

**VANDER HULTEZ**  
**V.**  
**ATTORNEY-GENERAL (1)**

COURT OF APPEAL

RAMANATHAN, J. W. N. D. PERERA, J. and A. de Z. GUNAWARDENA, J.

C.A. NO. 96/86—H.C. NEGOMBO NO. 535/86.

MAY 9 and 10, 1986.

*Criminal Procedure — Taking additional evidence in appeal — Code of Criminal Procedure Act, S. 351(b).*

Application by the prosecution was made to take evidence at the appeal stage to call the Government Analyst to testify whether there was an envelope which contained five packets of heroin whether the seals on the envelope were intact and whether where originally 482 grammes of heroin had been recovered the subsequent finding of only 455 grammes could be attributed to dehydration.

**Held:**

Although S.351 (b) of the Code of Criminal Procedure Act confers a very wide discretion on the Appeal Court in the matter of taking evidence at the appeal stage, still the Court will not exercise it unless there are exceptional circumstances affecting the interests of justice.

The points on which clarification was being sought could easily have been clarified at the trial stage by the prosecution. There were no special circumstances affecting the interests of justice to justify taking of evidence in appeal.

Application to Court of Appeal to take evidence at appeal stage.

*Ranjith Abeysuriya, P.C. with Iqbal Mohamed and Lasantha Wickrematunga for Accused-Appellant.*

*D. P. Kumarasiri, J.C., Senior State Counsel for Attorney-General.*

*Cur. adv. vult.*

May 11, 1988

**RAMANATHAN, J.**

The application is made by learned Senior State Counsel under Section 351(b) of the Criminal Procedure Code to take additional evidence on appeal.

Learned Senior State Counsel made application to recall the Government Analyst Mr. A. R. L. Wijesekera who gave evidence at the trial court and elicit his answers on the following three questions—

- (1) whether there was an envelope inside P8 which contained the five packets of heroin.
- (2) to state whether the seals on the envelope P8 were intact when he received them and if the answer was in the affirmative, the reasons for stating so.
- (3) the quantity of heroin detected on the 9th April, 1985 was 482 grammes. Subsequently, when the heroin was weighed for analysis it was found to be 455 grammes. There was a discrepancy of 27 grammes. If the Government Analyst could express an opinion as to the cause of the diminution of weight and whether it could be attributed to dehydration during the time of storage between detection and weighing by the Analyst.

Learned President's Counsel appearing for the accused-appellant opposed the application and submitted that the prosecution had ample opportunity to have clarified these matters from the witness who had given evidence at the trial. Furthermore, at this stage of the appeal the prosecution should not be allowed a second chance to fill up the gaps in the

prosecution case.

I have perused Section 351(b) of the Criminal Procedure Code which reads as follows:

"In dealing with an appeal, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice—

(b) take additional evidence itself or direct it to be taken by any judge of an original court or other person appointed by the Court of Appeal for the purpose:"

This section has conferred on the Court of Appeal a very wide discretion. However this court will not exercise that discretion unless there are exceptional circumstances which would affect the interests of justice. An application for the exercise of this discretion by the prosecution or the defence, where either party had an opportunity to clarify the matters in issue at the trial stage.

In the present case the prosecution had the opportunity at the trial to have clarified the three matters raised at the appeal stage because these matters arose out of the evidence led at the trial. In particular A.R.L. Wijesekera, Deputy Government Analyst gave evidence at the trial and the prosecution had the opportunity to have easily clarified these matters.

Learned Senior State Counsel has not adduced any special circumstances affecting the interests of justice which would justify taking additional evidence in appeal.

It was submitted by counsel for the accused-appellant that it would be highly prejudicial to the accused-appellant at this stage and would tantamount to a retrial and if not a second chance for the prosecution to prove their case.

In the circumstances, we do not see any reason why we should act under Section 351(b) of the Criminal Procedure Code and

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order the taking of additional evidence. The application is refused.

**W. N. D. PERERA, J.** — I agree.

**A. DE Z. GUWARDANA, J.** — I agree.

*Application refused.*

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