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

In an application for Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General

Complainant

SC Appeal 119/2023
SC (SPL) LA No: 303/19
CA Appeal No:
CA 278-280/2007
HC Colombo Case No:
HC 2006/2004

V.

1. Mohamed Samoon Mohamed Shiyam
2. Jayagodage Upali Abeygunawardena
3. Murshida Shiyam

Accused

AND BETWEEN

1. Mohamed Samoon Mohamed Shiyam
2. Jayagodage Upali Abeygunawardena
3. Murshida Shiyam

Accused-Appellants

V.

Hon. Attorney General

Complainant-Respondent

AND NOW BETWEEN

Murshida Shiyam
No. 76,
Ward Place,
Colombo 07
(Presently in Remand Prison)

3rd Accused-Appellant-Appellant

V.

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

Complainant-Respondent-Respondent

Before : **P. Padman Surasena, J**
Achala Wengappuli, J
K. Priyantha Fernando, J

Counsel : Rienzie Arsecularatne, PC with Chamindri Arsecularatne, Namal Karunaratne, Himasha Silva and Erandi Gamage for the 3rd Accused-Appellant-Appellant.

Ms. Ayesha Jinasena, SG with Ms. Chrisanga Fernando, SC for the Complaint-Respondent-Respondent.

Argued on : 30.09.2024

Decided on : 17.12.2024

K. PRIYANTHA FERNANDO, J.

The 3rd accused-appellant-appellant (hereinafter referred to as the 3rd accused) along with the 1st and 2nd accused were indicted in the High Court of *Colombo* on the following counts;

- Count No.1: The 1st accused for having in possession of 1.290 kg of Heroin contrary to section 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance.

- Count No.2: The 1st accused for trafficking 1.290 kg of Heroin contrary to section 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance.

- Count No.3: The 2nd accused for aiding and abetting 1st accused to traffic 1.290 kg of Heroin as referred to in Count No.2 contrary to section 54B of the Poisons, Opium and Dangerous Drugs Ordinance.

- Count No.4: The 1st and the 3rd accused for having in possession of 7.796 kg of Heroin contrary to section 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance.

- Count No.5: The 1st accused for trafficking 7.796 kg of Heroin contrary to section 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance

- Count No.6: The 3rd accused (appellant) for aiding and abetting 1st accused to traffic 7.796 kg of Heroin contrary to section 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance

After trial, by his judgement dated 14.12.2007, the learned High Court Judge convicted the 1st accused on counts 1, 2, 4 and 5 of the indictment and convicted the 2nd accused on count No.3 as charged. The learned High Court Judge also convicted the 3rd accused (appellant) on count No.6 as charged. All three accused were thereafter sentenced accordingly.

Being aggrieved by the said convictions and sentences all three accused appealed to the Court of Appeal. The Court of Appeal by judgment dated 04.07.2019, affirmed the decision of the learned Judge of the High Court and dismissed the appeals of all three accused.

Moreover, Their Lordships of the Court of Appeal proceeded to convict the 3rd accused for the aforementioned 4th Count and sentenced her to life imprisonment.

The instant appeal was preferred by the 3rd accused (appellant) against the judgement of the learned Judges of the Court of Appeal that affirmed her conviction and sentence on Count No.6 and also against the conviction and the sentence imposed in relation to Count No.4.

This Court granted leave to appeal on 10.08.2023 on the following question of law;

> "Did the Court of Appeal err, in convicting the 3rd Accused-Appellant-Petitioner to the count No. 4 of the indictment, which allege that she jointly possessed 7.796 Kg of Heroin with 1st Accused-Appellant-Petitioner in SC/SPL/LA. No. 301/2019, in the absence of an appeal against her acquittal of the said count and, contrary to the reasoning of the judgment of Upul de Silva v Attorney General, reported in Vol. 2 of Sri Lanka Law Reports (1999), at p. 324?"

In light of that, at the time of the hearing, the main argument advanced by the learned President's Counsel for the 3rd accused was that, there was no appeal brought before the Court of Appeal against the acquittal of the 3rd accused in relation to count 4. It was the position of the learned President's Counsel that, in the absence of such an appeal in relation to the acquittal, the Court of Appeal nevertheless proceeded to convict the accused to count No. 4 of the indictment, which alleged that she jointly possessed 7.796 kg of Heroin with the 1st Accused. The question raised is whether this course of action was legal and whether the Court of Appeal erred in doing so.

In the Court of Appeal, the Additional Solicitor General has submitted that the learned High Court Judge has neither convicted nor acquitted the 3rd accused for count No.4 and urged the Court of Appeal to convict the 3rd accused for Count No.4 and sentence accordingly. Thereafter, upon considering the omission on the part of the learned trial Judge to enter a finding on the 3rd accused on the 4th count, the learned Judges of the Court of

Appeal, invoking its jurisdiction under Article 138 (1) of the Constitution read with Section 331 of the Code of Criminal Procedure Act, convicted the 3rd accused for the 4th count, i.e for possession of 7.796 kg of Heroin (joint possession), which is an offence contrary to section 54A(d) of the Poison, Opium and Dangerous Drugs Ordinance.

At the hearing of the instant appeal, the learned President's Counsel for the 3rd accused submitted that, the 3rd accused was not convicted by the High Court on the charge under Count 4. Consequently, no appeal was filed in relation to her acquittal on that count before the Court of Appeal. The learned Counsel contended that, the decision of the learned Judges of the Court of Appeal to convict the accused on Count 4 in the absence of such an appeal is illegal.

It is pertinent to note that, the learned High Court Judge has neither convicted the 3rd accused on count No.4, nor was she acquitted. It is an omission on the part of the learned High Court Judge. However, in his judgment (at page 142 of the judgment, page 758 of the appeal brief) the learned High Court Judge has clearly stated, "කරුණු මෙසේ හෙයින් මම පැමිණිල්ල, අධිචෝදනා පත්‍රයේ දැක්වෙන 1, 2, 3, 4, 5 සහ 6 චෝදනාවන් සැකයෙන් තොරව ඔප්පු කර ඇති බවට තීරණය කරමි." Therefore, it is clear that the learned High Court Judge has omitted to record the conviction of the 3rd accused on count No.4 although he found that count No.4 has been proved beyond doubt.

By reference to authorities such as ***Emperor V. Jagannath Gir and Others AIR 1937 All 1937,*** and ***Ragunath and others V. Emperor AIR 1933 All 565, 145 Ind Case 849***, insight can be derived regarding the approach of Indian Courts in situations where the trial Judge has omitted to pronounce a conviction. In ***Emperor V. Jagannath Gir and Others (supra),*** the three accused persons were charged under section 366, or Section 366-A or Section 498, I.P.C., in the alternative. The Court agreed with the assessor's unanimous verdict which found all three persons guilty on those alterative charges, but has convicted the three appellants under Section 366-A only. A question arose as to whether the High Court was able to alter the conviction under section 366-A into a conviction under Section 498 of I.P.C. Although the learned Counsel for the appellants argued that

there has been an acquittal by implication on the charges under section 366 the Court, referring to case of ***Ragunath and others V. Emperor*** **(supra),** held as follows;

> *"The case of Ragunath V Emperor…Certain persons were charged under Section 304 and 147, I.P.C., but the sessions Judge competed them under Section 304 I.P.C. only. He was of opinion that the accused had committed rioting, but he omitted to record a conviction under section 147, I.P.C. It was held by this Court that it was open to the High Court under Section 423, Criminal P.C., to convict the accused under section 147, I.P.C., inasmuch as there was no acquittal on the charge under that section, but merely an omission to record a conviction."*

In the case of ***Ragunath and others V. Emperor,*** it was held;

> *"The ruling goes further than is necessary for the purpose of the present case where there is no express acquittal under Section 147 but merely an omission to record a conviction under that section. This ruling was followed by a single Judge of this Court in Emperor v Sardar (1912) 34 All 115. Here it was held that an appellate Court can under Section 423, Criminal P.C., in an appeal from a conviction alter the finding of the lower Court and find the appellant guilty of an offence of which the lower Court has declined to convict him"*

Therefore, in the above case it was held that, the High Court, under Section 423 of the Criminal Procedure Code (Corresponding provision in Sri Lankan Code of Criminal Procedure Act No.15 of 1979, section 335) is empowered to convict the accused under Section 147 of the Indian Penal Code inasmuch there was no acquittal on the charge under that section.

In the instant case, the learned Judge of the High Court, in his judgment, found that Counts 4 and 6, on which the 3rd accused was also charged, had been proven beyond reasonable doubt. However, due to an oversight, the learned Judge failed to formally convict the accused for these offenses in the judgment. As seen

by the case precedence from Indian Courts discussed above, such omission does not amount to an acquittal, but rather reflects a procedural error/ oversight. In this regard, the Court of Appeal has rightly exercised its authority to rectify this error and appropriately proceeded to convict the 3rd accused for the 4th Count.

Further, the position taken in the case of ***Upul De Silva V. AG [1999] 2 Sri L.R. page 324*** referred to in the question of law which was brought to the attention of this Court by the learned President's Counsel for the 3rd accused must be distinguished from the instant case. In the case of ***Upul De Silva V. AG (supra)***, the accused was indicted in the High Court with the offence of criminal breach of trust and offence of using forged documents but was acquitted on both charges and instead was convicted for criminal misappropriation. On an appeal by the accused, the Court of Appeal was of the view that the evidence that was adduced during the trial made out a sufficient case for criminal breach of trust and ordered a retrial while setting aside the conviction and sentence. It was held that, where the Court of Appeal acting under Section 335(2)(a) of the Code of Criminal Procedure Act orders a retrial upon a determination of an appeal against a conviction, such retrial must be strictly limited to the offence upon which the accused had been convicted by the trial Court, and against which he had preferred an appeal and none other. The Supreme Court referred to the case of ***Andra Pradesh V. Thadi Narayanan [1962] AIR 240*** which held that, when an order of conviction is challenged by the convicted person, but the order of acquittal was not challenged by the state, it is only the order of conviction that was to be considered by the Appellate Court and not the order of acquittal.

However, unlike in ***Upul De Silva V. AG,*** in the instant case, there was neither an acquittal nor a conviction explicitly ordered by the learned Judges of the High Court against the 3rd accused on count No.4. Instead, there was merely an omission to record the conviction/acquittal. Therefore, the principles established in the case of ***Upul De Silva*** are not applicable to the present matter, as there is no formal finding of either an acquittal or a conviction in the case at hand.

Article 139 (1) of the Constitution provides that, the Court of Appeal may in the exercise of its jurisdiction, affirm, reverse, correct or modify any order, judgment, decree or sentence according to law or it may give directions to such Court of First Instance, tribunal or other institution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit.

The aforementioned provision empowers the Court of Appeal to act as it did in instant case as it was clearly an omission on the part of the learned High Court Judge. Further, even in an instance where the accused has been acquitted, Article 139 of the Constitution would empower the Court of Appeal in correcting any such error on acquittal.

Article 127 of the Constitution provides that,

"

(1) The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.

(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgment, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court and it may affirm, reverse or vary any such order, judgment, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require, and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance. "

Additionally, as per Article 127 of the Constitution, even in an instance where the Court of Appeal has made an omission or

error, the Supreme Court is empowered to correct all such errors and vary such an order.

In light of the foregoing, I am of the view that the learned Judges of the Court of Appeal have correctly convicted the 3rd accused on the 4th Count, by proper evaluation of the case and upon considering the omission that was inadvertently overlooked by the High Court. Therefore, the question of law is answered in the negative.

