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

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

CA 488/2017
HC/ COLOMBO/6796/2013

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

Complainant-Appellant

vs.

Nawalage Lasantha Senanayake

Accused-Respondent

BEFORE	:	**Sampath B.Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Ms.Maheshika Silva SSC for the Appellant.** **Mr.Shahan Kulatunga for the Respondent.**
ARGUED ON	:	**13/01/2022**
DECIDED ON	:	**28/01/2022**

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JUDGMENT

P. Kumararatnam J

This appeal is preferred by the Hon.Attorney General.

The above-named Accused-Respondent (hereinafter referred to as the Respondent) was indicted under Sections 54(A) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession and Trafficking respectively of less than one gram of Heroin on 02nd May 2011 in the High Court of Colombo.

Before the trial commenced, on 31/01/2017 the Respondent had pleaded guilty to both charges in the indictment. After the submissions by both parties, the Learned High Court Judge of Colombo has imposed the following sentence.

For the 1st count a fine of Rs.15,000/- with a default sentence of 6 months simple imprisonment and 12 months rigorous imprisonment suspended for 07 years.

For the 2nd count a fine of Rs.15,000/- with a default sentence of 6 months simple imprisonment and 12 months rigorous imprisonment suspended for 07 years.

Being aggrieved by the aforesaid sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Respondent informed this court that the respondent has given consent to argue this matter in his absence due to the Covid 19 pandemic.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. That the imposed sentence is manifestly erroneous for it is contrary to sections 54[A] (b) and 54[A](d) of the Poison, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1984.
2. That the sentence is manifestly inadequate having regard to the nature of the offences for which the Respondent had been convicted and the antecedents of repeated convictions for similar offences.
3. That the antecedents of the Respondent warrant an order for compulsory rehabilitation.

Background of the case.

The Respondent was arrested during a raid conducted by a group of police officers from Welikada Police Station, around 4.25pm on 02/05/2011 in front of the Buddha Statue, in Maligawa Road, Ethul Kotte. At that time, he was found to be in possession of 2.22 grams of substance which the officers believed to be Heroin, in a bag hidden in his trouser pocket. He was then arrested and the substance recovered from the Respondent was sent to the Government Analyst under a court order. As per the Government Analyst's Report the substance contained 9 milligrams of Diacetyl Morphine commonly known as Heroin. As the Respondent had previous convictions, an indictment was preferred against him in the High Court of Colombo.

On 31/01/2017 when this case was called in the Colombo High Court the Respondent had pleaded guilty to both charges levelled against him in the indictment.

The Learned High Court Judge has convicted the Respondent upon his own plea and imposed the above-mentioned sentence.

As the 1st and 2nd grounds are based on the sentence, both appeal grounds will be considered together. The Appellant contends that the imposed

sentence is manifestly erroneous for it is contrary to sections 54[A] (b) and 54[A](d) of the Poison and Dangerous Drugs Ordinance as amended by Act No.13 of 1984 and that the sentence is manifestly inadequate having regard to the nature of the offences for which the Respondent had been convicted and the antecedents of repeated convictions for similar offences.

According to Section 54[A] (b) and (d) if any person traffic or possess less than one gramme of Heroin the prescribed sentence is 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 three years and not exceeding seven years.

Under this section minimum fine and minimum imprisonment has been prescribed by the law.

Upon perusal of the High Court proceedings the prosecution has brought to the notice of the court the previous convictions of the Respondent with case numbers, date of arrest and the sentences imposed on him. Further the offence relating to the instant appeal has been committed during the operational period of the suspended sentence.

In **The Attorney General v H.N.de Silva** 57 NLR 121 Basnayake A.C.J (as he then was) stated as follows:

> *"In assessing the punishment that should be passed on an offender a judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A judge should, in determining the proper sentence should 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 should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective…The incidence of crimes of the nature of which the offender*

has been found to be guilty. The difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail."

In **The Attorney General v Jinak Sri Uluwaduge and Another** 1995 (1) SLR 157 the court held:

"We are in agreement with the observations made by Basnayake A.C.J. in the case of Attorney General v H.N. de Silva (1) that whilst the reformation of the criminal though no doubt is an important consideration in assessing the punishment that should be passed on the offender where the public interest or the welfare of the State outweighs the previous good character, antecedents and age of the offender that public interest must prevail" Having regard to the serious nature and the manner in which these offences have been committed by the Accused-Respondents we are of the view that the sentence imposed in this case is grossly inadequate."

In **The Attorney General v J. Mendis** C.A. 430/92 C.A. Minutes of 15.12.1995 SLR 138 the court held:

"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 interests of the society on the other. In deciding what sentence is to be imposed the judge must necessarily consider the nature of the offence committed. The gravity of the offence, 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 in which it has been committed and the involvement of others in committing the crime."

The Learned Counsel for the Respondent citing **SC/Appeal/No.89A/2009** decided on 12/05/2011 and **SC Reference No.03/2008** decided on 15/10/2008 and **SC/Appeal/No.17/2013** decided on 12/03/2015 argued that the High Court is not inhibited from imposing an appropriate sentence notwithstanding a minimum mandatory sentence being given.

What is an appropriate sentence varies according to the facts of each case and should be determined by considering the entire evidence presented by the prosecution and the defence.

In this case the prosecution has provided the previous case history of the Appellant to court before the sentence was passed. All previous convictions were pertaining to the possession of Heroin although of different quantities. Further the sentence in this case was passed during the operational period of a suspended sentence.

Considering all the circumstances and the gravity of the offence committed by the Respondent in this case, I conclude that this is not an appropriate case to disregard the imposition of a minimum mandatory sentence so as to impose a suspended sentence using judicial discretion.

Hence, we set aside the sentence imposed by the Learned High Court Judge of Colombo on 31/01/2017 and substitute the sentence as follows:

1. For count one Rs.15000/- fine with default sentence of 06 months simple imprisonment and three years rigorous imprisonment.
2. For count two Rs.15000/- fine with default sentence of 06 months simple imprisonment and three years rigorous imprisonment.

We further order that the three years rigorous imprisonment imposed on count one and count two to run concurrently.

As no order has been made in respect of third ground of appeal by the High Court this Court also make no order.

Accordingly, we allow the appeal and vary the sentence imposed by the Learned High Court Judge of Colombo on 31/01/2017. The substituted sentence shall commence from the day the High Court communicate the judgment of this court to the Respondent.

The Registrar is directed to send a copy of this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL