

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

Officer in Charge,
Motor Traffic Division,
Police Station,
Kandy.

Plaintiff

**SC Appeal No. 173/2017
PHC (Central Province)
No. Appeal 172/2006
M.C. Kandy No. 28451**

Vs.

Illakotulena Gamaralalage Thilakarathna,
Kalugala,
Pitwala,
Nawalapitiya.

Accused

AND

Illakotulena Gamaralalage Thilakerathna,
Kalugala,
Pitwala,
Nawalapitiya.

Accused-Appellant

Vs.

Officer in Charge,
Motor Traffic Division,
Police Station,
Kandy.

Plaintiff-Respondent

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

Respondent

AND NOW BETWEEN

Illakotulena Gamaralalage Thilakerathna,
Kalugala,
Pitwala,
Nawalapitiya.

Accused-Appellant-Appellant

Vs.

Officer in Charge,
Motor Traffic Division,

Police Station,
Kandy.

Plaintiff-Respondent-Respondent

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

Respondent-Respondent

Before: **Justice E.A.G.R. Amarasekara**
Justice A.L. Shiran Gooneratne
Justice Janak De Silva

Counsel: Thishya Weragoda with Prathap Welikumbura, Thamali Rajapaksha
and Kalani Dassanayake instructed by Susantha Dodanwela **for the**
Accused-Appellant-Appellant.

V. Hettige, SDSG **for the Respondent.**

Argued on: 30/05/2024

Decided on: 22/10/2024

A.L. Shiran Gooneratne J.

[1] The Accused-Appellant was charged on 4 counts, under the Penal Code and the Motor Traffic Act (as amended), in the Magistrates Court of Kandy, for causing the death of a motor cyclist. At the conclusion of the trial, the Appellant was found guilty on 3 counts and the following sentences were imposed.

1st count, Section 298 of the Penal Code - 1year Rigorous Imprisonment with Rupees 1,500 fine with a default sentence of 6 months;

2nd count, Sections 214 (1) read with Section 151(3) and 217 (2) of the Motor Traffic Act, (as amended) - Rupees 500 fine;

3rd count, Section 214 (1) read with Section 149 (1), 217 (2) and 224 of the Motor Traffic Act, (as amended) - acquitted;

4th count, Section 148 (1) read with Section 151 (3) and 224 of the Motor Traffic Act, (as amended) - Rupees 500 fine.

[2] Aggrieved by the said Judgment dated 31/07/2006, the Appellant appealed against the conviction and sentence to the Provincial High Court of the Central Province holden in Kandy (“the High Court”). After hearing the case and considering the submissions from both parties, the High Court, by judgment dated 05/01/2017, having affirmed the conviction, the learned High Court Judge was of the view that; *“[t]he said sentence imposed on the Accused is not proportionate to the gravity of the negligent act committed by the accused,”* and proceeded to vary the sentence as follows:

1st count, 3 years Rigorous Imprisonment, Rupees 250,000 as compensation to be paid to PW2, with a default sentence of 3 years Rigorous Imprisonment;

2nd count, remained unchanged;

3rd count, acquittal set aside and a fine of Rupees 1,500 imposed;

4th count, remained unchanged.

- [3] Being aggrieved by the said Judgment, the Appellant made an application to the High Court seeking leave to appeal to the Supreme Court in terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 (as amended).
- [4] Having heard also considering the submissions by both parties, the High Court, by Order dated 11/08/2017, granted leave to appeal only on the sentence imposed by the High Court. In the circumstances, the conviction of the Accused-Appellant, of the offences as charged, stands affirmed.
- [5] The position of the Accused-Appellant is that the learned High Court Judge has enhanced the punishment without affording the Appellant an opportunity to respond and/ or show cause why the punishment ought to be enhanced. The Counsel for the Appellant strongly contends that an enhanced sentence was imposed in the absence of an application by the State to do so. It is also contended that the learned High Court Judge did not consider sentencing guidelines prior to enhancing the sentence.
- [6] It is observed, that the Magistrate's Court is empowered to try the Appellant on offences as charged and the above variation in sentence on count 1 and 3 by the High Court is within the exercise of judicial discretion of the sentencing judge.
- [7] With leave of the High Court, the Counsel for the Accused-Appellant filed a motion dated 20/01/2017 seeking leave to appeal to the Supreme Court against the said Judgment dated 05/01/2017. In terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 (as amended), the High Court can grant leave to appeal to the Supreme Court, ex mere moto or at the instance of any aggrieved party to such matter or proceedings. In support of the said motion, the Court permitted the Accused-Appellant to file written submissions, and accordingly written submissions dated 08/08/2017 was filed of record. Given the opportunity to show cause, the Accused-Appellant did not identify any issue of law ought to be considered by the High Court nor contended harshness or any other mitigating factor associated with the said enhanced sentence. An application to refer a point of law must plead reasons why that point should be considered by the High Court. Section

322(1) of the Code of Criminal Procedure Act makes it imperative to indicate the grounds of appeal. In *W.M.W.P.K Amarasekara v Nagaratnam Ratnakumara*¹, K. Priyantha Fernando J. held, “*In the instant case, no application for leave to appeal was made to the High Court. Once such application is made, if the High Court decides to grant leave, it is incumbent upon the High Court to specify the substantial question of law on which leave is granted. No such order is made in the instant case by the High Court as no leave to appeal application was made, not even ex mero motu, as provided in section 9 (a) of the Act.*”

[8] Mitigatory factors are capable of reducing the severity of a sentence. The gravity of the offence an accused is charged with and matters unconnected to the offence, such as age, ill health and family responsibilities can be used to demonstrate to Court to impact upon the assessment of the offender’s culpability. On the other hand, aggravating factors increase the sentence and must be considered in the context of the offence committed.

[9] The High Court having considered proportionality of the sentence in contrast with the gravity of the convicted offence, proceeded to enhance the penalty given by the learned Magistrate. An enhancement of sentence of a conviction offence is generally associated with an aggravating feature. The submission of the Accused-Appellant was that at no time during the proceedings before the High Court did the State Counsel sought to establish aggravating factors or urge the Court to vary the sentence on such circumstances. When the sentence was enhanced, the High Court too did not state as to why it is of that opinion. It was also the submission of the Appellant that the Court did not give an opportunity to show cause as to why the punishment ought not to be enhanced, and also afford an opportunity to adduce any mitigatory circumstances.

[10] In *Officer-In-Charge of Horana Police Station vs. Sirimanna Hettige Jayasena*², it was held; “*It is observed that, the conviction and sentence imposed by the learned*

¹ SC Appeal No. 136/2014, SC Minutes of 30th May 2024

² [2022] SC Appeal No. 115/2019 (SC, 4 April 2022)

Magistrate is not irregular and is sanctioned by law. The learned High Court Judge affirmed the conviction for reasons stated in the said Order, however, failed to give reasons for varying the sentence. When the High Court Judge interfered with an exercise of judicial judgment, the necessary factors leading to such interference should be stated. Also, when the Judge is inclined to a variation of sentence, the Judge should permit the Counsel to address Court as to the appropriateness of the varied sentence and to what extent should it be varied. I observe that the High Court Judge has failed to afford an opportunity to the Petitioner to be heard and to give reasons. A bald [sic] statement, as in this case, to justify a variation in sentence, does not suffice.”

[11] Consideration of aggravating or mitigatory circumstances generally, has relevance to the assessment of the seriousness of the offence. The appropriate effect on such consideration in sentence would depend on the circumstances of each case, in which the Court can take note of any factor it considers to aggravate or mitigate the imposed sentence. As such, the consideration of proportionality of the sentence to the gravity of the convicted offence, must be well reasoned.

[12] In ***Bed Raj vs. State of Uttar Pradesh***³ it was held that,
*“a question of a sentence is a matter of discretion and it is well settled that when discretion has been properly exercised along accepted judicial lines, an appellate court should not interfere to the detriment of an accused person except for **very strong reasons which must be disclosed in the face of the judgement.** (emphasis added)*

In a matter of enhancement, there should not be interference when the sentence passed imposes substantial punishment. Interference is only called for when it is manifestly inadequate,”

[13] If adequate reasons are given for imposing a more lenient or a more stringent sentence, this Court may not interfere with the judicial discretion exercised by the

³ [1954] AIR 778 (SC), 781

High Court. The Counsel for the Respondent cited the case of *Indrawansa vs. Officer-in-Charge, Police Station, Wennappuwa and Another*⁴, to emphasis upon the opportunity given to an aggrieved party to show cause justifying mitigatory or aggravating circumstances in mitigating the penalty, with reference to Section 303 (1) and (2) of the Code of Criminal Procedure Act No. 15 of 1979.

[14] In the above case the Court considered the decisions in *Karunaratne vs. The State*⁵, *Attorney General vs. Mendis*⁶ and stressed upon the need to have regard to the nature and the gravity of the offence, the presence of any aggravating or mitigatory factor concerning the offender, prior to any variation of sentence.

[15] The Court also acknowledged that deterrence serves a dual purpose: specific deterrence to prevent the individual from reoffending and general deterrence to reinforce the notion that 'crime does not pay,' and on the question whether a sentence of imprisonment should remain or be suspended, the Court was of the view that;
“When addressing the question of suspending a sentence, the gravity of the offence, the impact on the offender’s family, delay in sentencing, age, or ill health, pleading guilty in the first given opportunity, previous convictions, subsequent conduct of the accused are some of the many mitigatory factors that a court may consider. Therefore, a case-by-case consideration of the offence, the offender-based factors and the interest of society is essential to decide whether a sentence of imprisonment should remain or be suspended”.

[16] As held in the case of *Alister Anthony Pereira vs. State of Maharashtra*⁷,
“Sentencing policy is an important task in the matters of crime. One of the prime objectives of criminal law is imposition of appropriate adequate just and proportionate sentence commenced with the nature and gravity of the crime and the manner in which the crime is done. There is no straight-jacket formula for

⁴ [2021] 3 SLR 323

⁵ 78 NLR 413

⁶ [1995] 1 SLR 138

⁷ [2012] AIR 3820 (SC)

sentencing an accused on proof of crime. The courts have evolved certain principles:

Twin objectives of sentencing policy is deterrence and correction what sentence would meet the ends of Justice depends on the fact and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offense and all other attendant circumstances. The principle of proportionality in sentencing is a crime duo is well entrenched in criminal jurisprudence. As a matter of law proportion between crime and punishment bears mostly relevant influence in determination of sentencing the crime to a full stop the court has to take into consideration all aspects including social interest and consciousness of the Society for award of appropriate sentence.”

- [17] Provisions in Section 303(1) of the Code of Criminal Procedure Act No. 15 of 1979 and Section 303(1) as amended by Act No. 47 of 1999 enables suspension of a sentence of imprisonment. In terms of Section 303 (2) of Act No. 15 of 1979, if the Court was of the opinion that it was **inappropriate** in the circumstances of the case to deal with the offender in terms of the said subsection, where a sentence should not be suspended, then the Court would state so giving reasons in writing. By the amending Act No. 47 of 1999, considering the criteria set out in the form of legislative guidelines, the Court was given the discretion to make an order suspending a sentence, if it was satisfied and was **appropriate** to do so in the given circumstances, for reasons stated in writing. (Emphasis added).
- [18] Judicial discretion to make an order suspending a sentence demands that the court makes a judicious intervention in appropriate circumstances, in the expectation of progressively contributing to the better administration of the criminal justice system. When sentencing an offender to a term of imprisonment and the wide discretion of Court to order suspending the whole or part of the sentence, put into the context of statutory guidelines in terms Section 303(1) as amended by Act No. 47 of 1999, as seen below, essentially reiterates current case law.

[19] Section 303(1) of the Code of Criminal Procedure Amendment Act No.47 of 1999 states;

*303(1) Subject to the provisions of this section, on sentencing an offender to a term of imprisonment, a court may make an order suspending the whole or part of the sentence if it is **satisfied, for reasons to be stated in writing, that it is appropriate to do so in the circumstances, having regard to –***

- a) the maximum penalty prescribed for the offence in respect of which the sentence is imposed;*
- b) the nature and 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 factor concerning the offender.*
- g) the need to punish the offender to an extent, and in a manner, which is just in all of 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; or*
- l) a combination of two or more of the above***
(Emphasis added).

[20] This section allows a Court to suspend all or part of a term of imprisonment if it deems appropriate, based on the severity and nature of the offence, the offender's

past behavior and character, the harm caused by the crime, and other relevant circumstances.

[21] The legislative intent was to encourage the exercise of judicial discretion that balances retribution and rehabilitation. In appropriate circumstances, the Court, if it is satisfied, for reason to be stated in writing, may proceed to suspend the whole or part of the sentence.

[22] This is to be contrasted with section 303, prior to the amendment where it states;

(1) A court which imposes a sentence of imprisonment on an offender for a term not exceeding two years for an offence may order that the sentence shall not take effect unless, during a period specified in the order being not less than five years from the date of the order (hereinafter referred to as the "operational period"), such offender commits another offence punishable with imprisonment (hereinafter referred to as "subsequent offence").

(2) A court which imposes a sentence of imprisonment for a term not exceeding six months in respect of one offence on an offender who has had no previous experience of imprisonment shall make an order under subsection (1) unless -

(a) the offence involved the use or threat of violence, or the use or possession of a firearm, an explosive or an offensive weapon;

(b) the offence is one in respect of which a probation order or order for conditional discharge was originally made;

(c) the offender was subject to a suspended sentence at the time the offence was committed; or

(d) the court is of opinion that, for reasons to be stated in writing, it would be inappropriate in the circumstances of the case, to deal with the offender in terms of this subsection.

- [23] When analyzing Section 303, before and after its amendment, it is clear that there is a significant transition in the legislative intent from a mandatory to a directive approach in the suspension of sentences.
- [24] Prior to the amendment, Section 303 applied to sentences of imprisonment not exceeding two years, with a mandatory suspension order for first-time offenders sentenced to six months or less, unless specific exceptions were met.
- [25] The amendment to Section 303, introduces a discretionary framework. Previously, courts were required to mandatorily suspend sentences, with written reasons to be given only if they decided otherwise. Now, judges need to provide reasons only when they choose to suspend a sentence, considering a specific list of factors. This shift from a mandatory to a more discretionary approach would give judges greater flexibility to make decisions based on distinct characteristics on a case-to-case basis.
- [26] In the Court of Appeal Judgment in *Bandage Sumindra Jayanthi vs. Attorney General*⁸, Justice A.H.M.D. Nawaz, held that, the criteria listed in Section 303 (1) of the Code of Criminal Procedure Act, as amended, align with legal principles long established by case law. While Section 303(1) mandates that judges consider these criteria before suspending a sentence, they are also applicable in any situation where a judge imposes a custodial sentence. These criteria serve as legislative guidelines for judges when deciding on any punishment under the Penal Code or other criminal statutes. The Court was of the view that,
- “These criteria are not limited to suspended sentences alone and will apply in any situation where a judge wishes to impose a custodial sentence. This non- exhaustive list of factors, though prescribed by the legislature in 1999, reflect the jurisprudence that has been echoed by appellate courts over a long period of time.”*
- It is perceived that not every guideline fit every situation. Accordingly,
- “Where a court decides-
- a) *Not to follow a relevant sentencing guideline,*

⁸ [2015] 1 SLR 20

- b) *Not to make a compensation, reparation nor a travel restriction order where it has power to do so,*
- c) *Not to order a suspended sentence to take effect, the endorsement of the defendant's driving record or the defendant's disqualification from driving, for the usual minimum period, or at all, where it could do so, or*
- d) ----

*the court must explain why it has so decided when it explains the sentence that it has passed*⁹

[27] In *Indrawansa vs. Officer-in-Charge, Police Station, Wennappuwa and Another*¹⁰, the Court having observed that the Appellant did not mitigate the sentence before the High Court or before the Supreme Court, held that, when considering the suspension of a sentence, a case-by-case assessment is crucial, weighing the offence, offender-related factors, and societal interests to decide on imprisonment or suspension of a sentence. As the Appellant presented no mitigating circumstances to lessen the severity of the sentence (as is the case here), the Court concluded that there was no justification to alter the sentence imposed by the lower court.

[28] The High Court when enhancing the sentence in consideration of 'the gravity of the negligent act committed by the accused,' made no reference to any aggravating factors based on the facts and circumstances of the case, but merely proceeded to do so. If the learned High Court Judge was of the view that a more stringent sentence should be given to the Appellant where ends of justice would be satisfied, then it is the duty of the learned High Court Judge to give reasons. Without giving any reasons at all for adopting that course, it would not be conducive to interfere with a sentence already imposed. In all the above circumstances and also having

⁹ [Criminal Procedure Rules 2015 (SI 2015/1490), r. 28.1(1) and (2); Great Britain"]

¹⁰ *Indrawansa* (n3)

considered the nature and the gravity of the offence, this Court finds that this is not a fit case to suspend the sentence imposed by the learned Magistrate.

[29] Therefore, I answer the question of law which leave to appeal was granted in favour of the Accused-Appellant, only in respect of variation in sentence, which is not legally justifiable.

[30] For these reasons, the said Judgment of the learned High Court Judge dated 05/01/2017, convicting the Accused-Appellant is affirmed. However, the enhanced sentence given by the said Judgment is set aside and the sentence imposed by the learned Magistrate will stand restored. No costs ordered.

The Appeal is partly allowed.

Judge of the Supreme Court

E.A.G.R. Amarasekara J.

I agree

Judge of the Supreme Court

Janak De Silva J.

I agree

Judge of the Supreme Court