

**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 of the Democratic Socialist Republic of Sri Lanka and sections 364 and 365 of the Criminal Procedure Code Act No. 15 of 1979

**Court of Appeal case no. CA/PHCAPN/80/2015**

**H.C. Anuradhapura case no. SHC/65/2014**

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

**Complainant Petitioner**

**Vs.**

Jayathilakage Dhanuska Kumara Jayathilake  
Wannamkulam,  
Uttimawadu.

**Accused Respondent.**

**Before** : H.C.J. Madawala J.  
: L.T.B. Dehideniya J.

**Counsel** : Varunika Hettige SSC for the Complainant Petitioner.  
: Accused Respondent is absent and unrepresented.

**Argued on** : 16.12.2016

**Written submissions filed on** : 07.02.2016

**Decided on** : 15.02.2016

**L.T.B. Dehideniya J.**

This matter comes up before us on a revision application filed by the Hon. Attorney General against the sentence imposed by the learned High Court Judge of Anuradhapura. The Accused Respondent (the Accused) was indicted before the High Court of Anuradhapura on 3 charges namely;

1. Committing abduction on Chandrika Kumari Ariyapala who is less than 16 years of age from her legal guardian, punishable under section 354 of the Penal Code
2. Committing sexual harassment on Chandrika Kumari Ariyapala, punishable under section 345 of the Penal Code
3. Committing robbery of a gold chain and a pendent worth of Rs. 25,000/=, punishable under section 380 of the Penal Code

The Accused at the first instance pleaded not guilty to all charges but after few trial days, tendered an unqualified plea of guilty to all three charges. He was convicted on his own plea and sentenced as follows:

1. 1<sup>st</sup> count, 2 years RI suspended for 5 years  
Fine of Rs. 1000/= in default 6 months simple imprisonment
2. 2<sup>nd</sup> count, 2 years RI suspended for 15 years  
Fine of Rs. 1000/= in default 6 months simple imprisonment  
Compensation of Rs. 25,000/= to be paid to the victim, no default term ordered
3. 3<sup>rd</sup> count, 2 years RI suspended for 10 years  
Fine of Rs. 1000/= in default 6 months simple imprisonment

Being dissatisfied with the adequacy of the sentence, the Hon. Attorney General presented this revision application seeking to revise the order of sentence by ordering an appropriate sentence.

The Accused was issued with notice of this application on two occasions but did not appear in Court personally or through a Counsel. Therefore we were deprived of the privilege of hearing from the Accused side; we considered the submissions made by the Counsel at hearing before the learned High Court Judge prior to imposing the sentence.

In the case of *Abeywardene v. Fernando et al.* 27 NLR 97 Bertram C.J. in explaining the meaning of the breach the peace within the meaning of sections 80 and 81 of the Criminal Procedure Code expressed the opinion that;

*The King is entitled to require that all persons living under the protection shall not be subjected to violence in respect of their persons or their property. Any person who does subject to violence either the person or property of one of the King's subjects has committed a breach of the King's peace.*

A person who is committing the breach of the King's peace has to be punished for violating the law irrespective of the surrounding circumstances which led the Accused to commit the violence act against the King's subject. In deciding the adequate punishment, the Court can consider the aggravating and mitigatory factors, within the parameters of the law.

The Indian Supreme Court held in the case of *Raviji @ Ram Chandra vs State of Rajasthan* 1996 AIR 787 considering the proper punishment for a murder of the wife of the accused and his minor children and two outsiders held that;

*“It is the nature and the gravity of the crime but not the criminal, which are germane for the consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and the victim belong. The punishment to be awarded for a crime must not be irrelevant but it should confirm to the end be consistent with atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society’s cry for justice against criminal. In our view, if for such heinous crimes the most deterrent punishment for wanton and brutal murders is not given, the case of deterrent punishment will lose its relevance.”*

Indian Supreme Court in the case of Dhananjay Chatterjee vs State of W.B. 1994 SCR (1) 37 where a school girl was raped and murdered held that;

“Imposition of appropriate punishment is the manner in which the Courts respond to the society’s cry for justice against criminals. Justice demands that the Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of crime. The Courts must not only keep in view of the rights of the criminal but also the rights of the victim of crime and the society at large while considering the imposition of appropriate punishment.”

Keeping the above legal environment in mind, I now consider the incident. The victim is a school going girl preparing for the GCE O/L examination. She used to go to school and to other tuition classes by her bicycle. On the day of the incident, while she was returning home from a tuition class, the Accused obstructed her and asked her to kiss him. She

has refused and scolded. Thereafter he dragged her to the nearby corn field and bitten her face and forcibly removed her blouse and compresses her breast. She has resisted and struggled to escape. At this time her aunt came in search of her calling her name and the Accused had run away snatching her gold chain and pendent.

The Accused has admitted all the charges leveled against him. In his statement to the police also he has admitted the incident. The explanation given by the Accused is that he was annoyed by her scolding. He has ignored the fact that the incident was created by him by stopping the victim and asking her to kiss him. If he has not taken the first step of obstructing the victim and asking to kiss him, she wouldn't have scolded the Accused. The first step taken by the victim to defend herself is scolding the Accused. Therefore the explanation of the Accused that he was annoyed is not acceptable.

There is no evidence that they had a love affair and no evidence to show that the victim consented. The investigation notes of the police revealed that there were struggle marks and the footsteps that show that she was dragged to the corn field. The Accused used force on the victim to satisfy his immoral cravings. This is not only a crime against the victim but a crime against the society.

In considering the appropriate punishment, Court has to consider the punishment prescribed by the law and then the aggravating and mitigatory factors.

Chitrasiri J. in the case of Asan Mohamed Rizwan v. Attorney General CA [PHC] APN 141/13 CA Minutes dated 25.03.2015 expressed several guide lines in sentencing policies. His Lordship after a comprehensive analysis of authorities held that;

*Having referred to the importance of looking at the available statutory provisions, I will now advert to the other aspects that are necessary to consider before a sentence is determined. Those can be categorized as follows:*

- (a) The maximum and the minimum (if any) penalty prescribed for the offence;*
- (b) The nature and gravity/seriousness of the particular offence.*
- (c) The offender's culpability and degree of his/her responsibility for the offence*
- (d) mental state of the accused at the time the offence was committed;*
- (e) Evidence as to pre-arrangement for the commission of the offence;*
- (f) The impact of the offence on any victim and the injury, loss or damage caused as a result of the offence committed;*
- (g) Whether the offender pleaded guilty to the offence and if so, the stage in the proceedings at which the offender did so or the stage at which it was indicated;*
- (h) The conduct of the offender during the trial as an indication of remorse or the lack of remorse;*
- (i) Any action taken by the offender to make restitution of the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider.*
- (j) The offender's previous character, good or bad;*

- (k) *Imprisonment should be used when no other sentence IS adequate;*
- (l) *Proportionality between the crime and the sentence;*
- (m) *Possibility of reforming the offender;*
- (n) *To ensure consistency in deciding sentences;*
- (o) *Presence of any aggravating or mitigating factors concerning the offender or any other circumstance relevant to the commission of the offence; and*

In the present case the Accused was pre prepared to commit this high handed action against the victim. He got down from the motor bicycle in which he was travelling after seeing the victim coming and waited at a place where there are no houses until she comes. Then he forcibly stopped the victim's bicycle and forced her to kiss him. On refusal, he used force on her to commit the offences.

The learned High Court Judge's observation that if an adult has gone with the victim this incident wouldn't have happened and therefore the responsibility casting on the adult relations of the victim; is not tenable in law. The Legislature in its wisdom provided the protection to the minor children, and to all persons, by enacting necessary laws to protect them and making the violation of it is punishable. The law does not require the parents to go after their children all the time to protect them. Punishing the Accused leniently for not providing protection by parents to the victim is not acceptable. The culpability of the Accused in the present case is very high and there is no culpability on the part of the victim or her relations. The Accused needs to be punished severely.

The Accused submitted that he is a married person and having a child and the learned High Court Judge has considered this fact in sentencing. In the case of Mohamed Amza Mohamed Roshan v AG CA137/2015 CA Minutes dated 11.11.2016 where a boy of 8 years was

subjected to grave sexual abuse punishable under section 365B (2)(b) of the penal code, S.Devika De Livera Thennakoon J. after considering several authorities held that

*“the judicial discretion should not be exercised to impose a lesser sentence and/or suspended sentence in matters concerning serious offences such as the offence for which the appellant in the instant application stand convicted.”*

Thennakoon J further cited with approval the citation made by Gunasekara J in the case of Attorney General vs Mendis [1995] 1 Sri L R 138 at 144 that

*“In assessing the punishment that should be passed on an offender the 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 in determining the proper sentence should first consider the gravity of the offence, asst 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.”*

Section 303 of the Criminal Procedure Code specifies the instances where a suspended sentence can be imposed. It enacts;

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-*



*(a) the maximum penalty prescribed for the offence in respect of which the sentence is imposed;*

*(b) the nature and gravity of the offence;*

*(c) the offender's culpability and degree of responsibility for the offence;*

*(d) the offender's previous character;*

*(e) any injury, loss or damage resulting directly from the commission of the offence;*

*(f) the presence of any aggravating or mitigating factor concerning the offender;*

*(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.*

The learned High Court Judge has only considered from the point of view of the Accused. The Accused got married after the incident and having a child at the time of conviction. No doubt that it is a mitigatory factor that has to be considered, but as I pointed out earlier the Accused pre prepared to commit the offence, the way he committed the offence, and the brutality of the offence, are aggravating factors. The society's cry for justice in this type of offences committed against young children is also one aspect that the Court has to keep in mind.

Had the Learned Trial Judge given her mind to these aggravating factors that should have been taken into consideration as set out above in imposing sentence we are inclined to take the view that the sentence imposed may well have been different. The facts of this case warrants that the Accused should be imposed a custodial sentence.

I set aside the sentence of the learned High Court Judge and impose the following sentences.

1. Count 1, two years RI and Rs. 1000/= fine in default 6 months simple imprisonment.
2. Count 2 three years RI and Rs. 1000/= fine in default 6 months simple imprisonment.

In addition Rs. 25000/= compensation to be paid to the victim.

In default 6 months Simple Imprisonment

3. Count 3 one year imprisonment and Rs. 1000/= fine in default 6 months simple imprisonment.

I further order the jail terms to run concurrently.

Judge of the Court of Appeal

**H.C.J.Madawala J.**

I agree.

Judge of the Court of Appeal