

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

*In the matter of an Appeal in terms of
section 331 (1) of the Code of Criminal
Procedure Act No- 15 of 1979, read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

Court of Appeal No:

CA/HCC-126-133-2014

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

High Court of Colombo

Case No: HC/6228/12

Vs.

1. Muththurasa Kamal Krishtian
2. Kirathirasa Kilsan
3. Gnanaprakashan Dushanthan
4. Mariya Loyela Yamarshan
5. Rayappan Wilson
6. Thulandasami Prasad
7. Sanprito Selvalangam
8. Jalendaran Augustan

ACCUSED

AND NOW BETWEEN

1. Muththurasa Kamal Krishtian
2. Kirathirasa Kilsan
3. Gnanaprakashan Dushyanthan

1st, 2nd and 3rd ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anil Silva P.C. with Isuru Jayawardana for the 1st,
2nd and 3rd Accused Appellants

: Rohantha Abeysuriya, P.C., ASG, for the Respondent

Argued on : 16-06-2022

Written Submissions : 19-10-2017 (By the 1st, 2nd and 3rd Accused-
Appellants)

: 14-09-2018 (By the Respondent)

Decided on : 29-07-2022

Sampath B Abayakoon, J.

The 1st to 8th accused appellants were indicted before the High Court of Colombo on following counts.

- (1) Trafficking 955.4 grams of diacetylmorphine, commonly known as Heroin, on or about 28th November 2011, within the territorial waters of Sri Lanka, and thereby committing an offence punishable as provided for in terms of Poisons Opium and Dangerous Drugs Ordinance as amended by Amendment Act No 13 of 1984.
- (2) At the same time and at the same transaction, importing the said quantity of Heroin to Sri Lanka, an offence punishable in terms of the same Act.
- (3) At the same time and at the same transaction having in their possession the mentioned quantity of Heroin, an offence punishable in terms of the same Act.

The 1st to 3rd accused are Sri Lankans, while 4th to 8th accused are Indian Nationals.

After trial, the learned High Court Judge of Colombo found all the accused guilty as charged and they were sentenced to death in terms of the Poisons Opium and Dangerous Drugs Ordinance by his judgment and the sentence dated 30-10-2014.

Being aggrieved by the conviction and the sentence, the 1st to 8th accused appellants filed their respective appeals. However, the 4th to 8th accused appellants have withdrawn their appeals on 18-11-2014 and accordingly, this Court had dismissed their respective appeals.

It has been intimated to this Court that the death sentences imposed on the said 4th to 8th accused had been commuted to life imprisonment by the President of the Republic under the powers vested in him in terms of Article 34 of the Constitution, and later commuted to a prison term of twenty years each. It has also been informed that they have been deported to India thereafter.

It is therefore the appeals of the 1st to 3rd accused appellants (hereinafter sometimes referred to as the appellants) that will be considered in this appeal.

The facts in brief: -

On 28th November 2011 Lieutenant Commander Charitha Gunawantha (PW-01) was functioning as the Commanding Officer of the Sri Lanka Navy fast attack craft P.480, which was on surveillance duty in the northern seas of Sri Lanka between Mannar and Delft Island within the maritime boundary line of the country.

At around 21.10 hours, he and his officers have noticed the movements of a suspicious dingy boat through the radar facility of their vessel. At that time the dingy boat was around two nautical miles away from them. Using the onboard night vision camera they have continued to observe the boat while getting closer to it. They have switched off the lights of Navy vessel in order to avoid their movements being detected. In his evidence the PW-01 has well explained the reasons for the suspicions of the movements of the dingy boat and the facilities his vessel had to closely observe the movements of the boat and the methods they used to avoid detection of their presence. There were no other fishing boats of this nature in the vicinity of the dingy they observed. There were several Indian fishing vessels engaging in illegal fishing in the territorial waters of the country at that time, which were some distance away.

They have then observed one Indian Fishing vessel braking away from the group of Indian vessels and approaching the dingy boat they were observing and coming parallel to it. He has then seen a person from the Indian vessel handing over a parcel to one of the persons who were on board the dingy boat. There were three persons in the dingy boat, while he has observed four persons in the Indian vessel. Upon seeing this PW-01 had immediately approached the vessels after switching on the onboard flash lights and warning them to stop. While getting closer to the dingy boat, he has observed the person who was seated near the outboard motor engine of the dingy biting open one parcel, and throwing it into the sea. Immediately thereafter, two officers have boarded the dingy while one officer has recovered the parcel which was thrown into the sea.

Inside the boat they have found three more parcels of similar size near the person who throw one of them to the sea. Upon inspection, brown coloured powder has been discovered in the parcels and PW-01 had identified them as Heroin and the three persons have been arrested. PW-01 has observed the person who broke open one of the parcels before it was thrown into the sea with a brown-coloured powder all over his face and the T-shirt he was wearing. The witness has identified the appellants as the three persons arrested by him from the dingy boat at the trial before the High Court.

After their arrest, PW-01 and his team of officers had pursued the Indian vessel which was attempting to get away and stopped it as well, and arrested the occupants of the boat, whom he has identified as the 4th to the 8th accused before the High Court. He has identified the 8th accused as the skipper of the vessel. He has recovered GPS mobile communication devices from both the vessels among other things recovered. After the arrests, PW-01 has taken arrested persons and the productions recovered under his custody and had taken them to the Kankesanturai harbour, where they were stationed at that time. They have reached the harbour at around 6.00 hours on the following day, and after the initial Navy investigations into the detection, the productions and the arrested persons have been handed over to the Kankesanturai police. It was the evidence of the witness that all the relevant productions were sealed by him following the due procedure, at the time of the arrest of the appellants.

At the trial, the PW-01 has marked a map of the area of detection as P-01, where the movements of the two vessels arrested have been shown using the GPS positional signal information obtained from the two GPS devises found. He has marked and produced all the relevant productions recovered by him, including the parcels of Heroin, which has been marked as P-21 to P-24. It is clear from the evidence that the weighing of the Heroin had been done at the Kankesanturai police station. The parcel marked P-21 has had a total weight of 506 grams and the parcel marked P-22 has had a total weight of 510 grams,

while the parcel marked P-23 has had a total weight of 516 grams. The parcel marked P-24 was the parcel recovered after it was broken open and thrown into the sea, and it has had a total weight of 212 grams.

It needs to be noted that although the learned Counsel who represented the appellants and the other accused has cross-examined the witness at length, it has not created any reasonable doubt as to the truthfulness of his evidence.

In this matter, Lieutenant Herath, who was the second-in-command of the naval vessel and naval rating Wijeratne, the two officers assisted the PW-01 in the detection, has given evidence to corroborate his evidence.

Deputy Surveyor General, Jayaratne Dodampegama (PW-15) has explained at length the map marked P-01, while PW-13 Senior Assistant Government Analyst Kumuduni Rajapakse was the officer who analyzed and determined the pure quantity of Heroin found in the parcels sent to the Government Analyst. She has found a total weight of 955.4 grams of pure Heroin in the parcels sent by the Magistrate of Mallakam to the Government analyst in relation to this action.

After leading the evidence of the relevant police officers who conducted investigations into this detection the prosecution has closed its case.

When the appellants were asked for a defence, the 1st and the 3rd accused appellants have chosen to give evidence under oath, while the 2nd accused appellant had made a statement from the dock.

It has been the evidence of the 1st accused appellant that he and the other two appellants went to sea for fishing on the day of the detection and they laid their nets as usual and waited for the nets to be taken in. He has admitted that they used GPS technology to navigate and has claimed that while they were attempting to take their nets into the boat, fearing that Indian vessels that were in the vicinity will damage them, one Indian trawler approached them. (Evidence given on 21-11-2013 at 11.00 a.m.-page 1130 of the appeal brief).

It has been his evidence that on that instant a Naval vessel came and arrested them and searched their boat but could not find anything illegal in the boat. It was his position that two other Navy boats also came thereafter and an officer from one of the other boats brought a bag into their boat and kept it near him and took photographs. It was his claim that the bag had four parcels of similar size, and one parcel was broken open by the Navy officer who brought them, and the powder inside was applied on the faces of all three of them. He has claimed further that they were assaulted and handed over to Kankesanturai police and later produced before Mallakam Magistrate. He has stated that all the persons on board the Indian vessel were also arrested and later produced before the Magistrate. Under cross-examination, he has admitted that the GPS device marked P-02 was the device they had in their possession at the time of the arrest. He has also admitted that the covers marked P-19A, B, C, as the covers of the parcels he claims that were introduced by the Navy when they were arrested.

