

**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 read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka*

Officer in Charge,
Police Station,
Badulla .

Complainant

Vs.

Court of Appeal Application
No: **CA/ PHC/186/13**

High Court of Badulla
No: **Rev 32/2013**

Magistrate Court of Badulla
No: **40135**

1. Bandaranayake Mudiyanseleage
Nuwan Bandaranayake.
147/4
Mudaliwatta,
Kadugannawa.

2nd Accused

And

Bandaranayake Mudiyanseleage Nuwan
Bandaranayake.
147/4
Mudaliwatta,
Kadugannawa.

2nd Accused – Appellants Petitioner

Vs.

1. Officer in Charge,
Police Station,
Badulla.

2. The Hon. Attorney General
Attorney General's Department
Colombo 02.

Respondents

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : R. Wimalarathna for the Petitioner
Maheshika Silva, DSG for the
Respondents.

Argued on : 31.03.2022

Written Submissions on : 13.09.2018 (Petitioner)
13.11.2018 (Respondents)

Decided on : 19.05.2022

Iddawala – J

This is an appeal filed on 27.12.2013 against the order of the Provincial High Court of Uva holden in Badulla in Case No Rev-31/2013 delivered on 11.12.2013, which affirmed in revision a sentencing order pronounced on 05.03.2013 by the Magistrate Court of Badulla. The 2nd Accused Appellant-Petitioner (hereinafter

referred to as the petitioner) has invoked the appellate jurisdiction of this Court to set aside both orders.

The petitioner was charged in the Magistrate Court of Badulla with four others for six counts of offences punishable under the Penal Code. The case involved the forgery of the Geological Survey and Mining Bureau seal, whereby the accused had forged and used several licenses purportedly issued by the Bureau and caused significant loss to the State. All five accused, including the petitioner, pleaded guilty to their respective charges. As such the learned, Magistrate imposed the following sentence on the petitioner on 05.03.2013: Count 01: imposed 6 months imprisonment and an additional fine of Rs. 1,500/-, each carrying a default sentence of 1 month imprisonment.

- Count 02: imposed 6 months imprisonment for Count 02 suspended for 2 years. Additionally, a fine of Rs. 1,500/- imposed carrying a default sentence of 1 month imprisonment.
- Count 03: 6 months imprisonment and additional fine of Rs. 1500/- carrying a default sentence

Being aggrieved by the said order, the appellant filed a revision application in the Provincial High Court of Uva holden in Badulla. The learned High Court Judge delivered the impugned order on 11.12.2013 varied the sentencing order of the Magistrate.

- Count 01: imposed 06 months of Rigorous Imprisonment and the fine of Rs. 1,500/- to carry a 1-month default sentence of simple imprisonment
- Count 02: imposed 6 months of Rigorous Imprisonment suspended for 5 years.

- Count 03: released the petitioner from the sentence as he was not charged under Count 03 of the indictment.

Being aggrieved by the said order, the appellant preferred the instant appeal to the Court of Appeal, urging that the sentence imposed on the petitioner is excessive. The petitioner seeks a suspended sentence for his conviction under Count 01 and Count 03 by relying on Section 303 of the Code of Criminal Procedure Act, No.15 of 1979 as amended (hereinafter the CPC). The petition submits that the petitioner was a first-time offender with no previous convictions, and such fact qualifies him under Section 303 of the CPC for a suspended sentence.

Section 303 of the CPC provides for a suspended sentence of imprisonment. The trial judge is endowed with the discretion to decide against imposing a custodial sentence on a convicted person. Section 303 (1) of the CPC clearly lists 12 criteria that a trial judge ought to regard in deciding whether a satisfactory case for a suspended sentence has been made out. The criteria so provided by the legislature is as follows: the maximum penalty prescribed for the offence in respect of which the sentence is imposed; the nature and gravity of the offence; the offender's culpability and degree of responsibility for the offence; the offender's previous character; any injury, loss or damage resulting directly from the commission of the offence; the presence of any aggravating or mitigating factor concerning the offender; the need to punish the offender to an extent, and in a manner, which is just in all of the circumstances; the need to deter the offender or other persons from committing offences of the same or of a similar character; the need to manifest the denunciation by the court of the type of conduct in which the offender was engaged in; the need to protect the victim or the community from the, offender; the fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and

truly repentant; or a combination of two or more of the above. In its essence, Section 303(1) acts as somewhat of a guideline for a trial judge in exercising his discretion to impose a suspended sentence instead of a custodial sentence. Section 303(2) specifies the instances where a trial judge is barred from imposing a suspended sentence. The crucial point is that Section 303 of the CPC does not give to the offender, by way of a right, an entitlement for a suspended sentence for the section refers to the phrase 'a court *may* make an order suspending...'.

Hence, the primary contention to be decided by this Court is whether the facts and circumstances of the instant appeal warrant imposition of a suspended sentence as per Section 303 of the CPC.

The most pertinent fact relevant to this Court's examination is that the petitioner has been convicted of forging the seal of a government institution, i.e., the Geological Survey and Mining Bureau. The act of forging a license purported to have been legally issued by the Bureau and allowing persons to carry out mining outside the legal framework has the effect of far-reaching consequences. Apart from the loss incurred by the State in terms of government revenue, the act has a significant effect on the environment. When one regards the criteria set out in Section 303 of the CPC in light of such a context, it is evident that the petitioner had committed the offences with premeditation, much deliberation, and planning to gain profit, depriving the revenue of the State. Hence, the nature and gravity of the offence committed by the accused including the petitioner are severe, and the loss and damage caused by the petitioner's acts are by no means trivial. The Geological Survey and Mining Bureau has the sole authority to issue a license to explore, mine, process and trade minerals such as sand. As a regulatory mechanism for such natural resources, the Bureau is tasked with issuing licenses in appropriate cases keeping in mind the

need to balance the interests of mineral-based industries and the safety of the environment. The petitioner's action necessarily vitiates the very purpose for which the Geological Survey and Mining Bureau has been constituted, whereby he has issued licenses at his own will. In praying for a suspended sentence, the petitioner contends that he had pleaded guilty, that he was a first-time offender and that he has no previous convictions ought to stir leniency concerning his sentence. At this juncture, it is pertinent to echo a quote from **Karunaratne v The State** 78 NLR 413: "*the Courts should not give the impression that when they commit these offences, they can get away with it by getting a suspended sentence and going scot free*".

The petitioner's actions cannot be viewed within a vacuum as it has far-reaching implications on the community and the environment. Such a holistic approach has been endorsed by several reported cases concerning State institutions. **The Attorney General v H. N. De Silva** 57 NLR 121 concerned a case where an accused who was a clerk in the Food Control Branch of the Kandy Kachcheri pleaded guilty for three charges of forgery of 'surrender certificates. The trial judge was extremely lenient in his punishment that the accused was ordered to enter into a bond. Basnayake A. C. J. set aside the said sentence and imposed a term of one-year Rigorous Imprisonment. in doing so, the following observations were made: "*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...It should be remembered that the public are entitled to place their trust in professional men by virtue of the fact that they belong to honourable professions which enjoy public confidence. It would be extremely detrimental to the public interest that the betrayal of that trust should not be met with such punishment as will safeguard the interests of the public and the honour of the profession to which the offender belongs. The reformation of the offender in so far as it appears as a matter of practical consideration and such extenuating circumstances as appear from the evidence, though proper considerations in the assessment of punishment, are not overriding considerations.”

The Attorney General v Mendis (1995) 1 SLR 138 involved a case where the accused pleaded guilty to having defrauded a premier State Bank for a sum of Rs. 3.25 million. In the said judgment the Court of Appeal refers to the gravity and seriousness of white-collar crimes and its implications on society. Hence, the Court of Appeal refers to the considerations a trial judge ought to make observing that “*he (trial judge) 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.*”. Thus, the Court of Appeal enhances

the sentence imposed by the High Court from a *inter alia* term of two years Rigorous Imprisonment to a term of four years Rigorous Imprisonment per Count.

Learned Counsel for the petitioner contended that as per the provisions of Section 303 (1) and (2) of Code of Criminal Procedure Code, a custodial sentence is not warranted for a sentence not exceeding six months. To buttress this argument, Counsel for the petitioner relies on following reported cases.

1. A.M.S. Sampath Vs AG SC Appeal 17/2013 SC minutes dated 12.03.2015,
2. Maraba Liyanage Rohana Vs. AG SC Appeal 89A/2009 SC minutes dated 13.05.2011,
3. SC Appeal 03/2008 SC Minutes dated 15.10.2008 & 2008 BLR 160 ,
4. Kumara Vs AG 2003 1 SLR 139.

The facts of cases 1, 2 and 3 above are a stark contrast to the instant application where they dealt with cases of statutory rape. By relying on the said cases, the petitioner is attempting to equate the use of discretion concerning a minimum mandatory sentence to the instant case. In the said cases, the Court has imposed suspended sentences despite the stipulated minimum mandatory sentences by basing their rationale on the facts and circumstances of each case. Case no 4, relied on by the petitioner, involves a murder case whereby several mitigatory circumstances led the Court to be lenient on the accused of a murder trial whereby a suspended sentence was imposed. No such mitigatory circumstances have been divulged in the instant appeal.

At this juncture, it is pertinent to refer to **CA PHC-184/2013** CA Minutes 15.03.2019, cited by the State Counsel on behalf of the respondents, which was a revision application filed by a co-accused of the petitioner. The said revision application impugned the same order by the High Court of Badulla dated 11.12.2013, praying for a suspended sentence as the petitioner is praying for now. The Court of Appeal in CA PHC 184/2013 (supra) has comprehensively analysed the facts of the case against the law governing suspended sentences and has refused the application for revision. Several observations made in the said application are relevant to the instant appeal: *“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 (the CPC). 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. 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) ...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 recognised 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 devastating consequences of environmental pollution globally”

Based on the above exposition, it is the Court's considered view that the facts of the instant appeal do not warrant a suspended sentence to be imposed on the petitioner.

The appeal is hereby dismissed without costs and affirmed the judgment of the Learned High Court Judge.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL