

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

Hirimuthugoda Sanjeewa Shantha alias  
Ran Mama

**ACCUSED-APPELLANT**

C.A. 150/2010  
H.C. Balapitiya 528/2002

Vs.

Hon. Attorney General  
Attorney General's Department  
Colombo 12.

**RESPONDENT**

**BEFORE:** Anil Gooneratne J. &  
Malinie Gunaratne J.

**COUNSEL:** Tenny Fernando for the Accused-Appellant  
Anoopa de Silva S.S.C. for the Respondent

**ARGUED ON:** 18.06.2014

**DECIDED ON:** 16.07.2014

**GOONERATNE J.**

This is an appeal preferred by the Hon. Attorney General to set aside the non-custodial sentence imposed by the learned High Court Judge of Balapitiya in a case of grave sexual abuse by the trial Judges' judgment of 20.8.2010. The Accused-Respondent was indicted for a grave sexual offence in terms of Section 365(B)(2)(B) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998, on a victim called Kudaudage Tharindu Danushka on 24.4.2002.

It is pleaded in the Petition of Appeal that the trial commenced on 3.9.2003 in the High Court and continued till 19.12.2010. Evidence of prosecution witness Nos. 1, 2, 3 & 4 had been led during the said period. However on 30.7.2010 when the case was fixed for further trial the Accused-Respondent pleaded guilty to the charge. On 20.8.2010 the learned High Court Judge imposed a sentence of 2 years rigorous imprisonment and suspended it for 10 years and fined Rs. 2000/- which carries a default sentence of 6 months simple imprisonment. Court also ordered that compensation in a sum of Rs. 60,000/- should be paid. The sentence imposed by the learned High Court

Judge is illegal as its contrary to the mandatory sentence prescribed by the penal code, which necessarily has to be a custodial sentence.

The provisions relating to offences affecting the human body of offences affecting life is contained in Chapter XVI of the Penal Code. The Penal Code itself was enacted according to the material available to this court on 1<sup>st</sup> January 1885 and originally as described in the long title “an ordinance to provide a General Penal Code for Ceylon.” With reference at the beginning made to Ordinances Nos. 2 of 1883 and with so many amendments introduced over the years from time to time. The offences falling within the definition of rape, of carnal intercourse with young girls, and of unnatural offences are included in this chapter. Civilized society would at any cost condone such acts for the benefit and safeguard of the civil society, not limited in time and period but to be made applicable for the further generation as well. In the years 1995, 1998 and 2006 amendments were made to the Penal Code, which expanded the scope of sexual offences and the punishments applicable to same. Section 365 and Section 365A of the Penal Code which deals with “of unnatural offences” made it wide enough with amendments to include “of unnatural offences and grave sexual abuse”. The Code made the offences punishable and a sentenced to be imposed between 10 to 20 years (Section 365, 365A, 365B).

By these amendments a minimum sentence had been introduced which would be mandatory. Prior to the above amendments to the Penal Code there were no minimum mandatory provisions. The necessity to introduce the amendments would demonstrate the increase crime rate covering a variety of offences, connected to sexual desires, of offenders. More emphasis seem to be placed to safeguard small and very young children from sex perverts of various ages and caliber. Considering the magnitude of the problem and the number of cases filled in our courts a different punishment is inevitable.

What is more surprising and intolerable is the address made to the High Court of Balapitiya by the defence counsel, pleading in mitigation of the sentence on a particular date when a decision was made by his client to plead guilty to the charge, having gone through the trial for about 4 years. In the submissions of learned counsel for the defence at the beginning of his address states inter alia.

1. Incident occurred about 9 years ago (prior to 30.7.2010). Age of the Accused as at 30.7.2010 was 29 years.
2. Tolerated the charge for 9 years
3. No other offence committed during the 9 years period.
4. Only this incident occurred during the Accused 29 years of age,

5. These are normal happenings in the society (සාමාන්‍ය පරම්පරාවට මේවා සාමාන්‍ය දේවල්)
6. These things are done by the ordinary people (මේවා සාමාන්‍ය මිනිස්සු කරනවා)
7. According to his experience these are normal happenings (මාගේ ජීවිතයේ අත්දැකීම අනුව මේවා සාමාන්‍ය දේවල්)
8. There is something special to impose a lenient sentence. Accused had kept all this in mind and lived, without causing any problem.

The points urged to a court of law as in 5, 6 & 7 above are intolerable and may give the Wrong signal to the younger generation since the record maintained by the High Court and the Appellate proceedings would be a public document and as such access to same cannot be denied. In the medical science such sexual acts would be described and explained in medical parlance in relation to biological and or other reasons but the law of the land and all over the globe makes it an offence and a prohibition.

When I examined the journal entries it appears that the Accused had been absent on certain days and warrants issued and recalled for reasons stated therein. Accused had also been arrested and remanded. On many days when the trial was proceeding in the High Court the Accused had been present but on some days had been absent for some reason or the other. As such the

Accused party has also contributed for delays in disposing this case in the trial court. The Accused party having gone through the trial for 4 years, decided at a certain point of time to plead guilty, and court imposed a suspended sentence. This is an offence where the law clearly contemplates of a sentence where the minimum period of sentence should be 10 years. The damage caused to the victim mentally and physically cannot be compensated by payment of money alone. It is the mental trauma that could shape or destroy or weaken the life of the victim in the subsequent year of victim's life. The court after passing the sentence even with an order for payment of compensation, cannot assist the victim in the balance and subsequent life that the victim has to undergo.

In the cases dealing with a variety of criminal nature very often delay is considered as a mitigatory ground and the Appellate Courts are prone to show some leniency for the benefit of the Accused since cases should generally be heard and tried within a reasonable period of time. If found to be so unreasonable in time, Accused very often plead delay as a mitigatory failure.

I also had the benefit of perusing S.C No. 03/2008 H.C. Anuradhapura 334/2004 and S.C. Appeal 179/2012. In S.C. 179/2012, the Supreme Court took

the view inter alia that there was no reason to alter the sentence imposed by the decision of the Court of Appeal and affirm the sentence of 10 years. As such, the circumstances that prevailed in each of those cases referred to above is very much at variance to the case in hand. In S.C 03/2008 the Accused and the complainant though under age had a love affair, and both parties had eloped and had sexual intercourse. Thereafter the respective parents intervened and brought the complainant back home. To arrive at a decision the Supreme Court considered numerous authorities and decisions inclusive of Article 4 (c), 11 & 12(1) of the Constitution. What is paramount is the nature of the offence/age and the judicial discretions that need to be exercised by a court of law, in the circumstances and the context of the case before court and I think the decision in S.C. 03/2008 cannot bind any other court where the offence is of a very serious nature as in that judgment (S.C. 03/2008) court emphasis the fact of the nature of the offence and judges' discretion. It could be used in an appropriate case to impose a sentence below the minimum mandatory sentence, but not in each and every case of grave sexual offence. I would refer to the following excerpts from the judgment in S.C. 03/2008 ...

However there may well be exceptional cases in which an offence may be so serious in nature that irrespective of the circumstances a Court may never exercise judicial discretion in favour of a punishment that is less than an appropriate minimum mandatory punishment. The reasoning in *Re: Prevention of Organized Crime Bill (supra)* relates to such an exceptional case. The Supreme Court in *Re: Prevention of Organized Crime Bill (supra)* in fact contrasted the serious nature of the offences in *Re: Prevention of Organized Crime Bill (supra)* with far lesser serious offences in *Re: Prohibition of Ragging and Other Forms of Violence in Educational Institutions Bill (supra)*. A minimum mandatory punishment of appropriate severity for such serious offences would not be inconsistent with Articles 4(c), 11 and 12(1).

As far as Section 364(2)(e) of the Penal Code (as amended by Penal Code (Amendment) Act No. 22 of 1995) is concerned, the High Court has been prevented from imposing a sentence that it feels is appropriate in the exercise of its judicial discretion due to the minimum mandatory punishment prescribed in Section 364(2). Having regard to the nature of the offence and the severity of the minimum mandatory sentence we hold that the minimum mandatory sentence in Section 364(2)(e) is in conflict with Articles 4(c), 11 and 12(1) of the constitution.

I would also refer to the following extract from S.C. 179/2012 to verify and understand the importance of both the above judgments ...

Taking this view into account, in the above mentioned case of S.C. Reference No. 03/2008, the Court found it necessary to have the best interest both the victim and the Accused, in mind, despite the minimum mandatory statement, as both parties were children in the eyes of the law.



Indeed, quite correctly the rationale of that case was that where children under 16 years of age were being indicted and/or were convicted of the act of rape, the Court, being the upper guardian of the child, would also have to consider the best interests of the Accused who also, in the eyes of the Court, would be considered a child as he too was under 16 years of age and for reasons to be recorded by the Judge in such cases only the sentence could be mitigated and reduced below the mandatory period.

This court ratifies the principle that in such cases, where the Accused is under 16 years of age, the sentencing would depend on the facts and circumstances of each case and if the age of the Accused was 16 years or under, their age would be a material and relevant fact. This however, in the eyes of this Court, would only apply in cases where the Accused is under the age of 16.

In such cases, it would be incumbent upon the Judge to set out, with clarity, all the reasons which are relevant and salient for not imposing the mandatory statutory minimum period of 7 years or in the case of a person under 18 years, a mandatory period of 10 years, and the Court would have the power to do so as only where the accused is under 16 years of age, as the Court in its capacity of the upper guardian of each and every child has the inherent power to consider such matters and reduce the statutorily mandated minimum sentence. However, the facts in this case can be clearly distinguished from the facts in S.C. Appeal No. 179/2012, as in the present case, the Accused-Appellant was 28 years of age at the time the offence was committed.

It is the Courts belief that the legislation, as found in the Penal Code, reflects the law as it should be, as it is a result of the will of the Parliament and the will of the people.

Jayant Patel J. in the recent case of Jusabbhai Vs. State CR.MA/623/2012 9/9 ORDER states that:

“..... It is by now recognized principles that Justice to one party should not result into injustice to the other side and it will be for the Court to balance the right of both the sides and to up-hold the law.”

In the recent case of *Stubing V. Germany* (Application No. 43547/08) (As found online), it was held that regard should be had:

“.... to the fair balance which has to be struck between the relevant competing interests at stake and the margin of appreciation enjoyed by the State”

Taking this principle into account, the Court accepts that with regard to sentencing, the view of all parties involved in the case must be considered in a balanced manner, in particular where violations are carried out with impunity, even after the Legislature has placed minimum mandatory sentences.

The facts, as submitted by State Counsel disclosed the rape of a child of 13 years which will have enormous mental, physical, emotional, behavioral and developmental repercussions on this child, In this case, the victim was the 13 year old prosecutrix, whose testimonial credit worthiness has not been assailed or challenged in the Superior Courts. As a result, the Court must consider the interests on the offender, the victim and the public, in addition to the consequences of the sentencing similar to the view expressed in *R.V. Forsey*, 2005 CanL11 12511 (NL PC)

This court cannot show any leniency on any account, in view of the serious nature of the offence even at the Appellate stage, mainly to protect the society from such mentally disordered offences. As such sentence of learned High Court Judge is set aside. This sentence is imposed to deter

potential offenders as well, generally, through fear of punishment by influencing offenders who have been appropriately sentenced not to offend again.

We impose a sentence of 10 years rigorous imprisonment, and a fine of Rs. 10,000/- which carries a default sentence of 01 year rigorous imprisonment. Registrar is directed to send the record forthwith to the relevant High Court. The learned High Court Judge to follow the usual procedure and pronounce the sentence imposed by this court. The sentence will run from the date of pronouncing the sentence in the High Court. The learned High Court Judge is directed to issue a fresh committal.

Appeal allowed.

  
JUDGE OF THE COURT OF APPEAL

Malinie Gunaratne J.

I agree.

  
JUDGE OF THE COURT OF APPEAL