SHANMUGARAJAH
v.
REPUBLIC OF SRI LANKA

COURT OF APPEAL.
P. R. P. PERERA, J. AND W. N. D. PERERA, J.
C. A. 16/89.
HIGH COURT, NEGOMBO,
CASE No. 644/86,
AUGUST 01 AND 02, 1990.

Evidence – Evidence Ordinance, section 106 – Poisons, Opium and Dangerous Drugs Ordinance (ss. 54A(a) & 54A(d) as amended by Act No. 13 of 1984 – Possession – Mens rea – Burden of proof.

The accused was detected at the Katunayake Airport carrying 619 grammes of heroin concealed in the false bottom of his suitcase.

Held :

(1) The prosecution had by proof of the above facts established a *prima facie* case against the accused in regard to the mental element.

(2) The inference at (1) which at first sight appears to be legitimate could be exposed as erroneous by proof of facts peculiarly within the accused's knowledge (s. 106 of the Evidence Ordinance).

(3) The phase 'burden of proving' as used in the Evidence Ordinance has a constant meaning and, envisages the burden not merely of leading some evidence but of establishing the fact in question.

(4) It is settled law that section 106 imposes on the accused the duty of establishing on the evidence the fact peculiarly within his knowledge.

(5) As there is some substance in the complaint of the accused that the trial judge has been influenced by certain considerations which are not strictly relevant on the question of sentence and in view of his age, sentence can be altered from the death penalty to 15 years rigorous imprisonment.

Cases referred to:

(1) *Van Der Hultes v. Attorney-General [1989] 1 Sri L.R. 204*
(2) *King v. James Chandrasekera 44 NLR 97 (CCA)*
(3) *Jayasena v. The Queen 72 NLR 313*

APPEAL from Judgment of High Court of Negombo

Ranjith Abesuriya, P.C. with *V. E. Selvarajah* and *Lasantha Wickrematunga* for accused-appellant.

C. R. de Silva S. S. C. for the State.

Cur. adv. vult.

October 04, 1990

P. R. P. PERERA, J.

The accused-appellant was indicted in the High Court of Negombo on the following counts:—

(1) That he did on or about 25th March, 1986, import 619 grammes of Heroin except as permitted by or otherwise in accordance with the provisions of the Poisons, Opium and Dangerous Drugs Ordinance – an offence punishable under section 54 A (*d*) of the said Ordinance as amended by Act No. 13 of 1984.

(2) That at the same time and place aforesaid, and in the course of the same transaction, he did have in his possession 619 grammes of Heroin except as permitted by or otherwise in accordance with the provisions of

the Poisons, Opium and Dangerous Drugs Ordinance – an offence punishable under section 54 A (*d*) of Act No.13 of 1984.

After trial, the learned High Court Judge found the appellant guilty on both counts of the indictment and the sentence of death was accordingly imposed. The present appeal is against this conviction and the sentence of death imposed on the appellant.

The prosecution case was briefly as follows: On the morning of the 25th March, 1986, about 9.30 a.m. Customs Officer Pakiyanathan was on duty at the Passenger Terminal of the Katunayake Airport. It was his duty to examine the baggage of passengers who arrived there on the Indian Airlines Flight, which landed at the Katunayake Airport at 9.30 a.m. The appellant who was a passenger on this flight had come up to Pakiyanathan and handed over his travel documents and the declaration which are marked 'P8' & 'P9'. Pakiyanathan then examined the accused's baggage which consisted of a travelling bag and suitcase ("P 10"). According to Pakiyanathan when he examined the contents of the suitcase ('P10') he felt suspicious and he had instructed the accused to load his baggage into a trolley and to take it to office No. 1 of the Customs Department. At this office, Pakiyanathan opened 'P10' and having emptied the contents had examined this suitcase once again. Pakiyanathan had then torn off a yellow cloth which covered the bottom of the suitcase, and removed the plastic cover which lay beneath it. He then discovered two flat polythene packets. Pakiyanathan had questioned the accused and at the outset the accused had stated that he did not know what they were. Thereafter he had explained that 'P10' had been given to him by one Shanmugalingam at the Madras Airport to be delivered to an address at No. 116, Kathiresan Street, Colombo. On being further questioned the accused had stated that the two polythene packets may be containing 'Kudu' (It is in evidence that Heroin is commonly referred to as Kudu).

Pakiyanathan had then summoned an officer attached to the Customs Narcotic Division by the name of Premanath and had shown him the two polythene packets which he had recovered from the accused's suitcase 'P10'. The two polythene packets which contained a brown coloured powder had been produced marked 'P1' & 'P2'. Then Pakiyanathan and Premanath had made an inventory of the productions and informed N. A. Perera, the Chief of Customs Narcotic Division, and also the Police Narcotics Bureau.

The contents of the two packets 'P1' & 'P2', had been weighed and samples taken therefrom under the supervision of N. A. Perera. The productions had thereafter been duly sealed with the seal of the Customs Narcotics Division and the left thumb impression of the accused. The productions were then produced before the Magistrate of Negombo who had ordered that they be handed over to the Government Analyst. N. A. Perera, the Head of the Customs Narcotics Division had accordingly handed over the productions to the Government Analyst.

The Government Analyst had testified to the effect that the production 'P1' contained 311.4 grammes of pure Heroin, and that 'P2' contained 307.6 Grammes of the same substance. On the uncontradicted evidence of the Government Analyst therefore the two packets 'P1' & 'P2', contained 619 grammes of Heroin. The report of the Government Analyst has been produced marked 'P3'.

On the evidence adduced at the trial, I hold therefore that the identity of 'P1' & 'P2', with those recovered from the possession of the accused had been correctly determined by the learned Trial Judge.

Counsel for the appellant did not seek to canvass the finding of the trial Judge relating to the detection of the productions 'P1' & 'P2', in the false bottom of the suitcase 'P10' which admittedly formed part of the baggage of the accused- appellant. It was Counsel's submission however that for the purpose of bringing home guilt to an accused under section 54 A, or section 54 B, of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984, there was a burden on the prosecution to prove that the appellant had the knowledge that he was carrying a prohibited drug. In support of this submission Counsel relied on a decision of this Court in *Van Der Hultes v. Attorney-General (1)* where it has been held that *mens rea* is an essential ingredient of the offences of possessing and attempting to export Heroin under section 54 A, and 54 B of Act No. 13 of 1984.

Counsel submitted that having regard to the entirety of the evidence of this case the prosecution had failed to establish that the accused had knowledge that a prohibited drug was concealed in the false bottom of the suitcase 'P10', which formed part of his baggage.

It was the defence case that the accused was engaged in 'Baggage Business' – which entailed bringing goods from India for sale in Sri Lanka.

The accused had also made a dock statement in this case and stated that one Shanmugalingam had met him at the Madras Airport before he enplaned and had handed over to him the suitcase 'P10' together with its keys with instruction to deliver 'P10' at No. 116, Kathiresan Street. The accused had opened the bag and as there was sufficient room in it had put some of his personal belonging into 'P10' before he boarded the plane at Madras.

The learned trial Judge, having considered the accused's dock statement has totally rejected this story narrated by the accused. The trial Judge, had indeed come to a firm finding that the accused had the requisite knowledge envisaged by section 54 A and 54 B, of the Ordinance, as amended by Act No. 13 of 1984. In coming to this conclusion the trial Judge had observed that on his own showing the accused had complete custody and control over 'P10' as the keys to 'P10', had also been given to the accused. The Judge states that it is therefore clear that the accused has every opportunity and the power to do what he pleased with 'P10'. In point of fact the accused had opened 'P10' and put some of his personal belongings into this suitcase and brought them to Sri Lanka. Having thus had such complete control and custody over 'P10', the trial Judge states, that the accused cannot be heard to say that he had no knowledge of the fact that 'P1' & 'P2', were concealed in the false bottom of the suitcase 'P10'.

I see no compelling reason to disagree with this conclusion reached by the learned High Court Judge on this matter.

Be that as it may, Senior State Counsel contended that while he conceded that the burden was on the prosecution to make out a *prima facie* case against the accused which involved proof of both the *actus reus* and the *mens rea,* in a clear case it would be open to the prosecution to make out a *prima facie* case as to the mental element required by invoking the tentative presumption that a person is deemed to intend the natural and probable consequences of his act. If the accused in such a situation did nothing, the prosecution may be held to have discharged its burden in regard to proof of the mental element necessary to establish liability for the offence. The accused may however in such circumstances show that he did the act with some mental element, other than that which the character and circumstances of the act suggest. The accused may do so and secure an acquittal, not for the reason that he has proved a

defence, but simply because the prosecution has failed to prove that he committed the act with the mental element required. In this event the accused must prove the mental element entertained by him at the time of his act. I am in entire agreement with this submission.

In the present case the prosecution has established a *prima facie* case against the accused in regard to the mental element when it established that the accused was detected at the Katunayake Airport having in his possession the suitcase 'P10' in which 619 grammes of Heroin were found concealed in a false bottom. This inference which appears at first sight to be legitimate could be exposed as erroneous by proof of facts peculiarly within the accused's knowledge. Vide section 106 of the Evidence Ordinance. The initial inference is relied on by the prosecution as the basis of its *prima facie* case against the accused in respect of the mental element of the offence, but that inference could effectively be vitiated by facts of which the accused alone is aware.

A further question arises for determination in this context, and that is whether the phrase 'burden of proving' in section 106 of the Evidence Ordinance contemplates the burden of establishing the fact that is especially within the knowledge of the accused or whether the duty imposed on the accused is merely that of adducing some evidence in support of the fact alleged. On this question I hold that the phrase 'burden of proving' as used in the Evidence Ordinance has a constant meaning, and envisages the burden not merely of leading some evidence but of establishing the fact in question. I find support for this view in *King v. James Chandrasekera (2)* and the decision of the Privy Council in *Jayasena v. The Queen (3)*. It has been laid down in these authorities that the definition of the word "proved" contained in section 3 of the Evidence Ordinance applied generally to all the provisions of the Ordinance. Section 3 of the Evidence Ordinance provides thus –

> "A fact is said to be proved when after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

It is settled law therefore that section 106 imposes on the accused the duty of establishing on the evidence, the fact peculiarly within his knowledge. I am of the opinion that this burden the accused-appellant has failed to discharge in the present case. I hold therefore that the point

raised by Counsel for the appellant must necessarily fail. I therefore affirm the conviction on both counts of the indictment.

Counsel for the appellant also contended that in any event this was not an appropriate case in which the sentence of death should have been imposed on the accused-appellant. Counsel complained that in imposing the death sentence the learned trial Judge had been influenced by certain considerations which were not strictly relevant.

I have perused the reasons given by the trial Judge in deciding to impose the death penalty in the present case, and I am of the opinion that there appears to be some substance in the complaint of Counsel in this regard. I have also taken into account the age of the accused-appellant which was twenty seven years at the time this offence was committed. Having regard to all the circumstances in this case, I am of the opinion that a term of fifteen year (15 yrs.) rigorous imprisonment would meet the ends of justice. I therefore set aside the sentence of death imposed on the accused-appellant and substitute therefor a sentence of fifteen years rigorous imprisonment on each count, the sentences to run concurrently. Subject to this variation in sentence the appeal is dismissed.

W. N. D. PERERA, J.– I agree.

Appeal dismissed.

Sentence varied.