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

In the matter of appeal in terms of section 333(1) of the Code of Criminal Procedure Act No: 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Lokuheva Gamage Shyamalie

Accused-Appellant

CA Case No: HCC 165/17

HC Negombo Case No:
HC168/2009

Vs.

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

Complainant Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Tenny Fernando for the Accused-Appellant
Riyaz Bary, DSG for the Respondent

Written Submissions On: 29.01.2018(by the Accused-Appellant)
06.07.2021 (by the Respondent)

Argued On: 05.06.2023

Decided On: 27.07.2023

Sasi Mahendran, J.

The Accused Appellant (hereinafter referred to as the Accused) on being aggrieved by her conviction and the sentence by the learned High Court Judge of Negombo dated 30th of May 2017.

The Accused was indicted before the High Court on the counts of Possession, trafficking, and importing 193.4 grams of Heroin, in terms of Section 54A of the Poisons, Opium, and Dangerous Drugs Ordinance (as amended by) Act No. 13 of 1984.

Prosecution led evidence of the three witnesses PW1, PW3, and PW5, and closed its case wherein marked productions from P1 to P10. The Accused gave evidence from the evidence box. At the conclusion of the trial, The Learned High Court Judge convicted the Accused guilty on all three counts and sentenced to life imprisonment.

Being aggrieved by the said judgment this appeal was preferred by the Accused.

The following grounds of appeal were urged by the counsel for the Accused.

1. The Learned Trial Judge has arrived at a judgement that is contrary to law and legal principles.
2. The Learned Trial Judge has not properly evaluated the evidence of the Accused.
3. The Learned Trial Judge has not Properly addressed material issues raised.
4. The Learned Trial Judge has failed to correctly analyse the Prosecution evidence.

The facts and circumstances giving rise to this appeal are that:

The main prosecution witness Wijeya Fernando (PW1), attached to the Katunayake Police Station Narcotics Bureau was assigned to inspect the following passengers namely; Upananda, Kumara, and Shyamalie (the Accused), arriving from India on the 28th of September 2007 on plane No. UL–162 based on information that they were trafficking Illicit drugs.

While he was waiting with his team, after confirming the passenger's list on arrival, he identified the accused and introduced himself. Thereafter checking her passport and travel ticket, and confirming her identity she was then escorted to the Police Narcotics department at the airport where PW1 had asked the Accused to open the suitcase where she unlocked it with the relevant set of keys, thereafter PW1 entered the combination "000" which was given by the Accused, upon inspection the suitcase contained a mix of ladies' and gents' clothes

Upon further inspection, he identified a false bottom placed inside the suitcase when he then discovered a parcel, which was later established to be heroin. It weighed 2 kg and 20gs. (According to the government analyst it contained 193.4 grams of pure heroin) Thereafter the Accused was arrested and the production was handed over to SI Samarakoon (There is no dispute with regard to the chain of production up to the point of being received by the government analyst).

PW3 Indika Sudes Weerasinghe, stated that on the 28th of September 2007, he was informed that three individuals returning from India were carrying illicit drugs and were asked to investigate.

According to his evidence, he has corroborated with PW1's witness evidence on how the Accused was identified, how the Accused was Apprehended, how the suitcase was opened, and what was discovered in the suitcase.

We are mindful that there are no contradictions noted between these two

witnesses. When we peruse the evidence of both PW1 and PW3, the learned High Court Judge who evaluated the evidence has accepted the evidence as they were consistent and in the absence of contradictions or omissions marked.

The Accused's version.

The Accused elected to testify under oath. She stated that she was coerced into going to India by Nimal who blackmailed her with a set of indecent photos taken of her by Nimal and he had promised to hand over the photo with a negative every time she returned from India. According to her, she had visited India five times with Nimal, and on her return journey she was given a bag each time, although she had gone with Nimal there had been no such photograph that was transferred to her.

The Accused claims that she was only aware of bringing items such as saris and had no knowledge about the illicit drugs being a part of the contents. She states that she did not have the bag and that it was with Upananda, who handed the empty suitcase over to her in the hotel room. The Accused had opened and arranged the saris, she stated that she had not seen anything else, and thereafter she handed the packed suitcase to Upananda. When she was arrested by PW1 and PW3 she told the officers to break open the suitcase.

When we analyse the evidence postulated by the Accused according to the cross examination, different versions were put forward by the Accused which were not put to the witnesses. Such as the fact that she had asked PW1 to break open the suitcase, and that the bag was empty until she packed it with sarees. Upon further analysis, this gives prominence that she was aware of the contents that were within the suitcase and that she also knew the combination to open the suitcase, which she had not denied, although she denied that she was aware of a parcel being concealed in the suitcase.

The question before us to answer is whether there is any burden for the

prosecution to establish the requisite knowledge on the part of the accused in order to convict her for the offence for which she was indicted. This question was answered in Warners case which laid *down that there had to be actual knowledge of the fact of control of the relevant articles before there could be said to be possession of them.*

Lord Wilberforce in Warner v. Metropoliton Police Commissioner (1968) 52 Criminal Appeal Report 373. Held that;

"The question, to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused should be held to have possession of the substance, rather than mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances- to use again the words of pollock and wright, possession in the common law, P. 119- the 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, had been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substances."

This Principle was followed in **K. Sumanawathi Perera v. Attorney General 1998 2 SLR 20**, His Lordship **Ismail, J** in his judgement referred to the following cases.

In **R v Boyesen 82 AC 768, Lord Scarman** held: "*They do not arise for consideration in this appeal. Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature: but you do not possess it unless you know you have it. I would adopt the description of possession given by Lord Wilberforce in Reg v Warner [1969].*"

In the case of **Gareth Edmund Lewis 1988 87 Cr.App.R 270, Lord Justice May** held: "We respectfully agree that Warner's case is the leading authority on this particular question. But as has so often been said in different contexts, particularly in criminal jurisprudence, the question of what constitutes "possession" is an illusive concept at common law. It depends so much on the circumstances of the particular case, as well as the wording and intent, for instance, of the particular statute creating the offence under consideration. It is no doubt for this reason that the speeches in Warner's case seem to us, respectfully, to reflect a substantial number of different shades of meaning and approach from which it is not easy to distil a conclusion supported by the majority of the House which is relevant to the instant appeal. In this connection, we have been greatly assisted by the headnote in the Criminal Appeal Reports, which seems to us accurately and conveniently to summarise the decision.

The House of Lords certainly decided, though with Lord Reid dissenting, that the relevant statute created an absolute offence. This is in the sense that in order to be satisfied of guilt, there is no need for the jury to be satisfied of any mental element in the ingredients of the offence, such as we used to describe as mens rea. However, in our view herein lies one of the difficulties in applying the decision in Warner's case because, notwithstanding that the offence is an absolute one, a majority of their Lordships expressed the view that some mental element is required before a jury can be satisfied that the defendant is truly "in possession" of the relevant drugs. As Lord Morris of Borth-y-Gest said at p.398 and p.286 respectively:

"On this basis I think that the notion of having something in one's possession involves a mental element. It involves in the first place that you know that you have something in your possession. It does not, however, involve that you know precisely what it is that you have got."

And, at p.403 and p.289, the learned Law Lord said:

"The question resolves itself into one as to the nature and extent of the mental element which is involved in 'possession' as that word is used in the section now being considered."

Recently His Lordship **Aluwihare PC J** in the case of **Mohamed Iqbal Mohamed Sadath v. Attorney General, SC Appeal 110/15, (SC Minutes 14.12.2020)**, held:

"Lord Wilberforce went on to state that, on such matters as above, though not exhaustively stated, it must be decided whether in addition to physical control, he has or ought to have imputed to him, the intention to possess or knowledge that he does possess, what is in fact a prohibited substance. The above reasoning in my view is a rational guideline that should be adopted in deciding as to whether the Accused had the knowledge (the requisite mens rea) that what he possessed is a prohibited substance, even though he may not have known the precise nature of the substance."

Further he held that: "It would not be unreasonable to presume that it was well within his knowledge that people do smuggle contraband into the country under various guises, given the social standing of the Accused."

We have considered the evidence led at the trial and we are of the view that the following items of evidence are relevant in considering the requisite knowledge.

- The Accused had arrived at the airport and acquired the suitcase which she had then placed onto the trolley.

- The Accused admits that she herself had packed the sarees into the empty suitcase which was handed to her by Upananda.
- The Accused had known and subsequently given the combination "000" to PW1 to open the suitcase.
- The Accused has also mentioned that she has travelled to India on several occasions and on every time she had been handed a suitcase to be brought to Sri Lanka.

We have taken these facts into consideration and upon applying the dictum of Lord Wilberforce which was followed in our courts referred to above, we are of the view that the prosecution has succeeded in establishing that the Accused did possess the requisite knowledge required for the purpose of proving the charges in the indictment.

For the above-said reasons, this Court is of the view that the grounds of appeal raised by the Accused are without merit. We see no reason to interfere with the judgement dated 30th of July 2017. The conviction and the sentence are affirmed, and the appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL