

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

In the matter of an Appeal under and in
terms of Section 09 of the High Courts of
the Provinces (Special Provisions) Act
No.19 of 1990.

Officer in Charge,
Police Station,
Ahangama.

Complainant

SC Appeal No: 156/2016
SPL LA Application No: 198/13
Provincial High Court Galle Case No:
881/2011
Magistrate's Court Galle Case No: 75556

Vs.

1. Merenchige Jinadasa,
2. Merenchige Saman
Jayashantha,
3. Merenchige Sandya
Dilrukshi,
4. Merenchige Jasalin
Nona,

all of Yakdehiwatta,
Sangarathana
Mawatha, Madyama,
Ahangama.
5. Hewabuhage Thanuja
Priyanthi,

Kajugahawatta, Ratgama
Gedera,
Kataluwa, Ahangama.

6. Merenchige Saman
Krishantha,
Yakdehiwatta,
Sangarathana,
Mawatha, Madyama,
Ahangama.
7. Ambalangoda Gamage
Samanthika
Priyangika,
Mahawatta, Mahavihara
Road,
Ahangama.
8. Ambalangoda Subath,
Hemantha,
Mahawatta, Mahavihara
Road,
Ahangama.
9. Sudurukku Hannadige
Krishantha,
Kumara,
Mahavihara Road,
Madyama,
Ahangama.
10. Ambalangodage Prasad
Dipal,
Mahawatta, Mahavihara
Road,

Ahangama.

11.Kodagoda Hettige
Dimuthu
Pushpakumara,
Pahalawatta, Mahavihara
Road,
Ahangama.

12.Kahadarathmalpage
Danushka
Udaya Kumara,
Aranwala Handiya
Kanda,
Ahangama

13.Saunda Hannadige
Indika Prabath
Kumara,
Visudarama Road,
Aranwala,
Ahangama.

14.Nishantha Tenabadu,
Dharmarama Road,
Ahangama.

15.Ambalangodage Nishan
Jayantha,
Mahawatta, Mahavihara
Road,
Ahangama.

16.Merenchige Saman
Aruna Shantha,

Yakdehiwatta,
Sangarathana Mawata,
Madyama, Ahangama.

17. Merenchige Priyangani

Dilrukshi,
Yakdehiwatta,
Sangarathana Mawata,
Madyama, Ahangama.

18. Yakdehige Suranga

Jayalath,
Dharmarama Road,
'Ruwanthika
Niwasa', Madyama,
Ahangama.

19. Yakdehige Suresh

Jayalath,
Dharmarama Road,
'Ruwanthika
Nisa', Madyama,
Ahangama.

Accused

And

1. Merenchige Jinadasa,

**(1st Accused -
Appellant)**

2. Merenchige Saman

Jayasantha,

**(2nd Accused -
Appellant)**

3. Merenchige Sandya
Dilrukshi,
**(3rd Accused -
Appellant)**

all of Yakdehiwatta,
Sangarathana Mawatha,
Madyama,
Ahangama.

4. Hewabuhage Thanuja
Priyanthi,
Kajugahawatta, Ratgama
Gedera,
Kataluwa, Ahangama.
**(5th Accused-
Appellant)**

5. Merenchige Saman
Krishantha,
Yakdehiwatta,
Sangarathana,
Mawatha, Madyama,
Ahangama.
**(6th Accused -
Appellant)**

6. Ambalangoda Subath,
Hemantha,
Mahawatta, Mahavihara
Road,
Ahangama.

**(8th Accused -
Appellant)**

7. Sudurukku Hannadige
Krishantha,
Kumara,
Mahavihara Road,
Madyama,
Ahangama.

**(9th Accused -
Appellant)**

8. Kahadarathmalpage
Danushka
Udaya Kumara,
Aranwala Handiya
Kanda,
Ahangama

**(12th Accused -
Appellant)**

9. Saunda Hannadige
Indika Prabath
Kumara,
Visudarama Road,
Aranwala,
Ahangama.

**(13th Accused -
Appellant)**

10. Nishantha Tenabadu,
Dharmarama Road,
Ahangama.

**(14th Accused -
Appellant)**

Vs.

1. Officer in Charge,
Police station,
Ahangama.
**Complainant -
Respondent**

2. Honourable Attorney
General,
Attorney General's
Department,
Colombo - 12.
Respondent.

And Now Between

1. Ambalangodage Subath,
Hemantha,
Mahawatta, Mahavihara
Road,
Ahangama.
**(8th Accused -
Appellant - Petitioner)**

2. Sudurukku Hannadige
Krishantha,
Kumara,
Mahavihara Road,
Madyama,
Ahangama.
**(9th Accused -
Appellant - Appellant)**

3. Kahadarathmalpage
Danushka
Udaya Kumara,
Aranwala Handiya
Kanda,
Ahangama
**(12th Accused -
Appellant - Petitioner)**

4. Saunda Hannadige
Indika Prabath
Kumara,
Visudarama Road,
Aranwala,
Ahangama.
**(13th Accused
Appellant - Petitioner)**

Vs.

1. Officer in Charge,
Police Station,
Ahangama.
**(Complainant -
Respondent -
Respondent)**

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

The Court refused to grant special leave to appeal for the 08th, 12th and 13th Accused- Appellant- Petitioners.

The Petitioners along with 15 others were charged in the Magistrate's Court of Galle on the following charges:

1. On or about the 09th of December 2001, the accused being members of an unlawful assembly to cause mischief to the house and property of one Balage Ananda Rathnasiri residing at Madyama, Sangarathana Mawatha, Ahangama, violated under section 139 of the Penal Code punishable under section 140 of the Penal Code.
2. That at the same time, place and in the course of the same transaction the accused with the common intention of causing mischief to the house and property of one Balage Ananda Rathnasiri, caused damage amounting to Rs. 490,250/- thus committing an offence punishable under section 419 read with 32 of the Penal Code.
3. That at the same time, place and in the course of the same transaction the accused with the common object of causing mischief to the house and property of one Balage Ananda Rathnasiri, caused damage amounting to Rs. 490,250/- thus committing an offence punishable under section 419 read with section 146 of the Penal Code.
4. That at the same time, place and in the course of the same transaction the accused trespassed into the house and property of one Balage Ananda Rathnasiri with the common intention of causing mischief to the said property thus committing an offence punishable under section 434 read with section 32 of the Penal Code.
5. That at the same time, place and in the course of the same transaction the accused trespassed into the house and property of one Balage Ananda

Rathnasiri with the common object of causing mischief to the said property thus committing an offence punishable under section 434 read with section 146 of the Penal Code.

The Petitioners state that they pleaded not guilty to the charges leveled against them and the trial commenced on 24.08.2004. The Petitioners state that six witnesses gave evidence on behalf of the prosecution and nine witnesses (the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th and 10th Accused) gave evidence on behalf of the defense. The Petitioners state that on 25th October 2011 the Learned Magistrate of Galle delivered his judgment and convicted the 1st, 2nd, 3rd, 5th, 6th, 8th, 9th, 12th, 13th and 14th Accused on the 02nd and 04th counts and acquitted them on the 01st, 03rd and 05th counts.

The Learned Magistrate of Galle sentenced the Petitioners on 29.11.2011 as follows:

A. The 08th and 13th Accused- Appellant- Petitioners

The Second Count

01 year rigorous imprisonment suspended for 10 years and a Rs. 1500/- fine and in default 2 months simple imprisonment.

Rs. 25,000/- compensation to the 1st witness (virtual complainant) by each Accused and in default 6 months simple imprisonment.

The Fourth Charge

Rs. 1000/- fine and in default 2 months simple imprisonment.

B. The 9th Accused- Appellant- Appellant

The Second Count

01 year Rigorous imprisonment and a Rs. 1500/- fine and in default 2 months simple imprisonment.

Rs. 25,000/- compensation for the 1st witness (the virtual complainant) and in default 6 months simple imprisonment.

The Fourth Count

Rs. 1000/- fine and in default 2 months simple imprisonment.

C. The 12th Accused- Appellant- Petitioner

The Second Count

01 year rigorous imprisonment suspended for 5 years.

Rs. 25,000/- compensation for the 1st witness (the virtual complainant).

The 9th Accused Appellant Appellant was imposed 01 year rigorous imprisonment by the Learned Magistrate of Galle and the same was not suspended since he has a previous conviction (one year rigorous imprisonment) imposed by the Magistrate Court of Galle for the offence of robbery in case bearing No. 31112. An appeal has been preferred against the said conviction and the sentence and the said appeal is pending in the Provincial High Court of Galle.

Aggrieved by the judgement and sentence of the Learned Magistrate of Galle in case bearing No. MC 75556 the 1st, 2nd, 3rd, 5th, 6th, 8th, 9th, 12th, 13th and 14th Accused preferred an appeal to the Provincial High Court of the Southern Province Holden at Galle. The Learned High Court Judge by his judgement dated 25.06.2013 dismissed the appeal of the 1st, 2nd, 3rd, 5th, 6th, 8th, 9th, 12th, 13th and 14th Accused Appellants and affirmed the judgement of the Learned Magistrate of Galle in case bearing No. MC 75556.

Being aggrieved by the decision of the Provincial High Court of the Southern Province Holden at Galle, the 8th, 9th, 12th, and 13th Accused Appellant Petitioners by Petition dated 01.08.2013 sought Special Leave to Appeal from this Court. Accordingly, this Court granted Special Leave to Appeal from the aforementioned judgement of the Provincial High Court of the Southern Province Holden at Galle.

I will now proceed to answer the question of law on which leave has been granted, namely that “Whether the sentence imposed on the 9th Accused Appellant Appellant is excessive or not.”

In the written submissions of the 9th Accused Appellant Appellant it is submitted that the sentence imposed in the case bearing No. 31112 in the Magistrate Court of Galle cannot be considered as the Accused's previous character since the offence related to the said charges had been committed after the offence for which he was convicted and sentenced in the present case. It is submitted that the case bearing No. 31112 pertained to an offence committed on 28.05.2004 which was subsequent to the date of the present case which was on 09.12.2001.

It is further submitted that when the sentence was imposed on the 9th Accused Appellant Appellant in the case bearing No.75556 of the Magistrate Court of Galle the conviction in the case bearing No. 31112 had not been conclusively determined since the appeal is pending before the High Court of Southern Province holden at Galle under case bearing No. 848/11.

In the written submissions of the Respondent- Respondent, the learned State Counsel submitted that the Appellate Courts of Sri Lanka have repeatedly considered the matters that ought to be considered when imposing a sentence on the Accused such as the gravity of the offence committed. The State Counsel submitted that in this case the damage to property resulting from a fire, is violence over and above the

force necessary to commit the offence of mischief. Further, the facts and circumstances of the instant matter clearly illustrate that the weapons have been used to frighten the residents of the house and the mischief had been carefully planned. Owing to which, it is the contention of the Respondent- Respondent that the Learned Magistrate of Galle has acted in accordance with the law as set out in the Code of Criminal Procedure Act, as amended in imposing a custodial sentence on the Accused Appellant Appellant.

In order to answer the question of law on which leave has been granted, I will first evaluate the law regarding suspended sentences in Sri Lanka. This is set out in section 303 of the **Code of Criminal Procedure Act No. 15 of 1979 as amended**:

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

(a) the maximum penalty prescribed for the offence in respect of which the sentence is imposed;

(b) the nature and gravity of the offence:

(c) the offender's culpability and degree of responsibility for the offence:

(d) the offender's previous character;

(e) any injury, loss or damage resulting directly from the commission of the offence:

(f) the presence of any aggravating or mitigating factor concerning the offender;

(g) the need to punish the offender to an extent, and in a manner, which is just in all of the circumstances;

(h) the need to deter the offender or other persons from committing offences of the same or of a similar character;

(i) the need to manifest the denunciation by the court of the type of conduct in which the offender was engaged in;

(j) the need to protect the victim or the community from the, offender;

(k) the fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or

(l) a combination of two or more of the above.

(2) A court shall not make an order suspending a sentence of imprisonment if-

(a) a mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed; or

(b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or

(c) the offence was committed when the offender was subject to a probation order or a conditional release or discharge; or

(d) the term of imprisonment the aggregate terms

Where the offender is imposed, or of imprisonment

Where the offender is convicted for more than one offence in the same proceedings exceeds two years.

(3) The period for which the whole or a part of a sentence may be suspended (hereinafter referred to as the "operational period") shall be-

(a) determined; and

(b) specified, by the court, when making the order suspending the whole or part of the sentence:

Provided that such period shall not be less than five years from the date of The order suspending the whole or Part of the sentence.”

When considering the established principles of law regarding the granting of suspended sentences, the standard practice is that when the Accused has a previous conviction he or she is not entitled to a suspended sentence unless there are extenuating circumstances.

There are sentencing guidelines recommended, which aid judges in their decision making. In international law there are several common guiding principles to sentencing, which are common to criminal justice policies in many jurisdictions including Sri Lanka which include principles such as Proportionality, Parsimony, Totality and Consistency.

The Administration of Justice Law No. 44 of 1973, which brought about a sentencing policy, appears to have significantly altered the focus from punitive or deterrent to reformatory and rehabilitative sentences to be imposed in the future, allowing the prisoner to reintegrate into society after having served his time.

In the case of **Attorney - General v. H .N. De Silva 57 NLR 121 at 123** in that *“In assessing the punishment that should be passed on an offender the 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 from the angle of the offender. A judge in determining the proper sentence should 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. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration.”

In the case of **Kumara Vs. Attorney General [2003] (1) Sri LR 139** where the court held;

“i. A suspended sentence is a means of re-educating and rehabilitating the offender, rather than alienating or isolating the offender

ii. No offender should be confined to in prison unless there is no alternative available for the protection of the community and to reform the individual

iii. Imprisonment has an isolating and alienating effect on the family of the imprisoned offender because of the hardships they are faced with during the imprisonment of one of the family members

iv. Suspended sentence with its connotations of punishment and pardon is supposed to have integrative powers. The offender is shown that he has violated the tenets of society and provoked its wrath, but is immediately forgiven and permitted to continue to live in society with the hope that he would not indulge in that form of behavior again

v. The accused does not have previous convictions; he surrenders to the police; he pleaded guilty on the first date of trial; he offered compensation to the aggrieved party;

these amply demonstrate the mitigatory factors.”

In the case of **The Attorney General Vs. Mendis [1995] 1 Sri LR 138** it was held “*once an accused is found guilty on his own plea or after trial the judge is 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 in so far as the institution or organization in respect of which it has been committed, is concerned, the person 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.*”

Justice Gunasekera in the case of **Attorney General V. Jinak Sri Uluwaduge and Another [1995] (1) Sri LR 157** held that, “*In determining the proper sentence the Judge should 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. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration. The Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non- detection. Another matter to be taken into account is that the offences were planned crimes for wholesale profit. The Judge must consider the interests of the accused on the one hand and the interests of society on the other; also necessarily 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, 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”.

In the case of **Asan Mohamad Rizwan v Hon. Attorney General , C.A. Revision No.CA [PHC] [APN 141/2013] dated 25.03.2015**; His Lordship Justice Chithrasiri categorised the principles to be considered while sentencing. Those are as follows;

“(a) The maximum and the minimum (if any) penalty prescribed for the offence;

(b) The nature and gravity/seriousness of the particular offence.

(c) The offender's culpability and degree of his/her responsibility for the offence

(d) mental state of the accused at the time the offence was committed;

(e) Evidence as to pre-arrangement for the commission of the offence;

(f) The impact of the offence on any victim and the injury, loss or damage caused as a result of the offence committed;

(g) Whether the offender pleaded guilty to the offence and if so, the stage in the proceedings at which the offender did so or the stage at which it was indicated;

(h) The conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(i) Any action taken by the offender to make restitution of the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider.

(j) The offender's previous character, good or bad;

(k) Imprisonment should be used when no other sentence IS adequate;

(l) Proportionality between the crime and the sentence;

(m) Possibility of reforming the offender;

(n) To ensure consistency in deciding sentences;

(o) Presence of any aggravating or mitigating factors concerning the offender or any other circumstance relevant to the commission of the offence;”

The main contention of the Appellant in this case is that the Learned Magistrate is wrong in law when he imposed a custodial sentence on the Appellant whilst the similarly circumstanced other Accused were imposed suspended sentences. The Appellant contends that the sentence in the case bearing No. 31112 in the Magistrate Court of Galle cannot be considered as the offender's previous character since the offence related to the said charge was committed after the offence for which he was convicted in the present case. The date of commission of offence relevant to this trial was on 09.12.2001 for which he was convicted on 25.10.2011 and sentenced 29.10.2011. The offence committed in the case 31112 was committed on 28.05.2004 however, the Appellant was convicted on 30.11.2010 and sentenced on 14.12.2010 both of which are before the conviction and sentence which is the subject of this appeal. Therefore, even though the offence was committed after the date of conviction is before the date of conviction subject to this appeal and in the eyes of the law viewed as a previous conviction. The fact that the offence was committed after is a mere technicality. Therefore at this juncture, such conviction cannot be considered as a previous conviction.

When considering the culpability of other Accused's Appellants Appellants, all of them have acted with common intention to commit the mischief. The Learned magistrate had not considered any other ground or gravity of the offence and nature of offence of the crime, damage caused and culpability of the Accuseds. The previous conviction of the Appellant is pending in Appeal.

The Learned magistrate has only considered the previous conviction of the Accused Appellant Appellant to impose a jail term and not any other reason. Therefore when leaving a side the previous conviction, there is no other ground stated to differentiate the culpability of the 9th Accused Appellant Appellant from the other Accused person, to impose a custodial sentence. Since all the accused have acted with the common intention and the culpability of each accused are the same, the sentencing also should have been the same.

Therefore, the question of law mentioned above, in respect of which this court has granted leave, has to be answered in favour of the 9th Accused Appellant Appellant. For the foregoing reasons, I affirm the order with regard to the conviction of the High Court of the Southern Province holden in Galle and the Magistrate Court of Galle, but 1 year Rigorous Imprisonment imposed on the 9th Accused Appellant Appellant is suspended for 10 years. Subject to the above mentioned variation, the appeal is hereby dismissed without cost.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.
I agree.

JUDGE OF THE SUPREME COURT

A.L. SHIRAN GOONERATNE, J.
I agree.

JUDGE OF THE SUPREME COURT