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

In the matter of an appeal under and in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution.

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

Complainant

Curt of Appeal Case No:
HCC-301-309/2009
High Court of Colombo Case No:
HC 9319/1998

1. Mohammed Risak Hushen Imthiyas
2. Nasar Kakul Risvan
3. Mohammed Samin Mohammed Rashik
4. Ramayiya Selladore
5. Mohammed Buhari Mohammed Salavudeen
6. Kohombala Liyanage Asankasiri
7. Paramasivam Sivaraja
8. Velu Vadivelu
9. Karupaiya Raju
10. Sellayya Yogeswaran
11. Karupaiyya Sankar
12. Kalugampitiya Appuhamilage Nishantha Sanjeewa

Accused

And Now Between

1. Mohammed Risak Hushen Imthiyas
2. Nasar Kakul Risvan
3. Mohammed Samin Mohammed Rashik
4. Ramayiya Selladore
5. Mohammed Buhari Mohammed Salavudeen
6. Kohombala Liyanage Asankasiri
7. Paramasivam Sivaraja
8. Velu Vadivelu
9. Karupaiya Raju
10. Sellayya Yogeswaran
11. Karupaiyya Sankar
12. Kalugampitiya Appuhamilage Nishantha Sanjeewa

Accused-Appellants

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

Respondent

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

Counsel: Saliya Pieris, PC with Pasindu Thilakarathna Accused-Appellants
Rohantha Abeysuriya PC,ASG,for the Respondent

Written Submissions On: 22.09.2017 (by the Accused-Appellant)
06.11.2017 (by the Respondent)

Argued On: 25.10.2023

Decided On: 28.11.2023

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Sasi Mahendran, J.

The instance Appeal has been logged to set aside the Judgement dated 07th of December 2009 by the High Court of Colombo.

The Accused Appellants (hereinafter referred to as "the Accused") were indicted before the High Court of Colombo for the possession and trafficking of 141.3g 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, in order to substantiate the charges examined five witnesses. The Government Analyst expressed his opinion that it is Heroin. After the trial, the Learned High Court Judge found the Accused guilty on both counts, convicted, and life imprisonment was imposed.

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

i. That the case of the Prosecution is untenable and does not pass the test of probability. The following occasions have been cited as instances where doubt has been cast on the case of the Prosecution:

   a. That ten Police Officers participated in the raid but only five Police Officers entered the house.

b. That, not a single Accused tried to flee when the Police Officer PW1 broke into the premises and ordered the Accused to remain there.

c. That PWI did not clearly see what the Accused was doing as he entered the room but inferred that they were engaged in the packaging of heroin from the implements recovered from the scene. Whereas if all the Accused were engaged in the packaging of heroin, there should have been more implements.

d. That the police officers who conducted the raid, being experienced officers of the Narcotics Bureau did not check the amount of heroin recovered from each individual Accused but they collected all the heroin in a single parcel and sealed it.

e. That the journey to the scene of the crime lasted fifteen minutes but the return journey took fifty minutes and thereby renders the version of the prosecution improbable.

ii. That there is insufficient evidence to convict the 2nd - 12th Accused

iii. That the Accused has been denied of his right to a fair trial as the observations of the learned High Court Judge contained in the judgment give rise to an appearance of bias.

iv. That the learned High Court Judge failed to give the benefit of the doubt arising from the lack of the Government Analyst's report.

v. That the learned High Court Judge failed to correctly evaluate the burden of proof in this matter.

The story of the prosecution was that a group of police officers, led by Prosecution Witness 01, P Amarajith De Silva (hereinafter referred to as PW01) upon receiving information from Prosecution Witness 02's (PW02) private informant about an individual named 'Imthiyas ' (hereinafter referred to as the 1st Accused) involved in trafficking

narcotics, had gone to Wellampitiya on 18.05.1996 at around 2.00 pm to conduct the raid. They observed through a grill the 1st and the 2nd Accused at the said house were packing some substances in paper. The officers promptly barged into the said premises and detained all the Accused within the premises which amounted to 12 individuals. Along with the Accused, they also seized several metal foils with small amounts of Heroin already packed in foil, 2 lamps, blades, a plastic spoon, bundles of metal foils, and cellophane bags.

Further, a brown colour substance packed in a cellophane bag which was in between the legs of the 1st Accused was recovered and after examination by the officers, it was suspected to be Heroin.

On page 132 of the Appeal brief ;

ප්‍ර : 1 වෙනි චුදිතගේ කකුල් දෙක අස්සේ හෙරොයින් පාලර්.සයක් තබාගෙන සිටියා කිව්වා?

උ : එහෙමයි ස්වාමීනි.

ප්‍ර : 1 වන චුදිත මොන විදියටද සිටියේ. පෙන්වන්න පුලුවන්ද?

උ : කකුල් දෙක මේ විදියට පටලවාගෙන. හරියටම එරමිණිය ගොතලාද කියන්න අමාරුයි. කකුල් දෙක හරස් වෙන විදියට බිම වාඩිවෙලා හිටියා.

The officers afterward packed and weighed the productions found near 1st Accused separately (weighing 161 grams and 15miligrams) whereas they packed and weighed the rest of the production found at the said locations collectively (weighing 115 grams and 100 milligrams). According to the Government Analyst, they have analyzed both parcels separately and according to the Government Analysis report, the parcel recovered from the 1st Accused had 80.1 grams of Heroin, other Parcel contained 61.2g of Heroin. With a total of 141.3 grams. According to the Indictment, all were charged for joint possession of 141.3 grams of Heroin.

The accused position is that the story of the prosecution could not be believed, as the events that transpired during the trial by the prosecution are improbable.

This Court has to decide whether the following events are believable or not.

What it is probability was discussed **by Justice Jayasooriya In Wickremasinghe v. Dedoleena and others 1996 (2) SLR held that;**

"A Judge, in applying the test of probabilities and improbability relies heavily on his knowledge of men and matters and the pattern of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."

this proposition was followed by Justice Gooneratne in, Singharam Thiyagarajah v. AG CA 216/2010 Decided on 27.11.2014 held that

"I wish to observe that the realities of life and the testimony of a witness cannot always be co-related. Nothing is perfect in life and the truth does not surface so easily as a man so bias could attempt to hide the truth or distort it. The test of probability need to be applied and recognized to grapple with normal human behavior and problems and pave the way for the likelihood of occurrence."

We draw the following evidence that transpired at the trial.

According to PW01's evidence, Without any hesitation, he has given the reason why he has not indicated the place of the raid in his outward journey.

Page 126 of Appeal brief

ප්‍ර : මොකක්ද හානිය ?

උ : සමහර විට මත්ද්‍රව්‍ය නිලධාරීන්ට මේ පොත ඕනෑ . ලිපිකරුවන් ගන්න පුළුවන්. අධිකරණයේ රාජකාරි සඳහන් ගෙන්වන්න පුළුවන් . යම්කිසි හැඟීමක් ඇති වෙන්න පුළුවන්. එක නිසා තමයි ප්‍රකාශය සඳහන් නොකර අවශ්‍යතාවය පමණක් ලිව්වේ.

There's another question put forward by the defence that the PW01 has not followed rules of the section 17(4) of the Police Ordinance.

Page 127 of the Appeal brief

ප්‍ර : මම කියන්නේ තොරතුරු පොතට අදාළ වන්නේ වට සංචාරය පමණක් නොවෙයි. වැටලීමට අදාලව යන විටත් ඒ 17(4) වගන්තියට යටතේ ක්‍රියා කලයුතුයි කියලා මම යෝජනා කරනවා.

උ : නැත ස්වාමිනි. මා එය ප්‍රතික්ෂේප කරනවා.

but we are mindful that this raid took place on a tip-off, is it practical for them to follow all the rules and regulations before they leave the place?

On page 139 of the Appeal brief;

1930 ගණන් වල දෙපාර්.තමේන්තුවල සකස් කල නියෝග තිබෙන්නේ. නමුත් පරීක්ෂණ ක්ෂේත්‍රයේ නිලධාරීන් යනවිට උපසේවයෙන් අත්සන් කර ගෙන යාම සාමාන්‍යයෙන් කර ගෙන යන්නේ නැහැ,.

also, they have indicated that except for Inspector Saman Kumara, all the other officers were in their civil attires.

One of the defences was that the journey to the scene of the crime was 15 minutes but the return journey took 50 minutes, therefore the story of the prosecution is improbable.

According to PW01, he has explained the reason for taking more time to return from the scene. According to him, it was a Saturday and there was heavy traffic.

We hold that time of departure and arrival time was mentioned by PW01 is acceptable, there's no reason for him to give false timing. We Accepted the explanation given by PW01 regarding the time difference. We hold that there is no reason to disbelieve him.

The defence contends that the version of the prosecution where 10 police officers participated in the raid but only five police officers entered the house, is highly improbable and therefore casts doubt on the version of the prosecution.

According to PW01, since the house is very small and area was highly populated he kept 3 officers to guard the surrounding the area and other two officers to guard the vehicle. We are mindful that officers are well trained and they have their own pattern of conducting the raid. therefore there is no need for us to disbelieve his version.

Another point taken by the defence was that not a single of the 12 Accused attempted to flee when the police officers entered is highly unlikely and casts doubt on the case of the prosecution.

But according to the evidence of PW01, they have recovered one parcel which was hidden by the 1st Accused. This piece of evidence was not disputed by the defence. It shows that accused didn't have sufficient time to react. Furthermore, we observed that there were only two doors and they were guarded by the officers therefore there was no way for them to flee.

We don't see any improbability of the prosecution version.

Considering the evidence of PW01 this evidence is probable and there is no doubt created by the defence regarding the raid.

Therefore, we hold that the Learned High Court Judge correctly accepted the evidence of PW01.

In the instant case, all the Accused were charged under joint possession and trafficking of Heroin and convicted on the basis that all the Accused were presented in the said location at the time of the raid.

The issue is whether the 2nd to 12th Accused had the requisite knowledge that the parcel concealed by the 1st Accused contained Heroin.

Lord Wilberforce in **Warner v. Metropolitan Police Commissioner (1968) 52 Criminal Appeal Report 373. has considered this matter**;

"The question, to which an answer is required, and in the end, a jury must answer it, is whether in the circumstances the Accused should be held to have possession of the substance, rather than mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances- to use again the words of Pollock and Wright, possession in the common law, P. 119- the 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, had been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the Accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is, in fact, a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substances."

This proposition was considered by **His Lordship Ismail, J** in his Judgement on **K. Sumanawathi Perera v. Attorney General 1998 2 SLR 20, held that;**

"We have taken these facts into consideration and applying the observations of Lord Wilberforce, referred to above, we are of the view that the accused-appellant has succeeded in creating a reasonable doubt in regard to the question whether she did possess the requisite knowledge required for the purpose of proving charges in the indictment

against her. We are of the view that it would be appropriate to extend the benefit of the doubt in this regard to the accused-appellant."

Recently **His Lordship Aluwihare PC J in the case of Mohamed Iqbal Mohamed Sadath v. Attorney General, SC Appeal 110/15,** (SC Minutes 14.12.2020), held:

"Lord Wilberforce went on to state that, on such matters as above, though not exhaustively stated, it must be decided whether, in addition to physical control, he has or ought to have imputed to him, the intention to possess or knowledge that he does possess, what is in fact a prohibited substance. The above reasoning in my view is a rational guideline that should be adopted in deciding as to whether the Accused had the knowledge (the requisite mens rea) that what he possessed is a prohibited substance, even though he may not have known the precise nature of the substance."

Further in an Indian Judgement **Justice Dipak Mishra, J in Mohan Lal v. State of Rajasthan, Criminal Appeal No. 1393 of 2010, Decided on 17.04.2015, held that;**

"Term "possess." Under narcotic drug laws, means actual control, care, and management of the drug. Collini v. State [7]. Defendant 'possesses' controlled substance when defendant knows of substance's presence, substance is immediately accessible, and defendant exercises "dominion or control" over substance. State v. Hornaday[8]."

.....

The defendants must have had dominion and control over the contraband with knowledge of its presence and character. U.S, v. Morando- Alvarez[11].

.....

Dr. Harris, in his essay titled "The Concept of Possession in English Law[16]" while discussing the various rules relating to possession has stated that "possession" is a functional and relative concept, which gives the Judges some discretion in applying abstract rule to a concrete set of facts. The learned author has suggested certain factors which have been held to be relevant to conclude whether a person has acquired possession for the purposes of a particular rule of law. Some of the factors enlisted by him are; (a) degree of physical control exercised by person over a thing, (b) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (c) the persons' intention in regard to the thing, that is, 'animus possessionis' and 'animus domini'

……

In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the said narcotic substance was not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control."

Now I turn to the English judgments which dealt with the **'joint possession'**

Lord Widgery CJ, in R v. Searle and Others, The Criminal Law Review 1971,page592 held that;

"…allowing the appeals, the effect of those parts of the summing -up was to equate knowledge with possession. However, mere knowledge of the presence of a forbidden article in the hands of a confederate was not enough: joint possession had to be established. The sort of direction which ought to have been given was to ask the jury to consider whether the drugs formed a common pool from which all had the right to draw at will, and whether there was a joint enterprise to consume drugs together because then the possession of drugs by one of them in pursuance of that common intention might well be possession on the part of all of them: Thompson (1869) 21 L.T. 397. The summing-up was inadequate and possibly misleading. Although there was ample evidence to justify a conviction it was impossible to say with certainty that all the defendants were guilty and so it was not a case in which the proviso could be applied."

Chief Justice, Mr. Drake and Justice Henry, in James MC Namara, 1988 (87) Cr. App.R. 246, has stated that;

" The situation in the present case with which we are dealing is, to pick up Lord Wilberforce's words, a non-ideal form of possession, namely, holding by the defendant of a box and its contents, which perhaps it is convenient to refer to as box-possession, observing, as we do, that we appreciate the danger of begging the question altogether by the use of the word "possession." The defendant admittedly has control of a box which he knows contains a "thing" which he has not seen. If he knows what the thing is, no problem arises. But what if the defendant knows that the box contains something, but is mistaken as to the nature of that thing? That is to say, in terms of the present case, what if he knew

that the box contained something, but he thought it was pornographic or pirated video films, whereas in fact it was undoubtedly cannabis resin?"

R. v. Bland, Criminal LR 1988 41 at page 42, Held that;

"…allowing the appeal and quashing the conviction, there was no evidence of assistance, active or passive; the fact that the appellant and Ratcliff lived together in the same room was not sufficient evidence from which the jurv could draw such an inference. There was sufficient evidence from which the jury could have inferred knowledge on the appellant's part that Ratcliff was drug-dealing, but no more. Assistance, though passive, required more than mere knowledge; for example, it required evidence of encouragement at least, or of some element of control, which was entirely lacking in the case. The case should have been withdrawn from the jury."

May L. J., in Gareth Edmund Lewis, 1988 (87) Cr. App.R. Page 270 held:

"'We respectfully agree that Warner's case is the leading authority on this particular question. But as has so often been said in different contexts, particularly in criminal jurisprudence, the question of what constitutes "possession" is an illusive concept at common law. It depends so much on the circumstances of the particular case, as well as the wording and intent, for instance, of the particular statute creating the offence under consideration. It is no doubt for this reason that the speeches in Warner's case seem to us, respectfully, to reflect a substantial number of different shades of meaning and approach from which it is not easy to distil a conclusion supported by the majority of the House which is relevant to the instant appeal. In this connection, we have been greatly assisted by the headnote in the Criminal Appeal Reports, which seems to us accurately and conveniently to summarise the decision.

The House of Lords certainly decided, though with Lord Reid dissenting, that the relevant statute created an absolute offence. This is in the sense that in order to be satisfied of guilt, there is no need for the jury to be satisfied of any mental element in the ingredients of the offence, such as we used to describe as mens rea. However, in our view herein lies one of the difficulties in applying the decision in Warner's case because, notwithstanding that the offence is an absolute one, a majority of their Lordships expressed the view that some mental element is required before a jury can be satisfied that the defendant is truly "in possession" of the relevant drugs.

"On this basis I think that the notion of having something in one's possession involves a mental element. It involves in the first place that you know that you have something in your possession. It does not, however, involve that you know precisely what it is that you have got." And, at p.403 and p.289, the learned Law Lord said: "The question resolves itself into one as to the nature and extent of the mental element which is involved in 'possession' as that word is used in the section now being considered."

In the instant case as the law stands now prosecution, has failed to discharge its burden of establishing the requisite mental element presumptively by adducing evidence in which the heroin contained in the parcel has been recovered from the 1st Accused where other Accused had knowledge.

The evidence placed before the trial court is that the police had recovered two parcels in which one parcel was concealed by the 1st Accused and, the other one was found in the middle of the place where the other accused were packing. Although the Government Analyst separately weighed the quantity of Heroin in each parcel separately, both quantities were put together and indicted all Accused under joint possession.

We are mindful that the parcel recovered from the 1st Accused was hidden by himself and was not visible to the other Accused. There is evidence to show that only one spoon was used in the packaging process.

The question arises, whether the prosecution had led the evidence that the other accused had the knowledge (requisite mens rea) that the parcel contained a prohibited substance (Heroin).

Although the evidence does not clearly show that the other Accused (2nd -12th Accused) had knowledge about the parcel which was in between the legs of the 1st Accused, there is no doubt about the fact that all Accused were aware that the other parcel found in front of them contained Heroin, because all of them were engaging in packing heroin at the time of the raid.

According to the evidence all were present in the locked house with the prohibited substance and equipped with the necessary items to pack the said substance, such as foil, 2 lamps, blades, a plastic spoon, bundles of metal foils, and cellophane bags which has been marked and produced at the trial. Therefore it is clear that the all Accused were in joint possession of the substance.

And we are mindful that such a large quantity of Heroin should be considered for the purpose of trafficking.

The presence of the Accused in the said room under the circumstances sufficient to establish beyond reasonable doubt that they were possessing and trafficking Heroin.

The parcel was found in the commonplace.

However, in the dock statement, all the Accused offered no explanation whatsoever for their involvement in the crime.

Upon examination of the dock statement provided by the Accused, it becomes patently and manifestly clear that they have failed to create doubt regarding their connection to this crime. In other words, court expects that when incriminating evidence is adduced against the Accused, the Accused to give a reasonable explanation to the court. if he fails the court would presume that there was no such explanation available to him.

I would like to refer to the sentiments referred by **Justice F.N.D Jayasuriya along with Justice P.H.K Kulathilaka J** in the case **Thalpe Liyanage Manatunga v. Attorney General, CA No.47/98, decided on 25.08.1999,** held that;

"The question arises on an evaluation and analysis of the dock statement whether the accused has attempted to explain away the incriminating circumstances elicited against him and the prima facie case established by the prosecution by explaining away those circumstances and stating that there was only an insertion of the male organ into her legs and not into the private part of the virtual complainant. If such, a fact took place and existed, it was within the power of the accused to come out with that explanation and to refute the charge of rape. Though the accused made a dock statement he has failed to explain away the incriminating circumstances and prima facie case established against him by indulging in any such explanation. Then as wise and prudent judges often observe in those circumstances both common sense and logic induce any Court to come to the conclusion that the accused did not come out with such an explanation because such circumstances never existed. The accused in his utterly deficient dock statement has merely stated thus. මම කිසිම වැරද්දක් කලේ නැහැ. පෙමවති තමයි තරහට කියා තිබෙන්නේ. කිත්සිරි සමග මගේ කිසිම වරදක් වී නැහැ. That is the bare and the deficient dock statement made by the accused. In view of the deficiency in the dock statement this Court is entitled to draw the presumptions and inferences arising from such a deficiency in terms of the speeches of Lord Ellenborough in Rex v. Cochrane-Gurney's Reports 479 and of Justice Abbott in Rex v. Burdet (1820 4 Band Alderman 95 at 120)."

When we perused the evidence, the police had sent both parcels separately marking numbers. The report of the Government Analyst disclosed that they had received both parcels separately with different weights. Further Government Analyst has analyzed it separately and indicated the pure quantity in each parcel.

When there is evidence to show that the parcel recovered from other Accused contained Heroin, could this court deal with the certified quantity described by the Government Analyst which was a common possession of all the Accused.

It is true that the Honorable Attorney General had sent the indictment to all the Accused mixing the two quantities of heroin found in the 2 packs for joint possession. But it is clear from the evidence of the Government Analyst that the parcel recovered from the commonplace was 61.2 grams of Heroin. Therefore, this court would act on the basis to separate the Heroin found from the 1st Accused and deal with the Parcel found in the commonplace which exceeds 2 grams of Heroin.
A similar situation arose in the following case,

In **Agampodige Samantha de Zoysa v Attorney General CA 83/97,** decided on 27.10.1998. **Jayasuriya J** held that;

'Upon this appeal according to certain inquiries made by this court it was revealed that the accused had merely pointed out his house and this evidence of the police was to the effect that they on their own effects and exertion discovered the heroin which was found in the house. It is alleged that a quantity of 20 grams was discovered from that house and the quantity of 7 grams was discovered by the police Narcotics Bureau officials from the person of the Accused. However, the officers mixed the two quantities and make one parcel and sent it to the Government Analyst for examination and report. The report of the government Analyst's disclosed that of the entire quantity sent to the Government Analyst's Department for examination and report. The contends of the entire parcel contained 10.9 grams of heroin. As the officers have mixed the two quantities and prepared one parcel for forwarding it to the Government Analyst the learned Counsel contends that there is no evidence before the court in regard to the quantity of Heroin found in the packets on the person of the accused and in the absence of proof a certified quantity he contends that the Court would have to act on the basis that what was found on the accused person did not exceed one gram of heroin."

Therefore, we set aside the conviction and sentence imposed on the Accused, and in substitution, we find all the Accused guilty of possession and trafficking of a quantity of Heroin 61.2g and convict them for life imprisonment.

Subject to the variation of the sentence this Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL