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

In the matter of an Appeal in terms of Article 138 and 154 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 331 and 364 of the Code of Criminal Procedure Act.

The OIC,
Police Station,
Badulla.

Complainant

C.A. Case No: **CA (PHC) 184/2013**

P.H.C. Badulla Case No: **31/2013(Rev)**

M.C. Badulla Case No: **40135**

Vs.

Maddegoda Welli Durayalage Gangasiri,
No. 19/1, Gampola Road,
Lagamuwa, Kadugannawa.

1st Accused

AND BETWEEN

Maddegoda Welli Durayalage Gangasiri,
No. 19/1, Gampola Road,
Lagamuwa, Kadugannawa.

1st Accused-Petitioner

Vs.

01. The OIC,
Police Station,
Badulla.

02. Hon. Attorney General
Attorney-General's Department,
Colombo 12.

Respondents

AND NOW BETWEEN

Maddegoda Welli Durayalage Gangasiri,
No. 19/1, Gampola Road,
Lagamuwa, Kadugannawa.

1st Accused-Petitioner-Appellant

Vs.

01. The OIC,
Police Station,
Badulla.

02. Hon. Attorney General
Attorney-General's Department,
Colombo 12.

Respondents-Respondents

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	AAL Yajish Tennakoon with AAL Dinesha Ramanayake for the Accused-Petitioner-Appellant Nayomi Wickremasekara, SSC for the Respondents-Respondents
ARGUED ON	:	01.02.2019
WRITTEN SUBMISSIONS	:	The Accused-Petitioner-Appellant – On 09.10.2018 The Respondents-Respondents – On 13.11.2018
DECIDED ON	:	15.03.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner-Appellant has filed this revision application seeking to revise the order of the Learned High Court Judge of Provincial High Court of Uva province holden in Badulla dated 11.12.2013 in case No. 31/2013(Rev).

Facts of the case:

The accused-petitioner-appellant (hereinafter referred to as the 'appellant') was indicted in the Magistrate's Court of Badulla with four others for following counts;

1. The 1st and 2nd accused were charged for preparing, printing and placing forged signatures in sand transport licenses to be issued by the Geological Survey and Mining Bureau of Sri Lanka on or about 27.10.2010 at

Kendakatiya, an offence punishable under section 457 read with section 32 of the Penal Code.

2. All five accused were charged for preparing, printing and placing rubber seals in a sand transport form which was to be issued by the Geological Survey and Mining Bureau of Sri Lanka to one A. Subramanium and N.C. Rathnayake on or about 27.10.2010 at Kendakatiya, an offence punishable under section 459 read with section 32 of the Penal Code.
3. The 1st accused was charged for preparing, printing and placing the caption of the Geological Survey and Mining Bureau of Sri Lanka in letterheads prepared and printed alternate to counts 1 and 2 on or about 27.10.2010 at Kendakatiya, an offence punishable under section 461 of the Penal Code.
4. The 1st accused was charged for possessing a rubber seal with the caption of the Geological Survey and Mining Bureau of Sri Lanka, an offence punishable under section 461 of the Penal Code.
5. The 1st accused was charged for possessing a rubber seal with the caption of the Geological Survey and Mining Bureau of Sri Lanka alternate to above charges, an offence punishable under section 461 of the Penal Code.
6. The 1st accused was charged for possessing a seal similar to an official seal of the Geological Survey and Mining Bureau, Badulla with the knowledge that it could be a forged seal, an offence punishable under section 461 of the Penal Code.

All five accused pleaded guilty to their respective charges. Accordingly the Learned Magistrate convicted them and imposed following sentences;

I. The 1st and 2nd accused were sentenced to a term of 06 months imprisonment for each count of no. 01 and 03. A fine of Rs.1500/= was imposed with a default term of 01 month imprisonment.

II. All five accused were sentenced for a term of 06 months under 2nd count and it was suspended for 02 years. Each accused were ordered to pay a fine of Rs. 1500/= with a default term of 01 month imprisonment.

III. The 1st accused was sentenced to a term of 03 months imprisonment for the count no. 4, 5 and 6 each.

IV. The Learned Magistrate further directed the terms of imprisonment of the 1st and 2nd accused to run consecutively.

Being aggrieved by the said order, the appellant filed a revision application in the Provincial High Court of Uva province holden in Badulla. The Learned High Court Judge affirmed the sentence for the 1st count against the petitioner and revised the Learned Magistrate's order as follows;

1. The 2nd accused was released from the sentence and the fine for 3rd count since he was not charged under 3rd count.
2. The term of 06 months imprisonment for all the six accused under count 02 was converted to a 06 months rigorous imprisonment and it was suspended for 05 years. The fine for the 2nd count was affirmed with a default term of 01 month simple imprisonment.
3. The appellant was released from the imprisonment under count 03 since it was an alternative charge.
4. The sentences on the appellant for count 05 and 06 were removed since they were alternative charges to count 04.
5. A term of 03 months rigorous imprisonment was imposed on the appellant for count 04 but the Learned High Court Judge removed the fine for the said count.

Accordingly the appellant and the 2nd accused were sentenced to a term of 06 months rigorous imprisonment. Additionally the appellant was sentenced to a term of 03 months rigorous imprisonment which was to run consecutively. All five accused were sentenced to a term of 06 months rigorous imprisonment which was suspended for 05 years.

Being aggrieved by the said order, the appellant preferred this appeal.

The Learned Counsel for the petitioner submitted following grounds of appeal;

I. The Learned Magistrate and the Learned High Court Judge failed to identify the fundamentals laid down on sentencing and suspended sentences by section 303 of the Code of Criminal Procedure Act
II. The appellant is a father of 3 infants and has no previous convictions against him.
III. The appellant is the sole breadwinner of the family.

The Learned Counsel for the appellant contended that the fundamental rule under section 303(1) or 303(2) for a sentence not exceeding six months has not been duly followed by the Learned Magistrate. It was further contended that a first time offender who has not faced a previous jail term shall not be imposed a custodial sentence unless it falls in any of the conditions specified under section 303(2). The Learned Counsel for the appellant submitted that both suspended sentences and custodial sentences are imposed on different offences within the same proceedings.

We observe that section 303 of the Code of Criminal Procedure Act (as amended by Act No. 47 of 1999) permits Court to suspend the whole or a part of the sentence depending on the facts of each case. Section 303 (1) of the Code of Criminal Procedure Act reads that;

"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;..." (Emphasis added)

In the case of **Attorney General V. Mayagodage Sanath Dharmadiri Perera [CA (PHC) APN 147/2012],** it was 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 can be construed that Court is vested with discretion to suspend a sentence according to the circumstances of each case subject to the limitations stipulated in aforesaid section 303 of the Act. Therefore the Learned High Court Judge was correct in refusing to interfere with the Learned Magistrate's decision to impose a custodial sentence since the Learned Magistrate was exercising the discretion vested on her. (Page 63 and 64 of the brief)

Further we observe that there is no rigid rule as to a first time offender who has not faced a previous jail term shall not be imposed a custodial sentence unless it falls in any of the conditions specified under section 303(2). Therefore we answer the said contention of the Learned Counsel in negative.

The Learned SSC for the respondent submitted that the Geological Survey and Mines Bureau of Sri Lanka has the sole authority to issue license to explore mine

process and trade. Accordingly it was contended that the effect and impact of the crime committed by the appellant are very grave and therefore inexcusable.

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. 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****..."* (Emphasis added)

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..."*

In the case of **M. Gomes (S.I. Police, Crimes) V. W.V.D. Leelaratna [66 NLR 233]**, it was held that,

> *"I would also indicate what factors should be taken into consideration by Judges on the matter of sentence. I proceed to quote from the case of The Attorney-General v. H. N. de Silva (1). At page 124 Basnayake, A.C.J., (as he then was) says this: "In assessing the punishment that should be passed on an offender the judge should consider the matter of sentence both from the point of view of the public and the offender..."*
>
> *To these I would respectfully add:*
>
> *(5) Nature of the loss to the victim. In this case the loss to him was irreparable, especially in view of the prohibition on the importation of cars into this country. The victim would have been put to a great deal of inconvenience if he had to use the public modes of transport.*
>
> *(6) Profit that may accrue to the culprit in the event of non-detection..."*

Considering above, we are of the view that Court should impose a sentence which is proportionate to the crime committed and the damage caused. In the instant case, it is vital to consider not merely the financial loss caused to the Bureau but also the damage caused to the environment. The Bureau has authority in regulating mineral exploration, mining, processing, transport, trade-in, storing and export of minerals by the issue of licenses. As a country, we have seen several natural disasters including landslides in recent past which could have been possible consequences of illegal mining as well. Now it has been recognized that the environmental risks of mining include the formation of sinkholes, the contamination of soil and groundwater, loss of biodiversity and chemical leakages which are long-term consequences. Therefore issuing illegal licenses without proper expert supervision

should not be treated as a light crime given the fact that we are already suffering from the devastating consequences of environmental pollution globally.

In the case of **The Attorney General V. Mendis [1995] 1 Sri L.R. 138** it was held that,

> *"In our view once an accused is found guilty and convicted on his own plea, or after trial, the Trial Judge has a difficult function to perform. That is to decide what sentence is to be imposed on the accused who has been convicted. In doing so he has to consider the point of view of the accused on the one hand and the interest of society on the other.* ***In doing so the Judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organisation 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.*** *The Trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should in our view not to surrender this sacred right and duty to any other person, be it counsel or accused or any other person.* ***Whilst plea bargaining is permissible in our view, sentence bargaining should not be encouraged at all and must be frowned upon****..."*

In the case of **Sevaka Perumal etc. V. State of Tamil Nadu [AIR 1991 S.C. 1463],**

> *"...Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence.*

Therefore, law as a corner-stone of the edifice of order should meet the challenges confronting the society... Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the court did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc..."

As it was pointed out in the Mendis case, an accused or a counsel is not entitled to bargain a sentence he wishes for himself or the client. Parties should not be allowed to get a different sentence merely because they are dissatisfied with the sentence in an instance where Court has exercised its discretion depending on the circumstances of case. We are of the view that the nature and gravity of the offences committed, in the instant case, outweigh the grievances of the appellant such as having 3 infants and him being the sole breadwinner of the family. Few generations would have to bear negative consequences of the acts committed by the appellant in the event of non-detection.

In the case of **W.M.F.G. Fernando V. Rev Sr. Marie Bernard and others [C.A.1108/99 (F)],** it was held that,

*"It is trite law that the purpose of revisionary jurisdiction is supervisory in nature, and that the object is the proper administration of justice. In **Attorney General v Gunawardena (1996) 2 SLR 149** it was held that: "Revision, like an appeal, is directed towards the correction of errors, but it is supervisory in nature and its object is the due administration of justice and not, primarily or solely, the relieving of grievances of a party..."*

We observe that the Learned High Court Judge exercised the revisionary power adequately to rectify errors committed by the Learned Magistrate and refused to invoke revisionary power to revise the discretion exercised by the Learned Magistrate to impose a custodial sentence. Therefore we observe that the Learned High Court Judge acted well within law and we see no reason to interfere with the said findings. We affirm the order of the Learned High Court Judge dated 11.12.2013.

This revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL