SUMANARATNE
V.
O.I.C. POLICE STATION, BORELLA AND ANOTHER

COURT OF APPEAL
A DE Z. GUNAWARDENA, J
CA 485/83
MC COLOMBO 19865/2
20 and 29 May, 1991

(WRITTEN SUBMISSIONS TENDERED ON 27 JUNE 1991 AND 02 AUGUST 1991)

Motor Traffic Act, Sections 151 (1B), 214(1)(a) and 216 (B) -- Driving motor vehicle after consuming alcohol -- Concentration of alcohol above which a person is deemed to have consumed alcohol -- Penal Code, Section 298.

The accused was charged in the Magistrate's Court with having driven a motor vehicle on a highway, after he had consumed alcohol, and caused the death of a school boy, an offence punishable under section 216(B) read with section 151(B) and section 214(1)(a) of the Motor Traffic Act.

He was also charged with rash and negligent driving under section 298 of the Penal Code.

At the trial the only evidence led to prove the state of intoxication of the accused was the Medico-Legal Report, which stated that accused "smells of liquor", and the evidence of P.S. Welikala who stated that, a smell of liquor emanated from the mouth of the accused.

Held:

(1) That when a person is charged under section 151 of the Motor Traffic Act, for having committed an offence under that section, after consuming alcohol, the prosecution has to prove that such person had a minimum concentration of 08 grams of alcohol per 100 mililitres of blood. The prosecution has failed to prove that ingredient of the offence and therefore the accused is entitled to an acquittal on that count.

(2) It is clear that smelling of liquor and finding .08 or more grams of alcohol per 100 mililitres of blood, are two different things.

Per Gunawardana, J. "It is pertinent to note that it is the Amendment to the Motor Traffic Act, which introduced the norm of "consumed alcohol" for the first time. Till then the two known concepts in our law were "under the influence of liquor" and smelling of liquor", and that perhaps is the reason why that still, the Form of the Medico-Legal Report has a column (column 5) which contains the two questions, "Patient smelling of liquor" and "under the influence of liquor", to be answered by the doctor examining a person".

APPEAL from the order of the Magistrate's Court of Colombo.

R.K.S. Sureshchandra for accused - appellant.

S. Rajarathnam S.C. for the Attorney -General

Cur. adv. vult.

07 October 1991

A. DE Z. GUNAWARDANA, J.

The Accused-Appellant (hereinafter referred to as Accused) was charged in the Magistrate's Court of Colombo, on the following charges,

(1) that on or about 6th day of November 1981, at Colombo, the accused caused the death of Niraj Lakshman Jayasekera by driving vehicle No. 3 SRI 5338 rashly and thereby committed an offence punishable under section 298 of the Penal Code.

(2) or, in the alternative, that at the time and place aforesaid, the accused caused the death of the deceased above named by driving the said vehicle negligently, and thereby committed an offence punishable under section 298 of the Penal Code.

(3) that at the time and place aforesaid, the accused drove the said vehicle on a highway after consuming alcohol or any drug and caused the death of the deceased above named and thereby committed an offence punishable under section 216(A) read with section 151(1A) and section 214(1)(a) of the Motor Traffic Act.

After trial, learned Magistrate found the accused guilty on counts1 and 3 and sentenced him to 2 years rigorous imprisonment, in respect of each count, and ordered the cancellation of the driving licence. This appeal is from the said conviction and sentence.

At the trial P. Amarasena, an eye witness gave evidence and stated that he was in the boutique opposite the D.S. Senanayake Vidyalaya, and saw the deceased boy crossing the road. When the deceased came about 3 feet from the edge of the opposite side of the road, a car came at a fast speed and knocked the deceased. The deceased got thrown away a short distance and fell on the road. The accused was the driver of the car. This happened at about 2 p.m., about half an hour after the school closed. There was no rain. The road was not wet. There were no other vehicles on the road at that time. The deceased was a student of the D.S. Senanayake Vidyalaya. P.S. 2038 Welikala who prepared the sketch gave evidence and produced it marked P1. According to the said sketch there is a brake mark which is 69 feet in length, starting from a place before the point of impact and ending close to the place where the deceased lay fallen. The width of the road at the point of impact was 36 feet and it was straight. This witness was recalled to give evidence on 10.6.1983. He has stated that when he visited the scene soon after the incident, the accused appeared to be scared and was smelling of liquor. Therefore, he has produced the accused before a medical officer, and the Medico-Legal Report was produced marked P2.

The Medico-Legal Report states that accused was examined by the Deputy J.M.O. the same day, at 3.30 p.m. i.e about one and a half hours after the accident. In column (1)(C), of the said report, which is titled "Injuries", it is stated as follows, "smells of liquor". In the same report in column 5 where the comment "Patient smelling of liquor" appears, the answer typed is "no". In the light of the evidence of P.S. Welikala and the note in column 1(C) of the said report, the answer "no" appears to be a typographical error. However the learned Counsel for the accused submitted that this discrepancy in the report contradicts the evidence of P.S. Welikala. As pointed out above the note "smells of liquor", in column (1)(C) in fact corroborates the evidence of P.S. Welikala.

The accused has not given evidence or called any evidence on his behalf.

Upon a careful consideration of the evidence in this case, I am of the view that the conviction on count 1 is well founded, and should stand.

The learned Counsel for the accused submitted that the charge under count 3 is not maintainable because the prosecution has failed to establish an ingredient of the offence under section 151(1B) of Motor Traffic Act, namely, that the accused had "consumed alcohol" as contemplated under the said section. Under subsection (1C)(a) of section 151 a police officer is empowered to subject any driver of a motor vehicle on a highway, whom he suspects to have consumed alcohol, to a breath test, immediately. If a person refuses to submit himself to a breath test, provision under section 151 (1C)(b) creates a presumption that such person is deemed to have "consumed alcohol". Provision is made under subsection (1D)(i) of that section to make regulations prescribing the mode and manner in which the breath test for alcohol should be conducted. The section 151 (1D)(ii) provides for framing regulations prescribing the concentration of alcohol in a person's blood at which a person shall be deemed to have consumed alcohol. The regulations made by the Minister under this section are published in the Gazette dated July 13, 1979. The relevant regulation setting out as to when a person is deemed to have consumed alcohol reads as follows:-

> "F. The concentration of alcohol in a person's blood at or above which a person shall be deemed to have consumed alcohol shallbe a concentration of. 08 grams of alcohol per 100 mililitres of blood."

Thus when a person is charged under section 151 of the Motor Traffic Act, for having committed an offence under that section, after consuming alcohol, the prosecution has to prove that such person had a minimum concentration of .08 grams of alcohol per 100 mililitres, in his blood.

Now the question to be considered in this case is, has the prosecution proved that the accused had .08 or more grams of alcohol per 100 mililitres in his blood? The answer to this question will obviously be in the negative, because the prosecution in this case has led no such evidence.

The evidence that is available in the instant case is that, it is stated in the Medico-Legal Report that the accused "smells of liquor". In addition P.S. Welikala speaks of a smell of liquor emanating from the mouth of the accused. It is clear that smelling of liquor and

finding. 08 or more grams of alcohol per 100 millilitres of blood, are two different things. It is also pertinent to note that it is the amendment to the Motor Traffice Act, which introduced the norm of "consumed alcohol" for the first time. Till then the two known concepts in our law were "under the influence of liquor" and "smelling of liquor" and that perhaps is the reason why that still, the form of the Medico-Legal Report has a column (column 5) which contains the two questions, "patient smelling of liquor" and "under the influence of liquor", to be answered by the doctor examining a person. However, the provisions in section 151 of the Motor Traffic Act does not take cognizance of both the above concepts. Hence what is required in a charge under section 151 of the Motor Traffic Act is to prove that the accused had consumed alcohol, by adducing evidence that the concentration of alcohol in his blood is .08 or more grams per 100 millilitres of blood. This proof is not forthcoming in the evidence in this case. Therefore the prosecution has failed to prove an ingredient of the offence. Hence the accused is entitled to an acquittal on count 3. Accordingly, I hereby set aside the conviction and sentence of the accused on count 3 and acquit him on that count. It is the provision in section 216(B) which requires that the driving licence of a person convicted under that section be cancelled. Since the accused is acquitted on count 3 the order made by the learned Magistrate to cancel the driving licence of the accused is hereby set aside.

As I have upheld the conviction of the accused on count 1, it is now appropriate to consider the submissions made by the learned Counsel for the accused in regard to the sentence. He rightly confined his submissions only in regard to sentence, in respect of that count. He has pointed out that the offence had been committed in 1981, nearly 10 years ago and that there is no evidence of any previous convictions against the accused. Therefore he should be considered as a first offender and his sentence should be suspended under section 303(1) of the Code of Criminal Procedure. While I am inclined to agree with the learned Counsel for the accused, that the accused should be treated as a first offender, nevertheless in my view facts and circumstances warrant that a fine also should be imposed. Accordingly, I hereby make order that the accused should pay a fine of Rupees Two Thousand Five Hundred (Rs. 2,500/-), in default, serve a term of 6 months rigorous imprisonment. I also make order that the sentence of two years

rigorous imprisonment imposed on the accused on count 1 be suspended for period of 5 years with effect from today.

The Registrar, Court of Appeal, is directed to send this case record back to the Magistrate's Court, Colombo to enable the learned Magistrate to comply with the provisions of section 303 sub-sections (4) and (6) of the Code of Criminal Procedure.

Conviction on count 3 set aside. Conviction on other counts affirmed. Sentence varied.

IN RE NARESH PARSARAM BUTANI

COURT OF APPEAL,
P.R.P. PERERA, J. (P/CA) & ISMAIL J.,
C.A. HABEAS CORPUS APPLICATION NO. 22/90,
H.C. COLOMBO EXTRADITION CASE NO. 1865/85,
26 AND 27 MARCH 1991 AND
1,2 AND 3 APRIL 1991.

Habeas Corpus - Extradition - Extradition Law, and No. 8 of 1977, sections 6, 8, 10, and 11 - Extraditable offences - Passage of time.

On receipt of an "authority to proceed" dated 21 11.1985 issued by His Excellency the President acting under the powers vested in him by section 8 of the Extradition Law read with Article 44(2) of the Constitution, upon a request for extradition of the corpus Naresh Parsaram Butani made on behalf of the Government of Australia, a designated Commonwealth Country, the High Court of Colombo being the "court of committal" as the corpus was accused of the commission of certain offences in Australia against the law relating to dangerous drugs and narcotics of Australia and was wanted there to stand his trial. the High Court Judge issued a warrant for the arrest of the said corpus. The corpus surrendered to the High Court and was later released on bail. At the conclusion of the proceedings in the "court of committal" the High Court of Colombo, the High Court Judge made order on 29 May 1990 holding that the evidence tendered in support of the request for extradition was sufficient to warrant the trial of the corpus and committed him to custody under s. 10 of the Extradition Law of 1977 to await his extradition to Australia. An application was made for a mandate in the nature of a writ of habeas corpus under section 11 of the Extradition Law of 1977 read with Article 141 of the Constitution in respect of the body of Naresh Parasaram Butani who was then detained at the Welikada Prison.

The arguments urged were:

(1) The offences are not extraditable offences as they are not punishable by a mandatory term of imprisonment only of not less than 12 months as required by S. 6(1)(b) of the Extradition Law of 1977. Though the offence fell within item 29 of the Schedule to the Extradition Law of 1977 and would, if committed in Sri Lanka be punishable under the Poisons, Opium and Dangerous Drugs Ordinance a punishment of imprisonment was not mandatory but could be imprisonment or fine or both. Even in Australia the punishment was fine or imprisonment not exceeding 25 years or both.

(2.) The passage of time from the date of alleged commission of the offence (ten years) will be a relevant consideration in assessing the evidence and it would be unjust and oppressive to extradite the corpus.

Held:

(1) The words punishable "with imprisonment for a term not less than twelve months" in S. 6(1)(b) are not indicative only of a mandatory term of imprisonment. Hence the offences to which the "authority to proceed" relate are extraditable offences within the meaning of S. 6 of the Extradition Law, No. 8 of 1977.

(2) The standard of proof required for extradition is nothing less than a *prima facia* case. The Judge had to decide whether on the entirety of the evidence before him the person to be extradited is so implicated in commission of the offences alleged against him that he would be compelled by law to plead to the charges and face trial thereon.

(3) The Extradition Law provides for the review of the order of committal on an application to the Court of Appeal for a mandate in the nature of a writ of habeas corpus rather than by way of regular appeal. The review of the decision to commit will not be in the sense of entertaining an appeal from it or retrying the case, but determining whether there is evidence enough to give the jurisdiction to make the order of committal.

(4) There is nothing in the material furnished to show that owing to the passage of time it would be impossible for the corpus to obtain justice. The reason for the delay could be taken into account. But what matters is not so much the cause of the delay but its effect, like the risk of prejudice to the corpus in the conductof the trial itself or whether it is "oppressive" as directed to the hardships to the corpus resulting from the changed circumstances since the date of the alleged commission of the offences. The personal circumstances of the corpus are unrelated to the passage of time and are not appropriate to be taken into consideration. It would not be unjust or oppressivve by reason of the passage of time and the personal circumstances of the corpus to extradite him.

Cases referred to:

1. *R V. Governor of Holloway Prison re Siletti* (1902) 71 LJKB 931
2. *Benwell V. Republic of Sri Lanka* (1978 - 79) 2 Sri LR 194, 205
3. *Lady Benwell V. Attorney General and Another* (1989) 1 Sri LR 283, 300
4. *R V. Governor of Pentonville Prison, ex parte Sotiriadis* (1975) AC, 30

5. *R V. Governor of Brixton Prison, ex parte Schtraks* (1964) AC 556, 579
6. *In re Galwey* (1896) 1 QB 230, 236
7. *R* V. *Maurer* (1883) 10 QBD 513, 515
8. *In Re Henderson, Henderson* V. *Secretary of State for Home Affairs* (1950)1 All ER 283, 287
9. *Union of India* V. *Monohar Lal Narang* (1977) 2 All ER 38, 380

APPLICATION for a mandate in the nature of a writ of habeas corpus under the Extradition Law.

Ranjit Abeysuriya, P.C. with *Shiromi Seneviratne, Achala Wengappuli* and *Kithsiri Gunawardena* for petitioner.

K.C. Kamalasabayson Acting D.S.G. with *Kalinga Indatissa,* S.C. for respondents.

Cur. adv. vult.

03 May 1991

ISMAIL, J.

This is an application for a mandate in the nature of a writ of habeas corpus under section 11 of the Extradition Law No 8 of 1977 read with Article 141 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the body of Naresh Parsaram Butani presently detained at the Welikada prison.

On receipt of an "authority to proceed" dated 21.11.1985 issued by His Excellency the President of Sri Lanka the High Court, Colombo, being the "court of committal" issued a warrant for the arrest of the corpus.

Naresh Parsaram Butani surrendered to the High Court, Colombo, on 4.7.1986 and was thereafter released on bail. At the conclusion of the proceedings in the "court of committal", the learned High Court Judge by his order dated 29.5.90 held that the evidence tendered in support of the request for extradition was sufficient to warrant the trial of the corpus and an order was made under section10 of the Extradition Law No 8 of 1977 committing him to custody to await his extradition to Australia.

The "authority to proceed" in respect of Naresh Parsaram Butani was issued by an Order of His Excellency the President, acting under the powers vested in him by section 8 of the Extradition Law read with Article 44(2) of the Constitution, upon a request made on behalf of the Government of Australia, a designated Commonwealth

Country, as he was accused of the commission of certain offences against the law relating to dangerous drugs and narcotics in Australia.

The request for extradition was based on three warrants dated 16.02.1982 and 15.09.1982, issue by a stipendiary Magistrate at Melbourne for the arrest of Naresh Parsaram Butani on information filed by the Police in the State of Victoria:

a) that on or about 10 February 1981, at Sydney he did import into Australia a prohibited import, to wit, cannabis resin contrary to section 233B of the Customs Act.

b) that on or about 10 February 1981 at Sydney, he was knowingly concerned in the importation into Australia of a prohibited import, to wit, cannabis resin contrary to section 233B of the Customs Act.

c) that between 28.2.81 and 27.5.81, at Melbourne he did without reasonable cause have in his possession a prohibited import, to wit, cannabis resin, reasonably suspected of having been imported into Australia in contravention of section 233B of the Customs Act.

The Attorney General of Australia has furnished along with the request for extradition, the particulars of the corpus, the evidence given by several witnesses relating to the charges, the exhibits tendered at the hearing and the text of the relevant laws duly certified and authenticated.

The Counsel for the petitioner submitted, firstly, that the offences to which the "authority to proceed" relate are not extraditable offences as they are not punishable by a mandatory term of imprisonment only of not less than twelve months. He contended that a strict interpretation should be placed on the words "punishable under that law with imprisonment of not less than twelve months" in section 6(1)(b) of the Extradition Law No 8 of 1977. The relevant parts of section 6(1) of the Extradition Law No 8 of 1977 read:

"For the purpose of this Law, any offences of which a person is accused . . .in any designated Commonwealth Country . . .shall be an extraditable offence, if-

b) In the case of an offence against the law of a designated Commonwealth Country, it is an offence which, however described in that Law, falls within any description set out in the Schedule hereto and is punishable under that law with imprisonment for a term not less than twelve months; and

c) in any case, the act or omission constituting the offence or the equivalent act or omission, would constitute an offence against the law of Sri Lanka if it took place within Sri Lanka, or outside Sri Lanka."

The Counsel for the petitioner conceded that the said offences fall within item 26 in the Schedule to the Extradition Law No. 8 of 1977, being offences against the law relating to dangerous drugs or narcotics and that if similar offences were committed within Sri Lanka they would be offences against the Poisons, Opium and Dangerous Drugs Act and that thereby the requirements of section 6(1)(c) would be satisfied. He submitted, however, that the said offences do not attract a mandatory term of imprisonment only of not less than twelve months and that therefore they do not meet the requirements in section 6(1)(b) so as to classify the said offences as being extraditable offences. He contended that a strict interpretation should be placed on the words in section 6(1)(b) and argued that these offences are not extraditable offences as these offences which, though are punishable with imprisonment for a term not less than twelve months, can also be punished with a fine in the alternative or with both. It is also to be observed that the penalty applicable to these offences under the provisions of the Customs Act, 1901 of Australia, is a fine not exceeding $100,000 or a term of imprisonment not exceeding 25 years or both. The words "punishable under that law with imprisonment for a term not less than twelve months" are not indicative only of a mandatory term of imprisonment. A rule of strict construction does not allow the imposition of a restrictive meaning on the words so as to withdraw from the operation of the law those offences which fall both within its scope and the fair sense of its language. Maxwell in *Interpretation of Statutes* (11th ed.) at page 254 states, "A Court is not at liberty to put a limitation on general words which is not called for by the sense or the objects, of the mischiefs or the enactment, and no construction is admissible which would sanction a fraudulent evasion of an Act". Stanbrook and Stanbrook on *Extradition, Law and Practice* (1980) at page 40 refer to a judgement of Shaw, LJ. in which a restrictive and narrow

interpretation was not favoured in construing the words, "A term of 12 months or greater punishment" in section 3(1)(a) and (b) of the Fugitive Offenders Act, 1967, where it was held that it did not mean a specified minimum of 12 months. I therefore reject the interpretation sought to be placed by the counsel for the petitioner that extraditable offences for the purposes of section 6(1)(b) of Extradition Law No 8 of 1977 are those offences which are punishable by the law of the designated Commonwealth Country only with a mandatory term of imprisonment for a period not less than 12 months. Thus the offences to which the "authority to proceed" relate are extraditable offences within the meaning of section 6 of the Extradition Law No 8 of 1977.

The facts as disclosed by the evidence reveal that on 10 February 1981 two cartons arrived at Sydney from Seoul on a Japan Airlines flight addressed to Naresh Parsaram. The two cartons contained a number of batik garments, wood ornaments as well as fourteen coir mats with rubber backing. Naresh Parsaram engaged a firm of customs agents (Rudders) to clear the goods through customs. The two cartons were cleared on 25th February 1981 after inspection by Susan Rae Mclintock, an examining officer of the Customs Department at Mascot Airport, in the presence of an employee of the customs agency.

An employee of the customs agency removed the two packages to the warehouse from the Qantas Cargo terminal, strengthened its packaging and on the instructions of Parsaram forwarded them on 27 February '81, after relabelling them, to a private address at No. 42 Eildon Drive, Keysborough, Victoria. Parsaram had earlier arranged with Bernard Selwyn who lived at this address to accept and keep the packages which he said contained handicrafts for exhibition at the Adelaide Trade Fair, until he collected them. Parsaram later collected the packages from the residence of Selwyn and took them to a motel, the Eastern Town House, in East Melbourne arranged for him by Selwyn where he stayed from 28 February 1981 to 27 May 1981.

There is some circumstantial evidence to indicate that cannabis resin in pellet form was concealed in the coir mats and that Parsaram had presumably removed the rubber backing from the coir mats during his stay at the motel and that he had then placed the cannabis resin

in a suit case which he packed into a large cardboard package. A few days prior to 27 May 1981, Parsaram took this package containing the suit case to the residence of Selwyn. He collected it again on 28 may 1981 and delivered the package containing the suit case to a milk bar in Collingwood requesting the proprietress to keep it for him until he collected it on his return six weeks later.

Veronica Casey was the proprietress of a milk bar at Victoria Parade in Collingwood. Parsaram had got acqauinted with her as he was a regular customer who used to purchase tinned foods or food prepared in the shop on a regular basis. He requested her permission to leave the large cardboard parcel in her premises and had said he had paid $1000 customs duty on it and that he was unable to take it with him. He promised to come back in six weeks time to collect it. The cardboard parcel had been secured by a sticky tape and after making enquiries and presumably becoming suspicious of the contents of the parcel, Veronica Casey had informed the police about it and they took it away.

On 1 June 1981, Robert Freeman, Senior Detective of Police attached to the Drug Squad took into his charge the large cardboard package from Veronica Casey. On an examination of the package and the suit case inside it he had found a passport size photograph, exhibit W, which was identified by Neville Peiris as being that of Naresh Parsaram Butani. He also found a large quantity of pencil shaped pieces of a brown resinous substance which he had delivered for analysis to the Forensic Science Laboratory. The photographs taken of the cardboard packages, the suit case with its labels, and its contents have been tendered as exhibits.

On 27th May '81 before Parsaram left the motel, the Eastern Town House, he had sold fourteen coir mats for $100 to its owner Karl Schafheutle. These were also subsequently taken over by the police.

The contents of the suit case and the coir mats were analysed at the Forensic Science Laboratory in Melbourne and the findings are set out in the certificates of analysis which have been tendered as exhibits.

The suit case contained 6800 cylindrical pieces of hashish of varying lengths weighing 20.4 Kilograms. Some of the pieces were wrapped

in waxpaper, and there were pieces of waxpaper and pieces of a rubber substance in the suit case.

The coir mats had pieces of gauze and waxpaper attached to the underside. All the mats had a latex type of coating around the four sides. One of the mats had pieces of a vegetable type matter wedged in a piece of the rubber on its underside.

Senior Constable Drake of the Forensic Science Laboratory states that it is possible that the pieces of cannabis resin were wrapped in waxpaper and then had been laid down on a coating of a rubber substance on the underside of the mats.

Neville Peiris who was then serving a term of imprisonment at the Bendigo prison has stated that he had known Naresh Parsaram since 1979 and that his full name is Naresh Parsaram Butani, and he has identified the photograph tendered as exhibit 'W' as being the photograph of Naresh Parsaram Butani. Neville Peiris had stayed with Butani in the motel named Eastern Town House. Butani had told him that he was using only the name Naresh Parsaram in Austrailia.

Neville Peiris had then returned to Sri Lanka and in October 1981 Butani had contacted him and by prior arrangement they met on 23 October '81, in the lounge of the Singapore Airport. Butani had told him of the package left at the milk bar belonging to Veronica Casey and had told him to collect the package and keep it with him till he arrived in Melbourne. He had given him two letters addressed to Veronica Casey one of which authorised him to collect the package from her. Peiris then took a plane to Australia, where he arrived at Tullamarine Airport and then booked in at a hotel named Surrey Lodge in Surrey Hills. The next day on 24th October '81 at 1 p.m. he met Veronica Casey at the milk bar when he went to collect the package. He was asked to call over that evening at 6 p.m. to collect the parcel.

Meanwhile Detective Sergeant Thorn who had been informed of this arrangement by Veronica Casey collected the package immediately from the Joint Task Force office where it had been kept in safe custody, in order to replace it at Casey's premises. It appears that after the analysis of the contents of the suit case the pieces of cannabis resin were replaced in the suit case which was then packed

in the cardboard box in its original form. This officer had examined the package and checked its contents, and then had taken it to the premises of Veronica Casey where it was placed in a room.

Detective Sergeant Thorn testified that he observed Peiris arriving in a taxi that evening to the premises of Veronica Casey, collecting the package with the suit case inside it and loading it into the rear of a vehicle. The officer followed Peiris to the hotel where he was staying. Then Peiris had taken the package into the room, Sergeant Thorn followed him inside and had taken him into custody with the package which contained the suit case in which the cannabis resin was packed. He was then taken to the Victoria Police Drug Bureau where he was questioned and charged.

At the end of the committal proceedings the corpus made a dock statement in which he said that he belonged to the Sindhi Community and that his name was Naresh Parsaram Butani. He has several friends and relations who have the same name. He denied even having visited Australia or any of its cities. The passport which he surrendered to court, issued in 1983, was the only travel document that he possessed. He further stated that he had never met Miss Casey or the other persons referred to in the proceedings and that he has had no dealings with Neville Peiris.

The learned High Court Judge proceeded to examine whether on the entirety of the evidence furnished the corpus was so implicated that he should be compelled to plead to the charges and face trial and he has held that the available evidence is sufficient to warrant his trial for the stipulated offences.

The Counsel for the petitioner submitted that the admissible evidence was too slight and was of doubtful value to warrant the committal of the corpus for trial. He submitted further:

a) that there was insufficient evidence to establish the identity of the corpus and that Neville Peiris who gave evidence relating to the identity of the corpus was an accomplice who gave evidence while yet in prison.

b) that there was no evidence that the corpus participated or was knowingly concerned in the importation of a prohibited drug on 10.02.81, and

c) that there was a failure by the learned High Court Judge to examine the glaring discrepancies, inconsistencies and contradictions in the evidence of the witnesses and that a proper evaluation of the evidence of the witnesses would have revealed that there was insufficient material to connect the corpus with the prohibited import.

The Deputy Solicitor General in reply submitted that the evidence of the several witnesses was recorded in the requesting State before the stipendiary Magistrate on three occasions, on 28.12.82, 11.4.84 and on 29.4.85 and he contended that there was sufficient evidence to warrant the trial of the corpus. In regard to the identity of the corpus he submitted that the witnesses Bernard Selwyn, Carl Schafheutle and his wife Ilsa Schafheutle who were the owners of the motel where Naresh Parsaram stayed from 12th February '81 upto 27 May '81 and Veronica Casey, the proprietress of the milk bar to which Parsaram was a regular visitor have each given the descriptions of Parsaram and have stated that they would be in a position to identify him if seen again. Katherine Horvat who was the housekeeper of the motel who cleaned the room occupied by Parsaram during the period of his stay for over three months has stated that she would be able to identify him. In her evidence she has also stated that when Neville Peiris occupied the room with Parsaram she had seen that the fibres from the coir mats had fallen out and that she had chided them for making a mess of the room.

The Deputy Solicitor General further submitted that the photograph found in the suit case which was packed in the cardboard carton was identified positively by Peiris. He referred to the case of the *R* v *Governor of Holloway Prison re Siletti* (1) and submitted that it has been held that a photograph may be sufficient by itself as proof of identity if attested to by witnesses in the requesting State and is enclosed with their depositions.

He submitted that the evidence of Peiris though an accomplice is admissible and can be acted upon and is worthy of credit as it has been corroborated by the evidence of other witnesses.

In regard to the submission that there was no evidence that the corpus participated or was knowingly concerned in the importation of the prohibited drug he submitted that there was sufficient evidence in this regard and referred to the evidence of Susan Mclintock the customs examining officer, regarding the arrival of two packages which contained fourteen coir mats among other items, the evidence of Alan Johns of Rudders Clearing Agency regarding the clearance of the packages, the evidence of George Zannine, the owner driver for TNT Transport Systems who delivered them to Selwyn's address, the evidence of Bernard Selwyn who arranged for Naresh Parsaram's accommodation at the request of his friend Prakash Butani and who had accepted the packages and kept them till Parsaram collected them later.

Counsel referred further to the evidence of Katherine Horvat, the housekeeper of the motel, regarding the fibres from the coir mats on the floor of the room occupied by Parsaram and Neville Peiris, the evidence of Carl Schafheutle the owner of the motel regarding the sale to him of fourteen coir mats, and the evidence of Peiris that the mats taken over by the police from Carl Schafheutle and shown to him in Court were thinner than the mats which he saw with Parsaram, and submitted further, that there was sufficient evidence to establish that the cannabis resin in pellet form was concealed between the rubber backing of the coir mats and that he had then placed them in the suit case.

The Deputy Solicitor General referred to the evidence of Senior Detective Robert Freeman, Senior Detective David Ball, Senior Detective Constable Lionel Drake, Scientific Officer Lyall Brown, Detective Sergeant Ronald Thorn, Trevor Wilson, the Chemist of the Department of Science and Technology and Sergeant of Police Charles Pont, to establish the identity of the productions, and as proof that it was a prohibited drug, its weight, its analysis and its safe custody.

The Judge hearing the committal proceedings has to be satisfied in terms of section 10(4)(a) of the Extradition Law that the evidence is sufficient to warrant the trial of the person sought to be extradited if the offence had been committed within the jurisdiction of his Court. In *Benwell* v. *Republic of Sri Lanka* (2), Colin-Thome, J. observed that under section 10(4) of the Extradition Law No. 8 of 1977, which is the same provision as section 7(5)(a) of the Fugitive

Offenders Act, 1967, of England, the Judge hearing the committal proceedings had to decide whether the evidence was sufficient to warrant trial if the offence had been committed within his jurisdiction and that he was not required to have regard to whether the trial would lead to a conviction in the Commonwealth country. He proceeded to state,

> "The interpretation of the expression "sufficient" with reference to English authorities suggests that the standard of proof required is nothing less than a prima facie case."

In *Lady Benwell* v. *The Attorney General and Another* (3) Silva, J. observed as follows, "The Judge has only to decide whether or not, on the entirety of the evidence before him, the person to be extradited is so implicated in the commission of the offences that are alleged against him, that he should be compelled by law to plead to the charges and face trial thereon."

The Extradition Law provides for the review of the order of the committal on an application being to the Court of Appeal for a mandate in the nature of a writ of habeas corpus rather than by way of a regular appeal. Lord Diplock observed in *R* v. *Governor of Pentonville Prison ex parte Sotiriadis* (4) that an appellate court exercised wide powers in habeas corpus applications brought in extradition cases not by any express provisions in the Act but by long established practice. He stated, "under this practice, the Court will entertain the question whether there was any evidence before the Magistrate to justify the committal and, if it finds none, will order the prisoner to be discharged." He continued, "But if there is some evidence, you would not be entitled to substitute your own appreciation of its weight or cogency for that of the Magisrate upon whom jurisdiction to determine whether the evidence is sufficient to justify committal is conferred by section 10 of the Act".

Similarly it was observed in *R* v. *Governor of Brixton Prison ex parte Schtraks* (5) "The Court, and on appeal this House, can and must consider whether on the material before the Magistrate a reasonable Magistrate would have been entitled to commit the accused but neither a Court nor this House can retry the case so as to substitute its discretion for that of the Magistrate". In the same case at page 585 Viscout Radcliffe cited with approval the judgement of Lord

Russel of Killowen C.J. in *In re Galway* (6) "We should, after the order of committal, be entitled to review the Magistrate's decision, not in the sense of entertaining an appeal from it, but in the sense of determining whether there was evidence enough to give him jurisdiction to make the order of committal".

It has been observed that to commit a person for a trial for an offence when there is no evidence that he committed it is not to act in excess of jurisdiction but to err in law since it must involve a misunderstanding of the legal nature of the offence. Nevertheless, in extradition cases, the Courts have assimilated such an error of law to acting in excess of jurisdiction *(R* v. *Governor of Pentonville prison ex parte Sotiriadis* (4) Thus, Field J. in *R* v. *Maurer* (7) said, "It is only when there is no jurisdiction, as when there is no evidence before the Magistrate that we can interfere". He went on to say, "It was not for this Court to weigh the evidence, if there was any reasonable evidence of an extradition crime for the Magistrate to act upon".

On a careful review of the entirety of the depositions and the documentary evidence placed before the Court of Committal and which has been summarised above I am of the view that there was sufficient evidence to establish the identity of the corpus and to implicate him in his commission of the offences alleged against him. The High Court Judge has therefore acted within his jurisdiction in ordering the committal of the corpus so as to compel him to plead to the charges and face trial thereon.

The Counsel for the petitioner submitted, lastly, that in terms of section 11(3)(c) of the Extradition Law No. 8 of 1977 that it would be unjust or oppressive to extradite the corpus due to the passage of time, as the offences relevant to these proceedings have been committed ten years ago. The length of time that has elapsed will be a relevant consideration, for example, in assessing the evidence but there is nothing in the material furnished to show that due to the passage of time that it would be impossible for the corpus to obtain justice.

The Court could also take into account the reasons for the delay and consider whether the corpus was in any way responsible for the delay or whether it was due to the dilatoriness on the part of the requesting State. The delay in the case has not been due to either

of these reasons. What matters is not so much the cause of the delay but its effect like the risk of prejudice to the corpus in the conduct of the trial itself or whether it is "oppressive" as directed to the hardships to the corpus resulting from the changed circumstances since the date of the alleged commission of the offences.

It was submitted on behalf of the corpus that he is a prominent businessman and a Director of several business establishments and that should he be extradited to Australia, he would be gravely prejudiced and hampered in defending himself as he would be a total stranger there and would be completely disoriented and isolated. Considering the offences that are alleged to have been committed by the corpus it does not seem to me that they are complex or complicated to the extent that the passage of time has rendered it difficult to defend himself adequately at the trial. The position taken by the defence at the committal proceedings was a complete denial of guilt and he further took up the position that he has never visited Australia or any of its cities. It would be relevant to refer some of the observations of Tucker LJ. *in Re Henderson, Henderson* v. *Secretary of State for Home Affairs* (8). He said, "We do not know nearly enough about the facts about the case to form any opinion as to the nature of the applicant's defence or the extent to which he will be prejudiced in the presentation of it by the delay which has taken place. These are all matters which can and, no doubt will be considered by the tribunal of any civilised country which is dealing with a criminal matter". The Court would no doubt in an appropriate case be influenced by the personal circumstances of the applicant. Lord Keith has observed in *Union of India* v. *Manohar Lal Narang* (9) "I would also think it proper to be influenced, in an appropriate case, by the personal circumstances of the applicant, for example, that he had been long settled in this country with his family and had led there a respectable position". However, the personal circumstances urged by the petitioner in this case are unrelated to the passage of time and are not appropriate to be taken into consideration. Having given to the appraisal of the evidence and the available material the best consideration that I can, I have come to the conclusion that it would not be unjust or oppressive by reason of the passage of time and his personal circumstances to extradite him to face trial in respect of the alleged offences.

For these reasons I hold that no ground has been made out for the issue of a writ of habeas corpus and accordingly I dismiss the application. The petitioner is ordered to pay a sum of Rs. 1500/- as costs to the 1st respondent.

Perera, J. (P/CA) - I agree

Writ of habeas corpus refused.
Application dismissed.