

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

In the matter of an application for Special Leave to  
Appeal under and in term of Article 128 of the  
Constitution against the Judgment of the Court of  
Appeal

Democratic Socialist Republic of Sri Lanka

**Complainant**

**SC/SPL/LA 290/2008**

**SC/SPL/LA 293/2008**

**CA 184,184A-187/1996**

**HC Colombo Case No.6763/94**

Vs,

1. Wasantha Basnayake
2. John Cyril Nimal Fernando
3. Veerappan Murugan Kandiah
4. Arthur Patrick St' John Jackson
5. Thangeshwary Sundaramoorthy

**Accused**

**And**

1. Wasantha Basnayake
2. John Cyril Nimal Fernando
3. Veerappan Murugan Kandiah
4. Arthur Patrick St' John Jackson
5. Thangeshwary Sundaramoorthy

**Accused-Appellants**

Vs,

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

**Complainant –Respondent**

**And now between**

4. Arthur Patrick St' John Jackson
5. Thangeshwary Sundaramoorthy

**4<sup>th</sup> and 5<sup>th</sup> Accused-Appellant-Appellant**

**Vs,**

Attorney General,  
Attorney General's Department,  
Colombo 12.

**Respondent- Respondent**

**Before: Hon. Justice Vijith K. Malalgoda PC**

**Hon. Justice L.T.B. Dehideniya**

**Hon. Justice S. Thurairaja PC**

**Counsel:** Dr. Ranjith Fernando for the 4<sup>th</sup> Accused- Appellant-Appellant

Razik Zarook, PC with Rohana Deshapriya. Chanukya Liyanage and Thilak Wijesinghe for the 5<sup>th</sup> Accused- Appellant-Appellant

Priyantha Nawana PC, ASG for the Hon. Attorney General

Argued on: 22.03.2019

**Decided on: 25.07.2019**

**Vijith K. Malalgoda PC J**

Five Accused including the Accused-Appellant-Petitioner in SC/SPL/LA Application 290/2008 namely Thangeshwary Sundaramoorthy and the Accused-Appellant-Petitioner in SC/SPL/LA 293/2008 namely Arthur Patrick St' John Jackson were indicted before the High Court of Colombo by the

Attorney General on several charges for committing the offence of conspiracy to commit the offence of Criminal Breach of Trust, for committing the offence of Criminal Breach of Trust and for committing the offence of aiding and abetting to the said offence of Criminal Breach of Trust.

At the conclusion of the trial before the High Court, the learned High Court Judge had convicted all 5 accused and sentenced them accordingly. Being aggrieved by the said conviction and sentence, all 5 accused had appealed to the Court of Appeal.

The Court of Appeal by its order dated 08.10.2008 dismissed the said appeal and affirmed, both the conviction and the sentence.

All five accused have filed papers for Special Leave before the Supreme Court against the said order but delayed supporting the said applications until today.

As observed by me these applications are before the Supreme Court for over 10 years.

Whilst these appeals were pending for support before the Supreme Court, three Petitioners namely Wasantha Basnayake, John Cyril Nimal Fernando and Veerappan Murugan Kandiah had passed away.

As observed by me the five accused referred to above had faced the following charges before the High Court.

**Charge 1-** Conspiracy to commit the offence of Criminal Breach of Trust of monies belonging to Union Trust Investment Private Limited (UTI) - against all 5 accused

**Charge 2-** Committing the offence of Criminal Breach of Trust of Rs. 6150000/- the monies belonging to the said UTI by the 4<sup>th</sup> accused (Arthur Patrick St John Jackson - the Petitioner before this court in SC SPL LA 290/2008)

**Charge 3-** Committing the offence of abetment to the above 2<sup>nd</sup> charge by the 1<sup>st</sup> accused (Wasantha Basnayake who is now dead)

- Charge 4-** Committing the offence of abetment to the above 2<sup>nd</sup> charge by the 2<sup>nd</sup> accused (John Cyril Nimal Fernando who is now dead)
- Charge 5-** Committing the offence of abetment to the above 2<sup>nd</sup> charge by the 3<sup>rd</sup> accused (Veerappan Murugan Kandiah who is now dead)
- Charge 6-** Committing the offence of abetment to the above 2<sup>nd</sup> charge by the 5<sup>th</sup> accused (Thangeshwary Sundaramoorthy the Petitioner before this court in SC SPL LA 293/2008)
- Charge 7-** Committing the offence of Criminal Breach of Trust of Rs. 3000000/- the monies belonging to the said UTI by the 4<sup>th</sup> accused
- Charge 8-** Committing the offence of abetment to the above 7<sup>th</sup> charge by the 1<sup>st</sup> accused
- Charge 9-** Committing the offence of abetment to the above 7<sup>th</sup> charge by the 2<sup>nd</sup> accused
- Charge 10-** Committing the offence of abetment to the above 7<sup>th</sup> charge by the 3<sup>rd</sup> accused
- Charge 11-** Committing the offence of abetment to the above 7<sup>th</sup> charge by the 5<sup>th</sup> accused

The offences referred to the Indictment had taken place between the 1<sup>st</sup> February 1985 and 30<sup>th</sup> June 1985, 33 years ago and the accused referred to above were holding responsible high positions at the said Union Trust Investment Private Limited (UTI)

The same five accused had faced another Indictment before the same High Court on similar charges and the said trial was pending before the High Court of Colombo at the time the Special Leave to Appeal application was filed before this court in the year 2008.

When looking at the sequence of events that took place from the time of the alleged offence, i.e. in the year 1985, after the collapse of the UTI, due to the financial frauds that took place in the

management of the said company, an investigation was commenced by the Criminal Investigations Department. The Hon. Attorney General forwarded two Indictments before the High Court of Colombo in the year 1994. The two Indictments were allocated Number HC 6763/1994 and HC 6764/1994 by the High Court of Colombo.

The trial in 6763/94 was commenced before the High Court of Colombo in March 1995.

It is important to observe at this stage that the 1<sup>st</sup> accused in the said Indictment namely Wasantha Basnayake was not present before the High Court at that stage but was represented by a counsel. When the said case was called before the High Court of Colombo in October 1994, in order to serve the Indictment, it was revealed that the said 1<sup>st</sup> accused was never arrested even during the investigations, since he had left for England by that time and an officer from the Criminal Investigation Department had gone to England to record his statement. Based on the above material the court had issued a warrant against him, but subsequently at trial even though he did not participate, he was represented by a counsel.

At the conclusion of a protracted trial, the learned High Court Judge convicted all the accused of the charges against them except counts 4 and 5 against the 2<sup>nd</sup> and 3<sup>rd</sup> accused on 16.09.1996. The 4<sup>th</sup> and the 5<sup>th</sup> accused, who are the accused-appellant-appellants before this court, were convicted of all the charges against them and imposed the following sentence on them.

4<sup>th</sup> accused- Convicted of 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> charges against him and sentenced,

**1<sup>st</sup> count**      2 years Rigorous Imprisonment

**2<sup>nd</sup> count**      2 years Rigorous Imprisonment and fine of Rs. 500,000/-

**7<sup>th</sup> count**      2 years Rigorous Imprisonment and fine of Rs. 500,000/-

5<sup>th</sup> accused- Convicted of 1<sup>st</sup>, 6<sup>th</sup> and 11<sup>th</sup> charges against her and sentenced,

**1<sup>st</sup> count** 2 years Rigorous Imprisonment

**6<sup>th</sup> count** 2 years Rigorous Imprisonment and a fine of Rs. 500,000/-

**11<sup>th</sup> count** 2 years Rigorous Imprisonment and fine of Rs. 500,000/-

The sentences imposed on counts 2 and 7 on the 4<sup>th</sup> accused and counts 6 and 11 on the 5<sup>th</sup> accused were to run concurrent.

Total Imprisonment ordered on each accused is 4 years and a fine Rs. 1,000,000/- with a default term of 7 months Rigorous Imprisonment.

The appeals logged by all five accused before the Court of Appeal in the year 1996, were finally disposed by the Court of Appeal in the year 2008, affirming the conviction. All five accused including the 1<sup>st</sup> accused who was tried in absentia filed papers for Special Leave before the Supreme Court in 2008 but no steps were taken to support the said applications until March 2019, for 11years. In between this matter had come up on numerous occasions and had gone down for numerous reasons.

However it is observed that, the petitioners before the Supreme Court, even though they had not insisted to support the applications, negotiated settlements to avoid serving sentences in jail. This fact was recorded in journal entries on several days. As observed by me, on 02.08.2012 it was recorded that,

“Learned President’s Counsel who appear for the petitioner in the respective cases, which are all connected, state that they are in a position to have this matter resolved and that his

clients are ready to pay the principle amounts involved if interest component can be waived.”

again on 01.11.2013 it was recorded that,

“All learned Counsel who appear for the Petitioners who are respectively the 1<sup>st</sup> -5<sup>th</sup> accused in the High Court of Colombo cases bearing Nos 6763/94 and 6764/94 which are in the process of settling the amounts that are due under the relevant Indictments in the case and the interest accrued thereon. They state that in view of the fact that the case that is pending in the High Court namely 6764/94 is to be taken up in the afternoon in the High Court today. They state that they will go before the High Court and resolve all matters in order that this court can expeditiously deal with the application before this court for seeking Special Leave to Appeal”

As submitted by the counsel who represented the appellants in SC SPL LA 290/08 and SC SPL LA 293/08 their clients i.e. the 4<sup>th</sup> and the 5<sup>th</sup> accused in the Indictment along with the other accused who are now dead had settled the defrauded amounts along with interest and deposited them with the liquidator at the Central Bank. As submitted by the counsel the defrauded amount in each trial, i.e. HC 6763/ 94 and 6764/94 was Rs. 9 Million each and the appellants in all 5 Special Leave to appeal applications, had deposited Rs. 14 Million in each case with 5 Million interest. The total amount they deposited with the liquidator is Rs. 28 Million. In addition to that, the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> accused have pleaded guilty before the High Court in HC 6764 whilst the present leave to appeal applications are pending before the Supreme Court and they were imposed non-custodial sentences by the High Court on 22.11.2013. However there is no record of 1<sup>st</sup> and 4<sup>th</sup> accused in the said case pleading guilty before the High Court.

Whilst referring to the fact that all the accused referred to above along with the two appellants before this Court had now compensated “the victims” of the defrauded finance company, and the long delay in finalizing the case against them and specially the health condition of the appellant in SC SPL LA 293/2008, namely Arthur Patrick St. John Jackson, the 4<sup>th</sup> accused in the Indictment, the learned counsel took up the position that they would not challenge the conviction which was affirmed by the Court of Appeal but would only be canvassing the sentence before this court.

This court after considering the lengthy submission made by the learned President’s Counsel and the learned Counsel in both these matters and the learned Additional Solicitor General who did not object to the above application of the learned Counsel, decided to grant leave on the following question of law,

“Did the sentence imposed by the High Court on the accused appellant is excessive”

When making submissions, the learned Counsel for the appellants relied on the decision in ***Priyanka Perera Vs. Attorney General SC Appeal 99/2006 Unreported Judgments of SC 2007 Vol I-II page 10*** where the Supreme Court had considered the delay in disposing a case in the following terms;

“The charge has been hanging over the appellants’ head over a period of 8 years and the disorganization that essentially would have followed due to the undue delay in conformation of his sentence, in my view are circumstances, although not obligatory, that should be taken into consideration in suspending the sentence of imprisonment”

Following the same line of argument to canvass for a non-custodial sentence to be imposed on the appellants the parties further relied on the Court of Appeal decision in ***Kumara Vs. Attorney General 2003 (1) Sri LR 139*** where the court held;

- i. A suspended sentence is a means of re-educating and rehabilitating the offender, rather than alienating or isolating the offender
- ii. No offender should be confined to in 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 connotations 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 behavior again
- v. The accused does not have previous convictions; **he surrenders 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.”

This court is mindful of another Court of Appeal decision in *The Attorney General Vs. Mendis (1995) 1 Sri LR 138* on the question of sentencing. In the said case the court held,

..... “once an accused is found guilty on his own plea or after trial the judge is 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 in so far as the institution or organization in respect of which it has been committed, is concerned, the person 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.”

In the said case *Gunasekara J* had further observed,

“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.”

.....

**“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 offence to which the accused pleaded guilty.”**

(Emphasis added)

Even though this court is not bound to follow the above decisions I observe that their Lordships were mindful of several important areas a trial judge should consider in imposing a sentence.

In the present case there is no question of the learned trial judge imposing a lenient or sevier sentence. Their Lordships of the Court of Appeal had gone into the said judgment in full and affirmed the said judgment. That has not been challenged before us.

As observed by this court the only issue before the court is “in the present circumstances” the sentence imposed on the accused are “excessive or not.” The learned President’s Counsel who appeared for the appellant in SC/SPL/LA 290/08 in addition to the common mitigatory factors they submitted above, submitted that his client who underwent immense pressure due to this case for over 30 years is prepared to pay doubled the fine and urge this court to act under section 303 (1) of the

Code of Criminal Procedure Act No 15 of 1979. The learned Counsel who appeared for the appellant in SC/SPL/LA 293/08 has taken up his present health condition and total blindness of the right eye and critical diabetic condition as the main mitigatory factor and further submitted that, even though his client had previously contributed some money to pay back the defrauded money, today he is not in a position to make any payment as a fine and request the court to be in mindful of these facts when considering their appeals.

As observed by this court, even though the trial before the High Court was concluded within 3 years the two appeals had taken 23 years. The first appeal before the Court of Appeal had taken 12 years but at the conclusion of the said appeal, none of the accused before Court of Appeal mitigated the sentence imposed on them but challenged the conviction and sentence. However their Lordships of the Court of Appeal affirmed the conviction and sentence both.

The present Special Leave to Appeal applications were filed before the Supreme Court in the year 2008 by all 5 accused, whose sentence was affirmed by the Court of Appeal but as pointed out in this judgment they did not take any interest in challenging the conviction affirmed by the Court of Appeal. Instead they engaged in a discussion with the Attorney General's Department "for a settlement." If the appellants (all 5 appellants were among the living at that time) were genuinely interested in compensating the victims, there is no reason for the 2<sup>nd</sup> trial, before the High Court of Colombo to drag on until this time. It is our view that the accused had made use this opportunity to commence a dialog between them and the Attorney General and to impress both the Attorney General's Department and this court, by settling the defrauded amounts with an interest by depositing Rs. 28 Million with the liquidator at the Central Bank in the year 2013 (between 10.10.2013 and 19.11.2014) 30 years after the money belonging to the depositors were defrauded by them.

As observed from the journal entries before us, (I have referred to some in this judgment) this court as well as the officers of the Attorney General's Department had allowed the accused to "obtain time" with a view to settle the matter before the Supreme Court. When going through the journal entries, I further observe, that since 2008 this matter was not marked ready "for support" on a single day.

Whilst this process was in operation three appellants have passed away and their applications were accordingly abetted. As further observed by me, those applicants have succeeded in their "operation" and did not serve a single day in prison for the offence they were convicted and sentenced.

When considering the matters already discussed in this judgment it is not possible for me to conclude that the sentence imposed on the two remaining suspects are excessive. This court cannot approve any application made by a counsel allowing his client to buy freedom by making a double payment. At the same time the court cannot be so sympathetic and allow an accused person to go scot-free considering his sickness alone, when he is found to be the "main offender" in the Indictment. Both these appellants have worked together with the other accused who are not among the living today to "delay justice" in this case.

In the said circumstances we are not inclined to interfere with the sentence imposed by the learned Trial Judge, but considering all the circumstances of the present case, decided to make order to run the sentences imposed on the 1<sup>st</sup> count and the other counts on which the appellants were convicted to run concurrent. In the said circumstance the total imprisonment imposed on the each appellant will be 2 years.

We further make order under section 303 (1) of the Code of Criminal Procedure Act No 15 of 1979 suspending the said term of 2 years Rigorous Imprisonment for a period 10 years.

Subject to the above variation of the sentence, both appeals before this court, i.e. SC/SPL/LA 290/2008 and SC/SPL/LA 293/2008 are dismissed.

Both appeals are dismissed subject to above variation/ No costs.

**Hon. Justice L.T.B. Dehideniya**

**I agree,**

**Judge of the Supreme Court**

**Hon. Justice S. Thuraiaraja PC**

**I agree,**

**Judge of the Supreme Court**

**Judge of the Supreme Court**