

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

In the matter of an appeal terms of section 331 of the
Code of Criminal Procedure Act reads with the Article
133 of the Constitution of the Democratic Socialist
Republic of Sri Lanka

Court of Appeal case No. CA 04/2013

High Court Kegalla case No. 2054/2004

The Democratic Socialist Republic of Sri Lanka

Complainant

v.

Abdul Rasindu Mohamed Janoon

Accused

And Now Between

Abdul Rasindu Mohamed Janoon

Accused Appellant

Vs.

The Democratic Socialist Republic of Sri Lanka

Complainant Respondent.

Before : L.T.B. Dehideniya J. (P/CA)

: K.K. Wikramasinghe J.

Counsel : R. Arsacularatna PC with Chamindri Arsacularatna and Thejith
Punchihewa for the Appellant.

: Thusith Mudalige DSG for the Complainant Respondent.

Argued on : 01.06.2017 and 07.11.2017

Decided on : 24.11.2017

L.T.B. Dehideniya J. (P/CA)

This is an appeal from the High Court of Kegalle. The accused appellant was indicted on a charge of possessing 25.5 grams of Diacetylmorphine (Heroin) a dangerous drug, punishable under section 54A read with column II of the Part III of the Third Schedule of the Poisons, Opium and Dangerous Drugs Ordinance as amended; on or about 17th March 2004. The Accused Appellant was convicted after trial and the learned High Court Judge imposed a sentence of imprisonment for life. Being aggrieved by the conviction and sentence, the Accused Appellant presented this appeal.

At the argument, the learned DSG conceded that the charge had been read over to the Accused Appellant, after closing the prosecution case, and therefore, the conviction cannot stand. The learned DSG moved that this case be remitted to the relevant High Court for retrial. The Counsel for the Accused Appellant moved that he be acquitted without sending the case back for retrial and restricted his argument to the question of remitting the case for retrial. The learned President's Counsel argued that it is not a fit case to be sent for retrial.

The learned President's Counsel cited several authorities in this regard. His contention is that the Accused Appellant was incarcerated from the year 2013 and the offence was committed in 2004. He further submits that the prosecution shall not be given a second opportunity to correct their mistakes. Not reading the charge to the Accused Appellant prior to the trial is not a mistake of the prosecution or the Accused Appellant, but it is a mistake of the Court. Therefore the four years that he was incarcerated cannot be compensated.

The strength of the prosecution case was not argued before us.

In the case of *Seenithambi v. Jansz* 47 NLR 496, the case was not sent for retrial because the proceedings were so irregular and the Court did not

want to encourage the slackness or negligence. In the present case the Accused Appellant has failed to establish any procedural irregularity.

In the case of *The Queen v. Jayasinghe* 69 NLR 314 the Supreme Court held that the learned Judge had laid unusual stress on accomplices evidence and has not permitted a retrial.

In most of the cases that has been brought to our notice by the learned President's Counsel, the Supreme Court did not order a retrial after consideration of the procedure and the evidence led. In the present case the evidence was not considered in this appeal and no procedural error was pointed out. This case totally depends on the evidence of the police officers where they can refer to their notes when giving evidence. Even after some time, the witnesses can refresh their memory by looking at the notes maintained at the police station.

The punishment for the offence mentioned in the indictment is death or life sentence. Therefore spending four years in the jail cannot be considered as a reason for an acquittal.

For the reasons stated above, I set aside the conviction and the sentence and order a retrial. The learned High Court Judge is directed to hear and conclude this case at his earliest.

The prison authorities are directed to produce the Accused Appellant before the Kegalla High Court for appropriate action.

President of the Court of Appeal

K.K.Wickramasinghe J.

I agree.

Judge of the Court of Appeal