

SUMANAWATHIE PERERA
v.
ATTORNEY-GENERAL

COURT OF APPEAL
ISMAIL, J.,
J. A. N. DE SILVA, J.
CA 152/96
HC NEGOMBO 147/93
MARCH 23, 1998.

Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984 – S. 54A (b), (c) and (d) – Trafficking – Importation – Heroin – Possession – Intention to possess or knowledge that one does possess a prohibited substance – Reasonable doubt.

Held:

- (1) Whether in the circumstances the accused should be held to have possession of the substance, rather than mere control Court should consider all the circumstances – the modes or events by which the custody commences and the legal incident in which it is held.
- (2) The accused has succeeded in creating a reasonable doubt in regard to the question whether she did possess the requisite knowledge required for the purpose of proving charges in the indictment against her.

APPEAL from the judgment of the High Court of Negombo.

Cases referred to:

1. *Warner v. Metropolitan Police Commissioner* (1968) 52 Criminal Appeal Report 373.
2. *Re v. Edmond Levis* – 87 Criminal Appeal Report 270.
3. *R. v. Boyesen* 82 AC 768.

Dr. Ranjith Fernando with Miss Anoja Jayaratne and Miss Subashini Godagama for the accused-appellant.

Jayantha Jayasuriya, SSC for Attorney-General.

Cur. adv. vult.

March 23, 1998

ISMAIL, J.

The accused-appellant was charged on an indictment dated 13.9.93 on three counts with trafficking in 204.69 grams of heroin on 08.07.92 at Katunayake, and at the same time and place aforesaid and in the course of same transaction with having imported 204.69 grams of heroin and with having been in possession of the said quantity of heroin, offences punishable under section 54 A (b), 54 A (c) and 54 A (d), respectively of the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984. The accused-appellant was convicted after trial on 21.6.96 on the charge of importing 204.69 grams of heroin on count 2 of the indictment. She was acquitted on counts (1) and (3) in respect of the offences of trafficking in and with possession of the said quantity of heroin.

It appears from the evidence that the accused-appellant had returned at night at the Katunayake airport from a flight from Madras on 08.07.92. On arrival her bag was seized by officers of the Narcotics Unit on suspicion that it contained heroin. On examination of her bag, it was found to contain the body of a ceiling fan in which was concealed a parcel which contained about 400 grams of a brown-coloured powder. On analysis the said quantity of brown powder was found to contain 204.69 grams of pure heroin.

The position of the accused in her statement made immediately after the detection to the officers of the Narcotics Unit was that she had returned a few months ago after being employed in the Middle East and that she was entitled to import a certain quantity of goods without the payment of duty in proportion to the allowance available to her calculated according to her income and the period of her stay abroad. She had known a lady by the name of Chandrawathie during her stay abroad and she had become her friend. A friend of Chandrawathie named Sammy and a lady referred to as Sriyani's mother arranged a trip for them to proceed to India to purchase goods there and to utilize the allowance she was entitled to and to bring certain articles of clothing, etc., from Madras without the payment of duty. Accordingly, a trip was arranged and the accused-appellant accompanied by Chandrawathie proceeded to India on 5.7.92. The arrangement was for the accused-appellant to be given a sum of Rs. 600 in cash in India for her shopping expenses. In return for the use of her allowance she was promised a sum of Rs. 1,500 to be paid to her on her return. The expenses on account of the purchase of her ticket and other expenses for the journey and her stay abroad was to have been borne by the person who arranged the trip. Whilst leaving for Madras from Colombo each of them carried bags containing spices on behalf of the person named Sammy to be handed over to his friends who were to meet them there. On arrival at Madras they were met by friends of Sammy who provided them with board and lodging. After a three-day stay in Madras when it was the time for them to return, a friend of Sammy hurriedly brought two bags and handed over one each to Chandrawathie and to herself. The zip of the bag was opened and she was permitted to take a glimpse of its contents. She was made aware that the bag contained sarees and sarongs. These articles which had been packed in the bag were not purchased by either Chandrawathie or the accused-appellant.

The accused-appellant has set out the above facts in detail to the officers of the Narcotics Unit who recorded her statements. At the trial she gave evidence and her evidence was in accordance with the three statements given by her immediately after the detection, on 09.07.92, 10.7.92 and on 11.7.92. The trial Judge has at the end of the trial come to the finding notwithstanding the uncontradicted evidence of the accused-appellant, that her conduct showed that she had the requisite knowledge that a quantity of heroin had been concealed in the head of the ceiling fan and packed in the bag handed over to her.

At the hearing of this appeal learned counsel for the accused-appellant submitted that the prosecution had succeeded only in showing that the accused-appellant had the mere custody of the bag and that the accused-appellant has raised a doubt in regard to her knowledge of the presence of heroin packed in the head of the ceiling fan. He has referred to the principles set out by Lord Wilberforce in *Warner v. Metropolitan Police Commissioner*⁽¹⁾. It is as follows:

"The question, to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused should be held to have possession of the substance, rather than mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances – to use again the words of Pollock & Wright, *Possession in the Common Law*, p. 119 – the 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, had been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substances".

These observations have been applied in *Edmon Lewis*⁽²⁾ in *R. v. Boyesen*⁽³⁾.

We have considered the evidence led at the trial and we are of the view that the following items of evidence are relevant in considering the requisite knowledge to be imputed to the accused-appellant. The trip to India was arranged by Chandrawathie and her friends, the payment for the use of her allowance was agreed upon and her expenses for the trip has borne by them. The purchases in India were not made by her. The bag was not in her possession from the time it was handed over to Sammy's friends until the time the goods purchased in India were packed into it and brought to her hurriedly at the time of her leaving for the airport with Chandrawathie. She

was permitted to have a glimpse of its contents and she had not examined the bag. None of her personal articles appear to have been packed into this bag. The customs clearance and the other formalities at the airport in Madras were not handled by her but by the persons said to be friends of Sammy. The customs declaration form on arrival here has also not been filled up by her. There was a person named Sammy who was awaiting their arrival that night at the airport.

In addition at the hearing of this appeal learned counsel for the accused-appellant produced before this Court a certified copy of the proceedings of HC case No. 153/93 in the High Court of Negombo in which the accused was the said Chandrawathie, referred to by the accused-appellant as her friend and with whom she made the trip to India. She was charged with the importation of heroin and for having been in possession on the same date at Katunayake of 204 grams of heroin. She has pleaded guilty to the charge and has been convicted on her own plea on 4.10.94. She has been sentenced to a term of 10 years rigorous imprisonment.

We have taken these facts into consideration and applying the observations of Lord Wilberforce, referred to above, we are of the view that the accused-appellant has succeeded in creating a reasonable doubt in regard to the question whether she did possess the requisite knowledge required for the purpose of proving charges in the indictment against her. We are of the view that it would be appropriate to extend the benefit of the doubt in this regard to the accused-appellant. For these reasons we quash the conviction and sentence and acquit the accused-appellant.

J. A. N. DE SILVA, J. – I agree.

Appeal allowed.
