

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

1. Ganegodagamage Asanka Sanjeewa
2. Rajuraja Chandrakumari
3. Suduwadewage Gayan Harshana
Wimalaweera
4. Kandauda Liyanage Suminda Dulakshana

Accused

AND NOW

1. Ganegodagamage Asanka Sanjeewa
2. Rajuraja Chandrakumari
3. Suduwadewage Gayan Harshana
Wimalaweera
4. Kandauda Liyanage Suminda Dulakshana

Accused Appellants

Court of Appeal Case No.
HCC 312-315/2015

High Court of Awissawella
Case No. HC 35/2014

V.

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

Complainant Respondent

BEFORE

: K.K. WICKREMASINGHE, J
K. PRIYANTHA FERNANDO, J

COUNSEL

: Amila Palliyage with Duminda De Alwis
for the 1st, 3rd & 4th Accused Appellants.
P.D.M.S. Bandara for the 2nd Accused
Appellant.

P. Kumararatnam SDSG for the
Respondent.

ARGUED ON

: 11.10.2019

WRITTEN SUBMISSIONS

FILED ON

: 02.04.2018 by the 1st & 2nd Accused
Appellants.

03.04.2018 by the 3rd & 4th Accused
Appellants.

21.08.2018 by the Respondent.

JUDGMENT ON

: 03.12.2019

K. PRIYANTHA FERNANDO, J.

01. 1st to 4th Accused Appellants (Appellants) were indicted in the High Court of Awissawella on two counts for being in possession and trafficking of 15.62 grams of Heroin respectively, contrary to sections 54A(d) and 54A(b) of the Poison Opium and Dangerous Drugs Ordinance. After trial the learned High Court Judge found the Appellants guilty of the charges and sentenced them to imprisonment for life. Being aggrieved by the said conviction, the Appellants preferred the instant appeal.
02. At the argument stage counsel for the Appellants pursued only one ground of appeal.
 1. The learned Trial Judge has failed to consider the concept of joint possession of heroin.
03. Counsel for the 1st, 3rd and 4th Appellants made submissions at the argument and the counsel for the 2nd Appellant informed court that he associates with the submissions made by the counsel for the 1st, 3rd and 4th Appellants.
04. Facts of the case in brief are as follows. PW1 who conducted the raid had been attached to the Police Narcotics Bureau as an Inspector. According to his testimony at the trial, Constable Susantha Kumarage (PW2) had received the information about a house that was being used to pack and distribute heroin. On receiving that information, after obtaining permission from the Officer in Charge he had organized the raid. Ten police officers had participated in the raid.

05. On their way the informant had got into their vehicle and had guided them to the house in question. PW1 had given evidence in detail as to how they reached the double story house. They had placed themselves outside the house that was covered by a parapet wall. One officer had jumped over the wall and had opened the gate. They had surrounded the house and from the window he had seen a man seated on the floor in the sitting room. Right hand side of that man there had been a woman seated. In front of the woman there had been another man. There had been another man seated facing the other side of PW1. He had observed the four of them bending and doing something like packing. A radio had been on with loud volume inside the house.
06. PW1 had instructed two of the other officers to kick and break open the door, which they did. As they entered the house, the before mentioned all four persons including the woman had suddenly stood up. There had been a glass pad on the floor and on the said pad there had been pieces of paper those contained small quantities of heroin on them. There had been another cellophane bag that contained heroin and also a spoon. With his experience, PW1 had suspected the substance found on the pieces of paper and the cellophane bag to be heroin. They had arrested the four suspects with the productions.
07. Learned counsel for the Appellants submitted that according to the evidence of the PW1 and the other officers who were present at the raid, they had not found anything in the possession of the Appellants individually. As the police officers entered the house, Appellants had been standing and there had been no illicit drugs in their person.
08. Counsel further submitted that the learned Trial Judge has not analyzed or discussed about joint possession. Contention of the counsel is that the court

cannot infer possession and that the available evidence is not sufficient to prove joint possession.

09. Learned Deputy Solicitor General for the Respondent contended that it was evident that the PW1 observed packing being done by the Appellants from the window. It is the contention of the learned DSG that the Appellants had been jointly possessing the illicit drugs and that court cannot come to any other conclusion.
10. In case of *Alagaratnam and Others V. The Republic* [1986] 1 Sri L.R. at page 237, court observed that the question of joint possession must be determined on the facts and circumstances of each case.
11. In case of *R. V. Searle* [1971] Crim L.R. 592, CA, the defendants were convicted of possessing a quantity of various dangerous drugs which had been found in a vehicle used by them for a touring holiday. It was alleged that they were all in joint possession of all the drugs. Possession of any particular drug could not be attributed to any particular defendant. The Court held;

“... Mere knowledge of presence of a forbidden article in the hands of a confederate was not enough: joint possession had to be established. The sort of direction which ought to have been given was to ask the jury to consider whether the drugs formed a common pool from which all had the right to draw at will, and whether there was a joint enterprise to consume drugs together because then the possession of drugs by one of them in pursuance of that common intention might well be possession on the part of all of them”

12. In the instant case, the prosecution witness had seen through the window, all Accused Appellants seated around on the floor and bending and doing something like packing. As the raiding party instantly entered the house by break opening the door, all four Appellants had stood up. In the middle of them, the illicit drugs, cut pieces of paper that contained drugs on a glass pad and a spoon were found. 1st, 2nd and 4th Appellants in their dock statements admitted being present at the house where the raid took place and the fact that they were arrested, however, denied any involvement with the drugs. 3rd Appellant in his dock statement totally denied any involvement. The learned High Court Judge for the reasons given rejected their denial of any involvement.

13. The question to be decided was whether all four Appellants jointly possessed the drugs. It is clear from the evidence that all four Appellants had been seated on the floor around the glass pad where the illicit drugs were placed. Material used to pack the drugs in small quantities also had been there. Obviously all four of them could have seen what was going on. Their evidence of denial of any involvement with the drugs is rejected. Hence, there is sufficient evidence to prove beyond reasonable doubt that they all were in joint possession of the illicit drugs that were found.

14. After analyzing the evidence on possession of the drugs, the learned Trial Judge at page 47 of her Judgment said;

‘ඒ අනුව එම සාක්ෂි සියල්ලක්ම සැලකීමේදී පැමිණිල්ල විසින් සාධාරණ සැකයෙන් ඔබ්බට අදාළ නඩු භාණ්ඩ මෙම මුද්දිනයන් හතර දෙනාගේ සන්නකයේ තිබී අත්අඩංගුවට ගෙන ඇති බවට සාධාරණ සැකයෙන් ඔබ්බට සනාථ කර ඇති බවට නිගමනය කර සිටිමි.

මෙම නඩුවට ඉදිරිපත් කර ඇති භාණ්ඩ මෙම මුද්දිනයන්ගෙන් අත්අඩංගුවට ගත් භාණ්ඩ බවට සාක්ෂි අනුව සනාථ වී ඇති බවට තීරණය කරමි.’

15. The complaint of the learned counsel for the Appellants is that the learned Trial Judge has failed to consider the concept of joint possession of heroin. However, when one reads the above paragraph as well as the analysis of the evidence in her Judgment, it is clear that when the learned Trial Judge said ‘මුද්දිනයන් හතර දෙනාගේ සන්තකයේ තිබේ’, she has referred to joint possession although she had not used the same word. Although the learned Trial Judge has clearly analyzed the evidence which proves joint possession of the drugs by the Appellants, she has failed to describe what is joint possession. Hence, I am of the view that this is a fit case for this court to act in terms of proviso to Section 334 of the Code of Criminal Procedure Act and the proviso to Article 138 of the Constitution.

Proviso to Section 334(1);

The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on the ground that it is reasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before which the Appellant was convicted should be set aside on the ground of a wrong decision of any question of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;

Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

16. In case of *Somasiri V. Hon. Attorney General SC (Appeal) 79/2009*, referring to case of *Mannar Mannan V. The Republic of Sri Lanka [1990] 1 Sri L.R. page 280* and case of *Moses V. State [1999] 3 Sri L.R. 401* held that the proviso to section 331 may be applied to non jury trials as well.

Proviso to Article 138(1) of the Constitution;

The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of first Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance:

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

17. The applicability of Section 334(1) of the Code of Criminal Procedure Act was extensively dealt with in *Mannar Mannan V. The Republic of Sri Lanka [1990] 1 Sri L.R. page 280* Court said;

“ 1. *The enacting part of the sub-section (1) of section 334 ‘mandates’ the court to allow the appeal where-*

- (a) *the verdict is unreasonable or cannot be supported having regard to the evidence; or*
- (b) *there is a wrong decision on any question of law; or*
- (c) *there is a miscarriage of justice on any ground.*

The proviso clearly vests a discretion in the court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant to the view that the court is precluded from applying the proviso in any particular category of 'wrong decision' or misdirection on questions of law as for instance, burden of proof.

There is no hard and fast rule that the proviso is inapplicable where there is non direction amounting to a misdirection in regard to the burden of proof. What is important is that each case, falls to be decided on a consideration of (a) the nature and intent of the non-direction amounting to a misdirection on the burden of proof (b) all facts and circumstances of the case, the quality of the evidence adduced and the weight to be attached to it. ”

18. The above position was also accepted by the Supreme Court in Case of ***Somasiri V. Hon. Attorney General SC (Appeal) 79/2009***, decided on 11.07.2014.

19. As I stated before in this Judgment, there is clear evidence to prove beyond reasonable doubt that the Appellants were in joint possession of the drugs recovered. There is no substantial miscarriage of justice caused to the

Appellants by the learned Trial Judge not describing what is joint possession. Hence, I find no reason to interfere with the Judgment of the learned High Court Judge. The ground of appeal urged by the Appellants should fail.

Judgment of the learned High Court Judge convicting the Appellants on both counts is affirmed.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL