

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

In the matter of an Application for Special Leave to
Appeal

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

Complainant

Vs.

Sabrudeen Kamrudeen,
1249/C, Ananda Mawatha,
Hunupitiya, Wattala.

Accused

SC. Appeal No. 90/2013

SC (SPL) LA 69/2013

CA Appeal 211/2006

HC Negombo 55/2002

And between

Sabrudeen Kamrudeen,
1249/C, Ananda Mawatha,
Hunupitiya, Wattala.

Accused-Appellant

Vs.

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

Complainant-Respondent

And now between

Sabrudeen Kamrudeen,
1249/C, Ananda Mawatha,
Hunupitiya, Wattala.

Accused-Appellant- Appellant

Vs.

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

Complainant-Respondent-Respondent

**Before: Vijith K. Malalgoda PC J
Murdu N.B. Fernando PC J
P. Padman Surasena J**

**Counsel: Shanaka Ranasinghe PC with Niroshan Mihindukulasuriya,
for the Accused-Appellant- Appellant
Ms. Varunika Hettige, DSG for the Attorney General**

Argued on 15.03.2019

Decided on 25.07.2019

Vijith K. Malalgoda PC J

The Hon. Attorney General had indicted the Accused Appellant Appellant (here in after referred to as the Appellant) namely Sabrudeen Kamrudeen before the High Court of Negombo for possession of 249.4 grams of diacetyl morphine, an offence punishable under section 54 (c) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

The Appellant faced the trial before the said High Court where the prosecution had relied on the evidence of 04 witnesses, including the Chief Investigation Officer, Inspector of Police Priyantha

Liyanage and Inspector of Police Bogamuwa who assisted the said detection. When the court decided to call for the defence, the Appellant after making a statement from the dock, led the evidence of three witnesses, including a medical officer from prison hospital and two members of his immediate family.

At the conclusion of the said trial, the learned High Court Judge convicted the Appellant on the indictment and sentenced him to death. Being dissatisfied with the said conviction and sentence, the Appellant preferred an appeal before the Court of Appeal.

At the conclusion of the hearing of the said appeal, the Court of Appeal affirmed the conviction and dismissed the appeal. The Appellant had preferred the present appeal before this court challenging the said decision of the Court of Appeal.

When the Special Leave to Appeal application filed by the Appellant was supported before this court on 21.05.2013, the court granted Special Leave on the following questions of law raised on behalf of the Appellant.

- 1) The judgment of the Court of Appeal is contrary to law and against the weight of the evidence adduced at the trial
- 2) Did the Court of Appeal misdirected itself by its failure to give adequate consideration to the fact that the Petitioner truthfully unfolded the narrative in his dock statement which fact clearly raises doubt as to the place and circumstances of the arrest
- 3) Did the Court of Appeal misdirected itself by its failure to give appropriate weightage to the fact that,
 - i. There was a serious discrepancy between the gross weight of the Heroin parcels (730 grams) as weighted by the electronic weighing scale of the

Police Narcotic Bureau and the gross weight of the Heroin parcels submitted to the Government Analyst (749.4 grams)

- ii. There was a serious discrepancy in regard to the colour of the cellophane bags said to have been seized from the Petitioner. According to the police the bags were said to have been pink in colour but the cellophane bags produced in court and submitted to the Government Analyst were found to be blue in colour
- iii. The Prison Doctor has stated that the injuries noted on the Petitioner were consistent with a history of assault. No injuries whatsoever have been noted by the police at the time of arrest
- iv. That the evidence of the son of the Petitioner corroborates his evidence particularly as regards the place of arrest and the assault and was unshaken in cross-examination
- v. That the evidence of the Petitioner as regards to the place of arrest and the assault was further corroborated by the evidence of his wife
- vi. That the Court of Appeal has disregarded the clarification made and emphasized that the wife of the Petitioner has stated in the Petitioner's bail application in the High Court that a parcel of Heroin was recovered from under a dressing table in her house and thereby her evidence given at trial that Heroin was not found in the possession of the Petitioner becomes false. The Court of Appeal and the High Court have disregarded the fundamental principle- *Res inter Alios Acts Altieri Nocere Non Debet*- that the acts, declarations and conduct of others ought not to operate to the disadvantage of another (the Petitioner)

- vii. That Court of Appeal has not been cognizant of the fact that no such recovery of Heroin has been made from the house of the Petitioner according to the police, thus giving credence to the clarification of the Petitioner's wife as to the impugned statement in the affidavit
- viii. That the productions have never been taken before a Magistrate's Court and all the purported seals have been placed therein by the Police Narcotics Bureau (PNB) itself
- ix. That in any event the said affidavit has not been marked in evidence and hence is not part of the record
- x. That the evidence establishes that the productions lay in the drawers of the OIC of the PNB for over five days in violation of section 431 of the Criminal Procedure Code

Even though the Appellant had relied on several grounds of appeal, as referred to above, the learned President's Counsel who represented the Appellant before us had mainly relied the appeal to the following grounds,

1. The discrepancy of the gross weight of the Heroin when it was weighed at the Police Narcotic Bureau and the Government Analyst
2. The discrepancy with regard to the colour of the cellophane bags said to have been seized from the Appellant
3. The discrepancy with regard to the number of bags observed by the Government Analyst during her examination

and submitted that the learned trial judge as well as their lordships of the Court of Appeal had failed to give adequate consideration and appropriate weightage to the above discrepancies and therefore the findings reached by the said courts were against the weight of the evidence placed before the trial court.

As revealed before the trial court, the Appellant was arrested at Ananda Mawatha in the Wattala Police Area when he was carrying a bag which contained eight parcels of Heroin. The said detection was carried out by the officers of the Police Narcotic Bureau on a tip off received by an informant of Inspector Liyanage.

Subsequent to the arrest the officers visited the house of the Appellant which was on the same road but could not find anything incriminatory. The parcel recovered from the Appellant was a polythene bag and inside the said polythene bag there was a brown paper bag which carried eight cellophane bags containing suspected brown powder.

The subsequent investigations carried out by IP Liyanage after returning to the Police Narcotic Bureau was explained by him as follows;

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ප්‍ර: සාක්ෂිකරු නිවස පරීක්ෂා කරලා කිසිදෙයක් සොයාගත්තේ නැහැනේ විෂ මත්ද්‍රව්‍ය හෝ සැකකටයුතු දෙයක් ඉන් අනතුරුව ඔබ ගත් ක්‍රියාමාර්ග කුමක්ද?

උ: සැකකරු සහ නිලධාරී මණ්ඩලයන් සමඟ කාර්යාංශයට පැමිණියා.

ප්‍ර: පැමිණිලා ඔබ කුමක්ද මුලින්ම කලේ?

උ: හෙරොයින් බවට සැකකල කුඩු අඩංගු පාර්සල් අවේ කුඩු වෙන්වෙන් වශයෙන් කේන්ද්‍ර පරීක්ෂණයට ලක්කලා.

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ප්‍ර: මොකක්ද කේන්ද්‍ර පරීක්ෂණයේදී ලැබුණු ප්‍රතිඵලය?

උ: තවදුරටත් බැහැවල අඩංගුව තිබුණේ නීති විරෝධී මන්ද්‍රව්‍යයක් වන හෙරොයින් බව
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ප්‍ර: පරීක්ෂා කිරීමට අවශ්‍ය වන සාම්පල කොහොමද ලබා ගත්තේ?

උ: බැහැවල විවෘත කරලා.

ප්‍ර: කොහොමද පැකට් විවෘතවද තිබුණේ?

උ: පැකට් වල කටවල් ගැටගහලා.
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ප්‍ර: හෙරොයින් බවට එම පැකට් අවේ තිබුණු ද්‍රව්‍ය සාධක පෙන්වුවාට පස්සේ ඔබ ඊලඟට ගත්ත ක්‍රියා මාර්ගය කුමක්ද?

උ: ස්වාමීනි පැකට් අට කොහොමද වෙන්වෙන්ව ස්ථානයේ තරාදියෙන් කිරා බැලුවා

ප්‍ර: මොන වර්ගයේ තරාදියක්ද තියන්නේ?

උ: ඉලෙක්ට්‍රොනික් තරාදියක්
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ප්‍ර: කිරා බැලීමේදී පැකට් අට කොහොමද හඳුනාගත්තේ මේ බර තිබුණයි කියලා?

උ: පාර්සල් අට ස්වාමීනි මා හඳුනාගැනීම සඳහා සලකුණු කලා වෙන්වෙන් වශයෙන් කොල අවුරලා

ප්‍ර: කොහොමද ඒ සලකුණු කිරීම් කලේ?

උ: සලකුණු කලේ එස් 1 සිට එස් 8 දක්වා
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ප්‍ර: සම්පූර්ණ බර කියද ආවේ ඒ ඔක්කෝගෙම සාක්ෂිකරු?

උ: ග්‍රෑම් 730 ක් ආවා

ප්‍ර: ඒ බර කිරීමෙන් අනතුරුව එස් 1 සිට එස් 8 දක්වා පාර්සල් වලට ඔබ කුමක්ද කලේ?

උ: පාර්සල් අට වෙන්වෙන් වශයෙන් විනිවිද පෙනෙන පොලිතින් බැග් අටකට දැමීමා ඒ පාර්සල් අට වෙන්වෙන් වශයෙන් විනිවිද පෙනෙන බැග් අටකට දැමීමා

ප්‍ර: ඉන් අනතුරුව මොකද කලේ?

උ: ඒ කවර සියල්ලම සීලරය කරනු ලැබුවා ඒ බැග් අට නැවත විනිවිද පෙනෙන පොලිතින් බැගයකට දමල ඒ බැගයන් සීල් කලා.

As observed by me, the matters raised on behalf of the Appellant before this court stems from the evidence of witness Priyantha Liyanage referred to above.

When explaining how he weighed the eight parcels found inside the bag he recovered, witness had taken up the position that each bag was separately weighed using the electronic scale at PNB and the eight figures he obtained was added to each other in order to obtain the final figure which was only 730 grams.

However when the production was referred to the Government Analyst for examination the total weight of the brown powder was found to be 749.9 grams and the Government Analyst who conducted the said examination had explained the condition under which she carried out her examination as follows;

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ප්‍ර: 2002 වගේ කාලෙ කිරා බැලීම සඳහා මොනවගේ තරාදියක්ද තිබුනේ?

උ: ඉලෙක්ට්‍රොනික් තරාදියක් තිබුනා. එය දශම ස්ථාන 4 කට නිවැරදිසි දහදාහෙන් පංශුවකට නිවැරදිසි එය හැමදාම උදේට ක්‍රමාංකනය කරනවා

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ප්‍ර: දන්න බරක් යොදා නිවැරදි දත්ත තිබෙනවාද කියා අවධියෙන් ඉන්නවා?

උ: ඔව්

ප්‍ර: විද්‍යාගාර තත්වයේ තිබෙන්නේ මෙම තරාදිය?

උ: ඔව්

ප්‍ර: ප්‍රසස්ථ මට්ටමේ තිබෙන්නේ මෙම තරාදිය?

උ: ඔව්

The learned President’s Counsel among the other issues raised before us, insisted that the above discrepancy goes to the root of his case and the learned trial judge and their lordships of the Court of Appeal, had failed to give due consideration to the above discrepancy.

However as observed by me the learned trial judge had considered the above discrepancy in her judgment in the following terms;

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“මිලගට අධිකරණයට කල්පනා කිරීමට සිදුවන කරුණ නම් පොලිස් මන්දුවස කාර්යාංශය විසින් මෙම හෙරොයින් කිරන ලද අවස්ථාවේදී ඒ තුල හෙරොයින් ග්‍රෑම් 730 ක් තිබුණු බවට සාක්ෂි දී තිබෙන අතර රසරීක්ෂකවරිය විසින් කිරන ලද අවස්ථාවේදී එක් එක් 1 සිට එක් 8 දක්වා බැගේ වල තිබුණු හෙරොයින් ග්‍රෑම් 749 ක් වශයෙන් සටහන් කර තිබීමයි. රජයේ රසරීක්ෂකවරිය අධිකරණයේ සාක්ෂි දෙමින් පැහැදිලිව කියා තිබෙන්නේ ඇය මෙම බරකිරීම කරන ලද්දේ ඉලෙක්ට්‍රොනික් තරාදියෙන් බවත්, එය දශම ස්ථාන 4 කට නිවැරදි දත්තයන් ලබාදෙන බවත්ය. තවද එක් ඉලෙක්ට්‍රොනික් තරාදිය දිනපතා උදේට ක්‍රමාංකනය කරන බවත් මෙය විද්‍යාගාර මට්ටමේ ඉතා ප්‍රසස්ථ මට්ටමින් පවත්වාගෙන යන තරාදියක් බවත්ය. නමුත් පොලිස් පරීක්ෂක ලියනගේ විසින් මැහීම සිදුකර තිබෙන්නේ මන්දුවස නාශක අංශයේ තිබූ තරාදියෙන් වන අතර, මේ ආකාරයෙන් දිනපතා ක්‍රමාංකනය කිරීමට මෙම තරාදිය ලක් නොවන බවත්, එය නඩත්තු කිරීම රජයේ රසරීක්ෂක දෙපාර්තමේන්තුවේ ඇති බැලන්නිය මෙන් සිදු නොවන බවත් සාක්ෂි වලින් පැහැදිලි වී ඇත. තවද රජයේ රසරීක්ෂක දෙපාර්තමේන්තුවේදී මැහීම සිදුකරන ලද නිලධාරියා මැනුම් කිරීමේ සම්බන්ධව නිපුණ දැනුමක් ඇති රසායන විද්‍යාව හා භෞතික විද්‍යාව උගත් විශේෂඥ මට්ටමේ තැනැත්තියක් බවත් පොලිස් මන්දුවස කාර්යාංශයේදී මෙම වැටලීම සිදුකර තිබෙන්නේ පොලිස් පරීක්ෂකවරයකු විසින් යන කරුණත් අප විසින් අමතක කලයුතු නැත. ඒ අනුව මෙම මැහීමේ වෙනස මත වූදින නිවැරදිකරු බවට තීරණය කිරීමට අධිකරණයට කල නොහැකි අතර, මෙම මැහීමේ වෙනස නඩුවේ අරටුව තෙක් කිඳා බසින දුර්වලතාවයක් නොවන බවත් මාගේ නිගමනය වේ.”

As observed by this court, the learned trial judge had correctly analyzed the matter placed before her with regard to the discrepancy in weight and come to a correct conclusion.

The learned President’s Counsel is further concerned with regard to the number of bags recovered by the Government Analyst when she was conducting her examination. The learned President’s

Counsel highlighted the recovery of 16 “knotted bags” by the Government Analyst and argued that it is contrary to the evidence of witness Priyantha Liyanage. According to the learned counsel, witness Liyanage had referred to eight “knotted bags” and not to 16 knotted bags.

However when going through the evidence of witness Priyantha Liyanage, referred to above in this judgment, it is clear that he refers to the sealing of bags in the following terms;

“පාර්සල් 8 වෙන්වෙන් වශයෙන් විහිවීද පෙනෙන පොලිතින් බැග් 8 කට දැමීමා ඒ පාර්සල් 8 වෙන්වෙන් වශයෙන් විහිවීද පෙනෙන බැග් 8කට දැමීමා
ඉන් අනතුරුව මොකද කලේ?
ඒ කවර සියල්ලම සීලරය කරනු ලැබුවා ඒ බැග් 8 නැවත විහිවීද පෙනෙන පොලිතින් බැග් 8කට දමල ඒ බැග් 8ත් සීල් කලා.”

If I understood the above explanation correctly, it appears to me that the witness had first put the eight bags (which contained Heroin) in to 8 more transparent bags and thereafter put those 8 parcels (containing 16 bags) in to 8 more transparent bags and sealed them. Thereafter put the 8 parcels (sealed) in to another transparent bag and sealed it.

In his evidence witness Liyanage had not referred to putting an additional ‘knot’ on the second bag, but that itself is not sufficient to reject his evidence.

The Government Analyst in her evidence had referred to the number of bags she found when opening the parcel referred to by PNB in the following words,

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- ප්‍ර: සාක්ෂිකාරිය එම කවර අවේම වෙනවෙනම පරීක්ෂාකර බලා පොලිතින් සීලර් යෙදූ කවර අවේම සීලර් අදුන් තිබෙනවාද?
- උ: ඔව්
- ප්‍ර: පොලිතින් කවර අවේම තමාගේ අත්සන සහ රසරීක්ෂක අංක සඳහන් කර තිබෙනවාද?

උ: ඔව්

.....

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ප්‍ර: හෙරොයින් ද්‍රව්‍ය අඩංගු පාර්සල් වලින් චලියට ගත්තා?

උ: ඔව්

.....

ප්‍ර: දල වශයෙන් ලා නිල්පාට පැකට් තිබුනා?

උ: පොලිතීන් කවර ඇතුලේ කෙලවර ගැටගසා තිබුනා ඇතුලේ දුම්රු පාට කුඩු අඩංගු වෙලා තිබුනා

ප්‍ර: පොලිතීන් බෑග් දෙකක් තිබුනා? ඒ දෙකම පරීක්ෂාකරන්න පුලුවන්ද?

උ: ඔව් කෙටි අත්සන සහ දිනය යොදා තිබෙනව අංකය යොදා තිබෙනවා

ප්‍ර: බෑග් 16 ක් තිබුනා ලා නිල්පාට

උ: ඔව්

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ප්‍ර: ලා නිල්පාට හුරු පොලිතීන් කවරයක් ඇතුලේ තවත් කවරයක හෙරොයින් තිබුනා

උ: ඔව්

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As observed by this court the positions taken up by the two parties i.e. the Investigating Officer and the Government Analyst corroborates each other. The learned President’s Counsel for the Accused Appellant Appellant had an issue as to why both sets of bags had a knot but, this is a matter for the person who did that to give an answer but, without asking the said question from the witness, it is too late for the counsel to raise it as an issue before this court.

The next issue raised before this court is the discrepancy with regard to the colour of the bags which contained Heroin. According to the bags produced before court the bags were light blue in

colour but the bags had been discoloured to some extent. The Government Analyst when opened the parcels had found Heroin inside eight bags and those bags were in light blue in colour.

However when the witness Priyantha Liyanage was questioned as to the colour of those bags, he took up the position that those bags were pink in colour. As observed by this court, the said question was put to the witness little prior to the opening of the sealed parcel, and once it was opened the discrepancy was noticed. At that time the witness was asked to check the Productions Register but it was observed that the colour of the bags which contained Heroin was not entered in the Productions Register. It is also observed that no contradiction had been marked with regard to the colour of the bags which contained Heroin when witness Priyantha Liyanage was cross examined by the defence. In the said circumstances it is very much clear that the witness had given the said answer from his memory after three years from the detection. Witness has further said that he has conducted more than 250 such raids and one cannot expect any reasonable person to keep everything in his memory to testify several years later. However the court observes a laps from the part of the Investigating Officer for not entering the colour of those bags at least in the Productions Register but when considering the amount of evidence placed before the trial court to establish the identify of those productions, I am not in a position to agree with the arguments placed before this court by the learned President's Counsel. As further observed by this court, the learned trial judge too had considered this discrepancy in her judgment but she preferred to accept the explanation given by the witness under re-examination.

In addition to the three main grounds relied upon by the Appellant, the learned President's Counsel made submissions with regard to several other grounds on which the leave was granted by this court. He submitted the failure by the Trial Judge and their Lordships of the Court of Appeal to consider the Medical evidence placed before the trial court, which corroborates the

version given by the Appellant. He further referred to the dock statement made by the Appellant and the evidence of his two witnesses his wife and the son and submitted that both the Trial Judge and their Lordships of the Court of Appeal had failed to give adequate consideration and appropriate weightage to those evidences.

I cannot agree with the learned President's Council on the above submissions. As observed by me the learned trial judge had correctly analyzed the Medical Evidence and the dock statement and come to a correct conclusion. This is with regard to the injuries said to have received by the Appellant due to assault by several sticks and poles at his residence prior to his arrest. The learned trial judge as well as their Lordships of the Court of Appeal have considered the evidence given by his wife and his son and rejected them having given reasons for their rejection. I see no reason to interfere with those findings.

The failure by the officers of the Police Narcotic Bureau to take the productions before the Magistrate and keeping the productions in police custody for 05 days were also raised by the learned President's Counsel. Even though he drew our attention to section 431 of the Code of Criminal Procedure Act No 15 of 1979, he did not make submissions with regard to section 77A which was introduced by the amending Act No 13 of 1984 to the Poisons Opium and Dangerous Drugs Ordinance.

Section 77A grants the officers the power to submit productions taken into custody, to the Government Analyst without first submitting them to the Magistrate's Court in Narcotic Cases and as observed by this court the above provision is used when detections are carried out by the officers of the Police Narcotic Bureau. However as further observed by this court, the most important factor to be considered in a Narcotic Case is the inward journey and not whether the provisions of 77A or 431 is followed.

This factor was considered in several cases including in the case of *Perera V. Attorney General 1998 (1) Sri LR 378* by J.A.N. de. Silva (J) (as he was then) as follows;

“The most important journey is the inwards journey because the final Analyst Report will depend on that”

In the absence of any challenge with regard to the inward journey by the learned President’s Counsel, I see no basis to uphold his objection.

When considering the matters discussed in this judgment I observed that the Appellant is not successful in establishing the grounds on which the Special Leave had been granted by this court. I therefore make order dismissing this appeal.

Appeal dismissed, No costs.

Judge of the Supreme Court

Murdu N.B. Fernando PC J

I agree,

Judge of the Supreme Court

P. Padman Surasena J

I agree,

Judge of the Supreme Court