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

DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.

COMPLAINANT

CA 261/2015

High Court Panadura

HC- 2402/2007

Vs.

1. Sarathge Sugath Kumara
2. M. Udaya Prashantha Piyadasa
3. Reginold Joshep Seneviratne
4. B. Don Krishantha Alias Pathum
5. Sangharajage Deepal
6. E. A. Suranga Deepal
7. Francis Jude Shantha
8. W. Don Manoj Deshantha

ACCISED

AND NOW BETWEEN

Reginold Joshep Seneviratne

3RD ACCUSED – PETITIONER

Vs.

Hon. Attorney General

COMPLAINANT RESPONDENT

Before : P.R. Walgama, J

: S. Devika de L. Tennekoon, J

Council : Tenny Fernando for the Accused – Appellant.

: A. Jinasena SDSG for the AG.

Argued on : 05.09.2016

Decided on : 05.12.2016

CASE NO. CA- 261 /2015- JUDGMENT- 05.12.2016

P.R. Walgama, J

In this appeal the 3rd Accused- appellant has called in question the legal acceptability of the sentence passed by the Learned High Court Judge dated 23.10.2015.

By the afore said judgement the Learned High Court Judge has imposed on the 6th count in the indictment a jail term of 3 years Rigorous Imprisonment, and a fine of Rs. 100,000/ carrying a default term of 2 years with Simple Imprisonment, Further it was directed to pay a sum of Rs. 250,0000(25 lacks) as compensation, carrying a default sentence of 5 years of Simple Imprisonment.

The 3rd Accused -Appellant along with 7 others were indicted in the High Court of Panadura. The 3rd Accused was charged for retention of stolen property under Section 394 of the Penal Code.

As indicative from the case record except the 3rd Accused- Appellant all others had pleaded guilty for the respective charges without proceeding to trial.

The 3rd Accused – Appellant failed to make his appearance in court and the trial proceeded against him in absentia in terms of Section 241 of the Criminal Procedure Code. At the conclusion of the afore said trial the Learned Trial Judge convicted the 3rd Accused –Appellant and passed the sentence as stated above.

Being aggrieved by the above conviction and sentence the 3rd Accused- Appellant has preferred this appeal and impugned the said judgment.

The pith and substance of the Appellant's appeal is that by imposing the above sentence was inimical to the fundamentals of the sentencing policy, in that there is a disparity of the sentence. In the appeal at the argument stage counsel for the 3rd Accused- Appellant informed court that he does not wish to challenge the conviction, but only the sentence imposed on the Accused -Appellant.

The narrative of the prosecution version is unspooled thus;

That the 3rd Accused – Appellant along with other accused conspired to rob the SANASA Bank at Horana. It is said that the 3rd Accused – Appellant was aware

of the said plan. Eventually certain robbed items were recovered from the possession of the 3rd Accused-Appellant.

It is the contention of the counsel for the 3rd Accused -Appellant that the Learned High Court Judge had imposed a such sentence as the accused- Appellant was absent at the trial.

On 31.07.2012 the 1st ,2nd ,4th , and 5th accused persons withdrew their earlier plea and pleaded guilty to their charges respectively.

It is seen from the proceedings that the Learned High Court Judge had considered the plea of the above accused, imposed a sentence of 24 months RI suspended for 10 years and a fine of Rs.7,500/ carrying a default sentence of 6 months of Simple Imprisonment. In imposing the above sentence the Learned High Court Judge has taken the following facts in to consideration, in that;

The nature of the charge against them, the period of incarceration, at the outset having pleaded for the charge, and without previous convictions. It is pertinent to note that the 3rd Accused- Appellant were also charged with the same offence for retaining stolen property. It is contended by the Learned Counsel for the Respondent that the Learned High Court Judge had directed a non custodial sentence for the said accused persons purely on the grounds as stated

above. Therefore it is the contention of the Respondent that the 3rd Accused- Appellant does not deserve a non custodial sentence due to his contumacious behaviour.

It is contended by the Counsel for the Accused – Appellant that the 3rd Accused – Appellant should be considered with the sentence that was imposed on the 1st 2nd and 5th accused who stood for the same charge as the 3rd Accused – Appellant.

Respondent also asserts the fact that the Learned High Court Judge has before arriving at the above determination has taken in to account the fact that the 3rd Accused non appearance in court.

It is evident that the police had recovered about 10 items of gold from the 3rd Accused – Appellant's possession.

Therefore it is contended by the Respondent that the Learned High Court Judge has correctly assessed the facts in the proper perspective and same should be affirmed.

The Respondent has also adverted this court to the judicial decision of DON PERCY NANAYAKKRA .VS. THE REPUBLIC (1993) 1SLR- 71, wherein Their Lordships had opined that "in assessing punishment the court has to consider the matter from the point of both the offender and the public.

This Court will also take cognisance of the rational observed by Their Lordships in the case of THE KING .VS. E.T.M. DE SARAM 42 NLR- 575, which held thus;

"the Court of Criminal Appeal will not interfere with the discretion of the trial judge with regard to the sentence unless that discretion has been exercised on a wrong principle or unless the sentence is manifestly excessive".

The counsel for the Accused –Appellant thrust his defence mainly on the fact that the 1st accused who stood in the indictment for the similar charge, and who pleaded guilty to the same was imposed the sentence of 24 months Rigorous Imprisonment which was suspended for 10 years and a fine of Rs. 7500/ carrying a default of 6 months imprisonment.

More fully the 2nd Accused who also pleaded to the charge of retention of stolen property was imposed the sentence as stated above, which is a non custodial sentence. Therefore it is alleged by the Counsel for the 3rd Accused- Appellant who stood for the same charge has been sentenced to a sever punishment by imposing a custodial sentence of 3 years of Rigorous Imprisonment for retention of stolen property punishable under section 394 of the Penal Code, and a fine of Rs. 100,000/ as the other two accused who was charged with the similar offence was imposed a fine of Rs. 7500/. Besides a compensation of 2.5 million to be

paid to the SANASA Bank and in default of 5 years imprisonment.

It is salient to note that the 3rd Accused -Appellant was arrested by the police and produced by the prison authority. Pursuant to the afore the Counsel for the Appellant has made an application in terms of Section 241(3) of the Criminal Procedure Code, and the Learned High Court Judge made order rejecting the application of the 3rd Accused – Appellant.

The Accused – Appellant being aggrieved by the said order has appeal to this court to have the impugned order set aside. The Pith and substance of the counsel for the Accused- Appellant is that the above sentence is inordinately excessive in considering the circumstances attended thereto.

It is contended by the counsel for the Accused-Appellant that the Learned High Court Judge has erred in law by imposing a custodial sentence where as the accused who were charged with same charge under Section 394 for retention of stolen property was imposed a non custodial sentence. In addition it is said the Learned High Court Judge has not ordered the other accused who faced a similar charge to pay a compensation of such an excessive amount. In fact they were ordered to pay only Rs. 7500/ and with a default term 6 months Rigorous Imprisonment. Hence a cursory glance at the above, it exhibits clear disparity

in the sentences imposed by the Learned High Court Judge who were charge with the similar offence, viz a viz. Retention of stolen property. Therefore it is said the above determination has caused miscarriage of justice.

To fortify the position stressed by the counsel for the 3rd Accused –Appellant, had adverted court to the to the judicial decision in the case of HEWA FONSEKAGE PRIYANI SRIYANTHA .VS. ATTORNEY GENERAL (CA 125/2011) decided on 04.11.2013 had observed thus;

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

It is been noted that the same view was appreciated in the case of K.V. CHANDRASEKARA .VS. ATTORNEY GENERAL (CA 153/2012) DECIDED ON 09.02 .2016)

The counsel for the 3rd Accused- Appellant has dealt with the applicability of Section 17 of the Civil Procedure Code in dealing with awarding compensation for the parties.

The Counsel for the 3rd Accused -Appellant alleged that the Learned High Court Judge has not adhered to the

provision of the Criminal Procedure Code viz; Section 291 (1) (d) which states thus;

" (d) The term for which the court directs the offender to be imprisoned in default of a fine shall not exceed one-forth of the term of imprisonment which is the maximum fixed for the offence if the offence be punishable with imprisonment as well as fine."

Therefore it is the categorical position of the counsel for the Accused – Appellant that as per Section 394 the maximum sentence is 3 years and in terms of section 291 (1) (d) of the Criminal Procedure Code and the default sentence for the fine that may imposed by the court, shall not exceed ¼ of the 3 years.

Therefore the clear procedure to be followed in awarding compensation and imposing jail term in the event of a failure to pay the fine is fairly and squarely laid down in the Criminal Procedure Code as stated above.

Hence in the wake of the above factual and legal matrix this court is of the view that the Learned High Court Judge has imposed a fine which was imposed on the Accused persons who in fact were directly involved in the robbery of the SANASA bank, and also a jail term, merely because the 3rd Accused – Appellant was absconding and trial proceeded under 241 of the Criminal Procedure Code. As decided and it is trite

that such fact cannot be taken in to account in imposing the a sentence on the Accused- Appellant.

In the said back drop this court is of the view that there is a disparity in the sentence imposed on the accused persons who pleaded guilty to the same charge as a parole was granted, where as the 3rd Accused - Appellant was imposed a custodial sentence with an exorbitant fine and inordinate amount of compensation, which is unreasonable and vexatious and should be subject to the judicial review.

It is being observed by the proceedings dated 26.10.2015 that the Accused-Appellant was produced by the Prison Authority and a counsel appearing on his behalf made submissions to the effect that the above Accused made a statement on 31.10.2002 to the Acting Magistrate in terms of Section 127(1) of the Criminal Procedure Code, and in fact he was to be made a crown witness. It was at this stage that he received death threats and as a result he has gone to hiding for fear of death. Therefore the counsel has moved court in terms of Section 241(3) to afford an opportunity to the Accused – Appellant to explain reasons for his absence, which opportunity was rejected by the Learned High Court Judge and has imposed the same sentence that was imposed on the other accused who pleaded guilty for the charge of robbery. This Court

will take in to consideration the 1 year period of incarceration and impose the following sentence.

Therefore in the above setting I am persuaded to reduce the sentence imposed on the 3rd Accused-Appellant as follows;

2 years of Rigorous Imprisonment, suspended for ten years

In addition Rs. 25,000/ fine carrying a default term of 1 year Simple Imprisonment.

Subject to the above variation appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree.

JUDGE OF THE COURT OF APPEAL