

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an appeal under and in terms
of Section 331 of the Code of Criminal
Procedure Act No. 15 of 1979

The Attorney General of the
Democratic Socialist
Republic of Sri Lanka

Complainant

Court of Appeal
Case No. 44/2014

V.

High Court of Anuradhapura
Case No. No.08/2012

Premasirige Duminda Lakshan Premasiri

Accused

And Between

The Attorney General of the
Democratic Socialist
Republic of Sri Lanka

Complainant-Appellant

V.

Premasirige Duminda Lakshan Premasiri

Respondent

Before

A.L. Shiran Gooneratne, J.,
K.Priyantha Fernando, J.,

Counsel

Dileepa Peeris, Deputy Solicitor General for the
Complainant-Appellant.

Tenny Fernando for the Accused-Respondent

Argued on 11.02.2019

Written Submissions

Filed on 25.10.2017 – By the
Appellant

15.01.2018 – By the
Respondent

Decided on 06.03.2019

K. PRIYANTHA FERNANDO, J.

1. The Accused Respondent (Respondent) above named was indicted in the High Court of Anuradhapura on Counts 1, 2 and 3 for committing offences punishable under sections 436, 365 b (2) b, and 364(2) of the Penal Code respectively. At the time of the alleged offences were committed, victim Gunaratnage Lakmali Gunaratne had been below 16 years of age.

2. Upon serving of the indictment on 04.09.2012, the Respondent pleaded not guilty to the charges. Although the case was fixed for trial, on three occasions it had got postponed for various reasons. On the 4th date fixed for trial, on 21.05.2014, the Accused had requested to plead guilty to the charges. Hence the Learned High Court Judge had read over the charges to the Respondent and he had pleaded guilty for the same.

3. On his own plea of guilty, the Learned High Court Judge had proceeded to convict the Respondent and upon hearing the State Counsel

and the defence Counsel in mitigation the Learned High Court Judge proceeded to sentence the Respondent. Respondent had been sentenced to 2 years imprisonment on each of the three Counts to run consecutively and was suspended for 10 years. In addition, the Respondent had been ordered to pay Rs. 1,000/- on each Count as state costs. Further, the Respondent had been ordered to pay the victim a sum of Rs. 100,000/- as compensation and in default of payment to serve 6 months imprisonment.

4. The instant appeal has been filed by The State (Appellant) on 09.06.2014, against the said sentence of the Learned High Court Judge dated 21.05. 2014.

A cross appeal had been filed by the Respondent, however, on 11.02.2019 when the appeal was taken up for argument, Counsel for the Respondent informed this Court that the Respondent would not pursue the cross appeal filed by him.

5. We carefully considered the proceedings in the High Court, written submissions filed by Counsel for both Parties and the submissions made by Counsel at the hearing of this appeal.

6. Counsel for the Appellant contended that the Learned High Court Judge has failed to impose the minimum mandatory prison sentence prescribed by law for the offences of grave sexual abuse and rape in Counts 2 and 3 respectively. Counsel also submitted that in the given circumstances a stringent custodial sentence is warranted.

7. Counsel for the Respondent submitted that the Learned Trial Judge, when deciding on the sentence, has taken the mitigatory circumstances into account. In that, he said that as submitted in mitigation, the Learned Trial Judge has considered the possible altercation between the parties who are relatives.

8. On Count No. 3, the Respondent was charged for rape. Rape is the most serious sexual offence. It aggravates when it is committed on a child. The legislature taking the seriousness of the offence into account has prescribed a minimum mandatory imprisonment sentence of 10 years. Prescribed sentence for rape of a child in terms of section 364(2) of the Penal code is rigorous imprisonment for a term not less than 10 years and not exceeding 20 years and with a fine. In addition, Court shall order the Accused to pay compensation of an amount determined by Court to the person in respect of whom the offence was committed.

9. Provided however, in terms of section 364(2), where the offence is committed in respect of a person under 16 years of age, the Court may, where the offender is a person under 18 years of age and the intercourse has been with the consent of the person, impose a sentence of imprisonment for a term less than 10 years.

10. In the instant case there is no evidence to the effect that the victim child ever consented to the intercourse. The Complainant had been at home alone when the Respondent had opened the door and had come inside. He then had dragged her to the bed in the living room, forcefully removed her clothes, among other things inserted his finger into her vagina and then had raped her. Therefore, the prescribed punishment that applies to the Respondent for rape in this instance for Count No. 3, is imprisonment for not less than 10 years and not exceeding 20 years and a fine and compensation to the victim as determined by Court.

11. The prescribed punishment for Grave Sexual Abuse in Count No 2 in terms of section 365 b (2) b of the Penal Code is, rigorous imprisonment for a term not less than 7 years and not exceeding 20 years, and with a fine, and compensation to the victim.

12. Prescribed punishment for Count No. 1 in terms of section 436 of the Penal Code is, imprisonment for a term not exceeding 10 years and a fine.

13. An Appellate Court will not interfere with the discretion used by a Trial Judge when sentencing an Accused, unless the sentence imposed is illegal or wrong in principle. Therefore, this court would consider whether the Learned Trial Judge has erred in law or was wrong in principle when she imposed a suspended sentence to the Accused for the offences of rape and grave sexual abuse of a child, when in fact the law provides for a minimum mandatory term of imprisonment.

14. In case of Attorney General V. Gunasena CA(PHC)APN 110 of 2012 [12.02.2014], this Court referring to what was held in case of Attorney General V. Ranasinghe [1993] 2SLR 81 said that, an offence of rape calls for an immediate custodial sentence. Reasons are, to mark the gravity of the offence, to emphasize public disapproval, to serve as a warning to others, to punish the offender and to protect the victim.

15. This Court in C.A. Appeal No. 297/08, on 11.10 2012, allowing the appeal by the Attorney General, set aside the suspended sentence imposed on the Accused in Child Rape Case No. 259/2006 by High Court Kurunegala, and imposed a 10-year custodial sentence. Giving reasons for the decision, His Lordship Ranjith Silva J. said;

"It is true that the accused appellant pleaded guilty and that there is no other relief that he can expect other than some kind consideration from this court. The fact that he pleaded guilty should have been taken into account in deciding the sentence of imprisonment. This Court, although sympathetic towards the accused-appellant will be failing in its duty if it were to endorse the suspended sentence. The legislature has imposed a minimum mandatory sentence for this type of offences branding them as very serious offences, carrying a maximum sentence up to 20 years of imprisonment. It is not for the Courts to trifle with the intentions of the legislature. ...

Therefore, it is not proper to trifle with this type of offences and to allow people to commit offences and escape lightly. I hold that the suspended sentence imposed by the learned High Court Judge is highly inadequate or grossly inadequate and should be set aside."

16. On sentencing an Accused, His Lordship Basnayake, A.C.J. in The Attorney General, and H.N. De Silva, (S.C 457-Application in Revision) said;

"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. ... The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or welfare of the state (which are synonymous) outweighs the previous good character, antecedents and the age of the offender, public interest must prevail."

17. There should be parity in sentencing. Disparity and inconsistency will lead to criticism. Accused as well as the Complainant is entitled to know the reason for the sentence and how the Court arrived at the same. An Accused, or for that matter even the general public should know what the range of a sentence would be in a case of child rape depending on the aggravating and mitigating circumstances. There should not be a huge disparity.

18. Section 303 (2) of the Criminal Procedure Code (CPC) provides the instances where the Court should not make an order suspending a sentence of imprisonment.

Section 303(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...

19. As I mentioned before, for the offences mentioned in Counts number 2 and 3, there is a minimum sentence of imprisonment prescribed. Therefore, Court shall not make an order suspending a sentence of imprisonment. This is not a case where sexual intercourse occurred between young consenting persons who were in a relationship, to consider deviating from the prescribed custodial sentence. Hence the Learned High Court Judge has clearly erred when she decided to give away with the punishment prescribed by law and to give a suspended sentence.

20. Learned High Court Judge in her sentencing remarks has said that the Accused had committed a grave offence. However, she had said that there would be a possible altercation between the two families and therefore she considered a lenient sentence. Counsel for the Accused in High Court also had made the same submission in mitigation. He had submitted that the Accused and victim child are cousins and an altercation between the parties may occur.

21. In this case, parents of the victim child had been separated and victim had been living with the father. The Appellant, a married man who was her cousin had taken advantage of the vulnerability of the child had sexually abused her. It is a gross breach of trust which is an aggravating factor. The possible altercation between the families can no way be considered as a mitigating factor.

22. In the above premise, I find that the sentence imposed by the Learned High Court Judge is not in accordance with the law and also wrong in principle. It is grossly inadequate and therefore is set aside.

23. I take into consideration the sentence prescribed by law for the relevant offences in counts 1, 2 and 3. The aggravating factors are, that it is a gross breach of trust as I mentioned before. Although, a victim impact statement was not submitted, it is obvious that when a child is raped or sexually abused, she is adversely affected mentally and physically. Medico legal report speaks about the physical injuries to the hymen. In Asian culture it will scar her life.

24. In mitigation, Court must give sufficient discount for the early guilty plea. Unlike in other criminal offences, in cases of rape and sexual abuse, by pleading guilty, the Accused prevents the mental trauma the victim would undergo if she had to give evidence and subject herself to cross examination. Age and the previous good behavior of the Appellant are also taken into account.

25. Taking above aggravating and mitigating factors and the punishment prescribed by law we sentence the Accused in the following manner.

Count No. 1 - 2 years imprisonment and a fine of Rs. 2000/-,
in default of payment of fine imprisonment for
2 months.

Count No. 2 - 7 years imprisonment and a fine of Rs. 5000/-,
in default of payment of fine imprisonment for
3 months.

Count No. 3 - 10 years imprisonment and a fine of Rs. 5000/-,
in default of payment of fine imprisonment for
3 months.

The above sentences of imprisonment on Counts 1, 2 and 3 are ordered to run concurrently.

Appellant is also ordered to pay the victim (PW1) a sum of Rs. 100,000/-, in default of payment to serve another 6 months' imprisonment.

Appeal is allowed. Sentence is varied as above.

JUDGE OF THE COURT OF APPEAL

A.L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL