

**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. (PHC) APN:13/2017

Vs

H. C.Kurunagala No. : 164/14

Bulathsinghalage Somasiri
No 10/1

Waragammana Ambepola

Accused

and now

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

Complainant- Petitioner

Vs.

Bulathsinghalage Somasiri
No 10/1
Waragammana Ambepola
(Escaped from prison)
Accused-Respondent

BEFORE : **K. K. Wickramasinghe, j &**
P. Padman Surasena, J

COUNSEL : Accused-Respondant Absent and Unrepresented
Varunika Hettige D.S.G.for the Attorney General.

ARGUED ON : 26th July 2017

DECIDED ON : 19th October 2017

K. K. WICKRAMASINGHE, J.

The Accused - Respondent (herein after referred to as the respondent) in this case was indicted in the High Court of Kurunegala under three charges. First charge is for committing an offence of grave Sexual Abuse on Wannu Atapattu Mudiyansele Indrani who was physically disabled and thereby committed an offence punishable under section 365

B (2) a of the Penal code as amended by Act No. 22 of 1995, Act No.29 of 1998 and No. 6 of 2006 on or about the 8th May 2013 at Ambanpola.

The indictment served to the accused Respondent on the 12.02.2015 and the case was thereafter fixed for trial on 30.06.2015. On the said date of trial, the matter was post pond due to the absence of the respondent. The respondent was absent on 30.06.2015, 07.07.2015, 01.09.2015, 01.12.2015, 02.02.2016 and 29.03.2016. There after the accused respondent was arrested and produced before the learned High Court Judge on the 17.05.2016 and was remanded till 28.06.2016. On that day the case was fixed for trial on 26.10 2016.

On the 26.10.2016 the indictment was read over and explained to the Accused Respondent and thereafter he had pleaded guilty to the indictment. After submissions of both counsel, the Learned High Court Judge sentenced the accused on the following manner: -

3 years of Rigorous Imprisonment and a Fine of Rs. 20,000 and a default sentence of 6 months Simple Imprisonment and A compensation of Rs.100, 000 was awarded to the victim with a default sentence of 12 months Simple Imprisonment.

Being aggrieved with the above-mentioned sentence, the aforementioned complainant- petitioner preferred this revision application to this court. Notices were issued on the accused respondent to the prison. Prison officials informed that Respondent has escaped from prison. Thereafter this case is fixed for argument in his absence. The accused respondent was neither present nor represented by an AAL. The accused respondent was deliberately keeping away from court. Therefor argument was taken up in the absence of the accused respondent. Learned Counsel for the Petitioner made submissions.

Learned Counsel for the Petitioner invited this court to consider the following grounds: -

- 1) The inadequacy of the sentence, since it is illegal as it is not according to section 365B (2) b of the Penal Code,
- 2) The sentence is manifestly inadequate having regard to the nature of offence,
- 3) The aggravating circumstances surrounding this case is one which calls for a severe punishment,
- 4) The sentence imposed on the Respondent wholly disproportionate to the facts of the case.

It was further submitted that the learned high court judge has failed to give reasons for non-imposition of the minimum sentence.

In this case the accused respondent has tendered an unqualified plea for the charge of rape.

Facts of the case: -

The victim was an unmarried physically disabled woman of 31 years old. The only mode of movement is on the posterior. She has been living in a house made by a welfare organisation. The Respondent is the brother in law of the victim. On the night of the incident, her sister's children had come to sleep with the victim. The accused respondent had come to borrow box of matches at which point the victim opened the door and went in her manner to the room to fetch a box of matches. The accused respondent then followed her and forcefully sexually abused her. The accused respondent threatened her not to divulge it to anyone. Due to the victim's disability and immobility, she was unable to run when the accused was committing the act. The victim was carried to the High Court by her aged mother.

The learned DSG submitted that the learned high court judge has not considered the following facts: -

(a) The disability of the victim was used by the Respondent. The degree of planning by the respondent where the children were with the victim on that night and tricked the victim and taking the advantage of the disability of the victim.

(b) The victim was threatened by the respondent not to divulge the incident to anyone.

© Intention to deter the prospective perpetrators-It is inevitable for with similar incidents to be brought before in courts in future too.

(d) When the respondent tendered the unqualified plea, he was well aware of the gravity of the charge since the Charge was read to the respondent and explained and all the statements were produced. He was well aware that the prosecution was armed with. The learned judge ought to have been mindful of this aspect of the case at the time he was imposing the sentence.

The following decision in Sri Lanka and other jurisdictions given a light to this point in **CA Case No. 248/2013 Ratnasiri Silva Kaluperuma Vs State**, citing CA 297/2008 held that, *“It is not for this court to trifle with the intentions of the legislature. We must not encroach the domain of the legislature, because the legislature thinks and acts according the wishes of the people and the judiciary is to carry out the wish of the people. Therefore, it is not proper to trifle with this type of offences and allow the people commit offences and escape lightly.”*

In the case of **Hon AG Vs Mayagodage Sanath Dharmasiri Perera [CA (PHC) APN 147/2012]** it was held, citing **AG Vs Janak Sri Uluwaduge and another [1995] 1 SLR 157** held 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 other statute under which the offender is charged. He should also regard the effect of 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 interest of the accused on the one hand and the interest of society on the other; also necessarily the nature of the offence committed,”

AG Vs Janak Sri Uluwaduge and another (1995 1SLR157)

held that, *In determining the 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 under which he is charged.”*

AG Vs H.N.de Silva (57 NLR 121) *“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 punishments a deterrent and consider to what extent it will be effective... ..the reformation of the criminal, though no doubt an important consideration, is subordinate to the others 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*

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

- *to mark the gravity of the offence*
- *to emphasize public disapproval*
- *to serve as a warning to others*
- *to punish the offender*
- *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 sexual offence victim 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 511(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.....*".

The discretion vested with the trial Judges in sentencing should therefore be exercised judicially and in accordance with the law. Crime and perpetrator should be justly dealt with. The sentence awarded should be proportionate to the crime committed which was not the fact in the instant case. In the present case, the victim being some disabled has mentally suffered by the accused. 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.

We have also considered the fact that the respondent has pleaded guilty to the charge though he was absconding and also we are mindful of the fact that he is a father of small children.

For the above-mentioned reasons, we set aside the sentence of 3 years Rigorous Imprisonment imposed to the accused respondent by the learned high court judge and enhance the sentence to the mandatory minimum sentence of 5 years RI. Further, we affirm the Fine of Rs. 20,000 along with the default sentence of 6 months simple imprisonment, compensation of Rs.100, 000 awarded to the victim and the default sentence of 12 months imposed by the Learned High Court Judge.

Sentence enhanced

Revision Application is allowed

Judge of the Court of Appeal

P.P. Surasena J.

I agree

Judge of the Court of Appeal

Cases referred to:

- (1) CA Case No. 248/2013 Ratnasiri Silva Kaluperuma Vs State,**
- (2) AG Vs Mayagodage Sanath Dharmasiri Perera (CA (PHC) APN 147/2012)**
- (3) AG Vs Janak Sri Uluwaduge and another (1995 1SLR157)**
- (4) AG Vs H.N.de Silva (57 NLR 121)**
- (5) AG Vs Ranasinghe (1993) 2 SLR 81**
- (6) Bandara Vs The Republic (2002) 2 SLR 277**
- (7) Rajive Vs State of Rajasthan (1996) 2 SCC 175**
- (8) R Vs Perks (2001) 1Cr. Ap.R.(s) 19CA**
- (9) Jusabhai Vs State C.R MA/623**
- (10) The State of Karnataka Vs Krishnappa (2000) AIR 1470 at page 1475**
- (11) AG Vs Hewa Walmunige Gunasena CA(PHC)APN 110/2012 Decided on 12/2/2014**
- (12) Ukkuwa Vs AG (2002) 3 SLR 279**
- (13) Mahesh Vs Madhya Pradesh (1987) 3 SCC 80**