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.

Hapanpedige Tissa Piyadasa alias Baby Seeya,

Prison,

Monaragala.

Accused-Appellant

C. A. No. : 121/2014

H. C. Ampara Case No. : HC/ AMP/ 1490/ 2012

V.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

BEFORE : H. N. J. Perera, J. &

K. K. Wickramasinghe, J.

COUNSEL	:	Dr. Ranjith Fernando for the Accused-Appellant. Dilan Ratnayake, SSC for the Attorney General.
ARGUED ON	:	07th of September 2015
WRITTEN SUBMITIONS	:	10th of September 2015/ 09th 0f October 2015
DECIDED ON	:	11th of December 2015

K. K. WICKRAMASINGHE, J.

The accused-appellant (herein after referred to as the 'appellant'), Hapanpedige Tissa Piyadasa alias Baby Seeya, was indicted in the High Court of Ampara for;

1) committing grave sexual abuse on Wijesinghe Mudiyanselage Hashan Savinda Wijesinghe, who was a boy below sixteen (16) years of age, on or about a day during the period between 01.12.2004 to 31.12.2004; thereby committing an offence punishable under sec. 365 B (2) (b) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998 and
2) committing grave sexual abuse on the same aforesaid victim, in a different occasion which was not described in the first charge of the indictment, on or about a day during the period between 01.12.2004 to 31.12.2004; thereby committing an offence punishable under sec. 365 B (2) (b) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998.

After reading and explaining the indictment to the appellant on 22.05.2012 and again on 19.03.2013, upon the appellant pleading not guilty for both charges in the indictment then the trial commenced before the learned High Court Judge of Ampara on 19.03.2013.

At the trial the prosecution had led evidence of several witnesses (PW 1, PW 2, PW 4, PW 7, PW 6, PW 5 and PW 10) and the case for the prosecution closed on 13.03.2014. However, there were no eye witnesses and the case was based only on circumstantial evidence.

After the conclusion of the case for the prosecution the appellant had chosen to give evidence on oath and to call a witness (his wife) on his behalf. Then on 18.03.2014 the appellant and his wife (VW 1) had been called to give evidence and the case for the appellant had been concluded.

On 28.05.2014 the learned High Court Judge had convicted the appellant for both the above mentioned charges in the indictment and imposed following sentences;

1) fifteen (15) years rigorous imprisonment and a fine of Rs. 10 000/= with a default sentence of six (6) months simple imprisonment for the first charge and
2) fifteen (15) years rigorous imprisonment and a fine of Rs. 10 000/= with a default sentence of six (6) months simple imprisonment for the second charge.

Further the learned High Court Judge ordered that the sentences of imprisonment for both charges to run concurrently and a sum of Rs. 150 000/= to be paid to the victim as compensation, with a default sentence of two (2) years simple imprisonment.

The counsel for the appellant confined this appeal only to the sentence.

The learned Counsel for the appellant pointed out the following grounds and pleaded any possible relief upon those grounds.

I. Though nothing was preventing the victim from showing his displeasure or objection to the act, it appears that the victim had not shown any objection on any occasion.
II. The appellant had not acted violently on the victim and he had not used any force against the victim.
III. The complaint had been made six (6) months after the incident.
IV. According to the testimony of Dr. Rahul Haq who gave expert evidence about the victim's Medico Legal Report, there were no injuries attributed to the incident in issue in this case. However, he had revealed that the victim had anal injuries which went on to show that he had been subjected to sexual assaults by others as well.

V. The parties are well known to each other. They are living in the same village/ neighbourhood with daily meeting and seeing each other over years with no complaint previously against the appellant.

VI. The appellant had been a man with an unblemished character through his life until the time of conviction.

VII. The appellant's children are both government servants serving in the police and as a teacher and his conviction has brought a social stigma upon them.

VIII. The appellant is now about seventy (70) years of age and is in the twilight of his life.

IX. The appellant had been incarcerated since the date of conviction/ sentence (28th of May 2014).

The above mentioned first ground cannot be used when considering the sentence, as the consent of a child under sixteen (16) years of age is immaterial in the case of grave sexual abuse. Moreover, in this case the appellant had committed this offence by taking advantage of the tender age of the child at the time of the offence and the trust of the victim towards an elderly neighbour who was well known to him. Furthermore, it is very clear that the appellant had obtained the consent of the child by threatening him (page 74, 75, 84, etc... of the brief).

With regard to the belatedness of the victim's complaint, the learned State Counsel correctly submitted that the belatedness has been explained by the prosecution in the course of the trial. In ***Bandara v. The State 2001 2 SLR 63*** it was held that; *"If there is a valid reason or explanation for the delay and if the trial Judge is satisfied with the reasons and explanations given, no trial Judge would apply the test of spontainety and contemporaneity and reject the testimony of a witness in such circumstances"* and *"delayed witnesses evidence could be acted upon if there were reasons to explain the delay."* Therefore the above mentioned third ground also cannot be taken into consideration when deciding the sentence.

The learned State Counsel argued that the appellant is no way entitled to get any concession on the sentence on the following grounds;

I. The appellant had commenced a protracted trial by denying liability at the outset. The prosecution called six (6) witnesses including the victim and marked productions. The defence was called by Court at the end of the prosecution case and both the appellant

and his wife gave evidence under oath to present their defence. Thus the appellant did not contribute to save time of Court at all.

II. The appellant had never repented or regretted about the offence he had committed. He never pleaded guilty to the charges preferred against him.

III. The appellant, by opting to go through a trial, subjected the victim to re-live the incident and suffer further mental agony by compelling him to give evidence. During the trial the victim was subjected to long cross-examination which is a form of secondary victimization for the victim. The victim was further traumatized by these acts.

IV. The victim was a twelve (12) years old schoolboy at the time of the acts.

V. The accused appellant was a close neighbour, old enough to be the grand parent of the victim (in fact the victim refers to the accused as "Seeya" ["grandfather"]).

VI. It appears from the available evidence that the appellant had carefully planned the commission of the offence.

VII. The accused appellant had committed at least two acts of inter-crural (taking place or located between the legs) penetration.

VIII. The victim has suffered psychologically from this incident.

However, according to sec. 336 of the Code of Criminal *Procedure Act No 15 of 1979; "On an appeal against the sentence..., the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence, and pass other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed and in any other case shall dismiss the appeal."*

As the learned State Counsel pointed out, in interpreting a provision of a punitive law the Court should consider the intention of the legislature when enacting that special legislation. It is very much unblemished that when the offence of grave sexual abuse was introduced to the Penal Law of Sri Lanka in 1995 the special need was to impose a deterrent punishment to persons who sexually abuse children and to prevent them from getting away with soft punishments. Therefore, the shortest possible sentence that can be

legally considered is the minimum mandatory term of imprisonment (rigorous imprisonment for a term not less than ten (10) years and not exceeding twenty (20) years), fine and compensation as stated in the sec. 365 B (2) (b) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998.

In the case of ***Attorney General v. H. N. de Silva 1956 (57 N.L.R. 121)*** Bassnayake A.C.J. observed that "*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 regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and that difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail.*"

In the case of ***Attorney General v. Ranasinghe and Others (1993) 2 S. L. R. 81*** Justice Sarath N. Silva held that "*An offence of rape calls for an immediate custodial sentence. Reasons are –*

(1) to mark the gravity of the offence
(2) to emphasize public disapproval
(3) to serve as a warning to others
(4) to punish the offender
(5) 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 a sexual kind
(f) extreme youth or old age of victim
(g) effect upon victim, physical or mental
(h) *subjection of victim to further sexual indignities or perversions*".

In the present case repeated acts of grave sexual abuse had taken place and it is evident that all the acts were carefully planned by the appellant. Furthermore, the appellant had asked the victim to commit this act on other children as well and also to bring those children to the appellant (vide page 85 of the brief). Moreover, as per the evidence of the doctor, victim's mental condition had been affected as a result of these acts committed by the appellant (vide page 177 of the brief).

Considering above, I see no reason to bring down the sentence as submitted by the appellant.

The appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1) Bandara v. The State 2001 2 SLR 63
2) Attorney General v. H. N. de Silva 1956 (57 N.L.R. 121)
3) Attorney General v. Ranasinghe and Others (1993) 2 S. L. R. 81