

242/2013

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

In the matter of an appeal against the
Order of the High Court under section
331 of the Code of Criminal Procedure
Act No. 5 of 1979 as amended.

1. Alvitigalage Don Dinesh Nimantha
2. Ravi Murugesh Ananda

Accused-Appellants

C.A. Case No:-242/2013

H.C. Colombo Case No:-4862/2009

V.

The Attorney General
Attorney General's Department,
Colombo 1.

Respondent

Before:- H.N.J. Perera, J. &

K.K. Wickremasinghe, J.

Counsel:- Dr. Ranjith Fernando for the Accused-Appellants

Sarath Jayamanne A.S.G for the Respondent

Argued On:-18.05.2015/03.06.2015

Written Submissions:-29.06.2015

Decided On:-07.08.2015

H.N.J.Perera,J.

The accused-appellants with two others were indicted in the High Court of Colombo under section 54 A(d) & 54 A(b) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No13 of 1984 for being in possession and trafficking less than 1 gm heroin on or about 27.06.2006 at Wadullawatta. The Learned High Court Judge by his judgment dated 22.01.2013 found the 1st and 2nd accused-appellants guilty as charged and sentenced them on both counts to 7 years R.I. with a fine of Rs.50,000/- and further ordered that the sentences to run consecutively. Being aggrieved by the said conviction and sentence the accused-appellants have preferred this appeal to this court.

At the commencement of the trial, the 3rd and 4th accused had pleaded guilty to the said two charges and each had been sentenced to 1 year R.I with a fine of Rs.15,000/- on each count.

When this matter was taken up for argument before this court, the Counsel for the accused-appellants stated to court that he will confine this appeal to the sentence imposed on the accused-appellants.

The main contention of the Counsel for the accused-appellant was that there is a serious disparity on the sentence imposed on the 3rd and 4th accused who had pleaded guilty to the said charges at the beginning of the trial and the sentence that had been imposed on the 1st and 2nd accused-appellant who has been convicted after trial and that consecutive sentences being imposed notwithstanding the fact that the

two offences were “inextricably linked” committed at the same set of facts / same occasion in the course of same transaction.

The submission made by the Counsel for the accused-appellants to the effect that the 3rd and 4th accused had been given non-custodial sentences with minimum fine is not correct. The 3rd and 4th accused had been sentenced to 1 year R.I. The said sentence has not been suspended by court. Further there is no order made by the court directing that the said sentences to run concurrently. It is very clear from the proceedings that the court had acted on the basis that the said accused had no previous convictions.

I have carefully considered the submissions of the learned Counsel regarding the sentence.

Basnayake A.C.J in the case of Attorney General V. H.N.De Silva 57 N.L.R 121 observed as follows:-

“A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He also should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective.”

The law stipulates that for possession or for trafficking of not exceeding 1 gramme of heroin a fine not less than fifteen thousand rupees and not exceeding fifty thousand rupees and or imprisonment of either description for a period **not less than 3 years and not exceeding seven years.**

In the instant case the learned trial Judge had sentenced the 1st and 2nd accused-appellants to seven years R.I with a fine of Rs.50,000/-and 8 months R.I in lieu of the fine on both counts and had further ordered

that the said sentences be implemented consecutively. The learned trial Judge had proceeded to impose the maximum sentence under each count.

Although the quantity of heroin had been less than 1 gram, considering the attendant and extenuating circumstances, the trial Judge had decided to impose this sentence. The evidence led in this case indicates that the police had recovered 20 packets containing 600 m. gram of heroin and also 80 Aluminium foils from the possession of the accused-appellants. The learned High Court Judge had also taken into account the fact that the 2nd accused-appellant had previous convictions, the circumstances under which the offence was committed, and the gravity of the offence committed by the accused-appellants.

In the instant case the 2nd accused-appellant who was found guilty of the charges had three previous convictions. The learned trial Judge had proceeded to sentence him to 7 years R.I. and also had imposed a fine of Rs.50,000/-. The learned trial Judge had imposed the maximum punishment that he can impose on the said accused-appellant. It is quite clear that the learned trial Judge had been influenced by the fact that the 2nd accused-appellant had three previous convictions and by the seriousness of the crime committed and the harm it could have caused to the society as a whole. The Judge had imposed a sentence that he could have imposed on the 2nd accused-appellant and also had given good reasons for doing so. One cannot argue that the learned trial Judge had exceeded his powers by doing so. In my view the learned trial Judge had exercised his discretion wisely. The sentence of the trial Judge therefore had been fair and just and not excessive. There is no illegality in the sentence imposed and the fine ordered. Therefore we see no reason to interfere with the sentence imposed on the 2nd accused-appellant by the learned High Court Judge.

In Rajive V. State of Rajastan [1996] 2 SCC 175 it was held that the court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but against the society to which the criminal and victim belong.

The 1st accused-appellant does not have any previous convictions. Yet the learned trial Judge had proceeded to impose the same sentence on him too. It could be argued that the trial Judge had failed to exercise his judicial discretion fairly in passing sentence on the 1st accused-appellant. Therefore after considering all the above circumstances we set aside the sentence imposed by the learned High court Judge on the 1st accused-appellant and sentence the 1st accused-appellant to a term of 3 years R.I and to a fine of Rs.15,000/- on each count. We also impose a 6 months R.I. in lieu of the said fine on each count. We also direct the sentences to run consecutively. Subject to the variation in the sentence of the 1st accused-appellant the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL