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

In the matter of an Application for Revision made under Article 138 of the Constitution read with section 364 of the Code of Criminal Procedure Act No. 15 of 1979

Democratic Socialist Republic of Sri Lanka

**Complainant**

C.A. Revision Application No:
**CA (PHC) APN 122/2016**

H.C. Kandy Case No: **HC 132/2006**

**Vs.**

Urapola Pakshaperuma Arachchilage Gunathileke,
No.20, Adanadeniya,
Panvilathanna.

**Accused**

**AND NOW BETWEEN**

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

**Complainant-Petitioner**

**Vs.**

Urapola Pakshaperuma Arachchilage Gunathileke,
No.20, Adanadeniya,
Panvilathanna.

**Accused-Respondent**

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| BEFORE | : | K. K. Wickremasinghe, J.<br>Janak De Silva, J. |
| COUNSEL | : | Shanaka Wijesinghe, DSG for the Complainant-Petitioner<br>Accused-Appellant was absent and unrepresented |
| ARGUED ON | : | 24.05.2018 |
| WRITTEN SUBMISSIONS | : | The Complainant-Petitioner– On 24.07.2018 |
| DECIDED ON | : | 31.07.2018 |

**K.K. WICKREMASINGHE, J.**

This revision application is filed by the Hon. Attorney General seeking to revise and set aside the sentence imposed by the Learned High Court Judge of Kandy in the Case No. HC 132/06 dated 14.12.2015.

**Facts of the Case:**

The Accused-Respondent (hereinafter referred to as the Respondent) was indicted in the High Court of Kandy for committing grave sexual abuse, 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.

On 14.12.2015, the Respondent pleaded guilty to the said charge and the Learned High Court Judge of Kandy has imposed following sentences on the Respondent;

a) A term of 2 years Rigorous imprisonment suspended for 15 years,
b) A fine of Rs.2500/= with a default term of 1 year Rigorous imprisonment,
c) A compensation fee of Rs. 75,000/= if default 1 year Rigorous imprisonment.

Being aggrieved by the said sentence, Hon. Attorney General (hereinafter referred to as the Petitioner) preferred a revision application in this court seeking to revise the said sentence and to substitute lawful appropriate sentence, considering the facts of the case.

The Learned DSG for the Petitioner submitted that the victim was a girl of 13 years when she was subjected to grave sexual abuse by the Respondent in year 2003. At the time of the alleged act, the Respondent was 55 years old and a father of 3 children. In the statement made by the victim to the Police, she has alleged that this act of grave sexual abuse had taken place on numerous occasions and she was offered Rs. 40/= or 50/= following each act.

The Petitioner submitted that the sentence imposed by the Learned High Court Judge was contrary to law and manifestly inadequate having regard to the nature of the offence and for following reasons;

i) Section 365B (2)(b) carries a minimum mandatory sentence,
ii) The Learned High Court Judge had not considered the age gap between the Respondent (Accused) and the Victim,

iii) The Learned High Court Judge had misdirected himself with regard to the *ratio decidendi* in SC Reference 17/2003 which was completely different to the instant case.

In the case of **Attorney General v. Ranasinghe & Others (I993) 2 Sri L.R 81**, it was stated as follows;

> *"In the case of, Keith Billam [(1986) Vol 82 Criminal Appeal Reports 347] the Lord Chief Justice repeated the foregoing observations and stated that in a contested case of rape a figure of five years imprisonment should be taken as the starting point of the sentence, subject to any aggravating or mitigating features. He observed further as follows " The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned: (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point..."*

In the case of **Attorney General v. Mayagodage Sanath Dharmadiri Perera [CA (PHC) APN 147/2012], L.T.B. Dehideniya, J**, referred to the case of **State of Karnataka v. Krishnappa 2000 A.I.R. 1470,** in the following manner;

"Indian Supreme Court held in the case of **State of Karnataka v. Krishnappa 2000 A.I.R.1470** at page 1475 it was observed that;

*We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not only merely a physical assault - it is often destructive of the whole personality of the victim.* ***A murderer destroys the physical body of the victim; a rapist degrades the very soul of the helpless female.*** *The Courts, therefore, shoulder a greater responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos..."*

In the instant case, there had been no force or violence used on the victim. Further her consent was immaterial under the prevailing law, as she was only 13 years old at the time of the alleged offence.

As in the case of **[CA (PHC) APN 147/2012],** it was further held that,

*"In the instant case there is no violence practiced on the victim, but she is a person unable to give consent under the law. The victim is a girl under 16 years of age and the accused is a married person with two children. Therefore even if there is no violence used on her, Court has to consider that the accused having a sexual relationship with this young girl repeatedly as a very serious crime which deserves a deterrent punishment, a long term custodial sentence..."*

It is noteworthy that the Respondent had been previously convicted twice in the High Court of Kandy for offences of similar nature under Case No. HC 95/2006 and Case No. HC 133/2006.

In the case of **The Attorney General v. H.N. de Silva 57 NLR 121**, it was held that,

> *"In assessing the punishment that should be passed on an 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.*

It was further held that,

> *"...The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have 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..."*

Furthermore, we consider the fact that the Learned High Court Judge of Kandy had suspended the sentence imposed on the Respondent. Section 303 of the Code of Criminal Procedure Act No.15 of 1979 as amended by Act No. 47 of 1999 stipulates that;

**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;*

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

*(h) the need to deter the offender or other persons from committing offences of the same or of a similar character;*

*(j) the need to protect the victim or the community from the offender;*

**(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…*

Accordingly it is understood that section 303(2) of the Code of Criminal Procedure Act provides for the instances where the sentence shall not be suspended. In the instant case, the section 365B (2) (b) of the Penal Code, under which the Respondent was indicted, carries a minimum mandatory sentence of imprisonment. Therefore we are of the view that the Learned High Court Judge has misdirected himself in suspending the above sentence even without stating the reasons in writing for such suspension.

In the judgment of the Supreme Court, **SC Reference No.03/2008,** it was stated that,

> *"However, there may well be exceptional cases in which an offence may be so serious in nature that irrespective of the circumstances a Court may never exercise judicial discretion in favor of a punishment less than an appropriate minimum mandatory punishment...a minimum mandatory punishment of appropriate severity for such serious offences would not be inconsistent with Articles 4(c), 11 and 12(1)."*

It was held in the case of **Attorney General v. Jinak Sri Uluwaduge and another [1995] 1 Sri L R 157** 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 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 interests of the accused on the one hand and the interests of society on the other; also necessarily the nature of the offence committed..."*

It is pertinent to note that, at the time of committing the alleged offence, the minimum mandatory imprisonment prescribed under section 365B (2) (b) of the Penal Code was 10 years. However, the Amendment Act No.16 of 2006 has reduced that minimum mandatory sentence to 7 years. Considering the date of indictment, the punishment applicable to the Respondent was "rigorous imprisonment for a term not less than 10 years and not exceeding 20 years."

Therefore considering the facts of the case and the gravity of the offence, we are of the view that the sentence imposed by the Learned High Court Judge is manifestly inadequate. Further we find the Learned High Court Judge has misdirected himself in suspending the sentence when there was a minimum mandatory sentence prescribed by law.

Accordingly we set aside the imprisonment imposed by the Learned High Court Judge and enhance the sentence by imposing 10 years Rigorous imprisonment. Fine and the compensation imposed on the Accused will be the same.

Revision application is hereby allowed.

The Registrar is directed to send a copy of the judgment to the relevant High Court of Kandy to take immediate steps to apprehend the Accused-Respondent.

JUDGE OF THE COURT OF APPEAL

**Janak De Silva, J.**

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1) Attorney General v. Ranasinghe & Others (I993) 2 Sri L.R 81
2) Attorney General v. Mayagodage Sanath Dharmadiri Perera
   [CA (PHC) APN 147/2012]
3) The Attorney General v. H.N. de Silva 57 NLR 121
4) SC Reference No.03/2008
5) Attorney General v. Jinak Sri Uluwaduge and another [1995] 1 Sri L R 157