

SUMITHRA PREMARATNE
v.
REPUBLIC OF SRI LANKA

COURT OF APPEAL
JAYASURIYA, J.,
DE SILVA, J.
C.A. NO. 187/95
H.C. COLOMBO NO. 7269/94
MAY 28, 1998.

Poisons, Opium and Dangerous Drugs Ordinance – S. 54A (d) – Alleged possession presumption in law that the person who is the Chief Householder/Occupier is in exclusive and actual possession of all articles found in a particular house – Failure to call important witnesses – S. 114(F) Evidence Ordinance–Role of a trial judge – Contradictions inter se – Testimonial trustworthiness.

Held:

1. There was a noteworthy lacuna in the prosecution case in that no evidence has been led in regard to the other items that were contained in the bag. The truth or otherwise of the witnesses evidence could have been tested and evaluated had such evidence was led and if material was elicited about the other contents of the bag alleged to belong to the appellants.
2. The trial judge should not play the role of a mere umpire but must take effective action to ascertain and discover the truth.

"It is a great pity that judges when they see two sides fencing with one another and manoeuvring for positions, should conceive themselves merely as umpires in a game of strategy and should not themselves determine that the truth must be ascertained and themselves call witnesses who for strategic reasons or through misconception are withheld by either party".

"It is the duty of a trial judge to take effective steps in elucidating points which appear to require clearing up and are material for the purpose of doing justice by using his powers over the Information Book".

3. The contradiction *inter se* has not been given due weight and significance and the learned trial judge has disregarded this contradiction in arriving at a favourable finding in regard to the testimonial trustworthiness of the prosecution witnesses.

APPEAL from the High Court of Colombo.

Cases referred to:

1. *Ponnachipillai v. De Silva* 46 NLR 358.
2. *Samaraweera v. Bee Bee* 4 CWR 48.
3. *Sunderam Pulle v. Kathirase Pulle* 65 CLW 1.
4. *King v. Cooray* – 28 NLR 83.
5. *R. v. Muthu Banda* – 73 NLR 8.
6. *Sathasivam v. Manickaratnam* – 66 NLR 355.
7. *Bhajan Singh v. State of Punjab* – AIR 1977 SC 674.

Ranjith Abeysuriya, PC with *Ms. Priyadharshani Dias* for accused-appellant.

Dappula de Livera, Senior State Counsel for Attorney-General.

Cur. adv. vult.

May 28, 1998.

JAYASURIYA, J.

The accused-appellant is charged with illegal possession of 4.02 grams of heroin, an offence punishable in terms of section 54(A) (d) of the Poisons Opium and Dangerous Drugs Ordinance, as amended.

The evidence led against the accused-appellant at the trial consisted of the evidence of the raiding police officer, Headquarter Inspector attached to the Slave Island Police, Muhandiramge Lewis Benedict and another two prosecution witnesses by the name of Welitotage Sumanadasa and Habakkala Hewage Chandradasa. The bag, in which these offending packets of heroin were found was discovered from an unlocked cupboard in a house situated at 66/21, Wekanda Road, Colombo, where the chief occupant and chief householder was the aforesaid witness Sumanadasa. In these circumstances there was a duty on the part of the trial Judge to have indulged in a careful analysis and evaluation of the evidence of Sumanadasa before acting on his evidence against the accused-appellant. There is a presumption in law that the person who is the chief householder and the chief occupier is in exclusive and actual possession of all articles found in a particular house *Ponnachipillai v. De Silva*⁽¹⁾, *Samaraweera v. Bee Bee*⁽²⁾. In these circumstances the trial Judge ought to have probed whether in fact Sumanadasa implicated the accused in order to extricate himself from the common sense presumption and inferences arising against himself. Sumanadasa in his evidence has stated that the accused often quarrelled with her

husband and on account of resulting stresses and dissension she had left this bag in his cupboard with her clothing in accordance with her customary practice, on the 14th February, 1997. The reason trotted out by Sumanadasa is that accused experienced problems with her husband and therefore she had left this bag in his house in accordance with her customary practice. The evidence at the trial which is referred to by the trial judge in her judgment disclosed that the accused's husband had been remanded in January, 1993 and that even on the 14th February, 1993, he would have continued to be on remand and in the circumstances the reason adduced by Sumanadasa for her leaving this bag is wholly unsustainable and untenable. These matters have not engaged the consideration and analysis of the learned trial Judge.

It was alleged by the prosecution that the accused had appeared at the police station and had handed over the key of the padlock annexed to the bag which contained the heroin packets to the authorities on 16th February, 1993, That is two days after the detection. It is not quite clear on the evidence the identity of the police officer to whom this key is alleged to have been handed over by the accused. At page 46 it is in evidence that the raiding chief inspector had instructed police sergeant Jinadasa to proceed to the reserve and attempt to open the padlock with the key alleged to have been furnished by the accused. That evidence does not disclose that any other person was present at the time this exercise was indulged in, except police officer Jinadasa. However at page 48 in reply to a leading question the aforesaid inspector has stated that this exercise took place both before himself and Jinadasa. In view of the earlier answer given by this witness this answer furnished to a leading question, appears to be inherently improbable. In these circumstances we are of the view that there was an onus on the part of the prosecution to have called police sergeant Jinadasa who would have given evidence in regard to this exercise and possibly evidence in regard to the person who is alleged to have handed over the key to reserve at the Slave Island police station. If he was called as a witness, certainly the evidence of Inspector Benedict would have been advanced in strength. In these apt and exceptional circumstances, we are inclined to draw an adverse inference in terms of section 114(F) of the Evidence Ordinance against the prosecution for the failure to call the important and vital witness sergeant Jinadasa. Although the key was produced as a production; the padlock which was attached to this bag had not been marked and produced as a production in court. There was a

noteworthy lacuna in the prosecution case in that no evidence has been led in regard to the other items that were contained in the bag marked as P4. The truth or otherwise of Sumanadasa's evidence could have been tested and evaluated had such evidence been led and if material was elicited about the other contents of the bag alleged to belong to the accused-appellant. We hold that it was the duty of the trial judge in such circumstances to have put relevant questions to ascertain the nature of the remaining contents of the bag P4, as such an investigation by her would have helped her to arrive at the truth and satisfy the ends of justice.

The trial judge should not play the role of a mere umpire but must take effective action to ascertain and discover the truth. Justice Bertram with Justice Garvin agreeing – *Sunderam Pulle v. Kathirase Pulle*⁽³⁾ lamented thus: "It is a great pity I think that Judges, when they see two sides fencing with one another and manoeuvring for positions, should conceive themselves *merely as umpires in a game of strategy* and *should not themselves determine that the truth must be ascertained* and themselves call witnesses, who for strategic reasons or through misconception are withheld by either party."

Again Justice Garvin stressed the duty of a trial Judge to take effective steps in elucidating points which appear to require clearing up and are material for the purpose of doing justice, by using his powers over the Information Book. A perusal of this book "might show that there exists a *witness, whom neither side has called, able to give material evidence* which the Judge may think should be placed before the court. It may indicate lines of inquiry which should be explored in the highest interests of Justice" – *King v. Cooray*⁽⁴⁾ at 83. Vide the observations of Justice Alles in *R. v. Muthumenika*⁽⁵⁾ – at 8 in regard to the use of the Information Book by the trial Judge in proving significant omissions to ascertain credibility and the truth and to promote the ends of justice.

In *Sathasivam v. Manickaratnam*⁽⁶⁾ – the contention was advanced that the trial Judge in a maintenance case "had descended into the arena" when he put repeated questions to a witness called on behalf of the defendant and induced him to come out with the truth. But Justice Sri Skandarajah in reply to this contention succinctly observed that a trial Judge is not bound to take the position of a mere umpire and refrain from using his inherent powers to ascertain the truth.

In the result, he held that "the Magistrate has not acted improperly in making this witness (Kirihamy), who was giving palpably false evidence favourable to the defendant, speak the truth. In this case if the other contents of the bag could not be traced to the appellant, then this fact would have thrown considerable doubt on Sumanadasa's evidence.

In view of the paucity of the evidence led against the accused which consisted almost exclusively of the evidence of Sumanadasa who had an interest to implicate the accused and extricate himself from a possible charge, we hold that it is unsafe to allow the conviction to stand on the evidence which has been placed against the accused-appellant.

Learned President's Counsel appearing for the accused-appellant has drawn our attention to a glaring contradiction in regard to the place where the bag was found by the police on their raid. The aforesaid chief Inspector who conducted the raid has stated that the bag was found inside the cupboard which was positioned in the hall whereas Sumanadasa and Chandradasa have stated that the bag was found in the "Dum messa" in the kitchen. The evidence of Sumanadasa on this point too indicates a conscious attempt by him to extricate himself from the charge and assert that the bag was found in the "Dum messa" when the police inspector states that the bag was found in the cupboard in the constructive possession of Sumanadasa. This contradiction *inter se* has not been given its due weight and significance and the learned trial judge has disregarded this contradiction in arriving at a favourable finding in regard to the testimonial trustworthiness of the prosecution witness – see – *Bhajan Singh v. State of Punjab*⁽⁷⁾. Besides, the trial judge has erroneously and wrongfully disregarded and rejected the defence contentions and version of the accused on *pure conjecture and surmise*. Vide page 11 of her judgment. In view of the matters adumbrated by us we hold it is unsafe to let the conviction rest on this evidence. In view of the deficiencies and lacuna which we have adverted to in our judgment, we hold that more than a reasonable doubt has been raised in regard to the prosecution case and we proceed to set aside the conviction and sentence passed on the accused-appellant and we acquit the accused-appellant.

DE SILVA, J. – I agree.

Appeal allowed.