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

In the matter of an Application for Special Leave to Appeal under Article 154 P of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 3 of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990

Officer-in-Charge,
Police Station,
Wennappuwa.

Plaintiff

Vs.

Wijesinghe Dewage Lalith Indrawansa Rupasinghe,
'Nishanthi Arts',
Suhadha Mawatha,
Potuwila, Madampe.

Accused

SC Appeal 191/2016
SC/SPL/LA/02/16
HC Chilaw Case No: HCA/16/15
MC Marawila Case No: 2389/D

AND NOW BETWEEN

Wijesinghe Dewage Lalith Indrawansa Rupasinghe,
'Nishanthi Arts',
Suhadha Mawatha,
Potuwila, Madampe.

Petitioner-Petitioner

Vs.

1. Officer-in-Charge,
   Police Station,
   Wennappuwa.

Plaintiff-Respondent-Respondent

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

Respondent-Respondent

Before: **Justice L.T.B. Dehideniya**

Justice A.L. Shiran Gooneratne

Justice Janak De Silva

Counsel: Wasantha Nawaratna Bandara, PC with Pasan Weerasinghe and Ashan Bandara **for the Accused-Appellant-Petitioner.**

Ms. V. Hettige, DSG **for the Hon. Attorney General.**

Argued on: 24/02/2021

Decided on: **04/08/2021**

A.L. Shiran Gooneratne J.

The Accused-Petitioner (hereinafter referred to as the Petitioner) was charged in the Magistrates Court of Marawila on 6 counts under the Penal Code and the Motor Traffic Act for negligently driving vehicle bearing number LA 3777, for causing the death of an individual and injury to another. When the charges were read out in open court, the Petitioner pleaded guilty to all 6 counts. Thereafter, the learned Magistrate passed sentence on the Petitioner in the following manner: 6 months Rigorous Imprisonment on count 1, Rs. 1500, Rs. 1000, Rs. 2000, and Rs. 15,000 fine on count 2, 3, 4 and 5 respectively and Rs. 7500 fine with a default sentence of 1 month Simple Imprisonment on count 6.

The Petitioner being aggrieved by the said order dated 07/09/2015, appealed to the High Court of Chilaw. The High Court having heard submissions made on behalf of the Petitioner and the Respondents, by order dated 24/11/2015, set aside the sentence imposed on count 2 and count 6 and imposed a substituted sentence on the said counts in the following manner.

On count 2, where the Petitioner was charged under Section 272 of the Penal Code, the sentence of Rs. 1500 as fine was set aside and substituted by a fine of Rs. 100 and on count 6, a charge under Section 214 (1) to be read with Section 151(1) (a) of the Motor Traffic Act and Section 216 B of the Increase of Fines Act No. 12 of 2005, the sentence of a fine of Rs. 7500 was set aside and substituted by a sentence of 2 years Rigorous Imprisonment and the cancellation of the Petitioners driving license. Having taken into consideration the 6 months Rigorous Imprisonment imposed on count 1, the learned High Court Judge made order that both custodial sentences to run concurrently. Thus, an aggregate of 2 years Rigorous Imprisonment was imposed.

Varying the sentence on count 2 in terms of Section 328 of the Code of Criminal Procedure Act, the learned High Court Judge stated that the sentence of Rs. 1,500 as a fine was not according to law. Taking into consideration the criminal negligence on the

part of the Petitioner for causing the death of a person and an injury to another and also having observed that the sentence imposed should act as a deterrent to society, proceeded to substitute the sentence on count 2 and 6 as noted above.

Aggrieved by the said order of the High Court Judge, the Petitioner preferred a Special Leave to Appeal application dated 04/01/2016 to this Court, *inter-alia*, to revise the sentence of Rigorous Imprisonment imposed under count 2 and count 6, by substituting it with a suspended sentence on each count, as prayed for. It is noted that the sentence imposed on count 2 is a fine of Rs. 1,500 which was substituted by a fine of Rs. 100, and not a sentence of 2 months Rigorous Imprisonment as stated in the written submissions tendered by the Petitioner.

This Court having considered the submissions made by the Counsel for the Petitioner, granted special leave to Appeal on the following questions of law as set out in paragraph 9(i), 9(v) and 9(vi) of the Petition of Appeal.

1. Is the order of the High Court of Chilaw marked "Y" wrong in law
2. Has the learned High Court Judge of Chilaw erred in law in failing to consider the relevant facts and the law in varying the verdict and sentence of the Magistrates Court of Chilaw
3. Has the learned High Court Judge of Chilaw acted in excess of his powers in dealing with the appeal after stating that an appeal does not lie and the only remedy available is an application to the Court of Appeal

It is the position of the Petitioner that on 07/09/2015, he was thrust into an unfortunate situation to enter a plea of guilty to the charges preferred against him without legal representation, which has caused a travesty of justice.

The Petitioner is challenging the plea of guilty entered in terms of Section 183 of the Code of Criminal Procedure Act. The written and oral submissions made by the learned Presidents Counsel for the Petitioner was structured on the basis that the facts relating to the offence charged, circumstantial and/or direct, remained unproven and therefore

there is no valid conviction or sentence made according to law. Further the learned President's Counsel alleged that the police hastily filed a charge sheet without awaiting the advice sought from the Attorney-General, which prevented the Petitioner to obtain the required legal assistance. The learned Counsel also contended that the Petitioner pleaded guilty to all charges without comprehending the gravity of the offence.

Soon after the alleged incident, the Petitioner was released on bail by the Magistrates Court. The Police thereafter moved for several dates to seek advice from the Hon. Attorney General to preferer charges against the Petitioner. However, with no instructions from the Hon. Attorney General, charges were framed in the Magistrates Court of Marawila. There is no procedural or statutory impediment preventing the police going ahead and filing a charge sheet against the Petitioner, as they did.

When the case was called on 07/09/2015, the Petitioner on summons appeared in Court in person and the framed charges were read out in open court. The Petitioner pleaded guilty to all counts as charged. No objections were raised in terms of Section 182(1) and (2) of the Code of Criminal Procedure Act when the particulars of the case were stated to the Petitioner.

When the court inquired as to whether the Petitioner wished to say anything in mitigation, prior to imposing sentence, the Petitioner replied, *"I admit the offence. Permit me to pay the sum in installments".*

Section 183 (1) of the Code of Criminal Procedure Act lays down the procedure to be followed by a Magistrate when there is an admission of the offence by an accused.

> *"If the accused upon being asked, if he has any cause to show why he should not be convicted makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him; and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence:*

Provided that the accused may with the leave of the Magistrate withdraw his plea of guilt at any time before sentence is passed upon him, and in that event the Magistrate shall proceed to trial as if a conviction has not been entered".

It is observed that the Magistrate has recorded the statement made by the Petitioner as nearly as possible in the same words used by him in keeping with the statutory requirement. It is important to note that, when an unqualified plea of guilty is entered by an accused, the Magistrate having knowledge of the facts becomes aware that the charges are proved and accordingly, proceed to record a verdict of guilty and pass sentence.

Section 317 of the Code of Criminal Procedure Act reads as follows;

(1) An appeal shall not lie from a conviction –

(a) Repealed

(b) where an accused has under Section 183 made an unqualified admission of his guilt and been convicted by a Magistrate's Court.

(2) An appeal upon a matter of law shall lie in all cases.

When an unqualified plea of guilty is recorded, an Appeal from such an order is subject to the limitation provided in terms of Section 317. Accordingly, when an accused makes an unqualified admission of his guilt under Section 183, and after conviction, an appeal will lie only upon a matter of law, in terms of Section 317 (2) of the said Act.

At this point, it would be pertinent to note that the Petitioner came before the High Court on the basis that he was deprived of the opportunity to withdraw his plea of guilty, in terms of the proviso to Section 183 of the Code of Criminal Procedure Act. The Petitioner contends that adequate time was not granted to him to seek legal counsel before sentence was passed and therefore, had no opportunity to avail himself of mitigating his sentence. Accordingly, the Petitioner prayed *inter alia*, that the sentence imposed by the learned Magistrate be suspended.

The learned Judge of the High Court, considered the submissions made by both parties and proceeded to act in terms of Section 328 of the said Act. Accordingly, the sentence imposed on count 2 and 6 was set aside and a substituted sentence was imposed on the said counts, as observed above. The Petitioner placed no evidence in mitigation of sentence before the High Court or before this Court to consider the imposition of a reduced sentence.

The Petitioner, on summons, appeared before the Magistrates court in person and made no application to Court seeking time to retain counsel. According to proceedings dated 07/09/2015, the charge sheet was read out in open court and the Petitioner pleaded guilty to all counts. The statement made in response to the charge sheet consists of a plea in mitigation of sentence. The Petitioner tendered the guilty plea prior to commencement of trial and therefore the evidence against him remained unchallenged. The conviction and sentence imposed were based on the Petitioners unqualified admission to the commission of the offence. Therefore, the statement made by the Petitioner soon after the charge sheet was read, constitutes an unqualified admission of the offence committed. "*A plea of guilty constitute an admission of all essential elements of the crime, proof of which is therefore unnecessary". (**R vs. O'Neill (1979) 2 NSWLR 582; (1979) 1 A Crim R 59)***

A Similar view was taken in ***Amadoru vs. Officer in Charge, Special Criminal investigation Unit, Wennappuwa (2011) 2 SLR 315, where*** Shiranee Thilakawardene J. stated,

> *"it is relevant to consider that the summary trial in criminal procedure is initiated by the framing of charges and, therefore, one of the first tasks of a Magistrate is to ascertain whether there is sufficient ground to frame a charge against the accused as set out in Section 182(1) of the Code of Criminal Procedure Act referred to above. On reading the charge to the accused, if the latter makes a statement amounting to an unqualified admission, the Magistrate has a mandatory obligation in terms of*

Section 182(1) of the said Act to record a verdict of guilty and pass sentence according to the law.

If the accused withdraws his admission with leave of the Court, the Magistrate shall proceed to trial as if a conviction has not been entered. If no such admission is tendered, the Magistrate will in terms of Section 183(1), (2) of the said Act, inquire as to whether the accused is ready for trial and, if so, proceed to try the case. If, however, the accused is not ready for whatever reason, the Magistrate holds discretion to postpone or proceed with the trial, and the accused's claim of insufficient or lack of readiness will not prevent the Magistrate from taking evidence of the prosecution and of any other witnesses of the defence as are available."

In ***Mudiyanselage Suraj Sanjeewa Vs. Officer in Charge Police Station And Others, CA (PHC) APN 17/19,*** the Court held that:

"In the instant case, admittedly, the plea of guilty by the Petitioner had been unequivocal. Nowhere the Petitioner says that he was misled or that he could not understand the charge. The reason adduced in the application for withdrawal of his guilty plea is that later he found that the sentence imposed would affect his employment. The learned Magistrate has not acted illegally or arbitrarily. He has not acted upon a wrong principle of law. Hence, the learned High Court Judge had no reason to interfere with the order of the learned Magistrate."

It is also observed that the learned Magistrate did not in any manner inhibit the Petitioner's right to withdraw his plea, in terms of the proviso to Section 183 (1) of the Code of Criminal Procedure Act. The Petitioner made no application to withdraw the statement made, before the sentence was passed. Therefore, the statement made by the Petitioner amounts to an unqualified admission of guilt of the offence of which he was charged. The learned Magistrate thereafter, recorded a verdict of guilty and the Petitioner was convicted and sentenced accordingly.

The learned High Court Judge, having affirmed the said conviction, proceeded to act in terms of Section 328 of the Code of Criminal Procedure Act, to set aside and substitute the sentence imposed on count 2 and 6, as noted above. Before making the said order, the learned High Court Judge invited both parties to file written submissions and thereafter, the parties moved Court that an order be delivered taking into consideration the written submissions filed of record.

As defined in terms of the proviso to ***Section 328,*** the Court sitting in appeal,

> "*shall not exceed the sentence which might have been awarded by the Court of first instance".*

On count 2, the Petitioner was charged under Section 272 of the Penal Code and a fine of Rs.1500 was imposed. However, the maximum fine that can be imposed in terms of the said section is Rs. 100. Therefore, the learned High Court Judge was correct in substituting the sentence of Rs. 100 as a fine on count 2. On count 6, the Petitioner was charged under Section 151(1) to be read with Section 216 B of the Motor Traffic Act. A fine of Rs. 7500, imposed on the said count was varied to 2 years Rigorous Imprisonment and also the cancellation of the driving license. The maximum fine that can be imposed in terms of *Section 216 B of the Motor Traffic Act* was amended by the ***Increase of Fines Act, No.12 of 2005***, which reads, thus;

> *"to a fine not less than five thousand rupees", of the words "to a fine not less than six thousand rupees and not exceeding fifty thousand rupees"*

Section 216 B (b) of the Motor Traffic Act states,

> *"where he causes injury to any person, to a fine not less than six thousand rupees and not exceeding fifty thousand rupees or to imprisonment of either description for a term not exceeding five years or to both such fine and imprisonment and to the cancellation of his driving license."*

In terms of Section 216 (b) of the Motor Traffic Act, (as amended) a person after conviction, is liable to a fine or imprisonment of either description or to both such fine and imprisonment and to the cancellation of the driving license.

On both counts, the Court sitting in appeal did not exceed the maximum punishment and therefore has varied the sentence on count 2 and 6, according to law.

Before substituting the sentence on count 6, the learned High Court Judge considered the written submissions filed of record. The Court also considered the criminal negligence on the part of the Petitioner in causing the death of a person and injuring to another and also the deterrent effect of the sentence.

*Deterrence has a twofold object. The first object relates to specific deterrence. It will deter the individual from committing the same or other offences in the future. The second object is as to general deterrence. It will convince or deter others that "crime does not pay" (**See Crime and Punishment' by Harry E. Allen & Ors. at 735**).*

As pointed out earlier, due to the Petitioners unqualified admission of guilt to all charges, the evidence against the Petitioner remains unchallenged. The learned Magistrate delivered his order based on unchallenged evidence, the nature of the offence and the fact that the Petitioner pleaded guilty to all counts on the first available opportunity.

The learned DSG made submissions in support of the substituted sentence imposed by the High Court, by citing a Judgment delivered by the Court of Appeal in ***Bandara vs. Republic of Sri Lanka CA. No. 134/99***, where Amaratunga J. enhanced the sentence of an accused in terms of Section 366 of the Code of Criminal Procedure Act. When the prosecution case was about to be closed, the accused retracted his earlier plea of not guilty and pleaded guilty to all counts. Therefore, in the said case the court had the opportunity to consider the evidence before passing sentence.

It is observed that the High Court granted an opportunity to the parties to show cause by way of written submissions, to justify mitigatory or aggravating circumstances, to be considered by Court.

In the circumstances, I find that there is due compliance of Section 183(1) of the Code of Criminal Procedure Act and there exists no illegality in the substituted sentence imposed in terms of Section 328 (b) (ii) of the said Act.

I now turn to the question of sentencing.

In the case at hand, the alleged offence was committed on or about 16/01/2006. On count 1, the Petitioner was charged under Section 298 of the Penal Code for causing the death of a person and was sentenced to 6 months Rigorous Imprisonment. There was no variation in sentence by the High Court judge on that count. On count 6 a fine of Rs. 7500 imposed under Section 151(1) to be read with Section 216 B of the Motor Traffic Act, was varied to 2 years Rigorous Imprisonment and the cancellation of the driving license. On both counts the sentencing judge had the discretion to impose a sentence which he thought was just, according to law.

In terms of ***Section 303 (1) of the Code of Criminal Procedure Act***,

> *"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 5 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 ").*

In terms of Section 303 (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 had 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".

Therefore, it is mandatory on the part of a trial court to suspended the operational period of 6 months imprisonment imposed in terms of Section 303 (2) of the Code of Criminal Procedure Act, except in the circumstances specially provided for in Section 303 (2) (a) to (d) or as "the Court is of the opinion", for reasons to be stated in writing.

The learned Magistrate has given reasons for imposing an imprisonment of six months. As observed earlier, when varying the sentence imposed on count 6, the learned High Court Judge too has given reasons for doing so. Therefore, the variation of sentence in count 6, to two years rigorous imprisonment and the sentence of six months rigorous imprisonment imposed on count 1, is within the exercise of judicial discretion of the sentencing judge.

The question then is whether the said sentence of imprisonment can be suspended.

In ***Karunaratne vs. The State 78 NLR 413,*** the Court looked into the issues relating to suspension of sentence. In a majority decision the Court held that;

"while the trial judge was right in sentencing the accused to a term of two years rigorous imprisonment and to pay a fine of Rs. 1000 and that even if the provisions relating to the suspension of sentences were in operation at that time and the case was concluded in due time, this was not a case where the sentence would have been

suspended, having regard to the gravity of the offence. But, on the other hand, when a deserving conviction and sentence have to be confirmed ten years after the proved offence the judge cannot disregard the serious consequences and disorganization that it can cause to the accused's family".

In ***Attorney General vs. Mendis (1995) 1 SLR 138***, ***Gunasekara, J***. held that,

"Once an accused is found guilty and convicted on his own plea or after trial the judge in deciding on sentence, should consider the point of view of the accused on the one hand and the interest of society on the other. The nature of the offence committed the machinations and manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organization in respect of which it has been committed, is concerned, the persons who are affected by such crime the ingenuity with which it has been committed and the involvement of others in committing the crime are matters which the judge should consider"

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.

It is observed that there is no delay on the part of the sentencing court and that the Petitioner has failed to address this Court of any mitigatory circumstances which could reduce the severity of the sentence imposed by the Magistrates Court or the substituted sentence imposed by the court sitting in appeal. Therefore, I see no reason to deviate from the sentence of the lower court to substitute the sentence imposed on count 2 and 6.

In the circumstances, I answer the 1st and 2nd grounds of appeal contended by the Petitioner, in the negative.

In answering the 3rd ground of appeal, I find that the High Court Judge makes reference to Section 31 of the Judicature Act which deals with the powers and jurisdiction of the Magistrates Court with regard to a right of appeal. The learned High Court Judge makes a statement relating to Section 183(2) of the Code of Criminal Procedure Act, regarding the law as it stands.

Section 183(2) of the Act would be applicable where an accused does not make a statement or makes a statement which does not amount to an unqualified admission of guilt. Therefore, the application of the said section would be clearly irrelevant to the facts of this case.

Accordingly, I answer the 3rd ground of appeal contended by the Petitioner also in the negative. I am of the view that the learned High Court Judge has come to a correct finding based on the facts and the law.

For all the reasons stated above, I affirm the Judgment of the learned High Court Judge dated 24/11/2015, and dismiss the appeal. Registrar is hereby directed to send the case record to the Magistrate of Marawila to implement the sentence. I order no costs.

Appeal dismissed.

Judge of the Supreme Court

L.T.B. Dehideniya J.

I agree

Judge of the Supreme Court

Janak De Silva J.

I agree

Judge of the Supreme Court