

VAN DER HULTES
V.
ATTORNEY-GENERAL—(2)

COURT OF APPEAL

RĀMĀNATHAN, J.

W. N. D. PERERA, J. AND

A. DE Z. GUNAWARDANA, J.

C. A. NO: 96/86.

H. C. NEGOMBO NO: 535/86

MAY 9, 10, 11, 13, 16, 17, 19, 20, 23 AND 24, 1988.

Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No: 13 of 1984 ss 54A AND 54B — Possession of heroin — Attempting to export heroin.

- (1) Mens rea is an essential ingredient of the offences of possessing and attempting to export heroin under sections 54A and 54B of Opium and Dangerous Drugs Ordinance amended by Act No. 13 of 1984.
- (2) Discrepancies in the weight of the heroin at the time of detection and at the time of analysis and in the size of the packings are insufficient to cast doubt on the evidence of the identity where the evidence in regard to the sealing and delivery of the parcels prove such identity.
- (3) Sentence of death or life imprisonment is not imperative. The Court has a discretion in the matter of punishment and can impose any appropriate sentence between 7 years rigorous imprisonment and death or life imprisonment.

APPEAL from judgment of the High Court of Negombo.

Ranjith Abeyesuriyā, P.C. with Iqbal Mōhamed and Lasantha Wickrematunga for the Accused-Appellant.

D. P. Kumarasinghe, Senior State Counsel for the Attorney-General.

June 28, 1988

W. N. D. Perera, J.

The accused appellant in this case, Stephanus Cornelius Van Der Hultes was tried before the High Court of Negombo on two counts under the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 218) as amended by Act, No. 13 of 1984 viz:

- (1) That he did on the 9th of April, 1985 at Katunayake possess, except as permitted by, or otherwise in accordance with the provisions of the said Ordinance, 482 grams of heroin and that he was thereby guilty of an offence under section 54(A)d of the said Ordinance and liable to the penalties set out in Column 111 of Part 111 of the third schedule to the said Ordinance.
- (2) That at the same place and time and in the course of the same transaction he did attempt to export 482 grams of heroin except as permitted by or otherwise in accordance with the provisions of the said Ordinance and was thereby guilty of an offence punishable under section 54(A)c read with section 54(B) of the said Ordinance and therefore liable to the penalties set out in Col. 111 of Part 111 of the third schedule to the said Ordinance.

The accused was found guilty of both counts and was sentenced to death.

The facts of the case were as follows:

On the night of the 9th April, 1985, Lal Chandra Weerasinghe, security officer attached to the Katunayake International Airport was on duty having reported for duty at 7 p.m. His task was to examine passengers who were on their way to the aircraft which they were to board. His place of examination was, according to his evidence, the final place of examination that a passenger had to pass before boarding his plane. On this day a Swiss air passenger plane (Flight No. S. R. 163) was due to leave at 10.30 p.m. He examined each passenger who passed him. As the appellant approached him he detected metal on his person with his metal detector. On further examination he found a bunch of

keys and some coins on the accused. As the apparel of the appellant appeared to be bulging in the region of the stomach, he decided to have him further examined by the officer-in-charge, Mr. Neil Jayasinghe. He therefore informed the latter by a sign and both of them took the appellant to the search room. In the search room the appellant was requested to loosen his belt and lower his trousers when five packets made of transparent polythene were detected between his shirt and underwear. The packets contained a light brown powder. The witness and Mr. Jayasinghe thereupon took the appellant and the five packets to the Senior Asst. Charges Officer, Mr. Cyril Jayamanne, who informed the Senior Customs Officer Mr. Selvaratnam. On the latter's instructions the five packets were given to the Asst. Charges Officer, Mr. Lalana Seneviratne to be weighed. Mr. Seneviratne weighed the five packets in the presence of the appellant and the packets were then sealed. The weight of the five packets was found by Mr. Seneviratne to amount to 482 grams. The five packets were, according to Mr. Jayamanne, brought to him, and according to the instructions of Mr. Selvaratnam, weighed by Mr. Seneviratne and sealed. The total weight was 482 grams but he could not remember the individual weights. The five packets were handed over to him in the cover P8 on which he had made the endorsements that it contained 482 grams of heroin and that the appellant together with his passport had been handed over to Mr. Wijesekera of the Narcotics Bureau the following day. He had signed these endorsements and dated them 10.4.85. A feature of this case was that nowhere on P8 was the date of detection, 9.4.85, entered by any officer. He admitted that the appellant had informed him that the packets were given to him by a stranger after he had got down from his vehicle. Mr. Jayamanne had questioned him about this, but had not taken steps to locate the stranger. The number V 3219 he identified as having been entered on P8 at Katunayake before it was taken to Colombo where a separate register was maintained and on which an entry was made prior to the parcel being received into the strong room.

Mr. Seneviratne, Customs Officer weighed the five packets on the instructions of Mr. Jayamanne in the presence of the

appellant, enclosed them in an envelope and thereafter put them in the cover P8. The total weight of the five packets recovered from the appellant was 482 grams. Before he enclosed the five packets he made the distinguishing marks P1 to P5 on them and circled them. After P8 was sealed in the presence of the appellant, the latter's left thumb impression was taken on P8. He also prepared a document setting out the weight of the packets recovered and obtained the signature of the appellant on this document. This document was however not produced in evidence. The sealed packet was thereafter on the same night kept in the safe, and was taken to the Head Office in Colombo the following morning. In Colombo he had handed over the packet to Mr. Suraweera who placed it in a safe. Mr. Suraweera, who served as the first officer in the transit goods office in Colombo on 10.4.85 stated that he took over the packet P8 from Mr. Seneviratne on this day and made a log entry. He further entered the receipt of P8 in a book maintained in the transit goods office assigning it the number S. R. 47/85 dated 10.4.85 which he entered on P8 as well.

After the packet P8 had been deposited by Mr. Seneviratne at the transit baggage office in Colombo on 10.4.85, it was, according to Mr. Suraweera kept in the safe up to the 17th May 1985. Mr. Jayamanne had on 17.5.85 taken charge of it and produced it before the Magistrate Negombo and on his order delivered it to the Government Analyst for examination and report. During the period from 10.4.85 upto 17.5.85, it was in the charge of the Chief Charges Officer Mr. I. M. Fernando who was however not called as a witness.

The detection had been notified to the Narcotics Bureau in Colombo on the night of 9.4.85 according to Sgt. Mahagedera and two officers, P.C. Wijesekera and P.C. Chandredasa had been sent to Katunayake and had brought the appellant in custody to Colombo, together with his passport, and his air ticket.

The evidence regarding the contents of the five packets seized was given by Mr. A. R. L. Wijesekera, Additional Govt. Analyst. On 17.5.85, Mr. Henry, an officer serving in the Department had

received from Mr. Jayamanne five packets P1 to P5 enclosed in the cover P8. The seals were intact. He weighed the packets separately and the packets contained 105 gms., 50 gms., 100 gms., 100 gms., and 100 gms., respectively. Making a total of 455 gms. He carried out the H. P. L. C. Analysis and found the percentage of pure heroin in the packets to be 58% and the total quantity of pure heroin was therefore 263 gms.

The accused gave evidence on his own behalf. He stated that he was a hotelier in Holland and that he had the intention of commencing a hotel in this country. This was his third visit to Sri Lanka. His son was an asthmatic. On the day in question he had gone to the airport with the intention of travelling to Amsterdam. He had been accompanied to the airport by his wife and son. He had got down from the vehicle outside the premises, taken leave of his wife and son and met a stranger in the lobby who had requested him to carry five packets of what he had described as a new drug for asthma to Bombay. The stranger had told him that a person would meet him in Bombay and that he could identify himself to him with a visiting card that he gave him. The five packets that he was given contained powders of five different colours, pink, blue, white, grease coloured and the colour of the powder produced in Court. He had at first refused but had later consented. He denied that the five packets that were produced in Court were those that he had been given. As the stranger had told him that he would be delayed by the customs if he were to carry the packets openly, he had concealed them in his underwear. When he was apprehended at the metal detector barrier and taken to the search room he had handed over the packets to the officer and had informed him that the person who had given the packets to him could be found in the lobby but that no effort was made till it was too late to find him. He also informed the customs officers that it was a new drug for asthma. He disclosed to the customs officers all that had happened. His statement was recorded but he did not sign it as no one took any interest in trying to locate the individual who had given him the packets, and secondly as he had no lawyer to advise him as to the contents of the document. He did not know that the packets contained heroin. He also did not know the name of the stranger who had given him a name but he had forgotten it. As regards

the packets recovered from him he admitted that the customs officers had sealed the packets that were recovered from him. The cover could be P8 and his LTI was taken on the cover. The officer told him that the packets contained heroin. The LTI on P8 could be his. He stated that he had instructed his lawyer that the packets recovered from him contained a powder which was blue, pink, white, grease coloured and brown in colour. As to why his lawyer had not raised the difference in colour, he had no answer.

The Counsel for the State contended that the guilt of the accused was established beyond a reasonable doubt. The defence however contended that

- (1) The identity of the packets recovered from the accused and those examined by the Government Analyst had not been established.
- (2) The learned trial judge had misdirected himself on the question of knowledge on the part of the accused in that he had held that the prosecution had no burden to prove that the accused had the knowledge that the packets contained a drug prohibited under the Ordinance.

As regards the identity the main contention of the defence was that although Mr. Seneviratne who had weighed the five packets on 9.4.85 had found the weight to be 482 grams, the Government Analyst who weighed and analysed the contents and prepared a report on 18.6.85 found the total weight to be 455 grams, a diminution of 27 grams. Mr. Seneviratne stated that he used a delicate balance for the weighing. This diminution in weight was not explained by the prosecution at the trial. In appeal it was argued that dehydration or difference in the scales could have caused it or that the difference in weight could be accounted for by the weight of the polythene bags. An application was in fact made in appeal by the State to call the Government Analyst to clarify these matters. This application was refused by this Court. There was no evidence led at the trial either that there was a difference in the 2 balances used nor that there could be a diminution in weight due to natural causes although the

Additional Govt. Analyst Mr. A. R. L. Wijesekera was called as a witness after Mr. Seneviratne who had weighed the packets on 9.4.85 had given evidence.

A second circumstance relied on by the defence was that the size of the packets recovered from the appellant as stated by Mr. Neil Jayasinghe was about 5" to 6" long and 2" to 3" broad whereas the packets produced were bigger. (8¾" X 5") He however stated that he had not unfolded the packets.

Thirdly, the defence argued that Mr. Seneviratne who weighed the packets stated that he marked them with the letters P1 to P5 and circled them which marks he identified at the trial. The packets produced however also bore together with the markings P1 to P5 the initials which had not been shown to him at the trial and therefore not identified by him. The Govt. Analyst had detected the initials when the packets were examined by him.

Fourthly, the defence argued that although Mr. Seneviratne claimed that on 9.4.85 the details of the packets were entered in a register maintained at Katunayake and P8, assigned the number V 3219 which was written on it and the corresponding entry in the register signed by the appellant, the register itself was not produced in evidence, and that therefore the prosecution had failed to produce a vital link in the evidence regarding the identity of the productions.

On behalf of the State it was contended that the identity of the packets recovered from the appellant with those whose contents were examined by the Govt. Analyst was established beyond reasonable doubt by the oral evidence of Messrs. Weerasinghe, Jayasinghe, Jayamanne and Suraweera, by the entries on P8, by the thumb impressions of the appellant on P8 and by the markings P1 to P5 on P8 made on 9.4.85 by Mr. Seneviratne. It was further argued that if the packets recovered from the appellant contained an innocuous drug for asthma, no officer at Katunayake or at the Transit Baggage Office at Colombo had any motive to substitute an expensive drug for it.

It is thus seen that the recovery of 5 packets containing a powder from the appellant concealed between his shirt and underwear on the night of 9.4.85 at Katunayake by the security officer Mr. Weerasinghe is not in dispute in this case, nor that he attempted to export these packets out of this country. It has to be determined, firstly, whether the learned trial judge was justified in holding that these packets were the very same packets that were handed over, in the same condition, to the Government Analyst on 17.5.85 on the evidence placed before him.

That evidence is as follows:

- (1) The evidence of Messrs. Weerasinghe and Jayasinghe that they were handed over to Mr. Jayamanne immediately after the detection.
- (2) The evidence of Mr. Jayamanne that he handed over the packets he received to Mr. Seneviratne to be weighed in the presence of the appellant and that Mr. Seneviratne enclosed them in the envelope P8.
- (3) The evidence of Mr. Jayamanne and Mr. Seneviratne that immediately after the packets were weighed and enclosed in P8, P8 was sealed and the thumb impression of the appellant was taken on was on the envelope by Mr. Seneviratne who kept it in the safe.
- (4) The markings P1 to P5 made on the packets made by Mr. Seneviratne before they were enclosed in P8 and circled and identified by him.
- (5) The endorsements made on P8 by Mr. Jayamanne that the appellant and the file were handed over to Mr. Wijesekera of the Narcotics Bureau on the following day and identified by him.
- (6) The evidence of Mr. Suraweera that he had, on 10.4.85 received P8 from Mr. Seneviratne with the seals intact and the thumb impressions on the cover and that he had made the endorsement SR 47/85 on it before depositing it in the safe.

- (7) The evidence of Mr. Jayamanne that he had taken charge of P8 on 17.5.85 from the transit baggage office from the custody of the officer on duty and taken it to the Magistrate's Court of Negombo and on receiving an order from the Magistrate to have it examined by the Government Analyst, had taken it to the Government Analyst's department on the same day.
- (8) The evidence of Mr. A. R. L. Wijesekera, Additional Govt. Analyst that P8 was received by his assistant, Mr. Henry, Asst. Govt. Analyst, who had observed that the seals were intact, and that he had proceeded to weigh, and analyse the contents of the five packets. Each of the five packets had on it the marking P1 to P5 with an initial next to the markings.

The first contention of the defence as stated earlier, was that the discrepancy in weight when the packets were weighed by Mr. Seneviratne (482 grams) and by the Govt. Analyst (455 grams) raises a reasonable doubt as to the identity of the packets recovered from the appellant and those whose contents were subsequently analysed. The packets were however weighed with their plastic containers at Katunayake and it was Mr. Wijesekera's evidence that he weighed only their contents. Although it was open to the prosecution to have clarified this discrepancy at the trial when Mr. Wijesekera gave evidence, which they have failed to do, it must be borne in mind that the proof of identity does not rest only on the factor of weight. While the discrepancy of 27 grams may to some extent be accounted for by the proved fact that the greater weight included the weight of the covering packets, the other factors regarding identity cannot be ignored. It was also contended by the State that the difference in weight may be partly attributed to a difference in the weighing scales. The packets were placed in P8 after being placed in a second envelope, which was however not produced at the trial, and sealed. One of the contentions of the defence in appeal was that the non-production of this second envelope raised a doubt as regards the identity of the packets recovered from the appellant. However as the outer packet P8 had been positively identified and shown to have had its seals intact at all stages until it reached the Government Analyst, we do not consider this

absence to be of any significance. The sealing of the envelope containing the five packets recovered from him was acknowledged by the appellant as having been done in his presence. It has not been suggested at any stage of the trial that the seals were not found intact at any stage upto the receipt of P8 by the Additional Government Analyst, although affirmative evidence had been led by the prosecution as to their having been intact right upto this stage. Furthermore, although the appellant described the contents of the packets recovered from him as being blue, white, pink, grease coloured and light brown, this total discrepancy with the colour of the productions P1 to P5 was not the subject of a single question by the defence in cross-examination in spite of the fact that the five packets containing a brownish powder were identified by all the prosecution witnesses. The markings on the five packets also go to establish their identity. These markings were made by Mr. Seneviratne. The defence argued that since Mr. Seneviratne did not say that he initialled the markings, but that as the packets received by the Additional Government Analyst had the markings P1 to P5 as well as initials, the presence of the initials raises a further doubt as to their identity. If in fact Mr. Seneviratne had stated that he had initialled the markings, and these initials were not subsequently found, this could have given some substance to the defence argument. But the omission of the prosecution to show these initials to Mr. Seneviratne at the trial is, in our view, not a factor that leads to the implication suggested by the defence. The identity of the packets contained in P8 and whose contents were analysed by the Government Analyst is further fortified by the endorsement SR 47/85 made on 10.4.85 by Mr. Suraweera on P8 at the Transit Baggage office in Colombo. The appellant contended that the register in which the witness claimed to have made a corresponding entry in office had not been produced. We do not consider the production of this register indispensable, although the prosecution should bear in mind the importance of adducing all relevant evidence in a case of this nature.

Another argument put forward on behalf of the appellant was that according to the evidence of Mr. Jayasinghe the packets that he saw on the person of the appellant were about 3" by 2" in size whereas the packets that were produced in evidence were

8¾" by 5" in size. But this witness has further stated that he did not unfold the packets and that if he had done so, the packets that he saw would have corresponded in size to those produced in evidence.

The appellant in his evidence stated that the packets given to him by the stranger were the size of match boxes, but no question was put to the prosecution witnesses in cross-examination regarding this matter, suggesting that the packets recovered were actually of this size.

On this evidence we hold that the identity of P1 to P5 with those recovered from the possession of the appellant had been correctly determined by the learned trial judge. On the uncontradicted evidence of Mr. A. R. L. Wijesekera these packets had contained 263 grams of pure heroin.

We also hold that the learned trial judge has correctly rejected the version given by the appellant as false. His evidence that he consented reluctantly to conceal five packets of a powder described as medicine for asthma on his person which were to be handed over to another at Bombay whom he could identify only with the aid of a visiting card given to him appears incredible. Further it was his evidence that the stranger had told him that his own brother was a passenger on the same plane. If this was so there does not appear to have been any reason why the packets were not entrusted to him. He also stated in his evidence that he was accosted by the stranger after he had cleared his baggage at the customs and had returned to the lobby, a circumstance which in itself is suspicious. He has not spoken of how he concealed the packets while being in the lobby. It is difficult to see how he could have done so in the presence of the others there. It has to be borne in mind that he had to conceal them between his shirt and underwear, which according to him, he did on the instructions of the stranger.

A further submission made on behalf of the appellant was that the learned trial judge had misdirected himself in law when he held that there was no burden on the prosecution to prove that the appellant had the knowledge that he was carrying a

prohibited drug, and that therefore his conviction was invalid. The trial judge has in fact in certain passages of his judgment expressed the view that in offences of this type, there is no burden on the prosecution to prove that the suspect had knowledge that what he was carrying was a prohibited drug, but he has nevertheless considered the evidence of the circumstances of the finding of the five packets and the suspect's behaviour in coming to the conclusion that the appellant had the knowledge that he was transporting a prohibited drug. We are of the view that *mens rea* is an essential ingredient of the offences with which the appellant was charged. The ordinance nowhere rules out the necessity, recognized in the general law, that the prosecution must prove this element beyond reasonable doubt. On a consideration of the entirety of the evidence however, we are in agreement with the finding of the learned trial judge that the appellant was aware that the substance he possessed and attempted to export was a prohibited drug. Firstly there was the circumstance that the substance was concealed, the only excuse given being that the stranger had told him that concealment was necessary to prevent delay at the customs. Secondly in his own evidence the appellant stated that if the person who was to take the drug at Bombay could not be traced there, he would have left the packets in the plane at Amsterdam, which would have been a strange procedure in respect of an innocuous but all the same an entirely new drug for the treatment of asthma. The explanation given by the appellant appears to have been entirely artificial for however altruistic a person may be it cannot be said to be reasonable that any rational person would have been willing to run the risk of detection and delay by concealing this supposed drug on his person. One circumstance relied on by the appellant, was that on detection he informed the senior officers and Mr. Jayamanne of the nature of the drug and that the person who had given it to him would be in the lobby and may be traced. This was acknowledged by the prosecution witnesses. When an effort was made to trace him about an hour later, he could not be found. We are of the view that this explanation could be put forward by any person detected with a dangerous drug without any certainty of verification and the learned trial judge has been correct in rejecting it on that ground.

We therefore hold that the appellant has been correctly convicted of both offences. However, it appears that the indictment has incorrectly stated that the amount of heroin in both counts 1 and 2 is 482 grams whereas according to the evidence the amount has been 263 gms. This is a matter which should have been the subject of an amendment to the indictment at least at the end of the prosecution case, but both prosecuting counsel and the judge appear to have overlooked it. However the ordinance penalises the possession and export of any quantity of heroin without lawful excuse and as the quantity found is over 3 grams, no prejudice has been caused to the appellant on this ground.

As regards sentence it was argued on behalf of the appellant that the possession of more than 3 grams of heroin does not invariably attract the death penalty or life imprisonment as the words used in section 54 are 'shall be liable to the penalties in column 3 etc'. We are in agreement with this submission and hold that the trial judge had the discretion to impose any sentence over 7 years rigorous imprisonment extending up to the death penalty or life imprisonment on each count.

We therefore affirm the conviction of the appellant on both counts of the indictment. Taking into account his age which was fifty six years at the time of the offence, we however set aside the sentence of death passed on him and substitute in its place a sentence of fifteen years rigorous imprisonment on each count, the sentences to run concurrently.

P. RAMANATHAN, J. — I agree.

A. DE Z. GUNAWARDANA, J. — I agree.

Appeal dismissed; sentence varied.