

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

CA No. 81/2011

H. C. Colombo Case No. 5187/2010

1. T.Tukhtabonu alias Jhonu Jausmin
(Presently incarcerated at Welikada
Prison Female Section)

2. Abdul Aziz Ahamadu Marikkar

3. Mohommed Baheer Hussain

Accused-Appellants

Vs

The Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent

C. A. No. 81/2011

H. C. Colombo Case No. 5187/2010

Before : Vijith K. Malalgoda, P.C., J (P/CA) &
H.C.J. Madawala, J.

Counsel : Saliya Peiris with Gayan Madawa appears for
the 1st and 2nd Accused-Appellants.

Amila Palliyage appears for the 3rd
Accused-Appellant.

Kapila Waidyaratne P.C., A.S.G. for A.G.

Argued &
Decided on : 21.10.2015.

Vijith K. Malalgoda, P.C., J (P/CA)

Heard Counsel in support of their cases. The Counsel appearing for all 3 accused at the out set inform from Court that they would not be canvassing the conviction before this Court but would only be making submissions with regard to the sentence imposed.

The learned Senior Counsel appearing for the 1st and 2nd accused-appellants informs Court that the 1st accused-appellant is an Uzbekistan national, was married to the 2nd accused-appellant who is a Sri Lankan and was living in Sri Lanka for some time. She is the mother of two children. The eldest being nine years at present and the youngest is nearly five years. He submits that the eldest child was with certain known parties of the two accused since the both accused are in remand custody pending this appeal. Counsel submits that whilst the eldest son was with a known party, it was observed that the said child had behavioral problems probably due to the factor that both parents are not with him. They have to change hands and finally the child is now with an orphanage. The youngest child who is below five years is permitted to be with the mother. He submits that the prison authorities has discretion to consider the custody of the child once the child reaches the age of five years. The learned Counsel's submissions on behalf of the 1st accused-appellant is purely on sympathetic grounds. He begs mercy of this Court and submits that being a mother she had to look after her two children and now that she has realized the consequences of her conduct she will not lead to the same life once she leaves

the prison. Therefore he moves Court to consider a lenient sentence to be imposed on her. According to the judgment delivered on 28.03.2011 all three accused were convicted and they were separately sentenced to a total period of 9 years. Out of the charges in the indictment, 1st count on which all three accused were convicted the Court had imposed 5 years rigorous imprisonment with a fine of the Rs. 50,000/=. 2nd and 5th counts on which the 1st accused-appellant was convicted, was imposed two years rigorous imprisonment with a fine of Rs. 25,000/= with a default term of 3 months simple imprisonment. The Court has made order to run the above sentences consecutively.

The submissions before this Court was for the Court to consider making the above sentences to run concurrent. He further moves considering the circumstances under which he is making the submissions, to consider making the said term to run from the date of conviction. With regard to the 2nd accused who is the husband of the 1st accused the learned Counsel submits that the 3rd and 6th counts under which he was convicted other than the first count are abetment counts and therefore move that the Court to consider

making all the said sentences to run concurrent and also to consider back dating the sentence.

The learned Counsel appearing for the 3rd accused submits that his client is only the driver of the 1st and 2nd accused and was involved in transporting the so called victims in this case. He associates with the submissions made by the learned Counsel for the 1st and 2nd accused-appellants and move that the Court to act leniently on the 3rd accused-appellant.

Learned Senior Additional Solicitor General appearing for the Attorney General brings to the notice of this Court the seriousness of this indictment which is based on procurement and human traffic and he submits that he is facing the difficulty in replying the submissions of the learned Counsel for the 1st accused-appellant specially for the reason that the 1st accused-appellant on whom the Counsel wanted this Court to act leniently is the main perpetrator of this offence. Therefore he submits that this is very difficult task for him to justify any reduction on the sentence imposed on her. However considering the mitigatory circumstances

submitted by the learned Counsel, specially to the effect that she is a mother of two children, where the eldest is presently in an orphanage and the youngest staying with her but facing danger of taken out from her since the child is reaching the age of five years, the learned President's Counsel submits that he will not object for making sentences imposed on the 1st accused-appellant to run concurrent. But with the question of back dating the sentence the learned Counsel submits that he will leave that matter in the hands of the Court. However considering the nature of this offence where the three accused were involved in procurement of two Uzbekistan girls and making them to work as prostitutes in this country, he submits that he will vehemently object for any application for making the sentences to run concurrent or back dating with regard to the 2nd and 3rd accused-appellants.

We are mindful of all these facts and considering all the submissions made before this Court decide to impose the following sentence on all three accused.

All three accused-appellants were imposed a sentence of five years rigorous imprisonment with a fine of Rs. 50,000/= on the 1st count. There is no default term imposed on them, we order the default term of six months simple imprisonment on count one in addition to the 50,000/= fine already imposed on all 3 accused. In addition to that the 1st accused-appellant was convicted for the 2nd and 5th charges in the indictment and imposed the sentence of two years rigorous imprisonment with the fine of Rs. 25,000/= and default term of three months simple imprisonment on each count. We affirm those convictions but we make order that all three sentences imposed on the 1st accused-appellant to run concurrent and therefore the period she has to serve in jail will be five years rigorous imprisonment. With regard to the fines and the default terms already imposed we make no changes. We make further order to run the said jail term of 5 year with effect from the date of conviction, i.e from 28.03.2011. The 2nd and 3rd accused-appellants were convicted of 3rd and 6th and 4th and 7th respectively and imposed a sentence of 2 years rigorous imprisonment with a fine of Rs. 25,000/= on each count and default term of three months simple imprisonment. We affirm those convictions. With

regard to the implementation of the above sentences we make no changes and the both accused will have to serve a term of nine years rigorous imprisonment with effect from today. We make no changes on the sentences imposed on the 2nd, 3rd accused-appellant. Subject to the above variation in the sentences imposed on the 1st Accused-Appellant the appeal stand dismissed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala, J.

I agree.

JUDGE OF THE COURT OF APPEAL

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