

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

Tenison Ridgway Kern

Accused-Appellant

CA Appeal No. 222/2005

(HC Colombo Case No. 9299/98)

VS

Honourable Attorney General

Respondent

Before : Anil Gooneratne, J. &
P.R. Walgama, J.

Counsel : Dr. Ranjit Fernando for the Accused Appellant
S. Thrairajah, DSG takes notice on behalf of the Respondent

Decided on : 30.01.2015

P.R. Walgama, J.

The Accused- Appellant (herein after sometimes called and referred to as the Accused) has preferred the instant appeal against the judgment and the conviction of the Learned Trial Judge in the case bearing No. HC- Colombo- 9299/1998 by which judgment the accused was convicted and sentenced to 10 years of rigorous

imprisonment and in addition a fine of Rs. 10,000/ carrying a default sentence of 1 year rigorous imprisonment.

The accused was indicted inter alia, on two counts, for making a forged document and there by committing an offence punishable under section 456 of the Penal Code and for using the said forged document as a genuine document, there by committing an offence punishable under section 454 and 459 of the Penal Code.

The facts stemmed from the case for the prosecution was thus;

The Accused was an assistant staff officer at Sampath Bank at the relevant period of which the said alleged offence was committed. It is also to be noted that along with him one Selvarajah was also employed as a Staff Officer at the said Bank.

The Accused attempted to debit a customer's account by tendering the said document which is a forgery. The alleged act of forgery was detected through the computer process. It is the position of the Defence that before any money was debited form the said account as it was detected no financial loss has been caused to the Bank.

It is pertinent to note that the Accused- Appellant does not challenge the conviction, nevertheless urged the sentence to be commuted to one of suspended sentence. The Counsel for the accused in making the above application has also adverted court to the following facts herein below mentioned.

That the vital evidence relevant to the matter in issue was prevented due to the absence of above said Selvarajah. Further the EQD's report was not an exhaustive, as there were infirmities such as uncertainty as to the forged writing. It is contended by the Counsel for the Accused that the Sampath Bank at the relevant period was a newly set up Bank and there were lapses and shortcomings in the process of issue of vouches and payments are concerned. Besides it said that the

Learned Trial Judge who delivered the judgment did not have the opportunity of observing the demeanor/deportment of the prosecution witnesses.

The Counsel for the Accused –Appellant has stated the following facts to buttress the position of the Accused which warrants a non custodial sentence, that;

The accused was only 21 years of age and was engaged in employment for the first time.

The accused is now 44 years of age with a broken family as a result of this litigation and facing the agony of the mother suffering from terminal cancer.

Further it was stated in Court; that the accused repents for the said involvement and pleads for mercy.

Counsel for the Accused has cited the following case law to fortify his claim for a non custodial sentence.

In the case of K.R. KARUNARATNE .VS. THE STATE- 78 .NLR- 413, it was held a long period of delay in concluding the case is a fact for consideration in deciding the nature of the sentence and is valid to impose a non custodial sentence, considering the nature and the gravity of the offence committed.

In imposing a suspended sentence Their Lordships have observed thus;

‘In the instant case it is viewed the charges had been hanging over his head for well over 20 years.’ Therefore in the attended circumstances this Court is of the view, that it is justify to follow the rationale of the above case, in imposing a non custodial sentence in the case in hand.

It was also held in the case of ATTORNEY- GENERAL .VS. DEVAPRIYA -{1990} by Their Lord Ship SARATH .N. SILVA that 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.

In a similar non custodial sentence was imposed in a case where the accused was charged for committing grievous hurt, convicted and sentenced to a term of ten months of rigorous imprisonment. Therefore it abundantly clear even a conviction of an offence, a jail term is imperative our superior courts had taken a broader view, by considering the future of the accused and the nature of the crime committed, in imposing a suspended sentence.

The above procedure was followed in the case of ANANDA .VS. ATTORNEY GENERAL- (1995) 2 SLR -315 which held thus;

- a. An accused has a right to be tried and punished for an offence committed, within a reasonable period of time, depending on the circumstances of each case. A delay of over 18 years to dispose of Criminal case is much long period by any standard, delays of this nature are generally regarded as mitigating factors.
- b. It appears that the appellant has turned over a new leaf.

More interestingly in the case of KUMARA .VS. THE ATTORNEY GENERAL -(2003) 1 SLR-139

A case where the accused was charged of murder. The accused pleaded guilty to the charge on the basis of a sudden fight. The learned Trial Judge in entering a conviction, sentenced the accused to seven years rigorous imprisonment. In addition a fine of Rs. 500/ was imposed, carrying a default sentence of six months rigorous imprisonment.

In varying the above sentence by commuting the jail term to a suspended sentence Their Lordship have observed thus;

"A suspended sentence is a means of re-educating and re-habilitating the offender, rather than alienating or isolating the offender.

That no offender should be confined to, in a prison unless there is no alternative available for the protection of the community and to reform the individual,

Their Lordships were also of the view that suspended sentence with its connotation of punishment and pardon is supposed to have integrative powers.

It was contended by the Learned Counsel for the accused that at the time of the commission of the alleged incident that accused was a youth of 21 years, and has no previous convictions of this nature. In addition he had shown remorse and pleads for clemency.

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.

Therefore in the said backdrop we are of the view that it is fit and proper to vary the sentence of the jail term to a suspended sentence. Hence the sentence is varied in part. Nevertheless the fine and the default sentence will stand as it is.

Appeal is allowed in part.

JUDGE OF THE COURT OF APPEAL

Anil Gooneratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL