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

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

C.A.No.190/2002 H.C. Colombo No.8077/96	04. 05.	Vigneswaranathan Partipan Kathirgamathamby Sivakumar

Accused-Appellants

C.A. (PHC) APN No. 151/2011 H.C. Colombo No.8077/96	06.	Selliah Navaratnam

Accused-Petitioner

Vs.

Hon. Attorney General
Attorney General's Department

Colombo 12.

Respondent

****

BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI J.

COUNSEL : Dr. Ranjit Fernando for the Accused-Appellants and the Accused-Petitioner

Ayesha Jinasena (P.C.) A.S.G with Jayalakshi de Silva for the respondent

ARGUED ON : 31st August, 2018

DECIDED ON : 19th October 2018

ACHALA WENGAPPULI J.

This is an appeal by the 4th and 5th Accused -Appellants, challenging the validity of their conviction and sentence imposed by the High Court of Colombo in case No. 8077/1996 on 31st October 2002. The 6th Accused-Appellant has invoked the revisionary jurisdiction of this Court in application No. CA (PHC) APN 151/11 challenging the validity of his conviction and sentence. When this appeal was taken up for hearing on 31.08.2018, the said application was withdrawn with the understanding to consider the 6th Accused-Petitioner's case along with the appeal of the 4th and 5th Accused-Appellants.

In the indictment presented by the Hon. Attorney General to the High Court, the 4th and 5th Accused-Appellants and 6th Accused-Petitioner (hereinafter referred to as the "Appellants") were charged with seven other Accused, namely *Velupillai Prabhakaran* (1st Accused), *Sivasnakar alias Pottu Amman* (2nd Accused), *Kandiah Jeewamohan alias charles Master* (3rd Accused), *Rajadurai Saturukulasingham* (7th Accused), *Kandiah Sri Ganesh* (8th Accused), *Ramaiyah Papathi* (9th Accused) *and Karupiayah Kamalanathan* (10th Accused). It is alleged that they were involved with the incident generally known as the "Central Bank Bombing."

There were 712 counts in total, in the indictment including conspiracy to commit mischief, causing mischief, aiding and abetting to cause mischief, causing death of 76 persons and its abetment which are offences punishable under the provisions of the Prevention of Terrorism

(Temporary Provisions) Act No. 48 of 1979 as amended. The prosecution had listed 493 witnesses and 104 items of productions, at its back.

The trial proceeded in the absence of the 1st, 2nd, 3rd, 6th, 7th, 8th, 9th, and 10th Accused. After the evidence, the trial Court pronounced its judgment convicting the 4th, 5th and 6th Appellants along with the others.

Subsequent to his conviction and sentence, the 6th Accused-Appellant was arrested and produced before the trial Court. On 18th January 2010, his sentence was imposed having read out the judgment of the Court.

At the hearing of their appeal along with the revision application, learned Counsel for the Appellants has informed Court that he does not wish to challenge their convictions but would challenge legality and propriety of the sentences that had been imposed on the Appellants.

The basis of his submission on the sentence stems from the decision of the trial Court as claimed by the Appellants in their written submissions that "... sentences in respect of Courts 1 to 10 were ordered to run consecutively - totalling 200 years of imprisonment ...".

It is submitted by the Appellants that the consecutive sentence of imprisonment in respect of 1st to 10th counts aggregates at 200 years, and it extends well beyond the natural life time of a human being. The Appellants contend that the said consecutive sentence of imprisonment conflicts with the statutory provisions contained in Section 67 of the Penal Code.

He cited the following quotation from ***Emmins on Principles of Sentencing*** (2nd Edition, p.149 and 150) in support of his submissions where it is stated that;

> *"... as the facts of the two offences were inextricably linked, the terms should have been concurrent. Even where ... the offender has committed two quite distinct offences, sentences imposed should still be concurrent where the offences arise from the same set of facts: the same 'occasion' of the 'same transaction' as it is sometimes put ..."*

In addition, the Appellants relied upon the judgment of ***Rex v Ayudhiya*** (1882) 1 LR 2 All 644 where it had been held as follows :-

> *"... where in the course of one and the same transaction an accused appears to have done several acts, directed to one end, but which when combined together amount to a more serious offence, although the purpose of trial it may be illegal to charge the accused with not only the principle but also the subsidiary offences, yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence."*

Therefore, the Appellants contended that the decision of the sentencing Court to impose sentences of imprisonment to run consecutively is a "misdirection" since, these several but identical offences

were committed during "the same day, time and incident" and under the "same set of circumstances". It is also submitted that the Appellants show their remorse and regret by limiting their appeal to the sentence only at this juncture. They were in remand since 1996, had no personal gain over the commission of these offences and had acted only on their political ideology.

Learned Additional Solicitor General for the Respondent made oral and written submissions in reply and she had referred to the items of direct evidence that are available against each Appellant in justifying the imposition of a long sentence. We would refer to the submissions of the Respondent as we proceed along with the judgment.

In view of the submissions of the learned Counsel for the Appellants, the fundamental questions to be decided by this Court is whether the said consecutive sentence of imprisonment imposed on the 6th Appellant in respect of 1st to 10th counts is a legally valid sentence or not and if it is a legally valid sentence, whether it is justifiable to impose such a sentence under the circumstances.

The High Court of Colombo, in its judgment convicted the Appellants as follows;

1. The 4th Appellant was found guilty of Count Nos. 1, 2, 11 to 16, 18 to 20, 22 to 29, 31, 32, 34, 35, 37 to 39, 41 to 52, 56 to 60, 62, 65, 66, 69, 76, 77, 80, 81 and 82.

2. The 5th Appellant was found guilty of Count Nos. 1, 2, 11 to 16, 18 to 20, 22 to 29, 31, 32, 34, 35, 37 to 39, 41 to 52, 56 to 60, 62, 65, 66, 69, 76, 77, 80, 81 and 82.

3. The 6th Appellant was found guilty of Count Nos. 1, 6, 223 to 328, 330 to 332, 334 to 341, 343, 344, 346, 347, 349 to 351, 353 to 364, 368 to 372, 374, 377, 378, 381, 388, 389, 392, 393 and 394.

It also found the 1st Accused guilty of Count Nos. 1 and 2, the 8th Accused guilty of Count Nos. 1 and 8 and the 10th Accused guilty of Count Nos. 1 and 10.

The sentences imposed by the High Court on each Appellant are as follows :-

1. The 4th Appellant was sentenced to 20 years of imprisonment in respect of Count No. 1 and for the remaining Counts, life sentences were imposed.

2. The 5th Appellant was sentenced to 20 years of imprisonment in respect of Count No. 1 and for the remaining Counts, life sentences were imposed.

3. The 6th Appellant was sentenced along with 1st, 8th and 10th Accused to imprisonment of 20 years in respect of each of the Counts they were charged with. The Court further directed that the sentence of 20 years imprisonment imposed on the first 10

Counts to run consecutively for a total period of 200 years and the remainder of the 20 years of imprisonments to run concurrently.

In imposing the said sentences on the Appellants and other Accused, the High Court had considered the following facts :

a. 76 persons have died as a result of the attack and Counts in respect of 51 such deaths were proved,
b. the Central Bank of Sri Lanka has suffered damage due to mischief at an estimated value of Rs. 550 Million.
c. it is the duty of the Court to keep the 1st, 8th and 10th Accused and 6th Appellant away from society as long as it could

Thereafter, it proceeded to impose the above quoted sentences on the Appellants.

In imposing a 20 year term of imprisonment on 1st Accused, 4th to 6th Appellants, 8th Accused and 10th Accused, upon their conviction the 1st Count, the Court had thought it fit to impose the maximum punishment it could under Section 3(b) of the Prevention of Terrorism (Temporary Provisions) Act since the said Section confers discretion on the sentencing Court to impose a sentence of imprisonment of either description for a period of *"not less than five years but not exceeding twenty years"* for the offence of conspiracy to commit mischief to the property of Government.

The conviction of the 6th Appellant to Count No. 6 for abetment also attracted punishment under Section 2(1)(e) read with Section 3(b) of the Prevention of Terrorism (Temporary Provisions) Act of imprisonment of either description for a period of *"not less than five years but not exceeding twenty years"*. The remaining Counts of 223 to 328, 330 to 332, 334 to 341, 343, 344, 346, 347, 349 to 351, 353 to 364, 368 to 372, 374, 377, 378, 381, 388, 389, 392, 393 and 394 related to abetment to causing death of persons as per Counts 11 to 88. These are identical offences in relation to several deaths. The prescribed punishment for these Counts as per Section 2(1)(e) read with Section 3(b) of the Prevention of Terrorism (Temporary Provisions) Act of imprisonment of either description for a period of *"not less than five years but not exceeding twenty years"*.

It must be noted that the 6th Appellant was found guilty and was sentenced under the same penal section which carried an imprisonment of either description for a period of *"not less than five years but not exceeding twenty years"*.

In view of the identical penal provisions, the sentencing Court had made order that out of the sentences imposed on the 6th Appellant, the sentences that are imposed on him in relation to Counts 1, 6, 223, 224, 225, 226, 227,228,229,230 to run consecutively to make up for 200 years, whereas similar punishments in relation to the remaining counts to run concurrently.

In addition, the Court had also imposed life sentences on the 4th and 5th Appellants upon their conviction of the remaining Counts. It is observed that Count No. 2, is in relation to an offence punishable under

Section 2(2)(e) of the Prevention of Terrorism (Temporary Provisions) Act which also prescribes a sentence of imprisonment of either description for a period of *"not less than five years but not exceeding twenty years"* for committing mischief to the property of Government, but the Court had imposed a life sentence.

Count Nos. 11 to 16, 18 to 20, 22 to 29, 31, 32, 34, 35, 37 to 39, 41 to 52, 56 to 60, 62, 65, 66, 69, 76, 77, 80, 81 and 82 refers to causing death of persons, which are punishable under Section 3 of the Prevention of Terrorism (Temporary Provisions) Act, which imposes a mandatory life term. The 5th and 6th Appellants were therefore imposed life sentences in relation to above numbered Counts upon their conviction.

Returning to the complaint of the learned Counsel for the Appellants for imposition of a 200 years of imprisonment, it is evident from the above, that it only applies to the 6th Appellant. Other Accused who were imposed the said sentence along with the 6th Appellant have not preferred any appeals against it.

Having considered the individual sentences imposed on each of the Appellants and the statutorily prescribed punishment for the offences they had committed, we should now turn our attention to the legality of the said sentence of 200 years of imprisonment imposed on the 6th Appellant.

The 6th Appellant did not challenge the imposition of the 20 years of imprisonment on each of the counts he was found guilty to. His grievance is limited to imposition of consecutive sentences on him totalling 200 years.

In view of the 6th Appellant's grievance as submitted by his Counsel, this Court should examine the validity of imposition of a consecutive sentences vis a vis Section 67 of the Penal Code.

Article 13(4) of the Constitution of the Republic states as follows :-

> *"No person shall be punished with death or imprisonment except by order of a competent Court, made in accordance with the procedure established by law."*

Section 10 of the Judicature Act empowers the Judges of the High Court to *"impose any sentence or other penalty prescribed by written law"*. A similar provision contains in Section 13 of the Criminal Procedure Code.

This statutory provision confers power on the High Court to impose *"any sentence or other penalty"* but such sentence must be a one *"prescribed by written law"*.

The written law which prescribes the sentence, in relation to the instant appeal could be found in Sections 2 and 3 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as referred to in the preceding paragraphs, in dealing with the description of sentences. Therefore, the sentences that are imposed by the High Court on the Appellants are in fact *"prescribed by written law"*. It is therefore clear that the sentence imposed on each count is *per se* a legal sentence as the Court had acted within the statutory scheme of punishment. The Prevention of Terrorism (Temporary Provisions) Act only lays down the prescribed sentence in relation to the several offences it had defined in Sections 2 and 3. It does not provide the manner in which these sentences are to be carried out.

The statutory scheme of the procedure, in the imposition of sentences and carrying them out, is found in Chapter III of the Penal Code and particularly in the Code of Criminal Procedure Act No. 15 of 1979.

Learned Counsel for the Appellants, as already noted, placed heavy reliance on Section 67 of the Penal Code, in challenging the legality of the sentence imposed on the 6th Appellant.

Section 67 of the Penal Code reads as follows :-

> *"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.*
>
> *Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished; or*
>
> *Where several acts of which one, or more than one, would by itself or themselves constitute an offence, constitute when combined a different offence; the offender shall not be punished with a more severe punishment that the Court which tries him could award for any one of such offences."*

Before this Court ventures to consider the provisions of Section 67 of the Penal Code, it is preferable to consider some of the judgments that have already considered its applicability in imposing a sentence.

In ***Mendis v Cornelis*** 3 N.L.R. 196, Bonser CJ was of the view that in relation to sentences imposed upon conviction for house breaking with intention to commit theft and of theft, Section 67 of the Penal Code has no application as they are "distinct offences". This is a contrary view to the judgment of Withers J in ***The Queen v Nandua***1 N.L.R. 317, where it was held that:-

> *"In this case clearly the principal offence was riot. Some of the accused assembled together with the sole object of assaulting Mr. Gane. They affected their purpose. Riot was thus the principal offence they committed. That act of riot again was made up of two other offences, unlawful assembly and voluntarily causing hurt, which was the object of the assembly. They therefore should only be punished for the principal offence of riot. This case comes within the provisions of section 67 of our Penal Code."*

In ***Alwis Appu v Bansagayah*** 49 N.L.R. 66, where the accused had been punished for the offence of robbery and is also punished for the offence of hurt, Soertsz SPJ held the view that hurt being an integral part of the offence of robbery and therefore "is not allowed by law."

In the appeal of ***Inspector of Police v. De Zoysa*** 31 N.L.R. 127, the Accused was charged with voluntarily causing hurt to a Police officer, punishable under Section 314 of the Penal Code and also for assaulting the same officer with intent to dishonour him without any grave and sudden

provocation, punishable under Section 346 of the Penal Code. Akbar J, sitting alone, has held that;

> *"It is true that an assault on an Inspector of Police by an accused whom he is going to charge in Court is a serious offence and deserves to be punished severely, but at the same time these two charges are so connected together that I think the first charge is included in the second and that the two counts have been brought in merely to get the double punishment which the Court can award under section 17 of the Criminal Procedure Code. Under that section, when a person is convicted at one trial of any two or more distinct offences, in the. case of a Police Court the punishment cannot exceed twice the amount of punishment which it is competent to inflict. So that it is under that section that the Police Magistrate apparently horrified at the enormity of the offence, committed within the precincts of the Police Court, has sentenced the accused to a year's rigorous imprisonment.*
>
> *It was a foolish act of the accused, and he stated to the Court that he was provoked because he was assaulted by eight of them, meaning thereby, I suppose, that he was assaulted by the constables at the Police Station. But whatever that may be, under section 67 of the Penal Code there is a distinct injunction that where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender is not to be punished with a more severe punishment than the Court which tries him could award for any one of such offences. Now, the Police Court could not award more than six months' rigorous imprisonment for each one of these counts. I, therefore, think that the punishment should*

be reduced from twelve months' rigorous imprisonment to six months' rigorous imprisonment on each count to run concurrently."

In ***Sub Inspector of Police, Chilaw v Erebinu***31 N.L.R. 446, Jayewardene AJ held that;

"The principle underlying section 67 of the Penal Code is that where the intention was to commit an offence, the commission of which involves the perpetration of acts themselves punishable, the offender should not be punished for them separately, as his object was to commit one crime, not many."

It is evident from these judgments, that it has been the consistent view held by their Lordships that Section 67 does not apply in situations where the offender is convicted on distinct offences committed against the same individual.

Then a question arises as to whether the High Court could impose sentences of imprisonment to run consecutively if the offender is convicted of distinct offences. Section 16 of the Code of Criminal Procedure Act No. 15 of 1979 provides the answer.

Section 16 (1) reads thus :-

"When a person is convicted at one trial of any two or more distinct offences the court may, subject to section 301, sentence him for such offences to the several punishments prescribed therefor which such court is competent to inflict; such

punishments when consisting of imprisonment to commence, unless the court orders them or any of them to run concurrently, the one after the expiration of the other in such order as the court may direct, even where the aggregate punishment for the several offences is in excess of the punishment which the court is competent to inflict on conviction of one single offence:

Provided that if the case is tried by a Magistrate's Court the aggregate punishment shall not exceed twice the amount of punishment which such court in the exercise of its ordinary jurisdiction is competent to inflict.

It is important to note from section 16 of the Code of Criminal Procedure Act that it is subject to Section 301 of that Act.

Section 301, reads thus :-

"The provisions of sections 55 and 67 of the Penal Code shall apply to all offences whatever."

Clearly this Section imposes a mandatory requirement on Court to give effect to provisions contained in Section 67 of the Penal Code, in sentencing an offender under Section 16.

When one compares Section 67 of the Penal Code and Section 16 of the Code of Criminal Procedure Act, it is apparent that there is a conflict if one were to implement both schemes. This apparent conflict between a legal provision in a substantial law and another in the procedural law had

already received attention and this Court made an attempt to reconcile it by providing a solution based on interpretation of the two sections.

In delivering the judgment of ***Costa v ASP CID Colombo*** 50 N.L.R. 574 Nagalingam J. sitting alone, states thus:-

> *"There can be little doubt that each of the three offences of which the-accused has been found guilty is a distinct offence and that the appellant was rightly sentenced to separate terms of imprisonment in respect of each of them; there can be equally little doubt that the Magistrate had jurisdiction under this section to direct that the sentences in respect of two or more offences should run consecutively. But the Court cannot give effect solely to section 17 of the Criminal Procedure Code and ignore the provisions of section 67 of the Penal Code. There is an apparent conflict between these two provisions of our penal statutes. The conflict should, if possible, be harmonised and the two provisions read in such a manner as to give effect to both provisions without any conflict resulting therefrom. This object can be achieved, to my mind, by excluding from the operation of section 17 of the Criminal Procedure Code those cases, which would fall within the ambit of section 67 of the Penal Code. Read in this way the two sections are perfectly complementary and lead to no conflict. The position, therefore, is that, where the distinct offences of which the accused person is found guilty are such that the acts which constitute one or more of those offences in combination do not constitute the other offence or offences, the provisions of section 17 of the Criminal Procedure Code would be applicable, but not otherwise; and in the latter event the provisions of section 67 of the Penal Code would govern that case. The appellant's case falls*

in this view of the matter under section 67 of the Penal Code, and he should not have had his sentences directed to run consecutively in respect of the first and second charges of which he was convicted."

Upon plain reading of Section 67, it is evident that it consists of two segments. The first segment deals with situations where the Accused is charged for an offence which *"is made up of parts, any of which parts itself is an offence"*. In such a situation such an Accused *"shall not be punished with the punishment of more than one of such offences unless it to be so expressly provided"*.

The second segment of the said section contains two parts within it. The first part deals with situations where *"anything is falling within two or more separate definitions of any law ... by which offences are defined or punished."*

It its second part, the section deals with situations where *"several acts of which one, or more than one, would by itself or themselves constitute an offence, constitute when combined a different offence"*.

In both these situations, the discretion of Court, in relation to imposition of punishment, is limited by the section as it states *"... the offender shall not be punished with more severe punishment than the Court which tries him could award for any one of such offences."*

This section is further explained in the Penal Code by two illustrations. The first illustration is an instance of one strikes another 50 times with a stick. Upon conviction on 50 such counts of voluntarily

causing hurt, instead of imposition of 50 times the prescribed sentence, the offender was made liable to one such punishment only.

However, the second illustration concerns causing hurt to a third person in the same transaction, in addition to the first person. In such a situation of course, the offender is liable to be punished separately for causing hurt to the first person and third person.

In effect, this Section imposes a ceiling on the imposition of legally prescribed punishment that could be imposed on an offender for each of the counts he was charged and convicted with if a certain criterion is met. The applicable criterion for an offender to be qualified to become entitled to the concession granted by the said section is that the offences, such an offender is charged with are;

a. "... made up of parts, any of which parts itself as offence"
b. "... falling within two or more separate definitions of any law ... by which offences are defined or punished."
c. "several acts of which one, or more than one, would by itself or themselves constitute an offence, constitute when combined a different offence"

If the offender qualifies under any of these, then he is entitled not to *"be punished with more severe punishment than the Court which tries him could award for any one of such offences."*

The illustrations clearly point to a situation in which an exception to the said general rule is created. That is where a situation in which a third person is involved as a victim. It could be seen from the illustration *(b)* to Section 67, that if the acts of offending are committed in respect of two persons, each such act, although similar to each other, ought to be punished separately. But such offending is in respect of one person, then, if the offender qualifies himself under any of the three situations identified as above, he is entitled to the concession under Section 67.

As noted above the count Nos. 1 and 2 against the 6th Appellant are clearly distinct offences. Then the remaining several Counts of abetment on which the 6th Appellant was convicted of are identical in nature, except for names of the persons who died. All these offences carry the identical statutorily prescribed sentence of imprisonment not less than 20 years.

It is not possible to consider the offences of conspiracy to commit mischief, committing mischief, causing death of persons and abetment to cause death of each of the 51 persons as offences that are *"made up of parts, any of which parts itself as offence"* or *"falling within two or more separate definitions of any law ... by which offences are defined or punished"* or "several acts of which one, or more than one, would by itself or themselves constitute an offence, constitute when combined a different offence".

Learned Counsel for the Appellants did not address us as to the basis on which the provisions of Section 67 become applicable to the situation in the instant appeal. None of the offences that had been committed by the 6th Appellant could be categorised as coming under any

of the three situations as reflected in Section 67 of the Penal Code as they are clearly distinct offences. This Court prefers to adopt the approach of Nagalingam J in ***Costa v ASP CID Colombo***(supra) in resolving this issue as raised by the learned Counsel for the Appellants.

With due respect to learned Counsel for the Appellants, we are not inclined to accept his submission that the sentences imposed on the 6th Appellant are in violation of the provisions contained in Section 67 of the Penal Code for the aforesaid reasons. In our opinion, Section 67 has no application to the offences the 6th Appellant was convicted and sentenced to, although most of them are identical but forms a series of distinct offences. We derive support for this view by reference to the provisions of Section 16(2) of the Code of Criminal Procedure Act.

Section 16(2) reads as follows:-

> *"For the purpose of appeal aggregate sentences imposed under subsection (1) in case of convictions for several offences at one trial shall be deemed to be a single sentence."*

It is clear that when a Court had imposed sentences of imprisonment to run consecutively in respect of each of the distinct offences the offender was found guilty to, an appellate Court should consider that aggregate sentences as a "single sentence" in view of this deeming provision.

Learned Counsel for the Appellants relied on a quotation from *Emmins on Principles of Sentencing* in support of his submissions.

The quotation reads thus :-

> *"... as the facts of the two offences were inextricably linked, the terms should have been concurrent. Even where ... the offender has committed two quite distinct offences, sentences imposed should still be concurrent where the offences arise from the same set of facts: the same 'occasion' of the 'same transaction' as it is sometimes put ..."*

The principle emphasised by the learned author in the said text that *"Even where ... the offender has committed two quite distinct offences, sentences imposed should still be concurrent where the offences arise from the same set of facts: the same 'occasion' of the 'same transaction' as it is sometimes put"* is in direct conflict with the consistent approach adopted by our Courts which are bound by the provisions of Section 67 of the Penal Code and Section 16 of the Code of Criminal Procedure Act.

We are mindful of the fact that in Sri Lankan context there is no statutorily laid down sentencing policy which had been developed with the institutional support of specialised agencies that had been tasked to provide theoretical and statistical input in formulating such a policy. The above quotation is from an author who is familiar with the jurisdiction of United Kingdom where common law traditions are followed. But in Sri Lankan context, except for some statutory provisions touching upon the question of sentencing and judicial pronouncements by superior Courts, we are bereft of a comprehensive sentencing policy that suits the local

conditions, which had been moulded in the universally accepted norms of sentencing.

With the amendments brought in to Section 303 and 304 of the Code of Criminal Procedure Act with Act No. 47 of 1999, certain considerations were identified for the attention of the sentencing Courts when they decide the question whether a suspended sentence should be imposed or not. Thereafter, another consideration was added by Act No. 14 of 2005, to Section 154(3), when an Accused indicates his willingness to tender a plea of guilt to a lesser offence in the context of an indictable offence before a High Court. This amendment required the sentencing Court to "have regard" to the fact that the Accused had indicated in the Magistrate's Court of his willingness to plead guilty to a lesser offence. The imposition of statutory minimum sentence by the Legislature in several enactments is outside the scope of this determination and therefore will not be considered.

Returning to the said quotation, relied upon by the Appellants, we note that it is contained in a chapter titled "Concurrent and consecutive custodial sentences and totality principle." As the title to the Chapter indicates, the principles that are highlighted in the text, are developed under the "Totality Principle".

Said principle is explained in ***Sentencing & Criminal Justice*** ***Criminal Justice*** by *Andrew Ashworth* (3rd Ed) at p. 226 as follows:-

> *"Where it is appropriate to impose consecutive sentences rather than concurrent sentences, ... the basic approach is for the Court*

to calculate separate sentences for each of the offences and then to add them together. This could, however, lead to high overall sentence- placing thefts alongside rape, or burglaries alongside robbery, in terms of length of custody. The Courts have therefore evolved a principle which Thomas has called 'the totality principle', which requires a Court to consider the overall sentence in relation to the totality of the offending and in relation to sentence level for other crimes."

Learned author states (at p.226) that the authority on which this principle was formulated "may be found in an unreported judgment of ***Barton*** in 1972," where it is observed that:-

"When cases of multiplicity of offences come before the Court, the Court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what the appropriate sentence for all the offences is."

The sentencing policy of the English Courts are clearly laid down in the sentencing guidelines which in turn is based on totality principle. Therefore those Courts are bound to follow the said guidelines as per Section 125(1) of the Coroners and Justices Act 2009.

In ***Mill v The Queen*** [1988] HCA 70, the High Court of Australia reproduced the above quotation from ***Barton*** in re-emphasising its

applicability as it observed that *"when number of offences are being dealt with and specific punishments in respect of them are totted up to make a total, it is always necessary for the Court to take a last look at the total just to see whether it looks wrong."*

The Canadian Supreme Court, in ***R v Khawaja*** [2012] 3 S.C.R. 555, stated that *"the general principles of sentencing, including the totality principle, apply to terrorism cases."*

The Sentencing Council of United Kingdom, in its June 2012 guidelines, say that the totality principle comprises of following two elements :-

1. *"all Courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.*

2. *it is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the factors personal to the offender as a whole."*

It appears from the above quotations that the contention of the Appellant, although it claims to have been based on Section 67 of the Penal Code, is actually more or less based on the totality principle which had been adopted in Courts where the common law tradition is followed, with

necessary statutory backing. In effect, the totality principle, as *Ashworth* notes (at p.226) *"would clearly produce what is in effect a discount for bulk offending."*

Section 67, even if it is applicable to the instant appeal, could not have been formulated by adopting totality principle as it emerged only in the early seventies, not in 1887 when the Penal Code was enacted. Clearly the totality principle is not part of our law and we did not come across any precedent where it had been applied in determining sentence by our superior Courts.

In the divisional bench decision of the apex Court in ***Attorney General & Others v Sumathipala*** (2006) 2 Sri L.R. 126 it was held :-

> *"As stated by Viscount Simonds in* ***Magor and St. Mellons RDC v Newport Corporation*** *([1952] A.C. 189) a Judge cannot under a thin guise of interpretation usurp the function of the legislature to achieve a result that the Judge thinks is desirable in the interests of justice. Therefore, the role of the Judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any Court and the function of every Judge to do justice within the stipulated parameters. Referring to the function of a Judge, Justice Dr.Amerasinghe, was of the view that (Judicial Conduct, Ethics and Responsibilities, pg. 284),*
>
> > *"The function of a judge is to give effect to the expressed intention of Parliament. If legislation needs amendment, because it results in injustice, the democratic process must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years. In* **Government**

Agent, Superintendent of Police v Suddhana et al. ([1905] V Tambiyah's Reports 39) Chief Justice Layard said, at the time when the Privy Council was the country's apex tribunal:

> *"If we wrongly construe the law the remedy is by appeal to His Majesty in Council. If on the other hand we rightly construe the law and the law is unpalatable to any section of the community, the remedy of that section of the community is to endeavour, if possible to have the law amended. Such endeavours, however, should be constitutional."*

Though applied in most of the common law countries, adopting such a principle to this jurisdiction in view of the above quotation, is best left to Legislature if it thinks appropriate.

However, this Court must address its mind to the question of legality and propriety of imposition of long sentences. In the early part of this judgment, referring to the relevant statutory provisions we have already held that the imposition of the long sentence on the 6th Appellant is legally correct.

Therefore, what remains is to consider the propriety of the said sentence.

The 6th Appellant and his co-accused were convicted of offences recognised by the Prevention of Terrorism (Temporary Provisions) Act. Learned Additional Solicitor General has addressed us as to the nature of the available evidence in respect of each of the Appellants, in justifying the sentence imposed by the High Court. There is no challenge that these offences are committed while carrying on a meticulously planned, well-rehearsed, suicidal attack on a purely an economic, therefore purely a civilian target, with the intention of causing maximum possible damage to life and property. Of course, it is said that the Appellants were motivated by their political ideology. Undoubtedly, this attack on the nerve centre of Sri Lanka's economy, the Central Bank of Sri Lanka, could be termed as Sri Lanka's equivalent of "9/11", which had undoubtedly shocked the national conscience. This was a plain and simple act of absolute terrorism.

Unlike in January 1996, when the Appellant committed these offences, as at present terrorism has spread its tentacles from south Asia, Africa and Latin America to western democracies and had evolved itself as a global threat to democracy. Therefore, it is relevant to examine the sentencing principles that had evolved over time, founded on common law principles, in response to the threat of terrorism.

In ***R v Mohammed Abdul Kahar*** [2016] EWCA Crim 568, five Justices of the Court of Appeal, having considered several connected appeals from the Crown Court, decided to offer *"more detailed guidelines in relation to sentences that should be imposed"* under Section 5 of the Terrorism Act 2006.

Section 5 of the said Act provides :-

"1. *A person commits an offence if, with the intention of –*

(a) committing acts of terrorism, or
(b) assisting another to commit such acts

he engages in conduct in preparation for giving effect to his intention.

2. *It is irrelevant for the purpose of subsection (1) whether the intention and preparation relate to one or more particular acts of terrorism, acts of terrorism of a particular description, or acts of terrorism generally."*

Their Lordships have, at the outset of the said judgment quoted with approval the following passage from ***R v F*** [2007] EWCA Crim 243;

> *"... the legislation does not exempt, nor make an exception, nor create a defence for, nor exculpate what some would describe as terrorism in a just cause. Such a concept is foreign to the 2000 Act. Terrorism is terrorism whatever the motives of the perpetrators...*
>
> *... the terrorist legislation applies to countries which are governed by tyrants and dictators. There is no exemption from criminal liability for terrorist activities which are motivated by, or said to be morally justified by, the alleged nobility of the terrorist cause."*

In determining the appropriate sentence in a case of s. 5, their Lordships introduced a scale starting with *Level 1* to *Level 6* in descending order to determine the "Levels of Offending".

Level 1, being the highest in the said scale, is described as follows;

> *"The highest level in our view is where the offender has taken steps which amounts to attempted multiple murder, or something not far short of it, or to a conspiracy to commit multiple murder if it is likely to lead to an attempt that is likely to succeed – but no physical harm has been caused. Given the particular gravity of terrorist offences, the Definitive Guidelines issued by the Sentencing Guidelines Council in relation to attempted murder is not directly applicable. We should include within this level cases which, if charged under s.5, would have included the circumstances in Ibrahim & Others [2008] EWCA Crim 880 (Conspiracy to murder- the 21/7 plot in which four bombs were detonated on the London Underground but failed to explode, and life sentences with minimum terms of 40 years, imposed after trial, were upheld on appeal); Abdullah Ahmed Ali & Others [2011] 2 Cr App R 22 (Conspiracy to murder by causing explosions on transatlantic airliners – where life sentences with minimum term of between 32 to 40 years were imposed after trial and the sole appeal against sentence was dismissed); and Barot (conspiracy to murder, where the minimum term which this Court imposed, after a plea attracting 10% discount, was 30 years). For such an*

offence a sentence of life imprisonment with minimum term of 30 to 40 years or more is appropriate."

Having applied the totality principle, the setting up of life imprisonment with minimum term of 30 to 40 years or more by the Court of Appeal is a clear indication of the seriousness in which the sentencing in relation to persons who are convicted of terrorism offences such as "attempted multiple murder" and not actual multiple murder.

These guidelines have no direct application to our legal system. But its persuasive value should be appreciated by this Court, in order to be consistent with the sentencing policy in other jurisdictions against terrorism. This is not an attempt to review the sentence imposed by the High Court through the lens of English principles on sentencing of terrorists.

The 6th Appellant was pronounced of his sentences by the High Court on 31.10.2002.

In imposing the sentence of 200 years on the 6th Appellant, the High Court had considered the following facts;

a. 76 persons have died as a result of the attack and Counts in respect of 51 such deaths were proved,
b. the Central Bank of Sri Lanka has suffered damage due to mischief at an estimated value of Rs. 550 Million.
c. it is the duty of the Court to keep the 1st, 8th and 10th Accused and 6th Appellant away from society as long as it could.

The High Court confined the sentence to 10 Counts, when in fact it found the 6th Appellant guilty of more than 50 Counts, a clear indication that it did not impose the said sentence on mere arithmetical calculation as commented by ***Barton*** (supra). It also suggests that the High Court was alive to the proportionality of the sentencing when it confined the sentence to 10 such Counts.

The evidence revealed that it was the 6th Appellant who drove the explosive laden lorry, which later rammed into the Central Bank building, from Vavunia to Colombo and again on the day of the attack from a lorry parked in Colombo at 6.00 a.m. He had then left for Vavunia and had picked up his pass to cross over to the uncleared area at the *Thandikulam* check point at 4.00 p.m. on the same day.

The 4th and 5th Appellants were apprehended almost immediately after the attack and there were direct and circumstantial evidence to implicate them of their complicity to the attack .

The High Court had considered the gravity of the offending acts as did the Canadian Supreme Court in ***R v Khawaja*** (supra) whereby determining the high degree of *mens rea* in view of the considerations that"... an individual must not only participate in or contribute to a terrorist activity *"knowingly"*, his or her actions must also be undertaken *"for the purpose"* ... requiring a *"higher objective purpose of enhancing the*

ability of any terrorist group to carry out a terrorist activity", and decided to keep him away from the community.

As the Canadian Court did in ***R v Khawaja*** (supra) by determining that "... *in terrorism cases, denunciation, general deterrence and public protection should be emphasised over personal deterrence and rehabilitation*", the High Court also placed emphasis on protecting the community by keeping him away for some time.

We have already held that the High Court had imposed a legally valid sentence on the 6th Appellant. In examining its propriety after 16 years since its imposition, this Court notes that the sentences imposed by the High Court contains all the considerations that the common law Courts have now developed and are applying in sentencing a terrorist and for that reason could easily be accepted as a sentence that is commensurate with the act of offending and therefore appropriate under the circumstances.

In view of the reasoning contained in the preceding paragraphs of this judgment, it is our considered view that the appeal of the 4th and 5th Appellants and revision application of the 6th Appellant are devoid of merit.

Accordingly, the convictions of the 4th, 5th and 6th Appellants and the sentences imposed on them are affirmed by this Court.

In these circumstances, the appeal of the 4th and 5th Appellants are dismissed. The revision application of the 6th Appellant is also stands dismissed as he failed to establish any exceptional circumstances in support of his application

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL