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

In the matter of an appeal under Section 15 (b) of the Judicature Act, No. 02 of 1998 and Section 331 of the Criminal Procedure Code Act, No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal
Case No. 87/2015

Vs,

Susil Dammika Somasundara

Accused

And Now Between

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant- Appellant

High Court of Badulla
Case No. 51/ 2007

Vs,

Susil Dammika Somasundara

Accused -Respondent

Before : **S. Devika de L. Tennekoon, J &**
S. Thurairaja PC, J

Counsel : Dileepa Peeris DSG for the Complainant Appellant
Udaya Bandara AAL for the Accused Respondent

Argued on : 19th February and 6th March 2018

Written Submissions on: Appellant and Respondent – 14th March 2018

Judgment on : 21st March 2018

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Judgment

S. Thurairaja. PC, J

This is an appeal filed by the Honourable Attorney General.

The Accused Respondent (hereinafter sometimes referred to as Respondent), was indicted before the High Court of Badulla for Criminal Breach of Trust (CBT) punishable under section 391 of the Penal Code. The indictment was served on the Respondent 22nd of August 2007 and the trial was taken up on the 23rd October 2012. On that day the evidence of Prosecution Witness Rohana Rajapakse Herathge, the principle of St. Thomas College of Bandarawala, led and concluded. On the 26th August 2014 Evidence of Saman Joseph Perera, Syatem Engineer and Godahenalage Prematileka Accountant /Auditor attached to Earnest and Young were led and many productions were marked. Further trial was postponed and taken up on the 23rd June 2015, on that day the evidence of Brian Francis Seeman, Secretary of the college, commenced, the Counsel for the Respondent made an application to recall his earlier plea of not guilty. Indictment was read over again and the Respondent formally withdrew his plea of not guilty and pleaded guilty to the charge in the indictment.

Both Counsels made submissions and the learned Trial Judge accepted the plea and convicted the Respondent and imposed Rupees 5000/- fine in default four months rigorous imprisonment, additionally 5 years rigorous imprisonment and the same was suspended for a period of 5 years.

Being aggrieved with the said order the Attorney General had preferred this appeal and submits that the sentence imposed is illegal.

It will be appropriate to consider the facts of this case; The Accused Respondent was the Cashier attached to a Private School namely St. Thomas College Bandarawala. During the period of 1st July 1998 to 31st December 1998 money received from the children for the purpose of School fees, Hostel Fees and other manner was misappropriated by the Respondent. The amount in this case as per the indictment was Rs. 315715.46.

Since the Accused Respondent pleaded guilty and there is no complaint against the conviction, we do not incline to interfere with the same. We affirm the conviction.

Only complaint by the State is that the suspension of the sentence is illegal. It is mandatory to peruse the relevant law; Section 391 of the Penal code states as follows;

> Section 391- Criminal breach of trust by a clerk or servant;
>
> *Whoever, being a clerk or servant or employed as a clerk or servant and being trust in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

According to this section the court can impose a sentence up to 7 years and a Fine. In the instant case the Learned Trial Judge has imposed Rupees 5000/- fine (in default of payment 4 months rigorous imprisonment).and 5 years Rigorous imprisonment. Up to this point there is no illegality. But the said sentence was suspended.

Suspending a sentence is governed by Section 303 of the Code of Criminal Procedure Act 15 of 1979 as amended. It makes us to refer the relevant section.

Section 303 (1) states as follows;

> (1) Subject to the provisions of this section, on sentencing an offender to a term of imprisonment, a court may make an order suspending the whole or part of the sentence if it is satisfied, for reasons to be stated in writing, that it is appropriate to do so in the circumstances, having regard to-
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> (a) the maximum penalty prescribed for the offence in respect of which the sentence is imposed;
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> (b) the nature and gravity of the offence:
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> (c) the offender's culpability and degree of responsibility for the offence:
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> (d) the offender's previous character;
>
> (e) any injury, loss or damage resulting directly from the commission of the offence:
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> (f) the presence of any aggravating or mitigating factor concerning the offender;
>
> (g) the need to punish the offender to an extent, and in a manner, which is just in all of the circumstances;
>
> (h) the need to deter the offender or other persons from committing offences of the same or of a similar character;
>
> (i) the need to manifest the denunciation by the court of the type of conduct in which the offender was engaged in;
>
> (j) the need to protect the victim or the community from the, offender;

(k) the fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or

(l) a combination of two or more of the above.

If the facts are qualified under the above circumstances the Judge can consider suspending the sentence, but it is subject to other provisions of the said section.

(2) A court shall not make an order suspending a sentence of imprisonment if-

(a) a mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed; or

(b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or

(c) the offence was committed when the offender was subject to a probation order or a conditional release or discharge; or

(d) the term of imprisonment the aggregate terms Where the offender is imposed, or of imprisonment Where the offender is convicted for more than one offence in the same proceedings exceeds two years.

Reading the entire provisions of the law it is crystal clear that any sentence for a period more than two year cannot be suspended. In the present case the Trial Judge had imposed a sentence of 5 years and he had suspended the same for 5years, which is bad in law. Considering the above fact, we vacate the sentence imposed on the Respondent.

We are not inclined to send this case to the High Court to impose an appropriate sentence, because there will be further delay to the Respondent. Therefore, we act under Article 145 of the Constitution and impose an appropriate sentence.

The Learned DSG submits following factors;

- Incident had happened in 1998
- Indictment was served on the 22nd August 2007.
- Trial commenced and the prosecution led evidence of 4 witnesses
- The accused pleaded guilty only on the 23rd June 2015
- Money was belonging to a private School.
- Accused never shown any repentance, he had not paid a cent to the School
- Children and the School suffered because of the accused.
- Accused not pleaded guilty at the first or very early stage of the trial

The learned Counsel for the Accused Respondent submits his arguments in two folds; one is that the Accused Respondent was misled, He does not have any previous

conviction and pleaded guilty at the first given opportunity. Under the ruling given in 3 of 2008 by the Supreme Court allows the High Court to give any sentence.

Supreme Court issued a reference in SC. Reference 03/08 on 15-10-2008. This is a case where Judge of the High Court of Anuradhapura referred a case for the opinion of the Supreme Court. The substantive issue in that case was where the accused was charged for Rape of a Child who was between 15 to 16 years and had a love affair with the accused. The law provided a minimum Sentence of 10 years rigorous imprisonment, the Supreme Court considered the circumstances of that case and opined that the court after considering the facts judicially can award a sentence less than the minimum period stipulated by the statute.

In C.S.T. Kumara Wijenayake vs AG SC Spl. 29/2012 decided on 08-11-2013 Shiranee Thilawardena held the main purpose of 03 of 2008 was to look after the welfare of the child victim.

Considering both judgment and the Opinion the ratio decidenti will not be applicable to the instant case. Section 391 of the Penal Coe does not stipulate a minimum mandatory sentence.

This is white collar crime, where a cashier who was entrusted with the money of a School had misappropriated and he had pleaded guilty and accepted his liability.

In State of UP v. Anil Singh, (AIR 1988 SC 1998) as quoted in Ambika Prasad and Another vs State (Delhi Administration, Date of Judgment- 21/01/2000

> *it is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.*

In AG vs H. N. De. Silva 57 NLR 121 Basnayake ACJ held 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 public 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. "

In the present case we carefully considered the facts and submissions and impose the following sentence; 3 years Rigorous Imprisonment and a fine of Rs. 5000/- in default 3 months simple imprisonment, additionally we direct the Accused Respondent to pay Rs. 315715.46, in default 2years Rigorous Imprisonment.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree,

JUDGE OF THE COURT OF APPEAL