At the hearing of this appeal, the learned President's Counsel submitted that, there was insufficient evidence to prove beyond a reasonable doubt the charges set out in Counts 4 and 6 against the 3rd accused, and accordingly, challenged the decisions of both the Court of Appeal and the High Court with respect to these charges. Although the sole question of law on which leave to appeal was granted was answered in the negative, for the sake of completeness I will consider the above submission as well.

The 3rd accused was charged for the joint possession of 7.796 Kg of Heroine along with the 1st accused which is an offense punishable under section 54A (d) as well as for aiding and abetting the 1st accused in trafficking of 7.796Kg of Heroine which is and offence punishable under Section 54A(b) of the Poisons, Opium and Dangerous Drugs Ordinance, in counts 4 and 6 respectively.

The learned President's Counsel submitted that, the prosecution failed to prove beyond a reasonable doubt that the 3rd accused had knowledge of the Heroine that was present under her bed and that her presence in the room was not sufficient to prove knowledge.

As per the evidence adduced at the trial by the prosecution, IP Priyantha Liyanage who led the raiding party has gone with the informant and other officers in three vehicles. They have parked the van that IP Liyanage, the informant and some officers travelled near the house of the 1st accused at Ward Place. Whilst on surveillance, they have observed the wife of the 1st accused (3rd accused) coming in a car. She was identified as the wife of the 1st accused by the informant.

Whilst the police officers were waiting, they have observed that a three-wheeler arrived and parked in front of the house of the 1st accused. Then the 1st accused has come out from the small gate and has collected two black coloured plastic bags from the three-wheeler driver (2nd accused). With the two black coloured bags the 1st accused has gone inside the house. After about 10 minutes the 1st accused has returned carrying a white coloured bag. When IP Liyanage approached the accused, the 1st accused has tried to avoid him, however, upon identifying themselves as police officers they have searched the bag. Upon search of the bag, they have discovered another bag inside which contained Heroin. They have arrested both the 1st and the 2nd accused. With both the accused the Police officers have gone inside the house to search further. Inside the bedroom, the 3rd accused had been arranging clothes in the almirah. Police officers have found a blue coloured travelling bag that was not locked, under the bed. Inside the said travelling bag there had been ten bags containing Heroin, two bags containing Rs. 518850/- cash, and four scales.

It was evident that the bedroom in which the travelling bag that contained the Heroin and other productions was found, was the room that was used by the 1st and 3rd accused who were husband and wife.

In her dock statement, the 3rd accused raised the defense that the alleged suitcase containing the heroin could not have fit under her bed. She further contended that this allegation was fabricated by the police as an attempt to frame her and her husband, due to some animosity that existed between the police and her husband. Her defence was not that she had no knowledge of the contents in the suitcase, but the suit case could not fit in under the bed. That was to say that the suit case was a plant by the Police.

In cases involving joint possession, one of the key elements that must be established is the knowledge of the presence of the illicit substance. In the present case, the learned High Court Judge as well as the learned Judges of the Court of Appeal have carefully analyzed the evidence adduced in the High Court. The suitcase which contained the heroin was recovered in the presence of the 3rd accused under the bed in the bedroom that was shared by the 1st and the 3rd accused who were husband and wife. In the given

circumstances the Justices of the Court of Appeal have come to the correct conclusion that the prosecution has proved the count No 4 against the 3rd accused as well beyond reasonable doubt.

After carefully analyzing the evidence circumstantial and direct, the learned High Court Judge as well as the learned Judges of the Court of Appeal in their judgments have concluded that the prosecution has proved beyond reasonable doubt that the 3rd accused has aided and abetted the 1st accused in trafficking the illicit drugs.

Therefore, the learned Judge of the High Court has rightly found that counts 4 and 6 were proved beyond reasonable doubt. The learned Judges of the Court of Appeal have correctly concluded that the 3rd accused to be convicted on count No. 4 as well. Hence, I find that there is no merit in this appeal.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ACHALA WENGAPPULI

I agree

JUDGE OF THE SUPREME COURT