

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

In the matter of an application for revision made in terms of Section 16(3) of the Judicature Act No.2 of 1978 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

CA Revision Application No:
CA (PHC) APN 35/2015

Complainant

Vs.

HC Matara Case No: HC 174/2013

1. Samantha Kumara Pandithasekara alias Hittchi Putha
2. Thuduwage Anuruddha alias Kalu Malli
3. Thewarapperuma Arachchige Indrasiri Chaminda Kumara alias Mahathun
4. Samarakkodige Upali Gunasiri
5. Thuduwage Anura Shantha
6. Durage Nilanga Sandaruwan
7. Wellaka Liyanage Senaka

Accused

AND NOW BETWEEN

Agalakada Liyanage Harshana Kelum
Pradeep Kumara,

Malpudanagama,

Malpudathella.

Aggrieved party-Petitioner

Vs.

1. Samantha Kumara Pandithasekara
alias Hittchi Putha

2. Thuduwage Anuruddha alias Kalu
Malli

3. Thewarapperuma Arachchige
Indrasiri Chaminda Kumara alias
Mahathun

4. Samarakkodige Upali Gunasiri

5. Thuduwage Anura Shantha

6. Durage Nilanga Sandaruwan

7. Wellaka Liyanage Senaka (Trail is
still proceeding)

Accused-Respondents

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

Respondent

BEFORE: K. K. Wickremasinghe, J

Janak De Silva, J

COUNSEL: AAL Amila Palliyage with AAL Nihara Randeniya and AAL Sandeepani Wijesooriya for the aggrieved party-Petitioner

AAL Buddhika Serasinghe for the 1st to 5th Accused-Respondents

Varunika Hettige, DSG for the 8th Respondent

ARGUED: 06.02.2018

WRITTEN SUBMISSION: Aggrieved party-Petitioner – On 06.04.2018

8th Respondent – On 19.03.2018

DECIDED: 13.06.2018

K.K. WICKREMASINGHE, J.

The 1st to 7th Accused-Respondents (hereinafter referred to as Accused-Respondents) were indicted in the High Court of Matara under case No. HC/174/2013. The 8th Respondent was the Hon. Attorney General who initiated proceedings against the Accused on behalf of the State. In the said case, the 1st to 7th accused-respondents had been charged for committing offences punishable under sections 300 and 314 read with sections 140 and 145 of the Penal Code.

Accordingly five counts were stated in the indictment i.e.

1. On or about 09.09.2008, being members of the unlawful assembly with the common object of causing injury to Agalakada Liyanage Harshana Kelum Pradeep Kumara, committed an offence punishable under section 140 of the Penal Code.
2. Whilst being the members of said unlawful assembly, causing injuries to Agalakada Liyanage Harshana Kelum Pradeep Kumara with the knowledge and intention committed an offence punishable under section 300 read with section 146 of the Penal Code.
3. Whilst being the members of said unlawful assembly, causing injuries to Ranaweera Arachchige Tharanga Sanjeewa, an offence punishable under section 314 read with section 146 of the Penal Code.
4. In the same course of transaction causing injuries to Agalakada Liyanage Harshana Kelum Pradeep Kumara with the knowledge and intention committed an offence punishable under section 300 read with section 32 of the Penal Code.
5. In the same course of transaction causing injuries to Agalakada Liyanage Harshana Kelum Pradeep Kumara with the knowledge and intention committed an offence punishable under section 314 read with section 32 of the Penal Code.

After the indictment was read over to the Accused-Respondents on 30.07.2014, they have opted a non-jury trial before the Learned High Court Judge of Matara.

However, on 27.11.2014, 1st to 6th Accused-Respondents had pleaded guilty (7th Accused was absconding) for all the five counts in the indictment, accordingly the Learned High Court Judge of Matara had convicted the 1st to 6th accused for counts 1 to 3. The Learned High Court Judge had imposed sentences on the following manner;

1. 1st count – a fine of Rs.1000/- if default one month simple imprisonment.
2. 2nd count –18 months Rigorous imprisonment suspended for a period of 10 years.
3. 3rd count – 6 months Rigorous imprisonment suspended for a period of 10 years.

4. In addition to above sentences, a sum of 30,000/- was ordered to be paid to the Petitioner by each Accused-Respondent as compensation and if default one year simple imprisonment and a fine of Rs.3000/- to be paid by each Accused Respondent and if default 3 months simple imprisonment.

The Aggrieved Party-Petitioner (hereinafter referred to as the Petitioner) was one of the victims in the aforementioned assault and the Prosecution Witness No.01 in the indictment, whose attempted murder was the subject matter in the instant case. Being aggrieved by the said order of the Learned High Court Judge of Matara dated 27.11.2014, the Petitioner has filed a revision application in this court seeking to revise and/or vary the order (set aside the order of sentencing the Accused from 1 to 3 counts) and to impose appropriate and adequate sentences on the Accused on all counts.

The counsel for the aggrieved party (injured)-Petitioner submitted that the Learned High Court Judge of Matara had erred in law by failing to assign reasons for the

suspension of the sentences imposed on the Accused-Respondents. Section 303 of the Code of Criminal Procedure Act No.15 of 1979 as amended by Act No. 47 of 1999 states that

303. (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 –*

(a) the maximum penalty prescribed for the offence in respect of which the sentence is imposed ;

(b) the nature and gravity of the offence ;

(c) the offender's culpability and degree of responsibility for the offence ;

(d) the offender's previous character ;

(e) any injury, loss or damage resulting directly from the commission of the offence;

(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.

(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...

Accordingly Section 303(1) provides for the instances where the Court can consider suspending the sentence and section 303(2) provides for the instances where the sentence shall not be suspended.

It is important to note that section 303 (1) of the Code of Criminal Procedure Act No.15 of 1979 as amended by Act No. 47 of 1999 requires the Learned Judges to record the reasons for which he/she is proceeding to suspend the sentences imposed by him/her. In the case of **C.A. Revision No.CA [PHC] APN 141/2013, Chithrasiri, J** cited the case of **AG v. Gunarathna and others (1995) 2 SLR 240**, in which it was held that *“the High Court judge has not given any reason for imposing only a suspended term of imprisonment. On the basis of the facts relevant, the offence calls for the imposition of a custodial sentence.”*

The Learned State Counsel on behalf of the Hon. Attorney General submitted the case of **Mohomad Razik Hassim v. IP, Ampara (1986) 2 CALR 22**, where it was decided that the suspended sentence imposed without reason for doing so being adduced should be quashed.

The Counsel for the Petitioner further submitted that the sentences imposed on the Accused-Respondents are totally disproportionate having regard to the serious nature of the offences to which the Accused-Respondents had pleaded guilty.

In the case of **CA [PHC] APN 141/2013, Chithrasiri J**, further held that,

"In Attorney General Vs. Ranasinghe & Others, the Court of Appeal has referred to the decision in the case of Keith Billam in which the Lord Chief Justice in a contested case of rape, a figure of five years imprisonment was taken as the starting point and then considered the aggravating and the mitigating circumstances to determine the sentence. Sarath Silva J. (as he was then) has quoted the observations by Lord Chief Justice and it reads as follows: "The crime should in any event be treated as aggravated by any of the following factors:

(1) violence is used over and above the force necessary to commit the rape;

(2) a weapon is used to frighten or wound the victim;

(3) Where anyone or more of these aggravating features are present,

the sentence should be substantially higher than the figure suggested as the starting point..."

In the case of **AG v. Mayagodage Sanath Dharmadiri Perera [CA (PHC) APN 147/2012], L.T.B. Dehideniya, J**, held that,

"...On the other hand this is not a fit case to order suspended sentence. The nature and the gravity of the offence have to be considered before ordering a suspended sentence..."

It was held in the case of **Attorney General v. Jinak Sri Uluwaduge and another** [1995] 1 Sri L R 157 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... 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...”

In the case of **The Attorney General v. H.N. de Silva** 57 NLR 121, it was held that,

*“In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. 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 [Rex v. Boyd (1908) 1 Cr. App. Rep. 64.] and the difficulty of detection are also matters which should receive due consideration...”*

His Lordship Bandaranayake A.CJ further held that,

"...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..."

The counsel for the Petitioner has submitted that the Petitioner is deprived of his ability to engage in day today activities due to the aforesaid assault and he had to undergo several surgeries on his head including a plastic surgery. Further I draw attention to the production list in the indictment which sets out that the accused used Crowbar, two swords, iron rod and a fire arm. Also the B report produced before the Magistrate court of Morawaka indicated a recovery of a locally manufactured fire arm by the Police, in the crime scene.

The Learned State Counsel on behalf of the Hon. Attorney General has submitted aggravating circumstances i.e.

1. According to the MLR, the petitioner had informed the judicial medical officer that a group of known persons had assaulted him with clubs, crow bars and swords. There are 6 injuries recorded in the MLR.
2. The injury sufficient to cause death in the ordinary cause of death is a head injury and a depressed fracture to the skull.
3. The Accused-Respondents had been members of an unlawful assembly.

Accordingly I am of the view that the offences for which accused-respondents had pleaded guilty are of a serious nature and have been committed with much planning and deliberation and in fact deserve severe punishments as prescribed in the Statutes.

Further I find that the Learned High Court Judge had erred in failing to state a single reason caused him to make an order of suspension.

Considering the gravity, the seriousness of the offences and the requirements of the Statutes, I hold of the view that the sentences imposed by the Learned High Court Judge of Matara are manifestly inadequate.

Therefore suspended sentence is varied by substituting the following sentences to be imposed on 1st to 6th accused-respondents.

1. 1st count – 6 months Rigorous imprisonment and a fine of Rs.3000/- if default one month simple imprisonment.
2. 2nd count – 5 years Rigorous imprisonment
3. 3rd count – 6 months Rigorous imprisonment.

Above sentences to run concurrently and the default sentences to run consecutively.

In addition to above sentences, I order each 1st to 6th Accused-Respondent to pay a sum of 100,000/- (altogether Rs.600,000) to the Petitioner as compensation and if default one year simple imprisonment (the default sentences to run consecutively).

Accordingly the Revision application is allowed.

The Registrar is directed to send a copy of the judgment to relevant High Court of Matara to take immediate steps to apprehend the Accused-Respondents (1st to 6th).

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. C.A. Revision No.CA [PHC] APN 141/2013
2. AG v. Gunarathna and others (1995) 2 SLR 240
3. Mohomad Razik Hassim v. IP, Ampara (1986) 2 CALR 22
4. AG v. Mayagodage Sanath Dharmadiri Perera [CA (PHC) APN 147/2012]
5. Attorney General v. Jinak Sri Uluwaduge and another [1995] 1 Sri L R 157
6. The Attorney General v. H.N. de Silva 57 NLR 121