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

In the matter of an appeal in terms of Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0169/2015

Complainant

High Court of Embilipitiya
Case No. HCE/17/2007

Vs.

Kankanamage Jagathchandra Wijesinghe.

Accused

AND NOW BETWEEN

Kankanamage Jagathchandra Wijesinghe.

Accused-Appellant

Vs.

Hon. Attorney – General,
Attorney General's Department,
Colombo 12.

Respondent

BEFORE : MENAKA WIJESUNDERA, J

K.M.G.H. KULATUNGA, J

COUNSEL : J.P. Gamage with Theekshana Ranaweera for the Accused-Appellant.

Disna Warnakula, DSG for the Respondent.

ARGUED ON : 30.09.2024

DECIDED ON : 10.10.2024

K.M.G.H. KULATUNGA, J.

When this matter was taken up for argument on 30.09.2024, the Attorney-at-Law for the appellant, Mr. J.P. Gamage informed court that he would limit this appeal to the sentence and will not persue with the appeal against conviction. Accordingly, the appeal against the conviction was abandoned. The appeal against the sentence will be considered.

Another accused person and the Appellant were indicted with four counts as follows;

1. Under Section 54A(b) of the Poisons, Opium and Dangerous Drugs Act for trafficking of 634kg of Cannabis Sativa L.
2. Under Section 54A(b) of the Poisons, Opium and Dangerous Drugs Act for possessing the said 634kg of Cannabis Sativa L.
3. Under the Section 22(3) read with Section 22(1) of the Firearms Ordinance No. 33 of 1916 for being in possession of a locally made firearm.
4. Under Section 27 read with Section 09(2) of the Explosives Act No. 21 of 1956 for being in possession of a live cartridge.

At the commencement of the trial, the 1st accused had pleaded guilty on 18.07.2011 and was sentenced as follows;

One year's RI and a fine of Rs.50,000/- was imposed for counts one and two separately. Then, rigorous imprisonment of one year with a fine of Rs. 5,000/- was imposed for counts three and four respectively. Upon imposing the said sentences, the same were ordered to run concurrently.

As the Accused-Appellant (hereinafter also referred to as the Appellant) pleaded not guilty the matter proceeded to trial. At the end of which the Trial Judge found the 2nd accused guilty and convicted him in respect of all four counts and sentenced him to: two years RI for counts one and two respectively and rigorous imprisonment of one year with a fine of Rs. 10,000/- for counts No. 03 and rigorous imprisonment for one year with a fine of Rs. 25,000/- for count No. 04 and a default of six months imprisonment. Thereafter, the sentences-imposed for counts three and four were ordered to run concurrently along with the sentences imposed for counts one and two. The end result is that the appellant was required to serve a sentence of four years RI being a two-year term each for counts one and two to be served consecutively.

It is against this sentence that the accused had preferred this appeal and learned Counsel submitted that a variation on the sentence be made in favour of the appellant for following reasons;

1. The current medical condition of the Appellant.
2. The disparity in the sentence between the 1st accused and the appellant.

In opposition, the learned Deputy Solicitor General (DSG), Ms. Disna Warnakula argued that the sentence should not be reduced and considering the facts and circumstances the sentence ought to be enhanced. In support of the argument, she relied on the following;

1. That the facts and circumstances are serious as the 2nd accused was a reserve Police Constable in active service at the time he committed the offence and he was in uniform.
2. The appellant absconded for over a month.
3. The quantity is 634kg which is a substantial amount.
4. In respect of counts one and two, the law has specified a minimum mandatory sentence of two years imprisonment.

Now, I will briefly narrate the facts albeit the brief that led to this indictment.

According to the prosecution evidence on 06.09.2004, a team of officers travelling along the Thanamalwila – Embilipitiya road has observed a vehicle approaching with its lights on. As it appeared to be suspicious, the officers have ordered the said vehicle to stop. Notwithstanding the said order the vehicle has continued without stopping. The said team of officers had given chase and stopped the said vehicle and when approaching and observed the 2nd accused-appellant taking to his heels and escaping from the scene. He had been in his police uniform and the officers have clearly identified him to be the Appellant, a fellow Reserve Police Constable. On searching the vehicle, the 1st accused had been arrested and 30 bags of Cannabis along with a locally made firearm and a live cartridge were recovered.

Since this day, the Appellant had not reported for duty and was absconding. A month thereafter, he had been apprehended whilst being admitted to a local hospital. These are the salient facts.

The Accused-Appellant is now contesting only the sentence. According to the written submissions as well as submissions made during the argument, the learned Counsel moves for a reduction of the sentence. The main ground urged is the current medical condition of the appellant. This court on the request of the Accused-Appellant has

directed and obtained a Medico Legal Report to ascertain the current state of health of the Appellant. According to which the appellant had been examined on 13.08.2024 by the JMO of the Hambantota District Hospital. He had been specifically examined to ascertain his ability to serve the sentence. According to the history, the appellant has undergone a "right temparo parietal craniotomy" on 24.08.2019.

Upon the examination, Dr. Dilhani Amarasinghe has noted some weaknesses in the left upper and lower limbs. However, has not observed any deformity or a difficulty to walk without a support. Accordingly, she had opined that the patient did not reveal any permanent disability that could affect his capability to serve his sentence.

That being the medical opinion the learned Counsel for the appellant submitted that the appellant has a difficulty of movement and he relies on crutches to facilitate his free movements. In counter the learned DSG submitted that the medical evidence does not reveal any disability or inability to serve the sentence.

Let me evaluate the current medical condition as revealed by the Medico Legal Report which both parties relied on. No doubt the appellant has in fact undergone some form of a surgical intervention involving his right tempero region. It appears to have caused some form of weakness to his upper and lower limbs. However, Dr. Amarasinghe has clearly observed and opined that he can walk without a support and is capable of serving the sentence. In these circumstances, medically the appellant is able to serve the sentence and there is no medical evidence of any deformity or infirmity that prevents or impedes the Appellant from serving his sentence.

The Appellant there raises an issue of parity of sentences between the 1st Accused and the Appellant. As stated above, there is certainly

difference between the sentences imposed on the 1st Accused and the Appellant. All four sentences of one year each is ordered to run concurrently as regards the 1st accused and the aggregate sentence rounds up to one year. As opposed to that the Appellant is required to serve sentences of two years each for the 1st and 2nd counts consecutively with one-year terms for 3rd and 4th counts concurrently. The aggregate sentence will thus be four years rigorous imprisonment. On the face of it, there is a disparity or difference of three years between the effective periods of sentences to be served between the 1st Accused and the Appellant.

Is there a rational basis for this disparity and differentiation between the two accused persons is the issue that requires to be considered.

The 1st accused had pleaded guilty at the outset at the earliest opportunity before the commencement of the trial. As opposed to this, the Appellant had pleaded not guilty but was convicted after a long-drawn-out trial. This is the main difference between the two accused that appears to have been considered by the Trial Judge. An accused has a right to plead not guilty and proceed with the trial. This *per se* should not be a basis to enhance a sentence or to that matter should not be a relevant consideration in determining the sentence. The Trial Judge has not in any way considered the fact of the Appellant proceeding to trial as an aggravating circumstance in determining the Appellant's sentence.

As opposed to this, the fact of 1st accused pleading guilty had been considered in his favour by the Trial Judge. An accused pleading guilty to the charge is a lawfully recognized consideration that a sentencing Judge is required to take cognizance of by virtue of Section 197(2) of the CPC. The said Section provide that;

"*The Judge shall in sentencing the accused have regard to the fact that he so pleaded.*"

Then Section 303(1)(k) provides that pleading guilty is a circumstance that may be considered to suspend a sentence.

Accordingly, the sentencing Judge is statutorily required to have regard to the fact of an accused pleading guilty in determining the sentence. The 1st Accused has had the benefit of his early guilty plea in sentencing which the Appellant was not entitled to.

Similarly, when the Appellant was sentenced the Trial Judge has considered the fact that the Appellant was a Reserve Police Constable. This has been considered as an aggravating factor which is unique to the Appellant.

Thus, there is an appreciable and relevant difference in their culpability and circumstances that justifies the differentiation and the disparity of the sentences imposed on the 1st Accused and the Appellant.

Then, the learned DSG submitted that a minimum mandatory sentence of two years is prescribed under the schedule to the Poisons, Opium and Dangerous Drugs Act under which counts one and two are formulated. It was submitted that the Trial Judge has imposed the minimum mandatory sentence and, in the circumstances of this offending, there is no lawful basis or justification to go below the said minimum as far as the Appellant is concerned.

No doubt, the Supreme Court has clearly held in a series of cases starting with SC No. 03/2008 as follows…….

Justice Amaratunga in the case of ***A.G. Vs. Rohana*** ..... affirming and following this principle held as follows; .....

It is clear that the principle so determined by the said decisions is not '*offence specific*'. but of general application. Thus, it will apply to all offences prescribe a minimum mandatory sentence including the Poisons, Opium and Dangerous Drugs Act.

Be that as it may, in view of Article 13(6) of the Constitution, the legislature is empowered to prescribe a minimum mandatory sentence. Therefore, many a statute and certain offences under the Penal Code provide for such minimum mandatory sentences. However, as the law stands interpreted the sentencing Judges are not inhibited or prevented from exercising a discretion to determine an appropriate sentence. However, prescribing the range of the sentence is a matter of policy which is the purview of the legislature. Thus, when a minimum mandatory sentence is prescribed, sentencing Judge cannot just ignore such prescribed minimum mandatory sentence. No doubt, the sentencing Judge has a discretion to decide on the appropriate sentence even below the said prescribed minimum as held in SC No. 03/2008. However, it is necessary to have and advert to some reason to impose a sentence below the minimum mandatory. Therefore, as held in Hirimuthugoda..... By Justice Anil Gunaratne, it would be incumbent upon a Judge to set out with clarity, all the reasons which are relevant and salient for not imposing the mandatory statutory minimum sentence as prescribed by the relevant Penal Provision.

In the instant Appeal, the Appellant whilst being a Reserve Police Constable had made use of and abused his office to commit the offences of trafficking and possession of a commercial quantity of Cannabis Sativa L. As considered and held by the learned Trial Judge, there is no basis to consider the offending leniently. I am in total agreement with

this view on the perusal of the submissions made on sentencing at the original Court as well as the submissions made in this Court. There is no rational reason that justifies a sentence below the minimum two years prescribed for the first and second counts.

However, on a consideration of a totality of circumstances, I observe that the offence was committed in 2006, almost 18 years ago and that all the sentences of the 1st Accused were ordered to run concurrently. Hence, justice demands that the Appellant also be given the same benefit. Accordingly, the sentences imposed in respect of counts 1 to 4 are hereby ordered to run concurrently and the aggregate sentence will thus be rigorous imprisonment for two years.

Subject to this variation, the conviction and the sentence are affirmed and the Appeal is partially allowed to that extent.

Appeal is partially allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL