

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

In the matter of an application for Revision in
terms of Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka

Court of Appeal case no. CA/PHC/APN/69/2015

H.C. Colombo case no. HC 98/2005

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Kimbulapitiyage Gamini Mendis
2. Kimbulapitiyage Sudath Shantha Mendis
3. Kottehewage Sunil Priyantha
4. Ranadewa Kumaranayake
5. Sam Henry Premil Ihalagam

Accused

AND NOW

1. Kimbulapitiyage Gamini Mendis
2. Kimbulapitiyage Sudath Shantha Mendis
3. Kottehewage Sunil Priyantha
4. Ranadewa Kumaranayake

Accused Petitioners.

Vs.

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

Before : H.C.J.Madawala J.
: L.T.B. Dehideniya J.

Counsel : Amila Palliyage with Eranda Sinharage and Upul
Dissanayake for the 4th Accused Petitioner.
: Lakmali Karunanayake SSC for the Respondent.

Argued on : 03.10.2016

Written : 18.11.2016 and 21.11.2016
submissions

Decided on : 26.01.2017

L.T.B. Dehideniya J.

The Accused Petitioners were indicted before the High Court of Chilaw for the offences punishable under sections 140, 296, 315 read with section 146 of the Penal Code. After concluding the prosecution case and leading half way of defence evidence, the defence indicated to Court that the accused were prepared to plead guilty to a lesser count. The second count was reduced to a charge of culpable homicide not amounting to murder on the basis of sudden fight punishable under section 297 and all accused tendered a plea of guilty on all counts. After hearing the submissions of both parties, the learned High Court Judge other than the sentences imposed on 1st and 3rd counts, imposed a sentence of 12 years RI for the 1st and 2nd Accused, 18 months RI for the 3rd Accused and 4 years RI for the 4th and 5th Accused. Being aggrieved

by the sentence, 1 to 4 Accused moved in revision. At the argument, only the 4th Accused Petitioner contested the sentence and his argument restricted to the disparity of sentences on the 2nd count among the 3rd and 4th accused.

The 3rd Accused was imposed a term of 18 months RI while the 4th Accused was given 4 years RI. The Counsel for the 4th Accused Petitioner (the Petitioner) argues that it is a disparity of sentencing. He argues that the 3rd and 4th Accused were not involved in the incident directly and they were charged only on the basis of common object.

The learned SSC argues that there is no law that nowhere in the law as it is today is stated that in a case where there are number of accused, the accused should be sentence in the same manner.

In the present case it is evident that the 1st and 2nd Accused were directly involved in the incident. There were 14 injuries in the deceased's body, and 3 other persons were also injured in the incident. The house of the deceased was also damaged. The accused have gone to the house of the deceased and created the incident. These factors were brought to the notice of the learned High Court Judge in making the order of sentencing.

The evidence revels that the Petitioner had gone to the scene with a firearm in hand. The way that the Petitioner participated in the incident, i.e., going to the scene where a fight is going on having a firearm in hand does not establish that he is an innocent by stander, but he has gone there with a criminal motive.

Chitrasiri J. in the case of Asan Mohamed Rizwan v. Attorney General CA [PHC] APN 141/13 CA Minutes dated 25.03.2015 expressed

several guide lines in sentencing policies. His Lordship after a comprehensive analysis of authorities held that;

Having referred to the importance of looking at the available statutory provisions, I will now advert to the other aspects that are necessary to consider before a sentence is determined. Those can be categorized as follows:

- (a) The maximum and the minimum (if any) penalty prescribed for the offence;*
- (b) The nature and gravity/seriousness of the particular offence.*
- (c) The offender's culpability and degree of his/her responsibility for the offence*
- (d) mental state of the accused at the time the offence was committed;*
- (e) Evidence as to pre-arrangement for the commission of the offence;*
- (f) The impact of the offence on any victim and the injury, loss or damage caused as a result of the offence committed;*
- (g) Whether the offender pleaded guilty to the offence and if so, the stage in the proceedings at which the offender did so or the stage at which it was indicated;*
- (h) The conduct of the offender during the trial as an indication of remorse or the lack of remorse;*
- (i) Any action taken by the offender to make restitution of the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider.*

- (j) *The offender's previous character, good or bad;*
- (k) *Imprisonment should be used when no other sentence IS adequate;*
- (l) *Proportionality between the crime and the sentence;*
- (m) *Possibility of reforming the offender;*
- (n) *To ensure consistency in deciding sentences;*
- (o) *Presence of any aggravating or mitigating factors concerning the offender or any other circumstance relevant to the commission of the offence; and*

In the present case the Petitioner's culpability is very high. He has gone to the scene with a firearm in hand. Even though he claims that he has not directly participated in the incident, going to the crime scene with a firearm in hand cannot be considered lightly and it is obviously an aggravating factor. On the other hand the 3rd Accused was a 15 year old boy at the time of the incident and has not directly involved in the incident. It is a mitigating factor that has to be considered in his favour.

It has been held in the case of *Thilakaratne v. Attorney-General* [1989] 2 Sri L R 191 at page 198 that;

I have considered the sentences imposed on the 1st accused in the light of the sentences passed on the 2nd and 3rd accused. There is a disparity in the sentences passed on the 1st accused and those passed on the 2nd and 3rd accused. Generally speaking, uniformity in sentencing is desirable, but not where the facts and circumstances against each accused are different. The evidence in this case revealed that the 1st accused was armed with a pistol, fired a shot with it, and then proceeded to cause extensive injuries with a knife on Semasinghe during the course of this robbery.

Further, the 1st accused has previous convictions. Therefore, I see no reason to interfere with the sentences passed on the 1st accused-appellant.

In the present case also there is a disparity in the sentence passed on the 3rd Accused and the 4th Accused Petitioner. The 4th Accused Petitioner involved in incident with a firearm in hand and the 3rd Accused was a 15 year old young boy at the time of the incident. It is obvious that the learned High Court Judge has considered the aggravating and mitigating factors in passing the sentence on 4th and 3rd Accused.

I see no reason to interfere with the sentence passed on the 4th Accused Petitioner.

For the reasons stated herein, the revision application is dismissed and the sentences are affirmed.

Judge of the Court of Appeal

H.C.J.Madawala J.

I agree.

Judge of the Court of Appeal