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

In the matter of appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act N0.15 of 1979 as amended.

Jayasinghe Pathiranalage Lalith Kumara

Accused-Appellant

C.A.Case No:-163/2013

H.C.Badulla Case No:-64/2010

V

Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

Before :-H.N.J.Perera, J. &

K.K.Wickremasinghe, J

Counsel:-Vijaya N.Perera with Jeewani Pererafor the Accused-Appellant

H.I.Peiris S.S.C for the Respondent

Argued On:-25.05.2015

Written Submissions:-10.06.2015

Decided On:-11.11.2015

H.N.J.Perera,J.

The accused-appellant was indicted before the High Court of Badulla for committing grave sexual abuse on one Upali Dharmasena on or about 18th September 2004 an offence punishable under section 365 B(2)A of the Penal Code amended by Act No 22 of 1995. After trial the accused-appellant was convicted and sentenced by the learned trial Judge to 15 years R.I. and imposed a fine of Rs. 10.000/- with a default term of 6 months simple imprisonment. The accused-appellant was also ordered to pay Rs.100.000/-as compensation to the victim with a default term of 12 months R.I. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

This matter was taken up for argument before this court and the learned Counsel for the accused-appellant before the delivery of the judgment informed court that he will confine this appeal to the severity of the sentence imposed by the learned trial Judge . It was contended on behalf of the accused-appellant that the sentence of 15 years rigorous imprisonment imposed on the accused-appellant by the learned trial Judge was too harsh and out of proportion to the offence committed by the accused-appellant.

The incident had taken place when the victim was in police custody. He has been a 19 years old youth at that time. The accused-appellant was an officer attached to Mahiyangana police station at that time. The medical Officer who had examined the victim on 22.09.2004 had observed four injuries in the body of the victim.

(1)A contusion on the back of head towards the top (2x3 cm)

(2)A scratch (healing stage with a black cast 4 mm) on the left side of neck

(3)A scratch (healing stage with a black 8 mm) on the upper chest , just below the neck on the mid line

(4)Anus :- a muscle tear (1.2 cm) at 6 o'clock position of the anus. The area is inflamed. Examination was painful.

The doctor had further stated that the injury No 4 compatible with anal penetration and keeping with history given.

In Attorney General V. Janak Sri Uluwaduge and other (1995) 1 Sri L.R 157 it was held that in determining the proper sentence the Judge should 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 to what extent it will be effective.

It was also held in the said case that incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration.

Basnayake A.C.J in the case of Attorney General V. H.N.De Silva 57 N.L.R 121 observed as follows:-

"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 regard the effect of the punishment as a deterrent and consider to what extent it will be effective.

A Judge should in determining the proper sentence first consider the gravity of the offence. The reformation of the criminal though no

doubt an important consideration is subordinate to the others I have mentioned."

In the case of Attorney General V. Ranasinghe and others (1993) 2 Sri L.R 81 it was held that an offence of rape calls for an immediate custodial sentence, reasons are

(a)To mark the gravity of the offence

(b)To emphasize public disapproval

(c)To serve as a warning to others

(d) To punish the offender

(e)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 victim

(c)Repeating acts of rape

(d)Careful planning of rape

(e)Previous convictions for rape or other offences of sexual kind

(f)Extreme youth or old age of victim

(g)Effect upon the victim, physical or mental

(h)Subjection of victim to further sexual indignities or perversions.

In Rajive V. State of Rajastan (1996) 2 SCC 175, it was held that the Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong.

In State of M.P V. Bablu Natt (2009) 2 SCC 272 it was held that:-

"The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with. Socio economic status, religion, race, caste or creed of the accused and victim although may not be wholly irrelevant, should be eschewed in a case of this nature, particularly when parliament itself had laid down minimum sentence."

In this case the accused-appellant was found guilty for a charge punishable under section 365 B2A of the Penal Code and the accused-appellant had committed serious offence which the public disapproves and also expect deterrent punishment be imposed on the offender to serve as a warning to others. The victim in the instant case had been abused by the accused-appellant when he was in police custody of the accused-appellant. The court should clearly protect such victims and therefore deal with this type of offender deterrent so as to protect the interest of the society and also to convey a message to the society in general.

The law prescribes a minimum term of 7 years for the said offence and 20 years the maximum. The learned trial Judge had after consideration of all these matters imposed a term of 15 years R.I on the accused-appellant. The learned trial Judge had taken into account the age of the victim, the circumstances under which the offence was committed and the gravity of the offence committed by the accused-appellant. But there is no evidence to show that the accused-appellant has committed any of the acts which have been considered as aggravating factors stated in the case of Attorney General V. Ranasinghe (supra).

Therefore after considering all the above circumstances we set aside the sentence of imprisonment imposed by the learned trial Judge and sentence the accused-appellant to a term of 10 years rigorous

imprisonment. The fine Rs.10,000/- imposed by the learned High Court Judge should stand and in default 6 months simple imprisonment. We also affirm the order of the learned trial Judge ordering Rs. 100,000/- as compensation to the victim in this case, in default 1 year rigorous imprisonment. The High Court Judge of Badulla is directed to issue a fresh committal accordingly.

Subject to the variation of the sentence the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL