IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

Court of Appeal Case No.
CA (PHC) APN 147/12

High Court of Colombo Case No.
6020/12

Hohourable Attorney General,

Attorney's department' Colombo 12

Complainant - Petitioner

Vs.

Mayagodage Sanath Dharmadiri Perera,

No. 40/10, Pahala Mapitigama,

Malwana.

Accused - Respondent

Before : Malinie Gunarathne J.

L.T.B. Dehideniya J.

Counsel : Warunika Hettige SSC for the Complainant Petitioner.

Neville Abeyrathne With Kaushalya Abeyrathne for the Accused Respondent.

Argued on : 28.01.2016

Decided on : 01.06.2016

L.T.B. Dehideniya J.

This is a revision application by the Attorney General, against the order of the Learned High Court Judge of Colombo; seeking an enhancement of the sentence imposed. The Accused Respondent (the Accused) was indicted in the High Court on 6 charges. 1st 3rd and 5th

charge are on kidnapping the victim from the lawful guardianship punishable under section 354 of the Penal Code and the 2nd 4th and 6th charges for committing rape punishable under section 364 (2) to be read with 364 (2) (e). The accused pleaded guilty to the charges and was convicted on his own plea. The learned High Court Judge imposed the sentence of a fine of Rs 5,000/- each with a default term of 6 months RI for 1st, 3rd and 5th counts, a fine of Rs 10,000/- each with a default term of 6 months RI for 2nd, 4th and 6th counts; a period of one year Rigorous Imprisonment on each count, suspended for 10 years; all sentences to run concurrently and to be over within 2 years and a compensation of Rs. 125,000/- to be paid to the victim with a default term of 12 months RI. The Complainant Petitioner (Attorney General) (the Petitioner) presented this revision application seeking to enhance the sentence stating that the sentences imposed by the Learned High Court Judge are grossly and manifestly inadequate, illegal and improper and contrary to the law. The Accused filed objections and moved to dismiss the application.

Section 364(2) of the penal Code contains a mandatory punishment of minimum 10 years imprisonment. The counsel for the Accused submits that the Supreme Court in the case of SC reference 3/2008 held that the Court is not inhibited in imposing suitable punishment. He later submitted that in the case of SC Appeal 17/2013 SC minutes dated 12.03.2015 it has been reiterated that the Court is not inhibited in imposing a sentence considering the circumstances. Before considering the relevancy of these judgments to the present case, I will first consider the adequacy or inadequacy of the sentences imposed by the Learned High Court Judge.

The learned High Court Judge has imposed a suspended sentence. Section 303 of the Criminal Procedure Code provides the procedure for

suspended sentences. The sub section (1) provides the instances where the Court can consider suspending the sentence and the sub section (2) stipulates the instances where the sentence shall not be suspend. The section reads;

> *303. (1) Subject to the provisions of this section, on sentencing an offender to a term of imprisonment, a court may make an order suspending the whole or part of the sentence if it is satisfied, for reasons to be stated in writing, that it is appropriate to do so in the circumstances, having regard to-*
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> *(a) the maximum penalty prescribed for the offence in respect of which the sentence is imposed;*
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> *(b) the nature and gravity of the offence:*
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> *(c) the offender's culpability and degree of responsibility for the offence:*
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> *(d) the offender's previous character;*
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> *(e) any injury, loss or damage resulting directly from the commission of the offence:*
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> *(f) the presence of any aggravating or mitigating factor concerning the offender;*
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> *(g) the need to punish the offender to an extent, and in a manner, which is just in all of the circumstances;*
>
> *(h) the need to deter the offender or other persons from committing offences of the same. or of a similar character;*
>
> *(i) the need to manifest the denunciation by the court of the type of conduct in which the offender was engaged in;*

(j) the need to protect the victim or the community from the, offender;

(k) the fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or

(l) a combination of two or more of the above.

(2) A court shall not make an order suspending a sentence of imprisonment if-

(a) a mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed; or

(b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or

(c) the offence was committed when the offender was subject to a probation order or a conditional release or discharge; or

(d) the term of imprisonment the aggregate terms Where the offender is imposed, or of imprisonment Where the offender is convicted for more than one offence in the same proceedings exceeds two years.

Sub section (2) (d) impose a condition that if the aggregate term imprisoned, where the offender was convicted for more than one offence, exceeds two years, the Court shall not make an order suspending the sentence. In the instant case, the Accused convicted for 6 charges and he was sentenced for imprisonment of one year for each charge, the aggregate is 6 years. Even though the Learned High Court Judge has ordered to run the sentences concurrently, within two years, the aggregate

term of imprisonment is six years. Therefore the Court is precluded from ordering a suspended sentence. Court cannot take the case out of the operation of section 303 (2) (d) by ordering to run the term of imprisonment concurrently.

On the other hand this is not a fit case to order suspended sentence. The nature and the gravity of the offence have to be considered before ordering a suspended sentence. The victim is distant relation of the accused. She has referred to the accused as "Sanath Mama" which means uncle. A person in that position is expected to protect a person like the victim who was a school going child at the time of the incident. Instead of protecting her, he has committed a sexual offence, rape, on her. At that time also he was a married person with two children. These factors necessitate the imposition of a custodial long term punishment, not a suspended sentence.

The counsel for the Accused submitted that the accused had pleaded guilty and it has to be considered as a mitigating factor in sentencing. There is no doubt that it is. It has shortened the trial and it helps to clear the backlog of cases in Court. But as per the submissions of the learned Counsel for the Accused in the High Court, he had pleaded guilty only for the purpose of preventing the wastage of the precious time of Court. He has not pleaded guilty on admitting the crime that he has committed and on being regretful of what he has done. Pleading guilty can be considered under section 303 (1) (k) only if he is sincerely and truly repentant of what he has done. The sec section reads thus;

(k) the fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or

The time of Court is precious, but utilizing that precious time for dispensing justice is not wastage. Therefore, the Accused will get only a minor discount for pleading guilty to prevent the wastage of Court's time.

The learned Counsel for the Accused further submitted that prosecution had a week case and if the Accused had proceeded to trial, he would have been acquitted. The Accused pleaded guilty on his own choice. Before admitting the guilt, he was served with all the relevant documents including the statements of the witnesses and the medico-legal report. The learned counsel submits that according to the medico legal report there is no vaginal penetration and the strength of the case is insufficient to prove the case of the prosecution. I do not agree with this submission. Under the explanation (i) of the section 363 of the Penal Code, penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape and the fact that the possibility of inter labial penetration is a matter to be considered at the trial if the Accused opted to proceed to trial.

In sentencing, several factors have to be taken in to consideration. The learned counsel for the Accused cited the case of Kumara v. Attorney General [2003] 1 Sri L R 139 where it has been held that;

> *(i) A suspended sentence is a means of re-educating and re-habilitating the offender, rather than alienating or isolating the offender.*
>
> *(ii) No offender should be confined to in a prison unless there is no alternative available for the protection of the community and to reform the individual.*

(iii) Imprisonment has an isolating and alienating effect on the family of the imprisoned offender because of the hardships they are faced with during the imprisonment of one of the family members.

(iv) Suspended sentence with its connotation of punishment and pardon is supposed to have integrative powers. The offender is shown that he has violated the tenets of society and provoked its wrath, but is immediately forgiven and permitted to continue to live in society with the hope that he would not indulge in that form of behaviour again.

(v) The accused does not have previous convictions; he surrendered to the police; he pleaded guilty on the first date of trial; he offered compensation to the aggrieved party; these amply demonstrate the mitigatory factors.

This is a case where the Learned High Court Judge was of the view that there is no evidence that the accused acted with the intention of causing the death of Anura Kumara. He further states that the evidence disclosed that Anura Kumara the deceased received the stab injury when he attempted to intervene in the fight between Janaka and the accused. The accused pleaded guilty to a lesser offence of culpable homicide not amounting to murder on the basis of sudden fight. The instant case is not a case of that nature. The accused has carefully planned to have sexual pleasure with this young girl. He waited at the tuition class until it is over to pick up the victim. He took her to a work site called "*block gal wedapala*" where he has pre-arranged the persons there to leave the place in his motor cycle. Thereafter he committed the offense. He did it repeatedly at least for three occasions. This is a pre meditated crime, deserves a heavy punishment, which deserves a heavy custodial term.

It has been held in the case of The Attorney General v. H.N. de Silva 57 NLR 121 at page 124 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 3[Rex v. Boyd (1908) 1 Cr. App. Rep. 64.] and the 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.*

Almost similar facts (except for the consent, which is immaterial in statutory rape cases) to the case before us has been discussed in the case of Attorney - General v. Ranasinghe and others [1993] 2 Sri L R 81. This is a case where the 1st accused-respondent was 35 years of age and the prosecutrix was 11 years and 7 days old at the time the offences were

committed. It was not disputed that she was below the age of 12 and as such that this case is one of statutory rape, where the presence or the absence of the consent of the prosecutrix is irrelevant, as the law stud then. The 1st Accused was indicted in the High Court on charges of abduction and rape. The accused pleaded guilty and the Learned High Court Judge imposed a sentence of two years RI suspended for 10 years. The Attorney General moved in revision. His Lordship S.N. Silva J. (as he was then) cited the observation of Basnayake A. C. J. in the case of Attorney General v. H. N. de Silva (supra) with approval. His Lordship went further and cited two English cases, *Roberts (1982) Vol 74 Criminal Appeal Reports 242, 244. and Keith Billam (1986) Vol 82 Criminal Appeal Reports 347 and observed at page 88 that;*

> *It is also appropriate to cite an observation made by the Lord Chief Justice in the Court of Appeal of England, with regard to the sentence to be imposed for an offence of rape. In the case of Roberts (4) at page 244 it was observed as follows:*
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> *"Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasize public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these, in cases of rape vary widely from case to case. "*

In the case of, Keith Billam (5) the Lord Chief Justice repeated the foregoing observations and stated that in a contested case of rape a figure of five years imprisonment should be taken as the starting point of the sentence, subject to any aggravating or mitigating features. He observed further as follows:

"The crime should in any event be treated as aggravated by any of the following factors : (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned: (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point ".

In the present case several of these features are present. The accused has carefully planned to commit the offence. He repeatedly committed the offence for a long period of time. Another factor is that the accused is an adult relative of the victim who is expected to take care and protect the victim, but he, himself committed the sexual offence on the victim.

The counsel for the Accused submitted, as a mitigatory factor, that the accused is a father of two children. At the time of committing the offence also he was a married person with two children. Knowingly that he has to run a family, he committed a sexual offence on a relative. As

his Lordship Bandaranayake A. C. J. observed in A G v. H.N.de Silva (supra) "*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.*"

It was held in the case of Attorney General v. Jinak Sri Uluwaduge and another [1995] 1 Sri L R 157 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. ..... The Judge must consider the interests of the accused on the one hand and the interests of society on the other; also necessarily the nature of the offence committed, ...*

Indian Supreme Court held in the case of State of Karnataka v. Krishnappa 2000 A.I.R. 1470 at page 1475 it was observed that;

> *We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not only merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of the victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a greater responsibility while*

trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.

A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.

In the instant case there is no violence practiced on the victim, but she is a person unable to give consent under the law. The victim is a girl under 16 years of age and the accused is a married person with two children. Therefore even if there is no violence used on her, Court has to consider that the accused having a sexual relationship with this young girl repeatedly as a very serious crime which deserves a deterrent punishment, a long term custodial sentence.

In these circumstances, I hold that the sentences imposed by the Learned High Court Judge on the charges of rape are manifestly erroneous and insufficient. This Court has the power to act in revision if the impugned order is manifestly erroneous.

Under section 303 (2) (b) of the Criminal Procedure Code, accused person cannot be ordered any suspended sentence for any charge if he is yet to serve the term of imprisonment for any other charge. The section reads thus;

(2) A court shall not make an order suspending a sentence of imprisonment if-

(a) .....

(b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or

I act in revision and set aside the suspended sentences imposed on all the charges. I sentence the Accused for one year Rigorous Imprisonment for charge 1, charge 3 and charge 5 each and ten years Rigorous Imprisonment for charge 2, charge 4 and charge 6 each. I further order to run the sentences concurrently.

I do not incline to change the fines and the compensation ordered by the Learned High Court Judge.

The revision application allowed. No costs.

Judge of the Court of Appeal

Malinie Gunarathne J.

I agree.

Judge of the Court of Appeal