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

In the matter of an application for revision under article 138 of the Constitution read with section 364 of the Code of Criminal Procedure Code Act No.15 of 1979.

CA(PHC) APN : 75/2016

HC KANDY : HC 06/2012

The Hon. Attorney General

The Attorney General's Department

Colombo 12.

Complainant

Vs

Madagedera Gayan Chathuranga

Silwathgama,

Kadawewa,

Galewala.

Accused

And Now

The Hon. Attorney General

The Attorney General's Department

Colombo 12.

Complainant Petitioner

Vs

Madagedera Gayan Chathuranga

Silwathgama,

Kadawewa,

Galewala.

Accused Respondent

BEFORE: P.Padman Surasena J.(P/CA)

K.K.Wickremasinghe J.

COUNSEL: DSG Chethiya Goonasekera for the Petitioner

ARGUED ON: 10/11/2017

WRITTEN SUBMISSIONS FILED ON: 15/12/2017

DECIDED ON: 05/02/2018

JUDGEMENT

K.K.Wickremasinghe J.

This is a revision application by the state 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 for committing an offence of Grave Sexual Abuse (for committing anal sex). The Victim was a young boy of 8 years old, which is an offence punishable under section 365B (2) b of the Penal code as amended by Act No. 22 of 1995, Act No.29 of 1998 and No.16 of 2006.

The indictment served to the accused respondent and it was read over to the Accused Respondent. Thereafter he had pleaded not guilty. The case was fixed for trial on 17.07.2012. On the said date of trial evidence of the victim was commenced and concluded on the 21.10.2016. On that date, the Accused Respondent withdrew his previous plea and pleaded guilty to the charge.

After submissions of both counsel, the Learned High Court Judge acting under section 303 (1) (e) (k) (1) of the Criminal Procedure Code sentenced the accused on the following manner: -

2 years of Rigorous Imprisonment suspended for 15 years A compensation of Rs.200,000/- was awarded to the victim with a default sentence of 3 years Rigorous Imprisonment and a fine of Rs. 15,000/- with a default sentence of I year Rigorous Imprisonment.

Being aggrieved by the above-mentioned sentence, the aforementioned complainant- Petitioner preferred this Revision application to this court.

Learned Counsel for the petitioner invited this court to consider the Fact that this is an offence committed upon a young boy (aged 08 years) cannot be considered as an offence of non- serious nature which warrants a non- custodial sentence.

The learned DSG submitted the inadequacy 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 10 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 only 8 years of age and the accused was a 20 years old at the time of offence. On 18.11.2006, the day in question, the victim boy has gone to the boutique to buy sugar and when he was returning home. When he was passing the house of the accused (called Ranga aiya) the accused had called the victim promising him to give something. When the victim went near the accused, the accused had taken him to the kitchen and had pushed the victim on the ground. Victim was unable to shout since his mouth was closed by the accused. The accused had removed the victim's trouser and under wear forcibly subjected him to have anal intercourse.

After the act, the accused respondent had given Rs 20 to the victim and asked him not to disclose the incident to anyone. The victim immediately ran home and divulged this incident first to his sister and then to the father. The father had immediately taken the victim to the police station and lodged a complaint. The victim was subjected for medical examination. As a result it was revealed that there was evidence of rectal penetration to the victim.

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

The learned DSG brought to the notice of court that the learned High Court Judge has misdirected himself with regard to the ratio decidendi **in SC Reference No.**

17/2013, as this case is with regard to an offence committed under section 364(2) of the Penal Code, whereas the present case falls within the ambit of section 365B of the Penal Code. In the case of **SC No. 17/2013**, the medical reports negate the use of force and support the position that sexual intercourse had been consensual. In this present case there is no evidence of consent and the victim was only 8 years of age.

In the SC case, the focus of the bench was the best interest of the child that was born in consequence of the sexual intercourse between the accused and the victim.

Circumstances of the present case are totally different to the SC case.

According to section 14 of the Judicature Act, 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 **AG Vs Mayagodage Sanath Dharmasiri Perera [CA (PHC) APN 147/2012]** it was held, citing **AG Vs Jinak 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 Jinak Sri Uluwaduge and another [1995] 1SLR 157 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 the offender is charged."*

In the case of **AG Vs Jinak Sri Uluwaduge and others [1995] SLR 1-157** Court of Appeal 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 on 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. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration. The judge should also take into account the nature of the loss to the victim and the profit which may accrue to the culprit in the event of non-detection. Another matter to be taken into account is that the offences were planned crimes for the wholesale profit. The judge must consider the interests of the accused on the one hand and the interests of the society on the other; also necessarily the nature of the offence committed, the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organization in respect of which it had been committed, the persons who are affected by such crime, the ingenuity with which it had been committed and the involvement of others in committing the crime*".

Per Gunasekara, J:

"*The Trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above, should not in my view surrender the sacred right or duty to any other person, be it Counsel, or accused* ***or any other person. Whilst plea bargaining is permissible, 'sentence bargaining' should not be encouraged at all and must be frowned upon*****".**

In the case of **AG Vs Dharma Sri Tissa Kumara Wijenaike (SC Appeal No. 179/2012)** Supreme Court held that when a sentence is imposed, the interest of both parties involved in the case should be taken into consideration.

In **Ratnasiri Silva Kaluperuma Vs State, citing CA 297/2008,** the court 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 to the wishes of the people and the judiciary is to carry out the wishes of the people. Therefore, it is not proper to trifle with this type of offences and allow the people to commit offences and escape lightly*".

In the case of **AG Vs Hewa Welimunige Gunasena(CA (PHC) APN No. 110/2012),** 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 **Attorney General Vs Mendis (1995 SLR (1) at 138) held that,**

"*In assessing the 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 deterrent and consider to what extent it would be effective*".

In the case of **Attorney General Vs H.N. De Silva (1956) 57 NLR 121 at page 124,** it was held,

"*In assessing the punishment that should be passed to the offender, a 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 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 punishment as a deterrent and consider to what extent it will be effective".

In cases such as this, public policy demands that a deterrent sentence should be imposed when committing offences of this nature. In **Karunaratne Vs The State 78 NLR 413**, it was held that, "*The Courts should not give the impression that when they commit these offences they can get away with it by getting a suspended sentence and going scot free*".

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 **Bandara Vs The Republic of Sri Lanka [2002] 2-SLR-277** court held that the sentence should have a deterrent effect and should carry a message to the society.

In **Karunarathna Vs The State 78 NLR 413**, it was held that, *"the courts should not give the impression that when they commit these offences they can get away with it by getting a suspended sentence and going scot free"*

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 Welimunige Gunasena (CA (PHC) APN No. 110/2012),** 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".

R Vs. Perks[2001] 1 Cr. Sp. R.(s) 19 CA

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[2002] 3 SLR 279,** 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 [1988] CriLJ 1380,** 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 10 years rigorous imprisonment and we affirm the fine of Rs. 15000/= with a default sentence of one year rigorous imprisonment and the compensation of Rs.200,000 awarded to the victim with the default sentence of 2 years RI imposed by the Learned High Court Judge.

Sentence enhanced

Revision Application is hereby allowed.

Judge of the Court of Appeal

P.Padman Surasena J. (P/CA)

I agree

President of the Court of Appeal