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.

CA Appeal No: CA 225/2014

Democratic Socialist Republic of Sri Lanka.

High Court Colombo
Case No: HC 4258/2008

COMPLAINANT

Vs.

1. Godaperu Pathirennehelage Wimalarathne Pathirana.
2. Indika Lakmini Pathirana.

ACCUSED

And Now

Democratic Socialist Republic of Sri Lanka.

COMPLAINANT – APPELLANT

Vs.

1. Godaperu Pathirennehelage
   Wimalarathne Pathirana.
2. Indika Lakmini Pathirana.

ACCUSED – RESPONDENTS

Before : P.R. Walgama, J

: K.K. Wickramasinghe, J

Counsel : Nihara Randeniya for the Accused – Respondent.

: A. Jinasena SDSG for A.G.

Argued on : 20.10.2016

Decided on : 15.03.2017

P.R. Walgama, J

The judgement is this case was pronounced on 01.03.2017 subject to variation to the sentence imposed in the Original Court.

The 1st and the 2nd Accused were charged under Section 403, read with Section 32 of the Penal code, and Section 25 (1)(a) of the Debt Recovery (Special Provisions) Act No: 2 of 1990 as amended by Act No: 9 of 1994.

After the pronouncement of the judgment on 01.03.2017 the Learned SDSG brought to the notice of court, that by an oversight, court has not set aside the sentence on the 1 – 6 counts, wherein the Learned High Court Judge has imposed a jail term of 1 year Rigorous Imprisonment for each count and suspended for 10 years in respect of the 1st Accused, and where the 2nd Accused is concerned, she was ordered 1 year Rigorous Imprisonment for count 1, 5 and 6 and was suspended for 10 years.

A cursory glance at the impugned sentence it is contended by the Learned SDSG that the above sentence is obnoxious and inimical to Section 303 (2) of the Criminal Procedure Code, as the cumulative sentence of 6 counts exceeded 2 years, for the 1st Accused and, for 3 counts exceeds 2 years for the 2nd Accused.

As per section stated above it is mandatory that court shall impose a non custodial or suspended sentence when the sentence imposed is only two years or less than two years.

In the above setting it is so apparent that the above sentence imposed by the trial Judge cannot stand, as such should be set aside and be substituted with 1 year jail term for each count to run consecutively. Thus the above judgment dated 01.03.2017 accordingly, rectified and varied.

Thus the Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickramasinghe, J
I agree.

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By the present appeal the Attorney General call in question the defensibility of the judgment of conviction and the order of sentence dated 28.08.2013, passed by the Learned High Court Judge of High Court holden at Colombo.

By the instant appeal the Attorney General had assailed the said judgment and conviction as the sentence imposed on the 1st and the 2nd accused were

grossly inadequate, in the attended circumstances and urged for an enhancement of the sentence which commensurate with the offence committed.

The shortly stated facts emanate from this appeal are as follows;

The 1st and the 2nd Accused – Respondents were indicted by the Attorney General for having committed an offence punishable under Section 403 read with section 32 of the Penal Code.

It is to be noted that both the accused being husband and wife pleaded guilty to the charges in the indictment, and Learned High Court Judge had imposed the sentence and a fine as stated here under;

In addition to the charge stated herein before both Accused – Respondents were also charged for committing an offence punishable under Section 25(1)(a) of the Debt Recovery (Special Provisions) Act No. 02 of 1990 as amended by Act No. 09 of 1994.

The 1st and the 2nd Accused – Respondents were indicted for the following counts, which they pleaded guilty on 09.08.2013 and the Learned High Court Judge imposed the following sentences.

Regorous Imprisonment for a period of one year for each count and a fine of Rs. 5000. Further the said jail term was imposed on all 6 counts and same was suspended for a term of 10 years. In addition the total fine for the 6 counts for the 1st accused was Rs. 30,000/ and for the 2nd accused was 15,000/.

Further it is seen that the 1st accused was ordered to pay a compensation of 800,000/- to the aggrieved party in respect of the 1st count and carrying a default term of 24 months of simple imprisonment.

Being dissatisfied with the sentence imposed on the above charges it is urged by the counsel for the Respondent – Appellant that the said sentence is grossly inadequate as per charges stated in the indictment hereto.

Further it is also submitted that the Learned High Court Judge has failed to impose the fine provided by section 25(1) a of the Debt Recovery (Special Provisions) Act as amended by Act No. 09 of 1994.

For easy reference the above section is reproduced herein below;

25(1) Any person

(a)- draws a cheque knowing that there are no funds or not sufficient funds in the bank to honour such cheque,

Thus the offender the above section can commit the offence in two ways ie.

(i) Knowing there are no funds, draws a cheque

(ii) Knowing that there are no sufficient funds in the bank to honour such cheque, draws a cheque

Such an offender shall be punished with;

(i) Imprisonment of either description for a term which may extend to one year, or

(ii) With a fine of Rs.10,000/ or

(iii) Ten per centum of the full value of the cheque.....in respect of which the offence is committed which is higher or

(iv) With both such fine and imprisonment.

But it is seen from the sentence imposed for the counts 2 to 6 the Learned High Court Judge has ordered a very lenient punishment and a fine. For the above stated counts the Learned High Court Judge has imposed a jail term of Rigorous Imprisonment for one year suspended for 10 years and a fine of Rs.5000/ for each count.

Therefore it is contended by the Learned DSG that the Learned High Court Judge has failed to consider the intention of the Legislature in imposing the above fine limiting to Rs.5000/ which is gross violation or obnoxious and inimical to the above sections(ii) and (iii) of section 25(1) of Debt Recovery Act.

The Learned High Court Judge has imposed much lesser fine than the fine stipulated in the above Act.

In strict sense it should have been ten per centum of the full value of the cheque as stated in the counts 2 to 6 in the indictment.

The Learned SDSG has also adverted court to the fact that the vehicle in question has been disposed of by the Accused – Respondents to a third party on forged documents and presently a case is pending against the current owner. Therefore it is contended by the Counsel for the Appellants that the Complainant Company had lost the money as well as the subject matter which is the alleged motor vehicle.

Further it should be the grave concern of the trial judge in imposing the sentence on a criminal charge, of the fact the gravity of the offence, the sentence prescribed in the statute and the effect of the society at large. It is pertinent to note that the judicial pronouncement in the case of ATTORNEY GENERAL .VS. MENDIS- (1995) 1 SLR- 138 which held thus;

" In assessing punishment the judge should consider the matter of sentence both from the point of view 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 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.....two other considerations are the nature of the loss to the victim and the profit that may accrue to the accused in the event of non direction." (emphasis added)

In considering the sentence imposed by the Learned Trial Judge, is justifiable or not, this court in the pursuit of reviewing the sentence, is mindful of the nature of the offence, and the way in which the complainant was deceived, the manner in which the accused have acted to vit. when there were no funds to issue cheques to the value as stated in the indictment, and disposing of the vehicle in issue, more importantly leaving the place of abode and as a result being arrested.

In the above setting it is abundantly clear that the complainant had lost 6.5 million as well as the vehicle.

It is contention of the Counsel for the Accused – Respondents that section 403 does not prescribe a mandatory sentence, the Debt Recovery Act do not prescribe a mandatory jail term for an offence committed under Section 25 (1)(d). But it is seen that it is mandatory that ten per centum of the value of the cheque should be imposed as a fine. Therefore it is crystal clear that the fine imposed by the Learned Trial Judge grossly inadequate and illegal.

Further to have imposed a parole order or a suspended sentence for 6 counts is contrary to section 303 (2) of the Criminal Procedure Code.

It is observed from the sentence imposed for the 1st count, 1 year Rigorous Imprisonment, suspended for 10 years and Rs. 5000/ as a fine and in addition Rs. 800,000/ as a compensation to be paid to the complainant, with a default term of 24 months.

Before directing any variation of the sentence this court will take in to consideration their age and is not persuaded to increase the jail term as, already a term of default sentence has been imposed on the 1st Accused – Respondent. Nevertheless considering the above factual and legal matrix this court is inclined to vary the sentence to the extent of imposing a ten per centum of the value of each check as per count 2 to 6 and carrying a default term of 1 year on each count (count 2 to 6) to run consecutively.

Subject to the above variation appeal is allowed in part.

Accordingly the appeal is partly allowed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickramasinghe, J
I agree.

JUDGE OF THE COURT OF APPEAL