

**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 331 of the
Criminal Procedure Code Act No.
15 of 1979.**

The Attorney General of the Democratic
Socialist Republic of Sri Lanka.

Complainant

**Court of Appeal
Case No.CA/12/2008**

**Vs,
Sundaralingam Sankar Kumar**

Accused

And Now Between

Sundaralingam Sankar Kumar

Accused-Appellant

**High Court of Colombo
Case No.HC/41/2006**

Vs,

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

Complainant-Respondent

**Before : S. Devika de L. Tennekoon, J &
S. Thurairaja PC, J**

**Counsel : Anil Silva PC, Sahan Kulatunga AAL for the Appellant
Dappula De Livera PC , SASG for the Respondent**

**Written Submission: Appellant – 15th September 2017
Respondent – Not Filed**

Argument on ; 26th January 2018

Judgment on : 14th March 2018

Judgment

S. Thurairaja, PC, J

The Accused Appellant (hereinafter sometimes referred to as the Appellant) was indicted at the High Court of Colombo for possession of 234 grams of Heroin (Diacetyl Morphine), punishable under section 54 A (d) of the Poisons, Opium and dangerous drugs Ordinance. After the trial the Appellant was convicted and sentenced to Life Imprisonment. Being aggrieved with the said conviction and the sentence the Appellant had preferred this appeal and submitted following grounds of appeal.

1. Prosecution failed to prove exclusive possession.
2. There is no sufficient evidence to convict the appellant.
3. Knowledge cannot be deemed as possession.
4. Dock Statement was not duly considered.

Prosecution led evidence of Chief Inspector of Police (CI) Dewmuni Sumith Amarajith Silva, Police Sargent (PS) 22447 Mudalihamige Wimalaratne, Inspector of Police (IP) Sunil Padmasiri Perera, Assistant Government Analyst Sandya Perera, SI. Wijesiri Kuruppu Mudiyanseelage Piyadasa, IP. Sanka Jayamanna and closed the case for the Prosecution. The Accused Appellant made a Statement from the Dock and closed his case.

According to the witnesses for the Prosecution, the case is that, the Appellant was arrested on the 9th October 1999 at West Coat Lodge situated at Messenger Street, Colombo 12, and detained at the Police Narcotics Bureau. On the 11th instant, he was taken to a communication shop at 100 Galle Road, Dehiwala. There they found a key pasted in the upper portion of a drawer. They took that key and a bunch of keys of a

house at 199/5 Galle Road Dehiwala. When they opened the said house, they found a cupboard in a room, when they searched with the help of the appellant they found a polythene bag, which contained three parcels of brown coloured powder, on analysis it was found to be Heroin (Diacetyl Morphine) weighed of 234 grams. The defence case is that he doesn't know anything about it and he is innocent.

The first, second and third grounds of appeal are Prosecution failed to prove exclusive possession, there is no sufficient evidence to convict the appellant and Knowledge cannot be deemed as possession. When considering these grounds of appeal, it reveals that these are inter-woven to each other, hence it was decided to consider all together.

It is the obligation of the Prosecution to prove all ingredients of the charge beyond reasonable doubt. The charge warrants among other things that the Appellant had possession of 234 grams of heroin. Possession is now well defined as exclusive possession. What is exclusive possession being the next question.

In *Sumanawathie Perera vs. Attorney General* 1998 (2) Sri LR. 20 Possession was discussed. In this case the accused was arrested at the airport of Colombo for importing of 204.69 grams of heroin. *Ismail J*, considered, *Warner v Metropolitan Police* (1968) 52 Criminal Appeal Report 373

"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 & 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".

These observations have been applied in *Re. v Edmond Levis* 87 Criminal Appeal Report 270, *R v. Boyesen* 82 AC 768.

Indian Supreme Court in **Mohan Lal vs State of Rajasthan**, CRIMINAL APPEAL NO. 1393 OF 2010, Decided on 17 April, 2015, Justice Dipak Misra describes possession as follows;

8. When one conceives of possession, it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody". Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word possession. The classical theory of English law on the term "possession" is fundamentally dominated by Savigny-ian "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between "corporeal possession" and "possession of right" which is called "incorporeal possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word possession can be usefully defined and understood with reference to the contextual purpose for the said expression. The word possession may have one meaning in one connection and another meaning in another.

9. The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has

reference to exercise of the said control. One of the definitions of possession given in Black's Law dictionary is as follows: "Having control over a thing with the intent to have and to exercise such control. Oswald v. Weigel [6]. The detention and control or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint."

The term "Possession" is not expressly defined in our Poison, Opium and dangerous drugs ordinance. Section 2 (2) states as follows;

For the purposes of this Ordinance, anything in the order, disposition, power, or control of a person is deemed to be in his possession.

Possession in mandatory to convict a person under section 54 A (d)

In the present case it is revealed by the witnesses of the prosecution that the Appellant was arrested on the 9th at Messenger Street Colombo 12, and nothing was found incriminatory at the time of the arrest. On the 11th he was taken to Dehiwala to Toplin Communication and video shop. It was opened and it was alleged that the sister of the appellant Sundaralingam Sivakula was there running the business. Witnesses says that

they took a key pasted in an upper part of a drawer of a table which was not locked. They also got another bunch of keys in the same drawer and proceeded to a house at 199/5 Galle Road, Dehiwala. They opened the house and went to a room which was not locked. They found a 3 ½' X 2 ½' cupboard and opened the same with the key they got it from the shop. In that cupboard they found a black bag sealed in Sellotape, when they opened the bag they found three small bags contained brown coloured powder weighing 332 grams, 320 grams and 318 grams. Totalling 970 grams with the bag and sellotapes. When the Government analyst weighed it without the bags it was 885.40 grams. Anyhow the pure diacetyl Morphine was 234 grams.

It reveals that the heroin was found at a house at Dehiwala, no one was in that said place, it was also on evidence that after recovering the productions the Police Narcotics Bureau (PNB) witnesses says that there were freshly cooked meals at the kitchen, and the detectives had allowed the Appellant to have his meals there.

Evidence reveals the following factors;

- I. The appellant was arrested at Messenger street Colombo 12.
- II. He was arrested on the 9th October 1999.
- III. The Heroin was recovered on the 11th instant.
- IV. Keys were obtained from a shop at Dehiwala.
- V. The table drawer was not locked and Sundaralingam Sivakula was there and she had access.
- VI. The keys were stacked to the upper part of the drawer in a Sellotape. (It is noted that, it is not hidden or kept under lock and key). It is available to Sivakula also.
- VII. House key was there and it is also available to Sivakula.
- VIII. Room was not locked it is available to any person who has access to the house.
- IX. It is on evidence that the house was used by other person or persons, because somebody had cooked in the morning.

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.
- 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 above questions from the brief nor 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 comes that whether Knowledge is sufficient to convict person instead of exclusive possession.

Let us see the law now, Section 54 A (d) of the Poisons, Opium and dangerous drugs Ordinance states as follows;

(d) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a licence of the Director, possesses any dangerous drug set Out in Column 11 of Part III of the Third Schedule in excess of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury be liable to the penalty set out in the corresponding entry in Column III of that Part.

Section 2 provides interpretation to certain terms of the ordinance.

2.(2) For the purposes of this Ordinance, anything in the order, disposition, power, or control of a person is deemed to be in his possession.

In the factual scenario of this instant case, we find that the Prosecution had not proved the possession, hence the finding of the Judge is incorrect.

If the respondent Attorney General filed written submission it would have helped us immensely. Unfortunately, they have not filed the said submissions.

After carefully considering the major issue, it will be more academic to consider other grounds of appeal, therefore we are not discussing other grounds.

For the reasons stated above we find that the conviction cannot be sustained. Hence, we find the Accused Appellant not guilty, accordingly we allow the appeal and acquit him from this proceeding.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J
I agree,

JUDGE OF THE COURT OF APPEAL