයාව දැකලා තමයි අපි ටක් ගාලා නතර කලේ. නතර කළාම ඒ නිවස ඇතුළට ගිය නිසා තමයි අපි ටක්ගාලා අල්ලා ගන්නේ. පුද්ගලයාව දන්නවා. නමුත් නිවස දන්නේ නැහැ

He further explained that since they had arrested the Accused with heroin in his possession, there was no need to search his premises. Out of the 29 packets, PW1 opened a few and inspected them while they were placed on the bonnet of the jeep in front of the Accused and other officers. PW01 mentioned that they spent 15 to 20 minutes near the house and then arrived at the pawn shop at 5:20 p.m., where PW2, PW4, PW5, and PW6 assisted him in opening and weighing the 1160 packets, which took them 1 ½ hours. Thereafter, they reached the police station at 7:15 p.m.

PW1 affirms that while the Accused was not involved in DW1's arrest, the Accused's wife (DW1) was arrested prior to the Accused's arrest. He acknowledged that he had not recorded pertinent details of this incident in the pocket notebook as he failed to carry it on the said date.

PW2, P.C. 35454 Dayawansa, corroborated PW1's account, noting that they left the police station at 7:30 a.m. on 07.09.2012 with the team led by PW1. Subsequently, they encountered two Army officers who informed the police officers about the Accused, his address, and his name. Upon PW1's request, they obtained a jeep from the officer in charge and traveled to the specified address. Upon arrival, PW1 disembarked from the jeep and apprehended the Accused as he attempted to re-enter his house.

During cross-examination, it was stated that they received the information at 2:40 p.m. from the Army Officers in the intelligence unit, whom they had encountered near the Polhengoda Junction. PW1 briefed the team of officers about this matter based on the information received. They left at 4:15 p.m., and 25 minutes later, PW1 arrested the Accused as he exited his house.

According to PW15, Army intelligence officer Kumarasiri, accompanied by his fellow army officer Wijesinghe, informed PW1 after meeting him on 07.09.2012 at approximately around 11:00 to 11:30 a.m. that the Accused was in possession of heroin and was en route from Kithulwatta to Kirulapone.

The Accused, under oath, recounted that on the day in question, he was arrested by 7 to 8 police officers after returning from court. They tied his hands with a towel and placed him in a jeep where seven other individuals were already present. They detained him for 1 ½ hours. Furthermore, he mentioned that PW5 slapped his father when he inquired about the arrest.

While in the police jail cell, he saw his wife at the Police station but did not speak to her. DW1 was remanded, and he later learned that his wife was informed that the Accused was apprehended for drug possession and that he could secure his release by confessing. When he inquired about his arrest, he was asked to place his fingerprints on a parcel.

During cross-examination, he stated that when he was arrested inside the house, he was not informed of the reason for his arrest. The Accused further described that they tied his hands with a towel, confiscated his two phones and money, and placed him in the Police jeep. He was subsequently informed that heroin had been recovered from him.

At the police station, he encountered his wife. It was only after appearing in court that he learned he was arrested on allegations related to heroin. He denied the allegations of possession and smuggling of heroin in court. He also mentioned that he was in police custody for seven days.

DW1 Renuka, the Accused's wife, testified that on 07.09.2012, she was arrested by PW1, who was accompanied by Army and Police officers. They visited her house in Kirulapone, inspected the premises, and inquired about her husband's whereabouts. She informed them that he was at court, and she was initially taken to the Police station and later to the Kithulwatta address to locate him.

Upon their return to the police station, she was subsequently presented before the court and informed that she was remanded due to the discovery of an unknown I.D. card at her residence in Kirulapona, which had been brought by her mother. She was encouraged to accept this case in exchange for her release. After her return from court, she learned that she was arrested for possession of heroin.

In her cross-examination, DW01 mentioned that she was arrested between 9:30 and 10:30 a.m. after her house was investigated and later taken to the police station by PW1. They then took her to the specified address at around 1:30 to 2:00 p.m. and asked her to identify the Accused's house. She was subsequently transported back to the police station by jeep. She further stated that she was asked to accept the case related to an unknown identity card and was fined Rs. 3500.

The primary issue for consideration in this appeal is whether PW1's witness testimony is improbable. If so, the Learned High Court Judge failed to consider the test of probability regarding the prosecution's version.

Probability, in the context of legal matters, is defined as follows:

According to Murray's English Dictionary, probability means "the appearance of truth or likelihood of being realized, which any statement or event bears in the light of present evidence."

Sarkar and Monohara, in their book "SARKAR ON EVIDENCE" (Fifteenth Edition) on page 71, state, "...probability is meant the likelihood of anything being true, deduced from its conformity to our knowledge, observation, and experience. When a supposed fact is so repugnant to the laws of nature that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible."

According to E.R.S.R. Coomaraswamy, in "The Law of Evidence Volume II Book 02" on Page 1053, "The test of improbability has been described as essential inconsistency. There may be facts which may show it to be impossible or so highly improbable as to justify the inference that it never occurred."

In Bharwada Bhoginbhai Hirjibhai vs State of Gujarat 1983 AIR HC 753; A.P. Sen and M.P. Thakkar J observed that,

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. "

In Wickremasuriya v Dedoleena and Others [1996] 2 S.L.R. 95, on page 98, 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."

Based on the provided facts and the principles of probability, we can assess the following points:

- a) The delay in informing the police: It is reasonable to question why PW15 did not immediately inform the police when he received information about the Accused's possession of heroin and plans to transport it. The delay in informing the police raises questions about the urgency of the situation and whether there was a legitimate reason for the delay.
- b) Discrepancy in timing: There is a significant discrepancy in the timing of events as recounted by various witnesses. PW15 stated that they met the police officers around 11:00 to 11:30 a.m., while PW1 and PW2 mentioned meeting the Army officers at around 2:00 to 2:40 p.m. The Accused claimed to have been arrested at approximately 12:30 to 1:00 p.m. This inconsistency in timing should have been carefully considered by the court.
- c) Delay in action: The fact that PW15 and the police officers waited for 2 hours after receiving information before traveling to the specified location raises questions about the urgency of the situation. In a typical scenario, swift action would be expected upon receiving information about a crime in progress.
- d) Departure of Army officers: The departure of the Army officers without recording their statements as vital witnesses is a significant concern. Their presence at the time of the arrest and their potential knowledge of the events should have been documented. Additionally, the absence of pocketbooks raises questions about proper documentation and record-keeping by the police officers.
- e) Carrying drugs in hand: It is improbable that a drug dealer would openly carry drugs in their hands during the daytime, as it would expose them to a high risk of being apprehended. This raises doubts about the manner in which the Accused was allegedly caught with drugs.
- f) Contradictory accounts: The conflicting accounts regarding the location of the Accused's arrest, whether inside his house or outside, raise concerns about the accuracy of the testimonies provided by both the prosecution and the Accused.

Upon applying the Test of Probability and Test of Improbability to the aforementioned facts, it becomes evident that the evidence presented through the Prosecution's narratives cannot be deemed credible.

It is worth noting that DW1, the Accused's wife, testified that she was arrested between 9:00 to 10:00 a.m. and subsequently taken to the Accused's house, after which she was returned to the police station. Considering the evidence presented by the prosecution, it becomes apparent that PW1's testimony lacks veracity. In light of these circumstances, we find that the defense's narrative appears more plausible than that of the prosecution. Therefore, on these grounds and for the reasons detailed above, we overturn the conviction and sentence.

This appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL