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D I G E S T

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In *Ranjit v Kusumawathi and others, (supra)*, Dheeraratne, J. specifically stated that, Sharvananda, J. (as he then was) in *Siriwardena v Air Ceylon (supra)* had followed the decision in *Bozson (supra)*, which had clearly reverted to the order approach. Justice Dheeraratne, in *Ranjit v Kusumawathi and others (supra)* had carefully considered the decision of Lord Denning, MR., in *Salter Rex. and Co. v Gosh (supra)* and had applied the test stipulated by Lord Esher in *Standard Discount Co. v La Grange*[27] and *Salaman v Warner (supra)*, that is known as the nature of the application made to the Court (application approach) in deciding the question, which was at issue in that case.

Considering the two approaches, based on the order made by Court, and the application made to the Court, one cannot ignore the comment made by Lord Denning, MR., in *Salter Rex and Co. (supra)* that Lord Alverstone, who preferred the test based on the nature of the order as made (*Bozson v Altrinchem Urban District Council (supra)*, although it was correct in logic, the test applied by Lord Esher *(Standard Discount Co. v La Grange (supra)* and *Salaman v Warner (supra)* is a test that had always been applied in practice.

It is to be borne in mind that both the words 'Judgment' and 'order' are defined in section 5 of the Civil Procedure Code. Section 5 begins by stating thus:

> "The following words and expressions in this Ordinance shall have the meanings hereby assigned to them, unless there is something in the subject or context repugnant thereto."

Section 754(5) of the Civil Procedure Code however is specific about the meaning that should be given to the words 'Judgment' and 'order' as it has clearly specified that,

"Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter-

'Judgment' means any judgment or order having the effect of a final judgment made by any civil court;

and

'order' means the final expression of any decision in any civil action, proceeding or matter, which is not a judgment."

It is therefore quite obvious that a final judgment or order should be interpreted for the purpose of Chapter LVIII of the Civil Procedure Code not according to the meaning given in section 5 of the Civil Procedure Code, but that of the definition given in section 754(5) of the Civil Procedure Code.

Considering the provisions contained in section 754(5) of the Civil Procedure Code, it is abundantly clear that a decision of an original civil Court could only take the form of a judgment or an order having the effect of a final judgment or of the form of an interlocutory order. It is also vital to be borne in mind that clear provision had been made in section 754(5) in defining a judgment and an order made by any civil Court to be applicable only to the Chapter in the Civil Procedure Code dealing with Appeals and Revisions. Accordingly in terms of section 754(5) there could be only a judgment, order having the effect of a final judgment and an order, which is not a judgment and therefore only an interlocutory order.

In these circumstances, it is abundantly clear that, in interpreting the words, Judgment and Order in reference to appeals and revisions, it would not be possible to refer to any other section or sections of Civil Procedure Code, other

than section 754(5), and therefore an interpretation based on the procedure of an action cannot be considered for the said purpose.

Therefore to ascertain the nature of the decision made by a civil Court as to whether it is final or not, in keeping with the provisions of section 754(5) of the Civil Procedure Code, it would be necessary to follow the test defined by Lord Esher MR in *Standard Discount Co. v La Grange (supra)* and as stated in S*alaman v Warner (supra)* which reads as follows:

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

In *Salaman v Warner (supra)*, Fry, L.J., also had expressed his views regarding an appropriate interpretation that had to be given to final and interlocutory decisions. Considering the difficulties that had been raised regarding the correct interpretation for final and interlocutory orders, it was stated that attention must be given to the object of the distinction drawn in the rules between interlocutory and final orders on the basis of the time for appealing. Fry, L.J. had accordingly stated thus:

> "I think that the true definition is this. I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such applica-

tion or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined."

Considering all the decisions referred to above, the aforesaid statement clearly has expressed the true meaning that could be given to a judgment and an order in terms of section 754(5) of the Civil Procedure Code.

The order made by the Additional District Judge on 14.05.2008, was in terms of section 46(2) of the Civil Procedure Code and it is not disputed that the rights of the parties were not considered by the District Court. In such circumstances it would not be probable to state that the said order made by the District Court had finally settled the litigation between the appellants and the plaintiff. Considering the circumstances of the appeals it is abundantly clear that at the time the said order was made by the District Court, the litigation among the parties had just begun as the plaintiff as a Trustee of the 'Puthiya Sri Kathiravelayuthan Swami Kovil' and its temporalities had instituted action before the District Court of Colombo, seeking *inter alia*,

1. the appointment of Receiver under section 671 of the Civil Procedure Code for the preservation and maintenance of the Trust property;

2. the removal of the 2nd to 4th appellants and the 1st respondent as trustees of the Trust;

3. the 2nd to 4th appellants and the 1st respondent to account for Rs. 34,000,000/- of Trust money which had been illegally and immorally appropriated by the

2nd to 4th appellants and the 1st respondent for their personal use.

It must also be borne in mind that the District Court had accepted the Plaint in terms of section 46 of the Civil Procedure Code and had issued summons on the 2nd to 4th appellants and the 1st respondent returnable on 02.01.2008. The 2nd and 3rd appellants and the 1st respondent had filed their proxy on 02.01.2008 and had sought time to file their objections and Answer and the 4th appellant had not appeared before Court as summons had not been served on him. On 08.02.2008 without notice to the plaintiff, an ex-parte application had been made on behalf of the 2nd and 3rd appellants which was misconceived in law and therefore the order made by Court was *per incuriam*. The District Court had directed the parties to file written submissions. Thereafter learned Additional District Judge had delivered his order dated 14.05.2008 rejecting the Plaint.

Considering all the abovementioned it cannot be said that the decision given by the District Court could have finally disposed the matter in litigation. In *Ranjit v Kusumawathi (supra)*, Dheeraratne, J. after considering several decisions referred to earlier and the facts of that appeal had stated thus:

> "The order appealed from is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have finally determined the litigation? Far from that, even if the order was given in favour of the appellant, he has to face the second hurdle, namely the trial to vindicate his claim."

Considering the decision given by Dheeraratne, J., in *Ranjit v Kusumawathi (supra)* it is abundantly clear that the order dated 14.05.2008 is not a final order having the effect of a judgment within the meaning of sub-sections 754(1) and 754(5) of the Civil Procedure Code, but is only an interlocutory order.

For the reasons aforesaid, both appeals (S.C. (Appeal) No. 101^{A}/2009 and S.C. (AppeaI) No. 101^{B}/2009), are dismissed and the judgment of the High Court dated 21.11.2008 is affirmed.

I make no order as to costs.

J.A.N. DE SILVA, CJ. - I agree.

AMARATUNGA, J.- I agree.

MARSOOF, PC., J.- I agree.

RATNAYAKE, PC., J.- I agree.

Appeal dismissed.

SUNIL JAYARATHNA V. ATTORNEY GENERAL

SUPREME COURT
MARSOOF, J.
EKANAYAKE, J. AND
SURESH CHANDRA, J.
S.C. APPLICATION NO. 97/09
CA APPEAL NO. 45/2007
HC (KEGALLE) NO. 1230/97
NOVEMBER 23RD, 2O10

Constitution, Article 138(1) – Appellate jurisdiction of the Court of Appeal for the correction of errors committed by the High Court, in the exercise of its appellate or original jurisdiction, - Penal Code – Section 34 – Proof of Common Intention :- A rule of evidence does not create a substantive offence.

The case for the prosecution was that all three accused were armed with weapons and came almost together towards the deceased and attacked the deceased and dragged him and threw him into the river and the river where the body was found was in close proximity to the scene of the attack.

Three accused were indicted before the High Court of Kegalle for committing murder of one Gadayalage Sadiris. Of the 3 accused, the 3rd accused K.A. Gamini Jinadasa died pending trial and case proceeded against the 1st and 2nd accused. Both accused were convicted and were sentenced to death.

On appeal to the Court of Appeal, the appeal was dismissed.

The 2nd Accused-Appellant made an application for special leave to appeal against the judgment of the Court of Appeal the Supreme Court granted leave on the following questions of law:

1. Did the prosecution lead any evidence whatsoever to establish that the Petitioner and the other two accused entertained a common intention to murder the said deceased Godayalage Sadiris *alias* Madduma as required by law in order to apply the provisions of Section 32 of the Penal Code.

2. In the circumstances, is the conclusion of the Court of Appeal that the failure on the part of the Learned Trial Judge to consider the existence of murderous intention has not caused prejudice to the accused, justified ?

3. Have their Lordships of the Court of Appeal misdirected themselves by applying the provisions of the proviso to Section 334 of the Code of Criminal Procedure Act and those of the proviso to Article 138(1) of the Constitution to disregard the said failure in the circumstances of this case?

Held:

1. The Common murderous intention, the main issue, can either be proved by showing that the accused had planned and carried out the act of murder together or that they through the act of committing the murder together had a common understanding between them to carry out the murder thus satisfying the test of common murderous intention.

2. Although the cause of death was drowning, the intention to commit murder was apparent when considering the evidence.

3. Unless there is some grave miscarriage of justice it would not be appropriate to interfere with the judgment of the trial judge who enters judgment after careful consideration of the first hand evidence put before her to which the Judges of the Appellate Court would not have the ability to witness.

4. When considering the proviso to Article 138(1) of the Constitution it is evident that the judgment of the learned High Court Judge need not be reversed or interfered with on account of any defect, error or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

APPEAL from the Judgment of the Court of Appeal.

Cases referred to :

1. *Alwis V. Piyasena Fernando* (1993) 1 Sri L.R. 119
2. *King V. Loku Nona and others*
3. *King V. Assanna and Others* 50 NLR 324
4. *Wijithasiri and Another V. Republic of Sri Lanka* (1990) 1 Sri L.R. 56

5. *Don Samapala V. Republic of Sri Lanka* 78 NLR 183
6. *Sheela Sinharage V. Attorney General* (1985) 1 Sri L.R. 1

Shyamal A. Collure with *Weerasena Ranahewa* for the 2nd Accused-Appellant

Palitha Fernando, P.C., ASG with *N.Pulle SSC* for the Attorney General.

Cur.adv.vult.

June 29th 2011

SURESH CHANDRA J.

This is an appeal from the judgment of the Court of Appeal by the 2nd Accused–Appellant.

Three accused were indicted before the High Court of Kegalle for committing the murder of one Godayalage Sadiris. Of the three accused, the third accused, Kuruppu Arachchilage Gamini Jayatissa died pending trial and the case proceeded against the 1st and 2nd accused. Both accused were convicted and were sentenced to death.

On 23rd January 1988 the deceased Godayalage Sadiris and his wife Emilin had gone to the Dadigama Police Station to be present for an inquiry, to be conducted against the 3rd accused against whom a complaint had been lodged by the deceased's wife. After the inquiry both parties had boarded the village bus but the deceased and his wife had got off at the Nelundeniya Junction to buy provisions for the house. The 3rd accused had proceeded further in the same bus.

Emilin who was the main witness in the case and the only eye witness, had stated in her evidence that when she and her husband were proceeding to their house, after having bought provisions, the 2nd accused had come towards

the deceased and attacked him with a sword and the 1st and 3rd accused who had also come there had attacked him with clubs. They had thereafter dragged the deceased away. Emilin had at that stage run away and had given the child who was with her to Ramyalatha and Chandralatha and thereafter had gone to her husband's sister Asilin's house. Emilin had shouted out to Asilin stating that her husband was being attacked prior to reaching Asilin's house and she had run back towards the place of attack. Asilin had followed Emilin. When Emilin went to the scene of the attack the deceased had not been there nor were the accused there. She had then gone to the Dedigama Police Station to lodge a complaint. Whilst going to the Police Station she had stopped at Punchi Banda's shop to give the parcel of provisions she had with her.

When the Police had arrived at the scene they had found the body of the deceased floating in the river which was in the proximity of where the deceased was said to be attacked. The medical officer who carried out the post-mortem examination found injuries on the head of the deceased and the cause of death had been identified in the report as death due drowning. The medical officer who had made the report was unavailable to give evidence and the evidence in relation to the medical report was given by an authorized medical officer.

The case for the prosecution was that all three accused attacked the deceased and dragged him and threw him into the river.

The defence put forward in cross examination that the evidence of Emilin was flawed and that her identification could not be considered to be accurate. They further suggested that

she was lying in her evidence in relation to the fact that she did not see the attackers dragging the deceased to the river. Furthermore, the defence suggested that the injuries on the deceased were incompatible with a sword being used in the attack. The defence further put forward in cross examination as to the reliability of Emilin's evidence due to the fact that she did not tell any of the people she met about the attack on her husband and she also did not tell the names of the attackers to Asilin when she told her about the incident initially. Both accused made statements from the dock at the conclusion of the prosecution case.

On appeal to the Court of Appeal, the appeal was dismissed. The grounds urged before the Court of Appeal were:

1. Identity of the accused had not been established and the learned trial judge had not considered the weaknesses in the identification.
2. Section 27 of the Evidence Ordinance statement which was led in evidence was inadmissible in the circumstances of the case.
3. The learned trial Judge having permitted the section 27 statement to be led, did not refer to what inference that she was drawing from the recovery.
4. Considering the circumstances of the case it was incumbent on the learned trial Judge to have considered whether there was common murderous intention.
5. The learned trial Judge had not considered the dock statements of the accused as she should do in law.

It was stated by the Court of Appeal that the Learned Judge of the High Court in her judgment had stated in relation to the issue of identification that the main intention of Emilin was to save her husband and that she could not do anything with the child with her. The fact that Emilin made a prompt statement to the police satisfies the test of promptness. Due to the fact that there was no inconsistency between the evidence given with her previous statements the test for consistency was also satisfied. Taking into consideration the judgment given in A*lwis v Piyasena Fernando* [1] by GPS De Silva CJ the learned judge reiterated that the Court of Appeal would not lightly disturb the findings of primary facts made by a trial judge unless it is manifestly wrong as they have the priceless advantage of observing the demeanour of witnesses which the judge of the Court of Appeal does not have.

In relation to the evidence regarding the clubs being made admissible at the trial the Learned High Court Judge had stated that after taking the statements from the 1st and 2nd accused, the ASP had recovered two clubs. The facts that the investigating officer took the clubs into his custody shows that they were circumstantially relevant to the case. The clubs were handed over to the Magistrates Court and later the productions were sent to the High Court. No one at the trial had stated that the clubs were not produced at the non summary inquiry. Due to the length of time taken for the trial to proceed it had been shown in evidence that the clubs were destroyed due to natural decay. The Learned judge considered that the clubs were thus relevant evidence.

In relation to the issue of common murderous intention the Court of Appeal stated that due to the fact that the

evidence of Emilin was considered to be accurate the fact that the accused together armed with weapons had attacked the deceased and dragged him to the river shows that there was a common murderous intention and the failure of the trial judge to address the issue has not caused prejudice to the accused. The Court of Appeal applied Section 334 of the Criminal Procedure Code and Article 138 of the Constitution to reject the appellant's argument.

The 2nd Accused made an application for special leave against the said judgment of the Court of Appeal and this Court granted leave on the following questions of law:

1. Did the prosecution lead any evidence whatsoever to establish that the Petitioner and the other two accused entertained a common intention to murder the said deceased Godayalage Sadiris alias Madduma as required by law in order to apply the provisions of S.32 of the Penal Code?

2. In the circumstances, is the conclusion of the Court of Appeal that the failure on the part of the Learned Trial Judge to consider the existence of murderous intention has not caused prejudice to the accused, justified?

3. Have their Lordships of the Court of Appeal misdirected themselves by applying the provisions of the proviso to S.334 of the Code of Criminal Procedure Act and those of the proviso to Article 138(1) of the Constitution to disregard the said failure in the circumstances of this case?

In the case of *King v Loku Nona and others*(2) it had been held by Hutchinson C.J that if "A shoots B intending to

murder him, and digs a grave and buries the body, but it turns out that B was not dead when he was buried, and that he was suffocated in the grave. I should hold that A murdered him." He further elaborated on the issue that the word "act" in the Penal Code denotes as well a series of acts as a single act (s.31), and the striking with a club, the cutting of the throat, and the throwing into the sea were an "act" within the meaning of s.293 and that all these acts were done with the intention of killing. It could not be that the acts could be separated to say that this was done with the intention of killing, and the other was done with another intention. In the present case too although the cause of death was drowning the intention to commit murder was clear when considering the evidence of the eye witness.

In the case of *Wijithasiri and another v The Republic of Sri Lanka*[3] which had very similar facts to the present case the issue of common murderous intention was looked into very closely. The relevant facts in relation to that case were that the sole eye witness for the prosecution was an 8 year old boy who was the son of the deceased. They were going home on the deceased's bicycle and when they had dismounted and were going up a hill the first accused in the case came and hit the boy's father on the head with a club and the second accused said 'hit him till he dies'. The boy said that he had identified the accused by the aid of this father's torch light. The boy had run to a relative's house named Yakkala uncle and shouted stating that his father had been killed by Vijitha uncle the 1st accused. The boy had also informed another witness in the case of the assault on his father and the witness had gone to the scene and sent the deceased to the hospital. The statement of the boy was only made four days after the attack. Ramanathan J. dealt

with the issue of common murderous intention by laying down the test which was used to direct a jury in a jury trial. Referring to the case of *King v Assanna and others*[4] Ramanathan J stated that

"where the question of common intention arises the jury must be directed that –

i. The case of each accused must be considered separately.

ii. That the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.

iii. Common intention must not be confused with similar intention entertained independently of each other.

iv. There must be evidence of either or circumstantial evidence of a pre-arranged plan or some other evidence of common intention.

v. The mere fact of the presence of the co-accused at the time of the offence is not necessarily evidence of common intention unless there is other evidence which justifies them in so holding."

Applying the test stated by Ramanathan J to the present case even though the trial judge in her judgment did not mention the said law but as pointed out by the Court of Appeal in its judgment that even though the trial judge had not specified the term common intention in her judgment, by looking at the essential facts of the case specifically, by considering the reliability of the evidence of Emilin, that all three accused were armed with weapons and came almost together towards the deceased and attacked him, that they seemed to have been waiting for the accused and that the river where

the body was found was in close proximity to the scene of the attack, had in fact considered all the relevant issued in the case which would have led the trial judge to the same conclusion as when applying the test laid down in *King v Assanna. (supra)* Common murderous intention is clearly portrayed by the accused as the said acts could not have been done unless there was a common understanding or agreement between the accused parties to carry out such an attack with the intention of killing the said deceased.

Furthermore in the case of *Don Somapala v Republic of Sri Lanka*(5) Thamotheram J held that the accused could satisfy the requirement of common murderous intention by either having gone with the intention of committing the murder or at the spur of the moment joined in the act of committing the murder. The main issue here is that the common intention can either be proven by showing that the accused had planned and carried out the act of murder together or that they through the act of committing the murder together had a common understanding between them to carry out the murder thus satisfying the test of common murderous intention.

Considering all the above issues it is clear that the 2nd accused did have the requisite common murderous intention to commit the act of murder.

In relation to the procedural issue which has been brought up by learned Counsel it has to be stated that the correct provision which should have been considered for an appeal from a trial without a jury under the Code of Criminal Procedure would have been Section 335 and not Section 334 (as stated by the Court of Appeal) which deals specifically with trials by jury as stated in the case of *Sheela Sinharage v Attorney General*(6). Though the issue has been raised, it

does not have any application to the present context since under Section 335 the only procedural issue that the Court of Appeal needs to consider in appeal is whether there is sufficient grounds for interfering with the original judgment and if there is none the Court of Appeal should dismiss the appeal. As it has been made clear by the abundance of evidence of common murderous intention, the Court of Appeal did not find sufficient grounds to interfere with the decision of the Learned High Court Judge who was able to hear the evidence at first hand and it is generally the view of the Court that unless there is some grave miscarriage of justice it would not be appropriate to interfere with the judgment of the trial judge who enters judgment after careful consideration of the first hand evidence put before her to which the Judge of the Appellate Court would not have the ability to witness. Also when considering the Proviso to Article 138(1) of the Constitution it is evident that the judgment of the Learned High Court Judge need not be reversed or interfered on the account of any defect, error or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice as stated in the judgment of the Court of Appeal. In the above circumstances the 1st and 2nd questions of Law on which leave was granted are answered in the affirmative and the 3rd question is answered in the negative.

Therefore the appeal of the 2nd Accused – Appellant is dismissed and the conviction and sentence imposed by the Learned High Court Judge is affirmed.

MARSOOF J,- I agree.

EKANAYAKE J, -I agree.

Appeal dismissed, conviction and sentence affirmed.

ATTORNEY GENERAL VS. UDAYA DE SILVA AND OTHERS

COURT OF APPEAL
SISIRA DE ABREW.J
UPALY ABEYRATNE.J
CA 133/2007
HC 2914/06 – COLOMBO
SEPTEMBER 2, 2009

Penal Code - Section 102, 113, 456, 459, 454 - Code of Criminal Procedure Act No. 15 of 1979 - Section 331 Judicature Act No. 2 of 1978- Appeal by the Attorney General – Failure to comply with Section 303 (2) of the Criminal Procedure Code? – Sentence inadequate- Jurisdiction of the Appellate Court assessing punishment- Guidelines? – Plea bargaining- Sentence bargaining

The 1st and 2nd respondents were indicted under 11 counts punishable under Sections 102, 113, 456, 459, 403 and 454 of the Penal Code.

