ATTORNEY-GENERAL
v.
JINAK SRI ULUWADUGE AND ANOTHER

COURT OF APPEAL.
GUNASEKERA, J. AND
YAPA, J.
C.A. NO. 469/94
H.C. COLOMBO NO. 5958/93
DECEMBER 06, 1994.

Criminal Law – Cheating – Theft – Using as genuine a forged document – Sentences – Considerations that should weigh in determining sentence – Plea bargaining and sentence bargaining – Change of stand by prosecution in the matter of sentence.

Held:

In determining the proper sentence the Judge should 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. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration. The Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non-detection. Another matter to be taken into account is that the offences were planned crimes for wholesale profit. The Judge must consider the interests of the accused on the one hand and the interests of society on the other; also necessarily the nature of the offence

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

Per Gunasekera, J:

"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".

(2) 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.

Cases referred to :

1. *Attorney-General v. H. N. de Silva* 57 NLR 121, 123.
2. *Gomes v. Leelaratne* 66 NLR 235.
3. *Bashir Begum Bibi* 1980 Vol. 71 Criminal Appeal Reports p. 360.
4. *Attorney-General v. Ranasinghe and Others* (1993) 2 Sri LR 81.
5. *Attorney-General v. J. Mendis* C.A. 430/92 C.A. Minutes of 15.12.92.

APPLICATION for revision of sentence.

Rienzie Arsekularatne D.S.G. for petitioner.
A. A. de Silva with *P. A. L. Fernando* for accused-appellant.

Cur. adv. vult.

December 16, 1995
GUNASEKERA, J.

The two accused-respondents were indicted in the High Court of Colombo on the following charges:

(1) Both accused with conspiring to cheat officers of the Central Bank of Sri Lanka between the period 25th January, 1990 and 25th February, 1990 punishable under Section 113A read with Sections 102 and 403 of the Penal Code.

(2) The 1st Accused with using as genuine a forged document to wit, a cheque bearing No. 948680 on 16th February, 1990 issued to a Government Department, punishable under Section 454 read with Section 459 of the Penal Code:

(3) The 1st accused with cheating an officer of the Central Bank, Sumithra Rohini Fernando to part with a sum of Rs. 750,000/ – on 16th February, 1990, punishable under Section 403 of the Penal Code.

(4) The 1st accused with having used as genuine a forged document to wit, a cheque bearing No. 948781 valued at Rs. 900,000/- on 20th February, punishable under Section 454 of the Penal Code.

(5) The 1st accused with cheating an officer of the Central Bank, Kusumalatha Ratnayake and thereby inducing her to authorise the payment of a sum of Rs.900,000/- on 20th February, 1990, punishable under Section 400 of the Penal Code.

(6) The 2nd Accused with committing theft of six cheques bearing Nos. 948779, 948780, 948781, 948679, 948680 and 948681 from the possession of Koggala Guruge Susantha de Silva on or about 15th February, 1990, punishable under Section 367 of the Penal Code.

At the trial held on 7.3.1994 the 1st accused-respondent pleaded guilty to charges 1 to 5 and the 2nd accused-respondent to charges 1 and 6 in the indictment, and submissions in mitigation were put off for the following day. On the next day 8th March, 1994 learned counsel who appeared for the accused-respondents submitted that the 1st accused-respondent was 35 years old and having passed the G.C.E. (A.L.) Examination in 1981, that he had entered the Sri Jayewardenapura University and had obtained a Special Degree in Business Management in 1985. That he was employed in D. Samson Sons as he could not secure any suitable employment in keeping with his educational qualifications. Further that he repents having committed this crime and that he has no previous convictions. On behalf of the 2nd accused-respondent it was submitted that he was an employee of the Central Bank, that he is a graduate of the Sri Jayewardenapura University in Political Science and Valuation, he is

married and has a 1 1/2 year old child, that he had admitted his complicity in this crime, that he is 34 years old and has no previous convictions. Learned Counsel therefore moved that the Learned High Court Judge be pleased to consider acting in terms of Section 303 of the Code of Criminal Procedure Act.

Thereupon the Learned High Court Judge having recorded that the State Counsel does not object to the imposition of a suspended sentence, imposed the following sentences on the accused-respondents. The 1st accused-respondent to 2 years Rigorous Imprisonment in respect of counts 1 to 5 and suspended the operation of that sentence for a term of 5 years. Further a fine of Rs. 2000/- was imposed on each of the said 5 counts. In default of the payment of the fine 1 years rigorous imprisonment was imposed and the court directed that the fine be paid in ten monthly instalments. The 2nd accused-respondent was sentenced to 2 years rigorous imprisonment in respect of counts 1 and 6, and it was suspended for a period of 5 years. A fine of Rs. 2000/ was imposed in respect of each of the 2 counts and in default of payment of the fine, a further period of 1 years rigorous imprisonment was imposed. A period of 4 months time was given for him to pay the fine. The sentences were to run consecutively.

The Attorney-General has filed this application in revision on 7th July, 1994 and has moved this court to revise the said sentences imposed on the accused-respondents on the basis that they are totally disproportionate having regard to the serious nature of the offences to which the accused-respondents have pleaded guilty. At the hearing of this application Mr. Rienzie Arsekularatne, Deputy Solicitor-General submitted that the offences for which the accused-respondents have pleaded guilty are of a serious nature and attracted terms of imprisonment ranging from 3 to 7 years and have been committed with much planning and deliberation and calls for the imposition of an immediate custodial sentence. It was his contention that the 2nd accused-respondent who was employed at the Central Bank as a Supervisor was placed in a position of trust and that he has misused his position to commit the crimes for which he pleaded guilty. It was submitted that as an employee of the Bank that he had access to the unencoded cheques and the coding machines. In addition to conspiring to cheat, the 2nd accused-

respondent had commited theft of six cheques two of which had been made use of by the 1st accused-respondent to commit the offences set out in counts 2 to 5 in the indictment.

Learned Deputy Solicitor-General further submitted that the material discloses that the accused-respondents have committed a planned crime for wholesale profit for which deterrent punishment was called for. Relying on the observations of Basnayake A.C.J. (as he then was) in the case of *Attorney-General v. H. N. de Silva* [1] the Learned Deputy Solicitor-General contended 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 of sentence only from the angle of the offender. The 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. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration." In addition to the criteria laid down by Basnayake, A.C.J. it was contended by learned Deputy Solicitor-General that the Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of nondetection, in deciding what sentence is to be imposed. In support of this proposition he relied on the observations made by Sri Skandarajah, J. in *Gomes v. Leelaratne* [2].

It was further submitted that the offences to which the accused-respondents had pleaded guilty, being planned crimes for wholesale profit, the sentences imposed in this case were grossly inadequate. He relied on the observations of the Lord Chief Justice in the case of *Bashir Begum Bibi* [3] to contend for the proposition that the sentences imposed in this case were out of proportion having regard to the serious nature of the offences.

Mr. A. A. de Silva appearing for the accused-respondents submitted that the Learned High Court Judge has taken into

consideration that both accused-respondents were first offenders and decided to impose a sentence of imprisonment but however has used her discretion and decided that the operation of the sentences be suspended for a period of five years. This he contended was in keeping with the current trend of sentencing policy which gives an offender a chance to reform himself and submitted that this court should not interfere with the sentence which was imposed by the Learned High Court Judge.

Learned Counsel further submitted that the Attorney-General's representative who appeared in the Trial Court had had no objection to the sentence being suspended and submitted that it was unethical for the Attorney-General to canvass that sentence after a long delay of four months in this court in this proceedings.

We are unable to agree with this contention of Learned Counsel. In the case of *Attorney-General v. Ransinghe and Others* [4] Honourable S. N. Silva, J. with myself agreeing have taken the view that a delay of six months to make an application for revision of a sentence imposed by a High Court would not be considered unreasonable having regard to the circumstances of the case.

In the case of *Attorney-General v. J. Mendis* [5] I have observed as follows. "In my 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 interests of the society on the other. 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 manupulations 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. 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."

Learned Counsel for the Accused-Respondents submitted that the Record bears out that the State Counsel who appearing for the Attorney-General before the High Court has had no objection to the imposition of a suspended sentence in this case and contended that the Attorney-General is estopped from taking an entirely different stand from that taken by his representative who appeared for the prosecution in the High Court. It was his submission that the accused is entitled to the benefit of any concession made by the prosecution. We are unable to agree with the submission of Learned Counsel when it relates to the question as to what sentence is to be imposed. As observed earlier the sacred duty and function in imposing a sentence is on the Trial Judge and he has an unfettered discretion in the matter.

As observed by me in the case of the *Attorney-General v. J. Mendis* [5] "It is unfortunate to observe in the instant case that there has been sentence bargaining. It is to be observed from the two affidavits filed by the two accused-respondents and the affidavit filed by Learned Counsel who appeared for them in the High Court, filed in these proceedings marked 2R1 and 2R2, it is clear that there had been sentence bargaining and it appears that the Learned Trial Judge had permitted the dictates of the accused, presented through their Counsel to influence her mind in exercising what sentence should be imposed. This is most regrettable. It appears that the Learned Trial Judge had abdicated her right in deciding what sentence should be imposed. The opinion of the prosecutor as to what sentence should be imposed in our view is irrelevant.

We have carefully considered the submissions made by the Learned Deputy Solicitor-General and the Learned Counsel and the material placed before us.

We are of the view that the Accused-Respondents had been the perpetrators of a very serious crime which had been committed with much deliberation and planning. In doing so the 2nd Accused - Respondent had stolen six encoded cheques from the Central Bank, out of which two had been used by the 1st Accused-Respondent to deceive two officers of the Central Bank to part with large sums of

money and has succeded in drawing a sum of Rs. 750,000/- of public money. Had the Learned Trial Judge considered the relevant factors or criteria referred to above in determining what the appropriate sentence should have been, the sentence imposed on the accused-respondents may well have been different.

We are in agreement with the observations made by Basnayake A.C.J. in the case of *Attorney General v. H. N. de Silva* [1] 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. Thus we set aside the sentence of 2 years rigourous imprisonment imposed on the 1st accused-respondent in respect of counts 1, to 5 which have been suspended for 5 years in respect of each count, and sentence the 1st accused-respondent to a term of 3 years rigorous imprisonment in respect of counts 1, to 5, the sentences to run concurrently. We also set aside the sentence of 2 years rigorous imprisonment imposed on the 2nd Accused-Respondent in respect of counts 1 and 6 which has been suspended for 2 years in respect of each count, and impose a sentence of 3 years rigorous imprisonment in respect of count 1, and a sentence of 2 years rigorous imprisonment in respcet of count 6. The sentences to run concurrently. We affirm the fines imposed by the Learned Trial Judge in respect of both Accused-Respondents and the default terms for non payment of the fines. It is to be noted that although a fine of Rs. 2000 /– each has been imposed on the 2nd Accused- Respondent in regard to counts 1 and 6 it is to be observed that he had been permitted 4 months time to pay the said fine in Rs. 500 / - instalments. This appears to be an obvious error and we alter that portion of the judgment to read as 8 months time in eight instalments of Rs.500/ - . For the reasons stated above the application in revision is allowed, and the sentence is varied.

YAPA, J. – I agree.

Sentence varied.