

ASHOK KUMAR
v.
ATTORNEY-GENERAL

COURT OF APPEAL

ISMAIL, J.,

DE SILVA, J.

H.C. NEGOMBO NO. 68/92

C.A. NO. 143/96

FEBRUARY 26, 1998

MARCH 02, 1998.

Poisons, Opium and Dangerous Drugs Ordinance S. 54 (a) (c), S. 54(a) (d), S. 54 (b) amendment 13 of 1984 – Abetment – Statement recorded in English – Accused not proficient in English.

The accused-appellant was found guilty and convicted of having abetted the 1st accused to commit the offence of importation of heroin under S. 54 (b) (g) Act 13 of 1984. It was admitted that the accused is not proficient in English and that despite the direction of senior customs officer to record the statement in Tamil his statement was recorded in English.

Held:

1. The only evidence against this appellant is his statement.
2. It cannot be understood as to why the Assistant-Charges Officer S. Sundaralingam who can be presumed to be proficient in Tamil ordered the statement in English when he was given express instructions to record the statement in Tamil. It is apparent that he has questioned the appellant and spoken to him in Tamil.
3. There cannot be much doubt that the appellant was not adequately proficient in English considering the manner in which he has placed his signature "Mr. Ashok Kumar" at the end of his statement.

APPEAL from the judgment of the High Court of Negombo.

Dr. Ranjit Fernando with Ms. Anoja Jayaratne and Ms. Subashini Godagama for accused-appellant.

Jayantha Jayasuriya, Senior State Counsel for AG.

March 02, 1998.

ISMAIL, J.

There were three accused named in the indictment. They were:

- (1) Reverend Maradana Sumanawansa,
- (2) Manikkarajah Ashok Kumar, and
- (3) Vincent Ratnasingham Daniel.

There were four counts in the indictment. The 1st two counts related to the 1st accused. On the 1st count he was charged with having imported 674.3 grams of heroin at Katunayake on 27.01.1991, an offence punishable under section 54A (c) of the Poisons, Opium, and Dangerous Drugs (Amendment) Act, No. 13 of 1984. On an alternative second count the 1st accused was charged with possession of 674.3 grams of heroin contrary to the provisions of section 54A (a) of the said Act.

The charge against the 2nd accused was that he did between 8.1.1991 and 27.1.1991 abet the 1st accused in Madras to commit the offence of importation of 674.3 grams referred to in count (1) of the indictment, an offence punishable under section 54B of the said Act.

The 4th charge related to the 3rd accused and the charge against him was that he did on 08.01.1991 at Colombo abet the 1st accused to commit the offence of illegal importation referred to in count (1) of the indictment.

The case was taken up for trial on 29.05.1995 after all three accused pleaded not guilty to the several charges against them. However after the evidence of the principal witness the Assistant Charge Officer M. D. A. Jayantha Gunatilleke who made the detection was concluded on 16.6.1995 the 1st accused pleaded guilty to the charge of having illegally imported heroin referred to in count (1). In the circumstances he was acquitted on 2nd count which was an alternative charge of possession of the same quantity of heroin at the time of detection.

The 3rd accused was discharged and acquitted at the end of the case for the prosecution as there was insufficient evidence against him to establish the charge of abetment in Colombo of the importation of heroin.

The 2nd accused who is the present appellant was found guilty and convicted of the charge preferred against him in count (3) of the indictment of having abetted the 1st accused to commit the offence of importation of 674.3 grams of heroin referred to in count (1) of the indictment under section 54 (B) of the Act No. 13 of 1984. It provides that "any person who abets the commission of or who attempts to commit or does any act preparatory to or in furtherance of the commission of any principal offence set out in section 54A, shall be guilty of such offence and shall be liable on conviction to the punishment provided for the principal offence". In this instance the 1st accused has pleaded guilty and was sentenced to life imprisonment. In the circumstances the punishment for the sentence to which the 2nd accused was liable is also a sentence of life imprisonment. He has accordingly been convicted on 14.2.1996 of the offence and sentenced to life imprisonment. He has been in remand custody since then after conviction pending the hearing of this appeal. It was submitted that he has in fact been in remand custody since 27.01.1991, the date of the detection.

