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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act

The Democratic Socialist Republic of SriLanka.

Complainant

CA/HCC/0319/2015 **VS**

High Court of Colombo
Case No: HC/6143/12 Mohomed Ramzi Jamaldeen alias Ronnie

Accused

And now between

Mohomed Ramzi Jamaldeen alias Ronnie

Accused– Appellants

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Niroshan Mihindukulasuriya

for the accused-appellant

Janaka Bandara DSG

for the respondent

ARGUED ON : 18/05/2022

DECIDED ON : 16/06/2022

R. Gurusinghe, J.

The accused-appellant (the appellant) was indicted in the High Court of Colombo for trafficking 2.24grams of heroin, an offence punishable in terms of section 54 A(b) of the Poisons Opium and Dangerous Drugs Ordinance (the Ordinance) and for being in possession of 2.4 grams of heroin, an offence punishable under section 54 A(d) of the Ordinance.

After trial, the appellant was found guilty on both charges and sentenced to life imprisonment for both counts. Being aggrieved by the said conviction and sentence, the appellant preferred this appeal.

The following grounds of appeal were urged by the Counsel for the appellant.

1. The charge indicates that the offence was committed at Kollupitiya, but as per the evidence, it was committed at Wekanda Road, Colombo 02.

2. As per the police evidence, they have detected 12.2 grams of brown-coloured powder, but as per the Government Analyst, the weight was 11.67 grams. This discrepancy was not considered.

3. Two police vehicles used the same route; however, the mileage of the two vehicles was different.

4. The learned High Court Judge has not accepted nor has he rejected the dock statement of the appellant. He has failed to deal with it as required by law.

The prosecution called PW1 Inspector of Police Girihadeniya, PW2 Inspector of Police Paul Fernando, PW7 Assistant Government Analyst and PW3 Inspector of Police Rajakaruna. The appellant made a short dock statement.

PW1 arranged a series of raids on the 4th of September 2009, based on information received from a detained suspect named Amir and information received by PW2 from an informant. The police team consisted of 14 officers, and they used two vehicles. They first went to Amir's temporary residence in Borella and found a quantity of heroin. Afterwards, they went to a hotel at Kollupitiya and arrested two Pakistani nationals with heroin. The police received information from the Pakistani nationals that a person named Selvi had also taken drugs from them. Amir informed the police that he knew Selvi and that Selvi usually stayed at Wekanda Road with his three-wheeler.

The police team came to Wekanda Road, and Amir showed a person who was seated on the driving seat of the three-wheeler as Selvi. There was also another person standing near the three-wheeler who was the appellant. PW 1 searched Selvi, while another officer named Ranil searched the appellant. Both of them had small heroin parcels in their trouser pockets. Police Constable Ranil kept the heroin that was found from the appellant. Selvi informed the police that Amir's father was also involved in drug trafficking. The police team then went

to Battaramulla, where Amir's father was arrested. After that, they came to the Police Narcotics Bureau. The heroin parcels which were detected from each suspect had been kept by three difference police officers separately. The substance was sealed in the presence of the suspects. Then the productions were handed over to PW3. PW 3 took the parcels to the Government Analyst.

It was argued for the appellant that as per the indictment, the alleged offence was committed at Kollupitiya; however, the evidence led that the appellant was arrested at Wekanda Road, Colombo 2 and thereby, the prosecution failed to prove a vital ingredient in the indictment.

In terms of section 166 of the Code of Criminal Procedure Act, any error in stating either the offence or the particulars required to be stated in the charge, and any omission to state the offence or those particulars shall not be regarded as material, unless the accused was misled by such error or omission

Both the prosecution and the defence counsel questioned all witnesses on the basis that the appellant was arrested at Wekanda Road Colombo 2. The defence was not misled or prejudiced by this error.

In the case of *Wickramasinghe vs Chandradasa 67 NLR 550,* it was held that the omission to mention the penal section in the charges is not fatal irregularity, if the accused has not been misled by such omission. In such a case, Section 171 of the Criminal Procedure Code applies. (Old Code). The governing principle was described in the case of *Rex vs Amarasekera 29 NLR 33* as follows: *"the accused must not be prejudiced either by total lack of a formal charge or by an error or an omission in the charge".*

In the case of *Jayaratne Banda vs Attorney General [1997] 3SriLR 210 J.A.N. desilva J. (as he was then) held thus; "the three illustrations to section 166 provide a clear indication as to its scope. Illustration (a) relates to the failure to set out the mens rea of the offence. Illustration (b) relates to a failure to comply*

with section 165 (3). In both cases, the ultimate test to be applied is the direct effect of the conduct of the defence. This is further clarified by illustration (c) in the present appeal: Can the defence be heard to say that, had the date and number of the gazette specified in the indictment, the defence would have been different."

In the instant case, there is nothing to show that due to the difference of the place in the indictment, the appellant was misled and thereby caused prejudice to his defence. Besides, this is an area the boundary between Kollupitiya and Slave Island lies. Therefore, this argument of the appellant cannot be sustained.

The following argument of the appellant is about the quantity of the heroin. As per the evidence of PW 1, the heroin detected from the appellant weighed 12.2 grams. The Assistant Government Agent gave the following account regarding the parcel of heroin.

On Page 188

ප්‍ර: **මොනවද තිබුනු භාණ්ඩ?**

උ: **කවරය තුල සීල් කරපු පොලිතින් කවරයක් තිබුනා. ලා නිල් පැහැති ප්ලාස්ටික් පැකට් එකක් සහ ලේබලයක් තිබුනා.**

ප්‍ර: **ඉස්සෙල්ලාම මොකක්ද කලේ?**

උ: **බර කිරා ගන්නවා.**

ප්ලාස්ටික්පැකට් එකසමග එහි තිබුනු දුඹුරු පැහැති ද්‍රව්‍යයේබර කිරා ගන්නවා. එය විශ්ලේෂිත රසායනික තුලාවක් මගින් ඒ අනුව බර12.458 ක් ග්‍රෑම් ලෙස සඳහන් කරලා තියෙනවා. ඊට පස්සේ එහිප්ලාස්ටික්කවරයබරසඳහන් කරගෙන

තියෙනවා. .5821 ක් ලෙස හා එහිඇතුලතතිබුනු දුඹුරු පැහැති ද්‍රව්‍යයයේ බර 11.6664ක් ග්‍රෑම් ලෙස සදහන්කරගෙන තියෙනවා

The appellant did not challenge the weight confirmed by the Government Analyst. There can be minute differences in the weight depending on the equipment and atmospherical conditions. The Government Analyst's labs must have more sophisticated equipment and conditions to weigh production accurately. There is no substantial difference in the weight in the circumstance of this case.

The next argument is regarding the 4.0km difference in mileage of the two vehicles used for the raid. The police had covered more than 60.0km on that day as per the odometer. One vehicle indicates that they have covered 64.0km, and the other shows 68.0km. The learned Judge has considered this difference and come to the conclusion that this slight difference is not a reason to disbelieve otherwise credible evidence. I see no reason to disagree with this finding.

It was argued for the appellant that the learned High Court Judge had not accepted nor had he rejected the dock statement of the appellant and he had not dealt with it as required by law.

The learned High Court Judge has specifically referred to the dock statement on pages 13, 14, and 15 of his judgment. The learned High Court Judge has specifically considered as to whether the appellant was arrested at his home as stated in his dock statement. Further, he observed that the appellant being taken to Hokandara was not put to any of the prosecution witnesses. The learned High Court Judge has clearly stated that the defence evidence did not create a reasonable doubt in the prosecution case. In these circumstances, this argument cannot be sustained.

The next argument is whether the charge of trafficking is proved. As per section 54(A) of the Ordinance,*"traffic"* means *(a) to sell, give, procure, store, administer, transport, send, deliver or distribute or (b) to offer to do anything mentioned in paragraph (a).*

In the case of *Hon. Attorney General vs Mohomed Iqbal Mohomed Sadath SC/SPL/LA/58/15 SC Appeal 110/15* decided on 14.12.2020,Justice Buwaneka Aluwihare stated as follows, in paragraphs 41 and 42 of the judgment;

"41…The offence of drug trafficking, however, also requires that the prosecution establish that the perpetrator was involved in the selling, procuring, storing, administering, transporting, delivering or distributing of such drugs, or had offered to do anything referred to above [Definition of the term "traffic" in section 54 A of the Ordinance]. It is this additional requirement [of an act] that transforms the status of the offence [of possession] to trafficking.

42. Since possession and trafficking can look the same at first glance, prosecution for drug trafficking typically requires producing additional circumstantial evidence to indicate that the Accused was in possession of drugs not for personal use but for commercial purposes. The quantity of the drug detected would be a good indicator to decide whether the perpetrator is a user [an addict] or is trading in drugs. This would be a question of fact. It is in this context, it was stated at the commencement of this judgement that the 4th question of law raised by the State, on which special leave was granted, does not contain a question of law; thus, this court will not endeavour to answer that question."

In the instant case, the prosecution did not produce additional circumstantial evidence, or witness testimony to indicate that the appellant was in possession of drugs, not for his personal use but for commercial purposes. Whether the possession of 2.2 grams of heroin itself could be considered as a higher

quantity than an average drug addict would use, is a question of fact and should be proved by evidence.

Therefore, I believe that the evidence of possession of 2.2 grams of heroin itself is insufficient to prove a charge of trafficking. In the circumstances, I hold that count one in the indictment is not proved, and therefore sentence regarding count one is set aside.

The conviction for the second charge and the sentence imposed for that is affirmed. However, I direct that the sentence is deemed to have been served from the date of the conviction, namely, 2015.10.05.

Subject to the above direction and variation, the appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal