

**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.

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

Complainant

C. A. Case No. : 91/2012

Vs.

H. C. Kandy Case No. : 49/2011

Selliah Dharmalingam
Lantanhill Estate,
Meethalawa, Gampola
Accused

And now

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

Complainant- Appellant

Vs.

Selliah Dharmalingam

Lantanhill Estate,
Meethalawa, Gampola

Accused-Respondent

BEFORE : **M. M. A. Gaffoor, J &**
K. K. Wickramasinghe, J

COUNSEL : **Accused-Respondant Absent and Unrepresented**
Ayesha Jinasena D.S.G.for the Attorney General.

ARGUED ON : **10th August 2016**

DECIDED ON : **09th November 2016**

K. K. WICKRAMASINGHE, J.

The Accused - Respondent (herein after referred to as the accused) in this case was indicted in the High Court of Kandy punishable under section 364(2) of the Penal code as amended by Act No. 22 of 1995 for committing the offence of Rape on Sivanandan Muttu Lechchami at Welikanda between 01/11/2007 and 30/11/2007.

The indictment served to the accused on the 09/07/2012 and the accused pleaded guilty to the charge of Rape. After submissions of both counsel, the learned high court judge sentenced the accused for 2 years of rigorous imprisonment and suspended its operation for 8 years. A compensation of Rs.125, 000 was awarded.

Being aggrieved with the above mentioned sentence, the aforementioned complainant-appellant preferred this appeal to this court. The accused respondent was present in this court on the 17/09/2013 and the counsel who was appearing for him was asked to collect the brief. Thereafter fixed the case foreargument. On the date of the argument, the accused respondent was absent and unrepresented. Thereafter this matter was called several occasions. but the accused was neither present nor represented by an AAL. The notices through OIC, SSP and Fiscal were issued and served to the wife and his mother of the accused, but the accused respondent was not present. (As per journal entries dated 13/06/2014, 10/07/2014,

28/5/2015). On the 04/08/2014 counsel had appeared and Argument was fixed for 23/04/2015. On that day bench was not properly constituted and argument was re fixed for 28/5/2015. On that day the accused respondent was absent and unrepresented. Thereafter several occasions the accused respondent was absent and unrepresented, though the notices were served. On the 09/07/2015 the accused-respondent was present but not represented. Argument was fixed for 30/11/15. On the day of the argument he was absent again and the case was re fixed for argument. After re fixing for several dates, we were of the view that ample opportunity was given to the accused respondent to appear in court and he was deliberately keeping away from court. Therefor argument was taken up in the absence of the accused respondent. Counsel for the Appellant learned Senior D.S.G. Ayesha Jinasena made submissions.

Learned Counsel for the Appellant invited this court to consider the following grounds of appeal:-

- 1) The inadequacy of the sentence
- 2) The illegality of the sentence

It was submitted that the learned high court judge has failed to pay adequate consideration to the charge against the accused, relationship between the victim and the accused, conduct of the accused and the impact of this incident on the victim, reason for the belatedness of the 1st Complaint, independent corroboration of the version of the victim.

In this case the accused respondent has tendered an unqualified plea for raping a 14 yr. old school girl. The accused was the uncle of the victim and therefore he was in a position of trust. In the case of **Kampta Tiwari Vs State of M.P.** the court considered the fact that the accused was a close associate of the victim's family and that he was in a position of trust.

When testing the testimonial trustworthiness of the witness, court will have to consider the fact, whether the witness has made a prompt complaint to the authorities, but in the present case it was belated by one month. The reason behind was that the incident had come to light only after the victim had consumed poison to commit suicide due to the fact that she was raped by the uncle who is the accused in this case. She was threatened by the accused after the act of rape. It is so obvious that the victim made a belated statement to the police due to the conduct of the accused. Therefor it is crystal clear that victim had given a belated statement due to the conduct of the accused.

In the case of **AG Vs Ranasinghe** Court which considered the offence of rape calls for an immediate custodial sentence due to following reasons:-

- (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 perversions*

The court was of the view that starting point in sentencing an accused should be 5 years without any mitigating or aggravating circumstances.

In **Bandara Vs The Republic** court held that the sentence should have a deterrent effect and should carry a message to the society.

In **Rajive Vs State of Rajasthan** Court was of the view that it would be failing in its duty if appropriate punishment was not awarded for a crime which has been committed not only against the individual but also against the society to which the criminal belongs.

In **R Vs Perks** Court was conscious of the damage done to the victim when it decided on the sentence. Thus, it was observed that;

If an offence has had an essentially demanding or distressing effect on the victim, this should be taken into account by the court.

In **Jusabhai Vs State C.R. MA/623** the court expressed that;

".....it is by now recognized principles that justice to one party should not result into injustice to the other side and it will be for the court to balance the right of both the sides and to up-hold the law."

A rape victim of a girl of less than 16 years would face a mental, physical, emotional, behavioural and development repercussions. Her entire future will be affected. The court must consider the interests on the offender, the victim and the public, in addition to the consequences of the sentencing, similar to the view expressed in **R v Forsey, 2005 Can LII 12511(NLPC)**.

Considering the impact and after effect of being raped, in **The State of Karnataka, Appellant Vs Krishnappa, Respondent** the Indian Court was of the view that the offence of rape can do to a child when it said;

"Sexual Violence apart from being a dehumanizing act is unlawful intrusions of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends herself esteem and dignity-it degrades and humiliates the victim and where the victim is a helpless innocent child."

In the case of **AG Vs Hewa Walmunige Gunasena**, the court converted the non-custodial sentence into a custodial sentence making the following observation;

"In this case the learned High Court judge has not given proper attention to the facts of the case. The victim's age has not been considered by the learned High Court Judge. At the time of the incident the victim was a 12 year old girl and the accused respondent was 31 years older than the victim. Further I note this incident had taken place without the consent of the victim. The accused respondent's violent behaviour and the gravity of the offence had not been duly considered by the learned High Court Judge before imposing a non-custodial sentence. The present offence committed by the accused was greatly serious. Therefore imposing a non-custodial sentence to the accused is inadequate."

In the case of **Ukkuwa Vs AG**, Justice Shiranee Thilakawardene was of the view that, when a statute carries mandatory provision it is incumbent upon for the court to comply with it.

In the case of **Mahesh Vs Madhya Pradesh** it was held, *"The practice of taking a lenient view and not imposing the appropriate punishment observing that it will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and cruel actsto give the lesser punishment to the appellants would be to render the justice system of the country suspect and the common man will lose faith in courts....."*

In the present case, the victim girl has mentally suffered by the accused and further she didn't divulge about the incident to any one due to her of the accused. As a result she had taken a drastic step and had attempted to commit suicide.

Considering above material, it is abundantly clear that the trial judge has paid no attention to the aggravating circumstances of the facts of the case.

The learned high court judge has considered the unwillingness of the victim to testify fearing its adverse effect on her marriage. Even though the victim was reluctant to give evidence, the accused respondent had pleaded guilty to the charge. Therefore the duty of the trial judge to consider the aggravating and mitigating factors and to sentence the accused in accordance with the law.

For the above mentioned reasons we set aside the sentence of 2 years Rigorous Imprisonment imposed to the accused respondent by the learned high court judge, which has been suspended for 8 years and enhance the sentence to the mandatory minimum sentence of 10 years RI and order the accused respondent to pay a fine of Rs 10,000 if defaults 6 months simple imprisonment. Further, we affirm the compensation and the default sentence imposed by the learned high court judge.

Sentence enhanced

APPEAL IS ALLOWED

Judge of the Court of Appeal

M.M. A. Gaffoor J.

I agree

Judge of the Court of Appeal

Cases referred to:

- (1) Kampta Tiwari Vs State of MP 91996) 6 SCC 250**
- (2) AG Vs Ranasinghe (1993) 2 SLR 81**
- (3) Bandara Vs The Republic (2002) 2 SLR 277**
- (4) Rajive Vs State of Rajasthan (1996) 2 SCC 175**
- (5) R Vs Perks (2001) 1Cr. Ap.R.(s) 19CA**
- (6) Jusabhai Vs State C.R MA/623**
- (7) The State of Karnataka Vs Krishnappa (2000) AIR 1470 at page 1475**
- (8) AG Vs Hewa Walmunige Gunasena CA(PHC)APN 110/2012 Decided on 12/2/2014**
- (9) Ukkuwa Vs AG (2002) 3 SLR 279**
- (10) Mahesh Vs Madhya Pradesh (1987) 3 SCC 80**