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

In the matter of an Appeal under and in terms of Article 138(1) of the Constitution read together with Section 11 (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 with Section 331 of the Code of Criminal Procedure Act No. 15 of 19798.

Court of Appeal Case No:
CA-HCC 281-282/19

HC of Chilaw Case No:
HC 38/11

The Democratic Socialist Republic of Sri Lanka

Complainant

v.

1. Buddhika Nandana Paranawithana
2. Vidanage Prasanna Indika Perera

Accused

AND NOW BETWEEN

1. Buddhika Nandana Paranawithana
2. Vidanage Prasanna Indika Perera

02nd Accused-Appellant

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

Complainant Respondent

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

Counsel: Malindu Peiris with Dimuthu Bandara for the Accuse Appellants
Sudharshana De Silva, DSG for the Respondent

Written Submissions On : 22.06.2021 (by the Accused-Appellants)
22.06.2021 (by the Respondent)

Argued On: 01.11.2023

Decided On: 13.12.2023

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Sasi Mahendran, J.

The Accused Appellants (hereinafter referred to as "the Accused") were indicted before the High Court of Chillaw for the possession and trafficking of 333.7g 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.

The prosecution, in order to substantiate the charge examined six witnesses. The 1st and the 2nd Accused gave dock statements and did not call any witnesses. After the trial, the Learned High Court Judge found both the Accused guilty on both counts, convicted, and imposed Death sentence.

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

The following Grounds of Appeal were urged by the counsel for the Accused.

A. The learned trial judge has failed to consider the need to adduce evidence of the Driver of the Van alleged to have been used by the accused, especially when the conduct of such a raid is vehemently disputed by the defence.

B. The learned trial judge has failed to consider the glaring improbabilities and lapses in the prosecution version of the alleged raid which warrant calling of the said driver of the van as an independent witness.

C. The learned trial Judge has not considered the gravity of the failure by the prosecution to submit the vehicle alleged to have been used by the accused to be identified at the trial by which substantial prejudice was caused to the accused depriving them of a fair trial.

D. The learned trial judge has misdirected himself in law by not forming an inference under sec 114(f) of the Evidence Ordinance with regard to non-production of the van of the accused in the trial and failure to call its driver as a witness.

E. The learned trial judge has unduly burdened the accused by expecting them to prove certain facts, which is against establishes law.

F. The learned judge has erred in law, by considering against the accused, several facts which have not been proved in Court, and which also irrelevant to the matter.

The relevant facts giving rise to the prosecution are that on 09.03.2006 Prosecution Witness 02 (PW02) received information from his private informant about a consignment of drugs brought via boats from India being transported to Colombo. They were informed that the drugs would be transferred among parties at a certain place on the Chilaw-Colombo road in the Mahawewa area.

A team of 10 police officers proceeded to the said location and observed the said suspicious vehicle (van) from a distance of 50 meters. At around 5:55 am another suspicious motorcycle approached the said van, the officers noticed a parcel being passed. Then they promptly obstructed the van and searched it. Two parcels of Heroin were recovered from the two Accused who instantaneously tried to hide the said parcels. Although the officers gave directions to trap the motorcyclist, they managed to escape and there was no trace to be found.

On Page 134 of the Appeal brief,

PW01;

“ප්‍ර : එම සැක කටයුතු වාහානය ළඟට ළඟා වන අවස්ථාවේදී තමුන් දුටු ඒ පාර්.සලය කා භාරයේද තිබුනේ?

උ : පළවන පාර්.සලය අද දින ගරු අධිකරණයේ විත්ති කුඩුවේ සිටින 1 වන සැකකරු වන බුද්ධික නන්දන පරණවිතාන විසින් වාහනයේ දොරේ අපොසිටින් ගලවා ඒ තුලට එක පාර්,සාලයක් දැමීමට සුදානමින් සිටියා. අද දින ගරු අධිකරණයේ විත්ති කුඩුවේ සිටින 2 සැකකරු වශයෙන් පෙනී සිටින ප්‍රසන්න ඉන්දික පෙරේරා විසින් තවත් පාසර්ලයක් ඔහු වාඩි වී සිටි අසුන උඩට අත්දෙකෙන් තල්ලු කිරීමට සුදානම් වන අවස්ථාවේදී මම ඔවින් දෙදෙනාගේ පාර්.සලය පරික්ෂා කිරීම සඳහා සුදානම් වුනා. “

The aforementioned officers recovered heroin weighing 2kg106g parcel from the 1st Accused and 2kg 0.070 grams from the 2nd Accused respectively while they were trying to hide when the raid took place surrounding the van. The said parcel was wrapped using a Tamil newspaper and sealed with gum tape. According to the Government Analyst, it contained 333.7 grams of pure heroin.

There is clear evidence to show that the person who came on the motorbike had given both parcels to the rear side of the van.

On page 134 of the Appeal brief,

“ප්‍ර : එහි කී දෙනෙක් හිටියාද

උ : රියදුරු සමග පිටුපස ආසනයේ සැකකරුවන් දෙදෙනෙක් සිටියා .

ප්‍ර :තමන් නිරීක්ෂණය කරල ලද පාර්.සලය ලබා දුන්නේ රියදුරටද පිටුපස සිටි අයටද ?

උ :පිටුපස සිටි අයට.”

Evidence led in the action clearly shows that the parcel was not given to the driver. And it is also evident that the parcel was handed over to the Accused who was in the rear side of the van. It was further established that once the police opened the door both the Accused tried to hide the parcels. It shows that both Accused had exclusive conscious control over the property. The only inference that can be drawn is that both Accused were in joint possession of the Heroin. This conduct of the Accused suggests that they have knowledge of what the parcel contained. if they didn’t know what was in the parcel, they would not have tried to hide it when the officers raided the said vehicle.

Upon the conclusion of the evidence of the prosecution, In the Dock statement both the Accused vehemently denied the said accusation. However, the second Accused in his dock statement accepted the fact that he was inside the van at the time of the raid.

On Page 391 of Appeal brief;

"මම නිකන් වැන් එකේ ඉද්දී පාන්දර අපිට අරගෙන ගිහිල්ලා මේ නඩුව දැම්මා..."

In the instant case, Both Accused were charged with 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 they had the requisite knowledge that the parcels which was in their possession contained Heroin.

General Possession is defined in **Stroud's Judicial Dictionary of Words and Phrases Eighth Edition Volume 3, Greenberg, page 2223;**

"Controlled drug in his possession" (Misuse of Drugs Act 1971 (c.38) s.5(2)). A man who put a small quantity of cannabis into his wallet, knowing what it was, remained in "possession" of it within the meaning of this section even though he had long forgotten it was there (R. v Martindale [1986] 1 W.L.R. 1042). A woman who did no more than live with a man at a time when he possessed and dealt in drugs was not herself guilty of possession, notwithstanding that she must have known what he was doing (R. v Bland [1988] Crim. L.R. 41). Where an accused was apprehended while delivering a box containing cannabis resin to a co-defendant, he was held to be guilty of having a "controlled drug in his possession", notwithstanding his claim that he thought the box contained pornographic videos (R. v McNamara (1988) 87 Cr.App.R. 246). In construing the word "possession" the question to be asked was whether on the facts the defendant had been proved to have, or ought to have imputed to him, the intention to possess what was in fact a controlled drug (R. v Lewis (1988) 87 Cr.App.R. 270)."

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."

Lord Widgery CJ in R v. Searle and Others, The Criminal Law Review 1971,592, Held that;

"If you think they were and that they all knew that those drugs were then in the possession of other people and they knew they were drugs then you probably will not have any difficulty in deciding that they are guilty, whichever of them you think is guilty," and " is it conceivable, do you think, that drugs were there in (those) quantities without anybody or everybody in the van knowing about it and that they were dangerous drugs? That really is the essence of the case.

Held, 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."

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, he held that: "It would not be unreasonable to presume that it was well within his knowledge that people do smuggle contraband into the country under various guises, given the social standing of the Accused."

In the instant case, the prosecution established the following facts,

1. The van was parked in an isolated area in the early morning.
2. Suddenly a motorcycle approached and gave the parcel to the backside of the van.
3. When the Police opened, they were trying to hide this parcel.
4. It shows that they knew what was contained in the parcel.

Hence the only inference that can be drawn is that the Accused had the requisite knowledge the parcels contained Heroin.

What is the defense taken by the Accused? They have simply denied it.

Now the issue is once the prosecution discharged their burden, then the Accused has to create a real doubt. I am mindful of the words uttered by **Chief Justice, Mr. Drake, and Justice Henry, in James MC Namara, 1988 (87) Cr. App. R. 246,** Held that;

In the well-known case of Warner v. Metropolitan Police Commissioner (1968) 52 Cr. App. R. 373, [1969] 2 A.C. 256, Lord Wilberforce at p.433 and p. 300 respectively put the matter thus:

the following propositions seem to us to emerge. First of all a man does not have possession of something which has been put into his pocket or into his house without his knowledge: in other words something which is "planted" on him, to use the current vulgarism. Secondly, a mere mistake as to the quality of a thing under the

defendant's control is not enough to prevent him being in possession. For instance, if a man is in possession of heroin, believing it to be cannabis or believing it perhaps to be asprin.

Thirdly, if the defendant believe that the things is of a wholly different nature from that which in fact it is, then the result, to use the words of Lord Pearce, would be otherwise, Fourthly. in the case of a container or a box, the defendant's possession of the box leads to the strong inference that he is in possession of the contents or whatsoever it is inside the box. But if the contents are quite different in kind from he believed, he is not in possession of it.

"……. the prima facie assumption is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it and no reason to suspect that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had had no reasonable opportunity since receiving the package of acquainting himself with its actual contents. "

Here we hold that Accused had failed to create doubt from the statement he created at the Dock. That he did not possess the requested knowledge.

One of the grounds urged by the defence counsel was that failure on the part of the prosecution to produce the van to establish that the incident happened inside the van subject to the information referred to by the counsel has not in our view caused prejudice to the Accused for the reason that there's evidence by the 2nd Accused that he was inside the van. Where the raid took place. Therefore, this ground for appeal will fail.

Another point raised by the defence is the failure to call the driver as a witness, as indicated earlier there's no need to call the driver to give evidence as there's sufficient evidence for the High Court Judge to believe the story given by other witnesses.

For the above-said reasons, this Court is of the view that the grounds of appeal raised by the Accused are without merit. We see no reason to interfere with the Judgement dated 20th of September 2019. The conviction and the sentence are affirmed, and the Appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL