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

Arasa Marakkalage Milton Galahitiya

(Presently incarcerated)

C.A. 262/2012

H.C. Kalutara 373/2004

Vs.

ACCUSED-APPELLANT

Hon Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

BEFORE: Anil Gooneratne J. &
Sunil Rajapaksa J.

COUNSEL: Dr. Ranjit Fernando for the Accused-Appellant

Yasantha Kodagoda D.S.G., for the Respondent

ARGUED ON: 05.05.2014

DECIDED ON: 04.06.2014

GOONERATNE J.

The Accused-Appellant was indicted in the High Court of Kalutara for rape of a girl below 16 years of age, under Section 364 (2) of the Penal Code (Amendment) Act No. 22 of 1995. Offence committed on or about 28.1.2012. He was sentenced to 20 years rigorous imprisonment and fined Rs. 20,000/-. It carries a default sentence of 2 years rigorous imprisonment. Court has also order that a sum of Rs. 700,000/- be paid as compensation to the victim, and in default of same, 2 years simple imprisonment. Sentence imposed by the High Court on 4.10.2012.

At the hearing of this appeal, learned counsel for the Accused-Appellant indicated to court that his client would not contest the conviction, but would plead in mitigation of the sentence already imposed, mainly for the reason that the Accused-Appellant is as at the date of hearing of this appeal is 70 years old and suffering from various ailments as submitted by learned counsel. The learned Deputy Solicitor General on behalf of the Respondent drew the attention of this court to incident itself and serious nature of the offence and the impact to society. It is necessary for this court to very briefly refer to the incident.

The victim being 12 years old on the date of incident was known to the Accused and calls him Seeya. The Accused was seated on a half wall in close proximity to the victim's house The victim at about 4.30 p.m went to collect water. The mother was inside the house. Victim says 'Seeya' the Accused called her to give something Described as 'දුවේ බඩුවක් අපුන්න එන්න කිව්වා'. Evidence suggest that the Accused was known to the victim for some years. When the Accused called her to give something the victim told him to throw it so that she could take it from the place she was standing but the Accused did not do so. It is also in evidence that there were no other persons in the vicinity. Then she went near the Accused who grabbed her, and carried the victim a few distance away. She was taken inside the garden to the premises more to the rear side (පිටිකන්නට). The victim also describes the situation of the premises. Thereafter he clothes were removed by the Accused and had thereafter raped her, in spite of her resistance by shouting. I find that the proceeding indicate that the Accused also had threatened the victim and even shown a knife to her (pg. 83).

The sentenced imposed by the learned High Court Judge in the context and circumstances of the case is no doubt justified and imposed as a deterrent. I do not think that the punishment imposed is too harsh. This is a preplanned act, where the Accused induced the victim initially with a false

promise of giving something, may be a gift. The Accused abused his position and had taken advantage of the victims tender age to achieve his bad motives. The Accused having done all this, the question that arises in appeal and at this point of time where age of the Accused and his physical/health condition is being projected, how should the Court of Appeal react, in the circumstances of this case? This court is also mindful of the alarming proportion of the crime rate of this country, and the protection that need to be lent by court in the Criminal Justice System , to at least curtail the crime rate, for the benefit of the civil society, by imposing deterrent punishments. Let me now consider the mitigatory circumstances relied upon by the Accused-Appellant.

1. Parties known to each other – neighbours/seeing each other daily, with no allegation that the Accused ever attempted to make any sexual advances to victim or take advantage of her previously.
   (This militates against any pre-plan/pre meditation and indicates that the Accused being subject to a "moment of weakness" for some unexplained reason.
2. Incident occurs in broad daylight, virtually in a populated/public locality.
   (as opposed to dragging away victim into a shrub jungle/uninhabited area)
3. No allegation of any threats which she alleges he had at his waist (notwithstanding the improbability of 60 plus years old carrying her/raping her with a knife at his waist)

4. The Accused at the time of incident had been a law abiding/1st offender/who had proved himself and lived in society for over half a century.

   (Hence the probability of a 'humane problem" subjecting himself to an isolated moment of weakness).

5. Presently being 71 year plus in page – at the time the CA is reviewing the question of sentence – his naturally failing health due to age – being aggravated by present environment and the immense pain of mind that the future lives of his seven children, including daughters of marriageable age – have been destroyed, in the village – in view of their father having been convicted for the offence of rape.

   (It being common knowledge that in the village, a murderer may sometimes be considered a "hero" – unlike sexual and drug offenders – who are despised and ostracized as outcast. Also attached is a copy of the letter addressed to the Commissioner of Prison by one of his daughters, begging for necessary medical treatment for the father) – Document "M".

6. With a sense of responsibility it is brought to the notice of the Court that there is no doubt whatsoever, that invariably the Accused will serve the default terms of R1 totaling 4 years, in addition to his substantive term of 20 years, as there is no way his family could afford the fine of Rs.. 20,000/- and the Order for compensation of Rs. 700,000/-

All that is contained in (1) – (6) above could be developed by way of an argument advanced for the Accused party to plead in mitigation, but this court is not in a position to consider (1) to (4) above in favour of the Accused-Appellant. Only question is whether (5) & (6) could be considered in the context of this appeal?

I have gathered and perused the material submitted to court by learned counsel for the Accused-Appellant which contain useful reading matter connecting the subject. However before I consider same the following extract from the text by Home Office "The Sentence of the Court" (A hand book for courts on the treatment of offenders).

At pgs. 6/7....

3:2 The criminal courts play a key role in the criminal justice system. The objectives of that system are to prevent, detect and punish crime, and other agencies – such as the police, the prison service and the probation service – are involved in seeking to achieve them. The sanctions available to the courts are designed at least partly as punishments, but it is natural to ask to what extent they also serve to prevent crime. There are three ways in which they might be expected to do so: by deterring potential offenders generally, through fear of punishment; by influencing offenders who have been appropriately sentenced not to offend again; and by putting out of circulation, through custody, those who are a particular nuisance or a particular danger. The research evidence, however, suggests that within the realistic range of choice, imposing particular sentences, or particularly severe sentences, has a very limited effect on crime levels.

3:4

The general deterrent effect is in principle very difficult to measure, and this may in part account for the fact that there is also no clear evidence associating sentence severity and crime rates. But it is also true that such an effect can only occur for criminal acts which are premeditated by people making rational calculations of the likelihood of being caught, the likely sentence and the likely benefits from the crime. The inference most commonly drawn from research studies is that the probability of arrest and conviction is likely to deter potential offenders, whereas the perceived severity of the ensuring penalties has little effect.

Emmins on Sentencing – Martin Waik 2nd Ed.
Sentencing Law and Sentencing Principles

Offender is relatively old In Varden (1981) Crim LR 272 the Court of Appeal upheld a reduction in sentence on a 71 year old offender of low intelligence because his advanced years would probably make a term of imprisonment all the more unpleasant for him. In Wilkinson (1974) CSP C2-2B01 the offender pleaded guilty to various charges of indecent assault, indecency with a child and unlawful sexual intercourse with a girl aged under 13. All the offences were committed on the offender's grandnieces. Prison sentences of four years were reduced, 'as an act of mercy' to two and a half years, Roskill L.J stating that "No court willingly sentences a man of 60 to spend a large part of the remainder of his life in prison'. On occasions (such as where there is evidence of senility, or disordered thinking) it is arguable that the offender's relative age might tend to reduce culpability together with the matters mentioned at 2.2.3. It seems, though, that age cannot *per se* affect culpability, so that it is better placed as a mitigating factor.

In Karunaratne Vs. The State 78 NLR 413....
Held by Rajaratnam J and Ratwatte J. (Vythialingam J. dissenting) 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.

Therefore the delay of 10 years to finally conclude the case is a very relevant circumstance to be taken into consideration and in the circumstances of the case a suspended sentence is appropriate.

In the above circumstances and having considered all the above material I observe that the conviction and sentence was imposed after about 10 years from the date of offence and the age (70 years) and health condition of the Accused are the mitigatory factor. I have considered in giving some relief to the Accused party. A fairly long period of time has lapsed from the date of offence. The learned High Court Judge very correctly considered the serious nature of the offence and imposed a custodian sentence as above, and no High Court Judge could be faulted for doing sc. The mitigatory factors lead us to intervene and vary the sentence to 15 years rigorous imprisonment and a fine of Rs. 10,000/- and in default 10 months simple imprisonment. Court also award compensation in a sum of Rs. 300,000/- and in default of payment of same an imprisonment for a period

of 10 months simple imprisonment. Subject to above appeal is dismissed. The sentence to run from the date of conviction.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL