

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

In the matter of an Appeal to the Supreme Court
from a Judgment of the High Court in an
Appeal to the High Court against a Judgment of
the Magistrates Court.

Bopitiya Vidanagamage Sarath
alias Sarath Michal Sander,
No. 9/4, De Saram Road,
Mount Lavinia.

Accused-Appellant-Petitioner

SC. SPL. LA. No. 05/2020
HC Colombo Case No. HCMCA 12/2016
MC Colombo Fort Case No.19911/14

Vs.

1. Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.

Respondent – Respondent

2. Officer-in-Charge,
Colombo Fraud Investigation Bureau,
Wellawatte,
Colombo-06.

Complainant – Respondent – Respondent

Before: Yasantha Kodagoda, PC, J.
A.H.M.D. Nawaz, J. &
Janak De Silva, J

Counsel: Dulinda Weerasooriya, PC with Pasan Malinda for the Accused-Appellant-Petitioner.
Varunika Hettige, Senior Deputy Solicitor General for the Respondents.

Argued, decided and Judgment pronounced on 27th November 2023.

Yasantha Kodagoda, PC, J.

In this matter, having heard learned President's Counsel for the Petitioner in support of the Application seeking the grant of *Special Leave to Appeal* and learned Senior Deputy Solicitor General for the Respondents, this Court granted *Special Leave to Appeal* on the following questions of law:

1. Was the procedure followed by the learned Judge of the High Court in determining the sentence to be imposed on the Accused - Appellant - Petitioner, lawful?
2. Were the enhanced penal sanctions imposed by the High Court on the Accused - Appellant - Petitioner lawful?

Following the grant of *Special Leave to Appeal*, acting in terms of the proviso to Rule 16 of the Supreme Court Rules and having obtained the consent of both parties, the hearing of the substantive Appeal took place forthwith.

Background

On 14th October 2014, the Complainant (the present 'Complainant - Respondent - Respondent') instituted criminal proceedings against the Appellant in the Magistrates Court of Colombo Fort, for having allegedly committed the following offences:

- (1) That on or about 29th October 2013 in Colombo committed the offence of Cheating, an offence punishable in terms of section 403 of the Penal Code, by having deceived Liyanage Sriyani Anoma and thereby got her to handover a sum of Rs. 1,862,490.00 on the pretext that a jeep would be imported from a foreign country and it would be given to her, and thereafter by not having delivered that jeep to her.

- (2) That on or about the same day and place, having obtained a sum of Rs. 1,862,490.00 from Liyanage Sriyani Anoma on the pretext that a jeep will be imported from a foreign country, criminally misappropriated the said sum of money, and thereby committed the offence of Criminal Misappropriation of Property punishable under section 386 of the Penal Code.

Following trial, the learned Magistrate found the Accused (the present 'Accused - Appellant - Appellant') 'guilty' of having committed the offence of Cheating, and convicted him for having committed the first offence on the charge sheet. He was acquitted of the second count of Criminal Misappropriation of Property. A term of simple imprisonment of 1 year suspended for 5 years and a fine of Rs. 1,500.00 with a default sentence of 1 month imprisonment was imposed on the Accused in respect of the conviction.

Aggrieved by the conviction and the sentence, the convicted Accused appealed to the High Court. Following a hearing of the Appeal, the learned Judge of the High Court affirmed the Judgment of the learned Magistrate. However, he varied the sentence imposed by removing the period of suspension of the term of imprisonment and thereby making the term of imprisonment operative [by converting the suspended (non-custodial) term of imprisonment into a substantive (custodial) term of imprisonment], and by making order that the Accused - Appellant pays the virtual complainant a sum of Rs. 1,862,490.00 as compensation.

At the hearing of the Petition urging the grant of *Special Leave to Appeal*, it was decided by this Court that the review of the impugned judgment of the High Court should be limited to the two questions of law cited above, which relate to the enhanced sentence imposed on the Accused - Appellant - Petitioner (now the 'Accused - Appellant - Appellant') by the learned Judge of the High Court. The Court formed the view that as correctly decided by both the learned Magistrate and the learned Judge of the High Court, the evidence led at the trial, supported the conviction of the accused in respect of the charge of Cheating.

Thus, during the hearing of this Appeal, the focus of the arguments presented by learned counsel centered around the enhancement of the sentence and the imposition of an order for the payment of compensation by the High Court during the appellate hearing held before that Court, and the procedure followed in that regard.

Consideration of the submissions and findings of Court

Learned President's Counsel for the Appellant submitted that, to the utter dismay of the Appellant and his counsel, immediately following the delivery of the judgment affirming the conviction of the Accused – Appellant, the learned Judge of the High Court had without affording an opportunity to counsel, imposed a substantive sentence of imprisonment of 1 year (thereby vacating the order made by the learned Magistrate suspending the term of imprisonment) and imposed a fine of Rs. 1,500.00 (which was the same fine imposed by the learned Magistrate). The learned judge had also ordered the Accused – Appellant to pay a sum of Rs. 1,862,490.00 as compensation to the virtual complainant. In response to a question posed by this Court, learned Deputy Solicitor General, who appeared for the Respondents, submitted that learned State Counsel who appeared for the Respondents before the High Court had not moved the High Court for an enhancement of the sentence imposed on the Accused by the learned Magistrate. This fact is supported by the oral submissions made by both learned counsel before the High Court, which has been reproduced in the case record, verbatim.

Thus, this Court is faced with the vexed question as to why the learned Judge of the High Court who exercised appellate jurisdiction decided to enhance the sentence imposed by the learned Magistrate and as to why he did not invite learned counsel for the Appellant and the Respondent to address court on the question of the sentence. The impugned judgment of the High Court does not offer any reason as to why the learned Judge of the High Court deemed it necessary or just to interfere with the sentence imposed by the learned Magistrate and enhance it.

This takes me to the ensuing question as to why the learned Magistrate decided to suspend the term of imprisonment of 1 year. Section 303(1) of the Code of Criminal Procedure Act empowers a court when sentencing an offender to a term of imprisonment, having regard to the certain factors specified in that section, at its discretion, make order suspending the whole or part of the sentence of imprisonment. He may do so, if the court is satisfied, for reasons to be stated in writing, that it is appropriate to do so (suspend the whole or any part of the substantive term of imprisonment) in the circumstances of the case.

The factors which a court when deciding on whether or not a term of imprisonment should be suspended, are required to take into consideration are –

- (a) the maximum period of imprisonment prescribed for the offence in respect of which the sentence is imposed;

- (b) the nature and the gravity of the offence;
- (c) the offender's culpability and degree of responsibility for the offence;
- (d) the offender's previous character;
- (e) any injury, loss or damage resulting directly from the commission of the offence;
- (f) the presence of any aggravating or mitigating factors concerning the offender;
- (g) the need to punish the offender to an extent, and in a manner, which is just in all the circumstances;
- (h) the need to deter the offender or other persons from committing offences of the same or of a similar character;
- (i) the need to manifest the denunciation by the court of the type of conduct in which the offender was engaged in;
- (j) the need to protect the victim or the community from the offender;
- (k) the fact that the person accused of the offence pleaded '*guilty*' to the offence and such person is sincerely and truly repentant; and
- (l) a combination of two or more of the above factors.

It is necessary to take note of the fact that these factors which are in essence general principles recognized by law governing the determination of a sentence, are two-fold. While one set of factors justify the imposition of an order suspending a term of imprisonment, the other set operates against the suspension of a term of imprisonment. A judge who is called upon to exercise discretion on whether or not to suspend a term of imprisonment he has decided to impose on the convicted accused, must take into consideration all these factors and on a consideration of the cumulative impact arising out of the application of all these factors, decide whether or not to suspend the identified period of imprisonment. That would only be if the imposition of a suspended term of imprisonment is not excluded by section 303(2). It is necessary to place on record that the function of imposing a suspended term of imprisonment or refusal to do so, must not take the form of a perfunctory exercise of judicial discretion. It must be a decision carefully and judiciously taken following an objective consideration of all attendant facts and circumstances. Furthermore, as contained in section 303(1), reasons for the decision (independent of whether or not to suspend the identified term of imprisonment) must be recorded in the sentencing order.

The sentencing order of the learned Magistrate (vide journal entry of 14th December 2015) contains a brief reference to the fact that the '*fingerprint report*' has been received and that the accused has '*no previous convictions*'. Thus, the conclusion to be reached is that, the learned Magistrate had taken into consideration the fact that the accused had not been

previously found 'guilty' of having committed any offence, and thus, till the time he committed the offence in issue, he had an unblemished character. That is indeed a factor recognized by section 303 which justifies the imposition of a suspended term of imprisonment.

In comparison with the separate sentencing order imposed by the learned Magistrate, at the tail end of the impugned judgment of the High Court is what may be identified as the 'sentencing order'. It contains no reasons which indicate why the learned Judge of the High Court deemed it necessary to vacate the suspended term of imprisonment imposed by the learned Magistrate and substitute thereof a substantive term of imprisonment. With regard to administrative decisions, this Court has time and again expressed the view that the absence of reasons for the impugned decision recorded contemporaneously with the recording of the impugned decision, lends support to the allegation that the decision had been arrived at arbitrarily or unreasonably or that no valid reasons are available. That principle applies to judicial decisions as well. As justice must not only be done, and must manifestly be seen to have been done, reasons must be recorded contemporaneously with the decision.

I must also record another aspect to this case. Should the learned Judge of the High Court having considered the attendant facts and circumstances relating to this case, developed a provisional view that the sentence imposed by the learned Magistrate should be revised, he should have afforded an opportunity to the learned counsel for the Accused - Appellant and the Respondents to address court regarding the matter of the sentence. *Audi Alteram Partem* which is a component of the *Rules of Natural Justice* which regulates the need to act fairly not only in administrative decision-making, but in judicial decision-making as well, necessitates the adoption of such a fair procedure. That the learned Judge of the High Court did not resort to this procedure is another factor which necessitates the order of sentence of the High Court to be vacated.

In these circumstances, we conclude that the order made by the learned Judge of the High Court vacating the suspended term of imprisonment imposed by the learned Magistrate is unlawful and thus it must be set-aside.

I shall now consider the order made by the learned Judge of the High Court directing the Accused - Appellant to pay a sum of Rs. 1,862,490.00 as compensation to the virtual complainant. Section 28(1)(a)(i) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015 which was operative at the time the learned Judge of

the High Court exercised appellate jurisdiction, empowers a court that finds an accused 'guilty' of the charge(s) against him and therefore convicts him, to, in addition to the imposition of the punishment prescribed for that offence, require the convicted accused to pay compensation to the virtual complainant (victim of crime) in a sum to be determined by the learned Judge. That sum shall not exceed One Million Rupees (Rs. 1000,000.00). This order for the payment of compensation which a court may impose is a penal measure by which the victim of a crime can receive reparation in respect of the offence committed against such party and the loss suffered. It enables the victim to receive compensation from the accused from the criminal justice system itself, without having recourse to the civil justice system. However, an order for the payment of compensation when imposed by a court that has exercised criminal jurisdiction is certainly a penal measure, which is an extension to the punishment prescribed for the relevant offence. That it is a penal measure similar to a fine is evident from the fact that non-payment of compensation ordered can attract a default term of imprisonment. It should be noted that the offence for which the Accused - Appellant - Appellant had been convicted had been committed on or about 29th October 2013. Whereas, as at that time, Act No. 5 of 2015 had not been enacted. Hence, what the learned Judge of the High Court has done amounts to the imposition of a penal measure retroactively. This violates Article 13(6) of the Constitution, which *inter-alia* provides that no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed. In the circumstances, it is the view of this Court that the order made by the learned Judge of the High Court for the payment of compensation of Rs. Rs. 1,862,490.00 is unconstitutional and therefore unlawful. Therefore, that component of the order of sentence appearing at pages 6 and 7 of the impugned judgment of the High Court dated 29th November 2019 cannot stand and therefore needs to be set aside.

In view of the foregoing, I answer the two question of law in respect of which Special Leave to Appeal was granted in the following manner:

1. The procedure followed by the learned Judge of the High Court in determining the sentence to be imposed on the Accused - Appellant - Petitioner, was unlawful.
2. The enhanced penal sanctions imposed by the High Court on the Accused - Appellant - Petitioner was unlawful.

In the circumstances, this Court exercising its appellate jurisdiction makes the following orders.

- 1) The Order made by the learned High Court Judge exercising appellate jurisdiction affirming the conviction pronounced by the learned Magistrate is affirmed.

- 2) The Orders of sentence contained in pages 06 and 07 of the impugned order of the High Court Judge dated 29th November 2019 are hereby vacated and set aside.
- 3) The learned Judge of the High Court is directed to hear both counsel for the Appellant and the Respondent and make a fresh lawful order regarding the sentence imposed by the learned Magistrate.

The Registrar of this Court shall take steps to forthwith remit the case record back to the High Court of Colombo. Upon receipt of the original case record and copy of this Judgment, the High Court of Colombo shall issue Notice on the Accused-Appellant-Petitioner-Appellant and the Hon. Attorney-General and fix this matter for hearing only on the question of exercising appellate jurisdiction with regard to the imposition of the order of sentence by the learned Magistrate. Following fair hearing, the learned Judge of the High Court will make a suitable lawful order with regard to the sentence.

In view of the foregoing, this Appeal is partly allowed and the proceedings are terminated.

JUDGE OF THE SUPREME COURT