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

In the matter of an Application for Revision made under Article 138 of the Constitution read with Section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

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

Petitioner

C.A. Revision Application
No. CA (PHC) APN No. 08/2015 **VS.**
H.C. Mannar Case No. HC/MN/14/14

Subramaniam Dayabaran *alias*
Kannan,
No.247, Manik Farm,
Settikulam,
Vavuniya.

Accused – Respondent

BEFORE: **W.M.M. Malinie Gunaratne, J. &**

P R Walgama, J.

COUNSEL: Anoopa de Silva S.S.C.
for Petitioner

Respondent is absent and unrepresented.

Argued on : 10.12.2015

Written submissions

filed on : 09.02.2016

Decided on : 12.05.2016

Malinie Gunaratne, J.

This matter comes up on a Revision Application filed by the Honourable Attorney General (hereinafter referred to as the Petitioner) from the sentence imposed on the Accused – Respondent (hereinafter referred to as the Respondent) by the Provincial High Court of Manner.

The Respondent moves to set aside the sentences and substitute reasonable and appropriate sentences on the 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 Respondent had been convicted.

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

Count (1)

That on or about 28th June 2010, the Respondent along with persons unknown to the prosecution, entered the house of Jesudasan Gratian, and by displaying a hand grenade, robbed money and jewellery worth Rupees One hundred and fourteen thousand six hundred (Rs.114,600/-) thereby committing an offence punishable

under Section 380 of the Penal Code read with Section 32 of the Penal Code.

Count 2.

That in alternative to the above first charge, the Respondent was in possession of stolen properties namely some jewellery worth Rupees One hundred and eight thousand (Rs.108,000/-) which belonged to Benadicta Punkala, thereby committing the offence of Retention of Stolen Property an offence punishable under Section 394 of the Penal Code.

Count 3

That in the course of the same transaction as stated in the above first charge, the Respondent was in possession of an Offensive Weapon without any lawful authority, thereby committing an offence punishable under Section 2(1) B of The Offensive Weapons Act.

On 28th October 2014, the Respondent pleaded guilty to all three counts in the indictment. Thereupon, the learned High Court Judge sentenced the Respondent to a term of 10 years rigorous imprisonment and suspended it for five years (5 years) for the 1st Count, a term of two years (2 years) rigorous imprisonment and suspended it for five years (5 years) for the 2nd Count and a term of five years (5 years) rigorous imprisonment and suspended it for five years (5 years) for the 3rd Count.

In addition, a fine of Rupees Five thousand (Rs.5,000/-) was imposed with a default sentence of two years (2 years) imprisonment, after the

learned Counsel for the Respondent made oral submissions in mitigation. (Oral submissions made by the Counsel is marked P 3 and filed along with the Petition).

Being aggrieved with the aforesaid sentences, the Petitioner has preferred this application in revision against the above sentences imposed by the learned High Court Judge.

It was submitted by the learned State Counsel that the Respondent has committed this crime with much premeditation, pre-planning and pre-concert. Further contended considering the seriousness of the crime that the non-custodial sentence imposed on the Respondent is grossly inadequate and is out of proportion having regard to the magnitude of the crime that had been committed.

The facts relevant to the offence are as follows:-

On 28th June 2010, around 9.00 p.m., the accused and another 4 – 6 unknown people entered the house of the complainant and robbed the money and jewellery worth Rupees One hundred and fourteen thousand six hundred (Rs.114,600/-) from the possession of Jesudasan Gratian (Complainant) having displaying a hand grenade.

The facts stated above present the commission of a daring robbery using a hand grenade, forcibly removing cash and jewellery from the possession of the complainant and his wife threatening them with death. The offences for which the Respondent has pleaded guilty are of a serious nature and have been committed with much planning and deliberation.

Hence, on the basis of the facts relevant to the commission of the offences as stated above, I am of the view that the sentences imposed are manifestly inadequate. The offences call for the imposition of custodial sentences. The circumstances relevant to the commission of the offences clearly militate against the imposition of a suspended term of imprisonment.

I also note, that the learned High Court Judge has not given any reasons for imposing only a suspended term of imprisonment on the accused. If the learned High Court Judge took a lenient view of the matter, he should have stated the reasons on which such a view was taken.

