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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC/261/2014 **VS**

High Court of Galle
Case No: HC/3818/2013

Walakada Gamage Priyantha

Accused

And now between

Walakada Gamage Priyantha

Accused– Appellants

VS

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : M.P. Ganeshwaran with
H.D.H.Seneviratne
for the Accused-Appellant
Chethiya Gunasekera PC ASG
for the Respondent

ARGUED ON : 30/11/2022

DECIDED ON : 19/01/2023

R. Gurusinghe, J.

The accused-appellant (the appellant) was indicted in the High Court of Galle for having being in possession and trafficking 3.38 grams of heroin, offences punishable under Section 54 of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984.

After trial, the appellant was convicted of both counts and sentenced to twenty years of Rigorous Imprisonment for each count.

Being aggrieved by the said conviction and sentence, the appellant preferred this appeal to this court.

The Attorney General has also preferred an appeal against the sentence on the basis that the learned High Court Judge has not imposed the prescribed mandatory sentence for that offence.

The grounds of appeal set out by the accused-appellant are as follows:

1. The chain of custody has not been established by the prosecution.

2. The difference in the weight in respect of the production is not considered.

3. The Learned High Court Judge has misdirected, not considering the above discrepancies.

4. Prosecution has failed to produce evidence to substantiate the first offence, in other words, trafficking.

5. Improbability of certain aspects of the prosecution version.

The prosecution case is briefly as follows:

PW1 was working at the Police Narcotic Bureau Matara branch, located at Dickwella. He received information from a private informant, and then he arranged a raid. A police team of four police officers left to Thiranagama at 2.00 p.m. on 27.8.2011. At Thiranagama, PW1 met the informant around 4.00 p.m. The informant had come in a three-wheeler driven by himself. The police team then went to Gonapinuwala in the three-wheeler which was driven by the informant. They stopped at Gonapinuwala junction and waited there for the accused. PW1 informed the other police officers that a person coming from the Baddegama area was carrying heroin with him. The accused came out from a shop and the informant showed the accused to the police. Then they saw that the accused got into a bus bound for Hikkaduwa. The informant thereafter got down from the three-wheeler, and let a police officer to drive the three-wheeler. They followed the bus until the appellant got down at Patana area in Hikkaduwa. PW1 then held the appellant and three other officers checked his pockets. They found a parcel of heroin in his pocket. The appellant was arrested, and the police then went to the appellant's house in Baddegana.

They searched the house but did not find any illegal substances there. Then they came to the police station at Hikkaduwa, where they properly sealed the heroin and kept it in a locker allocated to PW1. The following day the productions were handed over to PW8 Inspector of Police, Rajakaruna and PW8 then handed over the productions to the Government Analyst.

The first ground of appeal is that the chain of custody has not been proved by the prosecution. It involves only PW1 and PW8. PW1 handed over the productions on the following day to PW8. PW8 handed over the same to the Government Analyst. There was no break in the chain of custody of the productions. Therefore, the first ground of appeal has no merit.

The second ground of appeal is that there is a difference in the weight of the heroin. As per the police, the weight of the heroin is 13 grams and 200 milligrams. When it was weighed by the Government Analyst department, the weight was 13 grams and 730 milligrams. The witness from the Government Analyst department had explained that the weighing scale at the Government Analyst department is accurate. She further said that most of the time the weight given by the police would slightly differ. This slight difference in weight does not create a reasonable doubt. The Trial Judge had considered it and come to the conclusion that it had no significance.

The next argument is that there was no evidence of drug trafficking. The prosecution had not given additional evidence that the appellant was trafficking heroin. There should be some additional evidence to prove the trafficking; if not, the quantity of heroin itself is a large quantity to presume that he was trafficking heroin. Therefore, I set aside the conviction of the accused for the first count.

The next ground of appeal is that the version of the prosecution is not probable. Counsel for the appellant argued that as there were no other personal items taken from the appellant such as a wallet, money or at least a

handkerchief or a bus ticket, the prosecution story is improbable. Even though this contention has some merit, the appellant himself admitted that he was arrested at the place called Dayananda service station. The prosecution version is that the appellant was arrested near the same service station. The position taken by the appellant in his dock statement was not put to the prosecution witnesses. Therefore, this cannot create a reasonable doubt. Considering the above-mentioned factors, the conviction for the possession of heroin is affirmed, and the appeal is dismissed to that extent.

As far as the Attorney General's appeal against the sentence is concerned, it will not be dealt with in the judgment as I intend to change the sentence for the reasons set out below.

Change of law during the pendency of the appeal

The accused-appellant was convicted for being in possession of 3 grams and 38 milligrams of heroin. The punishment stipulated for possession of 2 grams or above was life imprisonment or death sentence.

By Act no. 41 of 2022, the third schedule to the Poisons, Opium and Dangerous Drugs Ordinance was amended. Part 3 of the schedule was also amended. The punishment for possession of 3 grams to less than 5 grams of heroin is changed to "fine not less than Two Hundred Thousand Rupees and not exceeding Five Hundred Thousand Rupees and imprisonment of either description for a period not less than ten years and not exceeding twenty years or to both such fine and imprisonment."

Now, the legislature has clearly indicated its intention to reduce the rigour of punishment for possession of 3 grams to less than 5 grams of heroin by the Amendment to the Act. I will now consider whether this Court can impose this amended punishment or whether the punishment which was prevailing at the time of committing the offence should be imposed.

Thus, there are two different arguments;

(1) that a court must apply the law as it stands at the time of the decision, and

(2) that the punishment for a crime should be imposed under the law that existed when the crime was committed.

The general rule is that any change in substantive laws will not operate retrospectively in the absence of express provisions. However, procedural or remedial laws will operate retrospectively.

At this juncture, it is worth mentioning the following provision of the Interpretation Ordinance.

Section 6 (3) (c) of the Interpretation Ordinance provides as follows:

Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected-

(c) any action, proceeding, or thing pending or incomplete when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.

In civil matters, the substantive rights of the parties must determine as of the date of the institution of the action. (Vide Siva v Fernando15 NLR 499, Talagune v De Livera [1997] 1SriLR. 253.)

There is an argument that appellate courts' only concern is to see whether or not the judgment of the court was in conformity with the law as it stood at the time of the judgment.

As far as criminal cases are concerned the appellate court can extend the benefit of law which came into force after the accused was convicted of a crime.

In the case of Ratan Lal v. State of Punjab, AIR 1985 SC 444, wherein it was held by the Supreme Court of India that "an ex post facto criminal law, which only mollifies the rigour of law, is not hit by Article 20(1) of the Constitution and that if a particular law makes provision to that effect, though retrospective in operation, it would still be valid."

Article 20(1) of the Indian Constitution is similar to Article 13(6) of the Sri Lankan Constitution. Article 13(6) is as follows.

> *(6) No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.*

In the case of *D Barai vs Henry Ah Hoe and another 1983 AIR 150*, the Indian Supreme Court held that; *"the rule of beneficial construction requires that even ex-post facto law of such type should be applied to mitigate the rigour of the law. The principle is placed on both, sound reason and common sense."*

It was further held as follows:

"If it is a well-settled rule that construction at a later statute, again describes an offence created by a former statute and affixes a different punishment varying the procedure, the earlier statute is repealed by the later statute.

If a statute deals with a particular class of offence and a subsequent Act is passed, which deals with precisely the same offences and different punishment is imposed by the later Act, I think that in effect the legislature has declared that the new Act shall be substituted for the earlier Act."

It was further held "*just as a person accused of the commission of an offence has no right to trial by particular court or to a particular procedure, the prosecutor equally has no right to insist upon that the accused be subjected to an enhanced punishment under the repealed Act."*

It was held that the accused must have the benefit of reduced punishment.

In the case of *Freeman v. United States, 564 U.S. 522 (2011),* the Supreme Court of the United State has taken a similar view that the defendant should be eligible to seek relief under the amended Guidelines. It was held that *"therefore, Freeman's prison term is "based on" a sentencing range that "has subsequently been lowered by the Sentencing Commission," rendering him eligible for sentence reduction."*

At this stage, it is worth mentioning the fact that an appeal is a continuation of the suit. In the case *of Sudharma de Silva vs the Attorney General, 1986 1 Sri LR 9 at page 13* Sharvananda CJ said *"an appeal is not a fresh suit, but only a continuation of the original proceedings and a stage in that suit itself."*

This principle was quoted and followed by Justice Buwaneka Aluvihare PC in the case of *De Alwis vs Malwatte Valley Plantation Limited* decided on 21.6.2019.

As the appeal is a continuation of the proceeding of the original court, this court is competent to take into account the legislative changes that happened during the pendency of the appeal.

The appellant was taken into custody on 27.8.2011, and he has never been released thereafter. The appellant was sentenced on 16th October 2014.

For the reasons set out above, I set aside the conviction on the first charge, which is trafficking. The conviction on the 2nd charge is affirmed.

The sentence of 20 years for the second charge is reduced to 10 years of Rigorous Imprisonment and also imposes a fine of Rs. 200,000/=, with a default term of six months of Simple Imprisonment.

At this stage, it is important to be clear on the point that anything stated in this Judgment should not be construed as giving the Amendment Act a retrospective operation in so far as it creates new offences or provides for enhanced punishment and this Court has not applied the Amended Act retrospectively, but in terms of just and fairness, the appellant was given the advantage of the reduced punishment provided by the Amendment to the Act.

We further direct that the sentence of imprisonment is deemed to have been served from the date of conviction, namely, 16.10.2014.

The appeal is partly allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal