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

The Republic of Sri Lanka

-Vs-

Bandage Sumindra Jayanthi

Accused

AND NOW BETWEEN

Bandage Sumindra Jayanthi

Accused - Appellant

-Vs-

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

C/A No: High Court Vavuniya

Cases No:

1. **CA 251/12** **1839/04**
2. **CA 252/12** **1838/04**
3. **CA 253/12** **1837/04**
4. **CA 254/12** **1835/04**
5. **CA 255/12** **1836/04**
6. **CA 256/12** **1841/04**
7. **CA 257/12** **1840/04**
8. **CA 258/12** **1842/04**
9. **CA 259/12** **1843/04**
10. **CA 260/12** **1938/06**
11. **CA 264/12** **1834/04**
12. **CA 265/12** **1833/04**
13. **CA 266/12** **1831/04**
14. **CA 267/12** **1832/04**

BEFORE : **H.N.J. Perera, J, &**

A.H.M.D. Nawaz, J.

COUNSEL : **Nimal Weerakkody for the Appellant**

S.Thurairaja, DSG for the Attorney-General

Argued on : **02.04.2015**

Written Submissions : **For the Appellant on 15.05.2015**

For the Attorney-General on 16.03.2015

Decided on : **03.07.2015**

A.H.M.D. NAWAZ, J,

In all the appeals before us namely CA 251/12, CA 252/12, CA 253/12, CA 254/12, CA 255/12, CA 256/12, CA 257/12, CA 258/12, CA 259/12, CA 260/12, CA 264/12, CA 265/12, 266/12 and CA 267/12 identical issues arise on sentences that have been imposed upon the Accused-appellant by the High Court Judge of Vavuniya.

Before I proceed to dispose of these appeals against the sentences imposed on the Accused-appellant in the cases, let me narrate the facts and circumstances of these cases. There were 14 indictments that were filed against the Accused-appellant in the High Court of Vavuniya and each indictment had distinct counts charging the accused with criminal misappropriation under Section 386 of the Penal Code. A compendious table containing the number of cases, the names of victims, the dates of commission of offences and the amount misappropriated along with the sentences that have been imposed on each count upon the plea of the Accused-appellant is more fully set out below:-

SN	CA NO.	HC NO.		VICTIM	DATE	AMOUNT	SENTENCE
01	CA 251/12	1839/04	1	PC 39814 Seneviratne	16-02 to 12-06-1998	Rs. 20,000	Rs. 1500 + 6M R1
			2	PC 33617 Dissanayake	16-02 to 13-03-1998	Rs. 20,000	Rs. 1500 + 6M R1

							• R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment.
02	CA 252/12	1838/08	3	PC 34849 Wijerathne	16-02 to 09-04-1998	Rs. 20,000	Rs. 1500 + 6M R1
			4	PC 16521 Nandhimithra	16-02 to 03-03-1998	Rs. 20,000	Rs. 1500 + 6M R1
			5	PC 34700 Kumarasuriya	16-02 to 03-03-1998	Rs. 20,000	Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
03	CA 253/12	1837/04	6	PC 14098 Ganepola	18-02-1998	Rs. 20,000	Rs. 1500 + 6M R1
			7	SI Padmakumara	18-02-1998	Rs. 20,000	Rs. 1500 + 6M R1
			8	PC 24 Devaraj	17-08-1998	Rs. 20,000	Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
04	CA 254/12	1835/04	9	PC 35006 Ranjith	16-02-1998	Rs. 20,000	Rs. 1500 + 6M R1
			10	RPC 36630 Priyantha	08-02-1998	Rs. 20,000	Rs. 1500 + 6M R1
			11	RPC 6483 Sunilrathne	08-02-1998	Rs. 20,000	Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
05	CA 255/12	1836/04	12	PC 22161 Wanninayake	18-02-1998	Rs. 20,000	Rs. 1500 + 6M R1
			13	RPC Yasantha De Silva	18-02-1998	Rs. 20,000	Rs. 1500 + 6M R1
			14	RPC Susantha	18-02-1998	Rs. 20,000	Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
06	CA 256/12	1841/04	15	PC Kumarathileke	11-02 to 02-03-1998	Rs. 20,000	Rs. 1500 + 6M R1
			16	RPC 36605 Ranjith	16-02 to 26-05-1998	Rs. 20,000	Rs. 1500 + 6M R1
			17	RPC 3972 Wijayathilake	16-02 to 27-04-1998	Rs. 20,000	Rs. 1500 + 6M R1

							• R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
07	CA 257/12	1840/04	18 19 20	RPC 36585 Gamini PC 5121 Chandrasekara RPC 84681 Premasiri	11-02 to 23-02-1998 11-02 to 03-03-1998 11-02 to 03-03-1998	Rs. 20,000 Rs. 20,000 Rs. 20,000	Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
08	CA 258/12	1842/04	21	SI Jayasuriya	07-08 to 07-10-1998	Rs. 20,000	Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
09	CA 259/12	1843/04	22 23 24	PC 25761 Jayatissa PC 4801 Somapala PC 16367 Seneviratne	11-07 to 14-07-1998 11-07 to 14-07-1998 11-07 to 17-07-1998	Rs. 20,000 Rs. 20,000 Rs. 20,000	Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
10	CA 260/12	1938/06	25 26	CC Naidage Abarans K. Bawanandan	08-02 to 10-02-1998 08-02 to 10-02-1998	Rs. 20,000 Rs. 20,000	Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
11	CA 264/12	1834/04	27 28 29	PC 24823 Prasanna Sanjeewa PC 21885 Pathmasiri RPC 21390 Nishantha	18-02-1998 18-02-1998 18-02-1998	Rs. 20,000 Rs. 20,000 Rs. 20,000	Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment

12	CA 265/12	1833/04	30 31 32	PC 29898 Namal PCD 13132 Withanage PC 19850 Abeysundara	18-02-1998 18-02-1998 18-02-1998	Rs. 20,000 Rs. 20,000 Rs. 20,000	Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
13	CA 266/12	1831/04	33 34 35	SI Padmakumara RPC 6221 Asoka Nihal PC 6453 Jayatissa	11-02 to 20-02-1998 11-02 to 20-02-1998 11-02 to 20-02-1998	Rs. 20,000 Rs. 20,000 Rs. 20,000	Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
14	CA 267/12	1832/04	36 37 38	PC 19883 Wimalasiri RPC 37112 Jayasinghe RPC 37292 Warnasinghe	18-02-1998 18-02-1998 18-02-1998	Rs. 20,000 Rs. 20,000 Rs. 20,000	Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 Rs. 1500 + 6M R1 • R1 has to run through concurrently. So that only 6 months R1 • In default 3 months imprisonment
TOTAL	**14 Cases**	**14 Cases**		**38 Victims = 38 Counts**		**Rs. 760,000**	**Rs. 57000 (38 counts *Rs. 1500)** **84 months RI (14 cases * 6 months RI)**

As is apparent the money misappropriated on each count was a sum of Rs. 20,000/- which had been entrusted in terms of the indictment to the Accused-appellant for the purpose of being disbursed to individual dependents of police officers who had passed away in the battle. I have to observe that it is only through the indictments and the written submissions filed by the learned Deputy Solicitor General that this Court is able to gather the facts and circumstances that led to the indictments.

In terms of the written submissions filed on behalf of the Attorney General before this Court, it is asserted that at the material time the accused-appellant had been a clerk at the office of the Superintendent of Police, Vavuniya. Since 1995 she had been entrusted with the task of compiling files pertaining to pension and compensation payable to police officers. When a police officer came by his death in a contingency such as a war at the material time, the government would make a payment of Rs. 20,000/- for funeral expenses.

In the event of such an eventuality the Chief Clerk of the office would check the relevant documents, prepare cheques and hand them over to the accused-appellant for making payments. It was the responsibility of the accused-appellant to disburse the cheques to the dependents of the deceased police officers. The relevant indictments were forwarded against the accused-appellant because investigations revealed incriminatory material that the accused-appellant had misappropriated the monies to herself without distributing them to the dependents of the deceased police officers who had passed away under tragic circumstances in the war.

In other words the charges in the 14 indictments against the accused-appellant were premised on the basis that she had misappropriated the funds assigned for the funeral expenses of the deceased police officers and as a result of the act of the accused-appellant, the dependents of the respective police officers were each deprived of a sum of Rs. 20,000/- that was meant to be utilized for the purpose of funeral expenses.

As the aforesaid table in this judgment indicates, the dates of commission of all these offenses happen to fall in the year 1988 and the victims numbering 38 as named in

the 38 counts of the fourteen cases are said to have been deprived of Rs. 20,000/- each resulting in a loss to the State of a sum of Rs. 760,000/- cumulatively.

Initially the Attorney General had indicted the accused-appellant in the High Court of Vavuniya on each count for the offence of criminal misappropriation coupled with an offence against public property - offences punishable under Section 386 of the Penal Code to be read with Section 5(1) of Offences against the Public Property Act No. 12 of 1982 as amended by the Act No. 76 of 1988.

The accused-appellant was served with the indictment on 8th September 2004 and thereafter this case had been called on several dates until 12th July 2012 when the accused-appellant indicated to Court that she had deposited the relevant amount specified in the respective indictments. In other words there had been restitution of the moneys that had been misappropriated. Subsequent to these restitutionary payments the cases had come up on 11th September 2012 when the State Counsel moved to amend the indictment under Section 167 (1) of the Code of Criminal Procedure Act to have the offences against the Public Property Act withdrawn. The effect of these amendments was that the Accused-appellant had to face only offences under Section 386 of the Penal Code. Consequently the accused-appellant pleaded guilty to the amended indictments on 4th October 2012, whereupon the learned High Court Judge had proceeded to convict the Accused-appellant on the plea so recorded.

Thereafter the counsel for the accused-appellant had made submissions in mitigation of the sentence and the State Counsel in reply left the question of sentence to the discretion of the High Court Judge without having made barely any submissions on the facts.

Conviction and Sentence

On the same day as the plea was tendered on 4th October 2012, the Learned High Court Judge convicted the accused-appellant and imposed a sentence of 6 months' rigorous imprisonment on each count in the individual indictments with a fine of Rs. 1,500/- in default of which a term of 3 months' rigorous imprisonment was ordered. The imprisonment of 6 months on each count in the different indictments was to run concurrently. For instance the indictment in case no. 1839/04 which gave rise to the appeal CA 251/12 had two counts of criminal misappropriation of Rs. 20,000/- each in respect of two victims and the sentence of 6 months' rigorous imprisonment on each count would run concurrently. All in all the accused-appellant faced 14 indictments, each containing two or more counts of criminal misappropriation involving 38 victims and on each indictment, regardless of the number of counts of criminal misappropriation, the learned High Court imposed 6 months' rigorous imprisonment on each count but they would run concurrently. Cumulatively the total of 6 months' concurrent imprisonment on each indictment would aggregate to 84 months' rigorous imprisonment since there were 14 indictments (6 months x 14) and it is significant that the accused-appellant pleaded guilty to all 14 amended indictments on the same day namely 4th October 2012. The fine of Rs. 1,500/- each on 38 counts would aggregate to Rs. 57,000/- payable by the accused-appellant with the default sentence of 3 months' rigorous imprisonment. This is the sentence that has been appealed against.

Before I deal with the propriety of this sentence it becomes necessary to comment on the trajectory of these cases in the High Court of Vavuniya.

Progress of the 14 indictments in the High Court

In the instant cases the respective indictments were served on the accused-appellant on 8th September 2004. The cases had been called on several dates with no initiative on the part of either the prosecution or defence to begin the trial or terminate it and as if some belated wisdom dawned, on 12th July 2012 there is a journal entry to the effect: "Accused pays Rs. 40,000/- Registrar HCV-Credit the money under this case number."-please see JE of 12.07.2012 in case no. 1839/04 (CA/251/12).

The repayment of the misappropriated sums of money resulted in a joint motion of both the State Counsel and the Defence Counsel to have the case called on 11th September 2012 when the Defence Counsel notified the High Court that the funds misappropriated had been deposited whereupon the State Counsel gave notice of his intention to amend the indictment.

When the case was next called on 4th October 2012 the State Counsel withdrew the counts on offences against Public Property but retained the charges of misappropriation under the Penal Code.

What strikes this Court as empty as Mother Hubbard's cupboard is the bare statement of the State Counsel that he would leave the sentence to the High Court with nary a word on the facts surrounding the case. No doubt the sentencing belongs to the domain of the trial judge but that is no ground for the prosecuting counsel to be complacent about his role in responding to the mitigatory plea of a defence counsel.

As D.P.S.Gunasekera J observed in ***The Attorney General v Mendis***[1]*"whilst plea bargaining is permissible, sentence bargaining should not be encouraged at all and*

[1] (1993) 1 Sri.LR 138

must be frowned upon. No trial judge should permit and encourage a situation where the accused attempts to dictate or indicate what sentence he should get or what sentence he expects."

No doubt there might have been plea bargaining that took place between the prosecution and defence. Otherwise the amendment of the indictment lessening the severity of the charges could not have come about in the wake of the deposit of moneys that took place 8 long years after the service of indictment. If the repayment and restitution were the triggers to an amendment, the prosecuting counsel must have said so in his submissions. This failure on the part of the prosecuting counsel has led to the counsel for the accused-appellant to contend before us that the High Court Judge had not taken any cognizance of the repayment of the ill-gotten gains by the accused-appellant.

Duty of the Prosecuting Counsel

If the prosecutor gives the defence a discount by way of an amendment of the indictment in exchange for a guilty plea and restitution, which is of course a laudable approach on the part of the prosecution, that should not be a matter left for the Court of Appeal to infer. It is advisable that the State Counsel makes a clean breast of it on the record so that the Court is apprised that the State has awarded a discount in respect of the charges in exchange for a guilty plea. In the absence of such information either in the submissions of the State Counsel or in the order of the learned High Court this Court has to navigate through the labyrinth so to speak and gather from the conduct of the parties that the repayment of the ill gotten money on the part of the accused-appellant has indeed provoked an amendment. Neither does the plea in

mitigation help us either as nowhere in that submission before the High Court of Vavuniya repayment is relied upon as a ground for lessening of punishment.

I would like to observe that a bare statement to the learned High Court Judge that sentencing is best left to her/him is hardly the approach that should be followed by prosecuting counsel when confronted with a plea by an accused.

The State Counsel also bears an obligation as the representative of the Attorney General to set down for the record the facts and circumstances that gave rise to the respective counts in the indictments. In the absence of such a narrative of facts before the High Court it would not be possible for the High Court Judge to fully appreciate the nature of the offence committed by the accused as otherwise the learned High Court Judge would have only the plea in mitigation made by Counsel for the accused-appellant. When the propriety of the sentence is challenged before the Court of Appeal, there would be sparse material for Court to exercise its power of review if some narrative of facts has not been set down on the record. So a state counsel cannot stand as a mute bystander merely because the accused is willing to bring to a close a trial upon a voluntary plea.

Undoubtedly when an accused pleads guilty to the indictment, Section 58 of the Evidence Ordinance comes into operation requiring no further proof of any fact in any proceeding which would come to an end upon the conviction and sentence of the accused. Be that as it may, in view of the extensive submissions that are usually made by counsel for the accused subsequent to a plea, it is incumbent on the prosecutor to set out the salient features of the case to the High Court Judge so that even this Court which is possessed of the power of review of the sentence would be better placed to

embark upon its power having regard to the submissions made by both the prosecutor and the defense counsel.

Therefore, this Court holds that *ex abundanti cautela* it is prudent for prosecuting counsel to bear in mind the obligation to make submissions on matters that impact on the exercise of the sentencing discretion of the High Court Judge.

In any event let me hasten to add that this failure on the part of the prosecutor as has happened in this case would not preclude the appellate court from taking cognizance of the submissions proffered by both the counsel for the State and the Accused-appellant in order to assess the propriety of the sentence that has been imposed by the High Court judge.

Before I pass on to the rival submissions to assess the merits of this appeal, I would like to set down the law within which the jurisdiction to review sentences in appeal subsists.

Right of Appeal and Forum Jurisdiction

It is trite law that where an accused has pleaded guilty to the indictment an appeal would not lie against the conviction but against the sentence or it would lie where the appeal bears upon a question of law.

Section 14 (b) of the Judicature Act No 2 0f 1978 is explicit on this position;

> *Any person who stands convicted of any offence by the High Court may appeal there from to the Court of Appeal*
>
> *(a).....*

"..... (b) In a case tried without a jury, as of right, from any conviction or sentence except in the case where –

(i) the accused has pleaded guilty: or

(ii) the sentence is for a period of imprisonment of one month of whatsoever nature or a fine not exceeding one hundred rupees

Provided that in every such case there shall be an appeal on a question of law or where the accused has pleaded on the question of sentence only.

So Section 14 (b) of the Judicature Act No. 2 of 1978 has set down the parameters of review by this Court-Post conviction upon a plea to an indictment, the appeal will only focus on a question of law or the sentence. In fact the adequacy or otherwise of the sentence passed by the High Court Judge would by itself amount to a question of law if the sentencing discretion has been exceeded by the High Court Judge or the sentence is impugned as disproportionate to the offence committed.

So much for the right of appeal available to an accused who has pled to the indictment and the forum jurisdiction to entertain such appeal is no doubt traceable to Article 138 of the Constitution as it is axiomatic that the constitutional conferment of the appellate power on this Court in Article 138 does not per se give the accused a right of appeal and the bestowal of the right of appeal has to be statutory.[2]

The Two Principal Sources

Legislation and judicial decision are the two principal sources of guidance on

[2]Bakmeewewa v. Konarage Raja (1989) 1 Sri LR 231 (SC); Martin v. Wijewardena (1989) 2 Sri LR 409 (SC) ; Gamhewa v. Maggie Nona (1989) 2 Sri LR 250 (CA); Mudiyanse v. Bandara SC Appeal 8/89 S.C. mins of 15.03.91: Gunaratne v. Thambinayagam and Others (1993) 2 Sri. LR 355; Dassanayake v. Sampath Bank Ltd. (2002) 3 Sri. LR 268 (CA).

sentencing in Sri Lanka and it is relevant to observe that many a country has adopted Sentencing Guidelines whose merits and demerits continue to be debated in those jurisdictions.[3] In regard to fraud offences for instance, the Sentencing Council of England which was created by the Coroners and Justice Act 2009 bought into operation on 1st October 2014 *Sentencing Council's, Fraud, Bribery and Money Laundering Offences Definitive Guideline* and there are a number of countries[4] which have adopted sentencing guidelines in the hope there would be consistency and flexibility given the complex challenges encountered by sentencers. These debates have to be taken into account before Sri Lanka proceeds to adopt sentencing guidelines, subject of course to a consultative process.

As for review of sentences in Sri Lanka one has to have regard to the statutory provisions in place and case law. I would now set out the relevant statutory provisions and the judicial decisions that impact on the sentencing discretion.

Section 13 of the Code of Criminal Procedure Act No. 15 of 1979 stipulates that:-

> *"The High Court may impose any sentence or other penalty prescribed by written law".*

In the instant case the said sentence or penalty prescribed by written law is found in section 386 of the Penal Code.

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[3]See for instance A. Lovegrove, "The Sentencing Council, The Public's Sense of Justice, and Personal Mitigation" (2010) Crim.L.R 906; See the comment on this by Julian B.Roberts, Mike Hough and Andrew Ashworth, "Personal Mitigation, Public Opinion and Sentencing Guidelines in England and Wales" (2011) Crim.L.R 524 and the response thereto by A.Lovegrove, "There are more things in the Public Sentencing than in Your Philosophy: A Response to Roberts, Hough and As worth" (2011) Crim.L.R 531.

[44]Besides the US, guidelines have been introduced in South Korea, Uganda and the Republic of Fiji Islands and proposed in several other countries.

Section 386 of the Penal Code reads as follows:-

> *"Whoever, dishonestly misappropriates or converts to his own use any movable property shall be punished with* ***imprisonment of either description for a term which may extend to two years,*** *or with fine, or with both"*

The Code of Criminal Procedure Act No. 15 of 1979 is rife with provisions relating to sentences.

By an amendment made to the Code of Criminal Procedure Act No. 15 of 1979 in 1999[5], the legislature laid down guidelines which a court must bear in mind, before such court decides to suspend a sentence upon conviction.

Section 303 of the Code as amended reads thus:-

303.(1) Subject to the provisions of this section, on sentencing an offender to a term of imprisonment, a court may make an order suspending the whole or part of the sentence if it is satisfied, for reasons to be stated in writing, that it is appropriate to do so in the circumstances, having regard to;

a) **the maximum penalty prescribed for the offence in respect of which the sentence is imposed;**
b) **the nature and gravity of the offence;**
c) **the offender's culpability and degree of responsibility for the offence;**
d) **the offender's previous character;**
e) **any injury, loss or damage resulting directly from the commission of the offence;**

[5] Code of Criminal Procedure Amendment Act No 47 of 1999 certified on 10 December 1999.

f) the presence of any aggravating or mitigating factor concerning the offender;

g) the need to punish the offender to an extent, and in a manner, which is just in all of the circumstances;

h) the need to deter the offender or other persons from committing offences of the same or of a similar character;

i) the need to manifest the denunciation by the court of the type of conduct in which he offender was engaged in;

j) the need to protect the victim or the community from the offender;

k) the fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or

l) a combination of two or more of the above

(2) A court shall not make an order suspending a sentence of imprisonment if –

a) a mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed; or

b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or

c) the offence was committed when the offender was subject to a probation order or a conditional release or discharge; or

d) the term of imprisonment imposed, or the aggregate terms of imprisonment where the offender is convicted for more than one offence in the same proceedings, exceeds two years.

It is apposite to pose a while and observe that the criteria set down as above in **(a)** to **(l)** of Section 303 (1) of the Code as amended reflect the indicia long established by case law. Though section 303 (1) of Code requires judges to be cognizant of these

criteria before suspending a sentence, in my view these are some of the factors that constitute legislative guidelines to judges even when they utilize their discretion to sentence an accused to a punishment stipulated in the Penal Code or any other criminal statue. These criteria are not limited to suspended sentences alone and will apply in any situation where a judge wishes to impose a custodial sentence. This non-exhaustive list of factors, though prescribed by the legislature in 1999, reflect the jurisprudence that has been echoed by appellate courts over a long period of time. Some of those case law which gave rise to the legislative formulae in Section 303 (1) (a) to (l) are worthy of mention.

As to the matter of assessing sentence in a particular instance, Basnayake A.C. J in the case of ***Attorney-General v H.N. de Silva***[6] 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 form 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. He should also regard t**he effect of the punishment** as a deterrent and consider to what extent it will be effective. If the offender held **a position of trust or belonged to a service** which enjoys the public confidence that must be taken into account in assessing the punishment. The incident of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the

[6]57 NLR 121

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..."

After having set out the above indicia, Basnayake A.C.J found fault with the trial judge for not having taken into his reckoning some of the factors referred to above.

Some of the criteria Basnayake A.C.J alludes to in the passage quoted above are mirrored in the legislative guidelines in Section 303 (1)(a) to (l) of the Code as could be manifest upon a reading of that section.

In ***A.G. v Jinak Sri Uluwaduge and Another***[7] it was held that:-

"....in determining the proper sentence, the judge should 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. **He should also regard the effect of the punishment as a deterrent** and consider to what extent it will be effective. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration. The Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non-detection. Another matter to be taken into account is that the offences were planned crimes for wholesale profit. The Judge must consider the interests of the accused on the one hand and the interests of society in the other; also necessarily the nature of the offence committed, the machinations and

[7](1995) 1 Sri LR 157

manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organisation in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime..."

In the case of ***The Attorney General v Mendis***[8], it was held that in assessing punishment the judge should consider the matter of sentence both from the point of view of the public and the offender. **The judge should 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. **He should also regard the effect of the punishment as a deterrent** and consider to what extent it will be effective. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive the consideration. Two further considerations are **the nature of the loss to the victim and the profit** that may accrue to the accused in the event of non-detection.

Furthermore in that case the court observed that once an accused is found guilty and convicted on his own plea or after trial, the judge in deciding on sentence, should consider the point of view of the accused on the one hand and the interest of society on the other. The nature of the offence committed, the machinations and manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organization in respect of which it has been committed, is concerned, the persons who are affected by such crime the

[8] See Fn 1 supra

ingenuity with which it has been committed and the involvement of others in committing the crime are matters which the judge should consider.

D.P.S.Gunasekera J further observed –

> *"white collar crimes or economic crimes have been committed with impunity in the past. Hence the sentence passed should be in keeping with the nature and magnitude of the offence to which the accused has pleaded guilty."*[9]

Similar principles have been reiterated in ***Attorney General v Gunarathna***[10] and the learned Deputy Solicitor General has also cited in his written submissions the case of ***Walgama Kodituwakkuge Ruksiri alias Sudumalli v The Attorney General***[11].

Recidivism and recalcitrant conduct have to be averted for the greater good of society and punitive laws that prescribe sanctions for infractions of normative behavior have to be interpreted to advance the objectives of punishments whose parameters have been amply set down by the gladsome jurisprudence of the judicial precedents cited above. In fact some of the indicia such as gravity of the offence, presence of aggravating and mitigating factors, antecedents of the accused, prevention and deterrence have long been recognized in English courts.

Classical Principles of Sentencing

Lord Justice Lawton in the case of ***R v James Henry Sargeant***[12] designated them as classical principles of sentencing and summed them up in four words; retribution, deterrence, prevention and rehabilitation. The learned Judge stated:-

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[9] Attorney General v Mendis Fn 1 and Fn 8 supra
[10] (1995) 2 Sri.LR 240 per Sarath N.Silva J, P/CA
[11] CA/306/2012
[12] (1974) 60 Cr.App.R.74

"Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.....

There is, however, another aspect of retribution which is frequently overlooked: ***it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass.....***

.....I turn now to the element of ***deterrence****, because it seems to us the trial judge probably passed this sentence as a deterrent one. There are two aspects of deterrence:* ***deterrence of the offender and deterrence of likely offenders.....***

.....We come now to the ***element of prevention.*** *Unfortunately it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period.....*[13]"

It is pertinent to observe that the counsel for the accused-appellant has also highlighted in his written submissions that the accused appellant was jailed in two different cases of the same nature in 2004.

On the question of aggravating and mitigating factors, I consider the process as laid down. **The judges must typically settle on a starting point and adjust the sentence**

[13] See (1974) 60 Cr.App.R.74 at 75,76, 77 and 78.

for the aggravation and mitigation as appropriate. In an offence such as criminal misappropriation, the High Court Judge has the discretion of a range of sentences extending up to a maximum of 2 years and once he has settled on a starting point, he has to strike a balance between aggravation and mitigation. The balance is the watchword. He must go up and down the sliding scale based on the aggravating and mitigatory factors.

Where there is a legislative guideline as in Section 303 (1)(a) to (l) of the Code which is, as I have commented above, a mirror image to some extent of long established judicial guidelines, the sentencer will begin the process of sliding up and down the scale of aggravation and mitigation by reference to the non-exhaustive list of factors given in both the legislative and judicial guidelines. Secondly the sentencers can also engage in a consideration of any factors deemed relevant by them but not listed in the guidelines. Other statutory provisions such as sections 16 and 300 of the Code as commented upon below can also be taken into account.

In the light of this analysis of all the criteria set out above and the classical principles to be applied in sentencing, what is the result on the facts of this case? Is the sentence of 6 months' rigourous imprisonment aggregating to 84 months for 38 counts of criminal misappropriation in 14 indictments too disproportionate and inconsistent with the sentencing guidelines of Sri Lanka? The sentence is sought to be impugned on the following grounds in a nutshell. We will dispose of this question after having applied the law to the facts in the case.

The Guilty Plea and consideration of the ground of repayment

It has to be recalled that the guilty plea did not come all too soon. The amendment of charges to lesser offences followed in the wake of repayment 8 long years after

service of indictment. Why wasn't this repayment made in or around 2004 when the indictment was served or soon thereafter? Did the Accused-appellant buy time-virtually a period of 8 years to garner the money and pay it back in 2012? The victims were all driven back to the wall when the accused-appellant played ducks and drakes with their money which was really the largess of the State for funeral expenses. If this money had been paid back just after arraignment or even so soon thereafter, it would have been an emollient, if not palliative, to the victims. Eight long years or more thereafter, it would not lie now in the mouth of the accused-appellant to contend that her repayment is a virtue.

If at all, the first benefit of a plea of guilty is for victims and witnesses for whom the knowledge that an accused has accepted her/his guilt reduces the impact of the crime and avoids the stress of anticipating having to give evidence. The second major reason for the practice is a more pragmatic one. The expenditure in public time and money on trials and the preparation for trials is considerable. They are avoided or reduced by the admission of guilt, so that limited resources could be concentrated on those cases where a trial would really be necessary.

No doubt Section 197 (2) of the Code of Criminal Procedure Act which was brought in by Amendment Act No. 14 of 2005 is to the following effect-

> *"The judge shall in sentencing the accused have regard to the fact that he so pleaded."*

A slightly better version of the above provision is found in Section 236 (b) of the Administration of Justice Law No 44 of 1973 (A.J.L).

"Where any person accused of an offence assists the prosecution by pleading guilty to the commission of such offence and the court is satisfied that such person is sincerely and truly repentant, then that fact shall be taken into consideration in determining the amount of punishment."

Though the Code of Criminal Procedure Act No. 15 of 1979 did not re-enact this provision, the salutary guideline in the A.J.L provision cannot be altogether lost sight of in applying the provisions of Section 197 (2) of the Code as introduced by the 2005 amendment. In this connection what the English Court of Criminal Appeal has stated in ***R. v Caley and others***[14] becomes relevant.

"The well-established mechanism by which the difference between defendants who required the public to prove the case against them and those who accepted their guilt was by reducing the sentence which would have been imposed after trial by a proportion, on a sliding scale ***depending on when the plea of guilty was indicated.*** *The largest reduction was of about one-third, which was to be accorded to defendants who indicated their plea of guilty* ***at the first reasonable opportunity.*** *Thereafter the proportionate reduction diminished, and a plea of guilty at the door of the trial court would attract a reduced reduction."*

The rationale to be distilled from this case is that sentence discounting generally operates on the basic principle that the earlier a guilty plea is tendered, the larger size of the discount, as the benefits to the criminal justice system tend to be greater for early pleas than for later ones. For comparable observations to this effect in the

[14][2012] EWCA Crim 2821

Scottish jurisdiction please see ***Gemmell v HM Advocate***[15] and ***Murray v HM Advocate***[16].

So the cases establish that a plea of guilty might of course be an indication of remorse, but it might not be. An accused might regret his offence, or he might plead guilty because he did not see a way of avoiding the consequences. Discussing the question of tactical pleas, the English Court of Appeal had this to say in ***R. v David John Hollington: R. v George Michael Emmens***[17]

> *"The idea seems to be getting around that if a defendant ultimately pleads guilty he is entitled to a very considerable discount on his sentence. This Court has long said that discounts on sentences are appropriate but everything depends upon the circumstances of each case."*

In light of the above principles of law, what do we make of the sentence discount that the accused-appellant secured in this case? Despite an unduly belated repayment which brought about a lessening of very serious charges, the accused-appellant secured a two fourth reduction of the sentence punishable for criminal misappropriation. When the English courts prescribe only a one third of the maximum sentence for a timely plea, notwithstanding an inordinately delayed plea this accused-appellant obtained a reduction by two fourth of the 2 years' term thus having to undergo only a period of six months' rigorous imprisonment for multiple counts in the individual indictments.

In our collective view, this sentence is in no way disproportionate to the gravity of the offence that has been committed having also regard to the mitigatory

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[15] *[2011] HCJAC 129; 2012 J.C. 223; 2012 S.L.T 484.*
[16] *[2013] HCJAC 3; 2013 S.C.L. 243*
[17] *(1986) 82 Cr. App. R. 281*

circumstances that the accused pleaded before the learned High Court judge.

One of the mitigatory factors that was urged before both the High Court and the Court of Appeal is that the accused-appellant is the primary earner who maintains both her elderly mother and an adult daughter who was about to enter holy matrimony in the not too distant future. It was urged that her incarceration would sever the umbilical cord. It was always an inevitable consequence of her offence that the accused was going to be separated from her mother and daughter for a significant period. With the marriage of the daughter she would no longer be a dependent on the accused-appellant and though this Court recognizes that the rupture of a relationship with a dependent may in particular cases amount to a mitigatory factor, the question to pose would be whether the reduced sentence does reflect the personal factor in mitigation.

Furthermore it has to be emphasized that the legitimate aims of sentencing which have to be balanced against the effect of a sentence on personal mitigation such as family life includes the need of society to punish serious crime, the interests of victims that punishments should constitute just deserts and the need of society for appropriate deterrence. In our view such a balance has been achieved with the recognition of the plea and repayment by the imposition of concurrent sentences which stood reduced by two fourth of the maximum.

In fact the fact that the learned High Court Judge has shown benevolence to the accused appellant cannot be gainsaid. Such an exercise of discretion cannot be faulted by this Court as an erroneous imposition of an excessive sentence.

Having regard to loss of public funds and the harm caused to 38 victims by a process of premeditation and covert machinations indulged in by the accused-appellant, the

delayed reparation in no way attenuates the severity of the offences which the accused-appellant admitted.

In the circumstances I am of the opinion that the punishment that has been imposed restores the just order of society which was disrupted by the crime and the fact hardly needs repetition that retributive justice is predicated on the principle that the punishment must fit the crime.

So this Court is not inclined to set aside the conviction and sentence imposed in these cases.

Before I part with the judgment, I would advert to another argument that has loomed large in the written submissions.

Concurrent and Consecutive Sentences

Sections 16 and 300 of the Code would regulate the imposition of consecutive and concurrent sentences.

As I have stated above, the learned High Court judge ordered the imprisonment of 6 months on each count to run concurrently so that the accused-appellant has to undergo only a prison term of 6 months RI on each indictment. Her total term of imprisonment aggregates to 84 months' RI (7 years' RI) because she pleaded guilty to 14 indictments each carrying a sentence of 6 months' RI.

In fact there could not have been a bar to the learned High Court Judge to have ordered consecutive terms of 6 months on each count in the individual indictments as Section 16 (1) of the Code of Criminal Procedure Act quite clearly empowers the High Court Judge to order the punishments to commence, the one after the expiration of the other but the Learned High Court judge chose not to do so and instead

exercised her discretion namely the discretion to direct that the punishment for each offence (count) at one trial shall run concurrently with each other.

Thus the accused obtained a further advantage through the exercise of this discretion, when in fact the High Court Judge could have ordered in terms of section 16 of the Code that the sentences on each count in one indictment shall run consecutively.

As section 16 (1) of the Code of Criminal Procedure Act stands, it enacts both a rule and an exception. The rule is that if there are more than one count in one indictment, the separate sentences ordered on each count shall run consecutively. But the exception to the rule as found in the said section is that if the High Court judge chooses to do so, she/he is empowered to order the separate sentences to run concurrently. In fact Section 16 (1) a neutral provision which applies to both trials in the High Court and the Magistrate's Court enacts-

> *"When a person is convicted* ***at one trial of any two or more distinct offences*** *the court may subject to section 301 sentence him for such offence to the several punishments prescribed therefore which such court is competent to inflict; such punishments when consisting of imprisonment to commence, unless the court orders them or any of them to run concurrently, the one after the expiration of the other in such order as the court may direct, even where the aggregate punishment for the several offences is in excess of the punishment which the court is competent to inflict on conviction of one single offence;*
>
> *Provided that if the case is tried by a Magistrate's court, the aggregate punishment shall not exceed twice the amount of punishment which such court in the exercise of its ordinary jurisdiction is competent to inflict."*

Provided that if the case is tried by a Magistrate's court, the aggregate punishment shall not exceed twice the amount of punishment which such court in the exercise of its ordinary jurisdiction is competent to inflict."

Thus Section 16 of the Code is limited in scope to multiple counts in one trial and the power of ordering concurrent sentences does not extend to other indictments against the same accused as they would constitute separate and distinct trials.

In fact Section 300 of the Code reinforces this position.

"When a person actually undergoing imprisonment is sentenced to imprisonment such imprisonment shall commence at the expiration of the imprisonment to which he is being previously sentenced"

The Court of Appeal considered the scope of section 300 of the Code in the case of ***Muthukuda Arachige Ranjith v the Attorney General***[18] where Gamini Abeyratne J by interpreting the worlds "actually undergoing imprisonment" in section 300 of the Code correctly pointed out that if multiple indictments are taken up on one particular day and the accused pleads guilty to those indictments one after the other, he actually commences his imprisonment when she/he is sentenced upon the plea to the first indictment. Therefore section 300 of the Code would not permit the imposition of concurrent sentences for the different indictments. This view was also taken by Gamini Amaratunga J in ***Weerawranakula v The Republic of Sri Lanka***.[19]

While I respectfully adopt these decisions, I hasten to point out that not only Section 300 but also Section 16 of the Code would prohibit the imposition of concurrent sentences for multiple indictments.

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[18] CA No 70-72/2001 reported in (2004) Appeal Court Judgments 5.
[19] (2002) 3 Sri.LR 213

The learned Deputy Solicitor General has moved for an enhancement of the sentence which course this Court is disinclined to take as we opine that there was an opportunity available to the Attorney General to prefer an appeal against the sentence which was not availed of. Moreover even if this Court possesses the power to do so in an appeal preferred by the Accused-Appellant, we do not deem it proper to adopt that exceptional course in this case, as we are of the view that the sentence imposed on the Accused-Appellant meets the ends of justice from both the point of view of the public and the Accused-Appellant.

For the reasons I have already given, we are satisfied, having regard to the facts of this case and the relevant principles of law and criteria governing sentencing, there is no error committed by the learned High Court Judge and in the circumstances we affirm the conviction and sentence.

The appeal is thus dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J.Perera J

I agree

JUDGE OF THE COURT OF APPEAL