

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

**In the matter of an appeal under  
and in terms of Article 154(P)(6) of  
the Constitution of the Democratic  
Socialist Republic of Sri Lanka and  
Section 331 of the Criminal  
Procedure Code Act No. 15 of  
1979.**

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka.

**Complainant**

**Court of Appeal  
Case No. 251/2013**

**Vs,**  
Herath Mudiyanseelage Senarath alias  
Nimal.

**Accused**

**And Now Between**

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka

**Complainant-Appellant**

**High Court of Anuradhapura  
Case No. 116/2013**

**Vs,**  
Herath Mudiyanseelage Senarath alias  
Nimal.

**Accused-Respondent**

**Before : S. Thurairaja PC, J &  
A.L. Shiran Gooneratne J**

**Counsel : Anura B. Meddegoda PC for the Accused- Respondent  
Shanaka Wijesinghe DSG for the Complainant- Appellant**

**Written Submissions** : Accused-Respondent –5<sup>th</sup> June 2018  
Complainant-Appellant – 3<sup>rd</sup> April 2018  
**Argued on** : 04<sup>th</sup> October 2018  
**Judgment on** : 26<sup>th</sup> October 2018

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### Judgment

#### **S. Thurairaja, PC. J**

This is a State Appeal.

The Attorney General originally preferred an indictment against the Accused-Respondent, Herath Mudiyansele Senarath alias Nimal (hereinafter sometimes referred to as the Respondent). Under Section 364 and 365(B)(2)(b) for kidnapping and grave sexual abuse respectively. The Respondent pleaded guilty to both counts and the Learned Trial Judge convicted the Respondent and imposed the following.

1. For the First count Rs.1500/-fine, in default three (3) months simple imprisonment additionally twelve (12) months Rigorous Imprisonment and the same is suspended for five years.
2. For the 2<sup>nd</sup> count a fine of Rs.3500/- in default four (4) months Simple Imprisonment. Further Rs.50, 000/- compensation to be paid to the victim child in default ten (10) months Rigorous Imprisonment.

In addition to all above two (2) years Rigorous Imprisonment was imposed and the same was suspended for a period of fifteen (15) years.

After setting out the mode of the compensation, the Learned Trial Judge considering the Respondent's active service in the Sri Lankan Army converted the fine of Rs. 5, 000/-into a State cost.

It will be appropriate to briefly consider the facts of the case. According to the available materials, the Respondent was Twenty Four (24) years old attached to the Sri Lankan Army. He is married. The victim child is his sister's son who was five (5) year old at the time of the incident.

Victim child is his nephew (sister's son).

The indictment was served on 1<sup>st</sup> of July 2013 and the Accused-Respondent pleaded not guilty at the initial stage. On the 18<sup>th</sup> November 2013 the Accused-Respondent withdraw his pleading of not guilty and pleaded guilty on both counts of the indictment. Accordingly, he was found guilty by the Learned Trial Judge. Thereafter the Learned High Court Judge sentenced the Accused-Respondent as stated earlier.

The Learned DSG had filed written submission regrettably which is not much helpful for us to consider.

The Counsel for the Accused- Respondent filed written submissions justifying the sentence imposed on the Accused- Respondent.

It is mandatory to see the legal provisions stipulated in Section 364(B)(2)(b) of the Penal Code as amended by Act No. 22 of 1995.

*"Commits grave sexual abuse on any person under eighteen years of age shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person."*

The Counsels for the Accused-Respondent in the Original Court as well as in the Appellate Court relies on SC Reference 03/2008 (HC Anuradhapura No.333/2004), SC Appeal 179/2012 and SC Appeal 17/2013 and submits that the Court is not bound by the minimum sentence set out in the Penal Code.

In **SC Reference 03/2008(HC Anuradhapura No.333/2004)**, the Accused was a boy of around 15 years of age, and the victim on whom the statutory rape had been committed, was also under 16 years at the time of the incident.

In the case of **Dharna Sri Tissa Kumara Wijenaik** Vs. **Attorney General (SC. Appeal No. 179/2012-** minutes of 18.11.2013) with reference to the SC Reference 03/2008 case, the facts revealed that, the victim was a girl of 13 years at the time of the rape was committed. The Accused- Appellant a 28 year old male, was the driver for the head priest of the temple. Justice Tilakawardane commented that,

*"this court ratifies the principle that in such cases, where the Accused is under 16 years of age, the sentencing would depend on the facts and the circumstances of each case and if the age of the Accused was 16 years or under, their age would be a material and relevant fact. This however in the eyes of this Court, would **only apply in cases where the Accused is under the age of 16..**"*

*"The decision appears to be based on the reality that the Court is the upper guardian of a child".*

(Reproduced as it is)

This Court also mindful of the decision in **Attorney General vs Ambagala Mudiyansele Samantha (SC Appeal No. 17/2013)** which affirms the decision in SC Appeal 179/2012.

It will be appropriate to refer the Supreme Court judgment delivered on under the case no. SC Appeal 17/2013 dated 12<sup>th</sup> March 2015. That was an appeal by the appellant arising out of CA 297/2008 and High Court of Kurunegala 259/2006.

According to the said judgment, the facts of the case described as follows.

*"The Appellant, a labourer in occupation had married the victim's sister. They had no children in that marriage. The victim's sister had left the country without the consent of the husband about a year after the marriage. The Appellant was then invited by the victim's parents ie his mother in law and father in law, to come and live with them in their house. The victim was a 15 year old girl*

attending school. Only four of them lived in that house. The girl was found to be pregnant when her mother took her to the hospital when she was unwell. Then the pregnancy was 5 months old. The parents stopped her going to school; told the Appellant not to come home again; took her to another village and kept her there, with an older married couple who had no children, having in mind to hand over the baby to them when it is born. The parents did not go to the Police. The victim girl did not make any complaint to the Police.

Most unexpectedly, some outsider had informed the Police of the area that the Appellant and the victim were mysteriously missing from that house. It is only then that the Police had launched an investigation and found that the girl was away in another house whereas the Appellant was living with his parents in his village closed by. The statement made to the Police revealed that the girl was only 15 year old, and then the Appellant was taken into custody and was later enlarged on bail.

The victim gave birth to a baby girl on 19/07/2007 in the Kuliypitiya Base Hospital. It is the Appellant who informed the Registrar of Births of the area that the baby girl was born, according to her birth Certificate filed of record. It is mentioned therein that the father of the baby is the Appellant, A.M. Samantha Sampath and that the parents were not legally married. It is accepted that at the time of her birth, the baby girl Sanduni Wasana had a father, the Appellant and a mother, the victim.

The Attorney General forwarded an indictment to the High Court dated 04/08/2006. It was taken up for trial on 28/10/2008 for the first time. The Appellant pleaded guilty to the charge of rape of a girl below 16 years and he was subject to punishment by the High Court under Section 364(2)(e) of the Penal Code as amended by Act N0.22 of 1995. The baby Sanduni Wasana is being paid maintenance by the Appellant and moreover he visits the school as the father of the child when called upon to do so; has arranged the

*transportation to and from the school and sends money to maintain the child. The High Court imposed a punishment of 2 years Rigorous Imprisonment suspended for 10 years and imposed a fine and compensation."*

Further the Supreme Court has observed as follows.

*"In the present case, we must look at the big picture with the victim of rape the Appellant, the father of the child born, and the 10 year old child who was born into this world as a result of the victim having been raped. The victim of rape never complained to the Police until after a pregnancy of 5 months when Police on its own came to the victim in search of her when an outsider informed the Police of her missing from the home. There was no chance for the victim to give evidence as the Appellant pleaded guilty to the charge of statutory rape of the victim. There is a bar for the victim and the Appellant enter into a marriage as the Appellant is already legally married to the victim's sister who is living abroad. The child is been looked after by the Appellant father in the eyes of the society, and the child is depend on the income earned by the Appellant."*

Considering facts of the case we are not embarking to do a research on the applicability of the sentence and decided cases.

Considering the facts of this case and the sentence we would like to consider the appropriateness of the sentence.

A judge who imposes a sentence has a greater duty in balancing between society and the convict.

Jayant Patel J, in case of **Jusabbhai vs State (CR.MA/623/2012)** stated that, *"it is 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 uphold the law...."*

According to Republic of Fiji laws 2009, sentencing and penalties decree guidelines described as follows.

*The only purposes for which sentencing may be imposed by a court are —*

- (a) to punish offenders to an extent and in a manner which is just in all the circumstances;*
- (b) to protect the community from offenders;*
- (c) to deter offenders or other persons from committing offences of the same or similar nature;*
- (d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;*
- (e) to signify that the court and the community denounce the commission of such offences; or*
- (f) any combination of these purposes.*

*(2) In sentencing offenders a court must have regard to —*

- (a) the maximum penalty prescribed for the offence;*
- (b) current sentencing practice and the terms of any applicable guideline judgment;*
- (c) the nature and gravity of the particular offence;*
- (d) the offender's culpability and degree of responsibility for the offence;*

- (e) *the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;*
- (f) *whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;*
- (g) *the conduct of the offender during the trial as an indication of remorse or the lack of remorse;*
- (h) *any action taken by the offender to make restitution for 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 under this Decree;*
- (i) *the offender's previous character;*
- (j) *the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and*
- (k) *any matter stated in this Decree as being grounds for applying a particular sentencing option.*

**Handbook Of International Standards On Sentencing Procedure**, published by the American Bar Association stated that (page 8),

*"In the United States, the factors to be considered when imposing a sentence include the grade of the offense; mitigating or aggravating factors; that nature and degree of harm caused by the offense (including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust); the community view of the gravity of the offense; the public concern generated by the offense; the deterrent effect a particular sentence may*



*have on the commission of the offense by others; and the current incidence of the offense in the community and in the Nation as a whole."*

In **Sham Sunder vs Puran and another 1990 (4) SCC 731** has observed that,

*"The Court in fixing the punishment for any particular crime should take into consideration the nature of the offence, the circumstances in which it was committed, the degree and deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of the offence."*

Still further in **Shyam Narain vs State (NCT of Delhi) 2013 (7) SCC 77** has ruled that,

*"Primarily, it is to be borne in mind that sentencing in any offence has a social goal. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. "*

It will be appropriate the Judges to follow a strict guideline in deciding sentence. Penal Code which was enacted in 1883 (No. 02 of 1883) was amended after 112 years, that is in 1995 (No. 22 of 1995) by the Legislature to curtail the powers of the Judges regarding the sentence. This does not mean that this Court curtailing the discretion of the Trial Judge. Sentencing is solely rest on the trial judge. It cannot be uniformed in all the cases. It varies and depends on the facts before the trial judge. It is mandatory for the judge to consider the aggravating and mitigating circumstances before him and to impose an appropriate sentence. Therefore, it cannot be an arbitrary decision. It has to be well considered and well balanced judicial decision.

In the case of, **Keith Billam (1986) Vol 82 Criminal Appeal Reports 347** stated that,

*"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 **Attorney General vs Ranasinghe and others (1993 2 SLR 81)** it was held that,

*"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 or perversions"*

Basnayake A. C. J. in the case of **Attorney-General vs. H. N. de Silva** (57 NLR 121) observed as follows.

*"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. **If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment.**"*

(emphasis added)

We have observed in many cases, if not all, the sentence is imposed without giving reasons. As we discussed above, this is important as a matter of right, the accused should know the sentence and the reasoning for the sentence.

Judicature Act provides an Accused can appeal only against his sentence when he pleaded guilty at the Original Court. Similar to a judge giving reasons for conviction or acquittal, he must give reasons for the sentence.

It is observed the Accused-Respondent had pleaded guilty to all four counts. Therefore Section 14(b) (1) of the Judicature Act No. 2 of 1978 is to be considered.

*"Any person who stands convicted of any offence by the High Court may appeal there from to the Court of Appeal-*

*In a case tried without a jury, as of right, from any conviction or sentence except in the case where-*

- i. The accused has pleaded guilty; or*
- ii. The sentence is for a period of imprisonment of one month of whatsoever nature or a fine not exceeding one hundred rupees:*

*Provided that in every such case there shall be an appeal on a question of law or where the Accused has pleaded guilty on a question of sentence only.*

Now the appeal before the Court is only against the sentence.

For the purpose of clarity, we will summarize our concern as follows.

1. The Trial Judge after finding the Accused guilty before he proceeds to impose a sentence he must hear both parties on sentencing.
2. The Learned Trial Judge should give reasons for his findings.
3. It will be appreciated that the Trial Judge should briefly mention what are the aggravating and mitigating circumstances for his decision.

In short the Learned Trial Judge should be accountable for his sentencing.

Considering the facts that the victim child was 5 year old, he had a bleeding injury in his anus, the Accused-Respondent was his own uncle who was on a trusted relationship and he was a person who was attached to the Sri Lankan Army whose prime duty to safeguard the citizens of this country including the victim child are considered as an aggravating factors. The age of the Accused- Respondent, his

service in the Army and the injuries he had received while in the Army and the fact that he pleaded guilty are considered as mitigating circumstances.

In the light of the above reasoning we affirm the conviction and vacate the sentence imposed and impose the following sentence.

The Accused-Respondent is sentenced to 12 years Rigorous Imprisonment and a fine of Rs. 10,000/- in default 6 months Simple Imprisonment. Further we ordered to pay Rs. 250,000/- compensation to the victim child in default 4 years rigorous imprisonment. (if the compensation is paid it should be deposited in a Savings Account on a State Bank on the account of the victim child.)

We direct the Registrar to forward a copy of this judgment to the Judge who delivered the order and to the Director of the Sri Lanka Judges Institute for their attention.

**Appeal Allowed.**

**JUDGE OF THE COURT OF APPEAL**

**A.L. Shiran Gooneratne, J**

I agree,

**JUDGE OF THE COURT OF APPEAL**