

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC**  
**OF SRI LANKA**

*In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979, read with Article 138 of The Constitution of the Democratic Socialist Republic of Sri Lanka.*

**Court of Appeal No:**

CA/HCC/0037-041/2024

**High Court of Kurunegala**

Case No: HC/201/2023

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

1. Thushara Sanjeewa Vitharana
2. Nuwara Pakshage Pradeep Nishantha  
Thilakarathne
3. Adhikari Mudiyanseelage Chaminda  
Bandara Adhikari
4. Ilaludeen Zulfikar
5. Warnasuriya Patabendige Lakshman  
Priyantha

**ACCUSED**

**AND NOW BETWEEN**

1. Thushara Sanjeewa Witharana
2. Nuwara Pakshage Pradeep Nishantha  
Thilakarathne
3. Adhikari Mudiyanseelage Chaminda  
Bandara Adhikari
4. Ilaludeen Zulfikar
5. Warnasuriya Patabendige Lakshman  
Priyantha

**ACCUSED-APPELLANTS**

**Vs.**

The Attorney General  
Attorney General's Department  
Colombo 12

**COMPLAINANT-RESPONDENT**

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Amila Palliyage with Sandeepani Wijesooriya, Savani Udugampola, Lakitha Wakishta Arachchi and Subaj De Silva for the 1 <sup>st</sup> Accused-Appellant

: Priyantha Nawanna, P.C. with Edward Jayasinghe  
and Sachini Senanayake for the 2<sup>nd</sup> and 5<sup>th</sup> Accused-  
Appellants

: Lakmal Ratnayake with Vivendra Ratnayake for the  
3<sup>rd</sup> Accused-Appellant

: Shavindra Fernando, P.C. with K.A. Arawwawala for  
the 4<sup>th</sup> Accused-Appellant

: Madhawa Tennakoon, D.S.G. with Padmal De Silva,  
S.S.C. for the Respondent

Argued on : 28-06-2024

Decided on : 18-07-2024

**Sampath B. Abayakoon, J.**

This is an appeal preferred by the accused-appellants (hereinafter referred to as the appellants) on the basis of being aggrieved by the sentence imposed upon them by the learned High Court Judge of Kurunegala after they pleaded guilty to the charges preferred against them.

The appellants were initially indicted before the High Court of Kurunegala for committing the following offences.

1. That they conspired with a common intention to do or aid and abet to commit the destruction of a building belonging to the Kurunegala Municipal Council situated at No. 01, Kurunegala-Dambulla Road, and committed the offence of conspiracy to commit mischief to the said building on or about 14-07-2020 at Kurunegala within the jurisdiction of the High Court of Kurunegala, and thereby committed an offence punishable in terms of section 02 of the Offences Against Public

Property Act No. 12 of 1982 as amended by the Offences Against Public Property (Amendment) Act No. 76 of 1988 and 28 of 1999 read with section 113B, 102 and 410 of the Penal Code.

2. At the same time and at the same transaction as mentioned in count 1, the 4<sup>th</sup> and the 5<sup>th</sup> appellants caused mischief to the earlier mentioned public property by demolishing it which had a value of Rs. 7,250,000/-, and thereby committed an offence punishable in terms of section 02 of the Offences Against Public Property Act No. 12 of 1982 as amended by the Offences Against Public Property (Amendment) Act No. 76 of 1988 and 28 of 1999 read with section 32 and 408 of the Penal Code.
3. At the same time and at the same transaction as mentioned in count 1, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants instigated or conspired or aided and abetted the 4<sup>th</sup> and 5<sup>th</sup> appellants to commit the said mischief, and thereby committed an offence punishable in terms of section 02 of the Offences Against Public Property Act No. 12 of 1982 as amended by the Offences Against Public Property (Amendment) Act No. 76 of 1988 and 28 of 1999 read with section 102 of the Penal Code.
4. At the same time and at the same transaction as mentioned in count 1, the 4<sup>th</sup> and the 5<sup>th</sup> appellants destroyed the earlier mentioned building which was an ancient monument, and thereby committed an offence punishable in terms of section 15B of the Antiquities Ordinance No. 9 of 1940 as amended by Antiquities (Amendment) Act No. 24 of 1998 read with section 32 of the Penal Code.
5. At the same time and at the same transaction as mentioned in count 1, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> appellants conspired, instigated or aided and abetted the 4<sup>th</sup> and the 5<sup>th</sup> appellants to commit the offence mentioned in count 4, and thereby committed an offence punishable in terms of section 15B of the Antiquities Ordinance No. 9 of 1940 as amended by Antiquities (Amendment) Act No. 24 of 1998 read with section 102 of the Penal Code.

After the indictment was forwarded to the High Court of Kurunegala, and before the appellants were served with summons, they have filed a motion through their Counsel with notice to the Hon. Attorney General who is the complainant-respondent of this matter, and has gotten the matter mentioned before the High Court on 14-12-2023.

The learned President's Counsel who represented the appellants had intimated to the Court that the appellants are willing to get the matter concluded by way of a shortcut and has urged the Court to facilitate the same.

The learned Deputy Solicitor General (DSG) who represented the complainant-respondent before the High Court has agreed to that suggestion, and upon his request, the matter has been adjourned for a while. Accordingly, when the High Court reassembled, it has been informed to the Court by the learned DSG that he was informed by the learned President's Counsel who represented the appellants that the appellants are willing to plead guilty to a lesser offence than what was mentioned in the indictment, and they are also willing to pay the full amount assessed by the National Building Research Organization as the cost of reconstruction of the building, which amounts to a sum of Rs. 13.75 Million.

Accordingly, as requested, the said amount has been deposited to the Court account with the permission of the learned High Court Judge, and the prosecution has amended the 1<sup>st</sup> three counts of the indictment by removing the penal section which has been referred as section 02 of the Offences Against Public Property Act No. 12 of 1982 as amended, and by amending the said three counts as offences punishable in terms of section 410 of the Penal Code.

This goes on to show that the prosecution too has well facilitated the process of concluding the matter without the action being going into a protracted trial.

Once the amended indictment was read over to the appellants, all of them have unconditionally pleaded guilty to the respective charges preferred against them.

The prosecution as well as the appellants have made their respective submissions before the Court. On behalf of the prosecution, the learned DSG has made submissions as to the aggravating circumstances, while the learned President's Counsel who represented the appellants has pleaded in mitigation urging the Court's indulgence to consider leniency in sentencing the appellants.

The learned High Court Judge of Kurunegala pronouncing his sentencing order on the same day, namely, on 14-12-2023, and after having considered the mitigatory and the aggravating circumstances, and the fact that the appellants have unconditionally pleaded guilty for all the respective counts preferred against them, has sentenced the appellants in the following manner.

**On count 1,** all the appellants have been sentenced to a period of 1 year each rigorous imprisonment, and in addition, they have been ordered to pay Rs. 25,000/- each fine. In default of the fine, each appellant to serve a period of 6 months simple imprisonment.

**On count 2,** the 4<sup>th</sup> and the 5<sup>th</sup> appellants have been sentenced to a period of 1 year each rigorous imprisonment, and in addition, they have been ordered to pay Rs. 50,000/- each fine. In default of the fine, each appellant to serve a period of 6 months each simple imprisonment.

**On count 3,** 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> appellants have been sentenced to a period of 1 year each rigorous imprisonment, and in addition, they have been ordered to pay Rs. 50,000/- each fine. In default of the fine, each appellant to serve a period of 6 months each simple imprisonment.

**On count 4,** the 4<sup>th</sup> and the 5<sup>th</sup> appellants have been sentenced to a period of 1 year each rigorous imprisonment, and in addition, they have been ordered to pay Rs. 50,000/- each fine. In default of the fine, each appellant to serve a period of 6 months each simple imprisonment.

**On count 5**, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants have been sentenced to a period of 1 year each rigorous imprisonment, and in addition, they have been ordered to pay Rs. 50,000/- each fine. In default of the fine, each appellant to serve a period of 6 months each simple imprisonment.

Since the learned High Court Judge has not stated that the sentences should be served concurrently to each other, for all intended purposes, the appellants' sentences should be considered as consecutive to each other, which means each appellant have been sentenced to a total period of 3 years rigorous imprisonment, in addition to the fines, and the default sentences imposed upon them.

When this matter was mentioned before this Court for consideration, it was informed by the learned President's Counsel and the other learned Counsel who represented the appellants that they will restrict the arguments of their appeal only in order to urge this Court to consider varying the sentences imposed upon the appellants, for them to serve the sentences concurrently to each other.

Therefore, it needs to be noted that this appeal against the sentence was considered only on that basis.

At the hearing of this appeal, the learned President's Counsel and the other learned Counsel who represented the appellants submitted that, since the offences under which the appellants were charged and pleaded guilty relates to one and the same incident, the learned High Court Judge should have considered imposing the sentences to run concurrently to each other. The learned Counsel justified their application in that regard citing the judicial precedents in a situation of this nature.

The learned DSG who represented the Hon. Attorney General opposed the application stating that there was no basis for the learned High Court Judge to order that the sentences should be concurrent to each other, and therefore, the

sentencing order of the learned High Court Judge was justified and there is no basis for this Court to interfere with the sentencing order of the learned High Court Judge.

There can be no doubt that the five counts preferred against the appellants had been based on one incident, namely the destruction of a building. The above fact is very much clear in the manner in which the indictment has been presented to the High Court. The 1<sup>st</sup> count has been a charge against all the 5 appellants based on conspiracy, and thereby agreeing to commit mischief by destroying a building, punishable in terms of section 410 of the Penal Code. The said offence was said to have been committed on or about 14-07-2020.

The mentioned 2<sup>nd</sup> to 5<sup>th</sup> counts are counts relating to the 1<sup>st</sup> count as mentioned in the said counts itself.

**Archbold 2019 at page 5A-171** refers to sentencing policy that should be considered when sentencing an offender for offences arising from the same incident in the following manner.

*“As a general principle, consecutive terms should not be imposed for offences which arise out of the same transaction or incident, whether or not they arise out of precisely the same facts, but much is left to the discretion of the Court : See R. Vs. Lawrence, 11 Cr.App.R.(S.) 580, CA; R. Vs. Noble (2002) EWCA Crim 1713; (2003) 1 Cr.App.R.(S.) 65 (consecutive sentences for causing death by dangerous driving quashed; exceptional cases justifying departure from the normal principle tend to involve different offences) ...*

*A Court may depart from the principle requiring concurrent sentences for offences forming part of one transaction if there are exceptional circumstances: R. Vs. Wheatley, 5 Cr.App.R.(S.) 417, CA; and R. Vs. Billon, ibid. at 439, CA. See also R. Vs. Jordan (1996) 1 Cr.App.R.(S.) 181, CA; and R. Vs. Fletcher (2002) EWCA Crim 834; (2002) 2 Cr.App.R.(S.) 127*



*(consecutive sentences for indecent assault and threats to kill arising from the same incident justified, the gravamen of the offence being different)."*

In the case of **Rex Vs. R.P.D. Hotha and Another 34 CLW 11**, the two appellants were convicted under 6 counts for offences committed in the course of the same transaction. The sentences imposed were ordered to run consecutively, but the total of the sentences did not exceed the total which would have been passed for the most serious of those offences. On appeal against the sentence, the Court expressed the view that it would be better in such cases to make sentences run concurrently, and varied the sentence giving effect to the opinion to the Presiding Judge that the accused merited a sentence of at least 10 years.

In the judgment, **Canon, J.** observed;

*"An interesting point has been raised by Mr. Kumarakulasingham for the appellant as a ground for their appeal against the sentence. He submits that the indictment is prolix in so far that some of the offences charged constitute part of the other offences which have been separately charged and that therefore, the sentences passed for such offences should have been made concurrent and not consecutive. In support of this submissions, he cites section 67 of the Penal Code, the first paragraph of which reads:*

*'Where anything which is an offence is made of parts any of which parts is itself an offence, the offender shall not be punished with the punishment for more than one of such offences, unless it be so expressly provided'. "*

In the case of **Jayasuirya Vs. Ratnayake, S.I. Police 44 CLW 47, Gratiaen, J.** observed;

*"Both charges relate to the same incident and to the use of same abusive and filthy language, so that one single conviction and certainly one sentence would in any event have met the ends of justice. If the man offends against the law, it seems to me contrary to the principle and to the spirit of section*

*67 of the Penal Code to punish him more than once for what he has done merely because a single Act happens to contravene more than one provision of the criminal law.”*

When it comes to the facts relevant to this case, as I have stated before, all the charges emanate from the incident of causing destruction to the building situated at No. 01, Kurunegala-Dambulla Road. It is amply clear that the learned High Court Judge has well considered the aggravating circumstances as well as the mitigatory circumstances pleaded on behalf of the appellants when sentencing the appellants for 01 year each rigorous imprisonment for each of the separate counts preferred against them and the fines. Since the appellants no longer canvass the sentence *per se*, it is the view of this Court that no further comment would be necessary in that regard.

However, it is my considered view that in sentencing the appellants, the attention of the learned High Court Judge should have drawn to the charges filed against the appellants in order to decide whether the sentence should be concurrent or consecutive, with the relevant sentencing principles in mind.

It needs to be observed, that the 1<sup>st</sup> and the 3<sup>rd</sup> count preferred relates to the same alleged conspiracy. In my view, when the 1<sup>st</sup> count refers to all the 5 appellants engaging in a conspiracy and to aid and abet to cause mischief to the mentioned building, and thereby committing an offence punishable in terms of section 410 of the Penal Code, the facts mentioned in the 3<sup>rd</sup> count, which has been drafted as a separate count also includes in the 1<sup>st</sup> count itself, which is a fact, in my view, should have been considered by the learned High Court Judge in sentencing the appellants.

Another matter that should have been considered by the learned High Court Judge, in my view, was the fact that the 4<sup>th</sup> and the 5<sup>th</sup> count preferred against the appellants in terms of the Antiquities Ordinance for causing destruction to an ancient monument, and thereby committing an offence punishable in terms

of section 15B of the Antiquities Ordinance, refers to the one and the same offence mentioned in the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> count in the indictment.

The difference being that the 1<sup>st</sup>, 2<sup>nd</sup>, and the 3<sup>rd</sup> count under section 410 of the Penal Code, while the 4<sup>th</sup> and the 5<sup>th</sup> count under a separate statute, namely under the Antiquities Ordinance, which provides for the charging of an accused under a specific statute for offences alleged to have been committed under the same corresponding provisions of the Penal Code.

I am of the view that although the appellants have pleaded guilty to all the 5 counts preferred against them, when sentencing, the learned High Court Judge should have considered the 4<sup>th</sup> and the 5<sup>th</sup> count as alternate counts to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> count, since, if not, it would be amounting to sentencing the appellants twice for the same offence, although under two different statutes.

Under the aforementioned circumstances, I am of the view that sentencing the appellants to serve the sentences imposed upon them concurrently to each other would have been the justifiable sentence that should have been passed on them.

Accordingly, I hold that the respective separate jail sentences imposed upon the accused-appellants shall be served concurrently to each other.

Accordingly, I vary the sentencing order dated 14-12-2023 pronounced by the learned High Court Judge of Kurunegala by adding the directive that the sentences imposed upon the accused-appellants shall be served concurrently to each other.

It was brought to the notice of the Court that although the appellants preferred this appeal challenging the sentence, they are still under the prison custody as their bail pending appeal applications have not been taken up for consideration up until the time this matter was argued.

Hence, acting in terms of the Code of Criminal Procedure (Amendment) Act No. 25 of 2024, it is directed that the period of imprisonment the appellants now

stand to serve shall deem to have commenced from their original date of conviction by the High Court, namely, from 14-12-2023.

The Registrar of the Court is directed to communicate this judgment to the High Court of Kurunegala along with the original case record after the relevant period for necessary procedural steps.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal