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.

The Democratic Socialist
Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0149/2023 **Complainant**

High Court of Rathnapura
Case No. HCR/25/2019

Vs.

1. Maradhaviran Ratnam alias Chooty.
2. Selladhore Anoj Kumar alias Baabu.

Accused

AND NOW BETWEEN

Selladhore Anoj Kumar alias Baabu.

Accused-Appellant

Vs.

Hon. Attorney – General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J

K.M.G.H. KULATUNGA, J

COUNSEL : Amila Palliyage with Sandeepani Wijesooriya, Savani Udugampola, Lakitha Wakishta Arachchi and Subaj De Silva for the Accused-Appellant.

Shanaka Wijesinghe, ASG for the Respondent.

ARGUED ON : 04.11.2024

DECIDED ON : 11.12.2024

K.M.G.H. KULATUNGA, J.

Introduction

1. This appeal is preferred against the Judgment dated 08.03.2023 of the learned High Court Judge of the High Court of Ratnapura in case No. HCR/25/2019. However, when this matter is taken up for argument on 04.11.2024, the learned Counsel for the appellant, Mr. Amila Palliyage informed Court that the Appeal will be limited to the sentence only and would not pursue with the appeal against the conviction. Upon the appeal against the conviction was so abandoned, the matter was taken up for argument as regards the sentences.

2. The learned Counsel for the appellant submitted that there was a disparity of the sentence between the 2nd accused-appellant and the 1st accused.

Facts

3. The 2nd accused-appellant with another (the 1st accused) were indicted with two counts based on common intention for committing the offences of abduction of PW-1, Thyagarajah Sathyakumar punishable under

Section 358 of the Penal Code and with the 2nd count of attempted murder of the said Sathyakumar punishable under Section 300 of the Penal Code. Both counts alleged that the said offences were committed along with persons unknown to the prosecution.

4. The brief facts of the incident as narrated by PW-1, Sathyakumar is as follows. PW-1 was selling wadeh near a wine shop on the particular day when the 1st Accused had come and demanded the return of Rs.1000.00 which PW-1 was not able to give it at that moment. Later on the 2nd accused-appellant had come with the 1st accused and some others, damaged the wadeh stand, assaulted and forcibly taken PW 1 Sathyakumar into a three-wheeler and then taken him to a place called Ellagewatta. The three-wheeler was driven by the 1st accused. Whilst in the three-wheeler, the 2nd accused is alleged to have assaulted and delt several blows on the head using an empty glass bottle. With the alighting of the said blows PW-1 has lost consciousness and was thus unaware as to what happened thereafter. The he had been admitted to the local hospital.

5. Then the Investigating Officer, I.P. Chandrasena has testified that a complaint was received by the Kahawatta Police and the 1st accused has surrendered and the 2nd accused was subsequently arrested.

6. During the course of the trial, certain admissions have been recorded under Section 420 of the Criminal Procedure Act in respect of the investigation. Finally, the 2nd accused has made a dock statement to the effect that on that day he happened to meet the 1st accused a friend at the Kahawatta town and the 1st accused went to obtain some money from PW-1. The sum total of his statement is that though he was there he was not involved in any incident, and in short, he denies any involvement in the

abduction or the assault. The Accused has also called another witness in support of his position.

7. The 1st accused and the 2nd accused-appellant were indicted together. Before the commencement of the trial on 10.03.2020 the 1st accused opted to plead guilty to the charges and was convicted on his own plea. Upon being so convicted, the 1st accused was sentenced as follows;

    Count No. 01 – Six Months imprisonment and a fine of Rs.15,000.00 was imposed with a default term of six-month imprisonment.

    Count No. 02 – Eighteen Months rigorous imprisonment was imposed and a fine of Rs. 2000 with a default term of six months was imposed.

    In addition, Rs.100,000.00 compensation was awarded with a default term of one-year simple imprisonment. Both the substantive jail terms were suspended for 15 years.

8. Upon so concluding the case against the 1st accused, the trial against the 2nd accused proceeded and the learned High Court Judge found the 2nd accused guilty and convicted him for both counts. Upon hearing both parties, the 2nd accused was sentenced as follows:

    For Count No. 01 – Five years rigorous imprisonment and in addition a fine of Rs. 10,000.00 with a default terms of 2 years imprisonment.

    For the 2nd Count – 10 years' imprisonment with a fine of Rs.10,000.00 and the default terms of 2 months simple imprisonment imposed. Both terms were ordered to run concurrently.

    Further a sum of Rs. 150,000.00 was ordered to be paid as compensation with a default term of six-month rigorous imprisonment.

The arguments advanced

9. It is the appellant's complaint that the he was penalized and a higher sentence was imposed as he proceeded to trial, as opposed to the 1st accused who was leniently dealt with, upon pleading guilty. It was also submitted and argued that there is a serious disparity and in support relied on **Police Officer Dondra v. Baban** 25 NLR 156 where it was held that, "*an accused who pleads not guilty and claims to be tried should not be punished when found guilty more severely on that count, than aa co-accused who has pleaded guilty*."

10. The crux of the argument advanced on behalf of the 2nd accused-appellant is that there is an appreciable disparity between the sentences imposed on the first accused upon pleading guilty and on the 2nd accused-appellant after trial. Certainly, on the face of it, there is a difference between the sentences imposed on the two accused. It was submitted that he had been penalized for proceeding to trial.

11. The Learned S/DSG Mr. Wijesinghe submits that the difference in sentence is due to the different circumstances and that in any event the sentence imposed on the 1st Accused is unduly lenient. He relies on the decision of the Court of Appeal in the case of **Rathnasiri Silva Kaluperuma v. The State**, CA/248/13 decided on 18.12.2015:

> "*Dealing with the subject disparity of sentence as a ground of appeal Archbold recognizes that there are "a number of forms of disparity and it can occur in a number of different ways." (Archbold 2012,5-159, p.608.)*
>
> > *"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his*

accomplice, and there is no reason for the differentiation, the court of appeal may reduce the sentence, but only if the disparity is serious. It has been said that the court would interfere where "right-thinking members of the public, with full knowledge of the relevant facts and circumstances (would) consider that something had gone wrong with the administration of justice." (per Lawton I.J. in R.V. Fawcett 5Cr.App. R.(s) 15 C.A)""

Consideration

12. The 1st accused had been imposed with sentences of 6 months and eighteen months respectively for counts 1 and 2 and both of which have been suspended for 15 years. As opposed to that, the appellant has been sentenced to 5 years and 10 years rigorous imprisonment respectively. The complaint is based on this apparent difference between two sentences. The relevant principle on which the 2nd accused-appellant advances his argument is the principle of parity. It is necessary and prudent to consider what parity means in relation to sentencing. The parity principle, entails that where two or more offenders are to be sentenced for the participation in the same offence, the sentences passed on each of them should be the same, unless there is a relevant and appreciable difference in their culpability and responsibility for the offence or their personal circumstances. However, parity does not just mean that two persons charged together in respect of the same offence should receive the same or identical sentences (vide the Singaporean case of *Public Prosecutor v. Ramlee and another action* [1998]. This stands to reason as two or more accused charged together may have different mitigating and aggravating circumstances peculiar to each one of them. Their culpability and the contribution to the criminal enterprise may be different. For instance, one of the accused may be a person of a very young age, who will have certain

extenuating circumstances in his favour. Therefore, these varying factors, when subjectively applied to several accused who may be charged together, will necessarily lead to different sentences. Therefore, parity simply cannot mean the same sentence as urged on behalf of the 2nd accused-appellant. As between the accused persons in this appeal, the benefit of pleading guilty will accrue to the 1st accused which will certainly result in a reduction of a such accused person's sentence.

The effect of pleading guilty on the sentence

13. As in some jurisdictions, in Sri Lanka, matters as to determining and quantifying sentences are not codified. Judges follow and apply various norms, principles and jurisprudence prevalent and applicable. However, in various statutes, especially the Criminal Procedure Code, provides for and makes references to certain aspects of sentencing on a piecemeal basis. For example, Section 303 (1) (a) – (l) specifies the circumstances that may be considered in suspending a sentence. Then, Section 185 (2) and Section 238A which was brought in by the amending Act, No. 25 of 2024, now provide a discretion to the sentencing judge to consider the time spent in pre-conviction and post-conviction custody to be considered as a part of the sentence. Section 197(2) provides that the fact of pleading guilty be considered in sentencing.

The process of determining the sentence

14. As stated above, in the absence of anything similar to a sentencing and penalties Act, since time immemorial, criminal judges have adopted their own methods in determining and crafting their sentences. The prudent and rational process to determine the sentence in a transparent and understandable manner may be, as a first step, to decide on a starting point upon considering the seriousness and the gravity of the offence. This is determined upon considering the maximum sentence as well as the minimum mandatory, if prescribed. Upon determining the starting point,

the judge should consider the aggravating and mitigating circumstances and adjust the sentence. By this process, the judge will decide the appropriate sentence. Justice Nawaz in **Bandage Sumindra Jayanthi v. Attorney General**, CA 251-267/2012, decided on 03.07.2015 considered the desired process and opined that,

> "*On the question of aggravating and mitigating factors, I consider the process as laid down. The judges must typically settle on a starting point and adjust the sentence for the aggravation and mitigation as appropriate. In an offence such as criminal misappropriation, the High Court Judge has the discretion of a range of sentences extending up to a maximum of 2 years and once he has settled on a starting point, he has to strike a balance between aggravation and mitigation. The balance is the watchword. He must go up and down the sliding scale based on the aggravating and mitigatory factors.*
>
> *Where there is a legislative guideline as in Section 303 (1) (a) to (l) of the Code which is, as I have commented above, a mirror image to some extent of long-established judicial guidelines, the sentencer will begin the process of sliding up and down the scale of aggravation and mitigation by reference to the non-exhaustive list of factors given in both the legislative and judicial guidelines. Secondly the sentencers can also engage in a consideration of any factors deemed relevant by them but not listed in the guidelines. Other statutory provisions such as sections 16 and 300 of the Code as commented upon below can also be taken into account."*

15. Thereafter, the judge should consider any guilty plea or admission made under Section 420, and then finally, may set off the period in remand and then arrive at the final sentence. If such sentence does not exceed two years, then the court may consider suspending such sentence acting under Section 303 of the Criminal Procedure Code. A sentencing judge may either

expressly go through this process, or may, upon considering all these aspects, arrive at the final sentence. Whatever may be the process, to my mind, it is prudent to follow the above sequence as a matter of general practice. This will give a degree of certainty and transparency to the sentencing process, as well as a rational basis for the sentence itself.

Plea of guilt

16. In the present application, the 1st accused has certainly received a very lenient sentence which, in comparison with the sentence meted out to the 2nd accused appears to be not comparable and in parity. It was argued that the 2nd accused was penalised as he had opted to contest this matter and go to trial. The 1st accused has pleaded guilty at an early stage of the trial. Section 197 (2) statutorily requires and provides that a plea of guilt be considered in sentencing. Further, Section 303 (1) (k) provides that an accused pleading guilty to the offence is a circumstance which the Court should have regard in deciding to suspend a sentence. Thus, the 1st accused, or to that matter anyone who pleads guilty, will have the benefit of a guilty plea, as opposed to others who would go to trial. Of two accused charged in the same case jointly, one who opts to plead guilty, will necessarily receive a lesser sentence than the other who opted to proceed to trial. This is not due to such accused proceeding to trial, but independent to that, the other who pleaded guilty has accrued the mitigatory benefit of his early guilty plea. The resulting difference of sentences so created cannot be considered as being in disparity. Similarly, if two accused similarly circumstanced procced to trial and one of them admits certain facts under Section 420, he will have a benefit in view of such admissions. If both accused are convicted, in determining their sentences, the accused who made admissions will end up with a lesser sentence than his co-accused who was similarly circumstanced as far as the offending is concerned. Such sentences are not in disparity.

17. Accordingly, in the present appeal, the 1st accused appears to have had the benefit of his early guilty plea. Apart from the early guilty plea, I observe that their respective participation in committing the offence is not similar. The complainant had owed money to the 1st accused. Upon it being demanded, the complainant had failed and did not pay. It is this event that led to the subsequent abduction and causing of grievous hurt by assaulting. The 2nd accused had no monetary dealing or interest in the initial transaction. He had taken upon himself the role of a debt collector and then taking the law into his hands led the abduction and assault. According to the evidence, the victim had been assaulted by the 2nd accused. In the absence of any direct dealings with the complainant's money transaction, the 2nd accused's conduct is extreme in nature and without apparent reason or justification even in the lay sense. In the contrary, the 1st accused had some issue and reason to act as he did. In these circumstances, awarding sentences of a different nature of a higher degree to the 2nd accused, to my mind, is reasonable and rational. I see no issue of parity or disparity but each had been sentenced according to their conduct and culpability, and they have had the benefit of their respective conduct during the pendency and progress of the case.

Consideration of the sentence

18. The appellant's entire argument for a reduction of the sentence is based on disparity of sentence between him and the 1st accused. At the outset, it is best that this sentence imposed on the 2nd accused-appellant be considered in isolation, to ascertain if the said sentence is appropriate in the circumstances of this offence and offending. It is 5 years and 10 years for the 1st and 2nd counts respectively. The maximum sentence prescribed for the 1st count, under Section 358, is a maximum of 10 years. Similarly, as for the 2nd count of attempted murder under Section 300, it is a maximum period of 20 years. Therefore, when considered in relation to a

maximum sentence, these offences are considered serious by the legislature.

19. As for culpability, the 2nd accused, not being the money lender, has acted as the village thug, so to say, to help the 1st accused to recover the money lent. Abduction in this manner by any standard, is serious. Then, the victim is also severely assaulted on the head with a glass bottle by the appellant, which throws the victim to a state of unconsciousness. Medical evidence amply demonstrated the seriousness and the severity of the assault and the injury inflicted. Upon so assaulting, the victim is dumped on the wayside. This conduct, by any standard, is horrendous and extremely violent in nature, and is a clear act of impunity. The conduct warrants a serious sentence. There has been no remorse or repentance exhibited at any point of time. In these circumstances, the sentence imposed on the 2nd accused-appellant of 5 years and 10 years, being half the maximum sentence, cannot be found fault with, or deemed excessive.

20. Certainly, these facts, by no means warrant any sentence of a lower level as imposed on the 1st accused upon his plea of guilt. Therefore, it is clear that the sentence imposed in relation to the 1st accused is not a proper and an appropriate sentence, in the circumstances of this offending. In Archbald 2020 (5A-83, pg.263), on Disparity of Sentences, it is clearly stated that:

> *"Disparity – the difference between the sentences imposed between co-defendants is generally a difficult ground on which to achieve a reduction in sentence. While sentencers ought to be mindful of objectionable disparity between co-defendants, on appeal, disparity is unlikely to succeed as a sole ground. The view increasingly taken by the Court of Appeal (Criminal Division) is that an improper sentence*

in relation to one offender does not justify the substitution of a proper sentence for an improper sentence in relation to a co-defendant."

Therefore, the sentence imposed on the 1st accused does not justify the substitution and imposing of a similar sentence on the 2nd accused.

21. However, for whatever reason, the 2nd accused-appellant did abandon his appeal against the conviction. This demonstrates, to some degree, a tacit acceptance of his conviction and wrong doing. This, I would consider in favour of the 2nd accused as being a belated expression and exhibition of some remorse and repentance. There is a serious difference between the sentences of the two accused. This difference cannot be explained or attributed to the early guilty plea alone as the sentence imposed on the 1st accused is inadequate and is not a proper sentence. I would consider this inequality that has so arisen, in favour of the 2nd accused-appellant. Accordingly, the sentence of the 2nd accused-appellant is varied as follows; The 5-year term of rigorous imprisonment imposed in respect of count No. 1 is altered and varied to 3 years' rigorous imprisonment, and the 10-year term of rigorous imprisonment imposed in respect of count No. 2 is altered and varied to 5 years' rigorous imprisonment. Subject to this variation, the fines and the default terms are affirmed.

22. A sum of Rs. 150,000.00 had been ordered to be paid as compensation to PW-1, however, the trial judge had failed to specifically state the count in respect of which the said order of compensation is made. Accordingly, the said order is varied by making the order of compensation in addition to the sentences imposed in respect of count No. 2.

23. Further, I direct that the said sentences of rigorous imprisonment of counts 1 and 2 to run concurrently and the default terms consecutively. It is further ordered that the sentences to be operative with effect from

08.03.2023, the date of sentencing. Subject to the above variation in the sentence, the appeal against the conviction is dismissed and the appeal against the sentence is partially allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL