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

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

C.A.No. HCC No.222/2011
H.C. Colombo No. HC 1799/2004

Liyanage Nishantha Perera

Accused-Appellant

Vs.

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

Complainant- Respondent

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BEFORE : **ACHALA WENGAPPULI, J.**

DEVIKA ABEYRATNE, J.

COUNSEL : Rienzie Arasacularatne P.C. with G. Premakumar and C. Arasacularatne for the Accused-Appellant.

Sudharshana de Silva D.S.G for the respondent

ARGUED ON : 10th February, 2020

DECIDED ON : 25th August, 2020

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ACHALA WENGAPPULI, J.

This is an appeal, by which the accused-claimant-appellant (hereinafter referred to as the "Appellant") seeks to challenge the validity of an order of the High Court of Colombo in case No. HC 1799/04 delivered on 14.06.2011, in relation to the refusal of his application, made under Section 425 of the Code of Criminal Procedure Act No. 15 of 1979.

The Appellant was indicted before the High Court for possession and trafficking in of 742.3 grams of Heroin. In the indictment that had been presented against him, the prosecution had listed bank notes to the value of Rs. 4,222,076.00, as its 5th item of production. The trial of the Appellant commenced on 10.11.2004. The Appellant had absconded his trial half way through his case and was since tried in *absantia*.

At the conclusion of the trial, the Appellant was acquitted on both counts by the High Court by its judgment dated 28.07.2010, which was pronounced in his absence.

On 11.03.2011, the Appellant made an application to the High Court requesting it to release the said 5th item of production to him. The High Court had conducted an inquiry into the application of the Appellant. The Appellant and the prosecution made oral and written submissions and the Court had delivered the impugned order confiscating the 5th item of production to the State.

In support of the Appellant's appeal against the said order of confiscation, learned President's Counsel contended that the item of production could not be treated as proceeds of any crime since the prosecution never alleged during its evidence that the said amount of money that had been recovered from the possession of the Appellant at the time of his arrest was used for the commission of any offence. There was no one else other than the Appellant who claimed ownership to the said item of production before the High Court. Therefore, the Appellant claimed that the findings of the trial Court that the said amount of money could not have been earned by the Appellant through reasonable means, and that the Appellant did not challenge the judgment of acquittal, are clearly erroneous conclusions reached by the High Court which made the said order an illegal one.

It was also the contention of the learned President's Counsel that in the absence of;

a. any conflicting claim by a third party,
b. any material to conclude that the "any offence appears to have been committed" or, that the said item of production "has been used for the commission of any offence";

that the High Court was wrong to have acted under Section 425 of the Code and proceeded to confiscate the said item of production. He also made submissions which was in support of his position that the judgments of ***Jayagoda & Another v Attorney General*** (2006) 2 Sri L.R. 387 and ***Meegahapola v Officer in Charge,***

Harbour Police, Colombo & Another (1992) 1 Sri L.R. 58 have no application to the instant appeal since they could be distinguished.

Learned Deputy Solicitor General, in defending the impugned order of the High Court, submitted that it was made upon the available material in the absence of an application to have a *viva voce* inquiry. He contended that the material available was more than sufficient for the High Court to conclude that they satisfy the statutory requirement imposed by the Section 425, where it is stated the Court *"may make such order it thinks fit"* if *"any offence appears to have been committed"* in relation to the said amount of cash. He referred to the evidence presented by the prosecution where it was stated by the officers of the Police Narcotics Bureau, who raided the residence where the Appellant was residing with several others. It is their evidence that some of the bundles of bank notes that were recovered from the possession of the Appellant at the time of detection of Heroin, were found scattered on the bed while they also found several more bundles of bank notes that had been stacked inside a black bag, in which Heroin was detected.

The High Court, in the impugned order primarily acted on the principles that had been enunciated in the judgment of ***Jayagoda & Another v Attorney General*** (supra) since there was no contest among the parties that the applicable statutory provisions in relation to the Appellant's application are found in Section 425 of the Code of Criminal Procedure Act No. 15 of 1979. Not only the High Court had considered the evidence of the Appellant during his trial where he sought to offer an explanation to the trial Court over his possession of large

amount of bank notes, but it had also considered the judgment of the trial Court, where the Appellant's explanation was considered and rejected.

In the said order, the High Court also acted on the reasoning contained in the judgment of this Court in ***Meegahapola v Officer in Charge, Harbour Police, Colombo & Another*** (supra) in rejecting the Appellant's application.

Thus, it is incumbent upon this Court to consider the validity of the Appellant's challenge on the legality of the order of confiscation made by the High Court in the light of the legal principles enunciated in the said judgments, if they are applicable to the determination of the instant appeal.

The submissions of the learned President's Counsel that the statutory provisions contained in Section 425 have no relevance to his application to the High Court must be considered by this Court at the outset.

The said contention was made in the context that there was no allegation of commission of an offence in relation to the amount of money and there was no allegation that the money was used to commit an offence by the Appellant.

Section 425 of the Code consists of four subsections. Section 425(1) seems to spelt out the general scope of the applicability of the Section in general. The sub section states;

> *"When an inquiry or trial in any criminal Court is concluded the Court may make such order as it thinks fit for the disposal of any document or other property produced before it regarding which any offence appears to have been committed or which has been used for the commission of any offence."*

Upon plain reading of the said subsection it is clear that with the insertion of the said sub section, the Legislature had sought to deal with two situations. Said subsection is meant to apply where it appears to a criminal Court that any document or other property produced before it in any inquiry or trial *"regarding which any offence appears to have been committed or which has been used for the commission of any offence"* it must then make *"such order as it thinks fit"*.

In the instant appeal, the bank notes that were in the possession of the Appellant were produced as an item of productions by listing it in the indictment. The Appellant was indicted for possession and trafficking in of more than 700 grams of Heroin.

The definition provided by the Legislature to the offence of trafficking in of a dangerous drug, as per the Section 54A of the Poisons Opium and Dangerous Drugs Ordinance (as amended), is *"to sell, give, procure, store, administer, transport,*

send, deliver or distribute". The said definition to the offence of trafficking in of a dangerous drug envisage situations where involvement of monetary transactions in the commission of the offence of trafficking. In this respect, possession of a large amount of bank notes along with a quantity of Heroin, which had a gross weight of almost two kilograms clearly satisfies the statutory requirement imposed by Section 425(1) where it states "*regarding which any offence appears to have been committed or which has been used for the commission of any offence*". The required degree of proof is specified as "it appears" to Court. Therefore, the contention that the provisions of Section 425 have no application to the production item that had been listed as such by the prosecution necessarily fails.

Moving on to consider the second aspect of the learned President's Counsel's contention in which he contended that since there was no conflicting claim on the production item by any party other than the Appellant and there was no material before the High Court to conclude that the "*any offence appears to have been committed*" or, that the said item of production "*has been used for the commission of any offence*", this Court is of the view that the said contention should be examined for its validity in the light of the statutory provisions contained in Section 425(4), in addition to 425(1). This is due to the fact that the contested item of production, not being a "document", should then be considered as "property" as per the provisions of Section 425(1).

Section 425(4) not only provides a definition to the term "property" but also provides an explanation as to the circumstances under which some "property" could be included in to the scope of Section 425(1).

The Section 425(4) reads as follows;

> *"In this section the term "property" includes in the case of property regarding which an offence appears to have been committed not only such property as has been originally in the possession or under the control of any party but also any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise."*

Clearly, the said sub section has included not only the "property" that was in the possession or control of the claimant, but also extends to *"any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise"* by bringing them under the scope of Section 425(1).

The Appellant gave evidence before the trial Court. It was his position that he had withdrawn about three million rupees from several bank accounts a few days before he was arrested. The monies were to be invested in a business venture in partnership with his brother-in-law and these funds meant to be his share of the said business venture.

However, in his statement to the PNB, the Appellant stated that the cash that had been recovered from his possession was derived from his Heroin sales and at the time of detection, he was in the process of counting it when the officers have raised his house. He did not know the exact amount of cash he had in his

possession at the time of his arrest. In ***Joseph v Attorney General*** 47 NLR 446, it was stated that the opinion of Court as to the ownership of the property may be based on a confession made by the accused since Section 24 of the Evidence Ordinance which makes confessions 'irrelevant in criminal proceedings' does not prevent a Court from acting on them in an application under Section 425.

Returning to the legal submissions of the Appellant, the fact in issue before the High Court was whether "any offence appears to have been committed or which has been used for the commission of any offence" in relation to the item of production. The High Court had guided itself with the reasoning of the judgment in ***Jayagoda & Another v Attorney General*** (supra) in arriving at a finding not in favour of the Appellant.

In the said judgment, where an order of confiscation made under Section 425 of the Code of Criminal Procedure Act No. 15 of 1979 is challenged, invoking revisionary jurisdiction of this Court, it was held that;

> *"There is no rule that the property should be returned to the person from whom it was taken when the Court finds that an offence appears to have been committed in respect of the property. The Court is entrusted to make such order as it thinks fit. If the Court is bound to return the property to the person from whom it was taken from knowing that it did not belong to him and that no evidence had been led to prove that the claimant is entitled to it, it would not be a fit order."*

The Appellant sought to distinguish the judgment of ***Jayagoda & Another v Attorney General*** (supra) from the facts of the instant appeal. This Court is of the view that the said judgment had dealt with the identical issue that had been presented by the Appellant in the instant appeal and therefore is of very strong persuasive value. The only difference is this is an appeal whereas the judgment of ***Jayagoda & Another v Attorney General*** (supra) is in relation to an application for revision. It is evident from the said judgment as to the nature of the case presented by the Petitioner, which is identical with the position advanced by the Appellant before this Court. Their Lordships stated;

> *"There is no dispute that the accused made admissions to the police that the money formed part of the charge. Nowhere did the petitioners make a claim to this money other than through this motion in the High Court at the conclusion of the trial. The submission of the learned counsel is that the money should be returned to the petitioners as the police took this money from them."*

Their Lordships, in delivering the judgment of ***Jayagoda & Another v Attorney General*** (supra) have considered the scope of the Sections 425(1) and 425(4) extensively as well as the relevant authoritative judicial precedents on that point. This Court respectfully agrees with the reasoning of their Lordships' judgment as a judicial precedent which had laid down the legal principles that are applicable in an application under Section 425.

This Court already noted the evidence presented by the prosecution in relation to the circumstances under which the officers have taken charge of the

large amount of bank notes from the possession of the Appellant. The trial Court, although acquitted the Appellant by its judgment, had nonetheless disbelieved the explanation offered by him as to the presence of the large amount of bank notes. The contention that the High Court, in its judgment had observed that the said amount of money was not earned by the Appellant by *"reasonable business activity"* (සාධාරණ ව්‍යාපාර වලින් උපයා ගත්තේය) which is not the applicable criterion as envisage by Section 425, cannot be accepted since the High Court, in its impugned order and in rejecting his application clearly concluded that the Appellant had earned the said amount of money through criminal activity (සාපරාධී ක්‍රියා වලින්). Clearly the High Court had applied the correct legal criterion in making the impugned order.

Therefore, this Court is of the considered view that the appeal of the Appellant is devoid of any merit.

Accordingly, this Court affirms the order of the High Court dated 14.06.2011 and dismisses his appeal.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL