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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/253/2010
H/C Colombo 1486/04

Makawitage Lakshman Pathiraja Samarasinghe

ACCUSED

And,

Makawitage Lakshman Pathiraja Samarasinghe

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel: Shanaka Ranasinghe PC with Niroshan Mihindukulasuriya for the Accused-Appellant

KapilaWaidyaratne PC Senior Additional Solicitor General for the State

Argued on: 07.10.2015, 18.01.2016, 16.02.2016, 27.04.2016

Written Submissions on: 25.05.2016, 02.09.2016

Decided on: 03.03.2017

Order

Vijith K. Malalgoda PC J

The accused-appellant to the present appeal Makawitage Lakshman Pathiraja Samarasinghe was indicted before the High Court of Colombo under the provisions of the Bribery Act for Solicitation and acceptance of a bribe of 25,000 from one Kaukokila Arachchilage Wickramasiri Weeasinghe an offence punishable under sections 19C and 21C of the said Act (as amended).

At the conclusion of the said trial, the Learned High Court Judge after convicting the accused-appellant on all the six counts, had only sentenced him under counts 1,3 and 4 of the Indictment as follows;

1st Count 6 years Rigorous Imprisonment with a fine of Rs. 5000/- in default 12 months Rigorous Imprisonment

3rd Count 6 years Rigorous Imprisonment with a fine of Rs. 5000/- in default 12 months Rigorous Imprisonment

4th Count 6 years Rigorous Imprisonment with a fine of Rs. 5000/- in default 12 months Rigorous Imprisonment

Although the Learned Trial Judge found the accused-appellant guilty on counts 2, 5 and 6 he did not sentence the accused-appellant on the said counts on the basis that those were alternative counts.

Being dissatisfied with the said conviction and sentence the accused–appellant had preferred the present appeal before this court.

However during the argument before this court the Learned President's Counsel who represented the accused-appellant restricted his arguments only to the sentence imposed on the accused-appellant and limited his ground of appeal to the following.

"Is the sentence imposed on the accused-appellant excessive"

In this regard the Petitioner had raised the following argument to support his contention.

a) The Learned High Court Judge had imposed a sentence of 6 years Rigorous Imprisonment on each count where the maximum sentence that could be imposed is 7 years

b) The case was hanging over the accused-appellant for almost 12 years and altogether 21 years have passes since the alleged offence

c) Present unsatisfactory health condition of the accused-appellant warrants a non custodial sentence imposed on the accused-appellant.

As observed above the accused-appellant was indicted on six counts and was convicted on all 6 counts by the Learned High Court Judge but decided to impose the sentence only on counts 1, 3 and 4 of the Indictment. The said three counts were framed under section 21 of the Bribery Act which provides a sentence of; "rigorous imprisonment for a term of not more than seven years and a fine not exceeding five thousand rupees."

Imposing a sentence on an accused person after conviction is the prerogative of the court which imposes such sentence, but was guided by several factors including the circumstances under the offence said to have committed by the accused who faced the charges before the trial court. In the absence of specific guide lines on sentencing, our courts have discussed the principles that should be followed in imposing sentences and this court would like to consider some of those decisions when considering the case in hand before us.

Basnayake ACJ (as he was then) in the caseof ***Attorney General V. H.N. de Silva (1955) 57 NLR 121***observed that, "A Judge should, in determining the proper sentence, 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 other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should

receive due consideration. The reformation of the criminal though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the state (which are synonymous) outweighs the previous good character, antecedents and age of the offender public interest must prevail."

Gunasekera J in the case of ***Attorney General V. Jinak Sri Uluwaduge and Another 1995 (1) Sri LR 157*** held that,

"In determining the proper sentence the Judge should 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 other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration. The Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non- detection. Another matter to be taken into account is that the offences were planned crimes for wholesale profit. The Judge must consider the interests of the accused on the one hand and the interests of society on the other; also necessarily the nature of the offence committed, the machinations and manipulations resorted to by the accused a commit the offence, the effect of committing such a crime insofar as the institution or organization in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime."

In the case of ***Don Percy Nanayakkara V. The Republic of Sri Lanka 1993 (1) Sri LR 71*** S.N. Silva J (as he was then) held that,

"In assessing punishment the court has to consider the matter from the point of both the offender and the public. The accused had held high public office and exercised extensive statutory power in conducting public examinations in this country. These examinations have to be conducted fairly and

the results declared accurately. Thousands of students who face public examinations, every year, should have complete confidence in the fairness and accuracy of every process of the examinations. The accused has subverted the very basis of this confidence by his conduct in dishonestly showing favour to persons with whom he was acquainted. Therefore, public interest demands that he should be imposed a deterrent punishment."

S.N Silva Acting P/CA (as he was then) in the case of ***Attorney Genral V. Ranasinghe and Others 1993 (2) Sri LR 81*** whilst referring to the findings in ***Keith Billam (1986) volume 82 Criminal Appeal Report 347*** identified the following instances as aggravating features,

1) Violence is used over and above the force necessary to commit the rape;
2) A weapon is used to frighten or would the victim;
3) The rape is repeated;
4) The rape has been carefully planned;
5) The defendant has previous convictions for rape or other serious offences of a violent or sexual kind;
6) The victim is subjected to further sexual indignities or perversions;
7) The victim is either very old or very young;
8) The effect upon the victim, whether physical or mental, is of special seriousness;

When considering the above decisions, both by the Supreme Court and the Court of Appeal it appears that our courts were mindful on aggravating and mitigating circumstances of the cases before them, when deciding the sentences. It is therefore understood that the same yard stick should apply in the trial court, and a sentence imposed by a trial judge should be considered as adequate or excessive by using the same yard stick.

This court in the case of ***Pitiduwa Gamage Sumith Rohana V. Attorney General and Two Others CALA 06/2013*** Court of Appeal minute dated 25.01.2016, had identified some of the relevant Aggravating and Mitigatory factors as follows;

Aggravating factors,

a) Use of violence when committing crime

b) Use of weapons when committing crime

c) Drug related offences

d) Member of an organized gang

e) Repeating acts of similar offence

f) Previous convictions or pending cases of the similar type

g) Effect upon victims physical or mental condition

h) Obstruction for justice

i) Commission of an offence while on bail

j) Willful damage to state or private property

k) Disruption of governmental functions

l) Commits the offence in order to conceal another offence

m) Using high office to commit the offence

Mitigatory factors,

a) First offender

b) Good character

c) Determination to quit the criminal life

d) Serious medical condition

e) Victims conduct

f) Lesser harm (crime committed to avoid greater harm)

g) Coercion and/or duress

h) Voluntary disclosure of offence

Since the Learned President's Counsel who represented the accused-appellant before us had only canvassed the sentence imposed on the accused-appellant, this court would like to consider whether

the trial judge was mindful of the above factors when imposing the sentence on the accused-appellant. In this regard this court is further mindful of the fact that the sentence imposed on each count was 6 years Rigorous Imprisonment with a fine of Rs. 5000/- where as the maximum sentence that could be imposed under section 21 of the Bribery Act is 7 years Rigorous Imprisonment with a fine of Rs. 5000/-.

While imposing the said sentence the Learned Trial Judge was mindful and considered that the accused who was a Chairman of the Pradeshiya Sabha had solicited and accepted a bribe from a contractor who was awarded with a contract to construct a road for the said Pradeshiya Sabha, and the said bribe was taken at a time where the accused-appellant had recommended the payment, when the said contract was not completed and the said conduct of the accused-appellant was amount to

a) Misuse of his office

b) Misuse of Public Funds

c) A grave crime against the state which is serious in nature

and decided to impose the said sentence as a deterrent. Even though the Learned Trial Judge had referred to the fact that the accused-appellant had no previous convictions and has a medical history which needs attention, there is no proof of considering them as Mitigatory Factors by the Learned Trial Judge when imposing the sentence.

In the said circumstances, it is clear that the Learned Trial Judge was mindful and had considered the aggravating factors when imposing the said sentence on the accused-appellant but in the absence of anything substantial for us to satisfy that the Learned Trial Judge had considered the Mitigatory Factors, when imposing the said sentence and therefore we are reluctant to declare that the said sentence imposed on the accused-appellant was made after giving due consideration to the Mitigatory Factors.

When considering the Mitigatory Factors as against the Aggravating Factors, there is a duty cast upon the trial judge to compare the Mitigatory Factors as against the Aggravating Factors and give a

reasonable consideration compared to the enhancement given after considering the Aggravating Factors.

Whilst submitting that the sentence imposed by the trial judge was excessive, the accused-appellant had further submitted that the long delay in disposing this case too have serious consequences in the family life of the accused-appellant which warrants consideration by this court. In this regard our attention was drawn to several cases decided by this court including the case of ***Karunarathne V. State 78 NLR at 43*** where Rajarathnam J has observed, "I cannot disregard the serious consequences and disorganization that can cause in the accused's family. If there was a final determination of this case within a reasonable time, the accused by now would have served his sentence and come out of prison to look after his family. I find, however, that the charge had been hanging over the accused for the past 10 years till it reached a conclusion before us. The effect and consequences of this sentence cannot be totally disregarded when the sentence is imposed 10 years after the proved offence."

Whilst relying on another decision by this court in the case of ***E.M Senevirathne V. the State CA 78/99*** Court of Appeal minute dated 07.12.2000, where this court had concluded "since the incident has taken 18 years ago, we are of the view that, the ends of justice would be met by imposing a non-custodial sentence on the accused –appellant", the Learned Counsel submitted that this is a fit and proper case to consider imposing a non- custodial sentence.

In this regard the counsel had further relied on the decision in the case of ***Kumara V. Attorney General 2003 (1) Sri LR 139*** where some of the Mitigatory Factors were considered in favour of imposing a non-custodial sentence as follows,

i. A suspended sentence is a means of re-educating and re-habilitating the offender, rather than alienating or isolating the offender

ii. No offender should be confined to in a prison unless there is no alternative available for the protection of the community and reform the individual

iii. Imprisonment has an isolating and alienating effect on the family of the imprisoned offender because of the hardships they are faced with during the imprisonment of one of the family members

iv. Suspended sentence with its connotation of punishment and pardon is supposed to have integrative powers. The offender is shown that he has violated the tenets of society and provoked its wrath, but is immediately forgiven and permitted to continue to live in society with the hope that he would not indulge in that form of behavior again

v. The accused does not have previous convictions; he surrendered to the police; he pleaded guilty on the first date of trial; he offered compensation to the aggrieved party; these amply demonstrate the mitigatory factors

During the argument before this court the accused-appellant had further submitted some medical reports to establish the ill health and the deteriorating medical condition of the accused-appellant.

As observed above in this judgment, all the matters discussed above come within the Mitigatory Factors that should be considered when imposing the sentence. Some of them could have considered by the trial judge but as referred to above there is no proof of considering them by the trial judge when imposing the sentence.

In these circumstances this court will have a duty to consider the above Mitigatory Factors when considering the sentence in the case in hand.

However with regard to the question of imposing a non- custodial sentence, this court is mindful of the requirements under section 303 (1) of the Code of Criminal Procedure Act No 15 of 1979 to the effect;

303 (1) A court which impose a sentence of imprisonment on an offender **for a term not exceeding two years** for an offence may order that the sentence shall not taken effect unless, during a period specified in the order being not less than five years from the date of the order (here in after referred to as the operational period) such offender

commits another offence punishable with imprisonment (here in after referred to as subsequent offence) (emphasis added)

As observed by this court, in addition to the delay in concluding the case against the accused-appellant, the accused-appellant had further submitted the present unsatisfactory health condition in mitigating the sentence before us. As submitted before us the accused-appellant is a patient with cardiac ailment who is continuously undergoing treatment from the cardiology unit of the National Hospital and also suffering from a lymphoma cancer and is receiving treatment from the cancer institute Maharagama.

When considering the above Mitigatory Factors as against the Aggravating Factors which were already considered by the trial judge when imposing the sentence of six years Rigorous Imprisonment on each count with a fine of Rs. 5000/-, it is our considered view that the above Mitigatory Factors warrants the reduction of the sentence already imposed, by 30 months or by 2 ½ years.

When the said reduction is considered as against the provisions of section 303 (1) of the Code of Criminal Procedure Act No 15 of 1979 it is observed that the proposed sentence of 3 ½ Rigorous Imprisonment does not come within the period covered by section 303 (1) and in the said circumstances this court is not inclined to impose a non custodial sentence on the accused-appellant.

In the said circumstances, we replace the sentence already imposed on counts 1, 3 and 4 with a jail term of 3 ½ years Rigorous Imprisonment and make order to run the said sentences concurrently. We make no changes with regard to the fine and the default term imposed on the accused-appellant.

Appeal partly allowed. Sentence varied.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. MADAWALA J

I agree,

JUDGE OF THE COURT OF APPEAL