IN THE COURT OF APPEAL OF THE DERMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an appeal under Section 15(b) of the Judicature Act No 02 of 19 read with Section 331 of the Code of Criminal Procedure Act No 15 of 1979.

Court of Appeal Case No:
CA-HCC-159/09

HC Negombo Case No: 15/96

The Attorney General,
The Attorney General's Department,
Colombo 12

Appellant

Vs.

1. Devureunnahage Dissananda Dassanayake
   Ambampola,
   Malsiripura,

1st Accused-Respondent

2. Julian Wedege Stanley Perera
   No. 176 Welikada
   Makawita

3rd Accused Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Anoopa De Silva DSG for the State
Dr. Ranjith Fernando with Maleesha Meera for the Accused-Respondent

Written 18.06.2020(by the Appellant)
Submissions: 20.03.2023 (by the 1st and 3rd Accused-Respondent)
On

Argued On : 20.03.2023

Decided On : 19.06.2023

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B. Sasi Mahendran, J.

The Hon. Attorney General has filed this Appeal and moves to set aside the sentences and substitute a reasonable and appropriate sentence on the Accused - Respondents on the basis that the sentences imposed by the learned High Court Judge is inadequate and inappropriate having regard to the serious nature of offences for which the Accused - Respondents had been convicted.

One "Umargool", a Pakistani national who was suspected of having imported and possessed 12308 grams of Morphine in Sri Lanka which was an offence punishable with death. All the Accused-Respondents functioned as prison guards of Negombo prison, and have taken the suspect to the Magistrate Court Negombo on 23rd of January 1995, to produce before magistrate court, while in custody, where the said Umargool escaped.

Therefore, the Accused-Respondents along with Nissanka Somadasa Silva (2nd Accused, deceased by the time the trial had commenced) were indicted in the High Court of Negombo on the following charges.

Count 01.

On or about the 23rd of January 1995 the Accused along with Nissanka Somadasa Silva who is now dead whilst being public servants, legally bound as such public servants to keep in confinement the suspect named 'Umargool' of Negombo MC Case No:B 780/94 intentionally aided such person to escape and thereby committed an offence punishable under section 216 (a) of the Penal Code.

Count 02

In the course of the same transaction the 1st Accused being a public servant. Legally bpund as such public servant to keep in confinement the suspect named ' Umargool' of Negombo MC case No: B 780/94 lawfully committed to custody, negligently suffered such person to escape from confinement and thereby committed an offence punishable under Section 218 of the Penal Code.

Count 03

In the course of the same transaction the 3rd Accused legally bound as such public servant, to keep in confinement the suspect named ' Umargool" of Negombo MC Case No: B 780/94 lawfully committed to custody, negligently suffered such person to escape from confinement and thereby committed an offence punishable under Section 218 of the Penal Code.

After the trial, on 31st of July 2009, the learned High Court Judge convicted both Accused-Respondents and postponed the sentencing to 28th August 2009. On 28th of August, although the Learned High Court Judge in his judgment has considered that both the Accused have committed grave offence, proceeded to discharge the Accused Respondents conditionally under section 306 (2) of the Code of Criminal Procedure Act No. 15 of 1979 and imposed suspended sentences for three years. Against this sentence Hon. Attorney General has preferred this appeal.

Main argument put forward by the counsel for the Appellant was that the Learned High Court Judge misdirected herself by invoking the provisions of Section 306(2) of the Code of Criminal Procedure Act No 15 of 1979, having regard to the fact that the offence in respect of which the Accused Respondents were convicted were of a very serious nature.

The Learned High Court Judge has misdirected herself as regard to the principles of sentencing by failing to impose an appropriate sentence other than the sanctions prescribed in Section 306 (2) of the Code of Criminal Procedure Act No 15 of 1979 having regard to the serious nature of the offences committed.

For convenience I reproduce the section 306 of the Criminal Procedure Code Act No. 15 of 1979 and relevant section in old criminal Procedure Act.

306 (2) Where any person has been convicted on indictment of any offence punishable with imprisonment. And the court is of opinion that having regard to the character antecedents, age, health or mental condition of the person charged or to the trivial nature of the offence. or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to discharge the offender conditionally as hereinafter provided the court may in lieu of imposing a sentence of imprisonment. Make an order discharging the offender conditionally on his entering into a recognizance, with or whithout sureties to be of good behaviour and to appear for sentence when called on at any time during such period not exceeding three years as may be specified in the order.

325 (1) (2) Where any person has been convicted on indictment of any offence punishable with imprisonment. And the court is of opinion that having regard to the character antecedents, age, health or mental condition of the person charged or to the trivial nature of the offence. or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to discharge the offender conditionally as hereinafter provided the court may in lieu of imposing a sentence of imprisonment. Make an order discharging the offender conditionally on his entering into a recognizance, with or whithout sureties to be of good behaviour and to appear for sentence when called on at any time during such period years as may be specified in the order.

