SRILAL DE SILVA AND ANOTHER

v.

THE REPUBLIC OF SRI LANKA

COURT OF APPEAL.
RAMANATHAN, J., P. R. P. PERERA, J. AND PALAKIDNAR, J.
C.A. 87–88/86; H.C. PANADURA 311/86.
FEBRUARY, 9, 10 AND 11, 1988.

Criminal Law – Trafficking in heroin – Possession of heroin – Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 – S. 54A (b) and (d) – Confiscation of vehicle – Information by an informant – Hearsay – Dock statement.

On information received by the Police a parcel of heroin was detected in an aperture in the dashboard of the car in which 1st accused was travelling. The Magistrate acted on the contents of the information to infer knowledge.

Held –

(1) The evidence led of the contents of the information was hearsay evidence and could not be used to infer knowledge on the part of the first accused.
(2) An unsworn statement made by an accused from the dock (dock statement) should not be used against another accused in the same case.

Semble:

Unless the dock statement is rejected in its entirety it is not legally possible to convict the 1st accused.

Case referred to:

(1) *Queen v. Kularatne (1970) 71 NLR 529, 552.*

Ranjith Abeysuriya, P.C. with *Kamal Goonesinghe, Ruwan Fernando* and *Lasantha Wickrematunge* for the accused-appellant.

D. P. Kumarasinghe, Senior State Counsel for the State.

Cur. adv vult.

March 25, 1988.

P. R. P. PERERA, J.

The accused appellants were indicted by the Attorney-General in the High Court on the following counts:

(1) That on or about the 31st December 1985, they did traffick in a dangerous drug, to wit, heroin – an offence punishable under Section 54 (A) (*b*) of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984.

(2) That in the course of the same transaction of having had in their possession 17.6 grammes of heroin – a quantity in excess of that permitted by law – an offence punishable under Section 54, (A)(*d*) of the said Ordinance, as amended by Act No. 13 of 1984.

After Trial, without a jury, the learned Trial Judge, convicted the accused appellants on both counts, and sentenced the appellants to a term of seven years, rigorous imprisonment, on each count. The sentences imposed were to run concurrently. The Trial Judge has also ordered the confiscation of vehicle bearing registered number 60 Sri 575, in terms of Section 79 (i) of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984. The present appeal is against the said convictions and the sentences imposed by the Trial Judge.

Learned President's Counsel who appeared for the accused appellants complained that the learned Trial Judge has misdirected himself on several vital questions of law resulting in substantial prejudice to both accused appellants in this case.

It was Mr. Abeysuriya's submission that in order to bring home these charges to the accused appellants it was imperative for the prosecution to establish–

(*a*) That both accused appellants had knowledge that the parcel containing the prohibited drug was in fact secreted inside the aperture in the dash – board of the vehicle from which the radio cassette had been removed.

(*b*) That the appellants had knowledge of the contents of that parcel which has been produced marked P 1.

Counsel submitted that the Trial Judge has in this case relied upon inadmissible evidence to draw the inference that the accused appellants had the knowledge which was a necessary ingredient of these charges. It was the contention of Counsel that the Trial Judge has relied upon information given to the Police by an informant, for the purpose of drawing the inference that the accused appellants had the requisite knowledge. This information constituted hearsay evidence and the Court could not rely on the truth of such information. In support of this submission Mr. Abeysuriya invited the attention of this Court to the following passage in the Judgement –

> "The next question which arises for decision is whether the first and second accused had knowledge that the parcel was in the place where it was found. Further, had they knowledge that this parcel contained heroin. On this day at 12.45 p.m. Police Sergeant Amarasiri had received information relating to this detection. On this information, he had received, Sergeant Amarasiri knew the make of the vehicle, its colour, its registered number, that this vehicle was at Dematagoda, and that a large quantity of heroin was to be transported to Hikkaduwa in this vehicle. Amarasiri also had information regarding the proprietor of 'Farm House', Hikkaduwa."

It is relevant to note that according to the evidence, the first accused appellant is the proprietor of 'Farm House'.

Senior State Counsel, very properly conceded that the learned Trial Judge was undoubtedly in error when he relied on the contents of the information given to the Police, to infer knowledge on the part of the first accused appellant.

Yet another submission made by Counsel for the appellant was that the learned Trial Judge has failed adequately to consider the dock statement made by the first accused appellant. Learned Counsel rightly submitted that the Trial Judge has not expressly rejected in its entirety the dock statement made by the first appellant and that unless the dock statement is so rejected it was not legally possible to convict the first appellant on the charges presented against him. Relying upon the judgement of the Court, in *The Queen v. Kularatne* (1) Counsel submitted that if the learned Trial Judge believed the unsworn statement of the first appellant, it must be acted upon and if it raised a reasonable doubt in his mind about the case for the prosecution the

defence must succeed. It was Counsel's submission that the learned Trial Judge in this case has failed to consider the dock statement of the first accused appellant in this perspective and that such failure has resulted in serious prejudice to the first appellant.

Mr. Abeysuriya also complained that the Trial Judge in the course of his judgement has purported to use the dock statement made by the first accused appellant against the second accused appellant. It is indeed settled law that an unsworn statement made by one accused from the dock should not be used against another accused. Vide *The Queen v. Kularatne (supra)* Mr. Abeysuriya invited the attention of Court to a passage in the judgement of the Trial Judge to substantiate this submission. This passage is as follows:

> "The first accused in his evidence has stated that the second accused worked for him in his vehicle. There is no other evidence to show who the second accused was or what he does."

We agree with Counsel for the appellant that it is settled law that an unsworn statement made by an accused from the dock should not be used against another accused in the same case. The Trial Judge has in the passage from the Judgement cited by Counsel purported to use the unsworn statement from the dock made by the first appellant against the second accused appellant. This, the Trial Judge was not permitted to do. Vide *The Queen v. Kularatne* 71 N.L.R. 529 at 552 (1). Having regard to the above misdirections adverted to by Counsel for the appellants we are of the opinion that the learned trial judge was manifestly in error and the appeals have therefore to be allowed. We therefore quash the convictions and allow the appeals of both appellants. Acting however in terms of Section 335 (2) (*a*) of the Code of Criminal Procedure Act we order a new Trial of both accused appellants as we are of the view that there is sufficient evidence upon which the two appellants might reasonably have been convicted but for the misdirections that have been established.

RAMANATHAN, J.—I agree.

PALAKIDNAR, J.—I agree.

Appeal allowed.

Convictions quashed and case sent back for re-trial.