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, against the Judgment of the High Court of Balapitiya case No. 2780/21.

Court of Appeal No:

CA/HCC/0140/2023

High Court of Balapitiya

Case No: HC/2780/21

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Kaluwahandi Asanka Indikarathna *alias* Janaka
2. Ambepitiyage Don Samith Madhushanka

ACCUSED

AND NOW BETWEEN

Kaluwahandi Asanka Indikarathna *alias* Janaka

1ST ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Neranjan Jayasinghe with Randunu Heellage, Lahiru Vidushanke and Imangsi Senarath for the Accused-Appellant
	: Malik Azeez, S.C. for the Respondent
Argued on	: 28-03-2024
Written Submissions	: 25-03-2024 (By the Complainant-Respondent)
	: 13-03-2024 (By the Accused-Appellant)
Decided on	: 30-05-2024

Sampath B. Abayakoon, J.

The 1st accused-appellant (hereinafter referred to as the appellant), along with another, was indicted before the High Court of Balapitiya, for committing the offence of attempted murder, punishable in terms of section 300 read with section 32 of the Penal Code.

The indictment has been served on the appellant on 14-10-2021. The 2nd accused has been served with the indictment on 25-11-2021. The trial has been initially fixed for 15-03-2022. Since the appellant was absent and said to be in remand in relation to another case, the trial has been postponed for 27-

07-2022. On the said date, the 2nd accused had been absent and it had been informed to the Court that he has left the country.

However, on the same day, the prosecuting State Counsel has informed the Court that he intends to amend the indictment by including section 44(a) of the Fire Arms Ordinance, since the offence has been committed using a gun.

Thereafter, the learned High Court Judge has taken steps under section 241 of the Code of Criminal Procedure Act in relation to the absconding 2nd accused.

When the case was mentioned on 17-03-2023, it has been informed to the Court that the appellant intends to plead guilty to the charge against him. Most probably because of that, the prosecution has not amended the charge as indicated earlier to the Court, and the appellant has pleaded guilty to the charge on 06-04-2023.

In has been intimated to the Court that the appellant and the injured are now friends and the appellant is willing to pay a sum of Rs. One million as compensation.

After having listened to the mitigatory circumstances pleaded on behalf of the appellant and also having listened to the PW-01 who was the injured of this incident and after observing his present medical condition as a result of the gunshot injuries he suffered to his head, as well as the previous conviction record of the appellant, the learned High Court Judge of Balapitiya has sentenced the appellant in the following manner.

(1) Fifteen years rigorous imprisonment.
(2) A fine of Rs 25000/-, and in default to a simple imprisonment of six months.
(3) In addition to the above, a compensation in a sum of Rs. 1,000,000/- to be paid to the PW-01 in terms of section 28 of the Assistance to and Protection of Crime and Witnesses Act No 04 of 2015.

(4) It has been directed that if the appellant fails to pay the said compensation, it shall be recovered from him as a fine, and in default, he shall serve a simple imprisonment period of two years.

On the basis of being aggrieved by the above sentence, the appellant has preferred this appeal.

The Ground of Appeal

At the hearing of this appeal, the learned Counsel for the appellant urged the following ground of appeal for the consideration of the Court.

(1) The learned High Court Judge has not considered the mitigatory factors in the correct perspective when imposing the sentence on the appellant.

Consideration of the Ground of Appeal

The submission of the learned Counsel for the appellant was mainly based on the premise that the sentence imposed upon the appellant after he pleaded guilty to the charge without wasting valuable time of the Court, and offered to pay sufficient compensation, the sentence imposed was excessive. He was of the view that the learned High Court Judge has gone on presumptions against the appellant, and the comments made by the learned High Court Judge in his sentencing order was not appropriate, given the facts and the circumstances of the case.

It was the view of the learned State Counsel on behalf of the respondent that, the fact that an accused person pleaded guilty to a charge should not be the only consideration in deciding the appropriateness of a sentence. He submitted that the learned High Court Judge has correctly considered the facts and the circumstances that led to the PW-01 receiving serious gunshot injuries to his head, and the present health condition of the injured, as well as the previous conviction record of the appellant, as relevant in his sentencing order.

It was his position that the sentence imposed on the appellant was within the permitted legal parameters of the Penal Code and cannot be termed excessive as claimed on behalf of the appellant.

The learned State Counsel moved for the dismissal of the appeal for want of merit.

The relevant section 300 of the Penal Code under which the appellant had pleaded guilty reads as follows;

> **Section 300-Whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine; and it hurt is caused to any person by such act, the offender shall be liable to imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine.**

As pointed out correctly by the learned State Counsel, since the injured have received serious gunshot injuries to his head as a result of this incident, the sentence that can be imposed upon a person found guilty can extend up to twenty years imprisonment of either description. Hence, it is clear that the sentence imposed upon the appellant has been within the legally permitted limits in terms of the relevant section.

Therefore, the only question that needs to be determined in this appeal is whether the sentence can be termed excessive, as contended on behalf of the appellant, or whether it was reasonable enough, given the facts and the circumstances of the case.

I am in agreement with the submission of the learned State Counsel that although the fact of pleading guilty to a charge can be considered in mitigation of the sentence, that alone would not be a criterion for imposing a lenient sentence on an accused. I am of the view that offering to pay compensation cannot add much value in mitigation, as in any way, compensation can be ordered after an accused is found guilty to an offence of this nature.

It is imperative on a trial judge to consider the mitigatory as well as aggravating circumstances in an equal footing and come to a determination as to what would be the appropriate punishment of an accused, even after such a person having pleaded guilty to the charge or charges against him.

In the case of **Attorney General Vs. H.N.De Silva 57 NLR 121, Bssnayake, A.C.J.** observed as follows;

> *"In assessing the punishment that should be passed on an offender, 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 should, in determining the proper sentence, 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. If the offender held a position of trust or belonged to a service, which enjoys the public confidence, that must be taken into account in assessing the punishment. The incident of crimes of the nature of which the offender has been found to be guilty, and the difficulty of detection are also matter which should receive due consideration. The reformation of the criminal, though no doubt an important consideration is subordinate to others I have mentioned.*

Where the public interest or welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail"

The Indian Supreme Court held in the case of **Sevaka Perumal et al. Vs. State of Tamil Nadu AIR 1991 SC 1463** that;

"Protection of society and stamping out criminal activity must be the object of the law which must be achieved by imposing appropriate sentence…Therefore, undue sympathy to impose adequate sentence would do more harm to the justice system to undermine the public confidence in the efficiency of law and society could not long endure under serious threats. If the Court did not protect the injured, the injured then would resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc…"

The above principles were considered and followed by **S.N.Silva, J.** (As he was then) in the case **Attorney General Vs. Ranasinghe and others (1993) 2 SLR 81**, where the appropriateness of imposing suspended sentences on accused who pleaded guilty to the charges against them were considered.

Although no evidence has been led in the case, there was facts before the Court to consider the appropriate sentence on the appellant, having considered the mitigatory as well as aggravating factor in this case. It is clear that the PW-01 has been shot at from a close range using a firearm. The Government Analyst report made available shows that the weapon used was a gun in terms of the FireArms Ordinance. The injured has received serious gunshot injuries to his head and the chest, which has been categorized as injuries sufficient to cause death in the ordinary course of nature. This amply provides that the appellant had knowledge as well as a clear intention to kill the PW-01.

The learned High Court Judge has had the advantage of observing the fact that even after nearly eight years of the incident, the PW-01 was not in a position to properly speak and walk as a result of the injuries sustained by him, which should also be an aggravating factor.

Besides all this, the previous conviction record of an accused is also an important factor when determining the sentence, irrespective of the fact that he pleaded guilty to the charge, or found guilty after trial.

The appellant was a person who was found guilty of murder in terms of section 296 of the Penal Code of a judgment dated 09-01-2009 and sentenced to death. However, upon an appeal, his conviction has been reduced to that of culpable homicide not amounting to murder in terms of section 297 of the Penal Code, and he had been sentenced to seven years rigorous imprisonment on 15-11-2007.

The offence relating to this action has been committed on 15-12-2015. This means that the appellant was a person who knew very well the consequences of his actions, but showed scant disregard to the law.

It clearly appears from the sentencing order that the learned High Court Judge had considered not only the aggravating factors but, the relevant mitigatory factors when it was decided to reduce five years from the maximum possible sentence that can be imposed on the appellant.

I am not in a position to agree with the submission of the learned Counsel that, the learned High Court Judge has taken into consideration irrelevant matters in his sentencing order. It appears that what the learned Counsel refers to is the comments made by the learned High Court Judge as to what the proper charge should have been against the appellant, if the charges were drafted properly by the prosecuting authority.

It is abundantly clear that the injuries caused to the PW-01 had been caused by using a firearm, where the Government Analyst Report confirms that the weapon used was a gun. The police investigators have recovered the alleged gun used in the crime and spent cartridges, which has been analyzed by the Government Analyst and issued his Report. The drafters of the indictment should have all the necessary extracts of the evidence, investigation reports such as Government Analyst Report, Medico Legal Report, Non-Summary proceedings, etc., for consideration before the indictment was forwarded to the relevant High Court. It is quite obvious to a legally trained person like a High Court Judge that the charge should have been in terms of section 44(a) of the Fire Arms Ordinance read with section 300 of the Penal Code, where the punishment, if found guilty would-be life imprisonment. Even the prosecuting State Counsel has recognized this fact when he informed the Court that he intends to amend the charge accordingly.

I find that the learned High Court Judge has commented on these matters not with the intention of considering them as aggravating factors against the appellant. It is clear that the intention of the learned High Court Judge had been only to bring these matters to the attention of the relevant authorities with the view of emphasizing the importance of forwarding a correct indictment after having considered the relevant facts and the applicable law, so that amendments can be avoided at later stages of a case, and nothing else.

I view the comments made by the learned High Court Judge in this regard as part of the duties of a trial judge, which should be brought into open, so that the delivery of justice would be more efficient.

Since it is clear that the learned High Court Judge has not been influenced in any way when sentencing the appellant by his above considered comments, I find that no prejudice has caused to the appellant as contended.

It is my considered view that the sentence imposed upon the appellant was a fair and reasonable sentence having considered the facts and the circumstances of the case.

Accordingly, the appeal is dismissed for want of merit.

However, as the appellant has been in incarceration from his date of conviction pending the determination of the appeal, it is ordered that the sentence shall deem have commenced from his date of the sentence on 06-04-2023.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal