

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

CA(PHC) APN No. 110/2012

Hambantota HC No. 16/2005(Rev)

The Attorney General

**Attorney General's
Department,**

Colombo 12

Petitioner

Vs

Hewa Welimunige Gunasena

Beragama Junction, Koggala

Accused Respondent

BEFORE: A. W. A. Salam J and

Sunil Rajapakse J

COUNSEL: D. Bandara for the Accused Respondent

Shanil Kularatne, S.S.C., for the Petitioner

ARGUED ON: 01.11.2012

DECIDED ON: 12.02.2014

Sunil Rajapakse J.,

The Hon. Attorney General has invited this court to exercise its revisionary jurisdiction in terms of Section 364 of the Criminal Procedure Act No. 15 of 1979 and revise the sentence imposed on the accused.

The accused Respondent abovenamed was indicted in the High Court of Hambantota for committing an offence of grave sexual abuse on the victim Madurangani on 05.12.2002 at Koggala, Hambantota. According to the indictment filed by the Attorney General, at the time of commission of the offence the victim was only 12 years of age and the Accused Respondent was a person of 43 years old. This incident has occurred on 05.12.2002. When this case was taken up for trial the accused pleaded guilty to the indictment and the learned High Court Judge recorded the plea of guilt of the accused. After considering submissions made by the State Counsel and the Counsel for the defence, the learned High Court Judge imposed the following sentence on the Accused-Respondent.

1. Two years rigorous imprisonment, suspended for two years;
2. A Fine of Rupees Five Thousand with a default term of six months' imprisonment;
3. Compensation amounting to Rs. 100,000/- to be paid to the victim

When the case was taken up for argument on 01.11.2013, the main Issues that were placed before the Court were :

- (a) The inadequacy of the sentence;
- (b) The failure on the part of the learned High Court Judge to give reasons pertaining to his decision to impose a suspended sentence;

The statement made by victim to the Police reveals that the accused entered into her house at about 4.00 p.m and the accused caught hold of the victim and tried to thrust his male organ into her private part, despite the girls resistance and gave up only when the girl's sister arrived at the spot. At that time the accused threatened the two girls with death. At this stage the victim's parents were away from the house. I am of the view that this conduct of the accused shows his violent behavior.

In this regard I would like to cite the following authorities :

Attorney General vs Ranasinghe (1993) 2 SLR 81 CA it was held:

- i. An offence of rape calls for an immediate custodial sentence;

Reasons are :

- i. To mark the gravity of the offence;
- ii. To emphasize public disapproval;
- iii. To serve as a warning to others;
- iv. To punish the offender;
- v. To protect women

Aggravating factors would be ;

- a) Use of violence over and above force necessary to commit rape;
- b) Use of weapon to frighten or wound the victim ;

- c) Repeating acts of rape;
- d) Careful planning of rape;
- e) previous convictions for rape or other offences of a sexual kind;
- f) Extreme youth or old age o victim
- g) Effect upon victim, physical or mental;
- h) Subjection of victim to further sexual indignities or perversions

In contested cases of rape a figure of 5 years imprisonment should be taken as the starting point of sentence, subject to aggravating or mitigating features where the public interest (synonymous with the welfare of the State) outweigh the previous good character, antecedents and age of offender, public interest must prevail.

In the case of Attorney General vs H.N.de Silva 1 (1956) 57 NLR 121 at page 124, it was held "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 from 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 have regard the effect of the punishments as a deterrent and consider to what extent it will be effective".

In the case of Attorney General vs Mendis 1995 1 SLR 138 it was held that in assessing punishment the Judge should consider the matter of sentence both from the point of view of the public and the offender. The Judge 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 in what extent it will be effective.

In this case the Petitioner's contention is that the learned High Court Judge should have imposed a custodial sentence to the accused and that in the circumstances of this case the course adopted by him was wrong. Further he submitted that the sentence imposed by the learned High Court Judge was inadequate. Therefore the Petitioner moved in Revision to the Court of Appeal to get the sentence imposed by the learned High Court Judge set aside. Further the Petitioner in his Petition urged that a lawful and an appropriate sentence be given to the accused.

After analyzing the submissions made by the Petitioner and the accused Respondent I am of the opinion that the facts relating to this case warrants that the accused should be severely dealt with. Therefore a sentence of two years rigorous imprisonment suspended for ten years on the accused for a grave child abuse is a very lenient sentence considering the beastliness of the crime. When an offence of child abuse is proved victims of tender age and innocent behavior the sentence of imprisonment should be imposed severely. Further I hold two years R.I suspended for ten years is not adequate for the purpose of preventing the commission of further offences by the accused. Cases of

indecent touching, threats by an older man on a small girl seem to attract custodial sentence.

In this case the learned High Court Judge has not given proper attention to the facts of this case. The victims age has not been considered by the learned High Court Judge. At the time of the incident the victim was a 12 year old girl and the accused Respondent was 31 years older than the victim. Further I note this incident had taken place without the consent of the victim. The Accused Respondent's violent behavior and the gravity of the offence had not been duly considered by the learned High Court Judge before imposing a non custodial sentence. The present offence committed by the accused was greatly serious. Therefore imposing a non custodial sentence to the accused is inadequate.

It is also the contention of the Petitioner that there is a mandatory requirement to give reasons in writing when a decision is taken by a judicial officer to impose a suspended sentence on an accused. In this case, I note that the learned High Court Judge has not addressed his mind properly to the specific guidelines listed under Section 303(i) (a) to (d). Further the learned High Court Judge has not given specific reasons to impose non custodial sentence. Therefore imposing a non custodial sentence to the accused was contrary to the law.

Further I hold that this is one of the cruel cases of sexual abuse where the accused should be deterrently dealt with. A person indicted of an offence of child abuse does not deserve any sympathy. If the sentence is for a violent sexual offence the custodial part must be at least 7 years (minimum sentence)

Therefore I hold there were sufficient grounds for imposing a custodial sentence to the accused to prevent the commission of further offences.

For the aforesaid reasons I set aside the sentence of 2 years R./i. imposed on the accused by the learned High Court Judge, which has been suspended for a period of ten years and sentence the accused to a term of seven(7) years rigorous imprisonment. The compensation and fine ordered by the learned High Court judge is affirmed.

Sentence enhanced.

Revision application is allowed.

JUDGE OF THE COURT OF APPEAL

Salam J.,

I agree.

JUDGE OF THE COURT OF PPEAL