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

In the matter of an Appeal made
under Section 331 of the Code of
Criminal Procedure Act No.15 of
1979.

**Court of Appeal Case No.
CA/HCC/ 0040/2020
High Court of Monaragala
Case No. HC/51/2017**

Rambanda Devayalage Anoma
Priyadharshani

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.
P. Kumararatnam, J.**

COUNSEL : **Neranjan Jayasinghe with H.Ananda for
the Appellant.
Azard Navavi, DSG for the Respondent.**

ARGUED ON : **14/03/2022**

DECIDED ON : **05/04/2022**

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General for committing an offence under Section 365B (2) (b) of the Penal Code that is, Grave Sexual Abuse on Wannidurayalage Chandana Sudath Madhushanka alias Rasika between the period of 01.01.2007 and 31.12.2007.

The trial commenced on 29/01/2018. After leading all necessary witnesses, the prosecution had closed the case. The Learned High Court Judge had called for the defence and the Appellant opted to give evidence from the witness box and closed the case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant as charged and sentenced the Appellant to 07 of years rigorous imprisonment and imposed a fine of Rs.5000/- subject to a default sentence of 06 months simple imprisonment. In addition, a compensation of Rs.100000/- was ordered with a default sentence of 06 months simple imprisonment.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in her absence due to the

Covid 19 pandemic. It is further informed that the Appellant is on bail and she is waiting outside the court due to Covid 19 pandemic restrictions.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. The Learned High Court Judge has totally disregarded the fact that PW4 had a motive to induce PW1 to fabricate a false allegation against the Appellant.
2. The Learned trial judge has relied on uncorroborated and inconsistent evidence to convict the Appellant.
3. The Learned Trial Judge has failed to consider the test of probability and improbability of the testimony of the witnesses in convicting the Appellant.
4. The Learned trial judge has failed to offer appropriate prominence and due consideration on the defence evidence with established legal principles.

Before commencement of the argument, as a preliminary issue, the Learned Counsel for the Appellant informed this court that he has instructions from the Appellant to withdraw the appeal against the conviction and to canvas only the sentence considering the special circumstances in relation to the matter and therefore, urges the indulgence of this court to consider applying the principles laid down in the Supreme Court determination **No. 03 of 2008** decided on 15.08.2008.

The exclusive reason for the above preliminary application is that the Appellant was 17 years of age when she committed the offence and now, she is married and is a mother of two children aged 10 years and 02 years.

The Learned Deputy Solicitor General having considered the submissions made by the counsel for the Appellant, informed the court that given the facts and the circumstances that led to the conviction and other incidental matters, if the court decides to apply the relevant principle due to the uniqueness of this case and only in relation to the facts of this case, he

would not be standing in the way as sentencing is a matter that which entirely vests with the court.

The Facts of this case *albeit* briefly are as follows.

The victim was 07 years old and was in grade two at the time of the incident. He cannot remember the exact date or the time of the incident. The Appellant is his aunt's daughter who lived in close proximity to his house. It was usual for the victim to visit the Appellant's house and on one such occasion, only the Appellant had been at home. Thereafter, the Appellant had called the victim into the room, removed his trouser, laid him on the bed, slept over his body having placed the Appellant's female organ on the victim's male organ and hence committed the offence.

According to the victim, the act had continued for about an hour and the Appellant had let the victim go home only after instructing him to keep the incident in confidence.

This incident had come to light when the victim was involved in an incident with a female student studying in grade three of his school. After the detection of this incident, the school authority had informed this to the victim's parents and lodged a complaint with the police as well.

The Appellant had given evidence from the witness box and denied the charge.

Now the Appellant seeks the courts indulgence only to reconsider her jail sentence on the application of the Supreme Court determination given in **No. 03/2008** decided on 15/08/2008.

In the aforementioned SC Reference, the High Court of Anuradhapura by its communication dated 14/05/2008, made a reference to the Supreme Court in terms of Article 125(1) of the Constitution of Sri Lanka. In that reference, the Learned High Court Judge of Anuradhapura had queried whether Section 364(2) of the Penal Code as amended by the Penal code

(Amendment) Act No.22 of 1995, had removed the judicial discretion when sentencing an accused convicted of an offence in terms of that section.

In the said reference Justice P. A. Ratnayake held that:

“the minimum mandatory sentence in Section 364(2)(e) is in conflict with Article 4(c), 11, and 12(1) of the Constitution.”

“Article 80(3) (of the Constitution) only applies where the validity of an Act is called into question. However, Article 80(3) does not prevent a court from exercising its most traditional function of interpreting laws. Interpretation of laws will often require a court to determine the applicable law in the event of a conflict between two laws. This is a function that has been exercised by this court from time immemorial.”

In the event of a conflict between an ordinary law and the Constitution, the constitutional provisions must prevail over an ordinary law.”

“The minimum mandatory sentence in Section 364(2)(e) of the Penal Code is in conflict with Article 4(e), 11 and 12 of the Constitution and the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence.”

In this case the Appellant was charged under section 365 B (2) (b) of the Penal Code as amended. The Section 365B (1) reads as:

“Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any instrument on any orifice or part of the body of any other person, being an act, which does not amount to rape under section 363, in circumstances falling under any of the following descriptions, that is to say-....”

(2) (b) of the Section states:

“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.”

In this case the Appellant was sentenced to 7 years rigorous imprisonment with a fine and compensation as stated above. According to the counsel for the Appellant the Appellant was 17 years old when she had committed the offence.

On perusal of the court record the Appellant was 17 years old and was in grade 11 when she allegedly committed the offence. When she gave evidence, she was 26 years, married and blessed with two children aged 10 years and 02 years. Considering the age of the Appellant and the victim, the incident pertaining to this case has happened between children.

Under Section 364(2) of the Penal Code as amended there is a proviso to deal with the offence of rape committed by a child under the age of 18 years on a child under the age of 16 years with consent. On that occasion the court can pass a sentence of imprisonment on the offender of up to 10 years. No minimum mandatory sentence has been prescribed under the said proviso.

But, when the offender is a person under 18 years of age and the sexual act has taken place with or without the consent of the other party who is also a child, the court has no discretion to impose a sentence of imprisonment for a term less than seven years for the grave sexual abuse charge.

The Appellant submitting an affidavit averred that her sister and her brother had also been indicted before High Court of Monaragala for similar offences but they had been acquitted by the court after trial.

Hence, the Appellant pleads to this court to re-consider her sentence as she was only a 17-year-old child when she committed the offence.

When considering this plea/submission, it is important to recall the principle recognised by our court system that the court is the upper guardian of a child.

In **Dharma Sri Tissa Kumara Wijenaik v. Attorney General** SC Appeal 179/2012 decided on 18/11/2013 Justice Tilakawardena held that:

“the decision appears to be based on the reality that the Court is the upper guardian of a child”.

Article 3(1) of the Convention on the Rights of the Child (CRC) states:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

According to the above-mentioned CRC provision, the primary consideration in the implementation of legislation aimed at protecting children should be the best interest of the children. For the purpose of the Convention, a child is defined as a person who has not reached the age of eighteen years.

Hence, it is very clear that when imposing a custodial sentence on a child, preferably with a minimum mandatory sentence, the court being the upper guardian of the child, should have considered an appropriate sentence only after evaluating all the evidence presented by both parties to the case.

In **Dharma Sri Tissa Kumara Wijenaike v. The Attorney General** (supra) the court further held that:

“In such cases, it would be incumbent upon the judge to set out, with clarity, all the reasons which are relevant and salient for not imposing the mandatory statutory minimum period of 7 years or in the case of a person under 18 years, a mandatory period of 10 years, and the court would have the power to do so as only where the accused is under 16 years of age, as the court in its capacity of the upper guardian of each and every child has the inherent power to consider such matters and reduce the statutorily mandated minimum sentence.”

Jayant Patel, J. in the case of **Jusabbhai Ayubhai v. State of Gujarat** CR.MA/623/2012 stated 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.”

In this case there is no doubt that the Appellant had committed a very serious offence punishable under the law. But one cannot forget the fact that she was also a child who was entitled to the protection by the law. In the present circumstances she needs care and protection as she is married and has two children. In order to be a good parent, she need guidance and supervision, reformation and rehabilitation rather than punishment and branding as a criminal.

Considering the facts of the case and the submissions made by both counsels I conclude that this is not an appropriate case to order a custodial sentence against the Appellant.

I, therefore, with the guidance of the judgment given in SC Reference **No.3 of 2008**, set aside the sentence of seven years rigorous imprisonment imposed on the Appellant by the Learned High Court Judge of Monaragala and substitute a sentence of two years rigorous imprisonment suspended

for ten years from the date of judgment of the High Court of Monaragala which is 16/07/2020.

The Learned High Court Judge of Monaragala is hereby directed to issue notice on the Appellant to appear before the High Court, as she is on bail pending appeal, and to comply with this judgement.

Subject to above variation, the appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL