

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

In the matter of an Appeal against an order of the High Court under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

**Court of Appeal Case Number
CA/HCC/173/2020
Case Number of High Court of
Panadura: HC 3574 / 2017**

Democratic Socialist Republic of Sri Lanka.
Complainant

Vs.

Samaranayaka Pathirannahalage Dimuthu
Deepal Kumara
No. 10/29B, Undugoda,
Bandaragama.

Accused

And Now Between

Samaranayaka Pathirannahalage Dimuthu
Deepal Kumara
No. 10/29B, Undugoda,
Bandaragama.

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: N. Bandula Karunarathna J.

&

R. Gurusinghe J.

Counsel: Wasantha Fernando AAL with Dimithri Pandiwita AAL for the
Accused – Appellant

Anupa De Silva SSC for the Complainant-Respondent

Written Submissions: By the Accused – Appellant on 15.10.2021

By the Complainant-Respondent on 02.12.2021

Argued on : 08.12.2021

Decided on : 16.12.2021

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Panadura, dated 12.02.2020, by which, the accused-appellant, was convicted and sentenced to 2 years rigorous imprisonment in respect of Count 1 and 15 years rigorous imprisonment in respect of Count 2.

The Accused Appellant was indicted in the High Court of Panadura along with another accused. The Accused Appellant came to be indicted on the following counts;

Count 01: that on or about the 6th of June 2016 the Accused Appellant kidnapped Senuri Dilanka Wickremasekera from her Lawful Guardian Kellapatha Arachchige Nirosha Dilhani which is an offence punishable under section 354 of the Penal Code.

Count 02: that on the same time and place and in the course of the same transaction the accused-appellant committed cruel sex on Senuri Dilanka Wickremasekera and thereby committed the offence of grave sexual abuse of Senuri Dilanka Wickremasekera who is under sixteen years of age which is an offence punishable under Section 365b(2)b of The Penal Code as Amended by Act No 22 of 1995.

Whilst the 2nd accused was indicted for having aided and abetted the accused-appellant to commit the offence set out in the 2nd count.

After the trial, the Learned Trial Judge found the accused-appellant guilty in respect of Counts 1 and 2 and proceeded to impose the following sentences.

In respect of Count 01: 2 years RI, fine of Rs. 1,500/- and carrying a default sentence of 3 months of Simple Imprisonment

In respect of Count 02: 15 years Rigorous Imprisonment and compensation of Rs.100,000/- to be paid to the prosecutrix and carrying a default sentence of 2 years RI.

The Learned High Court judge directed the sentences to run concurrently. The accused-appellant preferred this appeal against the said conviction and sentence.

The 02nd accused was acquitted from the charge against him.

When this appeal was taken up for argument the learned counsel for the accused-appellant informs Court that his client is not challenging the conviction. The accused-appellants is challenging only the sentence.

The prosecutrix accepted that she left the guardianship to go for classes and in the meanwhile, she had opted to go for a chat or a mutual discussion with the accused-appellants as they were having a love affair since May 2017. The learned trial judge had considered the circumstantial evidence and the dock statement and accepted that the accused-appellant and the prosecutrix were in a relationship.

Page 67 of the brief is as follows;

අධිකරණයෙන්;

ප්‍ර : මුලින්ම ඔය සම්බන්ධය ආරම්භ කරන්න කවුද සෙනුරි කතා කළේ. ඒ සම්බන්ධය ඇති කිරීම ආරම්භ වුනේ කොහොමද?

උ : මමයි කතා කළේ.

ප්‍ර : විත්තිකරුට කෝල් එකක් දුන්නාද?

උ : ඔව්.

ප්‍ර : එහෙම තමයි ද සම්බන්ධය ආරම්භ වුණේ?

උ : ඔව්.

The learned counsel for the accused-appellant submitted that it was the prosecutrix who had initiated upon the accused-appellant to start this love affair and its reflex from the above evidence on page 67 of the appeal brief.

It is important to consider the judgement in case number CA/HCC/03/2008 in a similar situation.

The argument of the learned counsel for the accused-appellant at the hearing of this appeal was that the judgment in the case of SC. Reference No. 03/2008 recognizes the imposing of sentences below the minimum mandatory sentence after considering the circumstances of the particular case and that the present case should also be reviewed accordingly. The appellant prays that this Court should exercise its discretionary power and affirm the High Court judgment which imposed a sentence below the minimum mandatory sentence to the appellant setting aside the Court of Appeal judgment.

In the case of Maramba Liyanage Rohana alias Loku vs AG, S.C Appeal No 89A/2009, decided on 12.05.2011 High Court sentenced the accused of 10 years rigorous imprisonment, the mandatory minimum period of imprisonment prescribed by law and a fine of Rs.2500/- with a default term of imprisonment for one year under Section 364 (2) (e) of the Penal Code.

However, Lordships of the Court of Appeal has taken into consideration the fact that the accused had a love affair with the prosecutrix have set aside 10 years of rigorous imprisonment imposed by the Trial Judge and substituted for five years of rigorous imprisonment. Not being satisfied with the reduction of the sentence granted to him by their Lordships of the Court of Appeal the accused filed an application for special leave to appeal on the question of the sentence. Thereby, the Supreme Court considering the facts of the case set aside the five (5) years of rigorous imprisonment and substituted a sentence of two (2) years of rigorous imprisonment suspended for a period of ten (10) years.

The learned counsel for the accused-appellant submits that since by now the prosecutrix has reached 18 years and there is no evidence about any mental harm or distress suffered by prosecutrix even at that moment of the alleged incident and the original action filed as per the medical evidence demonstrates a situation that this Court can apply, the judicial

precedent in S.C. Appeal No 89A / 2009 and thereby reduce the punishment levied on the Accused-Appellant.

AG vs Ambagala Mudiyanseelage Samantha Sampath, Supreme Court appeal number 17/2013 dated 12.03.2015 it was held that the High Court of Kurunegala imposed a term of 2 years rigorous imprisonment suspended for 10 years and a fine of Rs.5,000/- with a default sentence of 1-year rigorous imprisonment and also ordered the payment of Rs.200,000/- as compensation to the victim of the crime under Section 364(2)(e) of the Penal Code.

The Supreme Court affirmed the High Court decision.

Because of foregoing reasons as considered in the light of the above-mentioned authorities, I am of the view that his interest has been gravely prejudiced by the learned trial Judge's unacceptable mode, of the bias evaluation of the evidence and the maximum punishment imposed on him even though both parties accepted the love affair between the prosecutrix and the accused.

There is no doubt that the accused is technically guilty of the offence described in section 365b (2) b of the Penal Code. However, after considering the facts of the case and the submission of the counsel I hold that this is not a case where the accused-appellant should be given a custodial sentence.

I set aside the sentence of 2 years rigours imprisonment imposed on the accused-appellant in respect of count 1 and substitute a sentence of 2 years rigours imprisonment suspended for 10 years from the date of the judgement of the High Court of Panadura namely 12.02.2020. The fine and the default term ordered by the learned trial judge is affirmed.

I set aside the sentence of 15 years rigours imprisonment imposed on the accused-appellant in respect of count 2 and substitute a sentence of 2 years rigours imprisonment suspended for 10 years from the date of the judgement of the High Court of Panadura namely 12.02.2020. The fine and the default term ordered by the learned trial judge is affirmed.

We direct the sentences to run concurrently.

The learned High Court Judge of Panadura is hereby directed to take necessary steps about the suspended sentence.

Appeal dismissed. The sentence is differed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal