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

In the matter of an application for Revision made under Article 138 of the Constitution, read with Section 354 of the Code of Criminal Procedure Act No. 15 of 1979.

CA Case No: CA/PHC/APN/137/2015

HC of Colombo Case No:

HC 672/18

Attorney General

Attorney General's Department

Colomo 12

Petitioner

V.

Hiti Bandara Gamlath Arachchige Wasantha Kumarasinghe

N.M. Appuhamy Maawatha

Gepellawa

Kurunegala.

Accused-Respondent

Before: **B. Sasi Mahendran, J.**
Amal Ranaraja, J.

Counsels: Anoopa De Silva, DSG for the Petitioner
Upali Jayamanna with Naveen Jayamanne for the Accused-Respondent

Written Submissions On: 20.06.2025 (by the Petitioner)
20.06.2025 (by the Accused-Respondent)

Argued On: 29.05.2025

Judgment On: 15.07.2025

JUDGMENT

B. Sasi Mahendran, J.

The Petitioner, the Honourable Attorney General, has filed this revision application challenging the sentence imposed by the Learned High Court Judge of Colombo on 17th September 2015.

The Accused-Respondent was indicted before the High Court of Colombo on a charge of criminal breach of trust involving a sum of Rs. 20,459,898. The alleged offence was committed while he was employed as a Marketing Promotion Officer at Browns Group of Industries. During the period from 1st January 2008 to 31st December 2008, he had misappropriated funds received through the sale of boat engines and fishing equipment across locations, including Mount Lavinia, Colombo, and areas spanning from Kirinda to Colombo.

Upon the indictment being read to him on 17th September 2015, the Accused-Respondent pleaded guilty to the charge. Consequently, he was convicted on the same day, and the Court directed both parties to make submissions regarding the appropriate sentence.

Further imposed a 2-year rigorous imprisonment sentence and suspended it for 10 years. And a fine of 2,500,000 with a default sentence of 2 years' rigorous imprisonment.

In the revision application was filed due to,

1. Considering the seriousness and the gravity of the crime, the sentence imposed on the accused respondent was too lenient
2. Due to the fine, instead of being properly punished, AR gained a profit from the crime
3. The suspended sentence given by the Learned High Court Judge disregarded the gravity and the seriousness of the offence.
4. The offence caused a financial loss to the Browns company, which couldn't pay the allowances to its employees.
5. The crime has a severe effect on society, making it inexcusable.
6. With predetermination and much deliberation and planning, the offence was committed with the intention of gaining a wholesale profit, making it difficult or impossible to detect the commission of the crime.

The accused respondent functioned as the marketing promotion officer of Browns Office. He was vested with the official duty of selling boat engines and fishing equipment. But the AR had sold boat engines and fishing equipment to the customers. Instead of giving money to the complainant company, the AR has misappropriated money to build his own house and to purchase a vehicle. The Browns company had a practice of handing over boat engines after an advanced payment, but as a precaution, the complainant company would withhold spare parts needed to start the engine until the full payment was made. In this case, the AR had obtained spare parts, though the full payment hadn't been made. He had

caused a loss of 20 459 898/=. As a result of the loss, the company was unable to pay allowances to the employees.

The counsel of the accused respondent sought to mitigate the sentence on the following grounds.

1. The accused was 36 years of age
2. The accused is the father of 5 years 5-year-old child and a 2-month-old baby
3. First offender

The Learned State Counsel informed the Court of the offence committed by the Accused and respectfully requested the imposition of an appropriate fine and a just sentence.

Subsequently, by his order dated 17.09.2015, the Learned Judge imposed a sentence of two years' rigorous imprisonment, suspended for ten years, along with a fine of Rs. 2,500,000. In default of payment, a further sentence of two years' rigorous imprisonment was prescribed.

Dissatisfied with the said order, the Petitioner has now filed this revision application before this Court.

We are mindful of the sentiments expressed in the following judgments.

Attorney General v. H.N.de Silva, 57 NLR 121, at page 123, Basnayaka, ACJ held that:

It is clear that the learned District Judge has only looked at one side of the picture, the side of the respondent : his age, his youth, his previous good character, that he has lost his employment, and will not be taken into the Clerical Service even though he has passed the qualifying examination. These are certainly matters to be taken into account : but not to the exclusion of others which are of greater importance. He has failed to take into consideration the gravity of the offence and the circumstances in which it was committed, the degree of deliberation involved

in it, the trusted position which the respondent held, the punishment provided by the Code for the offence, the difficulty of detection of this kind of offence, and the reprehensible conduct of the respondent after the offence was detected showing his criminal mind. These are all matters which far outweigh the considerations on the offender's side.

This Court has power in the exercise of its revisionary jurisdiction to increase or reduce a sentence, and it is not contrary to the rules which apply to appellate tribunals that it should exercise its independent judgment in a matter which is brought up before it in review and increase a sentence if it thinks it should be increased. Learned Counsel for the respondent urged that the quantum of sentence is a matter for the discretion of the trial Judge and that the Court of Appeal ought not to interfere, unless it appears that the trial Judge proceeded upon a wrong principle. He cited a number of cases which state the principles which should guide an appellate tribunal in altering a sentence passed by a Court of subordinate jurisdiction. Those cases quite properly lay down the rule that an appellate Court will interfere only when a sentence appears to err in principle or when the subordinate Court has either failed to exercise its discretion or has exercised it improperly or wrongly.

It may not always appear as in this case how the Court below has reached its decision, but, if upon the facts the appellate Court may reasonably infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Court of first instance, the exercise of the discretion may be reviewed.

The rules that should be observed by an appellate tribunal in interfering with the discretion of the Judge below are the same whether it be in a question of sentence or in any other matter. They have been stated over and over again and it is unnecessary to repeat them here. On the material before me I am satisfied in this case that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to the relevant considerations enumerated above.

The order-made by the learned trial Judge in respect of the respondent is therefore one that falls properly to be revised.

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 [1][Rex v. Nash (1950) 1 D. L. R. 543 ; Kenneth John Ball (1951) 35 Cr. A. R. 164.]. It is also intended to be a deterrent to others from committing similar crimes [2][Rex v. Dash (1948) 91 can. G. G. 187 at 191.]. 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 incidence of crimes of the nature of which the offender has been found to be guilty [3][Rex v. Boyd (1908) 1 Cr. App. Rep. 64.] 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 are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail.

Gomes v. Leelaratna , 66 NLR 233 at page 236, Sri Skanda Rajah J held that:

Though this report was staring the Magistrate in the face he proceeded to deal with this accused under Section 325 of the Criminal Procedure Code. He accepted his wife, " who is living in fear of this accused ", as surety in a sum of Rs. 500 and bound him over to be of good behaviour for a period of three years, and in the first case he ordered him to pay Rs. 250 as Crown costs by monthly instalments of Rs. 20 and in the second case a sum of Rs. 100 as Crown costs to be paid by monthly instalments of Rs. 5.

…….

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.

It has been repeatedly pointed out that Section 325 of the Criminal Procedure Code would not be applicable to grave offences. It is perhaps useful to set out the terms of that Section.

325 (1) : " Where any person is charged before a Magistrate's Court with an offence punishable by such Court, and the Court thinks that the charge is proved, but 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 without proceeding to conviction. ... "

……

Therefore, I would proceed to conviction in each of these two cases under Section 367 of the Penal Code.

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 Silva1.*[1 (1955) 57 N. L. R. 121.] . 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. Judges are too often prone to look at the question only from the angle of the offender. A judge in determining the proper sentence should 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.

(2) He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective . . .

(3) The incidence of crimes of the nature of which the offender has been found to be guilty.

(4) 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 are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail." (The numbering is mine).

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. In view of the shortage of cars in this country and the prohibitive prices of second-hand cars and also the demand for spare-parts, the profits to the culprit would be immense.

(7) Also the use to which a stolen article could be put.

Stolen cars, it is well-known, are used for committing other offences, like burglary, abduction, and so on.

These are all matters that the Magistrate should have taken into consideration. He has failed to discharge his duty properly in dealing with these two cases. Therefore, in each one of these cases I would sentence the accused under Section 367 to a term of two years' rigorous imprisonment. The sentence in the later case will begin to run at the expiration of that in the earlier one. The amounts paid as Crown costs to be returned to the accused.

Before I part with these cases I must also indicate the circumstances under which I came to send for these cases and to act by way of revision.

These cases were brought to my notice by a pseudonymous petition, copies of which had been forwarded to the Chief Justice and the Judicial Service Commission. Such petitions normally find their way into my waste-paper basket, of course, after I have read them. But when I read this petition I felt that there must be some substance in the allegations and that they should be verified.

Having been a Judicial Officer for a number of years, I was moved to make representations, over a decade ago, to the Criminal Courts Commission, presided over by Gratiaen, J., and of which Pulle, J., was a member, that there should be inspections of Magistrates' Courts by competent persons, not with a view to finding fault with their work, but with a view to assisting them in discharging their duties properly. This I did because I was aware of a growing public dissatisfaction

regarding the manner in which cases were disposed of in Magistrates' Courts and an increasing tendency to make use of Section 325 of the Criminal Procedure Code even in the case of very grave offences, this being done with an eye on the Quarterly Returns of disposals. This tendency, I felt, was not conducive to proper administration of justice.

Inspections of Courts would not be necessary if an Utopian state of affairs prevailed in our Courts. People concerned with the proper administration of justice should regard it as their duty to improve the administration of justice, so that there may be a feeling in the public mind that justice is being administered well and truly. Inspections should be carried out by a competent person, as I told the Criminal Courts Commission, competent not merely in the eye of the law, but competent to find out what is actually happening in Magistrates' Courts. I trust I will not be misunderstood if I say that it is not everybody who can put his ringer at the proper place.

I know that once a Judge of this Court, who was holding Sessions in Jaffna was requested by the Chief Justice to inspect the District Court there and the District Court was inspected ; but, unfortunately, no copy of the report made by the Judge was sent to the District Judge. That sort of thing should not take place, for the reason the Judge whose -Court is inspected is entitled to know in what way he could improve the administration of justice. Besides, common courtesy would demand . that a copy of the report should be sent to him. Whenever I inspect a Court I make no report to anyone but merely draw the Judge's attention to how the work could be improved.

The Quarterly Returns are useful only if they reflect the actual state of affairs in the Court. But often they do not. I am aware of a Court from which there was not even a single appeal for a period of over two years. The quarterly returns must have revealed that to anyone who looked into them. If anyone looked into them he should have realised that there was a Magistrate who was either perfect and infallible or that there was something radically wrong in that Magistrate's Court.

A proper inspection would have revealed that what was happening in that Court should not happen at all.

It is common knowledge that even grave crime cases are disposed of in an unconscionable manner, as in the two cases now before me. This state of affairs should be remedied as early as possible."

It is true that the duty of imposing sentence and the decision has to what sentence should be imposed is entirely in the discretion of the trial judge. But he has to consider the point of view of the accused on the one hand and the interest of the victim on the other. And also how the accused is involved in the crime.

It is pertinent to refer the sentiments expressed by Gunasekara J in *Attorney-General v. J. Mendis 1995 (1) SLR 138*

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 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 in which it has been committed and the involvement of others in committing the crime.

Further held that;

We are in agreement with the observations made by Basnayake A.C.J. that Whilst the reformation of the criminal though no doubt is an important consideration in assessing the punishment that should be passed on the offender where the public interest or the welfare of the State outweighs the previous good character, antecedents and age of the offender that public interest must prevail" Having regard to the serious nature and the manner in which these offences have been committed by the Accused-Respondents we are of the view that the sentence imposed in this case is grossly inadequate."

In the instant case, the following facts were placed before the learned High Court Judge by the state counsel.

- The accused respondent functioned as a marketing promotion officer of the Browns group located in Mt Lavinia, Colombo, Chilaw and Kirinda.
- By virtue of the post as a, marketing promotion officer, the Accused Respondent was vested with the official duty of selling boat engines and fishing equipment.
- However, instead of returning the monies to the complainant company, the Accused Respondent had misappropriated the monies and used for his own use to build a house and to purchase a vehicle.
- Browns Company had engaged in the practice of handing over the boat engine on an advance payment. The complainant company would not issue the necessary spare parts to start the boat engine as a precautionary measure.
- There is further evidence available to the effect that the Accused Respondent had in addition proceeded to obtain Spare Parts from the complainant Company when the full payments had not been made.
- There is strong and cogent evidence available which supports the fact that the Accused Respondent misappropriated and caused a loss of Rs 20, 459,898./= to the complainant company.

However, the Learned High Court Judge proceeded to impose only a suspended sentence with a fine of Rs. 2,500,000.

We are of the view that the sentence and fine imposed on the Accused-Respondent are disproportionate and inappropriate, given the gravity of the offence to which he pleaded guilty. The offence was committed in 2008, and sentencing occurred on 17.09.2015, with the sentence being suspended. Considering that 17 years have now elapsed since the commission of the offence, it would not be judicious to reimpose a custodial sentence at this stage.

Accordingly, we are not inclined to interfere with the sentence. However, we set aside the fine imposed by the Learned High Court Judge and, in its place, impose an enhanced fine of Rs. 20 million, with a default sentence of three years' rigorous imprisonment. This fine shall be paid as compensation to Browns Company.

For the reasons stated above, the application in revision is allowed, and the fine is varied. Application allowed.

The registrar of this Court is directed to send a copy of this judgment to the High Court in Colombo for compliance.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL