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

A matter of application under in terms of section 320 of the Code of Criminal Procedure Act No 15 of 1979.

CA/HCC/186/2024

HC Colombo Case No: 585/2018

The Attorney general

Attorney General's Department

Colombo 12.

Complainant

V.

Mohamed Nijabdeen Mohamed Rizwan

Accused

And Now between

Mohamed Nijabdeen Mohamed Rizwan

Accused

Accused-appellant

Vs.

The Attorney General

Attorney General's Department

Colombo 12.

Complainant -Respondent

Before : **B. Sasi Mahendran, J.**
Amal Ranaraja, J

Counsel: Nuwam D. Alwis for the Accused- Appellant
Anoopa De Silva, DSG for the Respondent

Argued On : 12.03.2025

Judgment On: 03.04.2025

JUDGMENT

B. Sasi Mahendran, J.

The Accused- Appellant (hereinafter referred to as the Accused) was indicted in the High Courts of Colombo for having being in possession and trafficking of 1.58g of Heroin on 23.08.2016, at Stasepura under Section 54A (b) and (d) of the Poisons, Opium and Dangerous Drugs Ordinance No. 13 of 1984 as amended.

After the Accused pleaded not guilty, the Prosecution led evidence through 13 witnesses and marked 7 productions. The Accused gave a statement under oath. At the conclusion of the trial, the Learned Judge of the High Court by judgment dated 09.02.2024 found the Accused guilty of the 1st Count and sentenced to 7 years of rigorous imprisonment and a fine of Rs. 100,000/- in default one year of rigorous imprisonment.

Being aggrieved by the said conviction and the sentence, the Accused has preferred the present appeal to this Court.

The following are the grounds of appeal as urged by the Accused;

1. The High Court has failed to consider the contradictions in the prosecution witnesses.
2. The High Court has not taken into consideration the defence
3. The Learned High Court Judge has failed to consider the weaknesses and the incredibility of the prosecution witnesses.
4. The judgment was delivered in contravention of the evidence placed before the Court.

According to the testimony of PW7, Police Officer Chammika, on 23.08.2016 when he with other officers were walking around 6.00 PM, near a littered area, the Accused was there. Upon seeing the witnesses, the Accused went towards the housing scheme, and the witnesses walked fast and stopped the Accused by holding his hand asking for reasons for such behaviour. The Accused had not responded and thereafter, the witness had checked the pockets of the Accused and found a small parcel wrapped in a pink cellophane bag. The witness had arrested the Accused at 6.30 PM after identifying it to be heroin. Thereafter, at 6.45 PM the witness was handcuffed and taken to Lechchami Jewellers at Kosgas Junction. The heroin alone weighed around 3400mg then was tied with a knot that was sealed and stamped. They left the said place around 7.40 PM and reached the Grandpass Police at 8.15 PM.

This Court notes that the Counsel for the Accused challenged the sentence imposed on the Accused by the High Court on the basis of no previous convictions,

the young age of the Accused and that the Accused has several minor children, the youngest being only 6 months old.

Our Courts have considered that when the Learned Trial Judge considers the mitigatory and aggravating factors, there is a duty cast on the Judge to give a reasonable consideration to such factors.

In *Archbold: Sentencing Guidelines* (2019), Thomson Reuters, on page 274, under the heading of applicability of guidelines on sexual offences, it is stated that;

> "Starting points define the position within a category range from which to start calculating the provisional sentence.
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> ……
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> Once the starting point is established, the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial."

In this context, since the Counsel for the Accused sought a mitigatory sentence, I am mindful of the sentiments expressed by His Lordship Basnayake ACJ in The Attorney General v. H.N. De Silva 57 NLR 121 at page 124 in the matter of assessing the sentence to be imposed for an offence.

> "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, 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. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty [Rex v. Boyd (1908) 1 Cr. App. Rep. 64.] and 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 the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail."

This dictum was followed by His Lordship Gunasekara J in The Attorney General v. Mendis 1995 1 SLR 138 and 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. The Trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should in our view not to surrender this sacred right and duty to any other person, be it counsel or accused or any other person. Whilst plea bargaining is permissible in our view, sentence bargaining should not be encouraged at all and must be frowned upon."

Further held that;

"We are in agreement with the observations of Basnayake, A.C.J. that whilst "the reformation of the criminal though no doubt is an important consideration in assessing the punishment that should be passed on an 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 manner and the ingenuity with which the crimes that the Accused-Respondent has committed to which he has pleaded guilty, we are of the view that the sentence imposed is grossly inadequate. In our view the crimes to which the Accused-Respondent pleaded guilty are of a very serious nature and have been committed with much planning, deliberation and manipulation and called for an immediate custodial sentence."

With the above dictums in mind, we consider the present appeal regarding mitigation of the sentencing.

Column II of Part III of the Third Schedule to the said Act as amended sets out the quantity of heroin and the penalty is set out in the corresponding entry in Column III. On a plain reading of the wording in Part III, it is clear that the for possession of heroin of 2g or below, the penalty as set out in the corresponding entry in Column III is "Fine not less than one hundred thousand rupees and not exceeding five hundred thousand rupees and imprisonment of either description for a period not less than seven years and not exceeding twenty years."

The Legislature has specified the maximum and minimum terms of imprisonment for the said offence. That is to stay, the Court is vested with the discretion with the specified limits. The Learned High Court Judge has imposed the minimum sentence on the Accused. In other words, the Court has given a lenient sentence to the Accused.

We observe that when the Trial Judge imposed the sentence, has taken into consideration the following;

> "**<u>අධිකරණයෙන්</u>**
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> දෙපාර්ශවය විසින් ඉදිරිපත් කරන ලද කරුණු සලකා බලමි. මෙම නඩුවේ චුදිත ඉදිරිපත් කර ඇති පලවන චෝදනාවට වරදකරු කර දෙවන චෝදනාවන් නිදොස් කර ඇත. විත්තිය වෙනුවෙන් දක්වන ලද කරුණුද, පැමිණිල්ල වෙනුවෙන් දක්වන ලද කරුණුද යන කරුණු සලකා බැලීමේදී විශේෂයෙන්ම චුදිතට පෙර වැරදි නොමැති වීමත්, බාල වයස්කාර දරුවන්ගේ පියෙකු වීමත් කරුණු සලකා බලා නීතියෙන් නියමිත අවම දඩුවම නියම කිරීමට මම තීරණය කරමි. ඒ අනුව,
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> 1. පලවන චෝදනාවට අවුරුදු හතත් බරපතල වැඩ ඇතිව සිර දඩුවම් නියම කරමි.

රුපියල් ලක්ෂයක දඩ නියම කරමි

2. දඩ ගෙවීම පහර හරි නම් අවුරුද්දක් බරපතල වැඩ ඇතිව සිර දඬුවම් නියම කරමි."

Therefore, we hold that the Learned Judge has correctly come to the conclusion by imposing the minimum mandatory sentence by taking into consideration the mitigatory facts submitted by the Accused and the offence he is charged with.

For the above-mentioned reasons, we see no reason to intervene with the sentence imposed on the Accused by the Learned High Court Judge on 09.02.2024.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.
I AGREE

JUDGE OF THE COURT OF APPEAL