At the trial the 2nd respondent pleaded guilty to all the counts and the High Court sentenced her on all the counts. The 2nd respondent also pleaded guilty and certain sentences were imposed. The state contended that the sentences are inadequate having regard to the law, the nature of the offences and the order of suspending the sentence is illegal-as the trial Judge has failed to comply with Section 303 (2) (d) of the Criminal Procedure Code.

Held

(1) In assessing the punishment that should be imposed on an offender the judge should consider the matter of sentence both from the point of view of the public and the offence. Judges are too often prone to look at the question only from the angle of the offender.

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

The incidence of crimes of this 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 Judge should also consider as to what punishment is to be imposed viz. the nature of the loss to the victim and profit that may accrue to the culprit in the event of non detection.

(3) Whilst plea bargaining is permissible sentence bargaining should not be encouraged at all and must be frowned up on. The opinion of the prosecutor as to what sentence should be imposed is irrelevant.

Per Upaly Abeyratne.J

"I am of the view that the respondents had been the perpetrators of a very serious crime which had been committed with much deliberation and planning. In doing so, the 1st respondent had gone with the 2nd respondent to a Notary Public and the 2nd respondent had personated and dishonestly signed a deed as a MP. The property which was dishonestly transferred by the said deed was sold to RRP and had obtained a sum of Rs. 215,000/- Both the respondent had shared this sum".

(4) 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.

APPEAL from the judgment of the High Court of Colombo.

Cases referred to:-

1. *Attorney General vs. H.N. de Silva* 57 NLR 121, 123
2. *Gomes vs. Leelaratne* 66 NLR 223
3. *Bashir Begum Bibi* 1980 Vol 71 Cri. Appeal Report p. 360
4. *Attorney General vs. Mendis* (1995) 1 Sri LR 138
5. *Attorney General vs. Jinak Uluwaduge and another* (1995) 1 Sri LR 157

Harippriya Jayasundara SSC for the respondent-appellant.

Rienzi Arsacularatne for the 2nd accused-appellant-respondent.

September 30th 2009

UPALY ABEYRATHNE, J.

This is an appeal preferred by the Attorney General under section 15 (b) of the Judicature Act No. 2 of 1978 read with section 331 of the Code of Criminal Procedure Act No. 15 of 1979 against the sentence imposed on the 1st and 2nd Respondents by the learned High Court Judge of Colombo. The facts leading to said Appeal are briefly as follows:

The 1st and 2nd Respondents were indicted before the High Court of Colombo under 11 counts punishable under sections 403, 102, 113, 456, 459 and 454 of the Penal Code. On 23.07.2007 when this case was taken up for trial the 2nd Respondent pleaded guilty to all the counts against her namely counts 1, 2, 4, 7, 9 and 11 of the indictment. After hearing submissions of both counsel the learned High Court Judge imposed the following sentences on the 2nd Respondent; Namely, for each of the counts 1, 2, 9 and 11 a term of 01 year rigorous imprisonment suspended for 5 years and to pay a fine of Rs. 10,000/- carrying a default term of 06 months imprisonment, for count 4 a term of 01 year rigorous imprisonment suspended for 5 years and to pay a fine of Rs. 25,000/- carrying a default term of 01 year imprisonment and for count 7 to pay a fine of Rs. 10,000/- carrying a default term of 06 months imprisonment.

Thereafter on 25.07.2007 when the case against the 1st Respondent was taken up for trial the 1st Respondent too pleaded guilty to all the counts against him namely the counts 1, 3, 5, 6, 8, and 10 of the indictment. After hearing submissions of both counsel the learned High Court Judge imposed the following sentences on the 1st Respondent; Namely, for each of the counts 1, 3, 5, 6, 8 and 10 a term of 01 year rigorous imprisonment suspended for 5 years and to pay a

fine of Rs. 25,000/- carrying a default term of 06 months imprisonment.

At the hearing of this Appeal the learned Senior State Counsel for the Appellant contended that:

a. Both the sentences are manifestly inadequate having regard to the nature of the offence for which the Respondents had been convicted and,

b. The order of suspending the sentences of imprisonment against both the Respondents is illegal as the learned High Court Judge has failed to comply with provisions of section 303(2) (d) of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 47 of 1999, according to which when the aggregate terms of imprisonment where the offender is convicted for more than one offence in the same proceedings exceeds two years the court is prohibited from suspending such terms of imprisonment.

The learned Senior State Counsel submitted that the indictment against the 1st and 2nd Respondents was founded on the following materials;

a. That both the Respondents have conspired to make out the false deed bearing No. 505 where the 1st Respondent had gone with 2nd Respondent to the Notary Public and the 2nd Respondent had personated and dishonestly signed as Monica Paranagamage.

b. On 11.06.2004 the 1st Respondent had sold the said land to a company named Rhino Roofing Products and had obtained a sum of Rs. 5,215,000/-.

c. That the 1st Respondent has deposited a sum of Rs. 3.5 million in to his account at the Golden Key Company on 11.06.2004 and the 2nd Respondent too had admitted receiving Rs. 5,00,000/- from the 1st Respondent from the sales proceeds and a sum of Rs.4,00,000/- had been deposited in the 2nd Respondent's personal account No. 18495 at the Golden Key Company on 16.07.2004 by the 2nd Respondent.

d. That there are two affected parties namely the rightful owner Monica Paranagama and the innocent purchaser the Rhino Roofing Company.

e. That the 1st and 2nd Respondents have committed this crime with the object of making profit and they have received a sum of Rs. 5,215,000/- and both of them have shared this sum.

The learned Senior State Counsel further submitted that the Respondents have pleaded guilty to offences which attracted sentences of imprisonment ranging from 5 to 20 years and that the sentence of 1 year rigorous imprisonment which had been imposed on the 1st and 2nd Respondents which had been suspended for 5 years and the fine imposed on each of the counts are grossly inadequate having regard to the nature of the crimes committed. She further submitted that although the learned State Counsel who appeared before the High Court submitted that in view of the nature and the gravity of the offences a sentence commensurate with the offences should be imposed as the respondents who committed the said crimes for economic gain should not be allowed to get away with the illicit gain and make a profit from the criminal acts, the learned High Court Judge has failed to consider the gravity of this type of white collar crimes.

The learned President's Counsel for the 2nd Respondent submitted that the 1st Respondent has initiated this legal process since his father had failed to divide his property among his children. The 2nd Respondent being his school mate has joined with the 1st Respondent in committing the said offence. The 2nd Respondent's participation in committing the said crimes was confined only to making of forged documents. The 2nd Respondent did not involve in the process of disposing the property to the Rhino Roofing Company. The 2nd Respondent being a housewife has dedicated her life for her only child.

The 1st Respondent though he was noticed by this court to appear and defend the Appeal was absent and unrepresented at the hearing of this Appeal.

It is important to note that the 1st and 2nd Respondents have committed this crime with the object of making profit and they have received a sum of Rs. 5,215,000/- and both of them have shared this sum. The 1st Respondent has deposited a sum of Rs. 3.5 million in to his account and the 2nd Respondent too has received Rs. 5,00,000/- from the 1st Respondent from the sales proceeds and a sum of Rs. 4,00,000/- has been deposited in the 2nd Respondent's personal account. In the said premise I now consider that in sentencing of the 1st and 2nd Respondents whether the learned trial judge has failed to adhere to the guide lines laid down by Superior Courts and to consider an adequate sentence for the said offences.

It was observed by Basnayake, A.C.J. (as he then was) in the case of *Attorney-General v. H.N. de Silva*[1] that "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. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. The incidence 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."

Sri Skanda Rajah J. in *Gomes v. Leelaratne*[2] has laid down two further considerations that a judge should take into account in considering what punishment is to be imposed on an offender. They are: 1. the nature of the loss to the victim and, 2. the profit that may accrue to the culprit in the event of non-detection.

In the case of *Bashir Begum Bibi*[3] Lord Chief Justice observed that "for some offences generally speaking longer sentences of imprisonment are appropriate such as for example most robberies, most offences involving serious violence, use of a weapon to wound, burglary of private dwelling houses, planned crime for wholesale profit, active large scale trafficking in dangerous drugs and the like."

In the case of *Attorney General v. Mendis*[4] it was held that "In assessing punishment the judge should consider the matter of sentence both from the point of view of the public and the offender. The judge 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. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. The incidence 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. Two further considerations are the nature of the loss to the victim and the profit that may accrue to the accused in the event of non-detection. For some offences generally speaking longer sentences of imprisonment are appropriate such as for example most robberies, most offences involving serious violence, use of a weapon to wound, burglary of private dwelling houses, planned crime for wholesale profit, active large scale trafficking in dangerous drugs and the like."

Gunasekara, J further held that "The Trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should in our view not surrender this sacred right and duty to any other person, be it counsel or accused or any other person."

Whilst plea bargaining is permissible in our view, sentence bargaining should not be encouraged at all and must be frowned upon. No trial Judge should permit and encourage a situation where the accused attempts to dictate or indicate what sentence he should get or what sentence he expects.

White collar crimes or economic crimes have been committed with impunity in the past. Hence the sentence passed should be in keeping with the nature and magnitude of the offences to which the accused has pleaded guilty."

In the case of *Attorney General v. Jinak Sri Uluwaduge and Another*[5] Gunasekera, J held that "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".

The opinion of the prosecutor as to what sentence should be imposed is irrelevant. The Attorney-General is not estopped in appeal from taking an entirely different stand on sentence from that taken by his representative who appeared for the prosecution in the High Court.

In the case of *Attorney General Vs Mendis (supra)* it was contended by the learned Deputy Solicitor-General that the Accused-Respondent has pleaded guilty to offences which attracted sentences of imprisonment ranging from 5 to 7 years and that the sentence of 2 years rigorous imprisonment which had been imposed on the Accused-Respondent which had been suspended for 5 years and a fine of Rs. 30,000/- imposed on each of the counts is grossly inadequate having regard to the nature of the crimes committed.

Learned President's Counsel who appeared for the Accused-Respondent in the said case contended that the duty of imposing sentence and the decision as to what sentence should be imposed is entirely in the discretion of the Trial Judge, and having regard to the fact that the Accused-Respondent was a first offender and a married man with six children and the fact that he was a heart patient, the Learned Trial Judge had imposed a jail term of 2 years in respect of each count which has been suspended for a period of 5 years in addition to the fines imposed. Since the Trial Judge had directed that the sentences imposed should run separately the operation of the period of the suspension would be 30 years. The Accused-Respondent who was 36 years at the time

of conviction would have to live practically for the rest of his life with the suspended sentences hanging over his head.

In considering the said submission in the Mendis' case Gunasekara J. observed that "In our 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 interest of society on the other. In doing so the judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organization in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime."

In the instant case I have carefully considered the submissions made by the Learned Senior State Counsel and the Learned President's Counsel and the material placed before this court.

I am of the view that the Respondent had been the perpetrators of a very serious crime which had been committed with much deliberation and planning. In doing so the 1st Respondent had gone with the 2nd Respondent to a Notary Public and the 2nd Respondent had personated and dishonestly signed a deed as Monica Paranagama. The property which was dishonestly transferred by said deed had later sold to Rhino Roofing Products and had obtained a sum of Rs. 5,215,000/-. Both the Respondents had shared this sum.

I am in agreement with the aforesaid observations made by Gunasekara J. in the case of *Attorney General Vs Mendis (supra)* and also the observations made by Basnayake A.C.J. in the case of *Attorney General v. H. N. de Silva (supra)* 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 1st and 2nd Respondents I am of the view that in imposing the sentence upon the Respondents, the learned trial judge has failed to adhere to the said guide lines laid down by superior courts and thus the sentences which has been imposed by her on the 1st and 2nd Respondents has become grossly inadequate. Hence I set aside the sentences of 01 year rigorous imprisonment imposed on the 2nd Respondent in respect of counts 1, 2, 4, 7, 9 and 11 which have been suspended for 5 years in respect of each count.

I sentence the 2nd Respondent to a term of 2 years rigorous imprisonment in respect of each count 1, 2, 7, 9 and 11 and to pay a fine of Rs. 30,000/- in default 01 year simple imprisonment in respect of each count 4 years rigorous imprisonment in respect of count 4 and to pay a fine of Rs. 2,00,000/- in default 4 years simple imprisonment. The terms of imprisonment imposed on the 1st, 2nd, 4th, 7th, 9th and 11th counts should run concurrently. Therefore the total term of imprisonment that the 2nd Respondent should serve is 4 years rigorous imprisonment. This is in addition to the default sentence.