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

In the matter of an application in terms of section 331 of the criminal procedure code Act No.5 of 1997.

C.A Case No. 203/2012

H.C. Kegalle

Case No.2982/10

Hon. Attorney General

Attorney General's Dept.

Colombo 12.

Complainant

Vs.

Shanmugalingam Suriya Kumar

Kurunegala Road, Rambukkana.

Accused

AND BETWEEN

Shanmugalingam Suriya Kumar

Kurunegala Road, Rambukkana.

Accused Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant Respondent

BEFORE : **H.N.J.PERERA, J**

P.W.D.C. JAYATHILAKE, J

COUNSEL : Dr. Ranjith Fernando with

Samanthi Rajapakshe for the

Accused Appellant.

Ayesha Jinasena D S G for the

Respondent.

ARGUED ON : 27.10.2014

DECIDED ON : 24.07.2015

P.W.D.C. Jayathilake, J

Suriya Kumar was a resident in Rambukkana. He is a Tamil National but married a Sinhalese woman and had a child. He was fluent in Sinhala. In the year 2005 he had to go to Jaffna as he had a traffic case. When he passed Pulliyankulama check point, Udayan who was a member of LTTE had helped him to obtain the required pass. At that time Suriya Kumar had given his telephone number and the address to Udayan. As he had travelled 3 days for the said case they had become friendly and one day Udayanhad asked Suriya Kumar whether he could help Udayan's elder sister to get an identity card and a passport. Suriya Kumar answered positively. Udayan had given a telephone

number of a communication centre situated near Kilinochchi bus stand to Suriya Kumar to give him the information about Suriya kumar's next visit to Jaffna. Accordingly on his following visit Suriya Kumar met Udayan near the said communication centre. Thereafter Suriya Kumar had visited Udayan's residence. He had met Suren pretending to be the brother of Udayan. Suriya Kumar had promised them to bring Uma, the person who needed the identity card and the passport, with him on next visit. In the month of July, 2005 Suriya Kumar brought Uma to his residence in Rambukkana with him. Suriya Kumar had taken Uma to Rambukkana police station and had made a complaint that her identity card had been lost. After that Suriya Kumar had introduced Uma to Grama Niladhari whom he knew as Ari Mahaththaya for about 10 years and had requested him to help Uma to get an identity card. He had given Rs.500/= to Grama Niladharias a gratification which was given to him by Uma. Uma had given an address in Anuradhapura to Rambukkana police and Rambukkana address to Grama Niladhari with the knowledge of Suriya Kumar.

She had obtained the identity card on the application handed over to said Grama Niladhari. Uma had been living with Suriya Kumar's family for a few months. She had given money to Suriya Kumar who got a house on rent for them to live. She had been travelling to Colombo very often (during her stay) with Suriya kumar's family.

Uma's head was found on a tree near the place of bomb blast in Army Head Quarters, which was the bomb blast that attempted to kill the Army commander.

Shanmugalingam Suriya kumar was indicted under the provisions of Prevention of Terrorism Act No 48 of 1979 for bringing LTTE member Manjula (who was referred to as Uma) to Rambukkana, giving her protection and accommodation in his house, finding her a house on rent and failure to give information to a police officer about her, knowing that she was a LTTE member. He was convicted for all four counts and sentenced to 10 years rigorous imprisonment each for the first three counts and five years rigorous imprisonment for the fourth count. It has been ordered to effect those sentences consecutively.

Being dissatisfied with the said conviction and the sentences the Accused Appellant has preferred this appeal to this court.

The Accused Appellant has been convicted purely on direct evidence. But the main item of evidence is confession of the Accused Appellant made to the police. Even though a confession made to a police officer is inadmissible under the provisions of the evidence ordinance, the confession made to a police officer in the rank not below Assistant Superintendent of Police is admissible under the Prevention of Terrorism Act if the confession has been made voluntarily.

In this case as the Accused Appellant had challenged the producing of confession as evidence on the ground that it had been recorded forcibly. A voire dire are inquiry had been held by the trial judge to decide whether the confession had been made voluntarily or it had been recorded forcibly. After the said inquiry the learned trial judge has made the order dated 25.09.2012 allowing to mark the confession as evidence.

Sec.16 of PTA is as follows.

According to Sec.24 of the evidence ordinance, a confession made by an accused person is irrelevant in a criminal proceeding if making of the confession appears to the court to have been caused by any inducement threat or promise having reference to the charge against the accused person proceeding from a person in authority or proceeding from another person in the presence of a person in authority and with his sanction and which inducement threat or promise is sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

The allegation which had been made against the producing of the confession was that the Accused Appellant had made the confession as a result of his being assaulted by the police officers. The learned trial judge had rejected this allegation having considered the evidence of the medical officer who had examined the Accused Appellant prior to and after the recording of confession. It is stated that the Accused Appellant has admitted that he was produced before the medical officer for examination and also representatives of I C R C visited him when he was in the police custody. When the police officers, who are said to have assaulted the Accused Appellant, totally rejected the said

allegation while giving evidence, they had not been questioned on the said point for the Accused Appellant in cross examination. Therefore it appears that the decision taken by the learned trial judge in respect of the confession shall not be interfered with.

Swarnalatha, a Sinhalese woman who had been a neighbor of the Accused Appellant in Rambukkana had testified that she had identified the head of the woman who had stayed at Accused Appellant's house and whom the Accused Appellant had introduced to her as a sister from Vavunia. Swarnalatha had observed that the said woman had been going out in the morning and coming back in the evening during the period that she was staying at the Accused Appellant's house for about two three months.

It has been revealed on evidence that the application submitted to obtain an identity card to Uma had been either destroyed or misplaced. According to the document marked as P10, two photographs submitted with the application appeared to have belonged to two different persons. One was a photograph of the woman who was living in Anuradhapura and the other a photograph of Uma. The learned trial judge has come to the following conclusion, in analyzing the evidence.

The Accused Appellant had taken Manjula to his house in Rambukkana from Killinochchi on the instructions of LTTE members. The Accused Appellant had provided accommodation to Manjula in his house with the knowledge that Manjula was having close connection with LTTE organization. The Accused Appellant had directly involved himself obtaining an identity card to Manjula by submitting bogus documents. The Accused Appellant had failed to inform the authorities that the particular woman was staying in his house even after he had come to know that the woman who had blasted the bomb on the Army Commander was staying with his family. The Accused Appellant had fled from his house on seeing C I D officers coming to his house. When all these inferences and the confession of the Accused Appellant are taken as a whole it is the conclusion of the learned trial judge that the mere denial of the Accused Appellant in his dock statement does not raise any doubt in the prosecution case.

The 4th charge is the failure of the Accused Appellant to inform the police about the movements of two L.T.T.E members, namely, Udayan and Suren who had attempted to commit the murder of General Sarath Fonseka, the Army Commander. Even though as a reasonable man, Accused Appellant should have known that Uma was a member of L.T.T.E organization, there is no direct evidence to presume that he had the knowledge that Udayan and Suren had

been attempting to commit the murder of Army Commander prior to the incident of the Bomb Blast. It is revealed in the confession that Accused Appellant had travelled to Jaffna and had met Vdayan and Suren even after the incident of the Bomb Blast. The learned D.S.G clarified that the 4th charge had been leveled eased on the activities of the Accused Appellant subsequent to the Bomb Blast. Therefore after the Bomb Blast. Knowing that Suren and Udayan were responsible for it. Accused Appellant's concealing this information makes him responsible for the 4th count.

It appears that the learned High Court Judge had carefully gone through the confession of the Accused Appellant and had compared the facts revealed in the evidence of the prosecution case in arriving at the conclusions with regard to the mental elements and factual elements relating the Accused Appellant to committing the offence. In particular she has performed a commendable duty in adjudicating this case. Therefore it seems that there is no reason to interfere with the judgment of convicting the Accused Appellants for the 1st three charges of the indictment.

It is submitted by the learned counsel for the Accused Appellant not withstanding the fact that some of the conclusions arrived at by the learned trial judge were unsupported by the evidence led and relevant portions extracted from the confession made, the Accused Appellant sacks permission

to confine his appeal to the question of sentence only. He submits the following for consideration of granting relief on the thirty five years rigorous imprisonment imposed by the High Court.

(a) The making of a confession tantamount to a show of regret and remorse on the part of the confessor.

(b) The fact that, in Appeal, only the sentence being canvassed. Also tantamount to a plea of guilt before the course of Appeal as the conviction is not being challenged.

(c) The Accused had been on remand since the day of arrest on 3rd July 2006, almost seven years at the time he was convicted on 23rd October 2012.

(d) There was no evidence what so ever that the Accused was a member of the L.T.T.E or that he had any previous involvement with the L.T.T.E or any of its members.

Furthermore, the learned counsel pointed out that the Accused is an innocent victim of the circumstances.

The learned D.S.G. submitted that these offenses are those committed against the state, so they are to be considered more seriously.

When taking the sentencing policy into consideration, courts, when passing custodial sentences for two or more counts at once makes them effective either consecutively or concurrently. The general rule to be applied to make custodial sentences effective concurrently is that committing of relevant offenses are the acts of the same transaction that have taken place during one and the same period.

It was for the judge in the exercise of his discretion to determine whether the sentences should be consecutive or concurrent, and such discretion was not limited so as to prevent him passing sentences more than the maximum permitted for any one of the offences taken by itself. (Rajina Vs Blake – Queen's Bench Division – Vol.2 1962 P 377) The learned Counsel for the Appellant has referred the legal text principles of sentencing (U.K) by Martin Wasik. He has drawn the attention where it has been stated, " The Court of Appeal held that, as the facts of the two offences were inextricably linked, the terms should have been concurrent. Even where, unlike *Coker*, the offender has committed quite distinct offenses, sentences imposed should still be

concurrent where the offences that arise out of the same set of facts 'the same occasion' or the 'same transaction' as it sometimes put."

In the case under consideration, Accused Appellant has committed the offences of all four counts during the period, 01.07.2005 to 30.07.2006. The acts relevant to first three counts are bringing an L.T.T.E member in safety from Jaffna to Rambukkana, providing accommodation and security to the said L.T.T.E member at his residence, and finding a house for the said person respectively. All those three counts are punishable under Sec. 2 (2) (ii) of the Prevention of Terrorison (temporary provisions) Act No.48 of 1979. Accordingly, any person guilty of those offences shall on conviction be liable to imprisonment of either description for a period not less than five years, but not exceeding twenty years. The learned High Court Judge holding the view that custodial sentences imposed for these three counts shall be effective consecutively has imposed ten years rigorous imprisonment for each count.

The fourth count is different from other three counts in nature, that is having in his possession information relating to the moments or whereabouts of person who has committed or is making preparation or is attempting to commit an offence under P.T.A fails to report the same to a Police Officer which is punishable under Sec. 5 B of the said Act. The learned trial judge has imposed five years rigorous imprisonment for the fourth count while the

maximum is seven years according to law. Finally this court has come to the conclusion that the considered decision of the learned trial judge in passing sentences shall not be interfered with. Therefore, the custodial sentences imposed by the learned trial judge shall be effective consecutively.

As such this court dismisses the Appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA, J

I agree

JUDGE OF THE COURT OF APPEAL