THE ATTORNEY-GENERAL
v.
MENDIS

COURT OF APPEAL.
GUNASEKERA, J. AND
YAPA, J.
C.A. 430/93
H.C. COLOMBO NO. 500/91
NOVEMBER 15 1994.

Criminal Law – Mischief – Forgery – Sentences – Principles which should guide the Court – Plea bargaining and sentence bargaining – White collar and economic crimes.

Held:

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.

Once an accused is found guilty and convicted on his own plea or after trial the judge in deciding on sentence, should consider the point of view of the accused on the one hand and the interest of society on the other. 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 organization in respect of which it has been committed, is concerned, 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 are matters which the judge should consider.

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 in our view not surrender this sacred right and duty to any other person, be it counsel or accused or any other person".

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

3. The accused had made use of the letter heads of a Government Department and forged or caused to be forged the signatures of highly placed public officials. He has also made use of the name of a Cabinet Minister in order to achieve his purpose. This is a serious matter and should have been taken cognizance of. Whilst the reformation of the criminal is an important consideration where the public interest or the welfare of the State outweighs the previous good character, antecedents and age of the offender, the public interest should prevail.

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.

Cases referred to:

1. *Attorney-General v. H. H. de Silva* 57 NLR 121, 123.
2. *Gomes v. Leelaratne* 66 NLR 233.
3. *Bashir Begum Bibi* 1980 Vol. 71 Criminal Law Reports p. 360.

APPLICATION for revision of sentence.

R. Arsekularatne D.S.G. for petitioner.
D. S. Wijesinghe P.C. with *Asitha Wijesundera* for respondent.

Cur. adv. vult.

December 15, 1994.
GUNASEKERA, J.

The 1st Accused-Respondent abovenamed and three others were indicted in the High Court of Colombo for committing jointly and separately the offences set out hereinafter:

1. that between 5th September 1984 and 20th November, 1985 the 2nd, 3rd and 4th Accused committed an offence in terms of Section 403 read with Section 102 and 113(B) of the Penal Code by conspiring to cheat the General Manager of the People's Bank Head Office in respect of two loans to the value of 1.2 million Rupees and 2.3 million Rupees respectively.

2. that on or about 5.12.84 the 1st Accused-Respondent committed an offence in terms of Section 459 read with Section 454 of the Penal Code by tendering as genuine a forged document to obtain a loan from the People's Bank.

3. that on or about 11.3.1985 the 1st Accused-Respondent committed an offence under Section 454 read with Section 459 of the Penal Code by tendering as genuine a forged document to obtain a loan from the People's Bank.

4. that on or about 25.9.1985 the 1st Accused-Respondent committed an offence in terms of Section 459 read with Section 454 of the Penal Code by tendering as genuine a forged document to obtain a loan from the People's Bank.

5. that on or about 20.11.1985 the 1st Accused-Respondent committed an offence in terms of Section 459 read with Section 454 of the Penal Code by tendering as genuine a forged document to obtain a loan from the People's Bank.

6. that on or about 12.11.1985 the 1st Accused-Respondent committed an offence of cheating under Section 403 of the Penal Code by dishonestly inducing the General Manager of the People's Bank to approve a payment of Rs. 1.2 million through the Borella Branch of the People's Bank in favour of the 1st Accused-Respondent.

7. that on or about 20.11.1985 the 1st Accused-Respondent committed the offence of cheating in terms of Section 403 of the Penal Code by dishonestly inducing the General Manager of the People's Bank to approve the payment of Rs. 2.3 million through the Hong Kong and Shanghai Bank in favour of the 1st Accused-Respondent and another.

At the commencement of the trial on 22.2.93 the 1st Accused-Respondent pleaded guilty to the charges levelled against him in the indictment, namely charges 2, 3, 4, 5, 6, and 7 respectively and was convicted by the learned High Court Judge and sentenced to 2 years rigorous imprisonment, in respect of each count. The said period of imprisonment was suspended for a period of 5 years. In addition the learned High Court Judge imposed a fine of Rs. 30,000/- in respect of each count and imposed a term of 2 years rigorous imprisonment in default of payment of the fine. The learned High Court Judge made further order that in the event of the fines being paid that a sum of Rs. 150,000/- be paid to the People's Bank as compensation. The learned High Court Judge also permitted the fines to be paid in monthly instalments of Rs. 5,000/-.

