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

In the matter of an application for Revision in terms of Article 138 of the Constitution read with Section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

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

Complainant -Petitioner

VS.

CA (PHC) APN 87/2012
High Court of Kandy No. HC/119/2010

Kanniappan Nagesh,
No. 10/3, Pihillakanda Road,
Thawalankoya,
Ukuwela.

Presently at Al Kazeem Munesha,
General Hospital,
Riyadah,
Saudi Arabia.

Accused-Respondent

BEFORE: : **W.M.M. Malinie Gunaratne, J. and**

L.T.B. Dehideniya, J.

COUNSEL	:	Chethiya Gunasekera, D.S.G. for the Petitioner.
		Accused – Respondent Absent and unrepresented.
Argued on	:	21.01.2016
Written submissions filed by the Petitioner on	:	27.01.2016
Decided on	:	25.04.2016

Malinie Gunaratne, J.

The Petitioner has preferred this application seeking to revise and set aside the sentence imposed against the Accused- Respondent (hereinafter referred to as the Respondent) by the Order dated 14.12.2011 of the learned Trial Judge of Kandy and substitute a lawful and an adequate sentence according to law.

This matter comes up on a revision application filed by the Honourable Attorney General (hereinafter referred to as the Petitioner) from the sentence imposed on the Respondent by the Provincial High Court Kandy.

The Accused – Respondent (hereinafter referred to as the Respondent) was indicted before the High Court of Kandy for committing rape on Nagesh

Thayageshwari, daughter of the Respondent, on or about the 02 of August 2005, being a person under sixteen years of age and thereby committing an offence punishable under Section 364 (3) of the Penal Code.

When this case was called on 14.12.2011, Respondent's Counsel informed Court that, the Respondent is willing to plead guilty to the indictment. Then the indictment was read over to the Respondent and he pleaded guilty to the charge of rape set out in the indictment. Upon the Respondent pleading guilty, learned State Counsel and the Defence Counsel made submissions as to the facts and circumstances of the case. The learned State Counsel invited the Court to impose appropriate sentence, considering the serious nature of the offence. The Defence Counsel also made submissions in mitigation of sentence.

Thereupon, the learned Trial Judge sentenced the Respondent to a term of two years (02 years) imprisonment and a fine of Rupees Two thousand five hundred (Rs.2500/-) with a default sentence of one year (01 year) rigorous imprisonment. The said term of two years rigorous imprisonment suspended for a period of seven years (07 years). Further ordered a sum of Rupees One hundred and fifty thousand (Rs.150,000/-) as compensation, to the victim being the victim of the offence with a default sentence of two years (02 years) rigorous imprisonment.

The Hon. Attorney General has filed this Revision Application and has moved this Court to set aside the said sentence imposed on the Respondent on the basis that it is totally disproportionate having regard to the serious nature of the offence to which the Respondent has pleaded guilty.

According to the proceedings before the High Court, the circumstances in which the offence was committed are as follows:

The Respondent is the father of Nagesh Thayageshwari (Prosecutrix) who was thirteen years (13 years) of age at the relevant time. The Respondent who was drunk on that day threatened to kill his wife after an argument and chased after her with an axe. The wife fearing for her life left the house with her third child. In the night the Respondent went near the prosecutrix and wanted her to remove her clothes. When she refused, the Respondent forcibly removed her clothes and then forcibly raped her.

The rape had taken place on 02.08.2005 in the house when the mother was away. The day after the incident, the Respondent threatened to kill the prosecutrix if she told the incident to anybody. On 07.08.2005 prosecutrix went to Matale with her brother. She met her mother and told her that she was raped by the Respondent. On the same day mother went to the Police station with the prosecutrix and made a complaint.

When this case was taken up for argument on 21.01.2016 the Respondent was absent and unrepresented although the notice had been issued on him.

Learned Senior State Counsel submitted that this case presents a serious incident where a 13 year old girl was forcibly raped by her father. The Respondent was drunk on that day, threatened to kill his wife, chased after her with an axe, the wife left the home, in the night the Respondent went near the prosecutrix and asked her to remove her clothes, when she refused Respondent removed her clothes forcibly and raped her. I agree

with the learned Senior State Counsel that these are aggravating circumstances.

It is the stance of the learned Senior State Counsel, that the sentence is manifestly inadequate having regard to the nature of the offence and the way it had been committed. He contended that when a minimum mandatory sentence is prescribed, suspending such a term of imprisonment is illegal and contrary to Section 303 (2) (a) of the Code of Criminal Procedure Act No. 15 if 1979, as amended by Act No.47 of 1999 and the learned Trial Judge has misdirected himself with regard to the ratio decidendi in S.C. Reference No. 03/2008. I agree with the submissions of the learned Senior State Counsel that the facts and the circumstances in this case are entirely different from the above case where the Supreme Court decided not to impose minimum mandatory sentence.

In S.C. Reference No. 03/2008, the accused was a boy of around 15 years of age, and the victim on whom the statutory rape had been committed, was also under 16 years at the time of the incident. In the case of No. 179/2012, Thilakawardana J. commented that the decision of the S.C. Reference No. 03/2008 would only apply in cases where the Accused is under the age of 16. "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 years".....

It is relevant to note, the facts in this case can be clearly distinguished from the facts in S.C. Reference No. 03/2008, the Respondent is the prosecutrix's father who was 36 years of age at the time the offence was committed. Hence, the ratio decidendi of S.C. Ref No. 03/2008 is, if the victim and the accused are 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 fact and relevant fact to mitigate and reduce the sentence below the mandatory period.

The facts, as submitted by the learned State Counsel disclosed the rape of a child of 13 years by her father, which will have enormous mental, physical, emotional, behavioral and development repercussions on this child. 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. As such I am of the view, the learned Trial Judge has misdirected himself with regard to the ratio decidendi in S.C. Ref. No. 03/2008.

It is the stance of the learned State Counsel that the learned Trial Judge has failed to consider the facts and circumstances of the case when

imposing the sentence. The learned State Counsel has drawn the attention of this Court to several relevant authorities in this regard.

As to the matter of assessing sentence in the case of Attorney General vs. H.N.G. De Silva (Supra) Basnayake A.C.J. observed as follows:

"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. 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. 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 vs. Mendis 1995 (1) SLR 138, it was held, to decide what sentence is to be imposed on the Accused, the judge has to consider the point of view of the Accused on the one hand and the interests of the society on the other. In deciding what sentence is to be imposed the judge must necessarily consider the nature of the offence committed, the gravity of the offence, the manner in which it has been committed, the machinations and manipulations resorted to by the Accused to commit the offence, the persons who are affected by such crime, the ingenuity in which it has been committee and the involvement of others in committing the crime.

The learned High Court Judge has given the following reasons in his Order for not imposing a mandatory sentence and imposing a suspended sentence.

(i) The incident had taken place six years ago.

(ii) Now the age of the prosecutrix is 19 years and she has got married to one Nandaraja.

(iii) If the prosecutrix gives evidence against the accused, her marriage will come to an end and she will come to an end.

It is significant to note although the Respondent's conduct was disgraceful, when the Defence Counsel making submissions in mitigation of sentence, he has not mentioned a single word that the Respondent repents of the offence which he had committed.

It is clearly shown that the learned Trial Judge has looked at only one side of the picture; the side of the Respondent. He has failed to consider the gravity of the offence and the manner and the circumstances in which it was committed. The learned Trial Judge has not considered the prosecutrix's age. He has not considered that the prosecutrix is the daughter of the accused. The Respondent's violent behaviour and the gravity of the offence had not been duly considered by the learned Trial Judge before imposing a non-custodial sentence.

It is relevant to note, that the Respondent was indicted under Section 364 (3) of the Penal Code. The sentence prescribed for the said offence is, a sentence of rigorous imprisonment of not less than fifteen years (15 years) and not exceeding 20 years (20 years) and a fine. However, the learned High Court Judge acting under Section 303 (1) (e) (k) (i) of Criminal

Procedure Act No. 15 of 1979 amended by Act No.17 of 1999 proceeded to impose the following sentence:

A sentence of two years (02 years) imprisonment and a fine of Rupees Two thousand five hundred (Rs.2500/-) with a default sentence of one year (01 year) imprisonment and suspended the said term of two years (02 years) imprisonment for a period of seven years (07 years). Further compensation of Rupees One hundred and fifty thousand (Rs.150,000/-) with a default terms of two years (02 years).

In the instant case, the learned Trial Judge has imposed a suspended sentence on the Respondent. If he wished to impose a suspended sentence of imprisonment, he should have addressed his mind to all the issues listed under Section 303 (1) (a) – (i) and also the reasons should have been stated in writing. In this case the learned Trial Judge has not addressed his mind to these issues. Also he has not stated the reasons to impose a suspended sentence. In the circumstances, if the learned High Court Judge took a lenient view of the matter, he should have stated the reasons on which such a view was taken.

The circumstances relevant to the commission of the offence and the fact that the Respondent is the father of the victim clearly illustrates that the imposition of a suspended term of imprisonment is not justified.

In Karunarathne vs. The State 78 N.L.R. 413, it was held that, "the Courts should not give the impression that when they commit these offences they can get away with it by getting a suspended sentence and going scot free".

When a person commits a crime by violating criminal law he is punished by imprisonment, a fine or any other mode of punishment which is prescribed by any other law. The purpose of a criminal punishment may vary. Protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The main objective of criminal justice is to protect society from criminals by punishing them under the existing penal system. The Court has to weigh all relevant factors in order to determine the blameworthiness of the offender.

I am of the view that the Respondent had been the perpetrator of a very serious crime which had been committed with much deliberation and planning. Had the learned Trial Judge considered the relevant factors or criteria referred to above in determining what the appropriate sentence should have been, the sentence imposed on the Respondent may well have been different.

Having regard to the serious nature and the manner in which the offence has been committed by the Respondent, I am of the view that the sentence imposed in this case is grossly inadequate. It is seen, several aggravating circumstances are present in this case. I cannot escape from the conclusion that the Respondent has been too leniently treated by the learned Trial Judge without any justifiable reason. The offence is far too grave to be dealt with a suspended imprisonment. Such lenient treatment of an offender for such serious crime is bound to defeat the main object of punishment, which is the prevention of crimes. There is no doubt that the crime committed by the Respondent is a heinous crime which requires a deterrent punishment.

On the whole I am of the view that public interest demand that a custodial sentence be imposed in this case and this is a fit case to impose it, having taken into consideration the nature, gravity of the offence and the manner in which it has been committed. I set aside the sentence of two years (02 years) rigorous imprisonment imposed on the Respondent by the learned Trial Judge dated 14.12.2011 which has been suspended for a period of seven years (07 years) and sentence the Respondent to a term of fifteen years (15 years) Rigorous Imprisonment. The compensation and the fine ordered by the learned Trial Judge is affirmed.

For the reasons stated above the application in revision is allowed, and the sentence is varied.

JUDGE OF THE COURT OF APPEAL

L.T.B. Dehideniya, J.

I agree

JUDGE OF THE COURT OF APPEAL