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

In the matter of an application for Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (PHC) APN: 183/2013
High Court of Kalutara Case No. 341/2011

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

1. Anil Asanka Jayasinghe
2. Hettikankanamge Sanath Kumara Perera.
3. Wedikkara Nishantha Chandaranada Silva

Accused

And Now

Hettikankanamge Sanath Kumara Perera

2nd Accused – Petitioner

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent

BEFORE **K.T. Chitrasiri, J**

W.M.M. Malinie Gunaratne, J.

COUNSEL: Amila Palliyage

FOR THE ACCUSED - PETITIONER

Rajindra Jayaratne, SC

FOR THE RESPONDENT

Argued on : 30th July 2014

Decided on : 7th October 2014

Malinie Gunaratne, J.

The 2nd Accused – Petitioner in this case, by his Petition dated 24th of December 2013 moved to revise the Order of the learned High Court Judge Kalutara, dated 17th of September 2013, and to impose a reasonable sentence considering the facts and the circumstances of the case.

The 2nd Accused – Petitioner was indicted with two others before the High Court for the offences punishable under sections 113 (b), 102 and 373 of the Penal Code. On 24th of June 2013, the 2nd Accused – Petitioner and the other Accused pleaded guilty to 1st and 2nd counts in

the indictment before the High Court. Upon the Accused pleading guilty, learned State Counsel and the Defence Counsel had made comprehensive submissions as to the facts and circumstances of the case, before sentencing. The State Counsel had invited the Court to impose an appropriate sentence considering the serious nature of the offences leveled against the accused while the learned Defence Counsel had made submissions in mitigation of sentence.

Thereupon, the learned High Court Judge sentenced the Accused to a term of one (1) year rigorous imprisonment and a fine of Rs.2000/- with a default sentence of three (3) months simple imprisonment on the 1st count and a term of two (2) years rigorous imprisonment and a fine of Rs.7000/- with a default sentence of six (6) months simple imprisonment. Sentences were to run concurrently.

The 2nd Accused – Petitioner, being aggrieved by the aforesaid sentence of the learned High Court Judge, moved to revise and/or set aside the Order dated 17th September 2013 on the basis that they are excessive, illegal, wrongful and contrary to the law / or unreasonable and to impose a reasonable sentence considering the facts and the circumstances of the case.

When this matter came up for hearing before this Court, the main contention of the learned Counsel for the Accused – Petitioner was that the learned High Court Judge has failed to consider any of the mitigatory factors mentioned in paragraph (4) of the Petition dated 24th of December 2013.

The Counsel for the Petitioner relied on the following mitigatory factors in order to have a lesser punishment.

(1)The learned Trial Judge has failed to give due consideration to the fact that the Petitioner has been incarcerated for a period of over 3 and ½ years at the time of conviction.

(2)That the sentences imposed by the learned trial judge is excessive when considering the fact that the petitioner pleaded guilty for the charge without wasting the time of the Trial Court.

(3)The learned Trial Judge has failed to consider the facts and circumstances of the case and has erred in law by failing to give consideration to the submissions made by the learned Defence Counsel in mitigation.

(4)The Petitioner is 37 year old and married with two children and one of them has a hole in the heart for which he needs due care and regular medication.

(5)The learned Trial Judge has failed to consider that there would be substantial miscarriage of justice to the petitioner in the event that the sentence imposed on him is excessive.

(6)The Petitioner is a first offender who has no previous convictions and pending cases and now his remorse with regard to the act that he committed.

(7)The learned Trial Judge has failed to consider the possibility to Rehabilitate the Petitioner in the society rather than isolating and alienating him from the society and also the affect that would be caused to his family members because of the long period of incarceration.

Briefly, the facts of this case are as follows:-

No. 1 and 2 of the prosecution witnesses are brothers who are running a gem and jewellery shop named " Moon Stones and Gems". On the 1st of October 2008, they received a telephone call which bears the number 0719229069 from an unknown person when they were in the shop. When Witness No.2 answered the phone, the caller has demanded Rupees Five Hundred thousand (Rs.500,000/-) and had informed him that if they do not comply with the request, the caller will take steps to kill their children and harm the family members.

After the phone call, the two brothers informed the incident to the Kalutara District Criminal Investigations Unit in the Police Department. Thereafter, the matter was discussed among them and the Police then decided to make arrangements to apprehend the accused. When the next call was received, there was an arrangement to meet the caller at a particular place with fake currency notes. Sunantha Kumara had gone with the parcel of fake currency notes to the arranged place. The 1st and the 2nd accused had come in a three wheeler and had grabbed the parcel from Sunantha Kumara and driven off. The Police having chased the three wheeler had taken steps to stop the same and searched the passengers. Thereafter the police had arrested them. The parcel containing the fake currency notes was in the possession of the 2nd accused. He was seated in the back seat of the three wheeler. The 1st accused was the driver of the vehicle. When the Police searched him a hand bomb was found in his possession.

After questioning the 1st and the 2nd accused, the police had arrested the 3rd accused, making use of the information given by the 1st and 2nd accused. At the time the 3rd accused was taken into custody, a mobile phone was found in his possession which was used to threaten 1st and 2nd witnesses of the prosecution and the family members having demanded

money. It was also revealed that several S.M.S. (Short messages) had been sent from this mobile to the 1st witness of this case, threatening the witness and the family members demanding money.

The main contention of the Counsel for the Petitioner is that the sentence imposed by the learned High Court Judge is excessive, illegal, wrongful and contrary to the law. He also submitted that the learned High Court Judge has failed to give due consideration to the fact that the Petitioner had been incarcerated for a period of over 3 and a ½ years at the time of conviction. In this instance, the High Court Judge has taken into consideration the above facts and stated in his order " .....
....."
Above findings of the learned High Court Judge shows that he has considered the period that the accused was on remand before imposing the sentence. Accordingly, I do not see any merit in these submissions.

The next issue for consideration is whether the sentences were excessive and the learned High Court Judge has failed to consider the facts and the circumstances of the case when imposing the sentence. The learned State Counsel contended that the learned High Court Judge has sentenced the Petitioner having regard to the serious nature of the offences to which the accused- petitioner has pleaded guilty.

In the circumstances, I will now refer to the relevant authorities in this regard.

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.

As to the matters of assessing sentence, in the case of Attorney General vs. H.N. de Silva (Supra) Basnayake Acting Chief Justice observed that 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.

It was held in the case of Attorney General vs. Mendis (1995) 1 SLR 138, to decide what sentence is to be enforced on the accused, 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. Further held in deciding in 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.

Having referred to the authorities above, it is clear that the appellate courts have laid down guidelines that are to be taken into consideration when deciding the sentence that is to be imposed on an accused.

The learned State Counsel submitted that the offences for which the accused – petitioner has pleaded guilty are of a serious nature and those had been committed deliberately after having it planned. He further submitted that under those circumstances, this Court will not interfere,

unless it appears that the learned High Court Judge has improperly exercised the discretion vested in him.

This position has been discussed in the following decisions:

In the case of the King vs. Rankira 32 NLR 145, it was held, the Court of Appeal will not interfere with the judicial discretion of a Trial Judge in passing a sentence unless that discretion has been exercised on a wrong principle. Similar opinion had been expressed in the King vs. E.M. D. de Saram as well.

The learned State Counsel further submitted, that the learned High Court Judge was correct in law in imposing a deterrent sentence having considered the serious nature of the offence. On perusal of the Order of the learned High Court Judge, it is apparent that the learned Judge has taken into consideration all the guidelines laid down in the case of Attorney General vs. Mendis. Accordingly, I am of the view that the Petitioner has failed to satisfy the court that the sentence imposed on him was illegal or that the Judge has exceeded his power when imposing sentence.

In the cases such as this, public policy demands that a deterrent sentence should be imposed when committing offences of this nature. In Karunaratne vs. The State 78 NLR 413, it was held that " ..... The Courts should not give the impression that when they commit these offences they can get away with it by getting a suspended sentence and going scot free".

The next point to be taken into consideration is the effect that would be caused to the members of the Accused family, because of a long period of incarceration. Although the Counsel for the Petitioner had

submitted the fact, that one of the accused children has a hole in the heart, for which he needs due care and regular medication in order to support his arguments, no documents relevant to those have been filed in this Court or in the High Court. Therefore the learned Counsel for the Petitioner cannot say, that the learned High Court Judge was not mindful of that matter. In Rex vs. Bazely (1969) CLR held that because of criminal stupidity when a person loses his family life, that it is not a ground for not imposing a severe sentence. In Solicitor General Vs. Krishnasamy held, it is not an inflexible rule that the first offender should not be sent to prison when crimes of violence are concerned.

I am of the view that the Accused – Petitioner had been the perpetrator of a very serious crime which had been committed with much deliberation and planning. Having regard to the serious nature and the manner in which these offences have been committed by the Accused – Petitioner, I am of the view that the sentence imposed in this case is neither excessive nor illegal. On perusal of the Order of the High Court Judge it clearly indicates that he was mindful of the matters submitted by the Counsel for the Petitioner in mitigation. He has looked at the matters from the point of view of the public and of the offender as well, when sentencing the accused.

The Petitioner has not satisfied Court that the sentence imposed on him was illegal or that the Judge has exceeded his power in imposing the sentence. I am of the view that this is not a fit case, where the sentence should be suspended, having regard to the gravity of the offence.

In the above circumstances, I have no reason to question the legality of the sentence imposed on the accused and therefore I decide that it is a proper and justifiable sentence.

For the foregoing reasons, this application is dismissed.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

I agree

JUDGE OF THE COURT OF APPEAL