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

In the matter of an Appeal under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No. HCC/0003/2021

High Court of Embilipitiya Case No. HCE/56/2017

Complainant

V.

Giriduruge Dishantha Chandana Gamage alias Kaju Mamage Putha

Accused

AND NOW BETWEEN

Giriduruge Dishantha Chandana Gamage alias Kaju Mamage Putha

Accused – Appellant

V.

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

Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J. (P/CA)**
WICKUM A. KALUARACHCHI, J.

COUNSEL : Amila Palliyage with R. Doralagoda and S. Udugampola for the Accused – Appellant.

Maheshika Silva, Deputy Solicitor General for the Respondent.

ARGUED ON : 28.03.2022

WRITTEN SUBMISSIONS FILED ON : 12.08.2021 by the Accused – Appellant.

05.11.2021 by the Respondent.

JUDGMENT ON : 06.04.2022

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K. PRIYANTHA FERNANDO, J.(P/CA)

1. The accused appellant (hereinafter referred to as the appellant) was indicted in the High Court of *Embilipitiya* for two counts of grave sexual abuse punishable in terms of section 365B 2(b) of the Penal Code. After trial, the learned High Court Judge acquitted the appellant on count No.1 and convicted him for count No.2 sentencing him for 7 years of rigorous imprisonment. Further, the appellant was ordered to pay a fine of Rs. 10,000/- and Rs. 100,000/- as compensation to the victim. Being aggrieved by the said conviction and the sentence, the appellant preferred the instant appeal.

2. At the hearing of this appeal, the learned Counsel for the appellant moved to withdraw the appeal against the conviction and canvassed only the sentence. Hence, upon withdrawal, the appeal against the conviction was dismissed.

3. The learned Counsel for the appellant submitted that the learned High Court Judge has failed to take into account that the appellant

was 16 years old when he committed the offence. Further, it was submitted that the appellant has no previous convictions and therefore the custodial sentence of 7 years is not proportionate with the sexual act that was performed by the appellant on the victim.

4. The learned Deputy Solicitor General (DSG) for the respondent submitted that the child victim who was 10 years old at the time of the incident has been mentally subnormal. It is the contention of the learned DSG that the punishment should deter the bullies in schools who commit such offences on school children who are vulnerable. Apart from the physical act and the injuries, the mental trauma that would affect the child victim also has to be taken into consideration when imposing the punishment on the offender, therefore, the 7 year imprisonment sentence is justified, the learned DSG submitted.

5. The prescribed sentence for the offence of grave sexual abuse, in terms of section 365(b) 2(b) is, rigorous imprisonment for a term not less than 7 years and not exceeding 20 years and with fine and also compensation of an amount determined by Court.

6. When sentencing an offender, Court will take into account the prescribed sentence by law with the gravity of the offence, the aggravating factors and the mitigatory factors. A considerable discount will be given to an offender for an early guilty plea especially on sexual offenders who are remorseful and prevent further trauma on the victims caused by giving evidence in Court. In the instant case, the appellant is not entitled to such discount.

7. The main mitigatory factor in this case in favour of the appellant is that he was a juvenile of 16 years old when he committed the offence on the victim who was also a child. Thus, it is important to take note as to how Courts have dealt with juvenile offenders.

8. Courts quite often tend to sentence juvenile offenders with non-custodial sentences. Even if a custodial sentence is imposed on a juvenile, usually it will be lesser than that imposed on an adult offender.

9. This issue has been discussed at length in Archbold 2019 sentencing Guidelines.

"*While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focused on the child or young person, as opposed to offence focused. For a child or young person the sentence should focus on rehabilitation where possible. A court should also consider the effect the sentence is likely to have on the child or young person (both positive and negative) as well as any underlying factors contributing to the offending behaviour.*

Domestic and international laws dictate that a custodial sentence should always be a measure of last resort for children and young people and statute provides that a custodial sentence may only be imposed when the offence is so serious that no other sanction is appropriate.

It is important to bear in my mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking behaviour. It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age their emotional and developmental age is of at least equal importance to their Chronological age (if not greater)."

(Archbold 2019 Sentencing Guidelines, Page 600)

10. In ***SC Reference 3/2008*** the Supreme Court held that the minimum mandatory sentence in section 362(2) (e) is in conflict with Article 4(c), 11 and 12(1) of the Constitution and that 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. This principle

was followed in case of ***Rohana Alias Loku v Hon. Attorney-General 2011 2 Sri.L.R*** (page 174).

11. It is important to consider whether this case warrants deviation from the minimum mandatory sentence prescribed by law. As mentioned before, the appellant had been a juvenile of 16 years when he committed the offence. He has been a first offender. Thus, I am of the view that this is a fit case to deviate from the prescribed minimum mandatory sentence of 7 years imprisonment. Although the learned High Court Judge in her sentencing remarks (at pages 331, 332 and 333 of the appeal brief) has rightly taken into consideration the aggravating factors such as the tender age of the victim, she has failed to even mention that the appellant was 16 years of age and was a juvenile at the time he committed the offence. Therefore, I find that the sentence of 7 years imprisonment imposed on the appellant by the learned High Court Judge is wrong in principle.

12. The learned High Court Judge has rightly considered the following aggravating factors. The victim has been a mentally subnormal 10-year-old child of the same school as the appellant. It is the duty of the Court to deter bullies in schools such as the appellant, to prevent vulnerable children being sexually abused. Hence, an immediate custodial sentence is justified.

13. However, when deciding on the sentence, it is also important to take into account the gravity of the sexual act performed by the offender on the victim. In this, according to the particulars of the offence mentioned in count No. 1 of the indictment, the appellant has performed oral sex and also anal sex on the victim. However, the learned High Court Judge has found the appellant not guilty and acquitted the appellant of count No.1. According to the particulars of the offence in count No.2, the charge that was added during the course of the trial and on which the appellant was convicted, the appellant has squeezed the penis of the victim. Although, the mother of the child victim has said in evidence that she saw redness on the child's penis, the Medical Officer who examined the victim has said in his report and testified that there were no injuries detected on the penis of the child.

14. Considering the above, including the aggravating and mitigating factors, I find that an 18 months' rigorous imprisonment sentence is justified in the circumstances. Hence, I set aside the 7 year sentence of rigorous imprisonment imposed by the learned High

Court Judge on the appellant and substitute a sentence of 18 months' rigorous imprisonment. The rest of the sentence namely the fine, compensation to the victim and the default sentences imposed by the learned High Court Judge will remain unchanged. As the appellant has been in incarceration since the date of sentence, the above sentence of imprisonment is ordered to run from the date of sentence imposed by the High Court, namely, 08.01.2021.

Appeal against the sentence is allowed to the above extent.

PRESIDENT OF THE COURT OF APPEAL

WICKUM A. KALUARACHCHI, J.

I agree.

JUDGE OF THE COURT OF APPEAL