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

In the matter of an Appeal under section 15(b) of the Judicature Act No. 02 of 1978 read with Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

C.A. Case No: **CA 204/2017**

H.C. Colombo Case No:
**HC 7582/2014**

Democratic Socialist Republic of Sri Lanka

**Complainant**

**Vs.**

Mahapatunage Sujeewa Samanmali Perera alias Hamina
No. 27/G/7,
Sedawatta Road,
Wellampitiya.

**Accused**

**AND NOW BETWEEN**

The Attorney General
Attorney-General's Department,
Colombo 12.

**Complainant-Appellant**

**Vs.**

Mahapatunage Sujeewa Samanmali Perera alias Hamina
No. 27/G/7,

Sedawatta Road,
Wellampitiya.

**Accused-Respondent**

| | | |
|---|---|---|
| BEFORE | : | K. K. Wickremasinghe, J.<br>K. Priyantha Fernando, J. |
| COUNSEL | : | Riyaz Bary, SSC for the Complainant-Appellant<br><br>AAL Dr. Ranjit Fernando for the Accused-Respondent |
| WRITTEN SUBMISSIONS | : | The Complainant-Appellant – On 03.09.2018<br>The Accused-Respondent – On 22.10.2018 |
| DECIDED ON | : | 08.08.2019 |

**K.K. WICKREMASINGHE, J.**

This appeal was filed by the Hon. Attorney General seeking to set aside sentences imposed by the Learned High Court Judge of Colombo dated 23.01.2017 in case No. HC 7582/2014, and seeking to substitute the same with lawful and appropriate sentences.

**Facts of the Case:**

The accused-respondent (hereinafter referred to as the 'respondent') was indicted in the High Court of Colombo on two counts for committing the offences of trafficking and possession of 1.72 grams of Heroin, punishable in terms of section 54(A) (b) and 54A (d) of the Poisons Opium and Dangerous Drugs Ordinance as

amended by Act No. 13 of 1984 (hereinafter referred to as the 'Dangerous Drugs Ordinance').

The indictment was handed over and read over to the respondent on 20.01.2015 and the respondent pleaded not guilty to the same. Thereafter, the case was fixed for trial. However, on 23.01.2017, the respondent informed her willingness to conclude the case by pleading guilty and accordingly, the indictment was read over to the respondent again. The respondent pleaded guilty to the both counts in the indictment and was convicted accordingly.

Thereafter counsel for the both parties made submissions regarding the sentence. The Leaned High Court Judge imposed sentences on the respondent as follows;

1. Count No.1 – A term of 12 months Rigorous Imprisonment that was suspended for 7 years. A fine of Rs.100, 000/= with a default sentence of 6 months Simple Imprisonment.
2. Count No.2 – A term of 12 months Rigorous Imprisonment that was suspended for 7 years. A fine of Rs.100, 000/= with a default sentence of 6 months Simple Imprisonment.

The Leaned High Court Judge ordered the sentences to run concurrently.

Being aggrieved by and dissatisfied with the said sentences imposed by the Learned High Court Judge, the appellant preferred this appeal.

Following grounds of appeal were averred on behalf the appellant;

1. The sentences imposed are manifestly erroneous and contrary to section 54A (b) and (d) of the Dangerous Drugs Ordinance.
2. The sentences are manifestly inadequate having regard to the nature of the offences for which the respondent had been convicted.
3. The attendant circumstances pertaining to the offence committed, warrant imposition of a higher sentence.

It is observed that as per the submissions of the State Counsel in the High Court, the respondent was arrested on 19.06.2013 by a team of police officers of Kotahena Police station. The said team of police officers had gone to Sedawatte on information received from a private informant and upon searching, a cellophane bag which contained 50g and 100mg was recovered from the respondent's purse. Thereafter she was taken into custody.

According to the Government Analyst's report, the quantity of pure heroin was 1.72grams.

The Learned Counsel for the respondent brought the attention of this Court to the fact that there is a difference between the quantities of heroin recovered from the possession of the respondent and heroin sent to the Government Analyst's Department. Accordingly, it was submitted that the police officers reveled that they have recovered 50.1grams from the possession of the respondent whereas the Government Analyst's report dated 24.09.2013, mentioned the gross weight of the brown colour powder was 54.8grams [page 13 & 14 of the brief]. It was argued on behalf of the respondent that, if the High Court case proceeded for the trial, there was a huge possibility of the respondent being acquitted, since the quantity of externally added heroin was more than the quantity of heroin which was mentioned in the indictment. I do not think that an accused who pleaded guilty to an offence at the stage of trial is entitled to submit the possibility of his/her acquittal, as a mitigatory factor at the stage of appeal. If an accused was very confident of his/her acquittal, he or she should have stood for trial instead of pleading guilty. Therefore I really do not see any merits in this argument.

It was submitted on behalf of the respondent that the fact that the respondent had pleaded guilty at the first instance of the trial would have been a main consideration to impose a suspected sentence. I observe that as per section 54A (b) and (d) of the Dangerous Drugs Ordinance, a person who is convicted of such

offence, shall be imposed a term of imprisonment not less than 07 years and not exceeding 20 years with a fine not less than Rs.100,000/= and not more than Rs. 500,000/=. It is observed that when the Learned High Court judge was imposing the sentence, he had considered the quantity of heroine, the fact that the respondent had one previous conviction of similar nature and the fact that the respondent pleaded guilty to the offence at first instance thereby saving the valuable time of Court. Accordingly, the Learned High Court Judge had decided to impose a sentence below the minimum mandatory sentence and proceeded to suspend the same. I am well aware that the Court has discretion to impose an appropriate sentence, even if it is below a minimum mandatory sentence, considering the facts of each case. [Vide ***S.C reference No. 03/2008-H.C. Anuradhapura 334/2004*** *and* ***Ambagala Mudiyanselage Samantha Sampath V. Attorney General (S.C. Appeal No. 17/2013)***]. I further observe that the instant case is very different from the above two decisions.

Further, section 303 of the Code of Criminal Procedure Act No.15 of 1979 as amended by Act No. 47 of 1999 reads as follows;

> ***"303(2): A court shall not make an order suspending a sentence of imprisonment if-***
>
> > ***(a) a mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed;*** *or*
> >
> > *(b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or..."* (Emphasis added)

Therefore, it is observed that the Court shall not suspend a sentence when a minimum mandatory sentence is prescribed by the respective provision of law. Since sections 54A (b) and 54A (d) of the Dangerous Drugs Ordinance carry a

minimum mandatory sentence, I am of the view that the Learned High Court Judge should have imposed a custodial sentence.

The Learned SSC for the appellant contended that the sentences are manifestly inadequate having regard to the nature of the offences and the attendant circumstances pertaining to the offence committed, warrant imposition of a higher sentence.

It was held in the case of **Attorney General V. Jinak Sri Uluwaduge and another [1995] 1 Sri L.R 157** that;

> *"In determining the proper sentence the Judge should 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 should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration..."*

In the case of **The Attorney General V. Mendis [1995] 1 Sri L.R. 138,** it was held that,

> *"In our view once an accused is found guilty and convicted on his own plea, or after trial, the Trial Judge has a difficult function to perform. That is to decide what sentence is to be imposed on the accused who has been convicted. In doing so he has to consider the point of view of the accused on the one hand and the interest of society on the other. In doing so the Judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations*

*resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organisation in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime..."*

In the case of **Attorney General V. Mayagodage Sanath Dharmadiri Perera [CA (PHC) APN 147/2012],** it was held that,

*"On the other hand this is not a fit case to order suspended sentence. The nature and the gravity of the offence have to be considered before ordering a suspended sentence..."*

In the case of **Sevaka Perumal etc. V. State of Tamil Nadu [AIR 1991 S.C. 1463],**

*"...Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of order should meet the challenges confronting the society... Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats.*

In light of above, it is understood that even though a Judge has discretion with regard to the sentencing of an offender, such discretion has to be exercised judicially. A trial Judge must be mindful to impose a sentence which is proportionate to the crime committed.

Considering the facts of the case, I am of the view that the sentences imposed by the Learned High Court Judge are manifestly inadequate. Therefore, I set aside the

sentences imposed by the Learned High Court Judge, dated 23.01.2017. I impose a term of 07 years rigorous imprisonment for each count, on the respondent. I further order the said terms of imprisonment to run concurrently. Since the respondent has already paid the total fine of Rs. 200,000/= on 02.03.2017 (page 44 of the brief), I do not impose another fine on her.

Accordingly, this appeal is hereby allowed.

JUDGE OF THE COURT OF APPEAL

**K. Priyantha Fernando, J.**

I agree,

JUDGE OF THE COURT OF APPEAL