It is to be noted, 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 been repealed and substituted by 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 under Section 303 (1) (a) - (i) and also reasons to be stated in writing. It is relevant to note in the instant case the learned High Court Judge has not given any reasons on which such a view was taken.

The learned High Court Judge has failed to comply with the provisions of Section 303 (2) (d) of the Criminal Procedure Act No. 15 of 1979 as amended by Act No. 47 of 1999.

Section 303 (2) (d) reads as follows:

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

(a) – (c)

(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.

In the instant case, the Respondent being convicted and sentenced to ten years rigorous imprisonment in respect of Count 1 and sentenced to five years (5 years) rigorous imprisonment in respect of Count 3 with the aggregate terms of imprisonment thereby exceeding two years, satisfies the requirement of Section 303 (2) (d).

Hence, the learned High Court Judge has acted contrary to the provisions of Section 303 (2) (d) of the Code of Criminal Procedure Act.

Apart from that, it is relevant to note, considering the seriousness of the crime that the non-custodial sentence imposed on the Respondent is grossly inadequate. It is the stance of the learned State Counsel that, the offences for which the Respondent pleaded guilty are far too grave to be dealt with in a non-custodial sentence and the material discloses that it was a planned crime for wholesale profit, for which deterrent punishment was called for.

In deciding appropriate sentence a Court should always 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 the Statute under which the offender is charged (Attorney General vs. Mendis (1995) 1 SLR 138).

It was held in Attorney General vs. H.N. de Silva 57 N.L.R.121 "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".

In the case of Attorney General vs. Ranasingha and Others (1993) 2 S.L.R. 81, His Lordship S.N. Silva has followed the consideration 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 Billiam (1986) Volume 82, C.A.R. 347. As observed by His Lordship it is seen several aggravating circumstances are present in this case.

(i) Violence is used over and above the force necessary to commit the offence;
(ii) Weapons (Hand grenade and a knife) used to frighten the witnesses;
(iii) The robbery has been carefully planned;
(iv) The Respondent has two previous convictions;
(v) The effect upon the witnesses, whether physical or mental.

It is to be noted that, the learned High Court Judge has acted leniently without considering those aggravating circumstances of the case before imposing the sentences on the Respondent.

It was held in Gardner vs. James (1948) 2 A E R 1069; Pickett Vs. Fesq (1949) 2 A.E.R. 705, that the lenient treatment of an offender for a serious crime is bound to defeat the main object of punishment which is the prevention of crimes.

On perusal of the Order of the learned High Court Judge, it clearly indicates that he has looked at the question only from the angle of the Respondent. He has looked at one side of the picture and has failed to consider the gravity of the offences and the circumstances which it was committed.

Hence, having regard to the serious nature and the manner in which these offences had been committed by the Respondent, I am of the view that the sentences imposed in this case is grossly inadequate, ex facie illegal and not in accordance with the law. Accordingly the Order made by the learned High Court Judge in respect of the Respondent is one that calls to be set aside.

The learned State Counsel has drawn the attention of this Court to the fact that though Count No. 2 came to be included in the indictment as an alternative Count to Count 1, the learned High Court Judge has inadvertently proceeded to read the said alternative count also to the Respondent and with the Respondent pleading guilty to same, the learned High Court Judge imposed two years rigorous imprisonment and suspended it for five years. As there is a count in the alternative there can be only one conviction. Hence, I set aside the sentence imposed on the Respondent in respect of Count 2.

On the whole, I am of the view, that public interest demand that a custodial sentence be imposed in this case. Accordingly, I set aside the sentence of ten years (10 years) rigorous imprisonment imposed on the Respondent in respect of Count 1 which has been suspended for five years (5 years) and sentence the Respondent to a term of ten years (10 years) rigorous imprisonment and a fine of Rupees Twenty five thousand (Rs.25,000/-) in default two years (2 years) rigorous imprisonment in respect of Count 1. I also set aside the sentence of five years (5 years) rigorous imprisonment imposed on the Respondent in respect of Count 3, which has been suspended for five years (5 years) and sentence the Respondent to a term of five years (5 years) rigorous imprisonment and a fine of Rupees Ten thousand (Rs.10,000/-) in default 2 years rigorous imprisonment. Further, I order the main sentences should run concurrently.

For the reasons stated above, the application in Revision is allowed and the sentences are varied.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Application is allowed.