Making a dock statement, the 2nd accused appellant has taken the stand that when he and the other two who went fishing with him were attempting to get their net back into the boat fearing that the approaching Indian vessel will damage it, they were arrested by the Navy. He has narrated a similar version of events to that of the 1st accused appellant, claiming that he is innocent as he has done nothing illegal.

The 3rd accused appellant, in his evidence has narrated the same version of events as claimed by the 1st accused appellant pleading his innocence of any crime.

The Grounds of Appeal: -

At the hearing of the appeal, the learned President's Counsel formulated the following grounds of appeal for the consideration of the Court.

- (1) Has the learned High Court Judge failed to evaluate the evidence of the expert witness, Deputy Surveyor General Dodampegama in the correct perspective.
- (2) Has the learned High Court Judge had not taken into consideration matters favourable to the appellants.
- (3) Has the prosecution failed to prove the case beyond reasonable doubt against the appellants.
- (4) In any event can the charges be maintained against the 2nd and the 3rd accused appellants.

The learned President's Counsel informed at the outset of the hearing that he is not contesting the chain of custody of the productions and the report by the Government Analyst.

It was his submission that based on the map marked P-01 and the evidence of Deputy Surveyor General, which are scientific evidence, it cannot be concluded that the dingy boat and the Indian vessel met during the time relevant to the incident as claimed by the witnesses. It was his view that this is a situation that completely cuts across the evidence of the prosecution, which should have been considered in favour of the appellants by the learned High Court judge.

It was also his argument that since it was the evidence of PW-01 that the parcels of Heroin were recovered from the possession of the 1st accused appellant, the prosecution has failed to prove the joint possession, the basis upon which the 2nd and the 3rd accused appellants were found guilty.

However, the learned President's Counsel admitted that the allocutus made by the appellants in terms of section 280 of the Code of Criminal Procedure Act when they were required to make a statement was not in favour of the appellants.

It was also his submission that in the event of the grounds of appeal being not considered in favour of the appellants, the Court may consider the revision of the death penalty imposed on the appellants in view of the fact that the Indian nationals who were found guilty along with the appellants are now free men due to the commuting of their sentences and been deported.

It was the submission of the learned Additional Solicitor General (ASG) on behalf of the respondent that he will not stand in the way if the Court decides to reconsider the sentence imposed on the appellants given the fact that some of the accused of the action who were found guilty along with the appellants are now free, only due to the fact of they being Indian nationals.

However, it was his contention that the grounds of appeal advanced on behalf of the appellants have no merit. He points out that the map marked P-01 has been clearly established by the evidence, and the joint possession as well. He also brings to the notice of the Court that the defence put forward by the appellants when they were called for a defence has not been put to the relevant witnesses when they gave evidence in Court, which makes such defence of no value.

Consideration of the Grounds of Appeal

The 1st Ground of Appeal: -

This ground of appeal is based on the contention that the map marked P-01, which supposed to show the paths of the two vessels do not show that the vessels came side by side at any point, and therefore the evidence of PW-01 and other witnesses who gave evidence in that regard are not credible.

It is clear from the evidence of PW-01 who produced the map marked P-01 in order to show the respective routes taken by the two vessels, and that of the expert witness PW-15, that the said route has been identified using the data that was available in the GPS devices found when the arrests were made and the navigational data available in the attack craft. It was his evidence as well as

the evidence of the 1st appellant that when at sea, fishermen often switch off their GPS devices in order to save the battery power. It is therefore clear that the data obtained from the GPS devices would not give an accurate picture as to the route of the vessels in this instance. It can be assumed that once both the vessels established contact and identified their respective positioning in the sea, they had no need of using the GPS facility for that purpose. I am of the view that not showing on the map marked P-01 that the two vessels came closer to each other is a matter that needs to be considered in relation to the facts of the matter, and not by taking the map reading in its isolation.

Besides that, there cannot be any doubt on this fact, as this is a fact that has been admitted by the 1st and the 3rd appellant in their evidence and the 2nd appellant in his dock statement. They have stated that while they were waiting after laying their fishing nets, an Indian trawler came near them and at that point the Navy officers came and ordered them to stop, and boarded the dingy boat. This clearly establishes that what the prosecution witnesses are saying are the true version of events that took place.

Therefore, I find no merit in the considered ground of appeal.

The 2nd ,3rd and the 4th Grounds of Appeal: -

As the mentioned grounds of appeal are interrelated, they will be considered together. The main ground advanced by the learned President's Counsel to argue that the learned High Court Judge failed to consider matters favorable to the appellants was the earlier considered map readings shown in the map marked P-01. As I have elaborated earlier, it is not a matter that can be considered in favour of the appellants in any manner.

As pointed out correctly by the learned ASG, the question whether the appellants are guilty on the basis of joint possession of Heroin is a matter that needs to be considered by taking the facts and the circumstances in its totality and not by taking certain facts in its isolation.

The three appellants have left the Sri Lankan shores in a small dingy boat, and when detected, were near the India-Sri Lanka maritime boundary. This is an area where Sri Lankan fishermen do not normally fish during that time of the day. The Navy craft which observed the suspicious movements of the boat had been keeping the boat under surveillance for some time before they observed the approaching Indian vessel towards the dingy boat. The Navy officers have seen a parcel being handed over to the occupants of the dingy boat. When the Navy officers reached the boat and stopped it, the parcel was near the 1st appellant and it was he, who has opened one of the packets and thrown it into the sea. That does not mean that it was he who had the sole possession of the parcel, making him liable to be prosecuted and not the other occupants of the boat. The proven facts provide ample evidence to show that it was an act done by the appellants in connivance. If not for the help of each other, it is not possible to travel so far into the sea in a small craft like a dingy. There is nothing to conclude that the appellants were not privy to each other in committing the crime. It is obvious that one has to hold on to the cargo they received from the Indian vessel to make sure that it is not lost at sea in an unstable small boat. I find that it was the reason why the parcel was near the 1st appellant when the Navy approached the boat and for no other reason. It is my considered view that the prosecution has proven the joint possession beyond reasonable doubt in this case.

The 1st and the 3rd appellants in their evidence and the 2nd appellant in his statement from the dock, has taken up the position that they were assaulted after their arrest and three other small Navy crafts also came thereafter, and a parcel brought in one of the other Navy crafts was introduced to them. In addition, it has been claimed that one parcel was opened by the Navy officers and the powder that was there was applied on their bodies by the Navy officers. However, I find that the appellants have failed to confront the relevant witnesses when they had the opportunity of cross-examining the witnesses in

Court giving them an opportunity to explain the claims. The only position taken had been that they were assaulted when arrested and the Navy officers applied the powder on the face of the 1st accused, which goes on to show that the claims are after thoughts rather than things actually happened.

In the case of **Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court iii 3652 at 3655,3656** it was stated thus;

“It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted.”

His Lordship **Sisra de Abrew, J.** in the case of **Pilippu Mandige Nalaka Krishantha Thisera Vs. The Attorney General, CA 87/2005 decided on 17-05-2007** held:

“...I hold whenever evidence is given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness.”

I find that the learned High Court Judge has well considered all the relevant evidence presented before the Court and the relevant law, when it was held that the prosecution has proved the case beyond reasonable doubt against the appellants, for which I find no reasons to disagree.

Hence, I find no merit in the considered grounds of appeal either.

I will now draw my attention to the sentence imposed on the appellants as submissions were made by the learned President’s Counsel as well as the learned ASG based on what has taken place in relation to the accused who withdrew their appeals against their convictions and the sentence.

The sentence that can be imposed on a person found guilty in terms of the Poisons Opium and Dangerous Drugs Ordinance for having in his possession

and trafficking of more than two grams of Heroin is either the death sentence or a sentence of life in prison. I find that the learned High Court Judge was justified in imposing the death sentence given the facts and the circumstances of the matter and having considered the pure quantity of Heroin detected in this instance.

However, as contended and agreed by the learned ASG, the death sentence imposed on the 4th to 8th accused of the case has been commuted to life in prison and subsequently to a term of 20 years by the President in terms of his powers as stated before. This has happened within a short span of their withdrawal of the appeals and they have been deported as well. The only conclusion that can be reached is that this has happened because they are Indian nationals.

As such, it is my considered view that given the special circumstances as they stand now, the imposition of the death sentence on the appellants can no longer be justified. Therefore, I set aside the death sentence imposed on the appellants on each of the three counts for which they were found guilty, and substitute sentences of life imprisonment on the appellants.

Subjected to the above variance to the sentence, the appeal is dismissed as it is devoid of merit.

Judge of the Court of Appeal

P. Kumarartnam, J.

I agree.

Judge of the Court of Appeal