

**SIDDICK
VS
THE REPUBLIC OF SRI LANKA**

COURT OF APPEAL
BALAPATABENDI, J AND
IMAM, J.
C. A. 2/2001
H.C. NEGOMBO 83/96
MAY 13,
NOVEMBER 15, AND
DECEMBER 17, 2004

Poisons, Opium and Dangerous Drugs Ordinance, No. 17 of 1929 amended by Act, No. 13 of 1984, sections, 54 (A) (d) and 54 (A) (c) Foreign national - Possession of heroin - Mens rea - Standard of proof - Offence of possession/importation? - Criminal Procedure Code, sections 203, and 283 (1) - Verdict within 10 days.- Is it mandatory? - Delay of 82 days - Failure of justice?

The accused appellant - a Pakistani national was arrested at the Katunayake Airport on an allegation of possessing a quantity of heroin. The heroin was detected in a cleverly concealed false bottom and frame of the suit case, bottom and handle of the cabin bag, and concealed in the inner side of the brown shoes, the accused was wearing. He was indicted, and after trial was convicted.

On appeal, it was contended that :

- (i) he did not have the mens rea;
- (ii) that the verdict was delivered after 82 days, and that delay had resulted in a failure of justice.

Per Imam J.,

“In applying the test of credibility and probabilities I am of the view that the prosecution witnesses are credible witnesses and that their evidence was considered.”

- (i) The charges have been proved beyond reasonable doubt, and the accused had the *mens rea* to commit the offence.
- (ii) The the verdict was delayed for 82 days after the conclusion of addresses — this has not resulted in a failure of justice, as the High Court of Negombo is a very heavy court.
- (iii) The provision that the verdict should be delivered within 10 days is only directory and not mandatory

APPEAL from the judgment of the High Court of Negombo.

Cases referred to :

1. *Anura Shantha alias Priyantha vs the Attorney General* - (1999) 1 Sri LR 299
2. *Sinha Rathnatunga vs the State* - (2001) - 2 Sri LR
3. *K vs Tholis Silva* - 39 NLR 267
4. *Karunadasa vs OIC Nittambuwa* - (1987) 1 Sri LR 155

Ranjith Abeysuriya, P. C. with *Thanuja Rodrigo* for accused appellant,
Kumudini Wickremasinghe, Senior State Counsellor for respondent

Cur. adv. vult.

April 27, 2005

S. I. IMAM, J.

The Accused - Appellant (hereinafter referred to as the Appellant) is a Pakistani national who arrived in Sri Lanka on flight UL 184 from Karachi on 10.07.1995, on which day he was arrested at the Katunayake Airport on an allegation of possessing a quantity of heroin. He was indicted in the High Court of Negombo on 2 charges namely,

- (a) That he had in his possession 15.58 grams of pure heroin in contravention of Section 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act, No.13 of 1984.
- (b) That he did import the said quantity of heroin in contravention of Section 54(A) (c) of the said Ordinance.

On the Appellant pleading not guilty the case proceeded to trial. The prosecution relied on the evidence of (1) the principal witness Customs Officer A. L. M. Nazeer who detected the heroin, (2) Police Narcotic Bureau Officer A. Nesharajah who took over the productions from witness Nazeer and (3) the Production Clerk of Court S. Rohana Wijayatilleke to produce the Government Analysts Report. On a defence being called for by the learned Trial Judge the Appellant was the sole witness who gave evidence and stated that he was unaware that the cabin bag, luggage suitcase and the shoes contained heroin.

Nazeer in his evidence stated that what roused his suspicions was that the Accused at the time of detection was attired in a dark blue suit and wore an ill-matching pair of brown shoes. On close examination Nazeer searched the cabin bag and a suitcase which comprised the luggage bag. This witness stated that he detected heroin in a cleverly concealed false bottom and frame of the suitcase and also in the bottom and handle of the cabin bag. Nazeer further alleged that he found heroin also cleverly concealed in the inner- side of the brown shoes which the Appellant wore at that time. It was accepted by the learned President's Counsel who appeared for the Appellant that the Appellant agreed that he was carrying both bags and the aforesaid pair of brown shoes on his arrival to Sri Lanka. However the defence submitted by learned President's Counsel was that the Appellant was completely unaware that the bags and the brown pair of shoes contained heroin. The position of the Appellant in evidence was that

he was directed by one Sultan a prominent businessman of Karachi to hand over the two bags and the brown pair of shoes to one Nizam in Sri Lanka, and that he was not wearing the brown pair of shoes, but merely carrying them. Briefly the defense position was that the Appellant did not have the necessary *Mens Rea* to constitute the offence of "Possession" or "Importation". The witness Nesharajah stated that on receiving a message from Nazeer that a Pakistani national was detected with heroin in his shoes and bags he went to where Nazeer was, where he found a pair of shoes on the table. Nesharajah in his evidence stated that heroin was found in the pair of shoes and in the two bags which were brown and green coloured respectively. This witness stated that the brown coloured suitcase and green bag had false bottoms which contained heroin, which was also found in the frame of the said suitcases and bag respectively. Witness stated that Nazeer arrested the Appellant at 7.30 a. m.; that the six parcels which contained heroin were weighed separately, and that the pair of shoes contained two parcels of which the parcel in the left shoe weighed 71 grams and that the parcel in the right shoe weighed 61.50 grams constituting a total of 132.50 grams.

Furthermore he said that 253 grams and 50 miligrams of Heroin were found in the green cabin bag and 245 grams were found in the suitcase respectively. Witness further stated that the Accused was present when the heroin was weighed by Nazeer and that the frame of the green cabin bag contained a further 164 grams and 50 miligrams. Subsequently the Production Clerk Wijayatillake marked the Government Analyst's Report and stated that the pure-quantity of herion obtained was 15.58 grams.

The Accused giving evidence stated that the bags and pair of shoes was given to him by Sultan, and said that he had no knowledge of the heroin whatsoever. He said that he came to Sri Lanka on a "feasability study" on the instructions of Sultan and produced a true copy of the agreement, between him and Sultan as 2, which is strangely dated 25.07.1995, although the Appellant was arrested on 10.07.1995.

This Court examined the written submissions tendered by both sides. The evidence of Nazeer is credible and consistent with that of Nesharajah. Although the defence disputed the evidence of Nazeer, no contradictions were marked by the defence. The defence further alleged that the Appellant at the moment of arrest wore a pair of back shoes. However the Appellant in his evidence on 17.02.2000 stated that Sultan gave him a pair of brown

shoes to be handed over to Nizam. Thus the Appellant cannot be said to say now that he had no "knowledge" of the brown pair of shoes involved in this case. Customs Officer Nazeer by virtue of his job was entrusted to question and check suspicious looking persons, by virtue of which he arrested the Appellant. The reason for the arrest of the Appellant was according to Nazeer the fact that the Appellant wore an ill-matching pair of brown shoes, which the Appellant claimed to be black. However the heroin was found in the 2 bags and the brown pair of shoes; which the defence did not contest, but took up the position that they were given to the Appellant by one Sultan, the presence of which narcotic the Appellant was unaware of. The position of the Appellant was that he was carrying the brown pair of shoes, and wearing a black pair of shoes. The defence laid much emphasis on the fact that Nazeer was lying with regard to his evidence that the Appellant was wearing a brown pair of shoes. Nesharajah corroborated the fact that he saw a pair of shoes on the table when summoned by Nazeer. Nazeer's suspicions were affirmed, when the heroin was found as aforesaid. Thus this Court is inclined to believe the evidence of Nazeer that the Appellant wore a brown pair of shoes.

Although the Appellant stated that he came to Sri Lanka for a "feasibility study" no acceptable documents were produced to substantiate this. A true copy of a document marked as B2 which was an agreement supposed to have been signed between the Appellant and Sultan, was **strangely** dated 25.07.1995, when the Appellant was arrested on 10.07.1995, which forces this Court to come to the conclusion that this so called Agreement was an after - thought, and thus cannot be accepted. There was a so called "Rent Agreement". Where one party is a Sri Lankan, Muslim residing in Negombo which was found in the diary of the Appellant, which has obviously nothing to do with the "feasibility study" of the Appellant, as the Appellant's name is not mentioned anywhere in this "Rent Agreement". Although the Appellant claimed that he functioned as a hotel manager, no documentary or other evidence was produced to prove this. It is rather strange that Sultan sent a pair of brown shoes to be handed over to Nizam unless the shoes were of a rare variety and meant to be given as a gift. However it is a well known fact that Sri Lanka has a wide range of very good shoes available in the market, and the pair of brown shoes which the Appellant brought had nothing in special, except of course for the heroin found in them. Although learned President's Counsel submitted that if the Appellant was bare footed, Nesharajah should have said so in evidence.

Nesharajah unfortunately had nothing to say on this aspect. However the fact that the Appellant was bare footed or not does not absolve the Appellant from liability for possession of heroin. This aspect was possibly highlighted by the learned President's Counsel to illustrate that Nazeer lied in his evidence. In this regard Nazeer in his evidence clearly stated that he conducted the detection and handed over the productions to Nesharajah, which task Nesharajah was obviously involved in. Nesharajah in cross-examination admitted that the piece of paper which contained the telephone number of the person whom the Appellant spoke to was a drug dealer. Furthermore the accused in his evidence referred to this person namely Nizam as having been arrested in Kandy and was later in remand. The family photograph of Nizam was found in the diary which the Appellant had in his possession. In applying the test of credibility and probabilities, I am of the view that the prosecution witnesses are credible witnesses and that their evidence is consistent.

Learned President's Counsel contended that the Trial Judge had not complied with section 203 of the Criminal Procedure Code and had delayed for 82 days after the conclusion of addresses of counsel, although the verdict should be delivered within 10 days. It was however admitted by learned President's Counsel that this provision of law is only directory and not mandatory, as decided in *Anura Shantha alias Priyantha Vs AG*⁽¹⁾ The question is whether the delay resulted in a failure of justice. Although admittedly there was a delay in pronouncing the verdict by the Trial Judge, this has not resulted in a failure of justice, as the High Court of Negombo is a very heavy court, and the learned trial judge apparently delivered his verdict with reasons amidst a great pressure of work. The directory nature of Section 203 of the Criminal Procedure Code was also affirmed in *Sinha Ratnatunga Vs State*⁽²⁾ Learned President's Counsel submitted to Court that the evidence of the Appellant must be critically examined and that there compulsorily must be a specific holding that his evidence is rejected for stipulated reasons. Learned President's Counsel further submitted that if there had been such a failure, then the conviction must be set aside. To substantiate this position,

- (1) *King vs Tholis Silva*⁽³⁾, where Hearne J held that "The evidence for the defence must be scrutinized, and failure to do so is an injustice to the accused"

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- (2) *Karunadasa vs O. I. C. Nittambuwa*⁽⁴⁾ where it was held that it must appear from the judgment that the trial judge has adequately considered the evidence given by an accused and that the failure to do so, and to state the reasons for the decision would occasion a failure of justice were referred to by learned President's Counsel.

Furthermore learned President's Counsel submitted that in accordance with Section 283 (1) of the Criminal Procedure Code which states that..... "in case where appeal lies shall contain the points for determination, the decision thereon and the reasons for the decisions". In my view the learned trial judge has given reasons for his verdict, and conformed with the aforesaid section.

Learned President's Counsel cited numerous authorities to illustrate that the *Mens Rea* with regard to the possession of the heroin should be proved beyond reasonable doubt. However on a perusal of the indictment it is my view that the 2 charges against the Appellant have been proved beyond reasonable doubt. Thus the Appellant had the necessary *Mens Rea* to commit the offences and was not merely an innocent person who was at every point manipulated by one Sultan as he seemed to depict.

For the aforesaid reasons I dismiss the appeal of the Appellant without costs, and affirm the verdict and conviction of the learned trial judge of Negombo dated 16.02.2001.

BALAPATABENDI, J. – I agree.

Appeal dismissed