

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

In the matter of an Application for
Special Leave to Appeal.

SC Appeal 88/2012

The State

SC SPL LA 180/2008

Complainant

CA 189/1996

Vs

HC Colombo 6025/1993

Udugamaralalage Walter Mendis

Accused

And

Udugamaralalage Walter Mendis

Accused-Appellant

Vs

Hon. Attorney General

Attorney General's Department,

Hulftsdorp, Colombo 12.

Complainant-Respondent

And Now between

Udugamaralalage Walter Mendis
No. 34C/45,
Rukmalgama Housing Scheme,
Pannipitiya.

Accused-Appellant-Petitioner-Appellant

Vs

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

Complainant-Respondent-Respondent

Before: Buwaneka Aluwihare PC, J.
Preethi Padman Surasena J. &
E. A. G. R. Amarasekara J.

Counsel: Faisz Musthapha PC with Kamran Aziz and Ershan
Ariyaratnam for the Accused-Appellant-Appellant.

Madhawa Tennakoon SSC for the Attorney-General.

Argued on: 28.01.2020

Decided on: 11.09.2020

JUDGEMENT

Aluwihare PC. J.,

The only question of law that this court is called upon to consider in this matter is, as to whether the sentence imposed on the accused-appellant-appellant (hereinafter the 'accused') is excessive. [The question of law raised in subparagraph 'L' of paragraph 8 of the Petition of the Petitioner].

The accused had been convicted for the offence of Criminal Breach of Trust in a sum of Rs. 527,496.00, punishable under Section 391 of the Penal Code. Upon conviction the accused has been imposed with a sentence of a term of 5 years rigorous imprisonment and in addition a fine of Rs. 700,000.00 was also imposed, which carried a default sentence of 21 months rigorous imprisonment.

Aggrieved by the conviction and sentence, the accused appealed to the Court of Appeal. After the hearing of the appeal, their Lordships of the Court of Appeal by their judgment of 9th July 2008 dismissed the appeal.

The appeal before us arises from the said judgment of the Court of Appeal. At the outset the Learned President's counsel for the accused contended that he is only seeking the relief prayed in paragraph 'c' of the petition, namely, to vary the custodial sentence imposed on the accused to a non-custodial sentence.

The allegation against the accused was that he committed Criminal Breach of Trust in a sum of money, while being employed as an Accounts Executive at the Freudenberg Air Service Ltd. It transpires from the record that the prosecution had led 5 witnesses to prove the charge and after the conclusion of the prosecution case, the accused had testified under oath on his own behalf and has refuted the charge. In view of the fact that the court is only called upon to consider as to

whether the sentence is excessive or not, I see no purpose in considering the merits of the prosecution case.

The main contention of the Learned President's Counsel on behalf of the accused was that 30 years has elapsed since the date of the offence, and it is highly inappropriate to incarcerate a person who has had a clean life since then after the lapse of such a long period. It was also submitted that the accused was incarcerated for a period of 8 months consequent to the conviction and sentence by the High Court before he was released on bail, pending the appeal by the Court of Appeal. The attention of the court was also drawn to the deteriorating medical condition of the accused. Medical records of the accused filed in this case ('P1' to 'P10') is indicative of that, the accused had suffered a myocardial infarction in 2006 and had obtained treatment since then from the Cardiology Unit of the Sri Jayawardenapura General Hospital and the Durdans Hospital.

The Learned President's Counsel relied on the decisions of **Karunanayake v. The State** 1978 NLR 413, **Ananda v. The Attorney General** 1995 2 SLR 315, **Wimalaratne v. The State** (CA Application 46/58-CA minutes dated 24.11.2000 and **Ranawaka Arachchige Priyanka Ruwanari Perera** (Sc Appeal 99/2006-SC minutes of 21.07.2007).

In all these decisions the court broadly takes into account the time elapsed since the date of the offence and the date the sentence was to be imposed as a factor in deciding whether imposing a custodial sentence could be justified. Although the period of time between those two events is a factor to be considered, taking into consideration that law's delays are prevalent in the system of administration of justice, the delay alone cannot be a factor to refrain from imposing a custodial sentence. The delay, however, may be taken into account in conjunction with other mitigatory factors in deciding the quantum of sentence that should be imposed to commensurate with the gravity of the offence and any other aggravating factors. Thus, in exercising judicial discretion, it is imperative for a judge to consider both

the mitigating factors as well as the aggravating factors before deciding on an appropriate sentence.

The Learned Senior State Counsel submitted that he has no objection to waiving off the custodial sentence imposed on the accused. However, the Learned Senior State Counsel invited the court to consider enhancing the fine imposed by the High Court in the event the court is of the view that the custodial sentence should be replaced with a suspended term of imprisonment. This court considered the factors peculiar to the case before us and is of the view that this is a fit instance to set aside the custodial sentence and to impose a suspended term of imprisonment in lieu of the same.

The court observes that this is a financial fraud committed by the accused when he was placed in a position of trust in the capacity of the Accounts Executive by his employer. As such this court is mindful of the fact that the sentence to be imposed should act as a deterrent, from the perspective of the society.

Taking all facts and the attendant circumstances into consideration, the sentence imposed by the Learned High Court Judge is hereby set aside and is substituted with the following sentence;

The accused is imposed a sentence of two years (2 years) rigorous imprisonment and, acting under Section 303 of the Code of Criminal Procedure Act, the said term of imprisonment is suspended for a period of ten years (10 years). In addition, a fine of Rupees Two Million Five Hundred Thousand (Rs. 2.5 million) and a default sentence of one year and nine months (1 year and 9 months) rigorous imprisonment are also imposed on the accused.

The Learned High Court Judge is directed to pronounce and enforce the sentence imposed by this court on or before 30th October 2020 and report back of its implementation, to this court.

The accused is directed to appear before the High Court upon receipt of notice from the High Court to that effect.

Appeal partially allowed.

Judge of the Supreme Court

Preethi Padman Surasena J.

I agree.

Judge of the Supreme Court

E. A. G. R. Amarasekara J.

I agree.

Judge of the Supreme Court