# UKKUWA
# v.
# THE ATTORNEY-GENERAL

COURT OF APPEAL
TILAKAWARDANE, J. AND
WIJEYARATNE, J.
CA NO. 90/99
HC COLOMBO NO. 9033/97
OCTOBER 10, 2002

*Poisons, Opium and Dagerous Drugs Ordinance as amended by Act, No. 13 of 1984, section 54 (A) (D) – Conviction – Life imprisonment – Evidence Ordinance, sections 59, 64 and 67 – Government Analyst's report – Presumption – Youthful Offenders (Training Schools) Ordinance, No. 28 of 1939 as amended by Act, No. 42 of 1944, section 4 (1) – Applicability – Is the sentence of life imprisonment contrary to section 4 (1)? – Should it be confined to a period of 3 years?*

**Held:**

(1) The Government Analyst's report, is merely a document that bears a contemporaneous record that is maintained in the ordinary course of business of the Government Analyst's Department and there is a presumption which operates in favour of such records, that is they are genuine and maintained by public officers, in the course of their duty.

(2) The sentence that has been given by the High Court Judge accords with the Poisons, Opium and Danagerous Drugs Ordinance – where contravention of section 54 (A) (D) attracts the death sentence or life imprisonment. It is a mandatory compliance that is required by the High Court Judge and he does not have any discretion.

(3) The Poisons, Opium and Dangerous Act was enacted specially to deal with a particular kind of offences and as the sentencing is mandatory as provided for by the Act, it must necessarily be complied with.

**APPEAL** from the High Court of Colombo.

*Dr. Ranjith Fernando* with *Sadamalie Munasinghe, Sadamali Manathunga* and *Ranmali Jayawardena* for appellant.

*Palitha Fernando,* Deputy Solicitor-General for respondent.

October 10, 2002

**S. TILAKAWARDANE, J.**

The accused-appellant in this case was indicted on the charge of possession of 28.4 grams of heroine, an offence punishable under section 54 (A) (D) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act, No. 13 of 1984. After trial he was convicted by the High Court of Colombo and sentenced to a term of life imprisonment. The accused-appellant has preferred this appeal on three separate grounds.

(1) That the learned trial Judge has erred in law by admitting inadmissible evidence in so much as his finding of proof beyond reasonable doubt and finding of guilt was based on the document P14, which is the Government Analyst's Report dated 29. 11. 1996 and thereby admitted evidence that was inadmissible in terms of sections 59 and 67 of the Evidence Ordinance.

(2) That the learned trial Judge had erred in so much as he has not considered relevant sentencing policies on a consideration of the age of the accused-appellant which admittedly was approximately seventeen and half years at the time of the commission of the offence.

(3) That the learned trial Judge had failed to act in terms of section 330 (5) of the Code of Criminal Procedure Act, No. 15 of 1979.

At the outset of his submissions, the counsel has conceded that he is not challenging or assailing the facts in this case as regards to the exclusive possession of heroin by the accused-appellant, nor the chain of productions, nor the subsequent evidence which he concedes as proof beyond reasonable doubt as to the charges that had been preferred against the accused-appellant.

In consideration of the first challenge to the judgment of the learned High Court Judge the learned senior counsel appearing for the accused-appellant has raised several matters for the consideration of this court. One of the matters that he has raised is in relation to the report of the Government Analyst's Department marked P14, adverted to above, upon which the conviction, on the facts as to whether the production that had been admittedly taken from the possession of the accused-appellant was a prohibited drug which possession was in contravention of the provisions of the Poisons, Opium and Drangerous Drugs Ordinance was made. His contention was that the only evidence considered was the document P14 and on a consideration of this evidence, it is important to note that apart from the evidence of this document, there was other evidence such as the real evidence of the substance that had been recovered from the accused-appellant, which the several officers who gave evidence before the learned High Court Judge submitted was a prohibited item. There was also the evidence of the officer of the Government Analyst's Department, Mr. Sivarasa, who had conducted the investigations into this substance which had been forwarded to him in two sealed envelopes marked as P1 and P2, respectively.

He gave oral evidence of the fact that he had analyzed this substance (page 309) and his findings upon analysis was that this substance was heroin as adverted by him in his report P14. An objection was also taken by the learned senior counsel that whereas one Sivarasa gave evidence in court that on the face of the report, the report adverted to have been prepared by a Senior Assistant

Government Analyst called Sivarajah. However, though there is this distinction in their names, it is important to note at pages 315 and 316 of the brief, that Sivarasa who gave evidence before the learned High Court Judge claimed to be the Senior Government Analyst who analyzed the said substance and also who prepared the report upon the conclusion of his findings on this analysis.

He, furthermore, categorically and specifically identified P14 as a report prepared by him and which contained his conclusions upon the analysis carried out by him. It is important to note that during the trial no objections had been preferred at the time that P14 was produced, through the witness Sivarasa.

Furthermore, there had been no questions under cross-examination relating either to the genuineness of document P14, nor to the authorship of such document which were the matters of contest that were brought up before this court. Nor was there any challenge raised even through cross-examination of the identity of this witness who claimed to have carried out the examination of the substance taken from the possession of the accused-appellant. This evidence given by the Senior Assistant Government Analyst, Mr. Sivarasa, has not been challenged in the proceedings before the original High Court, and is for the first time being challenged before this court. In this sense, court is mindful of the fact that having had the opportunity to cross-examine the witness before the original court and having failed or neglected to avail himself of the opportunity of such examination on these matters which could have been clarified, had such objections or cross-examination being raised in the original court, the counsel is precluded from challenging the veracity of such matters of fact before this court.

It is to be borne in mind that the Government Analyst's report is a contemporaneous recording of findings by the Government Analyst who had carried out certain tests and who had made certain

observations of which he made an immediate report. In these circumstances, to exclude the possibility that he might subsequently forget matters pertaining to this particular detection, his observations are contemporaneously recorded and in that sense the contents of the Government Analyst's report are important because it is a contemporaneous recording of the findings of the Government Analyst at the time the analysis of the substance was carried out.

It must also be borne in mind that is merely a document that bears a contemporaneous record that is maintained in the ordinary course of business of the Government Analyst's Department and there is a presumption which operates in favour of such records, that is they are genuine and maintained by public officers in the course of their duty.

This presumption can only be assailed by tangible evidence, through cross-examination of the witness or through other reliable evidence that has been placed before the original trial court. This has not been done so in this case. In fact, contrary to this, the Senior Government Analyst, Mr. Sivarasa, who gave evidence referred to his own notes and clarified the position that he had indeed made notes at the time of an analysis and that these notes were consistent with the report that he had produced in court. In this sense, he not only identified his report, but also affirmed the fact of his authorship of that report and the fact that he indeed carried out an analysis of the substance which he found to be heroin. In these circumstances, the proof that was envisaged in terms of sections 59 and 64 of the Evidence Ordinance have been complied with. Furthermore, it also proves that as he has admitted the preparation of the said document that this document cannot be assailed on the grounds it is not in compliance with section 67 of the Evidence Ordinance. In these circumstances, we find that the submissions of counsel pertaining to the initial matter raised by him are untenable and not borne out by the provisions of the Youthful Offenders Act.

In these circumstances, this court sees no reason to set aside the conviction of the accused-appellant as there are no grounds upon which the conviction can be set aside.

On the matter of sentence, counsel has urged two matters which this court has considered. The first matter he has brought up concerns the sentence, which was not in accordance with the Youthful Offenders (Training Schools) Ordinance, No. 28 of 1939 as amended by Act, No. 42 of 1944. One can see from the age of this enactment that this enactment today, in the light of several of the offences that have arisen, specially offences which are punishable in terms of the Poisons, Opium and Dangerous Drugs Ordinance, and offences which have been considered as serious by the State by the enactment of severe sentences as reflected in the schedule of punishments contained in the Poisons, Opium and Dangerous Drugs Ordinance (Amendment) Act, No. 13 of 1984, the question of sentencing matters outside this Act would also be relevant. However, this court considers the submissions of the counsel relating to this Youthful Offenders (Training Schools) Act. Section 4 (1) of the Act refers to a youthful person who has attained the age of 16 years and who has not attained the age of 22 years. Admittedly, the accused-appellant at the time of this offence was a person who was seventeen and a half years and this was not being challenged by the Deputy Solicitor-General who appeared for the State in this case. This section 4 (1) reads as follows :

> "Any person who is convicted by the High Court of any offence, which according to the First schedule to the Code of Criminal Procedure Act, is triable only by the High Court and where it appears to the court that the person is (1) a youthful person and (2) that by reason of his criminal habits or tendencies or association with persons of bad character, it is expedient that he should be subject to detention under such instruction, training and discipline as would be available in a training school, the court may, in lieu

of making any order which it is empowered to make under the provisions of any other written law, and subject to the provisions of subsection (2), order him to be detained in a training school for a period of three years."

The argument of counsel for the accused-appellant is that the sentence of life imprisonment is contrary to the provisions of this section and should be confined to a period of 3 years. First, it is important to note that the sentence that has been given by the High Court Judge accords with the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984, where a contravention of provision 54 (A) (D) which attracts death or life imprisonment. The learned High Court Judge has imposed a sentence of life imprisonment. It is also important to remember that whereas the word "intention of the legislature" in terms of the aforesaid Poisons, Opium and Dangerous Drugs Ordinance was concerned it was a mandatory compliance that is required by the High Court Judge and he does not have any discretion. In any event, the section adverted to under the Youthful Offenders (Training Schools) Act is a discretionary remedy.

On a consideration of the fact that the Poisons, Opium and Dangerous Drugs Ordinance as amended was a special Act enacted specially to deal with this kind of offences and as the sentencing is mandatorily as provided for by this Act, it must necessarily be complied with by the Judge. Furthermore, it is also important to remember that the provisions of the Youthful Offenders (Training Schools) Act, No. 28 of 1939 as amended gives a discretion to court under certain circumstances. The circumstances are, that in the mitigation of sentence, the assertion is made by or on behalf of the accused that there are matters which must be considered by the Judge in the sentencing. In this case, this had never been brought to the attention of the learned High Court Judge, nor were any matters placed before the learned High Court Judge for him to even consider the submissions of counsel

pertaining to youthful persons. However, it is important to note that in sentencing him, the learned High Court Judge has adverted to on 03. 12. 1999 (page 368) that the person is a youthful person and it has been a matter that he had considered. However, no other matters had been placed before him on behalf of the accused-appellant and in these circumstances we see no reason to interfere with the sentence given even though there are provisions in the Youthful Offenders (Training Schools) Act which may grant an opportunity for youthful offenders to be treated in a special manner.

Finally, the other argument of counsel was that the period of his incarceration had not been considered and therefore that this court should reduce the sentence of the accused-appellant. However, in the proceedings of 03. 12. 1999 at page 368, the learned High Court Judge has considered several matters prior to the sentencing of the accused-appellant as adverted to earlier and he has considered the fact that the accused-appellant was 18 years old. He has also considered the fact that the accused-appellant has no previous convictions. He has specially considered the fact that he has been remanded for a period of 4 years prior to his conviction and having considered these matters, he has sentenced him to life imprisonment. In all these circumstances, we see no reason to interfere with the sentencing of the accused-appellant by the High Court Judge. Accordingly, the appeal is dimissed.

**WIJEYARATNE, J.** – I agree.

*Appeal dismissed.*