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/329/18 **VS**

High Court of Colombo
Case No: HC 6993/13 Wedage Don Kamal alias Winsan Kamal

Accused

And now between

Wedage Don Kamal alias Winsan Kamal

Accused– Appellants

VS

The Democratic Socialist Republic of Sri Lanka.

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : The accused appellant absconding and unrepresented

Dilan Ratnayake SDSG for the Attorney General

ARGUED ON : 08/06/2022

DECIDED ON : 26/07/2022

R. Gurusinghe, J.

The accused-appellant (the appellant) was convicted for having in possession and trafficking 20.02 grams of heroin, an offence punishable in terms of Section 54 A(b) and 54 A(c) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984. The appellant was sentenced to life imprisonment.

Being aggrieved by the aforesaid conviction and sentence, the appellant appealed to this Court.

A raid was conducted pursuant to the information provided by a personal informant to PW2, that the appellant was bringing heroin to a particular place. The Police team waited near the Nikape school in the Dehiwela, Galkissa area, in order to apprehend the appellant. As they were waiting for the appellant, a police officer in a uniform saw that the vehicle of the appellant was approaching towards them, and he signalled the vehicle to stop, but the vehicle

did not stop. PW2 then fired a shot with his pistol onto the front tyre of the vehicle, which caused the vehicle to stop. The police then searched the vehicle and the people inside it. The appellant was arrested as he was detected with heroin in his trouser pocket.

The Grounds of appeal set out in the written submissions of the appellant are as follows:

1. The learned Trial Judge has not taken into consideration the preliminary objections raised by the appellant for the indictment.

2. The learned Trial Judge has not taken into consideration the fact that the prosecution has failed to establish the chain of custody of the productions.

3. The learned Trial Judge has failed to consider the improbabilities of the prosecution story.

4. The learned Trial Judge has failed to consider the contradiction between the evidence of the prosecution witnesses.

5. The learned Trial Judge has neither accepted nor rejected the dock statement of the appellant.

Even though the written submissions of the appellant were tendered to the Court, the appellant escaped from the prison authorities in 2019. The Counsel who appeared for him earlier had not been given any instructions by the appellant. The appeal was heard in the absence of the appellant in terms of section 325 (2) of the Code of Criminal Procedure Act.

The first ground of appeal was not raised at the trial as a preliminary issue. It was raised for the first time when the trial was concluded.

The first ground of appeal was based on two points.

1. As per the charge, the offence has been committed at Mount Lavinia. The evidence is that the appellant was arrested with the drugs at Nikape, Dehiwela. Nikape is an area that comes under the Mount Lavinia Magistrate Court's jurisdiction. It is an area that comes under the Dehiwela-Mount Lavinia Municipal Council.

2. As per the charge, the weight of the heroin is 20.8 grams. According to the government analysts report, the weight of the heroin was 20.02 grams.

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

The effect of an error in the charge was considered in *Rex vs Amarasekera 29 NLR 33* and held 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."* This is the guiding principle.

The Supreme Court considered the issue of not reading out the indictment to the accused in *Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya vs The Hon. Attorney General, SC Appeal No.115/2014 SC (SPL) LA Application No. 36/2014* decided on 22/01/2020. In that case, His Lordship Justice Aluwihare decided, among other things, as follows:-

"The threshold to be satisfied to obtain relief from the Court of Appeal in Appeals;

21. With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the proviso to Article 138(1), which is placed under the heading "The Court of Appeal". The proviso to the said Article of the Constitution lays down that; "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". (Emphasis is mine.)

22. The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the Court that the impugned error, defect, or irregularity has either prejudiced the substantial rights of the parties or has occasioned a failure of justice. It must be observed that no such Constitutional provision is to be found either in the '1948 Soulbury Constitution' or the 'First Republican Constitution of 1972'.

23. The Constitutional provision embodied in Article 138(1) cannot be overlooked and must be given effect to. None of the decisions (made after 1978) relied upon 11 by the Appellants with regard to the issue that this Court is now called upon to decide, appear to have considered the constitutional provision in the proviso to Article 138(1). It is a well-established canon of interpretation, that the Constitution overrides a statute as the grundnorm. All statutes must be construed in line with the highest law. Judges from time immemorial have in their limited capacity, essayed to fill the gaps whenever it occurred to them, in keeping with the contemporary times, in statutes which do not align with the Constitution. However, such interpretations are not words etched in stone.

42. While the omission of a formal arraignment was unfortunate and regrettable, having taken into account the facts and circumstances peculiar to the case before us, it cannot be said, in my view, that it had prejudiced the substantial rights of the Accused-Appellants, nor can it be said that it had occasioned a failure of justice. In the circumstances, I have answered the questions of law in the manner detailed in paragraph 8 of this judgement and hold that the procedural irregularity referred to, does not have the effect of vitiating the trial."

As the law now stands, 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.

The learned Trial Judge considered the effects of errors and came to the conclusion that the appellant was not misled by the errors. When considering the whole case, the errors were not affected by the defence and caused no prejudice to the accused. Therefore, the first ground of appeal cannot be sustained.

The next point raised by the appellant is that the person who kept the heroin and handed it over to the government analyst was dead at the time of the trial. Therefore, the chain of custody was not proved beyond reasonable doubt. PW3 Sub Inspector Samarakone was the person in charge of productions at the Narcotic Bureau at that time. He was dead by the time this case came up for the trial. PW4 Assistant Government analyst, when giving evidence, stated that Sub Inspector Samarakone, attached to the Police Narcotic Bureau, had handed over the sealed production to her on the 04th of August 2010. The seals were intact as per her evidence.

PW5 was called to produce the statement made by Sub Inspector Samarakone in the information book. This witness stated that the deceased Sub Inspector served under him for 12 years, and he knew his handwriting. During the12 years period, he had the opportunity to be familiar with the handwriting of Sub Inspector Samarakone. PW1 stated that the heroin detected from the appellant was sealed, and it was handed over to PW3 Sub Inspector Samarakone. PW4 testified that the seals were intact, and the productions were handed over by Sub Inspector Samarakone. PW5 gave evidence in terms of section 32(2) of the Evidence Ordinance. Section 32(2) of the Evidence Ordinance is as follows:

> (2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of

> business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities, or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written, or signed by him.

The death certificate of Sub Inspector Samarakone was produced in Court. PW5 stated that he had attended the funeral of Sub Inspector Samarakone. Sub Inspector Samarakone's duty was to accept the productions from police officers and keep them. Handing over the productions to the Government Analyst was a part of his duty. PW 1 handed over the sealed parcel to PW 3, which he had handed over to the Government Analyst. He had done that in the ordinary course of his duty.Therefore, this argument cannot be accepted.

Another point raised by the appellant is that the Learned Trial Judge has not considered the probabilities and improbabilities of the prosecution story. When perusing the judgment, it is clear that the learned Trial Judge has adequately considered the probabilities and improbabilities and came to the conclusion that the prosecution story is probable.

The appellant stated in his dock statement that the raid had taken place between Borallesgamuwa and Bellanwila Road. It further stated that several high-ranking police officers came to the scene. This manifests the significance of the raid. The learned Trial Judge has assessed the probabilities and improbabilities. Therefore, this ground of appeal has no merit.

The next point raised in the written submission of the appellant is that the learned Trial Judge has not considered the contradictions. There were no contradictions marked. However, in the written submissions, it is stated whether PW1 was informed of the appellant's name before the raid or whether he came to know his name after the raid. This is contradictory between PW1 and PW2. The other one is whether the high-ranking police officers came to

Nikape, where the raid took place or whether it took place in the house of the appellant in Ratmalana. The Next one is, where was the money of the appellant found?. None of these differences had a bearing on the credibility of the witnesses or affected the defence of the accused-appellant. Those were not significant. Therefore, this argument cannot be succeded.

The final point is that the learned High Court Judge has not accepted nor has he rejected the dock statement. The learned Trial Judge has considered the dock statement. The position of the appellant was that his vehicle was overtaken by the police vehicle and stopped by the police. This was specifically referred to in the judgment, and came to the conclusion that the position of the appellant could not be accepted. Therefore,it is quite clear that the learned High Court Judge has rejected the dock statement. Though the learned Trial Judge has not rejected the dock statement in so many words, he has refused to act on it.

For the foregoing reasons, the appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal