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

In the matter of an Appeal under and in terms of Section 9(a) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 of the Democratic Socialist Republic of Sri Lanka.

SC APPEAL NO.204/2015

High Court Embilipitiya No.APL/02/2015.
MC Embilipitiya No. 94991/13.

Officer-in Charge,
Police Station,
Sewanagala.

COMPLAINANT

Vs.

Mohamed Irupan Impar,
No.30, Randola,
Balangoda.

2nd SUSPECT

AND BETWEEN

Mohamed Irupan Impar,
No.30, Randola,
Balangoda.

2nd SUSPECT-APPELLANT

Vs.

01. Officer-in Charge,

Police Station,

Sewanagala.

COMPLAINANT-RESPONDENT

02. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW BETWEEN

Mohamed Irupan Impar,

No.30, Randola,

Balangoda.

2ND SUSPECT-APPELLANT-APPELLANT

Vs.

01. Officer-in Charge,

Police Station,

Sewanagala.

COMPLAINANT-RESPONDENT- RESPONDENT

02. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

BEFORE : **PRIYANTHA JAYAWARDENA, PC, J.**
L.T.B. DEHIDENIYA, J. and
S. THURAIRAJA, PC, J.

COUNSEL : Lakshan Dias with Shafnas Shanteen and Dayani Panditharatne for the 2nd Defendant- Appellant.
Chrisanga Fernando, SC for the Respondents.

ARGUED ON : 12th June 2019.

DECIDED ON : 29th January 2020.

S. THURAIRAJA, PC, J.

Background

The Second Suspect - Appellant Mohomed Irupan Impar (hereinafter sometimes referred to as Appellant) was originally charged under **Section 368 (a) of the Penal Code** by the Magistrate of Embilipitiya on the 1st of December 2012, for theft of five cows and a buffalo. The Appellant pleaded guilty. The Magistrate accepted the plea of the Appellant and sentenced him to 6 months rigorous imprisonment and imposed a fine of Rs 1500, in default one-month simple imprisonment. Being aggrieved with the said sentence, the Appellant preferred an appeal to the Provincial High Court of Sabaragamuwa and submitted that the sentence is excessive and, that he should be given a non – custodial sentence. After the matter was argued, the Learned High Court judge after giving reasons dismissed the appeal.

The Appellant being dissatisfied with the said order submitted an appeal to the Supreme Court. The matter was taken up for argument and both counsel made their submissions. The issue of law to be considered is, has the Magistrate erred in

not providing a suspended sentence to the Appellant despite him pleading guilty to the charge.

Considering all material before us, facts reveal that the Appellant was seen at around 2.00 am in the wee hours of the day, stealing cows. He was identified by the owner of the cows at an identification parade. When the matter was taken up for trial the Appellant had pleaded guilty.

I carefully considered the plea of guilty in light of the available evidence before the court. Appellant had not challenged his plea of guilt; hence we have no reason to interfere with the conviction.

Since the Appellant had pleaded guilty, he had no right under Section 14(b)(i) of the Judicature Act other than the right he had available to him to appeal against the sentence. Further, considering the sentence in light of Section 368 of the Penal Code, I find that there is no illegality or impropriety.

Issue of Bargaining of Sentence

The issue raised in this appeal was, with regard to the supposed confusion that is said to have been created towards the Appellant. The counsel for the Appellant submitted that the Appellant "*thought*" that when he said he will pay compensation of Rs. 50, 000/-, he would be given a suspended sentence.

In criminal trials in countries such as the United States and other modern Common law jurisdictions, the accused has three options as far as pleas are concerned: A) guilty, B) not guilty or C) plea of nolo contendere. As held in a US case **State ex rel Clark v. Adams [111 S.E.2d 336 (1959)]**, the plea of "*Nolo Contendere*" sometimes referred to also as "*Plea of Nolvut*" or "*Nolle Contendere*" means, in its literal sense, "I do not wish to contend", and it does not origin in early English Common Law. As per the practice (of US courts), a criminal case is disposed based on a guilty plea bargained or nolo contendere plea.

In this context there arises a necessity to differentiate and distinguish between a "plea of guilty" and "plea bargaining". The Ahmadabad High Court in **State of Gujarat v Natwar Harchandji Thakor (2005 CriLJ 2957)** (decided on 22 February 2005), brought out the distinction between "*plea of guilty*" and "*plea bargaining*". Accordingly, the courts said that both things should not have been treated, as the same. There appears to be a mix up. Nobody can dispute that "plea bargaining" is not permissible. However at the same time, it cannot be overlooked that raising of a "plea of guilty" at the appropriate stage as provided for in the statutory procedure for the accused and showing the special and adequate reasons for the discretionary exercise of powers by the trial Court in awarding sentences cannot be admixed or should not be treated the same.

Section 183 of the Code of Criminal Procedure Act explains the procedure upon which a plea of guilty is accepted by a Magistrate in a trial:

> 183(1) *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.

Whether a "plea of guilty" amounts to "plea bargaining" is a matter of proof. Every "plea of guilty" which is a part of the statutory process in a criminal trial, cannot be said to be a "plea bargaining" *ipso facto*. It is a matter requiring evaluation of the factual profile of each accused in criminal trial before reaching a specific conclusion of it being only a "plea bargaining" and not a plea of guilty simpliciter. It must be

based upon facts and proof, not on fanciful surmises without the necessary factual supporting profile for that.

In **State of Uttar Pradesh v. Chandrika (2000 Cr.L.J 384)** at 386, the Indian Supreme Court held that it is settled law that on the basis of Plea Bargaining the court cannot dispose of the criminal cases. Court held in this case that mere acceptance or admission of guilt should not be reason for giving a lesser sentence. The Accused cannot bargain for reduction of sentence merely because he pleaded guilty. Hence, by considering the basic principles of administration of justice merits alone should be considered for conviction and sentencing, even when the accused confesses to guilt, for it is the constitutional obligation of the court to award appropriate sentence.

In approaching the question of sentence, South African courts have taken into rumination '**the triad consisting of the crime, the offender and the interests of society**'. This was explained in **[S v Rabie 1975 (4) SA 855 (A) at 862G-H]** where the courts found the "punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances." In Rabie's case at 862A-B Holmes JA reiterated that "the main purposes of punishment are deterrent, preventive, reformative and retributive."

While it was perceived in **S v Karg 1961 (1) SA 231 (A)** at 236A, that the *"retributive aspect of punishment has tended to yield ground to the aspects of prevention and correction…The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct."*

What appears from these cases is that in other countries such as South Africa retribution and deterrence are the proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Given that both South Africa and Sri Lanka follow the same systems of Roman Dutch Law with principles of English Law and other private laws respective to each nation, even in Sri Lanka it could be

said that retribution and deterrence in its proper purposes of punishment could be accorded due weight in any sentence that is imposed. In my view each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.

It should also be reiterated that the Appellant "*thought*" that when he said he'll pay compensation of Rs. 50, 000/- that he would be given a suspended sentence. This could also be considered as some form of sentence bargaining on the part of the accused.

Gunasekara J in **Attorney General v Mendis [(1995) 1 Sri L.R 138]** was of the opinion that *"once an accused is found guilty and convicted on his own plea, or after trial, the Trial Judge has a difficult function to perform. That is to decide what sentence is to be imposed on the accused who has been convicted. In doing so he has to consider the point of view of the accused on the one hand and the interest of society on the other. In doing so the Judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organisation 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. The Trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should in our view not to surrender this sacred right and duty to any other person, be it counsel or accused or any other person. Further he went on to state that whilst plea bargaining is permissible in our view, sentence bargaining should not be encouraged at all and must be frowned upon"*. It is safe to say that this view still remains as a fundamental aspect of this court and sentence bargaining is still something that is be frowned upon.

As discussed earlier, it is the duty of a Trial judge to consider all the circumstances of the case. The triad of crime, offender and the interests of the society should be taken into consideration when delivering a judgment which should ensure it incorporates the purpose of a punishment namely deterrence and retribution among other purposes.

One such aspect that is commonly considered by a Trial Judge is to grant suspended sentence to offenders as envisaged in Section 303 of the Code of Criminal Procedure. In awarding a suspended sentence the rationale of it should be considered, which was explained by the Law Commission through a Memorandum to the Minister of Justice on the 13th October 1970. Such purpose of suspended sentences was explained as follows:

> (1) that no offender should be confined in a prison unless there is no alternative available for the protection of the community and the reform of the individual;
>
> (2) that imprisonment, with its obviously criminal associations, should not bring a non-criminal offender within its ambit;
>
> **(3) that an offender is given the opportunity of responding to incentives to good behaviour accompanied by the threat of drastic penal action, should he persist in criminal conduct**;
>
> (4) that the offender is treated as an individual who, despite the nature of the offence, is subjected to penal action related to his needs, his character and the possibility of his reform.
>
> (Emphasis added)

Further in the memorandum Professor C.H.S Jayewardene, Professor of Criminology in the University of Ottawa expressed the following opinion: *"the suspended sentence with its connotation 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 behaviour again. To this is added the supportive argument that 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." (Paragraph 5 of the memorandum)

The aforementioned view expressed shows the change in how punishments are to be meted out. In my view suspended sentencing could be considered as a progressive method of sentencing as it aims to rehabilitate and restore an offender whilst still having the option of incapacitating such an offender if they regress to former ways.

In this case it should be noted that the appellant submitted the appeal to the High Court and stated that the custodial sentence is unreasonable and unacceptable. On the perusal of the judgement of the Magistrate and the records, we find, according to the finger print record dated 8/9/2011, that the Appellant has a previous conviction, namely, High Court of Hambantota in case no. 304/07 had found him guilty under Section 140 and Section 300 of the Penal Code and sentenced him for 6 months and 2 years respectively and the same was suspended for a period of 10 years. The learned Magistrate in his judgement had considered these facts and imposed the aforementioned sentence.

In the given circumstances the Appellant cannot expect the Learned Magistrate to violate the provisions of the law to impose another suspended sentence when he is already serving a suspended sentence pending against him as this would be completely unacceptable. Such will pave the way for the offenders to commit offences and get away with it by throwing money. Sentencing is a sacred right vested with the judicial officer. The Magistrate exercised the same after evaluating all the circumstances of the case. The accused can submit their concerns by way of mitigatory circumstances to the court but it is unfair and unacceptable for him to form a question of the sentence. In the present case where the Appellant has

a previous conviction he cannot expect the judge to ignore the same and to start sentencing on a clean slate.

Considering all, I find that there is no merit in the appeal. Hence the appeal is dismissed. Registrar is hereby directed to send the case record to the Magistrate of Embilipitiya to implement the sentence.

Further the Registrar is also directed to forward the details of the second conviction to the High Court Judge of Hambantota, together with this judgment to activate the suspended sentences imposed against the appellant.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT