

KUMARA
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL

FERNANDO, J., AND
EDIRISURIYA, J.
CA 50/2001
17TH JUNE, 2002

Penal Code, section 296 – Murder reduced to culpable homicide not amounting to murder – Suspended sentence – Re-education and re-habilitation – General principles of sentencing – Mitigatory circumstances.

Held:

- (i) A suspended sentence is a means of re-educating and re-habilitating the offender, rather than alienating or isolating the offender.
- (ii) No offender should be confined to in a prison unless there is no alternative available for the protection of the community and to reform the individual.
- (iii) Imprisonment has an isolating and alienating effect on the family of the imprisoned offender because of the hardships they are faced with during the imprisonment of one of the family members.
- (iv) Suspended sentence with its connotation of punishment and pardon is supposed to have integrative powers. The offender is shown that he has violated the tenets of society and provoked its wrath, but is immediately forgiven and permitted to continue to live in society with the hope that he would not indulge in that form of behaviour again.
- (v) The accused does not have previous convictions; he surrendered to the police; he pleaded guilty on the first date of trial; he offered compensation to the aggrieved party; these amply demonstrate the mitigatory factors.

APPEAL from the judgment of the High Court of Avissawella.

Dr. Ranjith Fernando with J.P. Gamage for appellant

V.K. Malalgoda, Senior State Counsel for Attorney-General

Cur.adv.vult

July 12, 2002

EDIRISURIYA, J.

The accused in this case was indicted with having committed the murder of one Yakgala Hewage Anura Kumara, an offence punishable under section 296 of the Penal code.

On the date of the trial the accused pleaded guilty to the lesser offence of culpable homicide not amounting to murder under section 297 of the Penal code on the basis of a sudden fight. This was accepted by court and accordingly a conviction was entered.

The learned trial Judge sentenced the accused appellant to seven years' rigorous imprisonment. He also imposed a fine of Rs. 500/- on the accused appellant with a default term of six months' rigorous imprisonment.

It is admitted that on the day of the incident the deceased intervened to resolve a dispute, which arose between the accused and Janaka Polpitiya. It appears that there was another quarrel between the same parties on the day prior to the day of the incident.

Sentencing the accused, the learned trial Judge states that facts in the case do not indicate that the accused acted with the intention of causing the death of Anura Kumara. He further states that the evidence disclosed that Anura Kumara the deceased received the stab injury when he attempted to intervene in the fight between Janaka and the accused.

The learned trial Judge is of the view that the manner in which the accused responded to the advice tendered by a mature person such as Anura Kumara is a compelling reason to impose a

custodial jail sentence for the accused appellant and that there was no other way of rehabilitating the accused appellant with regard to his losing his self control than imposing a custodial jail term.

The learned counsel for the accused appellant submitted that the youth of the offender, his good character, the assistance he rendered to the police, remorse shown by him and plea of guilt are factors which may in the court's discretion be taken into account as mitigation. In support of his argument he cited certain passages from *Emmins Book on Sentencing* (Second Edition).

It is an admitted fact that the accused does not have previous convictions. It is also not in dispute that he surrendered to the police station. Furthermore he pleaded guilty on the first date of trial and offered compensation to the aggrieved party.

The aforesaid facts amply demonstrate that the mitigatory factors referred to by the learned counsel for the accused appellant are relevant and applicable to the instant case.

The learned High Court Judge has misinterpreted the offering of compensation to the family of the deceased which is a *bona fide* voluntary gesture of demonstrating regret and remorse by the accused appellant as legally unacceptable.

The learned counsel for the accused appellant invited the attention of court to the following passages from the memorandum submitted to the Minister of Justice by the Law Commission on the 30th October 1970 cited in *Criminal Procedure in Sri Lanka* by G. L. Peiris (at pgs.478-479)

Professor C.H.S. Jayawardane, Professor of Criminology in the University of Ottawa is of the view that:

"the suspended sentence with its connotation of punishment and pardon is supposed to have integrative powers. The offender is shown that he has violated the tenets of society and provoked its wrath, but is immediately forgiven and permitted to continue to live in society with the hope that he would not indulge in that form of behaviour again. To this is added the supportive argument that imprisonment has an isolating and alienating effect on the family of the imprisoned offender because of the hardships they are faced with during

the imprisonment of one of the family members. (Paragraph 5 of the memorandum)”

”It may safely be inferred that the growing use of the suspended sentence in countries throughout the world is an argument in favour of its adoption in Sri Lanka, for it is proof that the sentence is a means of re-educating and rehabilitating the offender rather than alienating or isolating him. (Paragraph 8 of the memorandum.)”

”That no offender should be confined in a prison unless there is no alternative available for the protection of the community and reform of the individual. (Paragraph 04 of the memorandum)”

It seems to me that the learned trial Judge has not directed himself on the general principles of sentencing accepted in law.

Having regard to the above circumstances I am of the view that a custodial jail term is not warranted in this case and accordingly whilst affirming the conviction. I set aside the sentence of rigorous imprisonment of seven years’ imposed on the accused appellant and substitute therefor a sentence of two years’ rigorous imprisonment on the accused appellant suspended from the date of the conviction (i.e. 27.09.2001) for a period of five years’. In addition I order the accused appellant to pay compensation in a sum of thirty thousand rupees (Rs. 30,000/-) to the next of kin of the deceased. This sum of thirty thousand rupees shall be recovered as a fine imposed by court. In lieu of payment I impose a term of two years rigorous imprisonment on the accused appellant.

Subject to this variation the appeal is dismissed.

FERNANDO, J.

I agree.

Sentence varied.