
**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.

Court of Appeal No:

CA/HCC/ 0310/2015

High Court of Colombo

Case No. HC/4983/2009

High Court of Vavuniya

Case No. HC/2023/2009

Kariyawasam Ampegama Gamage

Kamal Shantha Kariyawasam

Accused-Appellant

vs.

The Hon. Attorney General

Attorney General's Department

Colombo-12

Complainant-Respondent

BEFORE

**: Sampath B. Abayakoon, J.
P. Kumararatnam, J.**

COUNSEL

**: Shavindra Fernando, P.C. with
M.Skandarajah, N.Wijesekera,
A.Arawwawala, T.Mayadunne and
R.Rajapathirane for the Appellant.
Harippriya Jayasundara, ASG with
Maheshika Silva, SSC for the Respondent.**

ARGUED ON : **31/01/2022**

DECIDED ON : **01/04/2022**

ORDER

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Vavuniya under Section 54A (b) and 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Trafficking and Possession of 5919 grammes (5.919 kg) of Heroin on 14th June, 2006.

This matter was transferred to the High Court of Colombo by the Hon. Attorney General by his letter dated 26/08/2009. Hence, this matter was taken up in the High Court of Colombo from 30/10/2009.

After trial the Appellant was found guilty on both counts and the Learned High Court Judge of Colombo has imposed life imprisonment on 12th August, 2015 on both counts.

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

The Learned President's Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom from prison.

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

1. Did the Learned High Court Judge fail to consider the serious infirmities in the evidence of the main witness for the prosecution, IP Seneviratne (PW1)?
2. Did the evidence led at the trial prove the exclusive possession of the bag containing heroin by the appellant beyond reasonable doubt as required by the law?
3. Did the Learned High Court Judge fail to consider the serious contradictions in the evidence of Army Corporal Dissanayake (PW4)?
4. Did the Learned High Court Judge err in law by failing to reject the unsatisfactory evidence led with regard to the chain of custody of a padlock and a key (Production No. P24) which formed a vital part of the case against the appellant?
5. Did the Learned High Court Judge fail to consider the evidence given under oath by the Appellant?
6. Did the Learned High Court Judge err in law by not addressing his mind to the serious infirmities in relation to the 1st information received by the police?
7. Did the Learned High Court Judge err in law by imposing a mandatory punishment in the form of life imprisonment?

Background of the case

According PW3, a retired Army Officer, the Appellant who was also an Army Officer on 14/06/2006 had requested a vehicle to go to the “17 SLNG” Camp for a preliminary inquiry. As there was no vehicle available on that day, he was given a motor bike with a rider. After about two hours, this witness had been informed that the Appellant had not gone to “17 SLNG” but he had gone to Pesale, Mannar and had brought a suspicious parcel with him. As the motor bike had run out of fuel the rider had gone to a nearby camp to pump petrol leaving the Appellant at the runaway point of the camp. The rider had informed about the suspicious parcel to his superior officer and when he

came to the runaway point, the Appellant had left the place in a lorry which brought a load of firewood for Pudukamum Camp.

Thereafter, the Appellant got into a Colombo bound bus from Mannar. After informing about the Appellant to the officers at the road blocks, the Appellant was finally arrested at Parayanakulam junction by police officers attached to Murunkan Police Station.

At the hearing the Learned President's Counsel who appeared for the Appellant sought the indulgence of this Court to make a preliminary submission with regard to the sentence imposed on the Appellant on the basis that although the mandatory sentence is either the death penalty or the life imprisonment for an offence of this nature, it does not negate the Court's inherent powers to impose a suitable sentence. He also informs the Court that he wishes for a decision of this Court in this regard before he would consider whether to peruse the merits of the appeal.

As the Learned Additional Solicitor General has no objection, this court allowed the application of the Learned President's Counsel on the preliminary question raised by him.

The Counsel for the Appellant contends that the imposition of a minimum mandatory sentence or a mandatory sentence is unconstitutional and hence despite the statutes, the judiciary has the discretion to impose an appropriate punishment. He heavily relied on the Supreme Court Judgment given in the **SC Reference 03/2008**(HC Anuradhapura Case No.333/04) decided on 15/10/2008.

In the aforementioned SC Reference, the High Court of Anuradhapura by its communication dated 14/05/2008, made a reference to the Supreme Court in terms of Article 125(1) of the Constitution of Sri Lanka. In that reference, the Learned High Court Judge of Anuradhapura had queried whether Section 364(2) of the Penal Code as amended by the Penal code (Amendment)

Act No.22 of 1995, had removed the judicial discretion when sentencing an accused convicted of an offence in terms of that section.

In the said reference Justice P.A.Ratnayake held that:

“the minimum mandatory sentence in Section 364(2)(e) is in conflict with Article 4(c), 11, and 12(1) of the Constitution.”

“Article 80(3) (of the Constitution) only applies where the validity of an Act is called into question. However, Article 80(3) does not prevent a court from exercising its most traditional function of interpreting laws. Interpretation of laws will often require a court to determine the applicable law in the event of a conflict between two laws. This is a function that has been exercised by this court from time immemorial.”

In the event of a conflict between an ordinary law and the Constitution, the provisions must prevail over an ordinary law.”

“The minimum mandatory sentence in Section 364(2)(e) of the Penal Code is in conflict with Article 4(e), 11 and 12 of the Constitution and the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence.”

In the **Attorney General v. Ambagala Mudiyanseelage Samantha Sampath** S.C.Appeal No.17/2013 Eva Wanasundera,P.C.J, held that:

“I find that the issue in the present case is a conflict between the provisions in an ordinary law, i.e., the Penal Code and the provisions in the Constitution. The Constitution is accepted as the Supreme Law of the country and the ordinary laws derive their validity from the Constitution. The provisions in the ordinary law should be interpreted in the light of the Constitutional provisions. The Constitution should be used as a flashlight on the provisions of the ordinary law. Any mandatory minimum sentence imposed

by the provisions of any ordinary law, in my view is in conflict with Article 4(c), 11 and 12(1) of the Constitution in that it curtails the judicial discretion of the judge hearing the case.....When a minimum mandatory sentence is written in the law, the Court loses its judicial discretion. That part of the law with the minimum mandatory sentence, acts as a bar to judicial powers in sentencing or punishing the wrong doer.”

In **M.L.Rohana v. AG** (SC. Appeal No.89A/2009) Amaratunga J too held that the judicial discretion remained intact and reduced the custodial sentence to that of a suspended sentence.

Hence the Learned President’s Counsel argues that the decision given in **Thiruchelvam v. AG** [1995] 2 SLR 135 is no longer the law and the law is correctly stated in the subsequent two cases mentioned above.

In **Thiruchelvam v. AG** [Supra] G.P.S.de Silva C.J held that;

“In a case of possession of 2 grammes of heroin and above, (...) the penalty set out (...) is “death or life imprisonment. “It is manifest that in this category the discretion of the court is limited to the imposition of the death sentence or to a sentence of life imprisonment; the punishment is one fixed by the legislature; there is no discretion vested in the Court in regard to the period of imprisonment.”

“If the argument of counsel for the appellant is to be accepted, additional words vesting a discretion in the court would have to be inserted, a mode of interpretation which is impermissible save in exceptional situations. There is no warrant for inserting additional words where the sentence is one which is fixed by law.”

It is important to note that the Supreme Court decision in **Thiruchelvam v. Attorney General** [Supra] has rejected the basis on which a lesser sentence was imposed in the earlier decision of **Sepala Ekanayake v. Attorney General** [1988] 1 SLR 46.

In countering the argument advanced by the Learned President's Counsel for the Appellant, the Learned Additional Solicitor General who appeared for the Respondent contends that the judicial pronouncement of **SC Reference 03/2008** which was in respect of a specific provision in another statute, cannot be applied to the instant case and furthermore the said Reference was in respect of a provision where there was a mandatory minimum sentence of imprisonment imposed which should be distinguished from the instant case where there is only one sentence of imprisonment that can be imposed according to law.

It is very pertinent to mention following Articles of the Constitution which speak about the power of the Parliament.

As per the Article 4(a) of the Constitution of Sri Lanka, the Legislative power is granted to the Parliament. The Article reads as follows:

“the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum.”

Article 75 of the Constitution read as follows:

“Parliament shall have power to make laws including laws having retrospective effect and repealing or amending any provision of the Constitution or adding any provision to the Constitution;

Provided that Parliament shall not make any law,

- a. Suspending the operation of the Constitution or any part thereof, or

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- b. Repealing the Constitution as a whole unless such law enacts a new Constitution to replace it.”

Hence the law-making power is granted to the Parliament.

Article 76 (1) of the Constitution read as follows:

“Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power.”

Hence Parliament shall not abdicate or in any manner alienate its legislative power.

Further the validity of a legislation passed by Parliament cannot be called into question after the stage set out in Article 80(3) of the Constitution. The said Article reads as follows:

“Where a Bill becomes law upon the certificate of the President, or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.”

Hence it is very clear that the Parliament has the exclusive legislative power to enact law which power cannot be abdicated or alienated at any stage. Once a law is passed and certified by the President or the Speaker as the case may be the said law cannot be questioned in any manner by the Court.

In **Swasthika Textile Industries Ltd v Thantrige Dayaratne** [1993] 2 SLR 348 where questions were raised, inter alia, as to the validity of the High Court of the Provinces (Special Provisions) Act No.19 of 1990, Fernando J. declined to go into those issues noting that:

“In so far as the validity of those provisions is concerned, Article 80(3) precludes this Court from inquiring into, pronouncing upon, or in any manner calling in question, the validity of those provisions.”

In **B. Sirisena Cooray v. Tissa Dias Bandaranayake and Two Others** [1999] 1 SLR 1 where Act No.4 of 1978 which amended the Special Presidential Commission of Inquiries law was being considered, Dheeraratne.J, stated that:

“We are here certainly not inquiring into, pronouncing upon, or in any manner calling in to question, the validity of the Special Presidential Commission of Inquiries Amendment Act No.4 of 1978 as contemplated by Article 80(3). The Constitutional provisions must prevail over normal law.”

An important bench of five Justices of Supreme Court in **Attorney General and Others v. Sumathipala** [2006] 2 SLR 126 held that:

*“A judge cannot **under a thin guise of interpretation** usurp the function of the legislature to achieve a result that the Judge thinks is desirable in the interests of justice. Therefore, the role of the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any Court and the function of every Judge to do justice within the stipulated parameters.”*

Justice Dr.A.R.B.Amerasinghe in his book titled **‘Judicial Conduct, Ethics and Responsibilities’** at page 284 expressed the view thus:

“The function of a judge is to give effect to the expressed intention of the Parliament. If legislation needs amendment, because it results in injustice, the democratic process must be used to bring about the change. This has been the unchallenged view expressed by the Court of Sri Lanka for almost a hundred years.”

In the case of **Kodithuwakkulage Pradeep Samantha alias Freddie** SC Appeal No.139/2014, SC (SPL) LA Application No.105/2014 decided on 21/11/2018 His Lordship Aluwihare, J. held that:

“As referred to earlier, this court however, is required to give effect to the legislative provision and I quote with approval Henry Cecil (The English Judge, Hamlyn Lectures, 1970, pg.125), who expressed the view that,

“The object of every court must be to do justice within the law. Admittedly the law sometimes forces an unjust decision. If there is no way about it, it is for Parliament to alter the law if the injustice merits an alteration.”

In the case of **Attorney-General and others v. Sumathipala** (Supra) Her Ladyship Justice Dr. Shirani Bandaranayake (as she then was), in considering the impact of Section 47 (1) of the Immigration and Emigration Act on the liberty and freedom of an individual held that;

“However, it is to be noted that although the liberty and freedom of an individual is thus restricted in terms of the provisions of Section 47(1) of the Immigrants and Emigrants Act, that injustice cannot be cured by this Court as it is for the legislature, viz., the Parliament to make necessary amendments if there is a conflict between the specific provisions and individual liberty.”

In **Harrikissoo v. Attorney General of Trinidad and Tobago** [1981] AC 265, Hyattali CJ stated that:

“He was firmly of the opinion that a Court would be acting improperly if a perfectly clear ouster provision in the constitution of a country, which is its supreme law is treated with little sympathy or scant respect, or is ignored without strong and compelling reasons.”

The judicial decisions cited above and the writings amply demonstrate that the Parliament is the only place which can enact laws and its subsequent

amendment by exercising the legislative power of the people and the Court cannot under the guise of interpretation usurp the legislative power.

The contention of the Learned President's Counsel is that although possession and trafficking of two or more grammes of Heroin, the mandatory sentence is either death penalty or life imprisonment under the Poisons, Opium and Dangerous Drugs Ordinance, it does not negate the Court's inherent powers to impose a suitable sentence.

In the **SC Reference No.03 of 2008**, the Supreme Court has considered a specific provision in the Penal Code which is a separate enactment. In the said reference the Supreme Court mainly considered the imposition of minimum mandatory sentence under Section 364(2) of the Penal Code as amended.

Section 364(2) of the Penal Code reads as follows:

“shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall in addition be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person:

Provided however, that where the offence is committed in respect of a person under sixteen years of age, the court may, where the offender is a person under eighteen years of age and the intercourse has been with the consent of the person, impose a sentence of imprisonment for a term less than ten years.”

Firstly, I conclude that as the **SC Reference 03 of 2008** was in respect of a specific provision in another law, it cannot be applied to provisions in Poisons, Opium and Dangerous Drugs Ordinance. There is a difference between the two laws, i.e., the Penal Code and the Poisons, Opium and Dangerous Drugs Ordinance. There is reference to a minimum sentence in

the Penal Code provisions but not in the Poisons, Opium and Dangerous Drugs Ordinance.

Secondly, the said reference was made in respect of a mandatory minimum sentence of imprisonment.

Sections 54A (b) and (d) of the Poisons, Opium and Dangerous Drugs Ordinance reads as follows:

54A(b) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a licence of the Director, trafficking in any dangerous drugs set out in Column II of Part III of the Third Schedule in excess of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury be liable to the penalty set out in the corresponding entry in Column III of that Part;

54A(d) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a licence of the Director, possesses any dangerous drugs set out in Column II of Part III of the Third Schedule in excess of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury be liable to the penalty set out in the corresponding entry in Column III of that Part;

The Penalties for offences under Section 54A (b) and 54A (d) set out in Column II of part III of the Third Schedule are as follows in respect of 2 grammes or more of Heroin:

“2 grammes of Heroin or above-Death or Life Imprisonment.”

Hence the sentence prescribed by the law for trafficking and possession of two or more grammes of Heroin under Poison, Opium and Dangerous Drugs Ordinance is either death or life imprisonment. Therefore, the court is not empowered to deliver a sentence contrary to the stipulated punishment

under the guise of judicial discretion. Unless the nature of the offence is altered, the judiciary cannot go against the express intentions of the legislature declared through statutory provisions. Otherwise, by extension, the court can impose any other sentence than death, for a person found guilty of murder under Section 296 of the Penal Code.

Imposing any other sentence would amount to an opening of flood gates and in turn, the judges would be indirectly enabled to decide the nature of the offence not as provided by the legislature but according to their own personal opinions. Nature of the offence cannot be indirectly altered by the tool of judicial discretion.

Once the punishment is prescribed by law, then the judiciary cannot interfere with it under the guise of discretion. Discretion can be exercised if there is room left for that purpose by the legislature.

In the United Kingdom life imprisonment has been classified into two categories. The first category is lifelong imprisonment without parole and under the second category the accused is entitled for parole after serving a particular period in prison decided by the judge who sentenced the accused.

In Sri Lanka there is no such categorized provision pertaining to the imposition of life imprisonment available in our regime of criminal laws. As such our courts can only impose one category of life imprisonment.

In **Kodithuwakkulage Pradeep Samantha alias Freddie** [Supra] Aluwihare J correctly held:

*“On the other hand, in the absence of any ambiguity, this court cannot go beyond the literal construction of the statutory provision, which is the primary rule of interpretation. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and on natural meaning of the words and sentences. (Per Lord Fitzgerald in the case of **Bradlaugh v. Clerk** [1883] 8 App. Cases 354.) The rule of construction is “to intend, the legislature to have meant*

what they have actually expressed.” R v. Banbury (Inhabitants)
[1834] 1A and E 136 per Park J.

Hence, it is my considered view that imposition of any other sentence other than death or life imprisonment, for an offence of this nature, will amount to usurping of the legislative power of the Parliament.

Therefore, preliminary submission with regard to the sentence imposed on the Appellant is rejected and the case is fixed for argument.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL