

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

In the matter of an Appeal in terms
of Section 331 of the Code of
Criminal Procedure Act No.15 of
1979.

C.A. No. HCC No.242/2012
H.C. Colombo No. HC 3448/2006

Ottalie Welayudhan Sunil Lal

Accused-Appellant

Vs.

Hon. Attorney General
Attorney General's Department
Colombo 12 .

Complainant- Respondent

BEFORE : **ACHALA WENGAPPULI, J.**
DEVIKA ABEYRATNE, J.

COUNSEL : Shanaka Ranasinghe P.C. with Niroshan
Mihindukulasuriya for the Accused-Appellant.
Janaka Bandara S.S.C. for the respondent

ARGUED ON : 16.01.2020, 22.01.2020, 29.01.2020 & 07.02.2020

DECIDED ON : 03.07 2020

ACHALA WENGAPPULI, J.

The 1st accused-appellant *Ottalie Velaudhan Sunil Lal* (hereinafter referred to as the Appellant) was indicted by the Hon. Attorney General, along with the 2nd accused *Geethani Dhammadika Dharmaratne*, before the High Court of Colombo. It was alleged in the said indictment, as its first count, that the Appellant had imported 2257.4 grams of Heroin during the period 28.04.2004 and 30.04.2004, an offence punishable under Section 54A(d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984. The second count was that the Appellant and the 2nd accused have conspired to traffic in the said quantity of Heroin, while the third count alleged that they attempt to traffic in the said quantity of Heroin.

Trial proceeded against both accused on their entering a plea of not guilty. At the closure of the prosecution's case and when the trial Court ruled that the

Appellant and the 2nd accused had a case to answer, both of them gave evidence under oath, in addition to calling witnesses on their behalf.

The prosecution alleged that it is the Appellant who is involved in the importation of a rice pounder machine from a Company located in India. The Certificate of Origin ("P3") pertaining to the shipment of the said pounding machine indicated it was to be shipped on board Merchant Vessel *Orient Success* from the port of Cochin in India. It also indicates that the consignee is "*Aloy Expo (Pvt) Ltd., of 98C, Averiwatta Road, Wattala*". The Bill of Lading dated 15.04.2004 ("P5") too is in the name of the said consignee and it bears confirmation that the consignment was "Shipped On Board" on 15.04.2004. By an email ("P7"), the Indian Shipping agency had amended the name of the consignee as *Geetani Dhammika Dharmaratna of 55/7, St Anthony's Mawatha, Colombo 3*, the 2nd accused before the High Court. The Cargo Arrival Notice ("P6"), Invoice ("P9"), Delivery Order ("P8"), Value Declaration to Sri Lanka Customs ("P11"), were all in the name of the 2nd accused as the consignee of the pounding machine.

When the machine had reached Colombo via sea freight, both the Appellant and 2nd accused have submitted themselves to the Customs procedure and paid the relevant customs duties in order to secure the release of the machine into their possession. During further investigations carried out on the machine, it was revealed that Heroin was concealed in four stainless pipes fitted into it. The Appellant during his cross examination admitted that it was he who imported the pounding machine. The Appellant during his cross examination also admitted that heroin was detected concealed in the said machine that was imported.

In delivering the impugned judgment on 14.06.2012, the High Court had found the Appellant guilty only to the 1st and 3rd counts. The 2nd accused was acquitted from the 2nd and 3rd counts. The Appellant too was acquitted of the 2nd count. The Appellant was sentenced to death upon conviction on both these counts.

Being aggrieved by his conviction and sentence, the Appellant preferred an appeal and at the hearing, learned President's Counsel who represented him had presented submissions on the broader and general ground of appeal that he was deprived of a fair trial. As the learned President's Counsel proceeded along with his submission, he had itemised several factors upon which he founded his ground of appeal. In support of these factors, it was contended that;

- a. the trial Court had failed to properly consider the relative probabilities of the version of events as presented by the prosecution,
- b. the trial Court had failed to properly consider the inconsistent and contradictory evidence of the prosecution in determining its credibility.

Learned President's Counsel, in elaborating the grounds of appeal based on the probability of the prosecution version of events, posed the question whether it is more probable for the Appellant, if he knew that Heroin was concealed in the machine, to abscond rather than to present himself voluntarily at the Customs to complete the clearance procedure and thereupon to face the consequences. He also contended that the trial Court had failed to consider the said probability of the prosecution version, in the light of the Appellant's assertion that it was not the machine he had imported from the Indian supplier.

In support of the second ground of appeal, it was submitted by the learned President's Counsel that following inconsistencies that exist in the prosecution, if taken cumulatively, would at least render the evidence of the prosecution witnesses unsafe to act upon;

- a. the inconsistency as to the number of days the officers have attempted to trace the pounding machine among the other consignments received by the Sri Lanka Ports Authority,
- b. the inconsistency as to the exact date on which the Appellant had presented himself at the Customs,
- c. the inconsistency that exists as to the day on which the pounding machine was imported and the date specified in the indictment alleging the importation,
- d. the inconsistency in the description of the machine as spoken to by the prosecution witnesses and also as to the vessel in which it had arrived, whether it was mounted on a palette or in a crate,
- e. the inconsistencies that exists in the evidence of the detecting officers as to the circumstances under which they detected and identified Heroin at the Lathe Shop,
- f. the inconsistencies that exists in the evidence as to the Appellant's conduct at the point on which Heroin was detected, whether he made a confession, or did a demonstration for the benefit of the witnesses to easily release the Heroin concealed in the stainless tubes,
- g. the inconsistency as to the reference number of investigations,
- h. the inconsistency as to when the weighing of the Heroin was done.

In relation to the contention that the trial Court had failed to properly consider the relative probabilities of the version of events as presented by the prosecution, learned President's Counsel contended that if the Appellant, as the prosecution claims, had knowingly imported the Heroin concealed in the pounding machine, then is it probable for him to get personally involved with the process of clearing at the Customs, in view of the dire consequences such an engagement would undoubtedly ensue.

Learned Senior State Counsel, in his reply contended that it is a risk that exists during entire process of importation, since any imported consignment must pass through Customs for clearing. He further submitted that the possibility identified by the learned President's Counsel only arises if the Appellant had a reason to believe that his ploy to import a large quantity of Heroin, concealed in a machine, was already known to the authorities at the time of clearing. He contended that the Appellant had no knowledge of the discovery of his importation of Heroin at that particular point of time.

In the judgment, the trial Court had considered the credibility of each prosecution witness against the positions that had been advanced through cross examination by the Appellant. The evidence of the prosecution is clear that the information of the concealed Heroin, was known only to the officers who were tasked to investigate that information and their superiors. Mere shifting of the item from the warehouse of Sri Lanka Ports Authority under Sri Lanka Customs is not known to the Appellant. This is indicative from the evidence that the Appellant and the 2nd accused have come to Sri Lanka Customs and had secured the services of a Wharf Clerk on their advice to help them with the generally complicated Customs procedure in clearing goods.

The prosecution repeatedly clarified from its witnesses whether the Appellant or the 2nd accused were not excited at any point of time during the clearing. Even when the Appellant and the 2nd accused were accompanied to the warehouse after payment of Customs duty for them to identify the item for clearing, there was no unusual behaviour that had been attributed to the Appellant. The prosecution, the Appellant as well as the 2nd accused admitted that they had identified the pounding machine, which contained Heroin, whilst at the Customs warehouse. That is the point at which the two Customs Officers had commenced their investigation upon the information they had received. The Officers assert that without a proper identification and making claim to the imported items by the importer, they would not be able to proceed with that particular inquiry. The "coercion" on the Wharf Clerk by the two Customs Officers, apparently had not been conveyed to the Appellant, putting him on his guard hinting that his scheme had been discovered.

In considering these factors, this Court is not inclined to accept that the probability of the prosecution version of events is not adversely affected in any manner due to this factor. This ground of appeal therefore had no merits.

Learned President's Counsel had placed more reliance on the other grounds of appeal, as indicated by his repeated emphasis on them. Of these several grounds as urged by the Counsel for the Appellant, almost all of them are centred around the issue of credibility of the prosecution witnesses and its lapses in presenting the case against the Appellant, except to the one concerning the date of importation as specified in the indictment and "actual date of importation". Therefore, it is proposed to consider the complaint by the Appellant that the date of importation as reflected in the indictment and the evidence presented by the prosecution on the date of importation, which

obviously indicate two contradictory time periods, and therefore whether the prosecution had failed to prove its allegation of importation, at the very outset of this judgment.

This particular ground of appeal demands that this Court determines the issue whether the conclusion reached by the trial Court was justified or not, in view of this particular inconsistency in the light of the prosecution evidence as to the date and time of the importation of the pounding machine. In order to determine that issue, this Court then must undertake an exercise by which it determines, as far as Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance is concerned, what it meant by the word "import" and how the effective date and time of importation should also be determined. In other words, this Court was to provide a definition to the word "import" in Section 54A, which would include as to when the act of importation is completed, since the Legislature did not provide one as it did with the two other offences namely "manufacturing" and "trafficking in" of a dangerous drugs.

The indictment alleged that the Appellant had imported the specified quantity of Heroin during the time period 28.04.2004 and 30.04.2004. It was pointed out by the learned President's Counsel that there is evidence of the prosecution witnesses that, in fact the pounding machine did arrive in Sri Lanka on 17.04.2004 and the information on Heroin was conveyed on 21.04.2004 but the Appellant presented himself to the Customs only on the 28.04.2004. It was therefore contended by the learned President's Counsel that the machine containing Heroin was already imported to Sri Lanka on a date very much prior to the date of alleged importation by the Appellant.

Section 54A(c) of the Poisons Opium and Dangerous Drugs Ordinance had made illegal import or export of any dangerous drug as a punishable offence. Even though the Legislature defined the words "traffic" and "manufacture" that constitute distinct offences, it did not however provide any such definition to the words "import or export" contained in the said Section.

In *Attorney General v Kumarasinghe* (1995) 2 Sri L.R. 1, this Court considered the question whether a passenger, who possessed 40 gold pieces in the transit lounge of the Bandaranaike International Airport, had "imported" them in to Sri Lanka without a permit, in violation of Section 21(1) of the Exchange Control Act. The said passenger had arrived Sri Lanka from Singapore and was waiting in the transit lounge *en route* to Male. This Court, having noted that the ordinary meaning of "import" is to "bring from abroad", however, adopted the definition provided for "import" in Section 22 of the Imports and Exports Control Act No. 1 of 1969, where it states that "*import with its grammatical variations and cognate expressions when used in relation to any good means the importing or bringing into Sri Lanka, or causing to be bought into Sri Lanka whether by sea or by air of such goods*" to rule that the appellant had in fact "imported" gold.

This judicial precedent on importation has no applicability to the instant appeal since it could clearly be distinguished on two aspects. In *Attorney General v Kumarasinghe* (*ibid*), the concern was that the appellant had committed a Customs/Revenue offence. Hence the applicability of the definition provided in the Exchange Control Act. In this instance, however, the offence of importation is created by Section 54A(c) of the Poisons Opium and Dangerous Drugs Ordinance. This Statute states that prohibited dangerous drugs could only be imported "... *in accordance with the provisions of this Chapter*" or upon a licence

issued by the Director of Health Services. Therefore, it appears that any act of importation of a dangerous drug is governed by provisions of Poisons Opium and Dangerous Drugs Ordinance and therefore the provisions of Customs Ordinance or of the Exchange Control Act has no applicability in the context of Section 54A(c) of Poisons Opium and Dangerous Drugs Ordinance.

In addition, the said precedent could be distinguished on factual considerations as well. The evidence before their Lordships was that the appellant was physically carrying the quantity of gold when he was detected whilst waiting in the transit lounge of the airport. Thus, with the arrival of the carrier (the appellant) to Sri Lanka, the quantity of gold, being in his immediate personal possession, too was simultaneously brought into Sri Lanka. In the instant appeal, the physical possession of the pounding machine had transferred from several entities and individuals, which were involved with its transportation throughout its journey across the seas until it finally claimed by the Appellant and the 2nd accused with their act of surrendering the necessary shipping documents to the Customs on 28.04.2004 for its clearing. However, a consignment to Sri Lanka aboard a sea vessel, was considered to be in the possession of its consignee, when considered in the perspective of law applicable to carriage of goods by sea, which has no direct relevance in imputing criminal liability when a consignee is involved with an illegal importation.

Returning to the definition of importation, it had already been noted that although the Legislature in its wisdom thought it fit to provide a definition to the words "manufacture" and "trafficking" in Section 54A of Poisons Opium and Dangerous Drugs Ordinance, however, desisted itself from providing a definition to the word "import". There would have been a very valid reason for this deliberate omission by the legislative body. In the absence of a statutory

definition to the term "import" in the said Ordinance, it is to be taken as to its ordinary dictionary meaning, without this Court attempting to Legislate by providing one through judicial interpretation. It has already been noted that the word "import" means to "bring from abroad", as per *Attorney General v Kumarasinghe* (supra).

There is at least one reported authority which had dealt with the term "importation" as found in the Opium Ordinance No. 5 of 1910. A similar view, as the one adopted in *Attorney General v Kumarasinghe* (supra), was expressed in relation to Section 4(1)(a) of Opium Ordinance No. 5 of 1910, by Dalton J in the judgment of *Ashton v Croos* 30 NLR 369 where it was held;

"...The definition of time of an importation as set out in section 14 of the Customs Ordinance, 1869, is only for the purpose of determining in the instances set out the precise time at which an importation shall be deemed to have had effect. In Whitfield v. Martin Singho [19 C. L. R. 103] however it was common ground between the parties that "importation" in both the Excise and Opium Ordinances meant the actual landing of the article and that was accepted as correct by Lyall Grant J. in upholding a conviction on a charge of attempting to import. A person may do something in respect of the importation of an article, in other words begin to import an article, before it is actually landed, but the act of importation is in the ordinary course completed, in the absence of any law or regulation governing special cases, when the article comes over sea, as here, by the landing of the article in Ceylon."

On one hand, the judgments of *De Silva and Others v L.B. Finance Ltd.*, (1993) 1 371, *Toussaint v Cecilia* 37 NLR 308, *Appuhamy v Mahil* 50 NLR 263 indicate that the superior Courts in the absence of any statutory definition have opted to adopt the dictionary meaning of the undefined word as found in a particular Section of a statute.

On the other hand, there also had been instances where the Courts have consciously avoided adopting the general dictionary meaning as to its interpretation of a particular word found in the statute, owing to its plurality in meaning and the ensuing complexities if such an adoption by a Court would necessarily entail. In *Attorney General v Rodriguesz* 19 NLR 65 it was observed by the Court, in relation to the task before it in finding an appropriate meaning to the word "concerned", that a "... very little assistance can be obtained from the dictionary meaning, or the derivation of the word "concerned"." There are also instances where the Courts have deliberately refrained itself from providing a definition to a particular word found in the statute, to which the parties attempted to attribute a meaning more favourable to each of them.

The case of *Fernando v Nesadurai* 49 NLR 263 is one such example. Basnayake J (as he was then) did not venture to provide a definition when there was no statutory definition provided to the word "building" as "... it will be unsafe to make this case the occasion for attempting to define on an expression which even the legislature has left alone..." .

The word "import" under different statutes has received attention of Courts. An opportunity arose before the Supreme Court to determine "the precise time at which an importation" of a ship was made and completed under Section 16 of the Customs Ordinance. In delivering its judgment of *Vallibel*

Lanka(Pvt) Ltd., v Director General of Customs and three Others (2008) 1 Sri L.R. 219 on this point, the apex Court stated thus;

"The court therefore has to examine section 16 of the Customs Ordinance in order to ascertain the time and mode of importation of the said vessel into the limits of the port. In terms of the said section the precise time at which importation of any goods shall be deemed to be the time at which the ship importing such goods had actually come within the limits of the port." (emphasis original)

The word importation to which the Oxford dictionary attributes the meaning "bring (goods or services) into a country from abroad" sounds a very simple process of moving goods across borders of two or more countries. There is no indication in the dictionary meaning that the word "import" in that context also includes the point of time when an act of importation is completed. Needless to say that the simple physical act of "importation" had assumed much greater complexity in the present day globalised trading practices and thereby inviting application of legal considerations in both domestic and international spheres. Thus, the act of importation had transformed itself into a complicated and drawn out process rather than a mere physical movement of goods across the frontiers of two or more States.

The various steps that are involved with importation of goods via sea freight was discussed by the Supreme Court in *Sri Lanka Ports Authority v Peiris* (1981) 1 Sri L.R. 101, when it looked into the legality of the imposition of certain charges by the appellant Authority on the Respondent, a consignee who had imported some goods by sea freight.

Their Lordships observed that;

"... the 'port services' that are obligatory on the Corporation to provide. These include stevedoring and landing. "Stevedoring" means "loading or unloading of the cargo of a ship", and "stevedoring" is defined in section 80 of the Act to mean "the operations connected with the loading, discharging, shipping, trans-shipping and storing of cargo in the holds of, or on board, any vessel". These services involve, inter alia, the provision of cargo barges or lighters by the Corporation for the landing and discharging of cargo. The Corporation has to bring the cargo in the lighter to the delivery point and thereafter the consignee has to clear the cargo and release the lighter without undue delay. The service of stevedoring and landing is not completed until the lighter containing the cargo is cleared by the consignee. Default on the part of the consignee in expeditiously clearing the cargo will result in the detention of the plaintiff's lighter. Then the consignee will become liable for damages for such detention. 'Demurrage' generally signifies the agreed amount to be paid as compensation for undue detention beyond the stipulated time.

It is also legally presumed that the ownership or possession of any goods in transit referred to a bill of lading always lies with the consignee even though the entities such as shipping agents, crew of the vessel and agencies connected to cargo storage which may have the temporary possession of that consignment only in the capacity of agents of the consignee. However, that position is not applicable to the instant appeal.

The complexity of the process of "importation" in the context of Customs is indicative from the long description of it in providing a Legislative definition of time of an importation as contained in Section 16 of the Customs Ordinance. Section 16 is a deeming provision where its provisions could be applied when "*it shall become necessary to determine the precise time at which an importation or exportation of any goods made completed ...*" and in *Vallibel Lanka(Pvt.) Ltd., v Director General of Customs and three Others* (*ibid*) this aspect was considered when the superior Court sought to decide the question of fact whether a particular ship was imported on a particular day or not.

Thus, it is clear that the Legislature thought it fit to leave the word "import", in relation to Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance, without a statutory definition although it did provide one, in relation to Section 16 of the Customs Ordinance, which applies to importations that are subject to its provisions and where applicable to Import (Control) Act. The offences that are defined in Section 54A of the said Ordinance were brought in by the amendment Act No. 13 of 1984, which had been introduced primarily to put in place an effective legal regime to combat the ever growing menace of illegal supply of dangerous drugs for local consumption. The intention of the Legislature could be easily inferred with its decision to insert a totally new Section to the Ordinance and thereby criminalising the acts of manufacture, import and export, trafficking in and possession of dangerous drugs and statutorily prescribing harsh penalties, which had left the Courts with limited discretion in determining an appropriate sentence for the offenders of these offences, as decided by the Supreme Court in *Thiruchelvam v Attorney General* (1995) 2 Sri L.R. 135.

The dictionary meaning of the word import therefore merely provides a very general reference as it simply means the movement of goods across international borders. This general meaning of the word import is clearly inadequate to determine the issue, as necessitated by the submissions of the learned President's Counsel, raised in the instant appeal, as to the exact point of time at which an act of importation is made complete. In these circumstances, even if the Courts preferred to accept the general meaning of the word "Import" as a starting point, it must retain its discretion to decide this vital issue whether there is importation in any given set of circumstances as revealed in the evidence presented before it. In doing so, the Courts will be mindful of some applicable considerations in relation to interpretation of statutes.

In *Dorothy Silva v Inspector of Police, City Vice Squad, Pettah* 78 NLR 553, the then Supreme Court stated:-

"Maxwell on Interpretation of Statutes, 12th Edition, page 40 quotes the following passage from Heydon's case in regard to legislation which seeks to suppress the mischief and advance the remedy.

" *The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro private commodo, and to add force and life to the cure and remedy, according to the true intent of the maker of the Act, pro bono publico.*"

The Supreme Court, in *De Zoysa v Fernando* (2005) 1 Sri L.R. 10, emphasised this rule of interpretation as Weerasuriya J stated "*The provisions of a statute must be construed with reference to their context and with due regard to the object to be achieved and the mischief to be prevented. Where two views are possible an interpretation which would advance the remedy and suppress the mischief it contemplates is to be preferred.*"

If, the Courts were to provide a definition to the word "import" in Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance, as expected in the present instance, in the absence of a statutory interpretation, there could arise situations where some future event may prove its inadequacy in the suppression of the mischief the Legislature had sought with the relevant pieces of legislature. In the circumstances, its apt to repeat here Basnayake J's statement "... *it will be unsafe to make this case the occasion for attempting to define on an expression which even the legislature has left alone...*".

When the Legislature brought the amendment to Poisons, Opium and Dangerous Drugs Ordinance by way of Act No. 13 of 1984, it is presumed that it was aware of the general interpretation given by the Courts to the word "import" in Section 4(1)(a) of the Opium Ordinance in *Ashton v Croos* (supra) and therefore would have decided against in providing one, leaving the Courts to decide that question of fact which might have a legal aspect intertwined to it as well, upon the evidence presented. In fact, that was the approach adopted by the superior Court in *Ashton v Croos* (supra);

"On the facts it seems to me clear that both the accused were concerned in importing the opium set out in the first count, and were also concerned in transporting the ganja set out in the second

count in contravention of the provisions of the respective Ordinances mentioned."

In these circumstances, it is reasonable to assume that due to the sheer complexity of the processes, both legal and physical, that are involved with of importation, the Legislature, being mindful and alive to those practical realities and limitations, had desisted itself from providing a statutory definition to the word "import" in Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance, and found a pragmatic solution by leaving a discretion and thereby allowing the Courts to determine; whether, in a given set of circumstances, there is an act of importation or not and if there is importation, when, that particular importation was made.

When the submission of the learned President's Counsel is considered, it appears that he challenges the conviction, in respect of the count of importation, on two grounds. Firstly, he highlights the discrepancy in relation to the date of importation as specified in the indictment and the date of importation as revealed upon evidence presented by the witnesses for the prosecution. Secondly, he contends that if the pounding machine was already imported as it had arrived in Sri Lanka on 17th and landed on 18th April 2004 , then the Appellant could not have re-imported it once again between 28th and 30th April 2004 as alleged by the indictment. Learned President's Counsel contended that the act of importation was already completed when the machine landed in Sri Lanka on 18th April 2004.

A Similar argument, as the one presented in the instant appeal, was presented by the appellant in *Ashton v Croos* (supra). The evidence that were

available before Courts in the said appeal is as follows. The two appellants *Anthony Croos* and *Mallis Appu* were jointly charged with importation of four pounds of Opium in H.M. Customs launch "Wasp" on 7th September 1928. The said quantity of Opium was brought in to the launch from the ship "SS Bamora", which had dropped anchor apparently a few days prior to the detection. The quantity of Opium was detected in the early hours of the date specified in the charge, near the bridge over the Lake Canal.

On behalf of the two appellants, it was submitted that "...the ganja and opium had been imported so soon as the ship "Bamora" reached territorial waters or came to rest in the harbour, and if that was so, the landing of it from ship to shore by the launch was not "importation".

Dalton J, having noted that "... in *Whitefield v Martin Singho* (19 C.L.R. 103), however, it was common ground that between the parties that "importation" in both the Excise and Opium Ordinances meant the actual landing of the article and that was accepted by Lyall Grant J in upholding a charge of attempting to import," thereafter proceeded to hold that "... on the facts it seems to me clear that both the accused were concerned in importing the opium" and dismissed their appeal.

It appears from the above, the Court had accepted that there was importation of Opium on the basis that the quantity of opium had actually landed when it was found ashore in the possession of the appellants, although the ship, in which the Opium was brought on board, had already dropped anchor in the Port of Colombo, prior to its subsequent detection on land. This clearly indicated that the Courts have consciously steered away from the adaptation of a rigid definition of "import" as given in Customs Ordinance, and in determining the issue whether there was an act of importation which had been

statutorily criminalised, opted to retain its discretion to determine the said issue, upon the evidence presented before them.

After a lengthy discussion and determination of as to the law which is applicable in determining the issue whether there was importation as alleged or not, it is appropriate at this juncture to turn the attention of Court, to consider the evidence presented before the trial Court by the prosecution in relation to the said allegation of importation.

Deputy Director of Customs *Lesly Gamini*, who was in charge of the Preventive Unit of Sri Lanka Customs, received information from one of his private informants that prohibited drugs are being brought into Sri Lanka, concealed in a pounding machine imported by Aloy Expo Pvt Ltd of 98C, *Avariawatte Road, Wattala*. Said pounding machine arrived at Colombo Port in container TXEU 4749362 on board the vessel *Orient Success* on 17.04.2004. This information was duly entered in form DOPL 187 and Assistant Superintendents of Customs *Udaya Gamini* and *Senanayake* were entrusted with the responsibility of investigating into the veracity of said information on 21.04.2004. They have therefore opened up a file in relation to this investigation under reference POM/610/2004. When they enquired as to the location of the suspected pounding machine, it was learnt that the machine had already been unloaded and removed to "B/Q" warehouse, which belonged to Sri Lanka Ports Authority. The Customs Officers have then issued a letter preventing the clearance of the said machine to the keeper of the said warehouse. They did not receive any co-operation by the officers of SLPA to locate and identify the suspected pounder machine, but with the assistance of the store keeper, the officers have finally located it. The machine was mounted on a wooden palette and had a label affixed to it indicating that it had arrived through the vessel "*Lanka Mahapola*".

The machine was then taken charge by the Customs with the entry "seized by Customs" and removed the same to "Japan" Warehouse on 27.04.2004, which was operated under the control of the preventive unit of Sri Lanka Customs.

Since the Customs could not proceed with an inquiry without the consignee claiming ownership to the machine, the officers had to wait until the Appellant *Ottalie Velaydhan Sunil Lal* and 2nd accused *Geetani Dhammika Dharmaratna* presented themselves before the Customs with the relevant documentation in relation to the importation of the said pounding machine.

The Certificate of Origin ("P3") pertaining to the shipment of the said pounding machine indicated it was to be shipped on board Merchant Vessel *Orient Success* from the port of Cochin in India. It also indicates that the consignee is named as "*Aloy Expo (Pvt) Ltd., of 98C, Averiwatta Road, Wattala*". The Bill of Lading dated 15.04.2004 ("P5") too is in the name of the said consignee and it bears confirmation that the consignment was "Shipped On Board" on 15.04.2004. By an email ("P7"), the Indian Shipping agency had amended the name of the consignee to *Geetani Dhammika Dharmaratna* of 55/7, St Anthony's Mawatha, Colombo 3, the 2nd accused. The Cargo Arrival Notice ("P6"), Invoice ("P9"), Delivery Order ("P8"), Value Declaration to Sri Lanka Customs ("P11"), were all in the name of the 2nd accused as the consignee of the pounding machine.

On 28.04.2004, the Appellant and the 2nd accused have presented themselves to the Customs claiming their ownership to the pounding machine. They tendered documentation in support of their claim in importation of the pounding machine, which included of a faxed copy of the catalogue of the pounding machine, a draft Bill of Lading with its two originals, Cargo Arrival

Notice, original of the Certificate of Country of Origin. However, the Appellant and 2nd accused had no relevant documentation concerning payment of the Customs Duty and importation taxes with them and were advised to obtain services of a Wharf Clerk to complete the process of clearing, which they did on the following day.

Witness *Gamini* (PW1) had thereafter released the documents back to the Appellant, who then returned to him with the Customs Assessment Notice, Delivery Copy of the Customs, Invoice, Delivery Order, Draft Bill of Lading, Certificate of Country of Origin and the faxed copy of the catalogue. The witness, having satisfied that the Appellant had already paid the required Customs Duty, proceeded along with him and the 2nd accused to the Japan Warehouse, where the Appellant identified the pounding machine P1 as the one he imported from India.

The witness also had noted that the signature that appeared in the Invoice P9, appears to be of the Partner of Nass Associates, the exporter from India, bears a remarkable resemblance to the signature of the Appellant, that appeared in his initial statement to Customs on 28.04.2004. This observation by the witness assumes greater relevance as to the role played by the Appellant in the importation of the machine, when the Court considers this item of evidence in the light of the witness *Kumara Aloysius* who gave evidence on behalf of the Company Aloy Exports (Pvt.) Ltd, the initial consignee of the pounding machine.

Witness *Jude Kumara Aloysius* states that he had setup the Company Aloy Exports (Pvt.) Ltd and his Company is involved only with exporting of vegetables and not with any imports. He knew the Appellant due to prior acquaintance. The Appellant had some discussion with him concerning

importation of a machine. The witness declined to proceed with the said proposal and the Appellant departed only with the witness's business card. At a later point of time, a wharf clerk and the Customs have contacted him over an instance of importation of a pounding machine, to which he totally denied of any involvement or knowledge. He also states that he never opened any Letter of Credit for importation of such a machine nor had any documentation relating to this particular import in his possession. This evidence was not challenged by the Appellant as he did not cross examine the witness *Aloysius*.

The missing parts of the sequence of events as to how the shipping documents, initially made in the name of the said Company, and the circumstances under which an amendment to the consignee's name is disclosed by witness *Bandula Withanage*, a former wharf clerk. According to this witness, the Appellant approached him in April 2004 and wanted the witness to clear a pounding machine that he is about to import through a Company located in *Wattala*. By then the witness's license to act as a clearing agent had lapsed. However, when the witness had called to the "importer" of the machine, whose contact number was provided by the Appellant, he was told that the "importer" had nothing to do with this particular importation. The witness then conveyed this information to the Appellant, who, upon hearing the refusal of the Company to get involved with the clearing of the pounding machine, had directed the witness to amend the name of the consignee by supplying a name of a woman with an address in *Kollupitiya*. The required fee for the change of name was paid by the Appellant himself.

In her evidence, the 2nd accused said that she knew the Appellant from her childhood and had attended his wedding in *Kerala*, India. In April 2004, the Appellant had called her from India and requested her help in clearing a

pounding machine he had shipped. The Appellant told her that the Company which imported the machine had changed its mind and the machine might be useful in her cake business. It was her understanding that the imported machine is of a size of a kitchen blender which could be kept on a table and even if the machine did not meet her expectations, then it could be sold to a third party. The Appellant mentioned that the machine would cost her about 300 USD and she could pay in instalments. When she saw the machine on the 30th April at the Customs, she realised that the imported machine is an industrial grade one and not suited for home use.

In concluding that the Appellant is guilty of the importation of the specified quantity of Heroin, the trial Court had considered the evidence presented before it by prosecution as well as the evidence of the Appellant and the 2nd accused along with their witnesses. The evidence of the 2nd accused was accepted as credible by the trial Court and acted upon it since she was acquitted from the two counts upon which the prosecution had founded its accusation against her. There is no challenge to that determination.

In addition to above, the trial Court had correctly decided to act upon the admissions made by the Appellant during his cross examination by the prosecution. The Appellant had admitted the following in cross examination;

- a. he had overseen the packaging of the machine prior to its shipping by its exporter in India,
- b. that it was he who had imported the pounding machine,
- c. he had prepared the documents in the name of the 2nd accused to clear the machine, when the Company refused to get involved,
- d. he had planned the importation, and

- e. he had identified the machine as the one he had ordered from the Indian exporter.

As it was highlighted the pounding machine was brought into Sri Lanka on 17.04.2004 and remained unclaimed in the warehouse, awaiting the arrival of the Appellant and the 2nd accused on 28.04.2004, along with the relevant shipping documents with a view of completing the clearing procedure and securing its release. The specified quantity of Heroin was concealed in the said machine. Obviously the concealed quantity of Heroin was not declared to Customs and had not been brought into Sri Lanka upon any valid legal authorisation. Therefore, when the importation of the machine reached its final stage of the process of importation, so did the quantity of Heroin concealed in it. The fact that Heroin was found in the machine is a fact which had been admitted during the trial by the parties under Section 420 of the Code of Criminal Procedure Act.

The word "import" is a "verb", which in turn also described as "action". This presupposes that there should be an act and a doer of this act. Therefore, in relation to the act of importation, an item or a consignment of goods must not only be brought from abroad but must have its nexus to the doer, the importer.

The offence of importation could not therefore be committed by merely bringing goods across frontiers of a country without the intervention of an importer who initiates and complies the process of importation. This type of situation can only happen when such things are merely found ashore in a particular country after having drifted into its territorial waters from that of another country, probably after shipwreck or being thrown aboard from a vessel due to some reason. In these situations, the mere landing of an item is not

importation because that has happened without a conscious act of an individual. Another situation would be a particular item may have been found being abandoned in the transit lounge of an airport, where no individual claiming he had imported that item, although it may have had its origins in a foreign country and found in Sri Lanka. This type of situation itself would not satisfy the offence of importation , unless someone decides to move it beyond the transit area and completes the process.

In this particular instance, therefore, the point at which the importation process had reached its culmination is when the Appellant and 2nd accused have claimed ownership to the pounding machine and completed the clearing procedure after making the relevant payment of the Government Taxes on the machine. That enabled them to have total control of the imported article with its contents. Then only the Appellant will have complete access to the Heroin concealed within the machine. If the Appellant and the 2nd accused did not present themselves for clearing of the machine, the Machine would have remained in the custody of the Customs, subjected to the statutory provisions contained in Section 83 of the Customs Ordinance. If that was the situation, the machine may have landed in Sri Lanka, but the act of importation remains incomplete for there cannot be a situation where some item merely happens to be in Sri Lanka after being ferried across borders without someone consciously initiating and completing the process of importation.

It is noted above that the Appellant and the 2nd accused, being the actual importer and the "consignee" of the pounding machine respectively, have, by presenting themselves and clearing the imported pounding machine containing Heroin, completed the process of importation and thereby marked its terminal point. Therefore, the mere fact of landing the machine in Sri Lanka containing

Heroin, without its formal clearing by the importer would not therefore complete the process of importation as envisaged in Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance. The terminal point of the process of importation reached only on the 28th April 2004 when the Appellant and 2nd accused, having identified the item, paid applicable Customs duties and cleared the imported article. This day is well within the specified time period as per the indictment upon which the Appellant was tried. If not for the prior information received by Customs the pounding machine would have been released to the Appellant and 2nd accused.

In order to prove the offence of importation of a dangerous drug, not only the prosecution must prove the physical act of bringing it across the borders of Sri Lanka by an importer, but also that the importer has had the requisite mental element in the act of importation.

It is evident, even upon a cursory glance of the wording in Section 54A or 54B of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984, that there is no mention of the word "knowingly" in the importation, possession, trafficking in of any prohibited substance. This conspicuous absence of any reference to a mental element in respect of the commission of the offences that are set out in the said Sections, had given rise to an impression that there was no burden on the prosecution to prove a mental element.

Legality of this particular view was examined by this Court in *Van der Hults v Attorney General* (1989) 1 Sri L.R. 204, when the appellant contended that "... the learned trial judge had misdirected himself in law when he held that there was no burden on the prosecution to prove that the appellant had the knowledge that he

was carrying a prohibited drug, and that therefore his conviction was invalid." This was an instance where the appellant before their Lordships was accused of illegal possession of and exporting a prohibited drug and thereby committed offences described in Sections 54A and 54B of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984, which made those acts punishable offences.

In delivering its judgment of *Van der Hults v Attorney General* (*ibid*), a divisional bench of this Court stated;

"We are of the view that mens rea is an essential ingredient of the offences with which the appellant was charged. The ordinance nowhere rules out the necessity, recognized in the general law, that the prosecution must prove this element beyond reasonable doubt."

Adoption of this view is a reflection of continuation of a consistent approach of the appellate Courts.

After undertaking an exhaustive consideration and analysis of the applicable judicial precedents, Ennis J, in delivering the judgment of *Attorney General v Rodriguesz* 19 NLR 65, quoted the judgment of *Sherras v De Rutzen* (1895) 1 QB 918, where Wright J stated thus:-

"There is a presumption that mens rea, an evil intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject-matter with which it deals, and both must be considered."

In *Ashton v Croos* 30 NLR 369, Dalton J applied the requirement of requisite knowledge on the part of the appellants as his Lordship concluded “ ... that both accused were fully aware that Martin was conveying ganja and opium ashore and were both playing a willing and active part in its conveyance.”

A divisional bench of the then Supreme Court, in its judgement of *Perera v Munawweera* 56 NLR 433 had stated that “The correctness of the principle referred to at p. 43—that the absence of the word “knowingly” shifts the burden of proof—has been doubted by Devlin J. in *Taylor's Central Garages (Exeter) v. Roper* [5 (1951) 2 T. L. R. 284]”. This has been the consistent approach adopted by the English Courts as well. Archbold (2015) states (at p.1967) in reference to the word “knowingly” that “... where this word is included in the definition of an offence it makes it plain that the doctrine of mens rea applies to that offence. However, its absence is no indication that the doctrine does not apply” as per the judgment of the House of Lords by Lord Reid in *Sweet v Parsley* [1970] A.C. 132.

In *Shanmugaraja v Republic of Sri Lanka* (1990) 2 Sri L.R. 57, the appellant was accused of illegal importation and possession of a dangerous drug and following the pronouncement of *Van der Hults v Attorney General* (ibid), it was recognised that in the instances where it is alleged that the offence of illegal importation of a dangerous drug is committed, the prosecution must also prove the mental element being existence of requisite knowledge of the accused.

The then Supreme Court had the occasion to consider the question as to who should prove “importation” during proceedings before the District Court for seizure of prohibited goods, in *Attorney General v Lebbe Thamby* 61 NLR 254. In this instance, Basnayake CJ has held;

"The Customs Ordinance is a penal enactment which imposes severe penalties on those who violate its provisions. The Crown must therefore establish any breach of those provisions beyond reasonable doubt as in a criminal prosecution. The onus of proving that the gold bars were imported being on the Crown it should have established that fact beyond reasonable doubt. It has failed to do so. The onus proving lawful importation does not therefore lie on the respondents."

It is trite law that in a criminal prosecution, the burden of proving its allegation lies squarely on the prosecution and both the *actus reus* and *mens rea* of the alleged offence must be proved beyond reasonable doubt, except for very limited instances where the Legislature thought it fit to depart from this fundamental principle.

Thus, in view of the above precedents, it is settled law that in the offences that are described in Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance as amended consists of both physical and mental elements.

In these offences, the mental element consists of the accused's knowledge of the criminalised act, he is accused of and engaged in. The nature of the requisite knowledge of the offences of illegal trafficking in and possession of a dangerous drug and the attendant circumstances a Court would take into consideration in determining its presence had received attention in *Sumanawathie Perera v Attorney General* (1998) 2 Sri L.R. 20, in the light of the reasoning of an English judgment of *Warner v. Metropolitan Police*

Commissioner (1968) 52 Criminal Appeal Report 373, where Lord Wilberforce stated as follows:-

"The question, to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused should be held to have possession of the substance, rather than mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances - to use again the words of Pollock & Wright, Possession in the Common Law, p. 119 - the 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, had been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substances"

In *R v Hussain* [1969] 2 QB 567 Lord Widgery stated what the accused must know is;

"...the evasion of a prohibition against importation and he knowingly takes part in that operation, ... even if he does not know precisely what kind of goods are being imported. It is, of course, essential that he should know that the goods which are being imported are goods subject to a prohibition. It is essential he should know that the operation with which he is concerning himself is an operation designed to evade that prohibition and evade it fraudulently".

In relatively a recent judgment of *Regina v Forbes* [2001] UKHL 40, it is stated that the correctness of decision in *R. v Hussain* (*ibid*) by Lord Widgery LJ was accepted in *R v Hennessey* (1978) 68 Cr App R 419, *R v Taaffe* [1984] AC 539, 547 and in *R v Shivpuri* [1987] AC 1.

The judgment of *R v Hennessey* (*ibid*) is where Lawton LJ added:

"It matters not for the purpose of conviction what the goods were as long as he knew that he was bringing into the United Kingdom goods which he should not have been bringing in."

The English Courts have also considered instances where the knowledge could be imputed constructively. In such instances, Lord Bridge in *Westminster City Council v Croyalgrange Ltd*, 83 Cr. App. Rep 155, stated "*... it is always open to the tribunal of fact ... to base a finding of knowledge on evidence that the*

defendant had deliberately shut his eyes to the obvious or refrained inquiry because he suspected the truth but did not wish to have his suspicions confirmed."

This clearly indicates the nature of the mental element that is necessary to prove the commission of the offence of importation of a dangerous drug. The requisite mental element is the knowledge entertained by the accused that he is possessing and or importing some substance subject to a prohibition to possess and as well as to import.

In the instant appeal, what the prosecution was required to establish in relation to its allegation of importation of a prohibited drug was that the Appellant had imported the Heroin and in doing so he also had the requisite knowledge of the prohibited substance and of its importation.

The evidence presented by the prosecution clearly establish that the appellant had taken an active role to import the said machine into Sri Lanka from India. The admission marked by the prosecution and the Appellant at the very outset of the trial under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979, indicated the fact Heroin was detected in the said pounding machine is admitted without any formal proof of that fact being proved through witnesses. There was no dispute by the Appellant either to the fact that the pure quantity of Heroin that was detected concealed in the said pounding machine is 2257.4 grams.

Thus, the trial Court only had to consider, whether it is satisfied from the evidence presented by the prosecution to the required degree of proof; firstly, whether it was the Appellant who imported the prohibited substance concealed in a pounding machine (the physical element of the offence of importation) and secondly, whether the Appellant, when he imported the said pounding machine,

has had the requisite knowledge of the prohibited substance concealed therein (the mental element).

Learned Senior State Counsel, during his submissions, had highlighted the Appellant's conduct during the Customs inquiry particularly at the time of detection of Heroin, concealed in one of the stainless steel pipes.

After the identification of the imported pounder, by the Appellant and the 2nd accused witnesses *Gamini* and *Senanayake* have inspected it in order to verify the information they received regarding importation of illicit drugs concealed within. They suspected the only place there could be a concealment of drugs would be the stainless steel pipes that are attached to the machine. According to *Gamini*, these steel pipes were heavily coated with grease, an unusual precaution, in view of the fact that they were made of stainless steel. One of the pipes were removed from the machine, and the party consisting of the Appellant, the 2nd accused and the witnesses, had thereafter proceeded along to a nearby lathe shop where the stainless steel pipe was drilled into and thereupon the discovery was made by the prosecution witnesses of the concealed Heroin contained within it. With this discovery of Heroin, the Appellant, having claimed it is Heroin, had thereafter made a generous offer of a cash reward, if the witnesses are prepared to discontinue with their investigation. The witnesses also claim that the Appellant had thereafter revealed an easy method to release the concealed Heroin from the three remaining stainless steel pipes. It was later revealed that each of these pipes could be separated into two parts by applying the method described by the Appellant and thereby making a total of eight segments of stainless steel pipe.

The detection of Heroin was duly reported to their senior officer, the Director of Customs, and the witnesses have weighed the detected Heroin which was in eight packets separately in the presence of the Appellant and the 2nd accused. The Police Narcotics Bureau was thereafter informed of the detection and the productions were sealed in the presence of IP Welagedara, later who arrived to take over the productions and the suspects from the Customs. These productions were handed over to the PNB on 01.05.2004 at 6.30 p.m.

The analysis conducted by the Government Analyst Department revealed that the eight parcels contained 4958.6 grams of brown powder and it contained 2257.4 grams of pure Heroin. Traces of Heroin was also identified in the eight metal pipes sent for analysis.

This evidence indicates the existence of the both physical and mental elements of the offence of importation of a prohibited dangerous drug. During cross examination of these witnesses, the Appellant suggested to them that the witnesses have failed to mention the conduct attributed to him this factor in their statements and have come out with it only during trial. At that point of time, learned State Counsel had pointed out to trial Court that the witness had in fact mentioned that fact in his statement.

The Appellant during his examination in chief itself claimed that he paid Rs. 5000.00 to Customs officers when Heroin was detected but thereafter denied having made any cash offer without explaining as to why he parted with that money. He denied the pointed suggestion on this aspect during cross examination. He also denied that he never admitted Heroin but signed his statement under compulsion. Only during his cross examination by the 2nd accused, did the Appellant said if he knew the machine contained Heroin, he

would not have got involved in the clearing. However, he did not deny that he had disclosed the officers of an easy method in taking out the concealed Heroin inside the remaining steel pipes. The conduct attributed to the Appellant by the prosecution remained unchallenged.

In *Gunapala v Attorney General* (which states 2007) 1 Sri L.R. 273, when the appellant had raised the issue of whether the non-production of murder weapon during trial adversely affects the validity of the conviction, this Court, in addition to considering several Indian authorities where similar sentiment was expressed, placed reliance upon the following statement of HNG Fernando J (as he was then) in the judgment of *Edrick de Silva v Chandradasa de Silva* 70 NLR 169, in arriving at the conclusion when an appellant had failed to challenge a particular factual position that had been presented by the prosecution before the trial Court, in appeal he cannot successfully challenge that fact;

"... Where there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross-examination that is a special fact and feature in the case. It is a matter falling within the definition of the Word "prove" in section 3 of the Evidence Ordinance, and as trial Judge or Court must necessarily take that fact into consideration in adjudicating the issue before It ...".

This Court, in the unreported judgment of *Phillipu Mandige Nalaka Krishantha Kumara Thisera v Attorney-General-* CA 87/2005 - CAM 17.5.2007 had held that;

"... whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that

such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness.".

This reasoning was adopted and followed by this Court in *Karunaratne V Attorney General* (2007) 1 Sri L.R. 255 as well as in *Subasinghe v Attorney General* (2007) 1 Sri L.R. 224.

Thus, it is clear from the evidence of the prosecution witnesses and that of the 2nd accused, that, it was the Appellant who actually imported the machine by making the purchase, overseeing its shipping, preparing the necessary documentation, using his friend's Company name as the consignee, amending the papers to insert the 2nd accused name by luring her with the prospect of improving her cake business with the machine, when he realised the Company would not get involved in clearing, then getting her to clear it once it had arrived in Sri Lanka using her as a proxy, supports a strong inference against him, that he did know what was inside the machine when it was imported and had taken precautions not to leave any incriminating evidence against him in its importation.

When the role played by the Appellant in the process of importation is considered in the light of these particular items of evidence, his ground of appeal which was founded on the fact that the inconsistencies that exists in the evidence as to his alleged conduct at the point on which Heroin was detected, whether he made a confession, or did a demonstration to the benefit of the Customs officers making those items of evidence unreliable, could not succeed. Witness *Gamini* had in fact mentioned those items of evidence in his statement and therefore is

quite insufficient to raise any reliability issue in these circumstances. In considering the fact that of *Udaya Gamini* gave evidence in a Court of law for the first time in this particular instance is a factor that had to be considered by the trial Court in assessing his credibility, in addition to his approach to the detection. The subsequent conduct of the Appellant since the detection, though relevant in criminal proceedings, may not have received the attention it should have, by the two Customs officers who are primarily trained to detect Customs violations.

There was credible evidence before the trial Court that the machine was in fact shipped from India and was brought to Sri Lanka aboard a ship. There was also evidence that it had been brought ashore and kept in a warehouse. Thus, the machine had in fact been "*brought from abroad*". This satisfies the general meaning of "import". But the offence of "import" of a dangerous drug envisages an additional factor to complete the process of importation which occurred on 28th April 2004. That was the day in which the Appellant and 2nd accused have cleared the item from Customs. Therefore, the allegation of importation of Heroin as specified in the indictment has been proved by the prosecution to the required degree of proof.

Thus, in view of the above considerations, this Court is of the considered view that the trial Court had correctly concluded that the offence of importation of the specified quantity of Heroin during the time period specified in the indictment has been proved beyond reasonable doubt. Accordingly, this Court holds the view that the ground of appeal raised on this point is not entitled to succeed.

Remaining grounds of appeal that had been raised by the Appellant had one common underlying element. All of these grounds are based on the proposition that the prosecution had failed to prove the identity of the item imported into Sri Lanka. The concerns expressed by the learned President's Counsel on the inconsistency as to the number of days the officers have attempted to trace the pounding machine among the other consignments received by the Sri Lanka Ports Authority, the inconsistency as to the exact date on which the Appellant had presented himself at the Customs, the inconsistency in the description of the machine as spoken to by the prosecution witnesses and also as to the vessel in which it had arrived, whether it was mounted on a palette or in a crate and the inconsistency as to the reference number of investigations have this common denominator and had a bearing on the issue of the identification of the imported item.

It was stressed at the hearing of the instant appeal that the shipping documents clearly indicate the machine that had been shipped from India was contained in a crate but when the Customs Officers have located the pounding machine, it was mounted on a palate and not in a crate. It also had a label affixed to it that it had arrived in Sri Lanka aboard the ship *Sri Lanka Mahapola* but the shipping documents indicate that it had arrived aboard vessel *Orient Success*. Learned President's Counsel also highlighted the inconsistencies that exist in relation to the number of days the officers have taken to identify the machine, the wrong dates and reference numbers in internal communications of the Customs.

In stressing the stance of denial of the Appellant, learned President's Counsel submitted that the prosecution witnesses were suggested that a wrong

machine was identified by the Customs and the Appellant was therefore consistent in his position of denial.

The prosecution witness *Gamini* said that unless and until someone claims ownership of the imported rice pounder, they could not proceed with inquiry in relation to the importation of narcotics, by examining the machine upon dismantling it. Witness *Priyantha Senanayake* (PW2) also had testified as to the importance of such identification of a cargo item by its consignee. According to him, if there is no identification by the consignee, then a different procedure applies and the identification of the item had to be made by one of the shipping agents concerned with the importation. The two prosecution witnesses claim that the Appellant and the 2nd accused have identified the imported machine in their presence at the Customs warehouse.

As submitted by the learned President's Counsel, the two prosecution witnesses were suggested that the Appellant did not identify the machine due to difference in its appearance. This position was denied by the witnesses who reiterated that the Appellant had identified it. In re-examination it was clarified from the witnesses that such a position never been put to them by the Appellant during their investigations.

The Appellant, in his examination in chief stated that he had shipped the machine in a crate but the machine that one mounted on a palate in the Customs warehouse was incomplete without its bucket and few other rods and therefore not the machine he put into sea freight. He also claims the Customs had foisted the ownership of the machine on him. However, during his cross examination the Appellant had shifted his position multiple times and finally conceding to the allegation of the prosecution.

Initially the Appellant claimed that he had acted as an intermediary between the Indian Company and the consignee Company. A contradiction was marked off his denial that the exporting company is registered under his name in India. Then the Appellant admitted that it was his scheme to import the machine and he is the importer.

Another position taken up by the Appellant is that there was another similar machine in the warehouse. Contrary to this assertion, the Appellant had thereafter and repeatedly admitted that he had identified the machine at the Customs as the one he shipped from India. The Appellant had repeated the said admission once more during cross examination by the 2nd accused.

The trial Court, having evaluated the Appellant's evidence for its credibility decided not to act on his denial as his was not consistent on his stance and also on his demeanour in the witness box. It is evident upon perusal of the judgment of the trial Court that in finding guilty of the Appellant primarily on the count of importation was based on its conclusion that his position is that he had no knowledge of the concealed Heroin in the machine he imported. This approach was not challenged by the Appellant as he himself admitted having imported the rice pounder that had been taken charge by the Customs. At the commencement of the trial the parties have agreed under Section 420 that heroin was detected in the said machine. Therefore, the only disputed question of fact left to be decided by the trial Court was whether the Appellant has had the requisite knowledge of the prohibited substance concealed in the said machine.

The un-contradicted evidence of the prosecution that the Appellant had knowledge of an easy way to take out the concealed Heroin from the stainless steel pipes without drilling into them is a factor sufficient to draw the positive inference that he did possess the requisite knowledge as envisaged in the offence of importation of a dangerous drug. His bare denial of any knowledge, as admitted by the Appellant, is advanced only during the very late stage of his evidence for the first time.

The prosecution had clearly established a *prima facie* case against the Appellant on the counts of importation and attempt to traffic in of Heroin. The Appellant too had admitted he imported the machine and Heroin was detected concealed within it. His specific denial of not knowing is contradictory to the unchallenged evidence on his subsequent conduct.

When the prosecution had established a *prima facie* case against an accused in relation to commission of an offence under Poisons Opium and Dangerous Drugs Ordinance, the applicable legal position has already been considered by this Court.

Perera J agreed entirely with the submission the learned Senior State Counsel in *Shanmugaraja v Republic of Sri Lanka* (1990) 2 Sri L.R. 57, who contended 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."

In the instant appeal the Appellant's position of ignorance as to the concealed Heroin in the machine was not tenable due to positive evidence presented by the prosecution as to his knowledge which he opted not to challenge.

Before this Court part with this judgment, it is appropriate to cite *Fernando J* in the judgment of the Supreme Court of *Ranjith Fonseka v Attorney General* (1990) 1 Sri L.R. 50. It is stated in the judgment;

"Learned President's Counsel finally contended that even though the impugned evidence did not amount to a confession, and even if it could not reasonably have been so considered by the jury, there was nevertheless a possibility that the jury might have thought that the Appellant had made a confessional statement, and that it was therefore the duty of the learned High Court Judge to direct the jury that it was not a confession."

In dealing with this contention, *Fernando J* stated;

"Whether or not, as a counsel of perfection, that might have been done, there was certainly no duty to do so, and the failure to do so did not result in any illegality or prejudice to the Appellant. Our system of criminal justice rightly imposes on the Judiciary an onerous duty of fairness to the accused, but this duty cannot be exalted into a barrier which would obstruct the administration of justice, to the detriment of the victims of crime as well as the community at large."

In view of the above reasoning, this Court is of the view that the several grounds of appeal as urged by the learned President's Counsel are devoid of merit and therefore the appeal of the Appellant ought to be dismissed while affirming his conviction on both counts of importation and attempt to traffic in of Heroin.

Accordingly, this Court affirms the conviction of the Appellant on the two counts of importation and attempt to traffic in of Heroin by the High Court of Colombo in case No. HC 3448/06.

Even though, there was no challenge on the sentence of death imposed on the Appellant during the hearing, when considered against the aggravating circumstances of executing a well-planned scheme to illicitly import and attempt to traffic in a large quantity of Heroin, using the Appellant's engineering knowledge and exposing his long standing family friend, an unsuspecting 2nd accused, and luring her into that scheme, which cost her liberty and family, unreservedly deserves the harsh punishment he had been imposed with. Hence, this Court affirms the sentences of death imposed on the Appellant as the High Court had imposed.

The appeal of the Appellant is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL