

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

In the matter of an Appeal  
Against an order of the High  
Court under Sec. 331 of the  
Code of Criminal Procedure  
Act No. 15 of 1979.

Mohammed Saheed Mohammed  
Furukhan,  
Prison,  
Mahara,

**Accused-Appellant**

**C. A. No. : 207/2013**

**H. C. Gampaha No. : 05/2013**

**V.**

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

**Respondent**

**BEFORE : H. N. J. Perera, J. &  
K. K. Wickramasinghe, J**

**COUNSEL** : Chathura Amaratunga for the Accused-Appellant.  
Anoopa Harini de Silva SSC. for the Attorney General.

**ARGUED ON** : 26<sup>th</sup> June 2015

**DECIDED ON** : 17<sup>th</sup> July 2015

**K. K. WICKRAMASINGHE, J.**

In this case, the Accused-Appellant (hereinafter referred to as the 'Appellant') was indicted in the High Court of Gampaha for having committed the offence of 'Rape' on a minor (under 16 years of age) named Mohammed Saheed Sapna Begam who stood in a degree of relationship set out in sec. 364A (1) of the Penal Code as amended by the Act No. 22 of 1995 (his own youngest sister) three times on three different dates between the period of 1<sup>st</sup> July 2009 to 30<sup>th</sup> August 2009, at Pugoda, which are offences punishable under sec. 364 (3) of the Penal Code as Amended by the Amending Act No. 22 of 1995.

When the matter was mentioned for trial, the Appellant indicated his willingness to plead guilty to all three counts in the indictment and he did so after the indictment was read over to him.

Subsequently, the learned High Court Judge on being satisfied that the Appellant had duly understood the consequence of his act convicted the Accused for all three counts upon his own plea.

After the learned Counsel for the Appellant made submissions in mitigation and after the submissions of the learned State Counsel, the learned High Court Judge imposed sentence of 15 years rigorous imprisonment with a fine of Rs. 10 000/= and a default sentence of 1 year rigorous imprisonment on each count, on 14<sup>th</sup> of November 2013. Though the learned Trial

Judge didn't specifically mentioned whether the said terms of imprisonment should run consecutively or concurrently, She made a declaration to the effect that the total period of imprisonment that was imposed on the Appellant was 45 years. This indicates that the terms of imprisonment that were ordered in respect of counts 1, 2 and 3 were accordingly ordered to run consecutively. However, the learned Trial Judge refrained from ordering compensation to the Victim.

The Appellant does not contest the conviction in this case. This appeal is only against the sentence imposed by the learned High Court Judge. The Appellant requests an order which allows the terms of imprisonment to run concurrently and to impose a lenient sentence.

In this case the Victim was only a 14 years of age at the time of the incident and the Accused was 22 years old at that time. They lived in one house and only their mother and grandmother (mother's mother) were staying with them. The Appellant had committed this offence to the Victim on several occasions in nights and day times during the absence of other inmates of the house. Few months after the incident the Appellant had got married to another woman. The Victim had become pregnant by the Appellant and had given birth to a child as a result of the incident. The child was 3 years and 7 months of age at the time the Appellant pleaded guilty to the indictment. However, the Victim had not narrated the fact that her brother had sexual intercourse with her to anyone, until her mother took her to the hospital as she was sick and the doctor found that she was pregnant. On the other hand the Appellant had denied that he did the afore said offences mentioned in the indictment at the police and therefore a DNA report of the child was called and that DNA report established the fact that the Appellant was the father of the Victim's child.

As the learned Trial Judge had mentioned in her Judgment, the society expects protection to the sisters from brothers in a family. The Appellant, on the other hand, had acted contrary to the said expectation of the whole society and this gives a bad specimen to the whole society. However, the Victim in this case had not informed the incident to anyone and she kept the incident in secret. As a result of this there was a delay of 6 months to lodge a complaint to the police.

The Counsel for the Appellant submitted in mitigation the following matters;

- a) The Appellant did not move to proceed with the trial having denied the allegations leveled against him by the Victim.

- b) He pleaded guilty to all three counts in the indictment at the first instance without wasting the time of the Court by proceeding with the trial.
- c) In the event the Appellant proceeded with the trial and found guilty he is liable to be sentenced to a term of imprisonment which amounts to sixty years as indicated by court.
- d) The Appellant did not anticipate this kind of a long term sentence at the time he pleaded guilty.
- e) The Appellant was just a young boy of 22 years at the time of the incident and he is just 25 years of age at present.
- f) The Victim had got married to another person at the time the Court punished the Appellant.
- g) The child born as a result of the Appellant's act is in the custody of the Victim.
- h) The Appellant has no previous convictions.
- i) The Appellant lived his life in good behavior.
- j) The Appellant was a laborer.
- k) The Appellant has no pending cases which relate to offences such as rape or robbery.
- l) The Appellant is a married man.
- m) The Appellant deeply regrets for what had taken place.

The learned Counsel for the Respondent had sighted the case of **AG v. Mendis SLR [1995] Vol 1 Page No. 138** where Justice Gunasekera held (in the *dicta* of the Judgment) that; "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 surrender this sacred right and duty to any other person, be it counsel or accused or any other person." "While plea bargaining is permissible, sentence bargaining should not be encouraged at all and must be frowned upon. No trial should permit and encourage a situation where the accused attempts to dictate or indicate what sentence he should get or what sentence he expects."

But in the case of **Kumara v. AG [2003] 1 SLR, page 139** it was held that when the Accused does not have previous convictions and when the Accused pleads guilty, these can be considered as migratory factors.

In the present case, learned counsel for the Appellant contended that the sentence imposed by the learned High Court Judge on each count to run consecutively is excessive. Therefore he made an application to make the sentence imposed on each count to run concurrently. The Appellant had pleaded guilty at the first instance of the trial and he had no previous convictions. The Appellant is the sole bread winner of the family. The child of the Victim by the Appellant was 3 years and 7 months of age at the time of imposing the sentence. It was further informed that the said child was looked after by the Appellant until he was convicted. The Appellant was only 22 years of age at the time of committing the offence. The

stipulated sentence ranges from 15 years to 20 years. Considering the mitigating and aggravating factors of this case, I substitute a sentence of 18 years rigorous imprisonment on each count to run concurrently and the fine and the default sentence to stand.

Subject to the above variation of the sentence, Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

I agree.

~~JUDGE~~ OF THE COURT OF APPEAL

CASES REFERRED TO:

- 1) AG v. Mendis SLR [1995] Vol 1 Page No. 138**
- 2) Kumara v. AG [2003] 1 SLR, page 139**