As to the matter of assessing the sentence in the particular instance it is pertinent to quote the observation made by Basnayake A. CJ (as he was then). In **Attorney General v. H.N. De Silva, 57 NLR 121, at page 124, His Lordship held that:**

"The all too frequent use of section 325 of the Criminal Procedure Code in cases to which it should not be applied requires that the considerations that Judges of first instance should take into account in the imposition of punishments on offenders should be laid down by this Court. Primarily the punishment for crime is for the good of the State and the safety of society. It is also intended to be a deterrent to others from committing similar crimes. There must always be a right proportion between the punishment imposed and the gravity of the offence.

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 incidents of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration is subordinate to the others I have mentioned. Where the public interest or the welfare of the state (which is synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail."

This observation was followed by Sri Skanda Rajah,J. In M. Gomes v. W.V.D. Leelaratna . 66 NLR 233, in which His Lordship held that;

"I am in respectful agreement with that observation: but, are these sentences manifestly adequate? I would hold that these sentences are manifestly and scandalously inadequate.

S.N. Silva, J (as he was then) followed the above dictum in Attorney General v. Ranasinghe and Others, 1993 2 SLR 81, his Lordship held that;

These observations were followed by Sri Skanda Raja J. in the case of Gomes vs. Leelaratne (supra). It is also appropriate to cite an observation made by the Lord Chief Justice in the Court of Appeal of England, with regard to the sentence to be imposed for an offence of rape. In the case of Roberts (4) at page 244. It was observed as follows

" Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasise public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these, in cases of rape vary widely from case to case. "

In the case of, Keith Billam (5) the Lord Chief Justice repeated the foregoing observations and stated that in a contested case of rape a figure of five years imprisonment should be taken as the starting point of the sentence, subject to any aggravating or mitigating features. He observed further as follows "

Attorney General v. Jinak Sri Uluwaduge and Another, 1995 1 SLR 157, Gunasekera,J

Learned Deputy Solicitor-General further submitted that the material discloses that the accused-respondents have committed a planned crime for wholesale profit for which deterrent punishment was called for. Further held;

"In the case of Attorney-General v. J. Mendis I have observed as follows. "In my 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 interests of the society on the other. In deciding what sentence is to be imposed the Judge must necessarily consider the nature of the offence committed, the gravity of the offence, the manner in which it has been committed, the machinations and manupulations 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 in 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 not in my view surrender the sacred right or duty to any other person be it Counsel, or accused or any other person. Whilst plea bargaining is permissible, "sentence bargaining" should not be encouraged at all and must be frowned upon."

In the case of Attorney General v. Walgma Kodithuwakkuge Ruksiri alia Sudumalli CA 306/2012, Decided On 05.08.2014 ,Malinie Gunaratne, J held;

We have carefully considered the submissions made by the learned President's Counsel and the State Counsel and the material before us.

"When a person commits a crime by violating criminal law, he is punished by imprisonment, a fine or any other mode of punishment which is prescribed in criminal law. The criminal is to be punished simply because he has committed a crime. If punishment is not properly imposed, the aggrieved party may take the law into their hands and attempt to punish the offender.

The purposes of criminal punishment may vary. Protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the other when determining what an appropriate sentence is, in a particular case."

The authorities referred to above show the manner in which mitigating and aggravating factors have been considered by our Courts. Having look at those authorities I will now turn to consider whether the Learned High Court Judge is correct when he conditionally discharging the both the Accused-respondents under section 306 of the criminal procedure code.

In the case at hand both accused were indicted for while been public servants aided Umargool who was suspected for have been imported and possessed 12308 grams

morphine, which is an offence punishable with death. It should be noted both the accused-respondents functioned as prison guards. The learned High Court Judge has considered all these facts and convicted both accused for the crime set out in the indictment. Though when sentencing, he has failed to considered the legal impediment. After sentencing him he has acted under section 306 of the criminal procedure code.

Conditional Discharge

Having regard to factors referred to above, under that section the court may discharge the offender conditionally on his entering into a recognizance with or without sureties, to be on good behaviour and to appear for conviction and sentence when called for at any time during such period. Not exceeding 3 years, as may be specified in the order of the court. The difference between an absolute discharge and conditional discharge referred in the above section 306 (1) is that in a conditional discharge a condition is imposed that the offender commits no offence for a specified period in the future. In Gomes v. Leelaratne the appellate court has reprimanded the magistrate discharging the offenders of grave crimes on conditional discharged orders.

<u>When the High Court Has Powers to effect conditional discharge of offenders.</u>

Section 306 (2) deals with this power to make an order discharging the offender conditionally in lieu of imposing a sentence of imprisonment. The factors to be taken into consideration in effecting such an order are similar to those enumerated in Section 306 (1). Before making such an order the accused has to be convicted on indictment.

Relevant portion of the judgement is reproduced below.

(On Page 661 of the Brief)

මෙම චුදිත සැකකරුවන් දෙදෙනාට විරුද්ධව ඇති චෝදනාවන් සලකා බැලීමේදී එකී චෝදනාවන් බරපතල තත්ත්වයේ චෝදනාවන් බව පැහැදිලි වේ. මෙම චුදිතයන්ගේ ක්‍රියා කලාපය හේතුවෙන් මොෆින ග්‍රෑම් 12308 ආනයනය කිරීම සහ සන්තකයේ තබා ගැනීම සම්බන්ධයෙන් චෝදනා ලබා බන්ධනාගාර ගතව සිටි චුදිතයෙකුට බන්ධනාගාර අත් අඩංගුවෙන් පැන යාමට ඉඩ ප්‍රස්තා සලසා ඇති බව පැහැදිලි වී ඇත. 1 වන චුදිතට විරුද්ධව ඉදිරිපත් කර ඇති 1 වන චෝදනාව ලංකා දණ්ඩ නීති සංග්‍රහයේ 32 වන වගන්තිය සමග

කියවියයුතු වගන්තියේ 216 (අ) වගන්තිය යටතේ දඩුවම් ලැබිය හැකි චෝදනාවන් වේ. එකී චෝදනාව සම්බන්ධයෙන් ව්‍යවස්ථාදායකය විසින් නියම කර ඇති දඩුවම යන්නේ අවුරුදු 7 කාලයක් නොඉක්මනවා දෙයාකාරයෙන් එක ආකාරයක බන්ධනාගාර ගත කිරීමක් හෝ දඩයක් වේ.

On page 663 of the Brief

1 වන චුදිත මේ වන විට බන්ධනාගාර නියාමකවරයෙකු වශයෙන් බන්ධනාගාර දෙපාතර්මේන්තුවේ තවමත් සේවයේ යෙදී සිටින තැනැත්තකු බවත්, ඔහු විශ්‍රාම යාමට ආසන්න 56 වන වියේ පසු වන දරුවන් 5 දෙනෙකුගේ පියෙක් බවත් සඳහන් කර ඇත.

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අපරාධ නඩු විධාන සංග්‍රහයේ 306 (2) වගන්තිය යටතේ මම මේ අවස්ථාවේ දී ක්‍රියා කරමි. එසේ කටයුතු කිරීමේදී චුදිතයින් දෙදෙනාට පෙර වැරදි නොතිබුනය යන කරුණ ද අධිකරණයේ දැඩි සැලකිල්ලට ලක් කරමි. ඒ අනුව චුදිතයින් දෙදෙනාට අධිකරණය විසින් පිළිගනු ලබන ඇපකරුවන් දෙදෙනෙකු සහිතව බැඳුම්කරයක් අත්සන් තැබීමට නියෝග කරමි.

It is seen, several aggravating circumstances are present in this case. We have to note that the learned High Court Judge has failed to give any reasons for disregarding the specific plea of learned State Counsel as to the seriousness of the offence and the requirement to impose a deterrent punishment. We cannot escape from the conclusion that the Accused - Respondent has been too leniently treated by the learned High Court Judge. The offences are far too grave to be dealt with a suspended imprisonment. There is no doubt that the crime committed by the Accused - Respondent is a heinous crime which requires a deterrent punishment.

In the case at hand, although the learned high court judge erred in law in his failure to appreciate the imperative provisions governing the law of sentencing, as set out aforesaid, it is our considered view that in the circumstances of this case we should be guided by the principles of just and equity. The imposition of custodial sentence 14 years after an erroneous decision to suspend the sentence, is contrary to the said principles of just and equity. Such moral considerations have been operative in the minds of judges as evident in the following dictum.

For instance, in K.R. KARUNARATNE .VS. THE STATE- 78 .NLR- 413, In Page 419 His Lordship RAJARATNAM, J observed

" At this stage therefore the delay of 10 years to finally conclude this matter is in my view a very relevant circumstance to be taken into consideration before allowing the sentence of 2 years imprisonment to operate immediately. I am not aware of any case where an accused person has been kept in suspense for so long a period due to no fault of his own. The accused has always been present in Court and ready to receive justice at the hands of Court. He has made no contribution to the delay. If there has been such an earlier case I should imagine there would have been better reasons for the delay. The fact that I am unable to lay my hands on any precedent does not deter me from considering this delay in the circumstances of this particular case as a relevant factor for the imposition of an appropriate sentence".

Furthermore, His Lordship S. N. Silva J. (as he then was) observed in ATTORNEY-GENERAL .VS. DEVAPRIYA [1990] 2 Sri L.R., Page 212,

"a term of imprisonment is not warranted because (1) thirteen years has lapsed since the commission of the offence, (2) the accused will lose his employment and related benefits, (3) a substantial fine has been imposed which would meet the ends of justice."

Above said judgements were analysed by Her Lordship P.R. Walgama, J., in Tenison Ridway Kern v. Attorney General, CA Appeal No. 222/2005, Decided on 30.01.2015. Her Ladyship held,

"In the above exposition of the facts and decisions of our Superior Courts in similar situations of this nature has adopted a broader view by commuting a jail term to a suspended sentence."

Further, we are of the view that the inordinate delay in the appellate stage (since the year 2010) resulted due to no fault of the Accused, but plainly due to laws delays. When the Accused has duly completed the period of his suspended sentence without any blemish, to now set aside the suspended sentence, which is no longer operative and instead impose a custodial sentence is against the conscience of this court.

Therefore, we're not inclined with the sentence imposed by the learned High Court Judge. Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL