

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

In the matter of an Appeal under
Section 154 (P) of the Constitution
read 331 of the Criminal Procedure
Act No. 15 of 1979.

CA Case No: 309-310/18

Hon. Attorney General

HC Colombo Case No. HC 5929/2012

Attorney General's Department,
Colombo 12.

Complainant

VS

1. Paligasinghe Manamperi Jayantha,
No. 49, Negombo Rathna Pilice Division,
Hungama
2. Amarakoonge Supun,
No. 375, Ulananahena,
Meegahayaya,
Kekunadeniya,
Beralapanathara.

Accused

AND NOW BETWEEN

1. Paligasinghe Manamperi Jayantha,
No. 49, Negombo Rathna Pilice Division,
Hungama

2. Amarakoonge Supun,
No. 375, Ulapanahena,
Meegahayaya,
Kekunadeniya,
Beralapanathara.

Accused – Appellants

-Vs-

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

COMPLAINANT-RESPONDENT

Before: Menaka Wijesundera, J.

B. Sasi Mahendran, J.

Counsel: Neranjan Jayasinghe with Harshana Ananda and Lahiru Vidusanka
for the 1st Accused – Appellant.

Sahan Kulathunga with Thilini Samarasekara for the 2nd Accused –

Appellant.

Janaka Bandara, D.S.G for the State.

Argued On: 18.09.2023

Decided On: 26.10.2023

Menaka Wijesundera, J.

The instant appeal has been logged to set aside the judgement dated 16th of October 2018 by the High Court of Colombo.

In the instant matter the Accused Appellants were indicted for being in possession and trafficking of 122.68 grams of heroin under the provisions of Poison Opium and Dangerous Drug Ordinance.

The appellant had pleaded not guilty to the indictment and trial had commenced. Upon the conclusion of the trial the learned trial judge had convicted both the appellants for being in the possession of heroin and had acquitted on the charge of trafficking.

The grounds of appeal raised on behalf of the appellants were,

- 1. The improbability of the prosecution story,**
- 2. The contradictions and omissions in the evidence of the prosecution witnesses not being considered by the trial judge.**

The story of the prosecution witnesses was that a group of Police Officers of the Special Crime Division Mirihana led by C.I. Janaka Kumara, S.I. Hemantha had gone to Terrance Silva Mawatha Dematagoda on 09/12/2010. They had gone to a very small compound by the side of the road which had been built with wooden planks. The said compound had been closed. But they had peeped through a hole on the wall and had seen two people seated on the ground with two candles burning on neither side packeting a powder, therefore they had forced opened the door and had gone inside. They had found on the floor 17 packets of a substance sealed with gum tape and another two packets without tape and another bag which had been left open but containing the same powder. They had also found a pair of scissors, an electronic scale, a spoon and some tape. They had suspected the substance inside the bags to be heroin, therefore the 19 individually wrapped bags and the other single bags had been taken in to

custody. They had also taken the two persons in the scene of crime and the tools they had been using also in to custody.

They had taken the productions to be weighed to Vogue Jewelers Dematagoda. There after the productions had been sealed and handed over to PW7 who had kept it under lock and key in an Almira till the next day and had taken it to the Government Analyst. But the Government Analyst Department had not accepted the same because the covering letter had not been in order. Therefore, he had come back to the police station and had kept it in the same Almira as the day before and had taken it back on the 13th December to the Government Analyst Department and had handed over safely.

Therefore, according to the prosecution evidence stated above, PW1 had conducted the raid on the information received by PW3. PW3 had corroborated PW1. After the productions were taken in to the custody it had been in the personal custody of PW1, until it had been weighed and taken to the police station and handed over to the reserve officer PW7.

The improbability referred to by the counsel for the appellants was that in the small compound mentioned by the prosecution witnesses which had been at the side of the main road is according to them is highly unlikely. But we find that a place of this nature could be a very safe heaven for a crime of this nature because the appearance of the place is very misleading and nobody would be suspecting. As such we are unable to agree with that contention of the counsel for the appellants.

The next ground raised by the counsel for the appellants was that the contradictions in the evidence of the prosecution witnesses being not considered by the trial judge. But we find that it is not so because he had said very lengthily that contradictions and omissions had not been marked in evidence but only at submissions stage that it had been brought to the notice of court. But he had said even those were very un-important and do not go to the route of the case. This court also observes that these much referred contradictions are,

1. PW1 has referred to the jewelry shop in which they had weighed the productions to be as Vogue Jewelers but PW3 had said as Noor Jewelers and this we think is a typographical error and nothing more.
2. PW1 had said that the place of incident had been Terrance Silva Mawatha Dematagoda, but whereas PW3 had said it to be Gerens Silva place which again we see as a typographical error.
3. PW1 had said at one point that he put all 20 bags of heroin in to a colorless bag but latter he had said it to be a pink colored bag, this also we as a minor and frivolous and un-important discrepancy. As such we see no merit in this submission also.

Another point raised by the counsel for the appellant was that the productions which were taken to the Government Analyst to be handed over on the 10th of December were not handed over on that day but it had been taken on the 13th of December on which date it had been accepted by the Government Analyst. Therefore, their position is that between the 10th and the 13th of the December how the productions were kept is not in evidence. But according to the evidence of PW7 it had been in the same Almira from which it had been taken, under lock and key. Therefore, this submission also we see has no merit.

Another point raised by the counsel for the appellants was that the position of the defense had not been considered by the trial judge, but on perusal of the judgement we see that the trial judge has started the judgement by referring to the dock statements made by the appellants.

According to the contents of the two dock statements the two appellants admit the fact that they went to the place of incident on the date of offence to see their friend called Manju but the place had been closed. As such they had tapped on the door and at that point the prosecution witnesses had come from behind and had pushed them in to the house and had given the productions which contained the alleged substance of heroin by force to the appellants and they had been arrested by them. This position has been suggested to the prosecution witnesses in cross examination. They had denied that position. The defense had called two witnesses to establish that the raid by the prosecution was done in the house of Manju. They had called a prosecution witness who had been listed in the indictment. But we observe that he had only corroborated PW1 and 3. The trial judge had considered all this and had rejected the defense position, and he had said that the prosecution had proved its case beyond reasonable doubt because the evidence of PW1 and 3 is uncontradicted and corroborated by the defense witness.

The Government Analyst report which had been marked by the prosecution establishes the fact that the sealings in the parcels handed over by the prosecution were intact and that it contained heroin.

As such the learned trial judge had found the two appellants guilty for the charge of possession and acquitted on the charge of trafficking.

In the case of **Indian Supreme Court in Mohan Lal vs State of Rajasthan, CRIMINAL APPEAL NO. 1393 OF 2010, decided on 17 April, 2015, Justice Dipak Misra describes possession as follows; “When one conceives of possession, it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody".** **Attributing this meaning in the strict sense would be understanding**

the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word possession. The classical theory of English Law on the term "possession" is fundamentally dominated by Savigny-ian "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between "corporeal possession" and "possession of right" which is called "incorporeal possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word possession can be usefully defined and understood with reference to the contextual purpose for the said expression. The word possession may have one meaning in one connection and another meaning in another.

The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. One of the definitions of possession given in Black's Law dictionary is as follows: "Having control over a thing with the intent to have and to exercise such control. Oswald v. Weigel [6]. The detention and control or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment either as owner or as the proprietor of a qualified right in it and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. The law, in general recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. "

In the instant matter the prosecution witnesses no1 and 3 has categorically stated that when they went to the place of incident the two appellants had been seen packeting a substance which had been proved to be heroin by the Government Analyst and the chain of custody until the productions had been handed over upon the recovery had been intact and the trial judge had

observed that the evidence had been uncontradicted and consistent. We too observe that it is so.

Hence the surrounding circumstances of the facts at the scene of crime can be concluded only by finding the two appellants guilty of the charge possession. The defense although had made a valiant effort in trying to challenge the evidence of the prosecution by cross examination and by their statements from the dock , the evidence of the defense has only substantiated the evidence of the prosecution.

Therefore, the trial judge is correct in finding the two appellants guilty for the possession of heroin at the time of arrest. But it appears that in the charge it had not said specifically that the two appellants jointly possessed the heroin.

It is the opinion of this Court that it is not necessary to say so specifically because we find that when two accused persons are charged under section 32 of the Penal Code it is not stated in the charge specifically that it is so because it is implied and it is up to the prosecution to prove that they were in joint possession through evidence emanating from their actions and words.

As such in the instant matter the two appellants had been found to be together in a very small compound surrounded by instruments and utensils which facilitated their act of packeting the substance which later proved to be heroin. Hence the only irresistible conclusion that can be drawn is that they were in joint possession of the alleged heroin. Hence, we are of the opinion that the finding of the trial judge with regard to the possession of heroin against the appellants is justified and we affirm the same.

Hence then the question arises as to why the trial judge had acquitted the two appellants from the charge of trafficking.

It has been held in the case of **The Attorney General vs Mohamed Iqbal Mohamed Sadath SC Special LA 58 of 2003 by Aluvihare J that,**

“Since possession and trafficking can look the same at first glance, prosecution for 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 drugs detected would be a good indicator to decide whether the perpetrator is a user or is trading drugs.”

In the instant matter the amount taken in to custody is 122.68 grammes and the tools which were taken in to custody at the time of the detection also proves beyond a reasonable doubt that that the appellants were in the process of trafficking the narcotics as well.

As such we are of the opinion that the trial judge has erred in acquitting the two appellants from the charge of trafficking as such, we set aside the acquittal entered by the trial judge for the charge of trafficking and we convict the two appellants for the charge of trafficking and pass the sentence of life imprisonment and affirm the conviction and the sentence imposed by the trial judge for the charge of possession.

As such we see no merit in the submission of the Counsel for appellants and as such the appeals of the two appellants are hereby dismissed.

Judge of the Court of Appeal

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal