THE

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[2011] 1 SRI L.R. - PART 15

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gone to draw an adverse inference under section 114(f) of the Evidence Ordinance.

On behalf of the 4th Appellant learned counsel submitted that the prosecution failed to prove the charge against the 4th Appellant beyond reasonable doubt.

Learned counsel for the 5th Appellant submitted that:

- The learned trial judge failed to evaluate the evidence that could be considered as in favour of the 5th Appellant.
- The learned trial judge erred in law by the erroneous application of the Ellenborough Principle.
- The learned trial judge failed to address whether the ingredients of the offence set out in count 4 had been proved beyond reasonable doubt.

The learned counsel for the 6th Appellant submitted that:

- The learned trial judge misdirected himself in failing to consider failure of the prosecution to establish the essential prerequisite of an agreement between 18.04.2001 and 21.04.2006 among the 4th 5th and 6th accused to commit alleged crime.
- The learned trial judge erred in law by convicting all the accused on all counts without considering each count separately against each accused.
- The learned trial judge failed to consider that the prosecution witnesses did not identify the 6th Appellant on 18th April 2001 at the time the alleged vessel was about to sail away from Sri Lanka.

- The failure of the prosecution to prove beyond reasonable doubt that the 6th Appellant was aboard the alleged vessel at the time the substance was unloaded.

- The failure of the prosecution to place before courts the fact that the alleged vessel was not under the surveillance of police from the time it left the Negombo lagoon until it was subsequently apprehended by the police.

It is common ground that the 4th 5th and the 6th Appellants were taken into custody on the Ave Maria boat at deep sea. The prosecution has proved the fact that two parcels of heroin were unloaded from Ave Maria boat and was taken to the Suzuki jeep by the 1st 2nd and 3rd Appellants. It was also in evidence that at the time the 1st 2nd and the 3rd Appellants were taken into custody the Ave Maria boat had taken her way to deep sea. Thereafter, according to the evidence of the prosecution, the police party who were waiting at sea had chased the vessel and taken it into custody. The vessel had been stopped at gun point. At the time the Ave Maria trawler was taken into custody the 4th 5th and the 6th Appellants were in the vessel. The police team has searched the vessel and has recovered an unused fishing net in packing and a few provisions. There was no ice in the cold room of the vessel. Also the police party did not find fish in the vessel.

In the said premise the 4th Appellant made only a dock statement and the 5th and the 6th Appellants remained silent. No witnesses were called on behalf of them. The 4th Appellant in his dock statement took up the position that he was arrested on the boat whilst he was going fishing. The 4th Appellant in his dock statement stated that on 20.04.2001

they left for the job carrying food, fuel, water, ice, rice and coconut. Whilst they were proceeding for their job they were taken into custody and brought to Colombo. Thereafter they were incarcerated. His very short dock statement does not reveal anything other than that. The question now arisen for consideration is that whether the said dock statement is sufficient to create a doubt in the evidence of the case for the prosecution. As I stated earlier except the unused fishing net in packing and a few provisions the police could not find anything in the boat. It is important to note that there was no ice or fish in the boat. It is also important to note that the fishing net which was found in the boat was an unused one in packing.

When I consider the said evidence in the light of the said circumstances I am of the view that the position taken up by the 4th appellant is fallacious and misleading. Therefore I am of the view that the learned trial judge has correctly analyzed the evidence and has reached a right conclusion. As I stated hereinbefore so long as the learned trial judge has exercised his discretion judicially the Court of Appeal will not lightly disturb and interfere with such a judgment.

On behalf of the 5th and the 6th Appellants the learned counsel submitted that the learned trial judge has erred in law in applying the Ellenborough dictum against the 5th and the 6th Appellants. As I stated above the 5th and the 6th Appellants remained silent on the dock and did not call any witnesses on behalf of them. There were no contradictions marked or omissions highlighted in the evidence of the prosecution. It was in evidence that the 5th and the 6th Appellants were taken into custody on the Ave Maria boat. The two parcels of heroin were unloaded from the Ave Maria boat. According to the evidence of the prosecution the Ave

Maria boat has sailed to India from Negombo lagoon at about 4pm on 18.04.2001. At that time the 1st and the 2nd Appellants also were seen going to the boat and coming back. The boat had returned to Negombo lagoon on 20th night 2001 and the unloading of two parcels of heroin had taken place thereafter. At the time the 1st 2nd and 3rd Appellants were taken in to custody the Ave Maria boat has started sailing to deep sea. The boat had been stopped at gun point at deep sea. The 4th 5th and 6th Appellants who were in the boat at that time were taken in to custody. The police has recovered an unused fishing net in packing from the boat. There had been no ice in the cold room of the boat and no fish found in the boat. With all this strong incriminating evidence against the Appellants with the charges of importation, trafficking and conspiracy to import the 5th and 6th Appellants did not offer any explanation with regard to any of the matters referred to above.

In the case of *R. Vs. Lord Cochrane and others* (4) the Lord Ellenborough held that "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

Abbot J. in *Rex vs. Burdett*(5) at 162 observed that "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the

case is such as to admit of explanation or contradiction, if the conclusion to which the prima facie case tends to be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

In the case of *Rajapaksha Devaga Somarathne Rajapaksha and others vs. Attorney General* (7) Justice Bandaranayake observed that "With all this damning evidence against the Appellants with the charges including murder and rape the Appellants did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstances relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct there are permissible limitations in which it would be necessary for a suspect to explain the circumstances of suspicion which are attached to him."

When I consider the evidence of the case in the light of the aforesaid judicial pronouncements I am of the view that the learned trial judge has correctly applied the *Ellenborough dictim*. Therefore I reject the submissions of the learned counsels.

In the circumstances I see no merit and substance in the submissions advanced by the learned counsel for the Appellants. Therefore I affirm the convictions and the sentences of the 1st 2nd 3rd 4th 5th and 6th Appellants and dismiss the appeals of the Appellants without costs.

RANJITH SILVA, J. – I agree.

Appeal dismissed.

DFCC BANK LTD VS. SEYLAN BANK LTD AND FIVE OTHERS

COURT OF APPEAL
BASNAYAKE. J.
CHITRASIRI J.
CALA 132/2006
DC COLOMBO 171/CO
JUNE 17, 2008
JANUARY 15, 2010

Companies Act No. 17 of 1982 Section 260, 261, 352 Companies Act 7 of 2007 - Section 532 (1) – Recovery of Loans Act of 1990 – Bank passing a resolution to parate execute property – Winding up application filed – Can the Bank proceed to parate execute the property - Civil Prcedure Code - Section 227.

Held:

(1) The application to wind up X company had been made by the respondent Seylan Bank on 1.10.2009. The D.F.C.C. Bank, the petitioner had passed a resolution to parate execute the property in terms of Act No. 4 of 1990 in the month of March 2004. The intention to public auction the property was published on 12.3.2005 in the Daily News papers.

It is evident that the circumstances of the property in question and may be even the passing of the resolution by the DFCC Bank was made known to the public only after the winding up application had been filed.

(2) The previous Companies Act No.17 of 1982 was repealed. Until the impugned order was made, it is the repealed Act that was in force. The new Companies Act No. 7 of 2007 came into effect in May 2007. Section 532 (1) of the new Act permits to continue with the matters in which winding up has commenced. Issue at hand should be looked into giving effect to the provisions of the repealed Act.

(3) Section 269, 261 of the Companies Act should be considered as substantive law and it does not prescribe mere procedure. The purpose of enacting the Act No. 4 of 1990 is to have a speedy procedure to recover the monies lent by Banks without violating or allowing to override the provisions of other enactments, such as the Companies Act.

Per Chitrasiri, J.

> "If one creditor is allowed to take the benefit by selling a particular property belonging to the company sought to be wound up, it would definitely cause grave and irremediable loss and damage to other creditors. Therefore it is my view that Sections 260, 261 of the Companies Act should prevail over the provisions contained in Act No. 4 of 1990".

(4) Merely because the words 'special provisions' are found in the title to an Act, provisions of such an Act cannot have effect over the other enactments unless clear provisions are found to that effect in the subsequent law.

(5) Mere passing of a resolution to parate execute the mortgaged property by the Bank cannot be considered as seizure of property. Moreover the passing of the resolution had been published in the News Papers only on 12.3.2005 – whereas the application to wind up had been made on 1.10.2004.

Per Chitrasiri, J.

> "Unless steps referred to in those sections of the Civil Procedure Code as to the seizure are followed, seizure of property is not completed and it may be considered as a voidable act. If the adoption of a resolution is considered as seizure of the property in question it may amount to a decision that has been taken disregarding the said provisions found in the Civil Procedure Code."

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Cases referred to:-

1. *J. K. Fastener Lanka Pvt. Ltd vs. Seylan Bank Ltd 2000* – Sri LR 155 at 159
2. *Bowkett vs. Fullers United Electric Works* – 1923 1 KB 160 at 164
3. *Re Lines Bro Ltd* – 1983 Ch 1at 13
4. *Re Robert Wood & Shingle Co* – 1984 – 30 Can LT 353 at 356
5. *LM Apparels Pvt Ltd vs. E.H. Cooray & Sons Ltd and others* – CA 584/93 – BASL News 4/4/94
6. *DFCC & Bank of Ceylon vs. Deputy Commissioner of Inland Revenue* – BALJ – 1983 Vol 1 – Part 11

7. *Blackpool Corporation vs. Starr Estate Company Ltd* 1922 1 AL 26 at 39

Nihal Fernando PC with *Rohan Dunuwille* for creditor – respondent – appellant

Romesh de Silva PC with *Prasanna Jayawardena* for 4th supporting creditor respondent

P. Wickremasekera with *dilshani Gurusinghe* for 5th supporting creditor respondent.

July 15th 2010

CHITRASIRI J.

This is an application to set aside the Order of the learned District Judge of Colombo dated 20th March 2006. Learned District Judge, by the said Order, allowed an application made in the petition dated 22nd March 2005 filed by Akzo Nobel Coating India (Pvt) Limited (creditor petitioner respondent to this application) in a winding up application. This winding up application was made in the District Court of Colombo by a petition filed by Seylan Bank Limited to wind up Amico Industries (Ceylon) Limited [Petitioner – Respondent – Respondent in this application]

In the said impugned order dated 20th March 2006, learned Judge decided that the DFCC Bank cannot proceed to *parate execute* the property mortgaged to it, in terms of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 when there is an application under the Companies Act No. 17 of 1982 to wind up the company which had mortgaged the property in question. As a result, Creditor Respondent Appellant, namely the DFCC Bank Ltd. (hereinafter referred to as the DFCC Bank) was prevented from proceeding with *parate execution* of the property mortgaged to it by the company sought to be wound up namely Amico Industries (Ceylon) Ltd.

Admittedly, the application to wind up Amico Industries (Ceylon) Ltd had been made by Seylan Bank by its petition dated 01st October 2004 being a creditor of the company sought to be wound up. Before the said petition was filed, DFCC Bank had passed a resolution in the month of March 2004 to *parate execute* the said property in terms of the Act No. 04 of 1990. However, its intention to sell the property by public auction, pursuant to the resolution was published only on 12th March 2005 in the daily news papers. Therefore, it is evident that the auctioning of the property in question and may be even the passing of resolution by the Board Members of the DFCC Bank was made known to the public only after the winding up application had been filed in the District Court.

Accordingly, the question arose: could the DFCC Bank proceed with *parate execution* of the property when the company which had mortgaged the said property is being wound up by Court. As mentioned before, the decision of the learned District Judge on the issue was that the mortgagee namely the DFCC Bank cannot proceed to *parate execute* the property when the company that mortgaged the property is under liquidation. No clear provision is found both in the Companies Act and in the Recovery of Loans by Banks Act No. 4 of 1990 as to the applicable law in such a situation. Therefore, this court is required to interpret the provisions of the two enactments referred to above in order to decide the issue at hand.

At the outset, it is pertinent to decide the applicable Companies Act in this instance, since the previous Companies Act No. 17 of 1982 is now been repealed. Until the impugned order is made in this regard, it is the repealed Act that was in force. New Companies Act No. 07 of 2007 came in to effect in May 2007. Section 532(1) of the new Act

permits to continue with the matters, in which the winding up has commenced, in terms of the provisions of the repealed Act No. 17 of 1982. This new Section reads thus:

> *"523 (1) Subject to the provisions of subsection (2), the provisions of this Act with respect to winding up shall not apply to any company of which the winding up has commenced before the appointed date. Every such company shall be wound up in the same manner and with the same incidents, as if this Act had not been enacted, and for the purpose of the winding up, the written law under which the winding up commenced shall be deemed to remain in full force. ."*

Therefore, the issue at hand should be looked into giving effect to the provisions of the repealed Act No. 17 of 1982. In fact, this position has not been disputed by any party to the action.

I will turn on to the main issue now. As mentioned hereinbefore, the main issue in this instance is whether the DFCC Bank could proceed to auction the property of the Company sought to be wound up in terms of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 while an application to wind up the said company sought to be wound up namely Amico Industries (Ceylon) Ltd, is pending.

Section 260 and 261 of the Companies Act prevents disposition of the property of a company sought to be wound up when that company is under liquidation. These two sections are re-produced herein below for easy reference:-

> ***Section 260*** *– "In a winding up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in*

the status of the members of the company, made after the commencement of the winding up, shall, unless, the court otherwise orders, be void."

Section 261 *"Where any company is being wound up by the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents".*

However, the provisions of the Act No. 4 of 1990 has made no reference to the aforesaid sections in the Companies Act and therefore it is argued that there is no prohibition to *parate execute* the property owned by a company, though that company is subjected to wind up.

In the circumstances, it is seen that the provisions of the two enactments namely, the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 and the Companies Act No. 17 of 1982 cannot be given effect to simultaneously. Hence, this court should determine which provisions are applicable in a situation such as this. Before coming to a conclusion of the issue, it is necessary to consider the object of the Legislature when enacting those two statutes. Following authorities would be helpful in deciding the object of the Legislature of having Sections 260 and 261 in the Companies Act.

In the case of *T.K. Fastener Lanka (Pvt) Ltd vs. Seylan Bank Ltd* [(1)] at 159, it is stated "the policy seems to be protection of the interest of the creditors and to ensure that the free assets of the company at the commencement of winding up proceeding will be available for distribution of its creditors and also to avoid multiplicity of actions to prevent the company funds being wasted."

In the case of *Bowkett vs. Fuller's United Electric works*[2] at 164 per Scrutton LJ. It was held that "it is with the object of preventing the scramble of assets which would otherwise ensue' that the law (i.e. section 261) 'expressly declares void any attachments, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up."

Also in the case of *Re Lines Bros Ltd*[3] it had been held that "it must be remembered that liquidation is a collective proceeding whereby the creditors accept a collective enforcement procedure and a distribution of company assets according to a statutory scheme; the creditors surrender their rights to enforce their claims for a share in the assets of the company as administered by the liquidator."

In the case of *Re Robert Wood & Shingle Co.* [4] at 356, it had been held that "It must be kept in view that the intention of the Winding up Act and of all legislation respecting insolvency is to get within the control of the court all the estate of the insolvent company, to settle all the claims of debt, privilege, mortgage, lien, or right of property upon, in or to any effects or property of such company in the simplest and least expensive way, and to distribute its assets among its creditors in the most expeditious manner possible and not to have the proceedings of the winding up court or the distribution of the assets delayed or impeded by or dependent upon outside or expensive litigation in other courts."

The above mentioned authorities show that grave and irremediable loss and damage would be caused to the rest of the creditors of a company sought to be wound up, if one creditor is permitted to dispose of the property of the company after the winding up proceedings had begun. Further-

more, the object of having section 260 and 261 of the Companies Act is to ensure the distribution of assets of a company sought to be wound up on an equal basis according to the respective entitlements of the creditors.

On the other hand, Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 was enacted basically to ensure speedy recovery of monies given by Banks without recourse to adjudication by court. Moreover, provisions of this Act can be invoked only by the Banks registered with the Central Bank and not by each and every lending institution. Therefore, it is, clear that the intention of the Legislature when enacting the Act No. 4 of 1990 was to relieve, the Banks registered with the Central Bank, of the trouble of resorting to court procedures when they are to recover dues from the borrowers. Therefore, it is my view that the purpose of enacting the Act No. 4 of 1990 is to have a speedy procedure to recover the monies lent by Banks without violating or allowing to override the provisions of the other enactments such as the Companies Act.

Moreover, Section 260 and 261 of the Companies Act should be considered as substantive law and it does not prescribe mere procedure. Those two provisions in the Companies Act describe the way in which the distribution of assets of a company sought to be wound up should be made. Such matter cannot be suppressed by procedural law. Furthermore, if one creditor is allowed to take the benefit by selling a particular property belonging to the company sought to be wound up, it would definitely cause grave and irremediable loss and damage to the other creditors. Therefore, it is my view that Section 260 and 261 of the Companies Act should prevail over the provisions contained in the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990.

Learned counsel for the Petitioner has taken up the position that the provisions contained in Act No. 4 of 1990, being a Special Act, should prevail over the Companies Act. In support of his contention he has cited *L.M. Apparels (pvt) Limited vs. E. H. Cooray & Sons Limited and others*[5]. However, BASL News for the month of April 1994 does not carry such a decision. In any event, according to the submissions of the learned Counsel, the issue in that case arose after the sale of the property had been completed. Therefore, the said decision cited by the learned Counsel cannot be considered as a decision applicable to the issue at hand.

He has also referred to the case of *DFCC & Bank of Ceylon vs Deputy Commissioner of Inland Revenue* [6]. In that too, the issue was in relation to the matters that should get priority over statutory debts. Therefore, both the authorities cited by the learned Counsel for the DFCC Bank are not applicable to the dispute in this instance.

However, merely because the words "Special Provisions" are found in the title to an Act, provisions of such an Act cannot have the effect over the other enactments unless clear provisions are found to that effect in the subsequent law. This proposition has been discussed in the cases of *Blackpool Corporation vs. Starr Estate Company Ltd*[7] at 37. In that, it is stated "We are bound. . . . to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute had directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature has provided for

individually, unless an intention to do so is specially declared".

Even in **Maxwell on The Interpretation of Statutes, 12th Edition** this position has been accepted by referring to the aforesaid decision. **(at page 196)** Since there is no clear provision in the subsequent Act namely Act No. 4 of 1990 to negate the provisions in the Companies Act, it is my opinion that the said Act No. 4 of 1990, although it was enacted subsequently will not override, repeal or alter the provisions of the Companies Act.

Learned Counsel for the Petitioner also has submitted that adoption of a Board Resolution by the Board of Directors in the DFCC Bank amounts to completion of the seizure of the mortgaged property. Therefore, his argument is that the property in dispute in the instant case shall not be included as the goods or lands of a company referred to in section 352 of the Companies Act. Section 352 of the Companies Act does not empower a company under liquidation to retain the property that has been seized for the purpose of execution. The contention of the learned Counsel for the Petitioner is that the passing of resolution by the Board of Directors of a Bank amounts to seizure of the property, and therefore it should not be included into the assets of the company.

Before coming to a conclusion of the said argument, it is pertinent to refer to the provisions contained in the Civil Procedure Code as to the way in which seizure is made. These provisions commence from Section 227 onwards in the Civil Procedure Code.

Unless the steps referred to in those Sections of the Civil Procedure Code as to the seizure are followed, seizure of property is not completed and it may be considered as a

voidable act. Moreover, if the adoption of a resolution is considered as seizure of the property in question, it may amount to a decision that has been taken disregarding the said provisions found in the Civil Procedure Code. Therefore, mere passing of a resolution by the Board of directors cannot be considered as seizure of property.

Moreover, as mentioned before, the passing of resolution had been published in the news papers only on the 12th of March 2005, whereas the application to wind up the company had been made on the 1st of October 2004. Therefore, the parties who are affected in this instance were made aware of the adoption of resolution only after the application to wind up the company had been made. Hence, it is seen that no adequate notice had been given to the affected parties to the resolution before the winding up application was made.

In the circumstances, I am not inclined to accept the contention of the learned Counsel for the Petitioner and to decide that the adoption of the resolution by the Board of Directors amount to seizure of the property.

For the aforesaid reasons, it is my considered view that the property belonging to the company sought to be wound up is not liable to be auctioned in term of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 and the section 260 and 261 of the Companies Act No. 17 of 1982 should apply in this regard.

Accordingly, I dismiss the petition of the petitioner DFCC Bank with costs.

ERIC BASNAYAKE, J. – I agree.

Appeal dismissed.

ATTORNEY GENERAL V. DEVUNDERAGE NIHAL

SUPREME COURT
J. A.N. DE SILVA, C.J.,
MARSOOF, J. AND
SURESH CHANDRA, J.
S.C. APPEAL NO. 154/10
C.A. APPEAL NO. 125/08
H.C. GALLE NO. 2136
MARCH 21ST 2011

Poisons, Opium and Dangerous Drugs Act – Section 54(a)(c) – Illegal possession of heroin, drug related offence – Evidence Ordinance – Section 134 – No particular number of witnesses shall in any case be required for the proof of any fact

The Accused was indicted in the High Court under Section 54(a)(c) of the Poisons, Opium, and Dangerous Drugs Act for being in unlawful possession of 9.91 grams of heroin. He was found guilty and was convicted and sentenced to life imprisonment by the High Court.

The Accused appealed against the conviction and sentence to the Court of Appeal and the Court of Appeal set aside the conviction and acquitted the Accused on the ground that only one witness who took part in the raid where the Accused was arrested had given evidence.

The Attorney General filed an application for Special Leave to Appeal against the judgment of the Court of Appeal and the Supreme Court granted leave.

The observation made by the Court of Appeal was on the premise that in a drug related offence arising from a raid by the police, the prosecution has to corroborate the evidence of any member of the raiding party in order to bring about a conviction.

Held:

(1) There is no requirement in law that a particular number of witnesses shall in any case be required for the proof of any fact. Unlike in a case where an accomplice or a decoy is concerned, in any other case there is no requirement in law that the evidence of a Police Officer who conducted an investigation or raid resulting

in the arrest of an offender need to be corroborated on material particulars.

(2) However, caution must be exercised by a trial Judge in evaluating such evidence and arriving at a conclusion against an offender. It cannot be stated as a rule of thumb that the evidence of a Police witness in a drug related offence must be corroborated in material particulars where Police officers are the key witnesses.

Cases referred to:

(1) *A.G. v. Mohamed Saheeb Mohamed Ismath* – C.A. 87/97 C.A.M 13.07.1999

(2) *Muulluwa v. State of Madhya Pradesh* – AIR 1976 S.C. 198

(3) *Wallimunige John v. The State* – 76 NLR 488

(4) *King v. N.S.A. Fernando* – 46 NLR 255

(5) *Gunasekera v. A.G.* – 79 NLR 348

(6) *King v. Chalo Singho* – 42 NLR 269

(7) *King v. Seneviratne* – 38 NLR 221

(8) *Ajith Fernando and others v. Attorney General* – (2004) 1 Sri L.R. 288

(9) *Beddewela v. Albert* – 42 NLR 136

(10) *Lyris Silva v. Karunaratne* – 48 NLR 110

(11) *Ariyaratne v. Food & Price Control Inspector* – 74 NLR 19

(12) *Wickramadasa v. The Food and Price Controller* – 78 NLR 3

APPEAL from a judgment of the Court of Appeal

Jayantha Jayasuriya DSG, with *Shanaka Wijesinghe S.S.C.,* for Complainant – Respondent – Appellant

Accused –Appellant-Respondent absent and unrepresented.

May 12th 2011

R.K.S. SURESH CHANDRA J.

This is an appeal from the judgment of the Court of Appeal. The accused was indicted in the High Court of Galle under Section 54(a)(c) of the Poisons, Opium, and Dangerous

Drugs Act for being in unlawful possession of 9.91 grams of heroin which offence was committed on or about the 27th of January 2000. He was found guilty of the offence and was convicted and sentenced to life imprisonment.

The Accused appealed against the said conviction and sentence to the Court of Appeal and the Court of Appeal set aside the conviction and sentence and acquitted him on the ground that only one witness who took part in the raid where the accused was arrested had given evidence. The Attorney General filed an application for Special Leave to Appeal against the judgment of the Court of Appeal and this Court on 28th October 2010 granted leave on the following questions of law when the application was supported after notice of the accused who was absent and unrepresented:

7. (a) Is the judgment of the Court of Appeal contrary to law and to the weight of evidence led in the case?

(b) Did the Court of Appeal unnecessarily burden the prosecution by holding that in drug related offences where raids are conducted by trained officers, it is fair to require corroboration?

(c) Did the Court of Appeal err in holding that "where the raids are conducted by trained officers, corroboration is required as it is only then that the defence would have the opportunity to challenge the veracity or the credibility of the prosecution witnesses to contradict the version of the prosecution?

(d) Did the Court of Appeal misdirect itself and adduce an extra burden on the prosecution by holding that "the prosecution should provide the defense with the

opportunity to contradict the version of the prosecution"?

(e) Has the Court of Appeal drawn an adverse inference and thereby misdirected itself by holding that "the officials conducting raids are more often than not resourceful in strategy and inevitably experienced with lot of ingenuity and cunning."?

(f) Is the view expressed by the Court of Appeal that "a witness may bear the stamp of innocence yet he may turn out to be a calculated liar especially so when such witness happens to be a trained senior police officer" a misconception when facts in the instance case are not supportive of such a conception and a contention?

(g) Did the Court of Appeal misdirect itself by holding that "it was a little difficult to understand how the trial judge could be satisfied with the evidence of only one of the main witnesses who really took part in the arrest of the appellant especially in drug related offences where police officers are the key witnesses"?

The prosecution led the evidence of IP Jayamanne who had led the raid. They had proceeded to the location where the accused had been and the accused on seeing the Police approaching him and attempted to run away whereupon IP Jayamanne and PS Punchisoma had chased the accused and apprehended him and on being searched IP Jayamanne had found a parcel containing 18.6 grams of substance which on subsequent analysis by the Government Analyst had revealed the presence of 9.91 grams of heroin. PC Ranasinghe who had been in the team led by IP Jayamanne also gave

evidence. The Accused made a dock statement where he admitted being arrested by the Police Officers but denied having in his possession a parcel which contained heroin. No material contradictions or omissions were marked in the evidence of the prosecution.

Since the Accused admitted the arrest by the Police Officers the only question at issue was as to whether he was in possession of a substance containing heroin which was denied by him in his dock statement. The learned High Court Judge was satisfied with the evidence led by the prosecution and found the accused guilty and convicted him.

In the appeal before the Court of Appeal, the Court of Appeal did not fault the judgment of the High Court on any substantive matter as far as the judgment of the High Court was concerned, as regards the analysis of the evidence and assessment of the evidence, but stated that "It is difficult to understand how a trial judge could be satisfied with the evidence of only one of the main witnesses who really took part in the arrest of the appellant especially in drug related offences where police officers are the key witnesses."

This observation would be on the premise that in a drug related offence arising from a raid by the police, the prosecution has to corroborate the evidence of any member of the raiding party in order to bring about a conviction. In the present case IP Jayamanne who led the raid and who was mainly responsible in arresting the accused and found heroin in his possession had given evidence and the other Police Officer, Punchisoma, who assisted him in arresting the accused had not been called to give evidence, though he was listed as a witness. This would bring about a situation where in a

drug related offence the prosecution has to corroborate the evidence of the main witness or any witness which leads to the arrest of the accused in possession of drugs.

It is a well established principle that the prosecution is not required to lead the evidence of a number of witnesses to prove its case. In a similar case as the present instance, Jayasuriya J in *A.G. v. Mohamed Saheeb Mohamed Ismath*[1] Decided on 13.7.1999 stated that "There is no requirement in law that evidence of a Police Officer who has conducted an investigation into a charge of illegal possession of heroin, should be corroborated in regard to material particulars emanating from an independent source. Section 134 of the Evidence Ordinance states that *"No particular number of witnesses shall in any case be required for the proof of any fact.* The principle had been applied in the Indian Supreme Court where the conviction rested solely on the evidence of a solitary witness who gave circumstantial evidence in regard to the accused's liability. The Privy Council upheld the conviction entered by the trial Judge and adopted the Judgment of the Supreme Court in *Muulluwa v State of Madhya Pradesh*[2]. This principle has been adopted with approval and applied in the judgment of G.P.S. Silva J. in *Wallimunige John v The State*[3]. *King v. N. SA Fernando*[4]. The principle affirmed is that testimony must be weighed and not counted. Justice Vaithylingam dealing with a bribery charge laid down for the future legal fraternity the principle that even in a bribery case, that there is no legal requirement for a sole witness's evidence to be corroborated. No evidence even of a police officer who conducted a raid upon a bribery charge is required by law to be corroborated. *Gunasekera v. A.G.*[5].

In *Walimunige John v. State (Supra)*, it was stated that "the question whether the failure of the prosecution to call a witness on the back of the indictment could be made the subject of adverse comment by the defense and whether a trial Judge should direct the jury that they are free to draw an adverse inference from the failure to call such a witness are allied questions which are also inextricably bound up with the discretion exercisable to a prosecutor to decide which of the available witnesses he should call for a proper presentation of the case. These two identical questions came up for consideration during the very formative years, as it were, of this Court before Soertsz J associated with Keuneman J and de Kretser J in the case of *King v Chalo Singho*[6]. In a characteristically illuminating judgment Soertsz J has examined section 114(f) of the Evidence Ordinance as well as a large number of Indian and English commentaries and decisions on the question and has laid down with clarity and precision the answers to these questions. This decision has indeed facilitated our task in deciding on the correct approach to this question. It would appear that different Judges had, prior to the establishment of the Court of Criminal Appeal, taken somewhat divergent views as to whether a prosecution should call every witness on the back of the indictment or at least tender for cross-examination those whom he did not call. Consequently, an appropriate occasion arose in this case to review the entire position.

On the question whether a prosecutor is obliged to call all the witnesses on the back of the indictment or at least to tender those not called for cross-examination, that court decided to follow the principle enunciated in *King v. Seneviratne*[7] and summed up the decision as follows: "It must, therefore, be regarded as well-established now, that

a prosecutor is not bound to call all the witnesses on the back of the indictment, or to render them for cross-examination. That is a matter in his discretion, but in exceptional circumstances, a Judge might interfere to ask him to call a witness, or to call a witness as a witness of the court. It must, however, be said to the credit of prosecuting counsel today, that if they err at all in this matter, they err on the side of fairness."

The above principle was approved and adopted by the Full Bench of the Supreme Court in *Ajith Fernando and others v the Attorney General*[8].

It would be relevant to consider the position of the evidence given by an accomplice, where according to section 114(b) of the Evidence Ordinance, such evidence is unworthy of credit, unless he is corroborated on material points. In *Beddewela v. Albert*[9] it was held that a decoy or a spy is on a different footing from an accomplice so far as the rule of practice regarding corroboration is concerned, but that their evidence should be probed and examined with great care. This principle has been followed in *Lyris Silva v. Karunaratne*[10], *Ariyaratne v. Food & Prince Control Inspector*[11], *Wickramadasa v. The Food and Price Controller*[12].

Therefore it is quite clear that unlike in the case where an accomplice or a decoy is concerned in any other case there is no requirement in law that the evidence of a Police Officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars. However, caution must be exercised by a trial Judge in evaluating such evidence and arriving at a conclusion against an offender. It cannot be stated as a rule of thumb that the

evidence of a police witness in a drug related offence must be corroborated in material particulars where police officers are the key witnesses. If such a proposition were to be accepted it would impose an added burden on the prosecution to call more than one witness on the back of the indictment to prove its case in a drug related offence however satisfactory the evidence of the main police witness would be.

In my view the Court of Appeal erred in setting aside the conviction and sentence of the accused and that of the questions of law 7(a) to (g) referred to above, on which leave was granted by this Court, answering question 7(g) in the affirmative would suffice to dispose of this appeal as the said question encompasses the main issue that was argued in appeal.

In the above circumstances the Judgment of the Court of Appeal is set aside and the judgment of the High Court of convicting the accused and sentencing him for life is affirmed. The High Court is directed to summon the accused and take appropriate steps regarding the said conviction and sentence.

J.A.N. DE SILVA CJ – I agree.

MARSOOF J. – I agree.

Judgment of the Court of Appeal set aside and the judgment of the High Court convicting the Accused and sentencing him for life affirmed.

NANDANA VS. SADDASENA

COURT OF APPEAL
ERIC BASNAYAKE J.
K. T. CHITRASIRI J.
CALA 454/2006
DC BALAPITIYA 519/T
8TH OF SEPTEMBER 2008

Civil Procedure Code Section 714 (3) – Testamentary Action - Probate holder seeking an injunction preventing the cutting of trees? - Permissibility?

The probate holder filed petition and affidavit and sought an interim injunction preventing the Respondent – Petitioner from cutting down trees and leveling the property described in the Inventory. The District Judge issued the injunction prayed for.

Held:-

(1) The probate holder was out of possession more than 6 years. The Petitioner had been in possession for more than 6 years and he claims the property independently and on prescription. In such a situation the probate holder should file a separate action to vindicate title.

(2) When the Executor presents a petition under Section 712 of the Code to claim property belonging to the estate from the Respondent who has possession, when the Respondent put in an affidavit swearing she was the owner as soon as the affidavit was presented the only thing the court had to do was to dismiss the petition [Section 714(3)].

APPLICATION for leave to appeal for an order of District Court of Balapitiya.

Case referred to:

In *Re Cornelis* – 2 NLR 252

J. C. Boange for Respondent – Petitioner

N.R.M. Daluwatta P.C. with *Sajivi Siriwardena* for Petitioner – Respondent.

June 02nd 2009

ERIC BASNAYAKE J.

The petitioner - respondent (probate holder) was issued with probate in respect of the estate of H. Baron Silva who died on 23.10.1981. On 15.5.2006 the probate holder filed a petition and an affidavit seeking an interim injunction and an enjoining order against the respondent-petitioner (petitioner) preventing him from cutting down trees and leveling the property described in the inventory under items Nos. 3 & 4. The learned District Judge by his order dated 30.10.2006 issued an interim injunction as prayed for in the petition. The petitioner is seeking to have this order set aside.

The petitioner claimed this property independently and on prescription. It is conceded on behalf of the probate holder that the petitioner began disputing the title of these properties from about the year 2000 (written submissions of the probate holder in paragraphs 2; 4 & 5). On a complaint made by the probate holder to the police, proceedings were instituted in the Magistrate's Court of Balapitiya in case No. 28310 under section 66 of the Primary Court Procedure Act. The learned Magistrate had after inquiry advised the parties to resolve the dispute in a civil action (these proceedings are not found in the docket). Thus it is apparent that the probate holder was out of possession for more than six years. The petitioner had been in possession of this property for more than six years at the time of the injunctive application. In such a situation the probate holder should file a separate action to vindicate title. Section 714 (3) states thus "In case the person cited is put

in an affidavit that he is the owner of any of the ..... property or is entitled to the possession thereof by virtue of any lien thereon, the proceedings. . . shall be dismissed".

In *Re-Cornelis*[1] the Executors of a will presented a petition under section 712 of the Civil Procedure Code to claim some property belonging to the estate from the respondent who has possession. The respondent put in an affidavit swearing that she was the owner. Bonser C.J. held that "as soon as the affidavit was presented, the only thing the court had to do was to dismiss the petition".

I am of the view that the learned Judge had erred in granting an interim injunction in the testamentary case to restrain the petitioner from cutting down trees etc. without dismissing the petition. Hence the order of the learned District Judge of 30.10.2006 is set aside. Leave to appeal as well as the appeal is therefore allowed with costs.

K. T. CHITRASIRI J. – I agree.