Learned Senior State Counsel submitted that the principal evidence against the accused-appellant was the statement of the 2nd accused recorded by S. Sundaralingam, the Assistant Charges Officer of the Customs on duty at the Colombo International Airport, Katunayake on 27. 01. 1991. The statement was marked P23 at the trial and it appears at page 390 of the appeal brief.

Learned counsel for the accused-appellant submitted that the accused is not proficient in English and that despite the direction of Senior Customs Officer to record his statement in Tamil, his statement has been recorded by the Assistant Charges Officer in English. It appears from the endorsement at the conclusion of the recording of the statement that "the statement (was) recorded and translated into Tamil by him". It is therefore clear that the statement has been recorded in English and translated or interpreted to the 2nd accused into Tamil. Learned counsel for the accused-appellant referred us to the dock statement made by the accused-appellant appearing at page 287 of

the appeal brief. There he has stated that he spoke to the officer recording the statement in Tamil and that he was questioned in Tamil but that the statement was recorded in English. He also stated that this statement which was recorded in English was not read over or explained to him and that he placed his signature as he was asked to do so. We note that he has signed as "Mr. Ashok Kumar".

As the submission was made that the only evidence against the 2nd accused-appellant is the statement which has been recorded and produced marked P23, we have carefully considered its contents. The portion of the statement strongly relied upon by the prosecution and relating to the offence was as follows:

"At Madras, we stayed at Sri Buwaneswary lodge and I went out and met 'heroin' dealers and introduced to thero. After that, thero spoke to them and bought the heroin from them. But I do not know the quantity he bought and the money he paid. All the transaction was done by thero himself". (*sic*)

Learned Senior State Counsel drew our attention to the rest of the passages in the statement which indicate that the 2nd accused-appellant was introduced to the 1st accused by the 3rd accused for the purpose of introducing the 1st accused to persons who sell heroin and to help him to purchase heroin from them. It also appears that the appellant was promised the payment of a sum of Rs. 10,000 "for this help". According to the evidence led at the trial it appears that the 2nd accused-appellant and the 1st accused went together to Madras on 08. 01. 91 and that they were seen off at the Airport by the 3rd accused and that the two of them returned together on the same flight on 27.01.1991. The 1st accused, a Buddhist priest and the 2nd accused-appellant had missed their scheduled flight on 08.01.91 but after the 1st accused had pleaded with the authorities they were permitted to board the next flight that day. On their return on 27.01.1991 the 1st accused was stopped at the customs on suspicion and the bag carried by him was searched and it was found to contain two parcels with a large quantity of about 1,600 grams of brown powder concealed in a false bottom in the bag. The said quantity of brown powder was later analyzed by the Government Analyst and found to contain about 674.3 grams of pure diacetyl morphine – heroin.

It was strongly contended by learned Senior State Counsel that the statement of the 2nd accused-appellant as recorded reveals that the offence of abetment has been accomplished. We are however of the view that there is no reference in the statement to the role he played in assisting the 1st accused in the importation of heroin nor is there any indication in his statement that he was aware of the purpose for which the 1st accused purchased heroin. It is abundantly clear from the statement that his role was merely to help the 1st accused, who presumably did not speak Tamil, to introduce to him the heroin dealers. He has specifically stated that the transaction was done by the 1st accused himself. Admittedly the appellant had been a student in Madras for several years and has knowledge of the language and the city. Although it was contended by the Senior State Counsel that inferentially his statement reveals that he was aware of the purpose for which the 1st accused purchased heroin we are of the view that the exculpatory portions in this statement of the 2nd accused-appellant should also to be taken into account, specially in view of the submission on his behalf that the statement made in Tamil to the Assistant Charges Officer was recorded in English. We do not understand the reason as to why the witness S. Sundaralingam, the Assistant Charges Officer, who can be presumed to be proficient in Tamil recorded the statement in English when he was given express instructions to record the statement in Tamil. It is apparent that he has questioned the appellant and spoken to him in Tamil. There cannot be much doubt that the 2nd accused-appellant was not adequately proficient in English considering the manner in which he has placed his signature at the end of his statement.

The only evidence against the appellant is his statement referred to above and there is no other item which connects him with the importation of heroin. For the reasons set out above we are of the view that it would not be safe to allow the conviction of the 2nd accused-appellant for abetment to stand. We therefore quash the conviction of the accused-appellant and direct that the accused-appellant be acquitted of the charge.

DE SILVA, J. – I agree.

Appeal allowed.