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

IN THE MATTER OF AN APPEAL UNDER AND IN TERMS OF THE SECTION 331 OF THE CODE OF CRIMINAL PROCEDURE ACT

The Attorney General of the Democratic Socialist Republic Of Sri Lanka

HIGH COURT OF MATARA
CASE NO. 26/2011

VS

Walgama Kodituwakkuge Ruksiri alias Sudumalli

Accused

And now between

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Appellant

COURT OF APPEAL CASE
NO. CA/306/2012

VS

Walgama Kodituwakkuge Ruksiri alias Sudumalli

Respondent

BEFORE: Anil Gooneratne, J.

Malinie Gunaratne, J.

COUNSEL : Shanil Kularatna, S.S.C

for the Appellant

Razik Zarook P.C.

C. Liyanage

for the Accused – Respondent

Argued on: 8th May 2014

Decided : 5th August 2014.

Malinie Gunaratne, J

The Hon. Attorney General has lodged this Appeal and moves to set aside the sentences and substitute a reasonable and appropriate sentences on the Accused – Respondent on the basis that the sentences imposed by the learned High Court Judge is inadequate and inappropriate having regard to the serious nature of offences for which the Accused – Respondent had been convicted.

The Accused – Respondent was indicted before the High Court on the following charges:

Count (1) – that on or about 2001/09/10 the Accused along with others unknown to the Appellant for being a member of an unlawful assembly under Section 140 of the Penal Code.

Count (2) - in the course of the same transaction, while being a member of the said unlawful assembly, committed the robbery of cash in a sum of Rs.848,093/- belonging to Kalpage Hemachandra which is an offence punishable under Section 380 read with Section 146 of the Penal Code.

Count (3) – on the same day in the course of the same transaction that the accused along with Samarasingha Aratchige Sunil Weerasiri Pathiranage Sarath who is deceased and others unknown to the Appellant committed the robbery of cash in a sum of Rs.848,093/- belonging to one Kalpage Hemachandra which is an offence punishable under Section 380 read with Section 32 of the Penal Code.

The Accused – Respondent pleaded guilty to 1st and 2nd counts in the indictment before the High Court. Upon the Accused – Respondent pleading guilty, learned State Counsel and the Defence Counsel made a comprehensive submission as to the facts and circumstances of the case.

The State Counsel invited the Court to impose appropriate sentences considering the serious nature of the offences, which should serve as a deterrent. The learned Defence Counsel also made submission in mitigation of sentences.

Thereupon, the learned High Court Judge sentenced the Accused – Respondent to a term of six (06) months imprisonment and suspended the same for seven (07 years and a fine of Rs.12,000/- with a default sentence of three (03) months on the 1st count and a term of 18 months rigorous imprisonment suspended for five years (05) years and a fine of Rs.25,000/- with a default sentence of fifteen (15) months imprisonment on the 2nd count. No sentence was imposed on the 3rd count as the Appellant withdrew the said count as it was an alternative charge.

The Hon. Attorney General has filed this Appeal and has moved this Court to set aside the said sentences imposed on the Accused – Respondent on the basis that they are totally disproportionate having regard to the serious nature of the offences to which the Accused – Respondent has pleaded guilty.

When this matter came up for hearing the main contention adduced by the learned State Counsel for the Appellant was that the

sentences imposed by the learned High Court Judge is inadequate and inappropriate having regard to the serious nature of offences for which the Accused -Respondent had been convicted.

According to the proceedings before the High Court, the circumstances in which the offences were committed are as follows:

On 10th September, 2001, one Talpage Hemachandra, who is the Accountant of the Southern Province Road Development Board, had been travelling with another officer in a jeep on a main road within the Matara town limits after collecting the cash from the Bank of Ceylon, Matara Branch. The parcel containing cash Rs.848,093/- had been in the possession of Talpage Hemachandra. When the vehicle was proceeding along Beach Road, another vehicle had overtaken the vehicle in which Hemachandra and the other officer were travelling, and had suddenly stopped on the middle of the road obstructing the vehicle in which they were travelling. Afterwards, 5 to 6 persons wearing camouflage uniforms had descended from the vehicle and after threatening the Accountant (witness) with death, forcibly removed the cash that was in the possession of the Accountant. The officer who was with the Accountant and the driver of the vehicle, had made statements to the Police corroborating the Accountant's version.

Soon after the incident witnesses had informed the local police and immediately the Officer in Charge of the Matara Police Station had taken steps to alert the officers attached to the mobile units in the area. As a result the Accused – Respondent was arrested by two police officers who had been on duty near the People's Bank Branch of Yatiyana, at about 11.45 a.m.

The learned President's Counsel for the Accused - Respondent submitted, that the Accused - Respondent being a driver had unknowingly accepted a hire with the perpetrators, who were subsequently killed on arrest. Further submitted that he was unaware that his van was hired to commit the alleged offence until he was threatened with the fire arms. Further submitted hence the learned Trial Judge was correct in law by taking into consideration the circumstances presented on behalf of the Accused – Respondent in mitigation.

In the oral and written submissions of the State Counsel for the Appellant it was contended how the Accused-Respondent and the others were arrested by the police officers. Further contended, there is evidence to establish the fact that the Accused – Respondent had made an attempt to manhandle the Police Officer who is a witness in this case, when he had requested to search the vehicle. Further contended therefore, the submissions of the learned President's Counsel that the Accused –

Respondent is only a driver and had unknowingly accepted a hire, cannot be accepted as the Accused – Respondent (driver) too had been a participant in the robbery.

We have carefully considered the submissions made by the learned President's Counsel and the State Counsel and the material before us.

When a person commits a crime by violating criminal law, he is punished by imprisonment, a fine or any other mode of punishment which is prescribed in criminal law. The criminal is to be punished simply because he has committed a crime. If punishment is not properly imposed, the aggrieved party may take the law into their hands and attempt to punish the offender.

The purposes of criminal punishment may vary. Protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the other when determining what an appropriate sentence is, in a particular case.

The main objective of criminal justice is to protect society from criminals by punishing them under the existing penal system. The Court

has to weigh all relevant factors in order to determine the blameworthiness of the offender.

It has been held In Santa Singh Vs. State of Punjab AIR 1976 SC 2386, that, before imposing an appropriate degree of punishment a "hearing" directs the Court's attention to such matters as the nature of the offence, a prior criminal record, if any, of the offender, his age and record of employment, his background with reference to education and home life and the possibility of treatment of training. Also to the possibility that the punishment may act as a deterrent to both the offender and others, and meets the current community needs, if any, for such deterrent in respect of that particular type of offence.

Primarily the punishment for crime is for the good of the State and the safety of society (Rex vs. Nash (1950) 1 D.L.R. 543). It is also intended to be a deterrent to others from committing crimes (Rex vs. Dash (1948) 91 Can C.C. 187 at 191). It is also intended to be a deterrent to others for committing similar crimes.

The determination of the right measure of punishment is not an easy task, and no hard and fast rule can be laid down. The Court has always to bear in mind the necessity balancing the offence, the offender

and the punishment. In other words, the Court should impose a balanced punishment taking into consideration the offence and the offender both.

As to the matter of assessing sentence in the case of Attorney General vs. H.N. de Silva (Supra), Basnayake A.C.J. observed as follows:-

".....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. 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".

In the case of the Attorney General vs. H.N. de Silva, the learned District Judge has indicated the considerations that influenced him. Here are his words:

".....As regards the 1st Accused he is about 22 years old and has lost his job as a temporary clerk, and although he has passed the General

Clerical Examination he will not be taken in. Seeing that he is a young man, I do not wish to send him to jail".

His Lordship Basnayake A.C.J's view was ".....the learned District Judge has only looked at one side of the picture, the side of the respondent, his youth, his previous good character. These are certainly matters to be taken into account, but not to the exclusion of others which are of greater importance. He has failed to take into consideration the gravity of the offence and the circumstances in which it was committed, the degree of deliberation involved in it, the difficulty of detection of this kind of offence".

In the case of Attorney General vs. Mendis 1995 (1) SLR 138, it was held, to decide what sentence is to be imposed on the Accused, the Judge has to consider the point of view of the Accused on the one hand and the interests of the society on the other. In deciding what sentence is to be imposed the judge must necessarily consider the nature of the offence committed, the gravity of the offence, the manner in which it has been committed, the machinations and manipulations resorted to by the Accused to commit the offence, the persons who are affected by such crime, the ingenuity in which it has been committed and the involvement of others in committing the crime.

In the case of A.G.V.S. Ranasinghe and others 1993(2) SLR 81, His Lordship S.N. Silva, J. has followed the considerations taken by Basnayake A. C.J. in the case of Attorney General vs. H.N.de Silva. Further he has cited an observation made by the Lord Chief Justice in the case of Keith Billam (1986) Vol. 82 Criminal Appeal Reports 347. As observed by His Lordship it is seen that several aggravating circumstances are present in this case.

(i) Violence is used over and above the force necessary to commit the offence;

(ii) Weapon used to frighten the witnesses;

(iii) The robbery has been carefully planned;

(iv) The Accused-Respondent has a previous conviction of robbery;

(v) The victim is very young;

(vi) The effect upon the witnesses, whether physical or mental is of special seriousness.

The learned State Counsel submitted that the offences for which the Accused -Respondent has pleaded guilty are of a serious nature and have been committed with much planning and deliberation and calls for the imposition of an immediate custodial sentence. Further, he submitted that the material discloses that the Accused - Respondent has committed

a planned crime for wholesale profit for which deterrent punishment was called for.

It was his contention that the Accused - Respondent being a member of an unlawful assembly, committed a robbery in broad day light by using fire arms, forcibly removed cash from the possession of witness Kalpage Hemachandra threatening with death. It was further submitted that the offences to which the Accused -Respondent has pleaded guilty, being a planned crime for wholesale profit, the sentences imposed in this case were grossly inadequate. He relied on the following cases:

Gomes vs. Leelaratne 66 N.L.R. 234

Attorney General vs. H.N. de Silva (Supra)

Attorney General vs. Jinak Sri Uluwaduge and Another – 1995 (1) SLR 157.

Attorney General vs. Ranasinghe and Others - 1993 (2) SLR 81

to contend for the proposition that the sentences imposed in this case were out of proportion having regard to the serious nature of the offences.

The learned President's Counsel for the Accused – Respondent submitted, that the learned High Court Judge was correct in law by taking into consideration the extenuating circumstances presented on behalf of the Accused – Respondent in mitigation. His personal factors as he was

25 years of age, unmarried at the time of the incident, at the time of the pleading guilty he is 37 years of age, no previous convictions (it is not correct according to the certificate of previous convictions. He has been convicted for offence of robbery in year 2005) pleaded guilty at the earliest possible instance.

Further he submitted, a plain reading of the order of the learned High Court Judge clearly indicates that he was mindful of the matters submitted by the learned Counsel in mitigation.

When I perused the order of the learned High Court Judge it clearly indicates that he has looked at the question only from the angle of the offender. In his Order he has said

It is clearly shown that the learned High Court Judge has looked at one side of the picture, the side of the Accused – Respondent. He has failed to consider the gravity of the offence and the circumstances in which it was committed. The cases which I have cited in this judgment clearly indicates, in determining the proper sentence the judge has to consider the point of view of the Accused on the one hand and the

interest of the society on the other. A Judge should first consider the gravity of the offence and the manner and the circumstances in which it was committed, the degree of deliberations, previous convictions, if any, of the offender, the possibility that the punishment may act as a deterrent to others, protection of society. Though the reformation of the criminal is an important consideration, the public interest or the welfare of the State also must be looked at. As His Lordship Basnayake A.C.J. has observed in assessing the punishment a judge should look at both sides of the picture.

We are of the view that the Accused- Respondent had been the perpetrator of a very serious crime which had been committed with much deliberation and planning. Had the learned High Court Judge considered the relevant factors or criteria referred to above in determining what the appropriate sentence should have been, the sentence imposed on the Accused- Respondent may well have been different.

We are in agreement with the observations made by His Lordship Basnayake A.C.J. in the case of Attorney General vs. H.N. de Silva, that ".....whilst the reformation of the criminal, though no doubt is an important consideration in assessing the punishment that should be passed on the 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".

When I perused the written submissions filed by the learned President's Counsel, he admits that these are offences under the Penal Code including the offence of robbery, which is of a serious nature, which deserves severe punishments as recognized by the legislature. Hence the learned President's Counsel has conceded that the offence of robbery is a serious crime and which deserves a severe punishment.

We have to note that the learned High Court Judge has failed to give any reasons for disregarding the specific plea of learned State Counsel as to the seriousness of the offence and the requirement to impose a deterrent punishment.

Having regard to the serious nature and the manner in which these offences have been committed by the Accused- Respondent, we are of the view that the sentence imposed in this case is grossly inadequate. We cannot escape from the conclusion that the Accused – Respondent has been too leniently treated by the learned High Court Judge. Such lenient treatment of an offender for such serious crime is bound to defeat the main object of punishment, which is the prevention of crimes.

It was the submission of learned President's Counsel that the Appellate Court should not lightly interfere with the sentence imposed by the learned High Court Judge unless the sentence imposed by the Trial Judge is ex facie, illegal and not in accordance with the law.

Further, he contended that an Appellate Court will interfere only when the sentence passed was manifestly inadequate and not merely on the basis that it would have passed a heavier sentence. But are these sentences manifestly adequate? The view of the court is that these sentences are manifestly inadequate.

This Court has power in the exercise of its appellate jurisdiction to increase or reduce a sentence. The learned President's Counsel for the Accused – Respondent urged that the quantum of sentence is a matter for the discretion of the Trial Judge and that this Court should not interfere, unless it appears that the Trial Judge proceeded upon a wrong principle. We are of the view that an Appellate Court will interfere when a sentence appears to err in principle or when the subordinate court has either failed to exercise its discretion or has exercised it improperly or wrongly.

Upon the facts the Appellate Court may reasonably interfere, that is some way there has been a failure properly to exercise the discretion

which the law reposes in the Court of first instance, the exercise of the discretion may be reviewed.

On the material before us, we are satisfied that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight has been given to the relevant considerations enumerated above. Accordingly the order made by the learned Trial Judge in respect of the Accused – Respondent is one that calls to be set aside.

In this case the learned High Court Judge has imposed 6 months rigorous imprisonment suspended for 5 years and a fine of Rs.12,000/- and in default 3 months simple imprisonment on the 1st Count and 18 months rigorous imprisonment suspended for a term of 7 years and a fine of Rs.25,000/- or in default 15 months simple imprisonment.

It was the submission of the learned State Counsel that even though the Court has a discretion to impose a suspended sentence, it should be taken giving due regard to the specific provision listed under Section 303 of the Criminal Procedure Act. By Act No. 47 of 1999, this section has repealed and substituted a new Section. Specific guidelines listed under Section 303 (1) (a) – (i). If a trial judge wishes to impose a suspended sentence of imprisonment he should address his mind to all

the issues listed under section 303 (1) (a) – (i) also reasons to be stated in writing.

In this case the learned High Court Judge has imposed 6 months rigorous imprisonment suspended for five years and a fine of Rs.12,000/- and in default 3 months simple imprisonment on the 1st Count and 18 months rigorous imprisonment suspended for a term of 7 years and a fine of Rs.25,000/- or in default 15 months simple imprisonment.

It was the submission of the learned State Counsel that even though the Court has a discretion to impose a suspended sentence, it should be taken given due regard to the specific provision listed under Section 303 of the Criminal Procedure Act. By Act No.47 of 1999, this section has repealed and substituted a new section. Specific guide lines listed under Section 303 (1) (a) to (i). If a trial judge wishes to impose a suspended sentence of imprisonment, he should address his mind to all the issues listed under Section 303 (1) (a) – (1). Also reasons to be stated in writing.

In this case learned Trial Judge has not addressed his mind to these issues. He has looked at the question only from the angle of the Accused – Respondent. His Lordship Basnayake, A.C.J's observation was in determining the proper sentence a judge should look at both sides of the picture.

It is seen, several aggravating circumstances are present in this case. We have to note that the learned High Court Judge has failed to give any reasons for disregarding the specific plea of learned State Counsel as to the seriousness of the offence and the requirement to impose a deterrent punishment. We cannot escape from the conclusion that the Accused – Respondent has been too leniently treated by the learned High Court Judge. The offences are far too grave to be dealt with a suspended imprisonment. There is no doubt that the crime committed by the Accused – Respondent is a heinous crime which requires a deterrent punishment.

On the whole we are of the view that public interest demand that a custodial sentence be imposed in this case. We accordingly set aside the Order of the learned High Court Judge, and the Accused – Respondent is sentenced to six months rigorous imprisonment on Count 1 and five (5) years rigorous imprisonment on Count 2. The sentences should run concurrently. No change in fine imposed.

JUDGE OF THE COURT OF APPEAL

Anil Gooneratne, J.

I agree

JUDGE OF THE COURT OF APPEAL