

**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.

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

**C.A. Case No. HCC/326/19**

**High Court of Colombo**

**Case No. 085/17**

**Complainant**

**Vs.**

Halpitapathalage Don Nishantha  
Arskin Perera

**Accused**

**AND NOW BETWEEN**

Halpitapathalage Don Nishantha  
Arskin Perera

**Accused –Appellant**

**Vs.**

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

**Complainant-Respondent**

**BEFORE** : **K. PRIYANTHA FERNANDO, J (P/CA)**

**WICKUM A. KALUARACHCHI, J**

**COUNSEL** : Shehan De Silva with Naveen Maha Arachchi for the  
Accused-Appellant

Sudharshana De Silva, DSG for the Respondent

**WRITTEN SUBMISSION**

**TENDERED ON:** 24.02.2021 (On behalf of the Accused-Appellant)

09.07.2021 (On behalf of the Respondent)

**ARGUED ON** : 04.08.2022

**DECIDED ON** : 06.09.2022

**WICKUM A. KALUARACHCHI, J.**

The accused-appellant along with the two others was indicted before the High Court of Colombo for Trafficking 22.54 grams of heroin, an offence punishable under Section 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance. The first and the second accused died before the commencement of the trial. Accordingly, the trial proceeded against the third accused. After the trial, he was convicted and sentenced to death by the learned High Court Judge of Colombo by his judgment dated 21<sup>st</sup> August 2019. The third accused preferred this appeal against the said conviction and the sentence.

Prior to the hearing, written submissions have been filed on behalf of both parties. The learned Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions at the hearing of this appeal.

The prosecution case may be briefly summarized as follows:

On November 26, 2007, PW1, a Police Narcotic Bureau officer, received information from a reliable private informant about a group of people transporting heroin in a three-wheeler. According to the information; Melani Kumari, her son, and her brother, the accused-appellant in this case, are transporting narcotics in a three-wheeler bearing the registration number QL-1691. Accordingly, PW1 organized a team for a raid comprised of Police Narcotics Bureau officers, who arrived at the Kochchikade church around 6 a.m. in an official van. They met the informant who had provided information. The team had arrived in Mattakkuliya and parked their van at the Mattakkuliya petrol shed. The three police officers, PW1, PW3, and WPC 2290-Thilini, got down from the van and stayed outside the road, observing the road. After a short while, a three-wheeler with the same registration number given by the informant came from the direction of Samagipura. They stopped the three-wheeler.

Apart from the driver, there were two passengers inside the three-wheeler. PW1 had then searched the lady with a handbag in the passenger's seat. Inside the bag, there were two yellow colour covers containing a brown colour substance. SI Kumara identified the substance as heroin after opening one of the covers. Then, she was arrested after explaining the offence committed by her. She is the first accused in this case. The son of the woman seated next to her was also arrested for aiding and abetting to traffic heroin. He is the second accused in the case. The third accused-appellant, who drove the three-wheeler, was the first accused woman's brother.

Following that, PW1 directed the PW4 to search the three-wheeler. He obtained keys from the accused-appellant, the driver. PW4 then opened the cubbyhole that was in front of the driving seat and detected 5 similar yellow color covers, a scale, and 4 weights inside. PW1 noticed powder traces on the scale as well. The recovered items

were subsequently sent to the Government Analyst for examination. PW1, the main investigating officer and PW4 have given evidence about the raid at the trial.

The defence position suggested to the PW1 was that a woman called "Srimathi" had been arrested in another raid on the same day when she was in a three-wheeler (not the appellant's three-wheeler) and heroin found on her was implicated to the appellant. However, when the appellant made a dock statement, he stated that the said "Srimathi" and two other friends were in the three-wheeler driven by him, they were arrested and taken to the Borella police station. According to the appellant, his sister (first accused) and her son (second accused) were also arrested when they were in the house and then they were also brought to the police station. In the police station, heroin was introduced to them as well as to the "Srimathi", the appellant said in his dock statement. It is very clear that the position suggested to the main investigating officer and the position taken up by the appellant in his dock statement are totally contradictory. Therefore, the learned High Court Judge very correctly rejected these completely contradictory and unreliable two versions of the defence. Although the defence versions are rejected, the prosecution case would not succeed. The prosecution has to prove its case beyond a reasonable doubt.

At the hearing of the appeal, the learned counsel for the appellant confined his arguments to the issue of the appellant's knowledge of the offence although three grounds of appeal have been stated in the appellant's written submissions. Accordingly, the learned Deputy Solicitor General also made submissions only with regard to the said ground of appeal.

The argument of the learned counsel for the appellant was that even if the prosecution version that her sister, the first accused, was found

with heroin in the three-wheeler is accepted, the appellant had no knowledge that heroin was in the three-wheeler. Therefore, this court has to deal only with this issue of knowledge.

In considering the issue of knowledge, the accused-appellant had no burden to establish his lack of knowledge. To establish the trafficking charge against the appellant, the prosecution must prove that the appellant transported the heroin with the knowledge that the first accused, who was traveling in his three-wheeler, was in possession of heroin.

Although new story was narrated in the dock statement that “Srimathi” and two other friends were in the three-wheeler at the time of the raid, during the prosecution case, the appellant’s position was that “Srimathi” came in another three-wheeler and her heroin was implicated to them. It was not even suggested on behalf of the appellant in cross-examining PW1 and PW4, that the first accused was not in his three-wheeler at the time of the raid. Detecting two heroin parcels in the handbag carried by the first accused was also not challenged. The unchallenged evidence of the Government Analyst also established that the pure quantity of heroin she possessed was 22.54 grams. In addition, finding the weighing scale, four weights and five similar yellow covers from the cubbyhole has also not been challenged by the defence in cross-examination.

An observation of the Indian judgment of Sarvan Singh v. State of Punjab (2002 AIR SC (iii) 3652) at pages 3655 and 3656, has been cited in the case of Ratnayake Mudiyansele Premachandra v. The Hon. Attorney General C.A. Case No. 79/2011, decided on 04.04.2017 as follows: “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.”

In the case of Himachal Pradesh v. Thakur Dass (1983) 2 Cri. L. J. 1694 at 1701 V. D. Misra CJ held that “whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed”. Similarly, in Motilal v. State of Madhya Pradesh (1990) Criminal Law Journal NOC 125 MP, it was held that “absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact”.

In evaluating the evidence to determine whether appellant’s knowledge has been established, the crux of the aforesaid judicial authorities should be taken in to consideration.

Also, it is to be noted that issue of knowledge has to be determined by facts. The learned High Court Judge has considered the facts and circumstances of the case and held that the appellant had the knowledge. It has been held in several cases such as King Vs. Gunaratne 14 Ceylon Law Recorder 174, Fradd Vs. Brown & Company 20 NLR 282 at 283, State of Uttar Pradesh Vs. M. K. Anthony (1984) SCJ 236/(1985) CRI L.J. 493 at 498/499, Oliver Dayananda Kalansuriya alias Raja Vs. Republic of Sri Lanka CA 28/2009 (13.02.2013), Wickramasuriya V. Dedolina (1996) 2 Sri L.R. 95, and Alwis V. Piyasena Fernando (1993) 1 Sri L.R. 119 at 122, that the testimonial trustworthiness of witnesses is a matter for trial Judge and a considered finding of a trial Judge will not be disturbed by an Appellate Court lightly.

In the instant case, the learned High Court Judge has carefully considered and evaluated all of the evidence presented and given reasons for his findings. However, in light of the arguments advanced on behalf of both parties in this court, this court must consider whether it is needed to be interfered with those findings.

In order to substantiate the appellant's lack of knowledge on the offence of trafficking, the learned counsel for the appellant submitted the judgment of V. Sivadasan & V. Pavadasan V. The Attorney General - CA 46/2008 decided on 13.07.2012. In this case, the second accused brother who had been with the first accused who was convicted for trafficking heroin was acquitted by the Court of Appeal for the reason that the second accused cannot be convicted for the offence committed by the first accused simply because he is the brother of the first accused. The learned counsel contended that in the case before us also, the third accused-appellant cannot be convicted because of the reason that he was the brother of the first accused.

It should be noted that even in the instant action, the learned High Court Judge has taken the same view. The learned Judge has stated in his judgment that the accused's sister may have traveled with heroin in the accused's three-wheeler without informing him about the heroin. However, the learned trial Judge was of the view that the facts, that a weighing scale with traces of heroin was discovered in a locked compartment of the three-wheeler and the way the appellant reacted when he saw the police officers completely exclude the inference of innocence of the appellant.

In the aforesaid Court of Appeal case, two brothers were indicted on the basis that they had jointly committed the offences under sections 54A (b) and 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance. Police arrested the two brothers when they came out from a Kovil while the first accused was carrying a parcel allegedly containing heroin. The second accused attempted to prevent the arrest of the first accused. The Court of Appeal held that they had a right to be together as brothers and that there was nothing unusual. Also, it was held that the second accused came to rescue the first accused, and although it may be highly suspicious that the second

accused too had the knowledge but suspicion however great will not constitute evidence.

The facts of that case differ from the facts of the case before us. In the aforementioned case, the second accused possessed nothing; he was with his brother and he only attempted to rescue his brother. In the case before us, when PW1 searched the first accused's handbag, two yellow color covers containing heroin were found. So, the first accused who possessed with heroin was traveling in the three-wheeler driven by the appellant. Hence, it is apparent that the heroin was transported in the appellant's three-wheeler. The only issue is the appellant's knowledge. If he had knowledge, the offence of trafficking is committed because according to the interpretation in section 54A of the Poisons, Opium and Dangerous Drugs Ordinance, transport is one of the modes of trafficking.

Anyhow, in this case also, as in the aforesaid case, the appellant cannot be convicted of an offence for heroin found from the custody of the first accused merely because the appellant and the first accused were brothers and sisters.

However, it should be noted that although close relationships such as brother and sister or husband and wife are immaterial in proving certain criminal charges, they are material in establishing knowledge because close relations have ample opportunities to know what each other is doing. Therefore, this close relationship is also a relevant factor in ascertaining the knowledge but the remote possibility that the sister was taken in the appellant's three-wheeler without being aware of the heroin she possessed should not be overlooked. Hence, in addition to the brother-sister relationship, there must be other circumstances to come to the only conclusion that the appellant had the knowledge of the offence.



The learned Deputy Solicitor General contended that the appellant's knowledge has been well established in this case because five similar yellow colour covers, a scale with trace of heroin, and four weights have been recovered from the cubbyhole of the appellant's three-wheeler.

It is apparent from the evidence in this case, the brother-sister relationship is not the only factor in establishing knowledge. The cubbyhole was placed in front of the driving seat of the three-wheeler. The cubbyhole was locked and the keys were with the appellant. PW4 has obtained the keys from the appellant to open and check the cubbyhole. So, what was found in the cubbyhole should be considered to have been in the possession of the appellant. However, as learned counsel for the appellant pointed out, the appellant was indicted not for the items discovered in the cubbyhole, but for trafficking the heroin possessed by the first accused.

When the cubbyhole was opened, using the key in the appellant's possession, a weighing scale was discovered, and the Government Analyst confirmed that traces of heroin were found on the scale. In addition, five other yellow colour bags similar to the two yellow colour bags containing heroin that the sister was carrying were found in the cubbyhole. This is strong evidence of appellant's knowledge regarding the heroin possessed by his sister. There was no any explanation from the appellant to get an inference that the first accused possessed heroin without his knowledge when she traveled in his three-wheeler. Especially, the appellant failed to explain how, similar yellow colour bags to the yellow colour bags containing heroin possessed by his sister came to the cubbyhole. Taking all of the facts and circumstances into account, I hold that it is established beyond a reasonable doubt that the appellant transported the heroin knowing it was in the three-wheeler. Hence, the learned High Court Judge is

correct in coming to his conclusions on the basis that the appellant had knowledge of transporting heroin, I hold.

The learned counsel for the appellant did not canvas the sentence imposed on the appellant. This offence carries only two punishments; life imprisonment or the death sentence. For the reasons stated by the learned High Court Judge in sentencing, I hold that the sentence is lawful and correct in principle.

Accordingly, the conviction and sentence imposed on the accused-appellant are affirmed.

The appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

K. Priyantha Fernando, J (P/CA)

I agree.

**JUDGE OF THE COURT OF APPEAL**