

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

**Court of appeal case no.
CA/PHC/APN/52/2015**

**H.C. Kaluthara case no.
277/2011**

Thotahewage Sukitha Lakmal dec Silva,
Himbutuwelgoda, Kuttam Pokuna Road,
Kaleniya.

(Presently detained at Welikada prison)

Accused Petitioner

Vs.

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

Respondent.

Before : P.R. Walgama J.

: L.T.B. Dehideniya J.

Counsel : Asthika Devendra with Lilan Warusawithana for the
Accused Petitioner.

: Lakmal Karunanayake SSC for the Respondent.

Argued on : 03.06.2016

Written submissions filed on 21.06.2016

Decided on : 07.09.2016

L.T.B. Dehideniya J.

The Accused Petitioner (Hereinafter sometime called and referred to as the Petitioner) was indicted in the High Court Kaluthara on three charges namely, abduction of a minor child under 16 years of age and two charges of rape committed on the minor child on two consecutive days.

After trial the Petitioner was found guilty on all charges and was sentenced as follows;

For the first charge 7 years RI with a fine of Rs. 10,000/-

For the second charge 20 years RI with a fine of Rs. 10,000/- and a compensation of Rs. 300,000/-

For the third charge 20 years RI with a fine of Rs. 10,000/- and a compensation of Rs. 300,000/-

All sentences to run concurrently.

The petitioner moved in revision against this conviction and sentence, but at the argument stage, the petitioner did not contest the conviction and the fine and the compensation part of the sentence. He moved this Court to revise only the custodial part of the sentence. The learned SSC did not object to revise the custodial part.

The Petitioner and the Prosecutrix were having a love affair for some time before this incident took place. She has willingly come with the Petitioner and lived with him. When the relatives came to take her home, she has refused to go with them. After the incident, the Petitioner was willing to marry her but her parents have objected. These facts were admitted by the prosecutrix.

In a charge of rape committed on a girl less than 16 years of age, the consent of the prosecutrix is immaterial. Having sexual intercourse with such a person, whether she consented or not, the act itself constitutes an offence. When it comes to the sentence stage Court can consider the attended circumstances. The amended section 364(2)(e) of the Penal Code provides that the Court can impose a custodial term of 10 to 20 years RI. In the present case the Learned High Court Judge has ordered the maximum term of imprisonment on both charges of rape. The

Learned High Court Judge has failed to give due consideration to the difference between a brutal rape committed on a child using force and having a sexual intercourse with his lover with consent. In the first said situation the rapist must be punished severely, but in a latter situation can the Court act in the same way?

Even though the law prescribed a minimum term of imprisonment for an offence of rape committed on a girl less than 16 years of age, commonly known as statutory rape, the Supreme Court held that prescribing a mandatory minimum term of sentence amounts to preventing the High Court from imposing a sentence that it feels is appropriate in the exercise of its judicial discretion. (SC Reference No. 03/2008 decided on 15.10.2008) it was further held that;

The minimum mandatory sentence in section 364(2)(e) of the Penal Code is in conflict with Articles 4(c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence.

This decision has been approved again by the Supreme Court in the case of Attorney General v. Ambagala Mudiyansele Samantha SC Appeal 17/2013 SC minutes 12.03.2015.

The circumstances in which the offence was committed in the present case is also need consideration of imposing a non custodial term of sentence. The Petitioner as well as the prosecutrix are happily married and having their own family lives.

Under these circumstances, I set aside the custodial part in the sentences imposed on 1st 2nd and 3rd charges. The fines and the compensation part of the sentence remain intact.

In addition to the fine and the compensation imposed on the 2nd charge, I impose 2 years Rigorous Imprisonment suspended for 10 years.

I further direct the Learned High Court Judge to consider whether it is necessary to grant time to pay the fine and the compensation.

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal