

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

In the matter of an Appeal under
Section 331 of the Criminal Procedure
Act No. 15 of 1979.

Hon. Attorney General,
Attorney General's Department

Plaintiff

Case No. CA 31/2014

Vs.

1. Devanarayana Acharige Thilak
Premalal alias Thilak,
No. 12/1, Malwarushawa,
Dehiowita.

2. Devanarayana Acharige Suranga,
No. 12/1, Malwarushawa,
Dehiowita.

Accused

AND NOW BETWEEN

Devanarayana Acharige Suranga,
No. 12/1, Malwarushawa,
Dehiowita.

Accused – Appellant

Vs.

Hon. Attorney General,
Attorney General's Department

Respondent

BEFORE

: **P.R. WALGAMA J**
S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL : Neranjan Jayasinghe for the Accused
Appellant
Hiranjan Pieris S.S.C. for the Respondent

ARGUED ON : 21.06.2016

WRITTEN : 05.07.2016

SUBMISSIONS

DECIDED ON : 02.08.2016

S. DEVIKA DE LIVERA TENNEKOON, J

This is an Appeal from the judgment of the Learned High Court Judge of Kegalle dated 28.04.2014. The 2nd Accused – Appellant (hereinafter sometimes referred to as the Appellant) together with his brother who was the 1st Accused was indicted with the charge of attempted murder of one Wijesinghe Mudiyansele Ratnasiri by attacking and injuring him, an offence punishable under Section 300 of the Penal Code read with Section 32 of the said Act.

The 1st Accused pleaded guilty to the offence and he was given a suspended sentence and was fined Rs. 15,000/- carrying a default sentence of two and a half years imprisonment.

The 2nd Accused was tried in absentia and after leading evidence of the prosecution the Learned Trial Judge convicted the Appellant and he was sentenced to a term of 10 years rigorous imprisonment with a fine of Rs. 10,000/- carrying a default sentence of 6 months simple imprisonment.

The instant Appeal relates to the above mentioned sentence imposed on the 2nd Accused – Appellant as the Learned Counsel for the Accused Appellant limited his argument only in respect of the appeal against the sentence. When this Appeal was taken up for hearing the main contention of the Leaned Counsel for the Appellant was that there is a disparity of sentence between the 1st and the 2nd Accused.

The Learned Counsel for the Appellant invokes the appellate jurisdiction of this Court to lessen the sentence imposed on the Appellant and contests the disparity in the term of sentence imposed on the 1st and 2nd Accused.

The Learned Counsel for the Appellant relies on the unreported case of Hewafonsekage Priyari Sriyantha Vs. The Hon. Attorney General CA 125/2011 in which it was held that;

“The 1st, 2nd and 3rd accused were given suspended sentences. The person who inflicted injuries namely the 2nd Accused was also given a suspended sentence. In our view, the fact that the 4th accused absconded from the trial should not be considered as an additional ground when imposing the punishment.”

The Learned Counsel for the Appellant also relies on the case of The Police Officer, Dondra Vs. Baban 25 NLR 156 which held that “an accused, who pleads not guilty and claims to be tried, is not to be punished when found guilty more severely on that account, than a co – accused who has pleaded guilty. ”

The Learned Counsel for the Respondent does not contest the said contentions of the Appellant.

Even though I agree with the concept that the mere reason of absence of an Accused should not be taken in to consideration in deciding the sentence, I am of the opinion that non availability of the evidence, with regard to the circumstances, which if available could have been considered for mitigation cannot be exempted when examining the sentence passed by the trial judge after a trial in absentia.

But in the instant case when considering the participation of the 2nd Accused Appellant in the act of crime, it is obvious that he has been punished more severely on the mere reason of his absence of the trial. Therefore I agree with the contention of the Learned Counsel for the Appellant and accordingly, I affirm the conviction but set aside the sentence of 10 years rigorous imprisonment imposed on the Appellant and this court impose a term of 2 years rigorous imprisonment and suspend the same for a period of 5 years which is to be operated from the date he surrenders to or is produced before the Court.

Further the fine of Rs.10, 000/= imposed by the Learned Trial Judge is hereby enhanced to Rs. 25,000/= carrying a default sentence of six months simple imprisonment.

The Appeal is partly allowed subject to the aforementioned variations.

The Appeal is partially allowed.

Judge of the Court of Appeal

ROHINI WALGAMA J

I agree