

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

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

Court of Appeal Case No:

CA-HCC-213-20

HC of Colombo Case No:

HC/323/18

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Olua Austin Chiedozie alias Joseph Austin
Emmanual

Accused

AND NOW BETWEEN

Olua Austin Chiedozie alias Joseph Austin
Emmanual

Accused

Vs.

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

Complainant-Respondent

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

Counsel: Asthika Devendra with Wasantha S. Widanage for the Accused-Appellant
Sudharshana De Silva, DSG for the Respondent.

Written 21.04.2022 and 26.10.2023 (by the Accused-Appellant)

Submissions: 12.09.2023 and 06.11.2023 (by the Respondent)

On

Argued On: 11.10.2023

Decided On: 13.11.2023

Sasi Mahendran, J.

The Accused Appellant (hereinafter referred to as the Accused) was indicted at the High Court of Colombo for possession and trafficking of 774.97 grams of Cocaine, punishable under section 54 A (d) and (b) of the Poisons, Opium, and Dangerous Drugs Ordinance.

After the trial, the Appellant was convicted and sentenced to death. Being aggrieved with the said conviction and the sentence the Appellant had preferred this appeal.

The primary grounds for the Appellant's Appeal are as follows:

1. Whether a prosecution under section 54(A) (D) and 54 (A) (B) can be maintained/can be sustained on section 27 (1) recovery under the evidence Ordinance or has the Learned High Court Judge has come to the erroneous conclusion regarding the same?

2. Considering the evidence/ law of the case could the finding that the appellant was in exclusive possession or was trafficking the cocaine be sustained?

The facts of the case are briefly summarized as follows:

PW01, IP Subodha, acting on information received from PC Gupta, who had received information from a private informant, regarding the trafficking of Cocaine, led a team of officers to conduct a search operation. According to his testimony, he accompanied PW02 to the 5th floor of Blue Hill Residencies Apartment, where they apprehended Mohommed Guhari Rasik and the Accused in possession of a bag containing 516g of Cocaine. The Accused has been indicted for this offense by the Honorable Attorney General, and the case is currently pending.

On the following day, after presenting the Accused before the Mt. Lavinia Magistrate Court and obtaining a detention order, the Accused provided a statement indicating the presence of more contraband at his residence. Acting on this information, the officers proceeded to the address disclosed by the Accused.

Upon arrival at the location, a woman believed to be the Accused's wife granted the officers access to the premises. During their search, the officers discovered a plastic container in the kitchen containing a bag of cocaine weighing 1048g.

In his dock statement, the Accused denied the allegations against him. He contended that he was arrested at Dehiwala while waiting for a bus and that the parcel was shown to him after the officers searched his residence upstairs while he was downstairs. Furthermore, he asserted that there was no kitchen upstairs in his house.

The Learned High Court Judge convicted the Accused on the grounds of discovering cocaine under Section 27 of the Recovery of Property Ordinance at the said premises, where the Accused was the primary occupant. However, the Learned High Court Judge neglected to assess whether the prosecution had established the actual and exclusive possession of the Accused.

According to Sir Hari Singh Gour in his book "The Penal Law of India," he has stated: "Possession to be criminal must be actual and exclusive. For criminal liability does not apply to constructive possession."

This proposition was considered by Justice De Sampayo in the case of Banda v. Haramanis, 21 NLR page 141. Justice De Sampayo held:

“The question is whether either of the accused could be convicted under the provision in question. Mr. Jayawardene has referred me to page 1892 of the second volume of Gour, where the learned author states, with reference to authorities, that "possession to be criminal must be actual and exclusive, for criminal liability does not attach to constructive possession. . . . From this it follows that, where property is found in a house in the possession of more than one inmate, none of them could' be said to be in possession of it for the purpose of this offence, unless there is evidence of exclusive conscious control against them.”

The above Judgment was referred by Justice F.N.D. Jayasuriya, in Case of Muttaiiah Sriyalatha Saraswathie v. Attorney General, CA 212/95, Decided on 30.06.1999, Appellate Court Judgements 1999 Unreported. F.N.D.Jayasuriya, J held that;

“The conduct of the Accused is somewhat suspicious as referred to by the Learned Trial Judge, that fact per se is insufficient to hold that the prosecution has proved that the heroin in question was in the actual, exclusive and conscious possession of the Accused.”

It should be noted that after the statement was recorded, the police had gone to the place where the wife had the keys to the house. She opened the door and showed them the kitchen. There is no evidence to show who the occupants of the house were, apart from the Accused and his wife.

The crucial fact to consider is that the keys were in possession of the wife. The Accused was arrested on the 3rd of October between 9:15 to 9:45, and the statement was recorded on the following day at around 1:45 pm. According to the police officer, he voluntarily gave a statement stating,

“One kilo of Cocaine is in the kitchen in the Ratmalana house. Its address is No.24D, Gamini Lane, Rathmalana. If we go, there I can show it”

When we apply the above dictum, there is no evidence to establish that the Accused had actual and exclusive control over the aforementioned Cocaine. The sole admissible evidence against him is the recovery based on his statement.

What is the evidential value?

According to his **Lordship Priyasath Dep C.J.** in the case of **Duminda Silva and others vs. AG SC/TAB/2A-D-2017** decided on 11.10.2018

(Vide page 50 of the judgment)

“....The effect of the statement made under section 27 of the Evidence Ordinance is that the accused had the knowledge of the place where the item was kept or hidden. Solely on that evidence individual liability could not be established.”

In the instant case, the evidence indicates that the house was opened by the wife, who had the keys, and the parcel was discovered in the kitchen area.

Similar circumstance was followed by S. Thurairaja PC, J in Sundaralingam Sankar Kumar v. Attorney General, CA 12/2008, Decided on 14.03.2018 held that;

“Following factors raises concern of this court:

- a. Heroin was not found in the physical possession of the Appellant.*
- b. Arrest and recovery of the production happened on two different dates.*
- c. Production was recovered at a different place.*
- d. There is 27 (1) Statement regarding the recovery of the production was recorded.*
- e. Keys were found at a place where others had access, especially Sivakula.*
- f. The place where the heroin was recovered was accessible to others other than the Appellant.*
- 1. Evidence relating to the recovery does not reveal the cupboard was exclusively or normally used by the Appellant. Such clothes and other personal belongings.*
- g. Sivakula who had the key was neither produced as a suspect nor as a prosecution.*

We couldn't find answers to the above questions in the brief nor in the submissions. It is the content of the Respondent's Counsel that the Appellant had ample knowledge of the substance. Presuming, hypothetically, that's correct. Then the issue arises of whether knowledge alone is sufficient to convict a person instead of exclusive possession.”

With this evidence, the crucial issue at hand is whether it is sufficient to convict the Accused of the charge of trafficking and possession.

The evidence presented in the trial is primarily based on circumstantial evidence.

The prosecution relied on circumstantial evidence to establish the charges against the Accused. In light of the observations made by **Aluwihare, PC, J in Junaiden Mohamed Haaris v. Attorney General, SC Appeal 118/17, Decided on 09.11.2018:**

“Before I consider the facts of the case and the legal issues raised in this appeal, it should be borne in mind that the prosecution relied entirely on circumstantial evidence to establish the charges, for the reason that there were no eyewitnesses to substantiate any of the charges against the Accused-Appellant. Thus, it was incumbent on the prosecution to establish that the ‘circumstances’ the prosecution relied on, are consistent only with the guilt of the accused-appellant and not with any other hypothesis.

Regard should be had to a set of principles and rules of prudence, developed in a series of English decisions, which are now regarded as settled law by our courts.

The two basic principles are-

- i. The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.*
- ii. The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct (per Watermeyer J. in R vs. Blom 1939 A.D. 188)”*

In the current case, the fact that the wife had keys to the premises creates a reasonable doubt about whether the Accused had actual, exclusive, conscious control over the mentioned drugs or if someone else had access to the premises before the raid.

Therefore, when the prosecution cannot establish that the Accused had exclusive possession of the drugs in question, mere knowledge alone is insufficient to secure a conviction.

After careful consideration of the key issue, which is the Accused's exclusive possession of the drugs, and for the reasons outlined above, it is evident that the conviction cannot be upheld. Consequently, the Accused Appellant is found not guilty, and the appeal is allowed, leading to his acquittal from these proceedings.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL