

**In the Supreme Court of the Democratic Socialist Republic of Sri Lanka**

*In the nature of an Appeal in terms of section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 read with Article 128 of the Constitution.*

**1. Sarath Wijeratne  
Wickramasinghe**  
Mahagedarawatta,  
Yatalamatta,  
Naagoda.

**2. Bandusena Wijeratne  
Wickramasinghe**  
(Deceased)  
Mahagedarawatta,  
Yatalamatta,  
Naagoda.

**Accused - Appellant - Appellants**

**SC Appeal No. 87/2014**  
High Court Galle Appeal No. 843/2011  
Magistrate's Court Galle No. 33439

**Vs.**

**1. Honourable Attorney-General**  
Attorney General's Department,  
Colombo 12.

**Respondent - Respondent**

**2. Officer-in-Charge**  
(Crime Investigations)  
Police Station,  
Galle.

**Complainant - Respondent - Respondent**

**Before:** Jayantha Jayasuriya, PC, CJ  
Yasantha Kodagoda, PC, J  
Mahinda Samayawardena, J

**Counsel:** Dr. Sunil Abeyratne with Ms. Mihiri Kudakoluwa for the Appellants.  
Ms. Suharshie Herath Jayaweera, Deputy Solicitor General for the Respondents.

**Argued on:** 4<sup>th</sup> August 2022

**Decided on:** 10<sup>th</sup> October, 2024

### Yasantha Kodagoda, PC, J

#### **Introduction**

1. This Judgment relates to an Appeal from a judgment of the High Court of the Provinces (Southern Province) which had exercised appellate jurisdiction in respect of a judgment of the Magistrate’s Court of Galle. Following the judgment of the Magistrate’s Court (including the Order of sentence pronounced by the learned Magistrate) being affirmed and the Appeal being dismissed, on the application of the Accused – Appellant, the High Court of the Provinces had granted *Leave to Appeal* to the Supreme Court on the following question of law:

*“Is the Order of sentence passed following the conviction of the Accused, contrary to Article 13(6) of the Constitution?”*

#### **Background**

2. Following the conduct of an investigation and the initiation of criminal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Accused – Appellants – Appellants (hereinafter sometimes referred to as the Accused, Accused – Appellants, and as the Appellants, as the context requires), on 6<sup>th</sup> October 2005 the 2<sup>nd</sup> Respondent – Respondent instituted criminal proceedings against the Accused in the Magistrate’s Court of Galle for having committed the following offence:

*“That on 5<sup>th</sup> July 1993, in Galle, prepared a forged document, namely a purported deed of transfer of title bearing No. 8431 purportedly attested by S.P. Gunawardena, Notary*

*Public, containing the forged signature of Banduwathie Wijeratne Wickramasinghe, and afterwards having such document registered at the Land Registry of Galle, and thereby committed the offence of forgery, an offence punishable under section 457 of the Penal Code."*

3. The afore-stated charge had been preferred on the footing that the two Accused had jointly committed the offence of forgery.
4. The Accused pleaded '*not guilty*' and the case proceeded to trial.
5. The case for the prosecution was that the 2<sup>nd</sup> Accused and 1<sup>st</sup> Accused stood against each other as the father and son. Banduwathie Wijeratne Wickramasinghe was the sister of the 2<sup>nd</sup> Accused. During the final stages of her life at a time when she was suffering from a terminal illness and was very sick, on or about 5<sup>th</sup> July 1993, the two Accused had prepared a conveyance (deed) seeking to transfer her rights to a land co-owned by Banduwathie, the 2<sup>nd</sup> Accused and another sibling which was subject to a partition action, to the 1<sup>st</sup> Accused, forged her signature on it, caused it to be attested by S.P. Gunawardena, Notary Public, and thereafter submitted the said forged deed to the Land Registry for registration. Soon after the commission of the offence, Banduwathie had passed away. The husband of Banduwathie (virtual complainant) and their son were the principal witnesses for the prosecution. These two witnesses together with the Examiner of Questioned Documents provided evidence that the purported signature on the impugned deed was not the signature of Banduwathie. The Accused denied the allegation against them, and took up the position (unsuccessfully) that Banduwathie had in fact placed her signature on the impugned deed.
6. Upon the completion of the trial, on 22<sup>nd</sup> July 2010, the learned Magistrate arrived at a finding that the prosecution had proved its case beyond reasonable doubt, and accordingly found both Accused '*guilty*' of having committed the afore-stated offence. They were accordingly convicted of having committed the offence of forgery.
7. On 23<sup>rd</sup> September 2010, the learned Magistrate pronounced the following Order of sentence:
  - *A term of rigorous imprisonment of one and a half (1½) years, suspended for ten (10) years.*
  - *A fine of One Thousand Five Hundred Rupees (Rs. 1,500.00). If the fine is not paid, three (3) months simple imprisonment (default sentence).*

- *In consideration of the loss caused to the first witness for the prosecution (virtual complainant) compensation of Seventy-Five Thousand Rupees (Rs. 75,000.00) to be paid to the said person. If compensation is not paid, the stipulated sum to be recovered as a fine or six (6) months simple imprisonment (default sentence)."*

The same sentence was pronounced separately in respect of both Accused.

8. Aggrieved by the afore-stated conviction and the order of sentence, the convicted Accused presented an Appeal to the High Court of the Provinces holden in Galle. During the appellate hearing, the Accused - Appellants canvassed the alleged unlawfulness of both their convictions for the offence of forgery and the order of sentence imposed by the learned Magistrate. Following argument, by his judgment dated 1<sup>st</sup> November 2012, the learned Judge of the High Court of the Provinces affirmed the conviction and the order of sentence, and accordingly dismissed the Appeal.
9. It is consequent thereto that the Accused - Appellants sought from the High Court of the Provinces *Leave to Appeal* to the Supreme Court. By his Order dated 13<sup>th</sup> December 2012, the learned Judge of the High Court granted *Leave to Appeal* against his own judgment.
10. On 1<sup>st</sup> August 2017, it had been brought to the notice of this Court by learned junior counsel for the Appellants that following the filing of this Appeal, the 2<sup>nd</sup> Accused - Appellant - Appellant had died. No substitution was made on behalf of the deceased Appellant. Therefore, it is necessary to assume that the Appeal of the 2<sup>nd</sup> Accused - Appellant - Appellant stands abated. In the circumstances, learned counsel for the Appellants pursued only the Appeal filed on behalf of the 1<sup>st</sup> Appellant. Accordingly, this judgment shall deal with only the Appeal of the 1<sup>st</sup> Accused - Appellant - Appellant. The reference hereinafter to the 'Appellant' should be understood as a reference to the '1<sup>st</sup> Accused - Appellant - Appellant'.
11. During the hearing before this Court, learned counsel for the Appellant submitted to Court that on instructions received from the Appellant, he would be only canvassing the alleged unlawfulness of the order of sentence made by the learned Magistrate which was affirmed by the learned Judge of the High Court of the Provinces, directing the Appellant to pay a sum of Seventy-Five Thousand Rupees (Rs. 75,000.00) to the virtual complainant and the default sentence imposed thereon.

### **Submissions of the learned counsel for the Appellant**

12. Learned counsel for the Appellant submitted that the powers of sentencing of a Magistrate's Court are contained in section 14 of the Code of Criminal Procedure Act, No. 15 of 1979 (hereinafter referred to as 'the CCPA'). He further submitted that the learned Magistrate had imposed a default sentence of six months imprisonment with regard to the order to pay compensation of Rs. 75,000.00 to the virtual complainant. He submitted that therefore the order made for the payment of Rs. 75,000.00 "*is not mere compensation*" and should be treated as a fine. In terms of section 14 of the CCPA, the maximum fine which a Magistrate is empowered to impose is One Thousand Five Hundred Rupees (Rs. 1,500.00). Thus, the learned Magistrate had exceeded that upper limit and therefore acted in contravention of section 14 of the CCPA.
13. He further submitted that, till the enactment of Act, No. 14 of 2005, a Magistrate's power to order the payment of compensation was limited to Five Hundred Rupees (Rs. 500.00). Though section 17(7) of the Code of Criminal Procedure Act was amended by Act, No. 14 of 2005 enabling a Magistrate to make an order imposing a requirement for the payment of compensation up to One Hundred Thousand Rupees (Rs. 100,000.00), since the offence of forgery was committed on 5<sup>th</sup> July 1993, the learned Magistrate could not have acted in terms of the said amending Act, and therefore did not have power to impose an order for the payment of compensation to the value of Rs. 75,000.00.
14. Learned counsel for the Appellant also submitted that, the learned Magistrate had acted in contravention of Article 13(6) of the Constitution, by exercising the power vested on him to impose an order for the payment of compensation not exceeding One Hundred Thousand Rupees "*with retrospective effect*".
15. Due to the afore-stated two reasons, learned counsel for the Appellant submitted that the order made by the learned Magistrate for the payment of compensation of Rs. 75,000.00 to the virtual complainant and the corresponding default sentence was unlawful as it contravened Article 13(6) of the Constitution. Therefore, he urged that this Court quashes the said order made for the payment of compensation.

### **Submissions of the learned counsel for the Respondents**

16. With the aid of multiple sources, the learned Deputy Solicitor General (hereinafter referred to as 'DSG') submitted that the terms 'sentence' and 'penalty' were almost similar and would denote the 'actual punishment' imposed on a convicted accused.

Both the sentence and penalty must be *“a stipulated punishment for the relevant offence under the relevant law”*. Punishment stipulated for an offence under the Penal Code would not include an order for the payment of ‘compensation’, as it is not a ‘punishment’. In support of her submission, she cited section 52 of the Penal Code, which provides that *‘punishment to which offenders are liable under the provisions of the Code are – death, imprisonment which is of two descriptions, whipping, forfeiture of property and fine’*. She submitted that *“in an order of a judge, the sentence would be reflected only by an imprisonment and/or fine or any other thing that is stipulated under section 52 of the Penal Code, and would not include compensation”*.

17. It was also submitted that ‘compensation’ is not a form of ‘punishment’, as the Penal Code does not contain a reference to ‘compensation’ in section 457. Thus, learned DSG submitted that compensation is not a punishment that may be imposed for the offence of forgery. Nor is ‘compensation’ a ‘sentence’, for the purposes of section 14 of the CCPA. As the definition of the term ‘sentence’ is similar to that of ‘penalty’, an order for the payment of compensation does not amount to the imposition of a penalty.
18. Learned DSG also submitted that the ‘sentence’ imposed by the learned Magistrate on the Appellant for having committed the offence of forgery was lawful as it was within the range of punishment stipulated for that offence in the Penal Code. She further submitted that the sentence imposed on the Appellant was only the suspended term of imprisonment and the order for the payment of a fine. Therefore, the order for the payment of compensation to the virtual complainant should not be recognised as a ‘sentence’ for the offence of forgery.
19. Learned DSG submitted further that the power of a Magistrate to order the payment of compensation does not emanate from section 15 read with section 14 of the CCPA. It emanates from section 17 of the CCPA.
20. Learned DSG submitted that *“ordering of compensation is purely a procedural power under section 17 of the Code of Criminal Procedure Act, No. 05 of 1979. It has no connection to the offence committed as it is not stated in section 457 of the Penal Code, and as it is not to be considered as a punishment for an offence under the Penal Code, as the Penal Code section does not recognise compensation to be a punishment for offences under the Penal Code. Moreover, compensation is not a sentence that could be imposed by a Magistrate under its powers which emanates from sections 14 and 15 of the Code of Criminal Procedure Act, No. 05 of 1979”*.

21. It was also submitted that the amendment to section 17 of the CCPA which was introduced by Act, No. 14 of 2005 came into operation on 31<sup>st</sup> May 2005. The prosecution of the case before the Magistrate's Court commenced on 19<sup>th</sup> October 2005 upon the institution of criminal proceedings. Therefore, the amended section 17 was in '*operation*' learned DSG submitted, when the prosecution commenced, and the trial of the accused was under the '*amended procedural law*'. Learned DSG submitted that, in the circumstances, as at the time the learned Magistrate imposed the order for the payment of compensation, he possessed the power to act in terms of the amended section 17, and impose an order for the payment of compensation of Rs. 75,000.00. She submitted that, the learned Magistrate was empowered to make such an order, as section 17 of the CCPA contains '*procedural law*' and the learned Magistrate had exercised such '*procedural power*'.
22. Learned DSG also submitted that the power to impose a '*default sentence*' is regulated by section 291(1)(f)(iv) read with section 17(6) of the CCPA, which was in operation at the time the sentence was pronounced by the learned Magistrate on 11<sup>th</sup> August 2010. Therefore, she submitted that it was well within the power of the learned Magistrate to impose the default sentence.
23. The position advanced by the learned DSG was that, what Article 13(6) precludes from doing is to impose a penalty (sentence) which is in excess of the sentence that was in force at the time of the committing of the offence. She submitted that as an order for the payment of '*compensation*' is not an imposition of a penalty (sentence), the learned Magistrate had not acted in contravention of Article 13(6) of the Constitution.

#### **Analysis of the law and findings of Court**

24. In view of the core issue argued before this Court, it would not be necessary for this Court to deal with the imposition of the suspended term of imprisonment and the order for the payment of a fine by the learned Magistrate. Neither counsel challenged the lawfulness of the said orders, and in any event *ex facie* those two orders are lawful and appropriate in the circumstances of this case. Thus, for all purposes, those two sentencing orders would remain enforceable, independent of the decision this Court arrives at with regard to the instant Appeal.
25. As pointed out by the learned counsel for the Appellant, following the making of the sentencing order relating to the suspended term of imprisonment and the fine, the

learned Magistrate has made an order (as a component of the sentencing order) that the convicted Accused pays to the virtual complainant (first prosecution witness) Seventy-Five Thousand Rupees (Rs. 75,000.00) as compensation. Ostensibly, this order has been made under section 17 of the CCPA. The learned Magistrate has also considered the possibility of the Accused not paying the stipulated sum of compensation, and directed that, should the accused fail to pay compensation as ordered by Court, he shall be liable to be subject to a default term of six (6) months simple imprisonment. This order the enforcement of which is contingent upon the convicted accused failing to comply with the order for the payment of compensation, is generally referred to as a 'default term' or 'default term of imprisonment'. Ostensibly, this order has been made under section 291(1)(f)(iv) read with section 17(6) of the CCPA.

26. With regard to arriving at a judicial finding regarding the matter argued before this Court, a useful starting point would be to examine section 17 of the CCPA, to the extent relevant to the issue to be determined by this Court. I shall reproduce below section 17 (as it stood prior to the amendment introduced by Act, No. 14 of 2005).

- "17. (1) ... (not applicable).  
(2) ... (not applicable).  
(3) ... (not applicable).  
(4) *Whenever any person is convicted of any offence or where the court holds the charge to be proved but proceeds to deal with the offender without convicting him, the court may order the person convicted or against whom the court holds the charge to be proved to pay within such time or in such instalments as the court may direct, such sum by way of compensation to any person affected by the offence as to the court shall seem fit.*  
(5) ... (not applicable).  
(6) *Any sum awarded under this section whether by way of costs or compensation shall be recoverable as if it were a fine imposed by the court.*  
(7) ***When the compensation ordered is by a Magistrate's Court such compensation shall not exceed five hundred rupees to each aggrieved party.***  
(8) ... (not applicable).  
(9) *At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section."*

[Emphasis added.]



27. It would thus be seen that, section 17(4) of the CCPA confers judicial power on a Judge of the High Court and on a Magistrate for (a) following the conviction of any person for having committed any offence or (b) following the Court holding the charge to have been proved but proceeds to deal with the offender without convicting him (as in a situation where a Magistrate decides to act in terms of section 306 of the CCPA and either discharge the offender after admonition or conditionally discharge the offender), at its discretion, order that a stipulated sum of money be paid as compensation by the offender (accused) to any person affected by the offence. Based on the terminology found in section 17(7), it may be noted that the term 'any person affected by the offence' is a reference to the 'aggrieved party'. In contemporary nomenclature, an 'aggrieved party' is referred to as a 'victim of crime'.
28. It is necessary to recognise that, what is meant by 'compensation' in section 17(4) is similar to compensation a party aggrieved by the committing of an offence may recover from a civil suit. This is evident by the use of the term 'compensation' and the provision contained in section 17(9), which requires a Judge who subsequently adjudicates a civil suit relating to the same matter, being required to, when determining the awarding of compensation (in such civil suit) to take into account any sum paid or recovered as compensation under section 17 of the CCPA. In *R. v. Inwood* [(1975) 60 Cr. App. R. 70] Lord Justice Scarman commenting on compensation orders has expressed the view that compensation orders were introduced "*as a convenient and rapid means of avoiding the expense of resorting to civil litigation when the criminal clearly has the means which would enable the compensation to be paid*". **Thus, it would be seen that, what section 17 of the CCPA seeks to achieve is to add to the criminal justice penal response an element of relief which the aggrieved party is ordinarily entitled to obtain through civil litigation, and empower a court exercising criminal jurisdiction to grant such relief as a form of punishment.** It is important to note that recovery of compensation through civil litigation is not identical to the receiving of compensation following the successful completion of a criminal trial resulting in the conviction of the accused.
29. The judicial power conferred on a Magistrate or a Judge of the High Court to order the payment of compensation should not be recognised as a conferment of a power to award a civil remedy in criminal justice proceedings, as the awarding of compensation is a form of providing 'reparation' to the aggrieved party (victim of crime), which is a recognised penal measure of criminal justice which could take the manifestation of a punishment. **Providing reparation to the victim of crime is recognised in contemporary justice as a distinct outcome of criminal justice.** Thus,

providing reparation to the victim of crime is an objective of criminal justice and a form of punishment which a criminal court should necessarily consider imposing. In this regard, it is important to note that both the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 (repealed) and Act, No. 10 of 2023 (presently in force under the same title) provides a more comprehensive mechanism pertaining to the determination, ordering and payment of compensation to victims of crime, following criminal justice proceedings in both the Magistrate's Court and the High Court.

30. The conferment of power to a court exercising criminal jurisdiction to make an order for the payment of compensation to a party affected by the committing of the offence, is found in other jurisdictions as well. One such jurisdiction is the United Kingdom. Commenting on that power, Kevin Boyle and Michael Allen in *Sentencing Law and Practice* (Sweet & Maxwell, London, 1985) at page 151 has opined that '*... a compensation order is a sentence in its own right and not merely an ancillary order, and in suitable circumstances a court may use a compensation order as the only sentence to impose on an offender*'.
31. Section 17(6) of the CCPA provides that any sum awarded under section 17 by way of compensation shall be recoverable as if it were a fine imposed by the Court. Thus, the power of a Magistrate or Judge of the High Court to at its discretion act in terms of (i) section 291(1)(b) of the CCPA and direct the offender to suffer a term of imprisonment in default of payment of the fine, and (ii) section 291(2) of the CCPA and issue a warrant for the levy of the amount by distress and sale of any movable property belonging to the offender although the sentence directs that in default of payment of the fine the offender shall be imprisoned. While the first of these two measures is aimed at inducing the offender to make payment or in default suffer imprisonment, the second measure is aimed at recovery of the amount due by the sale of his movable property. **It would thus be seen that, an order for the payment of compensation in criminal justice proceedings has been equated to an order for the payment of a fine.**
32. As both learned counsels pointed out, section 2 of the Code of Criminal Procedure (Amendment) Act, No. 14 of 2005 has repealed section 17(7) of the principal enactment, and substituted therefor the following sub-section:

*"When the compensation ordered is by a Magistrate's Court, such compensation shall not exceed **one hundred thousand rupees** to each aggrieved party,*

*notwithstanding that such amount is in excess of the amount a Magistrate may normally impose as fine."*  
[Emphasis added.]

This amendment came into operation on the date on which the Speaker certified the enactment, that being the 31<sup>st</sup> May 2005. What this amendment has provided for is to raise the maximum limit of compensation a Magistrate is entitled to order from Five Hundred Rupees (Rs. 500.00) to One Hundred Thousand Rupees (Rs. 100,000.00).

33. During the hearing, both learned Counsel for the Appellant and the Respondents agreed with each other that, the order made by the learned Magistrate for the payment of compensation of Seventy-Five Thousand Rupees to the virtual complainant was founded upon the enhanced power conferred on a Magistrate to order the payment of compensation by the amended section 17(7), introduced by Act, No. 14 of 2005. Learned counsel for the Appellant submitted that the learned Magistrate could not have relied on the amended section 17(7) of the CCPA as having done so was in contravention of Article 13(6) of the Constitution since Act, No. 14 of 2005 was not in operation at the time of the committing of the offence on 5<sup>th</sup> July 1993. The submission of the learned DSG was two-fold. First, she submitted that, an order for the payment of compensation does not amount to a 'penalty', and hence, Article 13(6) had no applicability. Second, she submitted that, even if this Court were to conclude that the order for the payment of compensation amounts to a 'penalty' (for the purpose of Article 13(6)) and therefore Article 13(6) was applicable, it was well within the power of the learned Magistrate to have relied on the enhanced power conferred on him by the amended section 17(7), as the said provision of the law was a 'procedural provision' which could be applied prospectively, as the relevant amendment had been introduced by Parliament and came into operation after criminal proceedings were instituted against the Appellant on 6<sup>th</sup> October 2005. Thus, she submitted that the learned Magistrate had not acted in contravention of Article 13(6) of the Constitution.

34. In view of the foregoing, the issues to be determined by this Court are as follows:

a) *For the purposes of Article 13(6) of the Constitution, does an order for the payment of compensation amount to a 'penalty'?*

- b) *In the circumstances of the case at hand, does the imposition of the Order dated 23<sup>rd</sup> September 2010 for the payment of compensation of Seventy-Five Thousand Rupees to the virtual complainant, amount to a contravention of Article 13(6) of the Constitution?*

35. Article 13(6) of the Constitution provides as follows:

*“No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence and **no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.***

*Nothing in this Article shall prejudice the trial and **punishment** of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

*It shall not be contravention of this Article to require the imposition of a minimum **penalty** for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.”*

[Emphasis added.]

36. For the purpose of resolving the first issue to be determined by this Court, it is necessary to determine the meaning of the term ‘penalty’ as contained in Article 13(6) of the Constitution. The term ‘penalty’ has not been interpreted in the Constitution itself. Furthermore, the term ‘penalty’ is not defined in the Code of Criminal Procedure Act and in the Penal Code. Thus, there is a justification to ascertain and consider the ordinary meaning of the term and the meaning of the term in the context of the law. The Oxford Advanced Learner’s Dictionary (10<sup>th</sup> Edition - 2020) provides contextually that, a penalty means a punishment imposed for breaking the law, rule or contract. As an example, the dictionary contains the following sentence: “*Assault carries a maximum penalty of seven years’ imprisonment*”. The Oxford Dictionary of Law (Re-issue of the 7<sup>th</sup> Edition - 2013) to the extent applicable to the circumstances of this case provides that, a penalty is a punishment for a crime. The Black’s Law Dictionary (11<sup>th</sup> Edition - 2019) provides that a penalty is a punishment imposed on a wrongdoer usually in the form of imprisonment or fine. Especially, it is a sum of money exacted as punishment for either a wrong to the State or a civil wrong (as distinguished from compensation for the injured party’s loss), though usually for crimes, penalties are also sometimes imposed for civil wrongs. The Merriam-Webster Dictionary of Law (2016 Edition) contextually provides that a penalty is a punishment that is imposed

on a wrongdoer by statute or a judicial decision. Thus, it can be gathered that a 'penalty' is a consequential penal sanction provided by law on a person who has been found to have contravened the law. The term 'penalty' appears to be a synonym to the term 'punishment'. And it mostly takes the form of an order the compliance with which is mandatory, and sometimes has a monetary value. Nevertheless, the exact meaning of the term 'penalty' remains non-definitive.

37. As the next step towards the interpretation of the term 'penalty', I shall consider the contextual application of the term in the Constitution itself. The term 'penalty' has in addition to Article 13(6), been used in Articles 34(1)(d), 100 and 168(5) of the Constitution.

Article 34(1)(d) provides that the President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka, *inter alia* remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence. It appears that in Article 34(1)(d), the term 'penalty' has been used to depict it as being a judicially imposed penal sanction distinct from a 'punishment'. Article 100 provides that "*any person who having been elected a Member of Parliament but not having been at the time of such election qualified to be so elected, shall sit or vote in Parliament, or shall sit or vote in Parliament after his seat therein has become vacant, or he has become disqualified from sitting or voting therein, knowing or having reasonable grounds of knowing that he was so disqualified or that his seat has become vacant, as the case may be, shall be liable to a penalty of five hundred rupees for every day upon which he so sits or votes to be recovered as a debt due to the Republic by an action instituted by the Attorney-General in the District Court of Colombo*". It is thus seen that, the term 'penalty' has been used in Article 100 as amounting to a sanction which has necessarily a monetary value. Article 168(5) provides that, "*unless the Constitution otherwise provides, the part operation of any law in force prior to the commencement of the Constitution or anything duly done or suffered or any offence committed or any right, liberty, obligation or penalty acquired or incurred under any law in force prior to the commencement of the Constitution shall not in any manner be affected or be deemed to be affected by the Constitution coming into force*". It would be noted that the use of the term 'penalty' in Article 168(5) of the Constitution does not reveal the exact character of the term.

Thus, it would be seen that a consideration of Articles of the Constitution which uses the term 'penalty' also does not assist this Court to arrive at a definitive interpretation of the term.

38. The term 'penalty' is found as a specific penal sanction in sections 134 and 392A of the Penal Code. While in section 134, it is a reference to a payment to be made as a punishment for having committed the offence contained in section 134 (concealment of a deserter on board a merchant vessel due to the negligence of the master), in section 392A (criminal breach of trust by a public servant in respect of money or balance of money) it is a reference to the punishment contained in section 392 (criminal breach of trust by public servant or by banker, merchant or agent) of the Penal Code. In multiple sections of the Anti-Corruption Act, No. 9 of 2023, there are multiple references to the term 'penalty'. In sections 49(7) and the proviso to 76(2), the term 'penalty' has been used as a synonym to the term 'punishment'. However, in sections 109(8), 114(1), 114(2), 114(3), 114(4), 129 and 162(1) the term 'penalty' has been used to describe a form of penal sanction which has a monetary value as distinguishable from a 'fine'.

**39. It would thus not be possible to formulate a generic definition for the term 'penalty'. The meaning of the term 'penalty' must be contextually determined to cater for specific provisions of the law where such term is found, particularly having regard to the source of the law and the object and purpose it is sought to achieve.**

40. Article 13(6) of the Constitution provides as follows:

*"No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence and **no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.***

*Nothing in this Article shall prejudice the trial and **punishment** of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

*It shall not be contravention of this Article to require the imposition of a minimum **penalty** for an offence provided that such **penalty** does not exceed the maximum **penalty** prescribed for such offence at the time such offence was committed."*

[Emphasis added.]

**To put simply and briefly, what Article 13(6) prohibits is the enforcement of *ex post facto* criminal legislation. Article 13(6) also contains an exception to the general rule**

**which confers protection against *ex post facto* criminal legislation, that being legislation founded upon general principles of international law recognized by the community of nations.**

41. In the sphere of comparable foreign national legislation, Article 20(1) of the Constitution of India contains the same principle, in the following words:

*“No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”*

42. It is beyond doubt that the source of Article 13(6) of the Constitution of Sri Lanka (contained in Chapter III of the Constitution, entitled ‘Fundamental Rights’) and Article 20(1) of the Constitution of India is undoubtedly Article 11(2) of the Universal Declaration of Human Rights (UDHR) and Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR).

Article 11(2) of the UDHR provides as follows:

*“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”*

[Emphasis added.]

Article 15(1) of the ICCPR provides as follows:

*“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”*

[Emphasis added.]

It may be noted that Article 7(1) of the European Convention on Human Rights (ECHR) is also similarly worded. It appears so evidently that, both Article 11(2) of the

UDHR and Article 15(1) of the ICCPR are founded upon two universally recognised principles which ensures legality, justice (fairness) and predictability of substantive penal legislation and penal sanctions (punishment). This principle is in fact a component of the *rule of law*. There is universal acceptance that enforcement of substantive criminal law which includes prohibitions contained in criminal law and criminal punishments (penal sanctions) for the violation of such prohibitions with retroactivity is unjust. A person when fashioning his conduct must know in advance what is prohibited by law and the consequences for the violation of such prohibition. There must be foreseeability and certainty of the position of the law. In fact, it can be said that acceptability and the fairness of the harshness of criminal punishment is founded upon respect to and compliance with this exception to the empowerment conferred on the legislature to enact criminal laws and stipulate punishment – that being the principle against retroactivity.

The principle against retroactivity of substantive criminal laws is contained in two Latin phrases, *Nullum crimen sine lege* (“no crime without law”) and *Nulla poena sine lege* (“no punishment without a law”). In conjunction, these two phrases are referred to as ‘*Nullum crimen nulla poena sine lege*’ (No crime and no punishment without law). It is the Latin phrase *Nulla poena sine lege* which relates to the second component of the Articles of the afore-stated two universally acclaimed international human rights Conventions as well as Article 13(6) of our Constitution, the application of which is at the center of the argument between the learned counsel for the Appellant and the learned DSG for the Respondents.

The Oxford Dictionary of Law (Re-issue of the 7<sup>th</sup> Edition – 2013) provides the following useful description of this phrase *Nulla poena sine lege*:

*“The principle that a person can only be punished for a crime if the punishment is prescribed by law. The punishment may be specified by a statute as a term of imprisonment or fine or it may be based on common-law principles. ... ”*

The Black’s Law Dictionary (11<sup>th</sup> Edition – 2019 Print) provides the following quotation:

*“One of the core elements of modern Western law is the ‘nulla poena sine lege’ principle according to which an act can only be punished if the crime itself and the corresponding punishment is clearly determined at the time of the act’s commission.”*

43. Most learned authors of the law have dealt with the principle of *nulla poena sine lege* together with its counterpart *nullum crimen sine lege* in conjunction with each other as



the principle of '*non-retroactivity of criminal laws*' in common law jurisdictions, and as the principle '*de légalité en droit pénal*' in civil law jurisdictions. It is widely believed by researchers that these principles were embodied in the Roman criminal law (750 B.C. to 500 A.C.). In the '*Commentary on the Pandects of Johannes Voet*' by Percival Gane, Volume VII, Butterworth & Co. (Africa) Ltd. (1957), at page 514 is a reference to the fact that the Roman criminal law provided that the sentence to be passed on a convict should be as it stood for such a person as at the date of the crime. However, that this principle necessarily originated from Roman criminal law is debatable. That is due to the following historical fact.

44. According to Buddhist literature, the principle against retroactive enforcement of penal laws is embodied in the *Weeragna Kandakaya* of the *Paarajikaa Paaliya* of the *Vinaya Pitakaya* of the *Tripitaka* (a Cannon in *Pāli* language containing a standard collection of definitive scriptures of the original Theravada Buddhist tradition, which is believed to contain an authentic version of Lord Buddha's teachings) wherein it is apparent that Gauthama Buddha (563 to 483 BCE, North India) had during his lifetime prescribed Rules to be adhered to by the Buddhist Order of ordained monks (Buddhist priests), the violation of which would constitute offences and punishment for committing such offences. These Rules are contained in the *Vinaya Pitakaya*. The Buddha had preached that these *Vinaya* (disciplinary) Rules were to be enforced, and wrongdoer monks should be punished according to the law stated in the corresponding Rule which prohibits the relevant wrongdoing. However, such Rules were not to be enforced against the *Aadikammika* (the wrongdoer monk whose unethical or wrongful conduct resulted in the Buddha promulgating the corresponding *Vinaya* Rule), and should be enforced only against monks who on future occasions violate the prohibition contained in the relevant *Vinaya* rule. Justice C. Ananda Grero ("*An Analysis of the Theravada Vinaya in the light of Modern Legal Philosophy*", Karunaratne & Sons, 1<sup>st</sup> Edition (1996), p. 153) expresses the view that the Buddha was "... totally opposed to retrospective laws ...". Furthermore, citing an incident involving a misconduct by a monk called Suddhinna which resulted in Lord Buddha promulgating a particular *Vinaya* rule prohibiting such misconduct and not punishing Suddhinna for such misconduct, Justice Grero highlights that none of the *Vinaya* Rules fall within the category of retrospective laws. Thus, it appears that according to Buddhist historical literature, Lord Buddha was the first to recognise the principle against retroactivity of criminal laws, and had declared that his laws relating to Monks (*Vinaya Rules*) be enforced only prospectively.

45. In European civilization, these two principles (*nulla poena sine lege* and *nullum crimen sine lege*) combined as one was developed during the period of enlightenment (17<sup>th</sup> and 18<sup>th</sup> centuries A.D.) as protection against the imposition of arbitrary convictions and extraordinary penalties by the judiciaries of those countries. It is well-documented that the *Declaration of the Rights of Man and the Citizen* of France which was adopted during the pendency of the French revolution in 1789 by the National Constituent Assembly of France contained the principle of 'no punishment without crime' in a rudimentary form. [Article V – ... Anything that the law is not forbidden cannot be impeded ...] Most authors subscribe to the view that German scholar Professor Paul Johann Anselm Feuerbach (1775 - 1833) originated the phrase '*nullum crimen, nulla poena sine praevia poenali*' (No crime, no punishment without previous penal law) when drafting the Bavarian Penal Code (1813), where this concept was included. However, prior to that, the rule against *ex post facto* laws had been first included into legislation in the Austrian law of 1787, and in Article I Section 9(3) of the Constitution of the United States of America (1789). The underlying rationale had been the acceptance of the principle that substantive crimes (*nullum crimen*) and punishments (*nulla poena*) must be first enacted before the commission of an offence (*sine lege*), and that the criminal tribunal appointed to adjudicate and prescribe punishment must have been previously established by law. In other words, this principle required that punishments for criminal acts must be laid down in law in advance of the crime being committed, in order that a court may meet out the punishment in accordance with such law. To put in another way, there can be no crime and no punishment, unless it is in accordance with law that is laid down in advance (not retroactively sought to be enforced), certain, and unambiguous. Adherence to this principle ensures that people have advance notice of what conduct is prohibited by law (through criminalization) and the consequences (punishment) for the violation of each such prohibition.

46. In *Calder v. Bull*, [3 US (3 Dall.) 386, 390 (1798)], the Supreme Court of USA has identified four categories of *ex post facto* laws:

- (i) Any law that criminalizes an act after the fact, and which punishes such action.
- (ii) Any law that aggravates a crime, or makes it greater than it was at the time it was committed.
- (iii) Any law that changes the punishment, thus inflicting a greater punishment than that which existed at the time the crime was committed.
- (iv) Any law that alters the legal rules of evidence, thus accepting less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender.

47. **What Article 13(6) of the Constitution seeks to achieve is to confer a fundamental right which serves as a protection against retroactive or *ex post facto* application of criminal laws.** It is to ensure that, a person is subject to criminal justice measures only if the impugned conduct constituted an offence at the time the alleged conduct or illegal omission took place (first part of Article 13(6) – *Nullum crimen sine lege*), and that he is punished (penal sanctions imposed) only to the extent such punishment had been prescribed by law at the time the offence was committed (second part of Article 13(6) – *Nulla poena sine lege*). That is how Article 13(6) seeks to confer protection against retroactive application of criminal laws. [As the proviso to Article 13(6) shows, there is a well-recognised exception to this principle.]
48. In these circumstances, it is my view that in order to ensure that the protection accorded by Article 13(6) of the Constitution to a person who is subject to criminal prosecution and punishment be meaningful, effective and comprehensive, a court of law must be able to penetrate nomenclature and the sheer literal meaning and appearance of the term ‘penalty’ and go behind the term to assess and determine its actual and effective nature and impact on the rights of a person. Thus, this Court must determine whether the term ‘penalty’ would relate only to conventional forms of punishment such as imprisonment and fine, or whether it would include ‘compensation’ to be paid to the victim of crime as ordered by the trial judge. In other words, this Court has to determine whether, for the purpose sought to be served by Article 13(6) of the Constitution, the impugned order made for the payment of ‘compensation’ amounts to a ‘penalty’ as provided in Article 13(6).
49. It is evident from the structure and content of Article 13(6) and in particular the term ‘penalty’ being used in the operative clause containing the rule, and the term ‘punishment’ being used in the exception to the rule, that the term ‘punishment’ is used to denote the process or mechanism by which a ‘penalty’ (penal sanctions for violation of a prohibition contained in substantive criminal law) is imposed.
50. As I have shown earlier in this judgment, though referred to as an order for the payment of ‘compensation’, its very nature, impact and particularly consequences arising out of non-payment, renders such order almost synonymous with the term ‘fine’. The only difference is that when a ‘fine’ is paid by the convict, it is remitted to the funds of the State (Consolidated Fund) or to the corresponding Provincial Council [9<sup>th</sup> Schedule, List I (Provincial Council List), item 36.8 of the Constitution], and when

'compensation' is paid, it is given to the aggrieved party (victim of crime) which in this instance was the virtual complainant (first witness for the prosecution). It would also be seen that 'compensation' as provided in section 16 of the CCPA is distinctly different to 'compensation' that is recoverable by a plaintiff following the successful completion of civil proceedings. That is primarily because an order for the payment of 'compensation' is made by a court exercising criminal jurisdiction following the conviction of an accused for having committed an 'offence', as opposed to a finding by a civil court that the defendant is responsible for having committed an actionable wrong. As the order for the payment of compensation is made following a person having been accused of having committed an offence and thereafter having been found '*guilty*' and therefore convicted of having committed such offence or dealt with otherwise without entering a conviction [*vide* section 17(4)], the order for the payment of compensation amounts to a 'penal sanction' *alias* 'punishment'. Though the object and purpose of an order for the payment of 'compensation' is to provide reparation to the victim of crime, it is punitive in nature, particularly as recovery of compensation can be carried out as if it were a 'fine', and since a default sentence of imprisonment can be ordered as a consequence of non-payment. **Therefore, in this context, the term 'penalty' should be treated as a synonym for the term 'punishment'**. To that extent, I find myself in agreement with the submission made in that regard by the learned counsel for the Appellant.

51. The Black's Law Dictionary provides that 'procedural law' is a set of rules that prescribe 'the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves'. The term 'substantive law' has been defined as 'the part of the law that creates, defines, and regulates the rights, duties and powers of parties'. The Merriam-Webster's Dictionary of Law provides that 'procedural law' is 'the law that prescribes the procedures and methods for enforcing rights and duties and for obtaining redress (as in a suit)', and that is distinguished from the law that creates, defines, or regulates rights.
52. A consideration of the impact arising out of an order for the payment of compensation made under section 17(4) read with section 17(7) of the CCPA reveals clearly that it creates an undeniable obligation on the part of the accused found '*guilty*' of having committed an offence to pay a sum of money to the victim of crime. Thus, the order for the payment of compensation creates a legally enforceable duty. In the circumstances, I find myself in vehement disagreement with the submission made by the learned DSG, that section 17 is 'procedural law' and not 'substantive law'.

53. The learned DSG submitted that, what is important is that, at the time criminal proceedings were instituted in the Magistrate's Court, Act, No. 14 of 2005 was in force. However, it is of fundamental importance to note that, for the purposes of applying the principle *nullum crimen sine lege*, what is important is the date on which the offence was committed, and not the date on which criminal proceedings were instituted. In *In re F.J.C. de Mel and Thelma de Mel*, [78 NLR 67], this Court while commenting on the enhanced power conferred on the Criminal Justice Commission (established by the Criminal Justice Commission Act, No. 14 of 1972 and repealed by Law No. 12 of 1977) has observed as follows:

*"It is a well known rule of interpretation that generally statutes are prospective and operate only on cases and facts which come into existence after they were passed. The rule is based on an ancient maxim which is set out in Justinian's Code 1-14-7 and is expressed in Voet 1-3-17 thus:-*

*"It is certain further that laws give shape to affairs of the future, and are not applied retrospectively to acts of the past"*

*This rule is also part of the, English law. Maxwell Interpretation of Statutes (12<sup>th</sup> Ed.) p.215 states -*

*"Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. Nova constitution futuris formam imponere debet, non praeteris. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."*

*... On the view expressed by Salmond, a law which provides for enhanced punishment for an existing offence, is not intended to apply to offences committed before its enactment. ... On the grounds set out by us we hold that the provision for enhanced punishment introduced by amending law is not applicable to the punishment of offences committed before its enactment, in respect of such offences the punishment that may be imposed is that provided in for in the original Act ..."*

It is observable that at the date on which the offence was committed (5<sup>th</sup> July 1993), clearly, Act, No. 14 of 2005, which conferred on the Magistrate the enhanced power to impose an order for the payment of compensation extending up to One Hundred Thousand Rupees was not in force. Thus, I am not in a position to agree with the

submission made in that regard by the learned DSG. The learned Magistrate has enforced his enhanced power retroactively which is contrary to the law.

54. I wish to also observe that an examination of the Code of Criminal Procedure (Amendment) Act, No. 14 of 2005 does not reveal an intention on the part of the Parliament to require the enforcement of the provisions of that law with retrospective effect.

### **Conclusion and the outcome of the Appeal**

55. In view of the foregoing reasoning, I hold that **for the purposes of Article 13(6) of the Constitution, since an order for the payment of 'compensation' is a form of a 'punishment', an order for the payment of 'compensation' under section 17(4) read with section 17(7) of the Code of Criminal Procedure Act amounts to the imposition of a 'penalty'**. Furthermore, I hold that, in the circumstances of this case, the imposition of the order dated 23<sup>rd</sup> September 2010 for the payment of compensation of seventy-five thousand rupees to the virtual complainant, was in contravention of Article 13(6) of the Constitution, since such amount was in excess of the amount of compensation a Magistrate was empowered to impose (under the original section 17(7) of the CCPA) at the time the offence was committed.

56. Therefore, I answer the question of law in respect of which *leave to appeal* had been granted, in the following manner:

*The component of the Order of sentence passed by the learned Magistrate on 23<sup>rd</sup> September 2010 following the conviction of the accused for the payment of a sum of Seventy-Five Thousand Rupees to the first witness for the prosecution (virtual complainant - victim of crime), is contrary to Article 13(6) of the Constitution, and is therefore unlawful.*

57. In view of the foregoing finding, I quash and set aside the order made by the learned Magistrate for the payment of compensation of Seventy-Five Thousand Rupees, and substitute that sentence with an order for the payment of Five Hundred Rupees as compensation to the virtual complainant. The suspended term of imprisonment and the order for the payment of the fine shall stand.

The revised Order of sentence shall be as follows:

- A term of rigorous imprisonment of one and a half (1½) years, suspended for ten (10) years.
- A fine of One Thousand Five Hundred Rupees (Rs. 1,500.00). If the fine is not paid, three (3) months simple imprisonment (default sentence).
- In consideration of the loss caused to the first witness for the prosecution (virtual complainant) compensation of Five Hundred Rupees (Rs. 500.00) to be paid to the said person. If compensation is not paid, the stipulated sum to be recovered as a fine or one (1) month simple imprisonment (default sentence).

58. Accordingly, the judgment of the High Court of the Provinces is varied to the afore-stated extent. Accordingly, this Appeal is partly allowed. Parties shall bear their own costs. The Registrar of the Supreme Court is directed to forward a copy each of this Judgment to the High Court of the Provinces holden in Galle and to the Magistrate's Court of Galle.

**Jayantha Jayasuriya, PC, CJ**

I agree.

**Mahinda Samyawardena, J**

I agree.

**Judge of the Supreme Court**

**Chief Justice**

**Judge of the Supreme Court**