THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 2 SRI L.R. - PART 4**

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In *Ranjit v Kusumawathi and others, (supra)*, Dheeraratne,

J. specifcally 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 defned 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

specifc about the meaning that should be given to the words

‘Judgment’ and ‘order’ as it has clearly specifed that,

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 “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 fnal judgment made by any civil court;

 and

 ‘order’ means the fnal expression of any decision in

any civil action, proceeding or matter, which is not a

judgment.”

It is therefore quite obvious that a fnal 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 defni-

tion 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 deci-

sion of an original civil Court could only take the form of a

judgment or an order having the effect of a fnal 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 defning a judgment and an order made by any civil

Court to be applicable only to the Chapter in the Civil Proce-

dure 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 fnal 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

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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 fnal or not, in keeping with

the provisions of section 754(5) of the Civil Procedure Code,

it would be necessary to follow the test defned by Lord Es-

her 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, fnally dispose

of the matter in dispute, I think that for the purposes of

these rules it is fnal. On the other hand, if their decision,

if given in one way, will fnally 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 fnal, 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 fnal and interlocutory decisions. Considering

the diffculties that had been raised regarding the correct in-

terpretation for fnal and interlocutory orders, it was stated

that attention must be given to the object of the distinction

drawn in the rules between interlocutory and fnal orders on

the basis of the time for appealing. Fry, L.J. had accordingly

stated thus:

 “I think that the true defnition is this. I conceive that an

order is “fnal” only where it is made upon an application

or other proceeding which must, whether such applica-

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tion or other proceeding fail or succeed, determine the

action. Conversely I think that an order is “interlocutory”

where it cannot be affrmed that in either event the action

will be determined.”

Considering all the decisions referred to above, the afore-

said 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 Proce-

dure Code and it is not disputed that the rights of the parties

were not considered by the District Court. In such circum-

stances it would not be probable to state that the said order

made by the District Court had fnally 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 main-

tenance 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

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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 fled

their proxy on 02.01.2008 and had sought time to fle

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 fle written submissions. There-

after 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 fnally

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 frst 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

fnally 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.”

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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 fnal 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 interlocu-

tory order.

For the reasons aforesaid, both appeals (S.C. (Appeal) No.

101A/2009 and S.C. (AppeaI) No. 101B/2009), are dismissed

and the judgment of the High Court dated 21.11.2008 is

affrmed.

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.*

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**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 com-

mitting 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.

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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, justifed ?

3. Have their Lordships of the Court of Appeal misdirected them-

selves 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 commit-

ting 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 frst 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

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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

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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 thereaf-

ter 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 foating in the river which was in the

proximity of where the deceased was said to be attacked. The

medical offcer who carried out the post-mortem examination

found injuries on the head of the deceased and the cause of

death had been identifed in the report as death due drown-

ing. The medical offcer who had made the report was un-

available to give evidence and the evidence in relation to the

medical report was given by an authorized medical offcer.

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 fawed and that her identifcation could

not be considered to be accurate. They further suggested that

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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 examina-

tion 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 weak-

nesses in the identifcation.

 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.

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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 identifcation that the main inten-

tion 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 satisfes 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 satisfed. Taking into consid-

eration 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 fndings 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 offcer 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 consid-

ered that the clubs were thus relevant evidence.

In relation to the issue of common murderous inten-

tion the Court of Appeal stated that due to the fact that the

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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,

justifed?

 3. Have their Lordships of the Court of Appeal misdi-

rected 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

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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 frst 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 identifed 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

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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) Ramana-

than 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 sepa-

rately.

 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 circumstan-

tial 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 justifes 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 specifed the term common intention in her judgment, by

looking at the essential facts of the case specifcally, by con-

sidering 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

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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 conclu-

sion 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 be-

tween 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 specifcally

with trials by jury as stated in the case of *Sheela Sinharage*

*v Attorney General*(6). Though the issue has been raised, it

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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

suffcient 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 Ap-

peal did not fnd suffcient grounds to interfere with the deci-

sion of the Learned High Court Judge who was able to hear

the evidence at frst 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 frst 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 ques-

tions of Law on which leave was granted are answered in the

affrmative 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 affrmed.

**mArSoof J,**- I agree.

**ekANAyAke J,** -I agree.

*Appeal dismissed, conviction and sentence affrmed.*

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**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 inad-***

***equate- 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 con-

tended 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 of-

fender 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 frst 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.

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 The incidence of crimes of this nature of which the offender has

been found to be guilty and the diffculty 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 proft 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 opin-

ion 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 perpetra-

tors 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

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*Harippriya Jayasundara SSC for the respondent-appellant.*

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

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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 briefy as follows:

The 1st and 2nd Respondents were indicted before the

High Court of Colombo under 11 counts punishable un-

der 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 Re-

spondent; 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 fne 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

fne of Rs. 25,000/- carrying a default term of 01 year impris-

onment and for count 7 to pay a fne 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 submis-

sions 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

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fne 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 Respon-

dents 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 impris-

onment 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 Respon-

dent 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 Roofng Products and had

obtained a sum of Rs. 5,215,000/-.

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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 admit-

ted 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 Roofng Company.

e. That the 1st and 2nd Respondents have committed this

crime with the object of making proft 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 fne imposed

on each of the counts are grossly inadequate having regard

to the nature of the crimes committed. She further submit-

ted 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 com-

mitted the said crimes for economic gain should not be al-

lowed to get away with the illicit gain and make a proft from

the criminal acts, the learned High Court Judge has failed to

consider the gravity of this type of white collar crimes.

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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 commit-

ting the said crimes was confned only to making of forged

documents. The 2nd Respondent did not involve in the

process of disposing the property to the Rhino Roofng

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 proft

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 as-

sessing the punishment that should be passed on an offender

the judge should consider the matter of sentence both from

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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 frst 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 un-

der 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 na-

ture of which the offender has been found to be guilty and the

diffculty 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 proft 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 proft, active

large scale traffcking 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 frst 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

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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 diffculty of detection

are also matters which should receive due consideration.

Two further considerations are the nature of the loss to the

victim and the proft 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 proft, active

large scale traffcking 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 com-

mitted 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

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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 fne 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 sen-

tence should be imposed is entirely in the discretion of the

Trial Judge, and having regard to the fact that the Accused-

Respondent was a frst 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 fnes 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

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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 diffcult 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 involve-

ment 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 Roofng Products and had obtained a sum

of Rs. 5,215,000/-. Both the Respondents had shared this

sum.

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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 impris-

onment 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 rigor-

ous imprisonment in respect of each count 1, 2, 7, 9 and 11

and to pay a fne 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 fne 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.