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

In the matter of a revision under article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Hon. Attorney General

TheAttorney General's Department

Colombo 12.

Complainant

Vs

Weledurayalage Gedera Gayan Asanka Premadase

Accused

CA : 118/2009

HC KANDY : HC161/2008

And Now

The Hon. Attorney General

The Attorney General's Department

Colombo 12.

Complainant Appellant

Vs

Weledurayalage Gedera Gayan
Asanka Premadase

Accused Respondent

Before: K.K.Wickremasinghe J.

M.M. Gaffoor.J.

COUNSEL: ASG Wasantha Bandara PC for the Appellant

AAL Tenny Fernando for the Respondent

WRITTEN SUBMISSIONS FILED ON: 04/07/2017

DECIDED ON: 15/12/2017

JUDGEMENT

K.K.Wickremasinghe J.

This is a state appeal for an enhancement of the sentence imposed by the Learned High Court Judge of Kandy. The Accused - Respondent (herein after referred to as the respondent) in this case was indicted in the High Court of Kandy under three charges. All three charges were committing an offence of grave Sexual Abuse (for committing anal sex) on a young Buddhist monk named Rev. Dolosbage Sumeda aged of 12 years,which is an offence punishable under section 365 (2) B of the Penal code as

amended by Act No. 22 of 1995, Act No.29 of 1998 and No. 6 of 2006 between 01st April 2004 and 31st March 2005 at Gampola.

The indictment served to the accused Respondent and the case was thereafter fixed for trial on 12.05.2009. On the said date of trial, the matter was post pond for 29.09.2009. The indictment was read over to the accused respondent on the 29.09.2009. The accused pleaded guilty to the charge and the other two similar charges were withdrawn by the learned state counsel.

After submissions of both counsel, the Learned High Court Judge sentenced the accused on the following manner: -

2 years of Rigorous Imprisonment suspended for 5 years A compensation of Rs.150, 000 was awarded to the victim with a default sentence of 2 years Rigorous Imprisonment.

Being aggrieved by the above-mentioned sentence, the aforementioned complainant- Appellant preferred this appeal to this court.

Learned Counsel for the Appellant invited this court to consider the Fact that this is an offence committed upon a young Buddhist monk (aged 12 years) cannot be considered as an offence of non- serious nature which warrants a non- custodial sentence.

The learned ASG submitted the in adequacy of the sentence, since its illegal as it is not according to section 365(2) B of the Penal Code,

Further, following facts were also brought to the notice of court:-

1) The sentence is manifestly inadequate having regard to the nature of offence,
2) The aggravating circumstances surrounding this case is one which calls for a severe punishment (minimum of 7 years),

3) 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 adequate reasons for non-imposition of the minimum sentence.

In this case the accused respondent has tendered an unqualified plea for the charge of grave sexual abuse.

Facts of the case: -

The victim was ordained as a Buddhist monk in the year 2003and living with the chief monk at Anandaramaya temple , Gampola.

The accused was a 20 year old layman at the time of offence. Initially the victim monk was sexually abused by the chief monk of the temple by forcibly subjected him to have anal intercourse.

The accused respondent called Gayan aiya, was a frequent visitor to the temple. The above mentioned offence was committed by the accused with the encouragement of the chief monk of the said temple.

Having considering the serious nature of the offence the prosecuting state counsel in the high court has sought a punishment of deterrent nature.

By citing section 14 of the Judicature act the learned ASG submitted that only question of sentence can be taken into consideration, since the accused pleaded guilty to the charge against him.

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 committee."*

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 from 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) subject 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 Rajastan** 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 victim of a sexual offence would face a mental, physical, emotional, behavioural and development repercussions. His or 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.

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".

In the instant case, the 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 acts .....to 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 secretion 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.

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 as well as the applicable law.

We have also considered the fact that the respondent has pleaded guilty to the charge and also we are mindful of the fact that he was only 20 years old at the time of offence.

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 and enhance the sentence to the mandatory minimum sentence of 7 years rigorous imprisonment and impose a fine of Rs. 5000/= with a default sentence of 6 months simple imprisonment. Further, we affirm the compensation of Rs.150, 000 awarded to the victim and the default sentence of 2 years imposed by the Learned High Court Judge.

Sentence enhanced

Appeal is allowed

Judge of the Court of Appeal

M.M.Gaffoor J.

I agree

Judge of the Court of Appeal