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

In the matter of an Application for under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No: 70/2018

SC/SPL/LA No. 276/2017
CA (PHC) APN 133/2016
HC Chilaw 03/09

Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

-VS-

Badde Liyanage Wasantha Kumara Fernando.
No. 9, St Rita Mawatha,
Dummaladeniya South,
Wennappuwa.

Presently at,
Welikada Prison, Borella, Colombo 8.

ACCUSED

AND BETWEEN

Badde Liyanage Wasantha Kumara Fernando.
No. 9, St Rita Mawatha,
Dummaladeniya South,
Wennappuwa.

Presently at,
Welikada Prison, Borella, Colombo 8.

ACCUSED-PETITIONER

-VS-

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
COMPLAINANT -RESPONDENT

AND NOW BETWEEN

Badde Liyanage Wasantha Kumara Fernando.
No. 9, St Rita Mawatha,
Dummaladeniya South,
Wennappuwa.

Presently at,
Welikada Prison, Borella, Colombo 8.
ACCUSED-APPELLANT-APPELLANT

-VS-

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
COMPLAINANT -RESPONDENT RESPONDENT

BEFORE : **B.P. ALUWIHARE, PC, J.**
S. THURAIRAJA, PC, J.
E.A.G.R. AMARASEKARA, J.

COUNSEL : Anil Silva, PC with D. Gunaratne for the Accused- Appellant - Appellant.
Varunika Hettige D.S.G. for the Complainant – Respondent – Respondent.

ARGUED ON: 12th May 2020.

WRITTEN SUBMISSIONS : Accused- Appellant -Appellant on the 12th of July 2019.

Complainant – Respondent – Respondent on the 01st of August 2019.

DECIDED ON : 11th September 2020.

S. THURAIRAJA, PC, J.

The Accused-Appellant-Appellant namely, Badde Liyanage Wasantha Kumara Fernando (hereinafter referred to as the "Accused- Appellant") was originally indicted for murder punishable under section 296 of the Penal Code on 21/11/2004 for causing the death of Anthonilage Pradeep Gamini Fernando (hereinafter referred to as the "Deceased"). After the non-summary inquiry the indictment was forwarded in 2009. The Appellant initially pleaded not guilty and the matter was fixed for trial. According to the journal entries and the proceedings, both parties had moved dates on several grounds including the Accused-Appellant wanting to re-consider his plea. The trial commenced on 8/6/2015 and the prosecution led the evidence of two eye-witnesses and the Consultant Judicial Medical Officer (hereinafter referred to as "JMO"). Thereafter the Appellant, through his Attorney-at-Law, informed the Court that he wishes to withdraw his plea of not guilty and to plead guilty under Section 297 of the Penal Code for culpable homicide not amounting to murder **on the basis of grave and sudden provocation**. Accordingly, the State Counsel considered and amended the indictment and preferred a charge under section 297 of the Penal Code. The Appellant unconditionally pleaded guilty to the amended indictment and made submissions to mitigate his sentence.

After hearing submissions from both Counsel for the Appellant and the State, the learned trial judge imposed 15 years rigorous imprisonment and a fine of Rs. 7500/- in-default six months simple imprisonment.

The Appellant was convicted on 28/06/2016 and the sentence was imposed on 12/07/2016. Thereafter the Appellant submitted a revision application to the Court of Appeal on 19/10/2016. The Complainant- Respondent, the Attorney General, raised two preliminary objections at the Court of Appeal. Firstly, although the petitioner had a right of appeal which is a statutory right, he had without exercising the same sought to invoke revisionary jurisdiction and secondly, that the order of the learned High Court Judge is not irregular, illegal or capricious. The Court of Appeal without considering the preliminary objections considered the revision application, affirmed the conviction and reduced the sentence to 10 years rigorous imprisonment from 15 years rigorous imprisonment.

Being aggrieved with the said order, the Appellant preferred an appeal to the Supreme Court and on the 9/5/2018 this Court granted leave on the question of law stated in paragraph 17(b) of the petition dated 07/12/2017. The said question of law is reproduced here for easy reference.

> 17(b) "*did the Learned Judges of the Court of Appeal misdirect themselves in imposing a sentence of 10 years which is excessive considering the fact that 13 years has elapsed since the commission of the offence, this was not a premeditated incident, there was no animosity between the parties and the petitioner had led substantially blameless life?*"

The Counsel for the Appellant made his submissions primarily about intoxication, imposing a sentence after a long period of time and on the basis of knowledge at the time of the offence.

It will be appropriate to first consider the facts of the case. According to the evidence presented before the High Court, it is apparent that the Appellant had consumed liquor with about 10 of his friends including the eye-witnesses and the deceased. The wife of the Appellant had come there and addressed the Appellant in a degrading manner.

"සක්කිලියා මොකද කරන්නේ?"

[*Sakkiliya* (a word used to degrade or humiliate a person in society) what are you doing?]

Then the deceased had said,

"එහෙම කියන එක හරි නැහැනෙ, මනුස්සයා නේද?"

(It's not correct to say that, isn't he your husband?)

Thereafter, the Appellant had tried to hit the deceased with an empty bottle which did not strike him. Thereafter the Appellant had gone home, brought a knife and stabbed the deceased. According to the eye-witnesses, the deceased had not offered anything to provoke the Appellant. There is no evidence to substantiate that there was animosity or any preparation for this offence. As per the submitted facts the Accused- Appellant, deceased and their friends were consuming liquor when the wife of the Appellant came there and scolded the Appellant, the Appellant got angry with two of his friends including the deceased, went and brought a knife, stabbed the deceased and chased the other person. According to the JMO there were three superficial injuries other than the fatal injury which could have been caused in two blows.

When considering intention and knowledge in the context of culpable homicide, the type of weapon used (if any), the way the injuries were inflicted, the nature, location and number of injuries inflicted on the victim are considerable facts. As per the evidence of the JMO at pages 86 and 87 of the brief, he describes that the injury was so serious that it would definitely result in the death of the deceased, hence the Appellant's intention is proved.

ප්‍ර: මෙවැනි තුවාල හේතුවෙන් පුද්ගලයෙක්ට අනිවාර්යයෙන්ම මරනය ගෙනදෙනවාද ? ස්වභාවික තත්ත්වයක් යටතේ මරනය ගෙන දෙනවාද?

(Q: Are such injuries necessarily fatal or could cause death in the ordinary course of nature?)

උ: මෙවැනි තුවාල සඳහා ඉක්මනින් ශල්‍යකර්මයක් සිදු කිරීමෙන් ජීවිතය බේරා ගැනීමේ හැකියාව තිබෙනවා.

(A: There is potential to save lives by performing prompt surgery for such injuries as this.)

ප්‍ර: ශල්‍යකර්මයක් සිදුකලේ නැත්නම් ස්වභාවික තත්ත්වයක් යටතේ මරනය ගෙන දෙනවාද?

(Q: if no surgery is performed could death have resulted in the ordinary course of nature?)

උ: රුධිරය ගලා යාම හේතුවෙන් ඉතා ඉක්මනින් මරනය ගෙන දෙනවා.

(A: Because of bleeding, death results very quickly.)

As revealed from the evidence placed before the trial Court, the Appellant at the time of the incident was married and had two children. The fingerprint report of the Appellant was produced before the trial judge and according to the said report; the Appellant had a previous conviction in 1998.

The Court of Appeal in the order of the revision application referred **Ananda vs Attorney General (1995 2 SLR 315), Attorney General vs Dewapriya Walgamage and another (1990 2 SLR 212)** and **Liyana Mendis Gunadasa and two others vs Attorney General (CA 141/2006 decided on 20/06/2014).** The Court of Appeal stated in the order as follows; *"it is settled law that even a deserving sentence made after a considerable period of time should not be imposed at a later stage"* (sic). There is no reference made in the judgment that the Court of Appeal had considered the above judgments in making their decision.

Since it is mentioned, I perused the said judgments. In **Ananda vs Attorney General** (supra) the Accused was convicted for causing grievous hurt and a sentence of 10 months imprisonment was imposed. When it was appealed, the Court of Appeal observed that implementing a sentence of 10 months after 18 years was inappropriate. Court of Appeal held that,

"An accused has a right to be tried and punished for an offence committed within a reasonable period of time, depending on the circumstances of each case. A delay of over 18 years to dispose of a Criminal Case is much long period by any standard, delays of this nature are generally regarded as mitigating factors."

In **Attorney General vs Dewapriya Walgamage and another** (supra) there was a criminal breach of trust for which a sentence of 2 years rigorous imprisonment and a fine were imposed. The Court of Appeal was reluctant to imprison him after lapse of 13 years since the commission of the offence. Further it was observed that the Accused in this case lost his employment and related benefits. He was further ordered to pay a substantial fine of Rs. 50,000/-. Therefore, the Court of Appeal suspended the sentence for 5 years.

In **Liyana Mendis Gunadasa and two others vs Attorney General** (supra) three accused persons were initially charged for murder and attempted murder. After the trial they were acquitted for murder and found guilty on attempted murder and a sentence of 7 years rigorous imprisonment was imposed. The Court of Appeal observed that imprisoning the Accused for a sentence of 7 years after the lapse of 30 years was inappropriate. Hence, Appellate Court reduced the sentence to 2 years, suspended the same, imposed a fine and ordered to pay Rs. 30,000/- by each accused as compensation. It was held that,

"In the case in hand the long delay of 30 years from the date of offence is a mitigatory factor and no court would be able to decide otherwise mainly for the reason that the court procedure, itself has taken to finally conclude the matter by at least two decades. Such delays not only need to be avoided but condemned in the interest of justice."

Considering the aforementioned cases I find that the imprisonment imposed in those cases is much less than in the present case. Here the learned trial Judge had

imposed 15 years rigorous imprisonment for an offence of culpable homicide not amounting to murder and there is no award of compensation to the deceased. In the present case, the indictment was served in 2009 and as per the journal entries trial could not be taken up before the High Court as there were partly heard matters, thereafter the Accused- Appellant sought time to re-consider his plea and later withdraw his plea of not guilty and pleaded guilty under Section 297 of the Penal Code for culpable homicide not amounting to murder. Trial was taken up on 8/6/2015 and evidence of 3rd, 1st and 13th witnesses were fully led and concluded on 25/04/2016 and judgment of the 12/07/2016 hence it is evident that all evidence had been led and judgment delivered within a year from the commencement of the trial. It is also observed in the available materials that the deceased had not in any way provoked or was in no way involved in any manner towards the crime. In fact, he was defending the Accused- Appellant from his wife who was insulting him in public.

The Court of Appeal has not indicated whether they are accepting or rejecting the preliminary objections namely, although the petitioner had a right of appeal which is a statutory right he had without exercising the same sought to invoke revisionary jurisdiction and the order of the learned High Court Judge is not irregular, illegal or capricious. When the State raises serious and valued preliminary objections, it is the duty of the Court to accept or reject the same after giving due reasons. Further it is also observed that the judgment of the Court of Appeal had not given any reasonable grounds for reducing the sentence from 15 years to 10 years. This was a revision application; the Appellate Court is reasonably expected to give reasons for making a decision. Further the State has raised a specific objection namely; the order of the learned High Court Judge is not irregular, illegal or capricious. Considering those two objections even at this stage, I find that the order of the learned Judge of the High Court is regular, legal and reasonable.

The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice

is denied. The right to a fair trial was formally recognized in International law in 1948 in the United Nations Declaration of Human Rights. Since 1948 the right to a fair trial has been incorporated into many national, regional and international instruments. The Sri Lankan Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a fair trial by a competent Court. In **the Attorney-General vs. Segulebbe Latheef and another** (2008 SLR Volume 1, Page 225) Justice J.A.N. de Silva (as he was then), held that, *"the right to a "fair trial" amongst other things includes the following: - ….7. The right of an accused to be tried without much delay…"*

I am mindful that any inordinate delay in the conclusion of a criminal trial undoubtedly has highly deleterious effects on society generally and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than accused. Therefore, there is no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence.

In **Niranjan Hemachandra Sashittal and another v State of Maharashtra** (2013 4 SCC 642) it was held (at Para 18 and 19) that,

> *"Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-a -vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures right to an accused but it does not preclude the rights of public justice."*

In **Abdul Rehman Antulay v. R.S. Nayak** (AIR 1992 SC 1701) it was held that, several questions may be considered before deciding if the delay may be construed to the advantage of the accused (page 1722). Further (at page 1730) it was held that,

> "*…in short it is not possible in the very nature of things and present day circumstances to draw a time limit beyond which a criminal proceeding will not be allowed to go…*" also at page 1731 it was held that, "*while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work-load of the court concerned, prevailing local conditions and so on..*" .

In the present case, the indictment was served in 2009 and as per the journal entries trial could not be taken up as there were partly heard matters. Then the Accused- Appellant sought time to re-consider his plea. Trial was taken up on 8/6/2015 less than one-year from the commencement of the trial, evidence of three witnesses (witnesses 3, 1 and 13) were fully led and concluded, then the Accused-Appellant pleaded guilty. Judgment of the High Court was delivered on 12/07/2016 hence it is evident that all evidence had been led and judgment delivered within a year from the commencement of the trial. In this circumstance, I am of the view that, there was no severe prejudice caused specifically to the Appellant as he claims when imposing a sentence after a long period of time which was intractable.

Presently, I will proceed to deal with the sentence. The trial court imposed 15 years rigorous imprisonment and Court of Appeal considered the revision application, and affirmed the conviction and reduced the sentence to 10 years rigorous imprisonment from 15 years rigorous imprisonment. The counsel for the Appellant urged intoxication as a defence (which was not pleaded before the trial court) and the fact that the Appellant is a married person and father of two children for mitigation of the sentence imposed on the Appellant by the High Court. In **Rex. Vs. Bazely** (1969) C.L.R. held, that because of the criminal stupidity, when a person

loses his family life, it is not a ground for not imposing a severe sentence. Section 14(b) of the Judicature Act No. 2 of 1978 (as amended) states that, Right of Appeal in Criminal cases- any person who stands convicted of any offence by the High Court may appeal thereto to the Court of Appeal-

"(b) In a case tried without a jury, as of right, from any conviction or sentence except in the case where-

(i) The accused has pleaded guilty; or

(ii) The sentence is for a period of imprisonment of one month of whatsoever nature or a fine not exceeding one hundred rupees;

Provided that in every such case there shall be an appeal on a question of law or where the accused has pleaded guilty on the question of sentence only."

It is trite law that where an accused has pleaded guilty to the indictment an appeal would not lie against the conviction but against the sentence or it would lie where the appeal bears upon a question of law which in this case the Accused-Appellant failed to do so.

Hence, the issue that has arisen for consideration is whether the learned High Court Judge has disregarded the vital procedure of considering the facts in mitigation, when he was imposing the sentence. Before that, it is relevant to note, Section 13 of the code of Criminal Procedure Act No. 15 of 1979 stipulates that: - "That the High Court may impose any sentence or other penalty prescribed by written law". In the instant case the said sentence or penalty prescribed by written law is found in Section 297 of the Penal Code which deals with culpable homicide not amounting to murder and reads as follows;

"Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily

injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

The penalties for culpable homicide not amounting to murder depend on whether the offence was committed with intention (in which case, the maximum is 20 years' imprisonment) or knowledge (in which case, the maximum is 10 years' imprisonment). Hence, Court may impose a sentence upto 20 years imprisonment for an offence of culpable homicide not amounting to murder committed with intention. In considering intention and knowledge in the context of culpable homicide, the type of weapon used (if any), the way the injuries were inflicted, the nature, location and number of injuries inflicted on the victim are considerable facts. As discussed above, JMO described that the injury was so serious and will definitely result in the death of the deceased, hence the Appellant's intention is proved and the Court may impose a sentence upto 20 years imprisonment and the Learned Judge of the High Court had imposed 15 years rigorous imprisonment.

The Accused-Appellant took up the defense of intoxication before this Court which was not pleaded before the High Court. In this case it is evidenced that the Accused- Appellant consumed liquor with about 10 of his friends and there is no evidence to show that the Accused- Appellant had reached the degree of intoxication as envisaged by section 79 of the Penal Code to claim the defence of intoxication in which he could not have formed a murderous intention. There is also a gap between the time when he was allegedly found drinking and the time of the crime.

I am of the view that the trial court saw and heard the parties and it is not an easy task for an appellate court to replace its eyes and ears for those of trial court. Findings of facts are made by a trial court based on evidence led by the prosecution and State, thereby the learned trial judge weighs the evidence in the context of the

circumstances of the case. A finding of fact involves both perception and evaluation. Since the appellate court does not have that advantage of the trial court, such findings should not be treated lightly.

It is observed in many criminal appeals that the accused takes up a new defence and a new stance which he had not taken at the trial court. When the accused takes up a defence before the trial court, the learned trial judge has a tedious duty to consider the facts of the case, victim, accused, social repercussions and many other matters before he passes a sentence. Virtually, the trial judge has the visual and audio of the place and area of the incident. He considers all those matters with a judicially trained mind and evaluates the entire material before him and makes the decision. When the matter is appealed, the Appellate Court should consider the appeal *in situ*. Submitting a new defence or a material which was not before the trial judge should not be tolerated. It is the duty of the Appellate Court to evaluate the judgment and to see whether it is appropriate or not. If the Appellate Court accepts a new defence and a new material and thereafter concludes that the trial judge is wrong and/or the sentence it is inappropriate is very unfair to the judicially trained minded trial judge who is not represented other than by his judgment. It is my view that unless it is a question of law, a new defence and a new material which was not submitted before the trial court should not be considered before the Appellate Court.

Primarily, it is to be borne in mind that sentencing for any offence has a social goal. A sentence is to be imposed by taking into account the nature of the offence and the manner in which the offence has been committed. One of the fundamental purposes of imposing a sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. It serves as a deterrent. It is equally true that the proportionality between the offence committed and the penalty imposed must be reflected in the conviction and the sentence.

In this context, I may refer with profit to the pronouncement in **Dhananjoy Chaterjee vs State of West Bengal** [1994 SCR (1) 37, 1994 SCC (2) 220] at paragraph 14 and 15 as follows.

> *" Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and, in the ultimate, making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it....*
>
> *Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."*

As to the matter of assessing sentence in a particular instance, Basnayake A.C. J in the case of ***Attorney-General v H.N. de Silva (*57 NLR 121)** as follows;

> *"... in assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only form the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the*

effect of the punishment as a deterrent and consider to what extent it will be effective. "

As discussed above, every court has a duty to impose a proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.

We affirm the conviction and the sentence imposed by the Court of Appeal. There is no appeal from the State. For the purpose of clarity, the Accused- Appellant is convicted under section 297 of the Penal Code and imposed a sentence of 10 years rigorous imprisonment and a fine of Rs. 7500/- in default 6 months simple imprisonment. Further the High Court Judge is directed to implement the sentence from the date the Accused- Appellant surrenders himself of his bail.

Accordingly, I answer the question of law negatively and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

B.P. ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J

I agree.

JUDGE OF THE SUPREME COURT