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

In the matter of an application against an order of the High Court under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Attorney General

COMPLAINANT

CA 137 - 2015

Vs.

HC Gampaha 95-2014

Mohommed Amza Mohommed Roshan alia Nana

ACCUSED

AND NOW BETWEEN

Mohommed Amza Mohommed Roshan alia Nana

ACCUSED – APPELLANT

Vs.

Attorney General
Attorney Generals Department
Colombo 12.

COMPLAINANT- RESPONDENT

BEFORE: **P.R. WALGAMA J**

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: **Nayantha Wijesundara Attorney-at-Law for the Accused – Appellant**
Harippriya Jayasundara – DSG for the Complainant – Respondent

ARGUED ON: **17.06.2016**

WRITTEN SUBMISSIONS – **Accused – Appellant – 11.07.2016**

Complainant – Respondent – 01.09.2016

DECIDED ON: **11.11.2016**

S. DEVIKA DE LIVERA TENNEKOON J

The Accused – Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Gampaha for committing offences punishable under Section 354 and Section 365(B) of the Penal Code.

The first charge was for kidnapping a minor under the age of 14 years by the name of Mohommed Rafaideen Mohommed Iruffain on or about the 18th of November 2013 in Rukmale from the custody of his lawful guardian Mohommed Razik Mohommed Rafaideen which is an offence punishable under Section 354 of the Penal Code.

The second charge was for committing the offence of grave sexual abuse on the said Mohommed Rafaideen Mohommed Iruffain in the course of the same transaction as the 1st charge by placing his penis on the genitals of the said Mohommed Rafaideen Mohommed Iruffain which is an offence punishable under Section 365B (2)(b) of the Penal code as amended by Act No. 22 of 1995 and Act No. 29 of 1998.

The Appellant pleaded not guilty to the offence and upon conclusion of the trial against the Appellant the Learned Trial Judge by Judgement dated 07.07.2015 convicted the Appellant for both chargers as contained in the indictment in the following manner;

1st Count – 1 year rigorous imprisonment and a fine of Rs. 2,500/- carrying a default sentence of 3 months simple imprisonment.

2nd Count – 7 years rigorous imprisonment and a fine of Rs. 7,500/- carrying a default sentence of 9 months simple imprisonment.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred the instant appeal under Section 331 (1) of the Criminal Procedure Code Act No. 15 of 1979 *inter alia* to set aside the conviction and the sentence of the Learned High Court Judge dated 07.07.2015, to pardon and acquit the Appellant and to reduce the penal sanctions imposed on the Appellant.

The prosecution lead the evidence of 6 witnesses including the victim and his father, to establish the case for the prosecution. In evidence it was revealed that on or about 18.11.2013 at around 7.00 pm the victim who was a boy 8 years of age was sent by his grandfather to borrow Rs.2,000/- from the Appellant. Having given the money to the victim the Appellant had thereafter sent the boy to buy a sim card from the nearby boutique. When the victim returned from this chore the Appellant had forced the victim on to his bed, removed his clothing and placed his penis on the penis of the victim. The victim had then pushed the Appellant away and run home and informed his grandfather and the other inhabitants of the house about the incident.

The Appellant in his dock statement while denying the version of the prosecution admitted that the victim was sent to his place to borrow money by the grandfather of the victim and maintained that the prosecutions version was a fabricated story since the grandfather of the victim harboured a grudge against the Appellant for being an informant to the Police. The Appellant took up the position that the victim had peeped in to the Appellants room when he was retrieving money from the cupboard and the Appellant had therefore knocked the victim on the head and that it was this knock-on-the-head which the victim had complained of to the grandfather who eventually misrepresented it to the Police.

When the appeal was taken up for argument the learned Counsel for the Appellant informed Court that the conviction of the Appellant will not be challenged and that submissions will be made for the limited purpose of reducing the sentence.

The contention of the Appellant was three fold;

i) The Learned High Court Judge was seemingly in favour of sentencing the Appellant for a lessor term than the mandatory minimum sentence or was in favour of imposing a suspended sentence,

ii) That it is violative of Article 4(c) of the Constitution to impose a mandatory minimum sentence, and

iii) That the sentence of 7 years for Count No. 2 is disproportionate and excessive.

Before I consider the contention of the Appellant it is prudent to note that although the learned Counsel for the Appellant has submitted that there is no indication in the sentencing order whether the sentences are to concurrently or

consecutively, it is clearly stated by the learned trial Judge that the sentences are to run concurrently (vide page 194 of the Appeal Brief).

I shall now consider the arguments submitted by the learned Counsel for the Appellant for the limited purpose of reducing the sentence.

The learned Counsel for the Appellant submits that the learned trial Judge was seemingly in favour of sentencing the Appellant for a lessor term than the mandatory minimum sentence or was in favour of imposing a suspended sentence. He further submits that the learned High Court Judge has stated in the Judgment that there are no legal provisions to hand a suspended sentence for the Accused-Appellant. To test the accuracy of the submission I must consider the provisions under which a trial Judge may make an order suspending a sentence of imprisonment. As correctly submitted by the learned DSG on behalf of the Complainant-Respondent (hereinafter referred to as the Respondent) the operative provision in this regard is Section 303(2)(a) of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 47 of 1999 which reads;

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...

In light of the above provision it was correct for the learned High Court Judge to state that there are no legal provisions to hand a suspended sentence for the Accused-Appellant as there is a mandatory minimum sentence of 7 years rigorous imprisonment as per Section 365 B (2) (b) of the Penal Code.

I must now consider whether the learned trial Judge had intended to pass a suspended sentence but could not do so as she was legally barred considering that her hands were tied in view of the mandatory minimum sentence prescribed by law. As submitted by the learned DSG on behalf of the Respondent nowhere in the Judgement of the learned High Court Judge is it stated that this case warrants giving a suspended sentence. The learned High Court Judge has however applied her judicial mind to the culpability of the Appellant and has correctly evaluated that the evidence presented by the prosecution as establishing the offences contained in the indictment. The Learned trial Judge points out that the evidence of the prosecution is void of any contradictions or omissions, is consistent and has concluded that the prosecution has proved its case beyond reasonable doubt. It is only on the date of sentencing i.e on 07.07.2015 that the learned High Court judge states that there are no legal provisions to hand a suspended sentence for the Accused-Appellant in light of the chargers in the indictment. It is therefore the view of this Court that the leaned Trial Judge was merely articulating the fact that Section 365B (2)(b) of the Penal code as amended by Act No. 22 of 1995 and Act No. 29 of 1998 carries a minimum mandatory sentence.

The learned Counsel for the Appellant relies on the *ratio* in Supreme Court Reference 03/2008, 2008 BLR 160 in which the facts are different to the facts of the instant case.

The case of Rohana Vs. The Attorney General (S.C. Appeal No. 89A/2009) relied upon by the learned Counsel for the Appellant as following the *ratio* in Supreme Court Reference 03/2008 is also a case in which the prosecutrix had a love affair with the accused and was charged for the offence of statutory rape and as such must be distinguished from the instant case.

The instant case relates to an act of grave sexual abuse on a boy of 8 years of age with no consent whatsoever.

The learned DSG for the Respondent relies on the Judgment of my brother Judge Sunil Rajapakse J in the unreported case of The Attorney General Vs. Hewa Welimunige Gunasena CA (PHC) APN No. 110/2012 delivered on 12.02.2014 in which a suspended sentence was awarded to the Accused for a charge of grave sexual abuse on a minor in the High Court. His Lordship cites the case of AG Vs. Ranasinghe 1993 (2) SLR 81 which lists down reasons where an offence of rape calls for an immediate custodial sentence and aggravating factors. His Lordships further cites the cases of Attorney General vs H.N.de Silva 1 {1956} 57 NLR 121 and Attorney General vs Mendis 1995 1 SLR 138 in which cases it was held that;

> "in assessing punishment the Judge should consider the matter of sentence both from the point of view of the public and the offender. The Judge should 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 in what extent it will be effective.'

His Lordship thereafter states that;

> "I am of the opinion that the facts relating to this case warrants that the accused should be severely dealt with. Therefore a sentence of two years rigorous imprisonment suspended for ten years on the accused for a grave child abuse is a very lenient sentence considering the **beastliness** of the crime. When an offence of child abuse is proved victims of tender age and

innocent behaviour the sentence of imprisonment should be **imposed severely**."

His Lordship Sunil Rajapakse J, thereafter enhanced the sentence of 2 years R.I. imposed on the accused by the learned High Court Judge, which has been suspended for a period of ten years and sentenced the accused to a term of seven (7) years rigorous imprisonment.

Although this Court is not bound by this precedent I do find that this sentiment echo the attitude adopted by this Court in dealing with cases relating to grave sexual abuse especially that of a minor.

The learned Counsel for the Appellant contends that certain serious crimes which involve the killing of another person do not have a mandatory minimum sentence (For instance Sections 297, 298 and 300 of the Penal Code) and in contrast the offence of grave sexual abuse does not justify a minimum mandatory sentence. However, I cannot agree with this contention especially where in the instant case the Appellant is a father of two children who attend the same school as the victim and in a context where the conviction of the Appellant is not challenged in Appeal. I find that the offence committed by the Appellant is very serious in nature and this Court takes note of the conduct of the Appellant and the age of the victim (8 years of age) when the crime was perpetrated on him.

Therefore, I cannot agree with the argument made on behalf of the Appellant that the sentence of 7 years rigorous imprisonment for Count No. 2 is disproportionate and excessive.

It must also be noted that the sentence imposed on the Appellant was only the minimum mandatory sentence and that the learned Trial judge did not extend

judicial discretion to consider any other custodial sentence between the minimum sentence and the maximum sentence prescribed by law been 7 – 20 years.

In considering whether the mandatory minimum sentence is disproportionate and is in violation of Article 4(c), 11 and 12(1) of the Constitution it is conceded that it was held in S.C. reference 03/2008 and S.C. Appeal No. 17/2013 that the minimum mandatory sentence is in conflict with the above mentioned Articles of the Constitution and 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.

It is pertinent to note the case of Dharma Sri Tissa Kumara Wijenaike Vs. The Hon. Attorney General S.C. Appeal No. 179/2012 in which Her Ladyship Tilakawardena J considered the application of Supreme Court Reference 03/2008, 2008 BLR 160 on the minimum mandatory sentence and held that it should be in only limited instances. In the said case it was held that;

> "it is the Courts belief that the legislation, as found in the Penal Code, reflects the law as it should be, as it is a result of the will of the Parliament and the will of the People."

And further that;

> "... the Court accepts that with regards to sentencing, the views of all parties involved in the case must be considered in a balanced manner, in particular where violations are carried out with impunity, even after the legislature has placed a minimum mandatory sentence."

Her Ladyship in the said case was of the view that;

"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."

Having considered the circumstances of the instant appeal in its totality I take the view that 7 years rigorous imprisonment imposed on the Appellant by the learned trail Judge is lawful and appropriate. I further hold that judicial discretion should not be exercised to impose a lesser sentence and/or a suspended sentence in matters concerning serious offences such as the offence for which the Appellant in the instant application stands convicted.

Therefore, I affirm the conviction and the sentence imposed by the learned trial judge against the Appellant on both counts by judgment dated 07.07.2015 and the sentence is to run concurrently as mentioned in the said order.

However, taking into consideration the period the Appellant has been in remand prison, I order that the sentence of 7 years rigorous imprisonment takes effect from the date of conviction of the Appellant i.e. 07.07.2015.

Appeal Dismissed.

Judge of the Court of Appeal

P.R. WALGAMA J

I Agree.

Judge of the Court of Appeal