

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

Kumaradath De Soysa Siriwardena

**ACCUSED-APPELLANT**

C.A. No. 217/2003

H.C. Colombo No. 8030/1996

Vs.

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

**COMPLAINANT-RESPONDENT**

**BEFORE:** Anil Gooneratne J. &  
Sunil Rajapaksa J.

**COUNSEL:** Dr. Ranjit Fernando for the Accused-Appellant

Yasantha Kodagoda D.S.G. for the Complainant-Respondent

**ARGUED ON:** 23.09.2014 & 24.09.2014

**DE CIED ON:** 13.11.2014

**GOONERATNE J.**

The Accused-Appellant was a dealer in motor vehicles, supplied mainly by his brother who was a resident in Japan. The indictment presented to the High Court of Colombo was on two counts of cheating in terms of Section 403 of the Penal Code. The period relevant to count No. (1) was between 1<sup>st</sup> and 31<sup>st</sup> March 1995. Accused fraudulently and dishonestly induced and obtained a sum of Rs. 275, 000/- from one K. Jinadasa by undertaking that a vehicle be imported and delivered to him from Japan. Count No. (2) was that he dishonestly obtained on 30<sup>th</sup> May 1995 a sum of Rs. 600,000/- from one Upali Lakshman Alwis for the same purpose to import a vehicle. After trial the Accused-Appellant was convicted and sentenced to 5 years rigorous imprisonment on each count and a fine of Rs. 10,000/- on each count which carries a default sentence of 1 year's rigorous imprisonment. The sentence to run consecutively which would be altogether 10 years and a fine of Rs. 20,000/-. Learned counsel for the Accused-Appellant informed court that his client was granted bail pending appeal after 6 months of incarceration from the date of conviction.

The learned counsel for the Accused-Appellant at the outset of the hearing of this appeal submitted that he would only canvass the sentence and argued that a custodial sentence is not warranted in the circumstance of this case and drew the attention of this court, to a long lapse of time from the date of offence being 1995 and as at the present day, over 19 years have lapsed. However the learned Deputy Solicitor General drew the attention of the court to several items of evidence to demonstrate the dishonest/fraudulent criminal intention and acts of the Accused-Appellant which deserve a custodial sentence and argued vehemently that the material placed before the High Court support the prosecution version and as such moved court to affirm the conviction and sentence of the High Court and dismiss this appeal.

I would very briefly, inter alia refer to the submissions of learned Deputy Solicitor General to support the views expressed by him as above. (learned counsel for the Accused-Appellant did not seriously attempt to resist such submissions since he is only canvassing the sentence).

(a) Only two vehicles had been imported during the period June/July 1995. First import was on 07.06.1995 and the second was on 30.05.1995. This is supported by the evidence of the officers of the Department of Customs.

- (b) The cheque and money given to Accused by complainant Alwis and Jinasena was a sum of Rs. 600,000/- and 275,000/-.
- (c) No vehicles were handed over to complainants for the said sums.
- (d) By letters P2 Accused stopped payment on the cheque given to complainant. As such cheque dishonoured.
- (e) Cheques marked P1 and P6 produced by the prosecution pertains to the accounts maintained by the Accused, as testified the Bank Managers of the People's Bank and Seylan Banks. It was the evidence of the Bank Managers that the Accused noticed, the bank to stop payment. (Accused admitted this fact in his evidence)

The Accused-Appellant being a dealer of vehicles no doubt had obtained the sums of money described in the indictment in count Nos. 1 & 2 from the complainants named therein. He having obtained such sums of money never attempted to import the vehicles promised to them or hand over any vehicle to the two complainants. It is clear from the evidence led at the trial that the Accused-Appellant dishonestly and intentionally cheated the complainants.

This court need not once again evaluate the evidence led at the trial. I see no basis to interfere with the findings of the trial Judge. However what remains to be considered is whether a custodial sentence already imposed by the trial Judge need to be affirmed?

The date of offence as stated in the indictment is during the period march to May 1995. As at the year 2014 over 19 years have lapsed. Accused-Appellant, had been granted bail pending his appeal, after 6 months of incarceration from the date of conviction. We are called upon to decide on the sentence in the above circumstances of this case. So many years have lapsed and there is no justification at this point of time to affirm the sentence imposed by the learned High Court Judge. I am guided by the case reported in 78 NLR 413 Karunaratne Vs. State. Sentence – offence committal 10 years ago – considerations applicable in suspending sentence.

*Held by Rajaratnam J.*

That while the trial judge was right in sentencing the accused to a term of two years rigorous imprisonment and to pay a fine of Rs. 1000 and that even if the provisions relating to the suspension of sentences were in operation at that time and the case was concluded in due time, this was not a case where the sentence would have been suspended, having regard to the gravity of the offence. But, on the other hand, when a deserving conviction and sentence have to be confirmed ten years after the proved offence the judge cannot disregard the serious consequences and disorganization that it can cause to the accused's family.

Therefore the delay of 10 years to finally conclude the case is a very relevant circumstance to be taken into consideration and in the circumstances of the case a suspended sentence is appropriate.

*Per Vythialignam, J.*

‘In the instant case the essential question is, is the strain that the accused would have undergone during these ten years when the charge was hanging over his head such as to outweigh the demands of public policy that for this type of offence and this class of offender a different sentence of immediate imprisonment should be imposed”.

We would accordingly vary the sentence and impose a suspended sentence on both counts, and on counts (1) and (2) 2 years rigorous imprisonment imposed on both counts, separately would be suspended for a period of 10 years, on each count. Further we impose a fine of Rs. 10,000/- each on count No. (1) and on count No. (2). Any default of payment of fine would carry a default sentence of 1 year rigorous imprisonment to run consecutively. We also make order for payment of compensation to the complainant described in count No. (1) of the indictment in a sum of Rs. 275,000/- and to the complainant in count No. (2) of the said indictment a sum of Rs. 600,000/-. In the event the complainants are no longer living the legal heirs of the complainants would be entitled to above.

In default of payment of compensation as above, a default sentence of 1 year rigorous imprisonment is imposed. Default sentence to apply to each count separately and would run consecutively.

Subject to above variation on sentence, this appeal stands dismissed.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL