

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

Mohamad Shibly Mohamad Nishkar

Accused-Appellant

Vs

The Democratic Socialist Republic of Sri Lanka
Complainant Respondent

CA 64/2007
HC Negombo 146/2003

Before : Sisira J de Abrew J &
PWDC Jayathilake J
Counsel : Faiz Musthapa President's Counsel with
Shantha Ratnasooriya for the accused appellant
DSG Kodagoda for the Respondent.

Argued on : 19.2.2013 and 20.2.2013
Decided on : 2.5.2013

Sisira de Abrew J.

The accused appellant in this case was convicted for importing and being in possession of 351.4 grams of heroin and was sentenced to death. Being aggrieved by the said conviction and the sentence he has appealed to this court. Facts of this case may be briefly summarized as follows.

On 19.1.2001 around 2.30 p.m. Dharmadasa a custom officer who was on duty at the Bandaranayake International Airport (BIA) decided to check the accused appellant who arrived at the BIA. When he emptied the travelling bag of the accused appellant he found the bag unusually heavy. When he examined

further he found a parcel of heroin hidden in a false bottom of the bag. He thereafter handed over the accused appellant, the parcel of heroin and the miscellaneous items found in the bag to SI Piyadasa. PS Bandaranayake took the said items from SI Piyadasa. Later PS Bandaranayake handed over the said items to IP Sunil Perera of the Police Narcotic Bureau (PNB). IP Sunil Perera says he received three sealed parcels from PS Bandaranayake around 2.40 p.m. on 20.1.2001. He entered the sealed parcel of heroin in PR 150, the travelling bag in PR 151 and miscellaneous items in PR 152. On 25.1.2001, he took three parcels to the Magistrate's Court (MC) and after handing over the parcel entered in PR 152 (miscellaneous items) to Record Keeper Sunil Perera in the MC brought back sealed parcels entered in PR 150 and 151 having obtained the permission of the MC. Thereafter he, on 23.2.2001, handed over the sealed parcels in PR 150 and 151 to the Record Keeper whose name is also Sunil Perera and later on the same day produced in the MC for the purpose of sending them to the Government Analyst. After leading evidence in the MC and sealing the parcel again with the court seal he handed them to the Government Analyst. He says that when he handed over the parcels to Record Keeper Sunil Perera seals of the parcels were intact and when they were produced in the MC also the seals were intact. The evidence IP Sunil Perera at the trial was not challenged. He was not cross-examined by the defence counsel. Record Keeper Sunil Perera did not give evidence at the trial. The learned trial judge recorded the following admissions.

1. Productions marked M1 and M2 which relate to the MC Negombo case No. B 257/2001 of which the seals were intact were duly handed over to Record Keeper Registrar of the MC.
2. Those productions which were marked P1 and P2 before the Magistrate and to which the seals of the court were affixed on a covering paper were again handed over while the seals were intact to IP Sunil Perera.

I must mention here production marked M1 is P1 which was entered in PR 150 and production marked M2 is P2 which was entered in PR151.

Learned PC appearing for the accused appellant submitted that these admissions were recorded as a result of an agreement reached between the defence counsel and the prosecuting State Counsel outside court and that therefore the learned trial judge could not have considered these admissions. Learned PC further submitted that both defence counsel and the prosecuting State Counsel had agreed on these admissions before the commencement of the trial and as such signature of the accused was necessary for the said admissions. In order to appreciate this contention it is necessary to examine section 420 (2) of the criminal Procedure Code (CPC) as amended by Act No.11 of 1988 which reads as follows:

“It shall not be necessary in any summary prosecution or trial on indictment for either party to lead proof of any fact which is admitted by the opposite party or to prove any documents the authenticity and terms of which are not in dispute and copies of any documents may by agreement of the parties be accepted as equivalent to originals.

Such admissions may be made before or during the trial. Such admissions shall be sufficient proof of the fact or facts admitted without other evidence:

Provided however that this section shall not apply unless the accused person was represented by an attorney-at-law at the time that the admission was made:

Provided further that where such admissions have been made before the trial, they shall be in writing, signed by the accused and attested as to their accuracy and the identity and signature of the accused by an attorney-at-law.

According to the 2nd proviso of section 420(2) of the CPC, if admissions have been made prior to the commencement of the trial which should be in writing must be signed by the accused. Such admissions must be attested by an attorney-at-law as to their accuracy and identity and signature of the accused. Learned PC

appearing for the accused appellant contended that the said admissions have been made prior to the commencement of the trial and that as they have not been made in compliance with the 2nd proviso of the CPC, they have no validity in law. He further contended that as the learned trial judge had failed to follow the procedure established by law, the accused appellant had not had a fair trial. Have the said admissions been recorded outside the trial court prior to the commencement of the trial? The said admissions have been recorded at page 157 of the brief. Learned prosecuting State Counsel in moving the trial court to record the admissions addressed the court in the following language: "Your Honour, at this stage, as the defence counsel submitted..... ." Learned PC harping on the words 'as defence counsel submitted' contended that this was a private arrangement by both counsel prior to the commencement of the trial. But learned PC did not consider the words 'at this stage'. The above language clearly indicates that while the trial was continuing both counsel had agreed to record the admission. Thus there was no necessity for the learned trial judge to adopt the procedure laid down in the 2nd proviso to section 420 (2) of the CPC. I am therefore unable to agree with the above contention of learned PC.

Learned PC next contended that even if the said admission were recorded during the trial, they were not valid as the defence counsel at the trial had not consented to them. I now advert to this contention. An examination of section 420 (2) of the CPC as amended by Act No.11 of 1988 reveals that the trial Judge during the trial, can record admissions with the consent of the opposite party. In the present case can it be contended that the defence counsel had not given his consent to record the admissions. As I pointed out earlier learned Prosecuting State Counsel in moving the trial court to record admissions had addressed the court in the following language. Your Honour, at this stage as defence counsel submitted... ." This shows that defence counsel has agreed to record the admissions. If he was

not agreeable to the admissions he could have objected. No such objection was raised. It appears from the above proceedings that the learned defence counsel in order to save time of court had consented to record the above admissions. Learned PC further submitted that matters recorded at page 159 of the brief were not admissions but submissions of the State Counsel. But as I pointed out earlier the defence counsel had agreed to the said matters and they have been recorded as admissions. When I consider all these matters, I am unable to agree with the submission of learned PC. In view of the above admissions it was not necessary for the prosecution to lead evidence of record keeper Sunil Perera. When evidence was led at the MC to forward the productions to the Government Analyst, according to Sunil Perera's evidence, IP Nanayakkara, in addition to the Magistrate's signature, had placed his signature. Thus IP Nanayakkara had placed his signature on the cover of the production. IP Nanayakkara did not give evidence at the trial. The above matters in my view have not affected the prosecution case.

I have considered the evidence led at the trial. I am of the opinion that the case has been proved beyond reasonable doubt and that there is no reason to interfere with the judgment of the learned trial judge. I therefore affirm the conviction and the sentence of the accused appellant and dismiss the appeal.

Judge of the Court of Appeal.

PWDC Jayathilake J

I agree.

Judge of the Court of Appeal.