The Attorney-General has filed this application in revision against the above sentence imposed by the Learned Trial Judge. It was submitted by the Learned Deputy Solicitor-General who appeared for the Attorney-General that the 1st Accused-Respondent has committed this crime with much premeditation, pre-planning and pre-concert. It was contended that the 1st Accused-Respondent has pleaded guilty to having defrauded a premier State Bank for a sum of Rs. 3.25 million and considering the seriousness of the crime that the non custodial sentence imposed on the 1st Accused-Respondent is grossly inadequate and is out of proportion having regard to the magnitude of the crime that had been committed. At the hearing Mr. Arsekularatne, learned Deputy Solicitor General submitted that the indictment against the 1st Accused-Respondent was founded on the following material:

1. that on 28.6.1983 the 1st Accused-Respondent opened a Current Account bearing No. 7274 at the Borella Branch of the People's Bank.

2. that he made an application dated 30.8.84 for a loan of Rs. 8,250,000/- for the purpose of expanding a transport business which he stated that he was engaged in. In this application he offered as security a mortgage of 55 vehicles which he proposed to acquire. Subsequently in support of this application he tendered a letter P2 dated 5.12.1984 purported to be signed by the Additional Deputy Director, Government Supplies Department wherein it was stated that 22 Tata Benz lorries had been reserved for him on the instructions of the then Minister of Trade and Shipping, Hon. M. S. Amarasiri. In the said letter it was also stated that the 1st Accused-Respondent had already paid a sum of Rs. 3.5 million and that he was requested to pay the balance of Rs. 70,40,000/- to finalise the transaction and to take over possession of the said 22 lorries. It was submitted that the writer of the purported letter H. P. W. Premadasa the Additional Deputy Director of the Department of Government Supplies in the course of the investigations had categorically denied that the said letter was issued by him to the 1st Accused-Respondent and that the signature appearing in that letter is not his, and that the signature is a forgery.

3. Mr. Stanislaus Pieris the Deputy General Manager Domestic Finance who subsequently became the General Manager of the People's Bank having examined the application of the 1st Accused-Respondent refused the loan for Rs. 8 million but recommended that the 1st Accused-Respondent be granted a loan of Rs. 3.5 million.

4. After approval of the loan the 1st Accused-Respondent made a request that Rs. 1.2 million be credited to his Current Account. He had stated that he had already paid the Department of Government Supplies Rs. 1.2 million before the approval of the loan and there was a further sum of Rs. 2.3 million outstanding and requested that a cheque in respect of the balance Rs. 2.3 million be drawn in favour of the Department of Government Supplies. In support of the said request the 1st Accused-Respondent submitted a letter dated 25.9.1985 marked P3 purporting to be issued by the Department of Government Supplies. The Additional Director of Government Supplies had categorically denied that the signature on the said letter was his and that it was a forgery.

5. Mr. S. Pieris the Deputy General Manager of the People's Bank having examined the request referred to above made by the 1st Accused-Respondent recommended to the Chairman of the People's Bank that it be granted. However the Chairman turned down the request stating that all payments should be made out to the Department of Government Supplies and he categorically ordered not to pay this sum of Rs. 1.2 million to the Current Account of the 1st Accused-Respondent.

6. On the decision of the Chairman being conveyed to the 1st Accused-Respondent he made an application by letter dated 10.10.85 wherein he once again made an application to the Chairman stating that he had already paid a sum of 1.24 million to the Department of Government Supplies out of his business earnings and borrowings made from friends and relations. He stated that as a result of this payment he had run short of capital to continue his business and appealed to the Bank to re-consider the decision of the Chairman referred to above.

7. The Deputy General Manager Stanislaus Pieris recommended to the General Manager People's Bank that the request be granted on the basis that the 1st Accused-Respondent had paid the said sum of Rs. 1.2 million to the Government Supplies Department since there had been some delay on the part of the People's Bank regarding the preparation of the documents pertaining to the said sum. On the basis of the recommendation of Mr Stanislaus Pieris the General Manager approved the granting of the request of the 1st Accused-Respondent.

8. Subsequent to the approval referred to in the above paragraph, the Borella Branch of the People's Bank had credited 1.2. million to the Current Account of the accused. Thereafter in addition to the pay order for Rs.2.3 million in favour of the Department of Government Supplies this cheque had been given to the 1st Accused Respondent to be tendered to the Department of Government Supplies. Subsequently the 1st Accused-Respondent had submitted a letter dated 20.11.1985 purported to have been issued by the Deputy Director Department of Government Supplies, stating that the sale of vehicles was handled by the

Transport Unit of the Borella Branch and had requested in the said letter that the cheque be drawn in favour of the Director of the Transport Unit. The 3rd Accused in the case who was the Manager of the Borella Branch of the People's Bank had issued a fresh cheque in favour of the Director of the Transport Unit. The said cheque had been handed over to the 1st Accused-Respondent who had acknowledged receipt of the same. A few days later the 1st Accused-Respondent had gone to the Borella Branch of the People's Bank and had requested that the description of the payee in the said cheque be altered from the Director Transport Unit to Director Colombo Transport Unit . The 3rd Accused had directed one of his subordinates to alter the said cheque. The 1st Accused-Respondent having obtained this cheque had deposited the same to the credit of an account he had opened earlier at the Hong Kong and Shanghai Bank styled, Director Colombo Transport Unit, and subsequently the 1st Accused-Respondent had withdrawn all the monies lying to his credit in this account. Thus the 1st Accused-Respondent had defrauded Rs.3.5 million from the People's Bank in the manner set out above.

It was submitted by the Learned Deputy Solicitor-General that the offences for which the Accused-Respondent had pleaded guilty are far too grave to be dealt with a non-custodial sentence and the material discloses that it was a planned crime for wholesale profit, for which deterrent punishment was called for. He contended as 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." Learned

Deputy Solicitor-General also submitted that in addition to the criteria laid down by Basnayake A C.J. in the above case that 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.

Learned Deputy Solicitor-General also relied on the observations of the Lord Chief Justice in the case of *Bashir Begum Bibi* [3] "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."

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.

Mr. D. S. Wijesinghe, President's Counsel who appeared for the Accused-Respondent 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 in the instant case 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 sentence hanging over his head. Therefore, he submitted that this court should not interfere with the sentence imposed by the Learned Trial Judge.

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 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. 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 to 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. It is unfortunate to observe in the instant case that there has been "sentence bargaining" and in our view no Trial Judge should encourage this unhealthy practice. Further 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.

In the affidavit of the accused-respondent filed in these proceedings it is to be observed that he has stated thus " I state that on the first date of the trial itself I indicated to the Learned Counsel appearing on my behalf that I would be willing to plead guilty to the charges if I was given a non-custodial sentence. However, Learned Counsel informed me that this was a matter essentially for the Honourable High Court Judge, but he would meet the Honourable High Court Judge in chambers together with the Learned State Counsel appearing for the prosecution, and attempt to persuade the Honourable High Court Judge to give me a non-custodial sentence in the event of my pleading guilty to the charges against me at the outset itself." (paragraph 4 of the affidavit of the accused-respondent). Further it is stated "that the Learned Counsel appearing on my behalf and the Learned State Counsel saw the Honourable High Court Judge in chambers and after a long delay Learned

Counsel and Learned State Counsel came back from the chambers of the Honourable High Court Judge. I was informed by Learned Counsel appearing on my behalf that there was every possibility of my getting a non-custodial sentence and on the strength of this assuarance I decided to plead guilty to the charges against me" (paragraph 5 of the affidavit of the accused-respondent). The above averment of the accused-respondent gives us the impression that the Learned Trial Judge had been a party to the unhealthy practice of sentence bargaining and permitted the dictates of the accused presented through his Counsel to influence her judicial mind in exercising what sentence should be imposed. This in our view is most regrettable.

We have carefully considered the submissions made by the Learned Deputy Solicitor-General and the Learned President's Counsel and on the material set out above we are of the view that the Accused-Respondent had been the perpetrator of a serious crime which has been committed with much deliberation and manipulation. In doing so he had made use of the Letter Heads of a Government Department and forged or caused to be forged the signatures of highly placed public officials. He also has made use of the name of a Cabinet Minister in order to achieve his purpose. This in our view is a very serious matter that should have been taken cognizance of by the Learned Trial Judge in deciding what sentence should be imposed. Had the Learned Trial Judge given her mind to the relevant factors that should have been taken into consideration as set out above in imposing sentence we are inclined to take the view that the sentence imposed may well have been different.

We are in agreement with the observations of Basnayake, A.C.J. that whilst "the reformation of the criminal though no doubt is an important consideration in assessing the punishment that should be passed on an 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 manner and the ingenuity with which the crimes that the Accused-Respondent has committed to which he has pleaded guilty, we are of the view that the sentence imposed is grossly inadequate. In our view the crimes to which the Accused-Respondent pleaded guilty are of a very serious nature and have been committed with much planning,

deliberation and manipulation and called for an immediate custodial sentence. It is to be observed that this type of white collar crimes or economic crimes have been commited with impunity in the recent past. For the reasons stated we are of the view that the sentence imposed on the accused-respondent is disproportionate and inappropriate having regard to the nature and magnitude of the offences to which he has pleaded guilty. Thus we set aside the sentence imposed by the Learned Trial Judge and sentence the Accused Respondent to a term of 4 years Rigorous Imprisonment in respect of counts 2,3,4,5,6,&7, the sentences to run concurrently, and affirm the fine of Rs. 30,000/ - imposed by the Learned Trial Judge in respect of each of the aforesaid counts. For the reasons stated above the application in revision is allowed and the sentence is varied.

Application allowed.