

**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 11 (1) of the High Court of the provinces (Special Provisions) Act no. 19 of 1990, with section 331 of the Criminal Procedure Act No. 15 of 1979.

CA Case No: CA -HCC- 09/2022

HC of Colombo Case No: HC / 3422/06

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Madawala Liyanage Kusumawathie

Accused

AND NOW BETWEEN

Madawala Liyanage Kusumawathie

Accused-Appellant

Vs.

The Attorney General

Attorney General's Department

Colombo 12

Complainant-Respondent

Before: **P. Kumararatnam, J.**
 B. Sasi Mahendran, J.

Counsel: Jagath Nanayakkara for the Accused- Appellant
 Anoopa de Silva, DSG for the Respondent

Written

Submissions: 03.08.2023 (by the Accused Appellant)
On 28.03.2024(by the Respondent)

Argued On: 14.10.2025

Judgment On: 25.11.2024

JUDGEMENT

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as ‘the Appellant’) was indicted before the High Court of Colombo for Possession and Trafficking 9.5 g of Heroin under Section 54 (a) (d) and Section 54 (a) (b) of the Poisons, Opium and Dangerous Drugs Ordinance, No. 13 of 1984, as amended.

At the trial, the prosecution presented evidence through four witnesses and marking productions P1-P9 and thereafter closed its case. The Appellant, in his defence, gave evidence from the witness box. Upon conclusion of the trial, the Learned High Court Judge found the Appellant guilty on both counts and imposed life imprisonment on 21.10.2021.

Aggrieved by the aforementioned conviction and sentence, the Appellant preferred this appeal before this Court. The grounds of appeal advanced by the Appellant are as follows:

1. The Failure to deploy a female officer to assist in the conducting of the raid
2. The illegal drugs came to be taken into custody whilst it was buried in the neighbouring premises

3. Failure to establish the fact that the Accused Appellant was the owner of the house wherein the heroin came to be recovered. There is an irregularity with regards to the notes of the Excise Inspector Janaka
4. The prosecution version fails the test of probability
5. The Prosecution failed to establish the case beyond reasonable doubt

The facts and circumstances of this case are as follows,

PW 2, Excise Inspector Janaka Perera, testified that on 18.06.1998, a private informant provided a tip-off. According to the information received, a consignment of heroin belonging to Kapila was concealed in a house located at No. 33, Gardens, Thotalaga.

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පූ : මොකද්ද ලැබුන මුලික තොරතුර ?

උ : තොටළග 33 වත්තේ එක්තර නිවසක කපිල කියලා කෙනෙක්ට අයිති හෙරෝයින් තොයයක් සගවලා තිබෙනවා. සමහර ද්‍රව්‍යවලට ගෙනල්ලා තිබෙනවා. ද්‍රව්‍ය 12.30, 1.00 විතර වෙනකාට ඒවා අවසන් වෙනවා. නිවස පිහිටා තිබෙන්නේ 33 වත්තේ මැද බැවින් නිවස ගැන හරියටම විස්තර මට කියලා දෙන්න අමාරු වැට්ලීම් අවස්ථාවේදී ඔහුට පූජ්‍යවන් පැමිණ ඒ නිවස පෙන්වන්න කියලා කියා සිටියා.

Upon receiving this information, with the advice of PW 1, the witness informed the private informant to provide the exact date and location where the consignment of heroin would be available. Acting on this advice, the informant contacted the witness on 19.06.1998. The witness then organized a raid, instructing the informant to arrive at the Excise Department around 11.30 a.m. on his motorbike, and informed the OIC accordingly. Following PW 1's instructions, eleven other officers, together with the witness, took part in the raid. The witness left the department at 12:00 p.m., and while proceeding towards the cinema hall, the team spotted the informant. At that point, the witness directed the informant to lead them.

After halting the vehicle at the market on Ferguson Road, the informant led the team on foot through the place, passing several shanties. The informant pointed out a shanty where the appellant was standing to the witness, that this was the location where the consignment of heroin was concealed and thereafter left the scene.

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පු : මහත්තයාලා කොහොවද ගියේ?

ල : වත්තක් පැල්පත් රාජියක් තිබුණා. ඒ අතුරින් හැරි හැරි ඔත්තුකරු ඉදිරියට ගියා. ඊට පස්සේ එක කුඩා නිවසක් අසලට ගිය වෙලාවේ කාන්තාවක් හිටිය ඒ නිවස ඉදිරිපිට. ඔත්තුකරු ඒ අවස්ථාවේදී මට කියා සිටියා මේ ගෙදර තමා සහවලා තිබෙන්නේ මෙයා තමයි කියලා මට කිවිවා. කියලා ඔත්තුකරු එතනින් මග හැරලා ගියා.

පු : ඔත්තුකරු ඒ කාන්තාව ඉන්න තැනැද ඒ කාන්තාවද පෙන්නුවේ?

ල : ඔත්තුකරු ගියා ඒ අසලින්ම පිටි පස්සේන් මම ගියා. යන ගමන් කියාගෙන ඔහු එහෙමමම ඉදිරියට ගියා.

We note that the witness admitted that they did not make any inquiry to ascertain the true owner of the house. Instead, upon the Appellant's revelation, they proceeded to arrest her.PW 1 then approached the Appellant and requested her to cooperate by handing over the heroin concealed in her house.

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පු : මොකක්ද ඊට පස්සේ සිද්ධ වුනේ ?

ල : ඊට පස්සේ සුරාඛද පරික්ෂක පතිරණ මහත්තයා ගිහිල්ලා මේ කාන්තාවට කතා කලා. අපි කවිද කියලා ඒ කාන්තාවට භූන්වලා දැන්නා. කියලා උපායක් වගයෙන් කියා සිටියා අපි දන්නවා මේ ගෙදර තිබෙනවා කියලා ඒ නිසා කරදර කරන්නේ තැතුව අපිට තිබෙන දෙයක් දෙන්න කියලා පැවසුවා. ඒ අවස්ථාවේදී කාන්තාව බය වුණා. බය වෙලා ඒ කාන්තාව අපි කියන්නේ ඇත්ත කියලා පිළි අරගෙන මාව අරගෙන යන්න එපා දෙන්නම කියලා

පු : පතිරණ මහත්තයා අර ඔත්තුකරු පෙන්නුව කාන්තාවට කඩා කලා කියලා කිවිවා නේද?

ල : එහෙමයි

පු : කතා කරලා මොකක්ද කිවිවේ ඒ කාන්තාවට?

ල : පතිරණ මහත්තයා කිවිවා අපි දන්නවා මේ ගෙදර බඩු හංගගෙන ඉන්නවා කියලා බඩු කියලා අදහස් කලේ හෙරෙයින්. අපිට සෝදිසි කරලා උනත් හොයාගන්න පුළුවන්. කරදර නොකර අපිට ඒ වික දෙන්න කියලා තමයි කිවිවේ.

The Appellant appeared frightened and pointed to a table, beneath which there was a pot. She removed the pot, revealing a hole underneath that contained a cellophane bag. The Appellant handed the bag to PW 1, and upon inspection, it was found to contain seven cellophane bags. Inside those seven bags were

644 packets, which PW 1 showed to PW 2, who identified the contents as heroin. The Appellant was arrested at 12:45 p.m., and the witness admitted that the material was in the possession of PW 1 until they took it to the office, where it was weighed and recorded as 28 grams, and subsequently seized the production.

On the same day, the production and the Appellant were handed over to the Maligakanda Magistrate's Court at 3:40 p.m. Thereafter, on 10.07.1998, pursuant to an order of the Learned Magistrate, the production was handed over to the Government Analyst by PW 1.

During cross-examination, the witness stated that after halting the vehicle, three officers, together with the witness, followed the private informant. The witness further testified that only the witness and PW 1 went to the place where the informant pointed out that heroin was concealed. The defence then questioned the witness regarding the route taken during the raid, the manner in which it was conducted with the assistance of the informant, and the subsequent handing over of the production to the Magistrate's Court and thereafter to the Government Analyst. Furthermore, the witness asserted that the Appellant acknowledged residing in the said house.

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පූ : ඔබට මම යෝජනා කරනවා මේ වෙන පුද්ගලයෙක්ගේ හෙරෙයින් අත්අඩංගුවට අරගෙන ඒ පුද්ගලයා සොයා ගන්න බැරි හින්දා මේ කාන්තාවට හුණ්වලා දුන්නා කියලා?

ල : යෝජනාව ප්‍රතික්ෂේප කරනවා. මම පිළි ගන්නවා මේ ඔත්තුවේ සඳහන් වෙනවා මෙම හෙරෙයින් අයිතිකරුවෙක්ගේ වෙන නමක්. නමුත් ඒ ඔත්තුවේ සඳහන් වෙනවා සගවන තැන මෙක කියලා. ඒ වගේම මගේ සටහන්වලට අනුව සහ මගේ මතකයට අනුව මෙම විත්තිකාරීය තමයි අපට මෙම හාංචි තිරාවරණය කළේ?

පූ : තමුත් ඒ නිවාස පිළිබඳව සොයා ගැනීමක් කළාද කාගේ නිවසක්ද කියලා?

ල : තැහැ එහෙම සොයා බැලීමක් කළේ තැහැ.

පූ : ඒ නිවසේ අයිතිකරු කවිද කියල ?

ල ; තැහැ එහෙම සොයා බැලීමක් කළේ තැහැ.

පූ : තමුත් ඒ අවස්ථාවේදී ඒ නිවසේ අසල නිවුප මේ කාන්තාව නිරපරාදේ අත්අඩංගුවට ගත්තා කියලා මම ඔබට යෝජනා කරනවා?

උ : නිරපරදේ අත්අඩංගුවට ගැනීමක් කලේ නැහැ. ඇය මේ නිවසේ පදිංචි බවට ඇය පිළිගෙන තිබෙනවා. ඇය තමයි හාන්ධ අපිට නිරාවරණය කලේ සහ හාර දුන්නේ. ඒ අනුව තමයි ඇයට අත්අඩංගුවට ගත්තේ.

PW 1, Excise Inspector Prasanna Pathirana, acting upon the information provided by PW 2, informed the OIC and organized the raid. In giving evidence, the witness corroborated the testimony of PW 1. Upon reaching the Appellant's residence, the informant pointed out as the place where Kapila's heroin is concealed. After the witness requested that the Appellant allow them to take Kapila's heroin, the Appellant pointed out and produced the heroin.

Further, the witness affirmed that he and PW 2 sealed the production, which was thereafter handed over to the Magistrate's Court by PW 2.

During cross-examination, the defence questioned the witness regarding the manner in which the raid was conducted and the route taken to reach the Appellant. The witness admitted that he could not hear what the informant had said to PW 2. When the counsel for the Appellant inquired about the ownership of the house, the witness stated that the Appellant herself had acknowledged that the house belonged to her.

During cross-examination, the witness denied the defence suggestion that the place where the production was concealed belonged to a person named Kapila. He further rejected the claim that Kapila had contacted him, stating that he would surrender to the police.

PW 3, Government Analyst K.P. Sivarajan, testified that the productions handed over by PW 2 on 10.07.1998 were properly sealed at the time of delivery, and upon analysis, confirmed that the pure weight of the production was 9.5 grams.

Upon the conclusion of the evidence of the prosecution, in the Dock statement, the Appellant asserted that on the day of the incident, three officers came to her house and inquired about Kapila. She stated that she replied that she did not know, after which the officers took her outside. The Appellant then pointed to a house located three houses away from her own as Kapila's house. She further claimed that, in the absence of a female officer, the officers took her to their office, where her fingerprints were obtained, despite no evidence being found in her house. It is noted that this version was not elicited or advanced by the defence in the course of cross-examination.

The Learned High Court Judge, upon analyzing the evidence presented before him, held that in this type of case, the prosecution is required to prove possession and not ownership. It is therefore appropriate to reproduce that portion of the judgment delivered by the Learned High Court Judge.

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මෙහිදී සඳහන් කළ යුතු වනුයේ මෙවන් නඩුවකදී අදාළ වනුයේ අපිතිය තොට සන්තකය බවයි. පැ. යා 01 සහ 02 යන දෙදෙනාගගේම සාක්ෂියෙහි සඳහන් කරුණු අනුව මෙම හෝරෝයින් අඩංගු බැඟය මුට්ටියක් යට තිබූ වලක දමා තිබියදී රැගෙන දී ඇත්තේ විත්තිකාරිය විසිනි. එම කරුණ හරස් ප්‍රශ්න වලදී අහියෝගයට ලක් වී තොමැත.

The issue for determination is whether the prosecution has established that the Appellant was in exclusive possession of the production. In the present case, PW 1 informed the Appellant that they already knew the location of the production and requested that she show it.

Page 169 of the brief,

ප්‍ර : ඔබ මොනවද කිවිවේ?

ල : මම කාන්තාවට පැහැදිලිව ප්‍රකාශ කළා මෙම ස්ථානයේ කපිල තමැති පුද්ගලයාට අයිති හෝරෝයින් තොගයක් සහවලා තිබෙනවා. අපිට ස්ථානය සෝදිසි කරලා මේක ගන්න පුළුවන්. එහෙම ගත්තොත් කරදර වෙයි කරදර එහෙම කරදර වෙන්නේ නැතුව ඒ වික අපට දෙන්න කිවිවා.

This indicates that the officers had prior knowledge of the location. The question that arises is how they obtained this knowledge, whether it was from the Appellant herself or from another source.

There is no evidence before this Court to demonstrate who possessed the keys to the house or how entry was effected. We are also mindful that the informant did not mention the Appellant's name at any stage. These gaps in the evidence cast doubt on the prosecution's claim of exclusive possession of heroin by the Appellant.

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.*"

Justice De Sampayo considered this proposition 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 **Muttaiaah 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."

When applying the above dictum, it becomes evident that there is no material to establish that the Appellant had actual and exclusive possession over the heroin in question. The prosecution's case rests primarily on the information provided by the private informant. According to the evidence presented at the trial, we note that PW01 has informed the Appellant where the production was kept. Thereafter, she went to the house and took the product from the place where it was hidden. But there is no indication that the house was occupied by the Appellant. We are mindful that the informant implied that the production, which belonged to Kapila as "එක්තර නිවසක කඩල කියලා කෙනෙක්ට අයිති හෝරයින්". There is no evidence indicating that, when the informant led the officers to the house, he identified whose property it was.

A similar circumstance was considered by His Lordship S. Thurairaja PC, J in **Sundaralingam Sankar Kumar v. Attorney General**, CA 12/2008, Decided on 14.03.2018, held that;

"Following factors raise 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.***
- g. ***Evidence relating to the recovery does not reveal the cupboard was exclusively or normally used by the Appellant. Such clothes and other personal belongings.***
- h. ***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.” (Emphasis Added)

We note that the evidence adduced at the trial is primarily circumstantial in nature. The prosecution has relied upon such circumstantial evidence in seeking to establish the charges against the accused. While the informant tip and the subsequent raid form the foundation of the case, no direct evidence has been produced to demonstrate that the accused had actual and exclusive possession of the narcotics. The prosecution’s case, therefore, rests on inferences drawn from the surrounding circumstances. We are mindful that there is no evidence before this Court as to the manner in which the house was opened.

In cases based on circumstantial evidence, any inference of guilt must be the sole, compelling, and inescapable conclusion that the accused committed the offence. Upon evaluating the evidence presented at trial, the only logical and unavoidable conclusion is that the Appellant had exclusive possession of the production, to the exclusion of all others.

The above dictum was considered 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 Waterm eyer J. in R vs. Blom 1939 A.D. 188)”*

With the evidence presently before the Court, the crucial issue that arises is whether such evidence is sufficient to sustain a conviction against the accused on the charges of trafficking and possession. The

prosecution has relied primarily on the information provided by the informant and the subsequent recovery of the narcotics.

Considering the above evidence, it is observed that the private informant categorically stated that the heroin belonged to Kapila. The informant led the team to the location, pointed out the house as the place where the goods were concealed, and thereafter departed. At no point did the informant refer to the Appellant, and it was explicitly stated that the goods were attributed to Kapila. Furthermore, the evidence does not disclose whether any person resided in the house where the Appellant was allegedly staying, nor does it establish the occupation of the premises. We also note that there is no evidence before this Court as to the manner in which the house was opened, or how many individuals had access to it. In addition, PW 1 entered the house on the basis that the witness was aware of the presence of productions therein, and stated that they should be handed over without resistance.

In light of the foregoing factors, a reasonable doubt arises as to whether the Appellant had actual, exclusive, and conscious control over the heroin or whether another individual may have had access to the premises before the raid. Consequently, the prosecution has failed to establish exclusive possession of the drugs in question.

Upon careful consideration, we find that the prosecution has failed to establish, beyond a reasonable doubt, that the Appellant was in exclusive possession of the drugs.

In the light of the foregoing, the conviction and the sentence imposed by the Learned High Court Judge are hereby set aside. The Appellant is acquitted of the charge on which he was convicted.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam J.

I AGREE.

JUDGE OF THE COURT OF APPEAL