

**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 294-296/2015**

**Vs,**

1. Meboob Kumar
2. Wanniarachcige Ranga Sampath  
Fonseka
3. Fazad Masar

**Accused**

**And Now Between**

1. Meboob Kumar
2. Wanniarachcige Ranga Sampath  
Fonseka
3. Fazad Masar

**Accused-Appellants**

**High Court of: HC 7433/2014  
Case No. Colombo**

**Vs,**

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka

**Complainant-Respondent**

**Before** : S. Thurairaja PC, J &  
A.L. Shiran Gooneratne J

**Counsel** : Amila Palliyage, AAL, for the Accused-Appellant  
Dilan Ratnayake, DSG, for the Complainant-Respondent

**Argument** : 17<sup>th</sup> May 2018

**Judgment on** : 31<sup>st</sup> May 2018

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## Judgment

### **S. Thurairaja PC J**

Three accused persons above named were indicted before the High Court of Colombo as follows;

First Count - On the 11<sup>th</sup> November 2012, 1<sup>st</sup> Accused Possessed 246.14 Grams of Heroin.

Second Count – On the same day 1<sup>st</sup> Accused trafficked 246.14 Grams of Heroin.

Third Count - On the same day 1<sup>st</sup> Accused Possessed 546.70 Grams of Heroin.

Fourth Count - On the same day 1<sup>st</sup> Accused trafficked 546.70 Grams of Heroin.

Fifth Count - On the same day 2<sup>nd</sup> Accused Possessed 246.14 Grams of Heroin.

Sixth Count - On the same day 2<sup>nd</sup> Accused trafficked 246.14 Grams of Heroin.

Seventh Count - On the same day 3<sup>rd</sup> Accused Possessed 263.06 Grams of Heroin.

Eighth Count - On the same day 3<sup>rd</sup> Accused trafficked 263.06 Grams of Heroin.

When the matter came up before the High Court for trial the 1<sup>st</sup> and the 3<sup>rd</sup> Accused persons pleaded guilty to the charges against them and they were sentenced to death accordingly. They submitted a formal appeal from the prison and withdrew it subsequently.

It will be appropriate to refer the facts of the case, On the 11<sup>th</sup> November 2012, Police Constable (PC) Jaliya who was attached to the Police Narcotics Bureau (PNB)

received an information from his private informant that two foreigners who brought Heroin by swallowing, were in the process of selling the same at Eurolanka Hotel, Situated at Marine drive, Bambalapitiya. He in turn, informed to his superior, Inspector of Police (IP) Rangajeeva Neomal. A raid was organised and at around 12.10 noon, a team of seven officers from the PNB, proceeded to Bambalapitiya. There, they met the informant and laid in ambush, after about few minutes IP Neomal and PC Jaliya had seen, two Pakistani Nationals were coming out of the hotel, the informant confirmed those are the persons, whom he meant and fled away from that place. PNB officials then gradually approached the hotel. They have noticed one of them (First accused) were talking to someone on the phone, both persons were carrying a parcel bag each in their hands. When the officers were getting closer to the suspects, they have seen a person was travelling in a motor cycle from the direction of Fort towards Wellawatte, approached the 1<sup>st</sup> Accused and obtained the parcel from him and hanged the parcel on the motor cycle handle. When he attempted to leave the Police official who were there in civvies moved into operation. IP Neomal approached the 1<sup>st</sup> and 3<sup>rd</sup> Accused persons, PC Jaliya stopped the appellant by holding the handle of the bike. The appellant further tried to getaway then the bike tilted to one side. PC Jaliya took the parcel from the handle and gave it to IP Neomal thereafter he apprehended the appellant. After the arrest of these three persons the PNB officials commenced further investigation.

Initially they found a key of room number 306 with the 1<sup>st</sup> Accused they went to the room there they found a suitcase and it was locked. When inquired the 1<sup>st</sup> accused admitted it was his and he opened with his secret number, there they found another bag contained with heroin capsules. Further investigations revealed these 1<sup>st</sup> and the 3<sup>rd</sup> accused persons were from Pakistan and they were staying in two rooms. When they went to the next room bearing number 202, they have found a woman who is the wife of 3<sup>rd</sup> accused and two kids were there. When they searched the room, they didn't find anything suspicious, hence the woman and the kids were not taken into the police custody.

All three accused persons were taken to the PNB office and the formalities like field test, weighing, sealing and formal arrest were followed there. All were produced to the Judicial authorities after the investigations. The parcel recovered from the appellant weighed 500 grams. When the substance referred to the Government Analyst, it contained 246.14 grams of Diacetyl Morphine (Heroin).

After the trial, the accused appellant was found guilty and sentenced to death. Being aggrieved with the said conviction the appellant preferred this appeal and submitted the following grounds of appeal;

1. The learned trial Judge erred in law referring defence in wrong demise. (sic)
2. Concept of joint possession not considered.
3. Prosecution filed to establish conscious possession.

At the trial against the appellant, the Prosecution called, IP Neomal, PC 6114 Jaliya, PC 8450 Wakista Chief Inspector (CI) Rajakaruna and the Senior Assistant Government analyst Ms. Ratnapala. When the defence called the Appellant opted to make a statement from the dock and called three witnesses Dilantha Nanayakkara, Nadeera Jayasinghe and Premasiri Ratnayake from two telecommunication companies.

Since the second and the third grounds of appeals Joint possession and Conscious possession are deals with possession hence we decided to discuss those two at the beginning.

Briefly, recalling the events as revealed by the witnesses for the prosecution, At the hotel, PNB officials spotted the 1<sup>st</sup> and the 3<sup>rd</sup> Accused persons, when they approached the 2<sup>nd</sup> Accused appellant who came there in a Motor Cycle, received the parcel from the 1<sup>st</sup> Accused. He was then arrested; the appellant takes up a defence of alibi. He said that he was not arrested at Bambalapitiya but at Boralasgamuwa. The defence witness says that there were two calls taken from the mobile of the appellant, one at 1.27 noon and the other was at 3 pm. The appellant denies the involvement and submits that if he was arrested as claimed by the prosecution at about 1pm and his phone was taken into the custody of the PNB, how could he take calls.

Presuming the prosecution facts are correct, we discuss about the joint possession. Concept of Joint possession is discussed in many cases and it is well established in our legal system. In the present case, the prosecution clearly demarcates the possession. The 1<sup>st</sup> Accused had the possession and he gave to the Appellant. There is nothing to say that both were holding or possessing the parcel together.

The Appellant took up a defence that he was elsewhere at that time, so the issue of joint and conscious possession will not become a part of the defence. The prosecution should prove the case beyond reasonable doubt, that burden never shifts until they complete the case for the prosecution.

It is the duty of the prosecution to prove the appellant had the heroin with him and he had conscious possession. In this case the prosecution witness says that the appellant came in a motorcycle to the hotel, received the parcel bag from the 1<sup>st</sup>

accused and hanged it in the bike and secured it. When he tried to move away, he was apprehended.

Evidence of the prosecution witnesses says that the appellant took the parcel and kept it with him. It was in his custody. This is not an accidental pick up nor unknown possession. For all purpose there is no material to show that this is a theft or robbery. It was a clear transaction between the 1<sup>st</sup> accused and the appellant. The appellant from the beginning of the trial took up the stance that he doesn't know about this and he was arrested elsewhere and the case was falsely framed. He never took up a defence of innocent or unconscious possession.

As we discussed above the prosecution evidence regarding possession is consistent and corroborated by witnesses. We do not find any material to create a reasonable doubt in the case for the prosecution, therefore we conclude that there is no merit in these two grounds of appeal.

The first ground of appeal is that the learned trial Judge erred in law by considering the evidence for the defence. We wish to consider this ground of appeal together with the entire case for the prosecution and the defence.

Recalling the facts again, the prosecution says that the 1<sup>st</sup> and the 3<sup>rd</sup> accused persons who were Pakistani nationals who had the heroin with them, had given it to the appellant. He took the parcel and secured it in his motorcycle and tried to go away, at that time the PNB officials had apprehended him.

The appellant says, that he was travelling from Kalubowila to Boralesgamuwa and he was arrested in front of the Police Station of Boralesgamuwa. He had no connection with the 1<sup>st</sup> and 3<sup>rd</sup> accused persons. He was never arrested at Euroasia hotel, Bambalapitiya. He further submits that he had used his mobile phone to call at 1.27 and 3 pm to take calls. It is his argument that if he was arrested at 1 pm and his belongings including the mobile phone was taken into Police custody how did he make those two calls.

We perused the evidence for the prosecution especially the chief investigating officer and PC Jaliya who apprehended the appellant, we could not find that the appellant had questioned or even suggested of these, taking calls from his mobile. It is only taken up by the appellant at the Dock Statement and thereafter. Appellant had called a witness from Etisalat Mobile company, he submitted that there were two calls originated from his Dialog mobile, first one was at 1.27 for 15 seconds and the other one was at 3 pm for 45 seconds.

The next witness M. Jayasinghe who is from the same company, says that he cannot provide more technical details like, what was the exact place the receiver phone was at the time etc., He is not an expert nor a technical person.

Mr. Ratnayake who was attached to the Dialog mobile company was called as a defence witness says that the request of details came very much after three months hence they are unable to give any details regarding any calls taken or received before three months.

The prosecution submits that the appellant had conscious possession. The appellant not only denying the same but also submitting a defence of alibi.

The appellant submits an argument that, if he was arrested at 1 pm and his belongings including phone were taken into Police custody how could he take two calls at 1.27 and 3 pm. The Prosecution submits that this was not suggested to the chief investigating officer Neomal when he gave evidence. He was recalled to clarify the same, he told court that, he arrested the appellant at around 1 pm and took charge of the phone and examined the same. He submits that It is the practice of the PNB to collect the details and information from communication equipment for future intelligence information and operations. He further told Court that when calls came it was allowed under their supervision similarly when took calls also allowed, these two calls above mentioned also allowed by him. He was extensively cross examined on that fact, he cleared the suspicion and clarified the practice adopted by the investigators of PNB.

It is evidence before the Court that the recipient of these calls was at Boralesgamuwa area, but there was nothing before the Court regarding the place of the appellant's mobile phone at that relevant time. Defence witness is not supporting the defence of alibi.

The chain of production was not contested and the evidence of the Government Analyst also not materially challenged.

Considering the entire proceedings, it is observed by the learned Trial Judge that the appellant and his were not sailing together. Both had taken different stances.

When we carefully considering the Judgment of the learned Trial Judge which consists of 110 pages, we find that he had considered all necessary ingredients in the judgment. The learned High Court Judge, after careful consideration found the appellant guilty after giving reasons.

Considering all, we find that there is no merit in all the grounds of appeal, hence we conclude, that we have no reason to interfere with the findings of the learned Trial Judge. Accordingly, we dismiss the appeal and affirm the conviction.

Regarding the sentence even though the appellant did not make any submissions, we considered the appropriateness and conclude that the gross weight was 500 grams and the net quantity was 246.14 grams of Diacetyl Morphine (Heroin). The other two accused persons were imposed of death sentence, after they pleaded guilty. Considering all we are of the view that the sentence imposed on the Appellant is reasonable in the given circumstances, accordingly, we affirm the sentence.

**Appeal dismissed.**

**JUDGE OF THE COURT OF APPEAL**

**A.L. Shiran Gooneratne, J**

I agree,

**JUDGE OF THE COURT OF APPEAL**