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

In the matter of an appeal against an order made by the High Court of Colombo on 03.10.2019 under and in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979

Court of Appeal Case No: CA /HCC/0037/20
HC Monaragala Case No: HC/276/2019

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

Complainant

Vs.

Peduru Nandage Janaka Pushpakumara

Accused

And Now Between

Peduru Nandage Janaka Pushpakumara

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: I.B.S. Harshana AAL for the Accused-Appellant

Maheshika Silva DSG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 17.05.2022

By the Complainant-Respondent 02.06.2021

Argued on : 06.06.2022

Decided on : **20.06.2022.**

N. Bandula Karunarathna J.

This appeal is preferred against the Judgement, delivered by the learned Judge of the High Court of Monaragala, dated 18.05.2020, by which, the accused-appellant, was convicted and sentenced to 33 years rigorous imprisonment and Rupees Twenty Thousand fine in default 6 months simple imprisonment and Rupees One Hundred Thousand compensation in default 12 months rigorous imprisonment.

The accused-appellant, hereinafter referred to as the "appellant", was indicted in the High Court of Monaragala on the following charges;

The accused-appellant was indicted on the following counts;

Count 01: that on or about 07.07.2012 at Aluthgoda within the jurisdiction of this court, the accused-appellant committed a crime by kidnapping Labunasinghe Arachchige Saduni Tharaka who was under 16 years of age from her lawful guardian Bogahawattage Siriyawathi, which is an offence punishable under section 354 of the Penal Code.

Count 02: that during 08.07.2012 and 10.07.2012 at Aluthgangara within the jurisdiction of this court, the accused-appellant committed rape on Labunasinghe Arachchige Saduni Tharaka who is under sixteen years of age which is an offence punishable under Section 364 (2)(e) of The Penal Code as Amended by Act No 22 of 1995 of the penal code.

Count 03: that during the same time and place and in the course of the same transaction but not during the period mentioned in count number 02, the accused-appellant committed rape on Labunasinghe Arachchige Saduni Tharaka who is under sixteen years of age which is an offence punishable under Section 364 (2)(e) of The Penal Code as Amended by Act No 22 of 1995 of the penal code.

Count 04: that during the same time and place and in the course of the same transaction but not during the period mentioned in counts number 02 and 03, the accused-appellant committed rape on Labunasinghe Arachchige Saduni Tharaka who is under sixteen years of age which is an offence punishable under Section 364 (2)(e) of The Penal Code as Amended by Act No 22 of 1995 of the penal code.

Before the trial commenced the accused-appellant pleaded guilty in respect of all 4 counts and the learned trial Judge imposed the following sentences;

In respect of Count 01; 3 years rigours imprisonment, fine of Rs. 5,000/- and carrying a default sentence of 6 months rigours imprisonment.

In respect of Count 02; 10 years rigours imprisonment, fine of Rs. 5,000/- and carrying a default sentence of 6 months rigours imprisonment.

In respect of Count 03; 10 years rigours imprisonment, fine of Rs. 5,000/- and carrying a default sentence of 6 months rigours imprisonment.

In respect of Count 04; 10 years rigours imprisonment, fine of Rs. 5,000/- and carrying a default sentence of 6 months rigours imprisonment.

The learned High Court Judge ordered the accused-appellant to pay Rs. 100,000/- as compensation to the victim, in default 12 months rigorous imprisonment.

The learned High Court Judge directed the sentences imposed on all counts to run concurrently. The default sentences are to be carried out consecutively.

When this appeal was taken up for argument the learned counsel for the accused-appellant informed Court that his client is challenging only the sentence.

The appellant being aggrieved by the above sentences imposed by the learned High Court Judge appeals to this Court for the vacation of the said sentences relating to the count numbers 02, 03 and 04 of the indictment bases on the offence of Section 364(2) (e) of the Penal Code as amended by the Act No.22 of 1995 while seeking for a non-custodial sentence for the same offences irrespective of the minimum mandatory sentence.

The issue of statutorily provided mandatory sentences has already been decided by the Supreme Court in the Supreme Court Reference No.03 of 2008 and the case of Attorney General Vs. Ambagala Mudiyanselage Samantha, 17 of 2003, where it has been held that a statutory mandatory sentence would not prevent a court from exercising its discretion in an appropriate case. The submissions made by the learned Counsel for the accused-appellant before the High Court in trying to obtain a non-custodial sentence for the accused-appellant are tenable in law, though the learned High Court Judge had acted to the contrary.

The learned counsel for the respondent argued that there is no illegality in the sentence imposed on the accused-appellant and that the learned High Court Judge has imposed the minimum sentence prescribed by the statute on the accused-appellant. Also made order that all sentences run concurrently. In those circumstances, the sentence imposed on the accused-appellant is the most lenient sentence prescribed by the statute.

On behalf of the respondent, it was submitted that the following matters were within the contemplation of the learned High Court Judge at the time of imposing the sentence:

(a) The Accused was 21 years and the Prosecutrix was 15 years old at the time of the commission of the offences as such the accused-appellant being an adult was 6 years older than the Prosecutrix.

(b) The offence was repeated (three charges of Statutory Rape).

(c) The previous opportunities given to the accused-appellant to reform himself and reintegrate into society by imposing non-custodial sentences for other offences have proven to be wholly ineffective in the reformation of the accused-appellant.

(d) The accused-appellant has repeatedly demonstrated that he is a person who shows no regard for any leniency granted by courts of law relating to imposing lenient sentences for offences committed by him.

(e) There is a steady increase in the number of sexual offences being committed in Sri Lanka and there is a significant increase in the cases relating to child abuse.

It was the contention of the learned counsel for the respondent that the Previous conviction report on page 48 of the Appeal brief of the accused-appellant amply demonstrates that the accused-appellant has been imposed suspended sentences on 6 occasions by courts of law and such leniency has had no positive effect on him. The previous conviction report also indicates that the accused-appellant qualifies to be imposed long sentences under section 6 of the Prevention of Crimes Ordinance.

The offences relating to this case have been committed during the operative period of one of the suspended terms of imprisonment. The learned counsel for the respondent submits that the callous disregard demonstrated by the accused-appellant to the numerous opportunities given by courts of law to reform himself and reintegrate into society and repetitions of crimes indicates that a deterrent punishment is warranted for the accused-appellant. The learned counsel for the respondent further argued that the accused-appellant has exploited the immaturity of the Prosecutrix and caused her to elope with the accused-appellant. The impact of the offence on the Prosecutrix has to be considered with due weight. The evidence of the Prosecutrix in terms of provisions of the Protection of Victims of Crime and Witnesses Act No 04 of 2015 (as amended) indicates that the incidents occurred due to her immaturity and that her education came to a stop after the incident.

One of the primary intentions of the legislature in enacting Act No 22 of 1995 which brought in the enhancement of punishment in the form of a minimum mandatory sentence for the offence of Statutory Rape has been the prevention of sexual exploitation of children and protection of children. A child of 15 years does not have the mental maturity or perception to give consent to an act of sexual intercourse. The child is not mindful of the gravity of the consequences attendant upon the physical act of intercourse and therefore the criminal law has protected that child by declaring that the act of intercourse per se, whether there is consent or not, constitutes rape.

The legislature in it its wisdom has also expressly provided that persons below the age of 18 years, who themselves fall within the definition of "child" will not attract the minimum mandatory sentence if sexual intercourse has been committed with "consent".

This is found in the Proviso to section 364 (e) which reads as follows:

> Provided, however, that where the offence is committed in respect of a person under sixteen, years of age, the court may, where an offender is a person under eighteen

years of age and the intercourse has been with the consent of the person, impose a sentence of imprisonment for a term less than ten years;

No such leniency has been intended by the legislature in respect of an “adult" who has sexual intercourse with a "child". It is my view that the punishment imposed by the Learned High Court Judge is reflective of the following considerations relating to sentencing:

(a) the gravity of the offence
(b) the degree of culpability and responsibility of the offender
(c) the punishment provided in the statute
(d) difficulty in detection of the offence
(e) the interest of the society
(f) need to signify that the court and the community denounce the commission of such offences;
(g) to deter offenders or other persons from committing offences of the same or similar nature
(h) the need to protect children
(i) to punish offenders to an extent and in a manner, which is just in all the circumstances;

Learned counsel for the respondent draws the attention of this Court to the following cases which discuss the principles relating to sentencing.

(i) Attorney General Vs Ranasinghe 1993 (2) SLR 81
(ii) Attorney General Vs Gunasena CA 110/2021 decided on 12.02.2014
(iii) Attorney General Vs Uluwaduge 1995 (1) SLR 157
(iv) Rizwan Vs AG CA PHC APN 141 / 2013 decided on 25.03.2015

On behalf of the respondent, it was argued that the sentence imposed by the learned High Court Judge is legal and reflects the gravity of the offence. The sentence imposed serves to protect the children in society and acts as a deterrent to future offenders of sexual abuse of children and signifies the disapproval of court to all forms of sexual exploitation committed on children. Further, it was argued by the learned counsel for the respondent that in the instant case the judicial discretion has been exercised fairly and within the four corners of the applicable statute by the learned High Court Judge and there is no legal basis to set aside the lawful sentence imposed by the learned High Court Judge.

Therefore, the respondent moves that this Court affirm the conviction and sentence imposed on the accused-appellant by the High Court of Moneragala, in the case bearing number HC 276/ 2019.

The learned counsel for the appellant argued that the decision by the learned High Court Judge to impose custodial sentences on the appellant was unreasonable and unjustifiable. The learned counsel for the accused-appellant further requests that the Court can impose non-custodial sentences for the count’s numbers 02, 03, and 04 based on statutory rape on the following grounds that make this case a fit and appropriate, to do so;

(i) The accused-appellant had accepted liability at the first opportunity afforded to him without wasting the precious time of the court which makes him entitled to a huge discount in getting sentenced.

(ii) That the accused-appellant had no similar kind of previous convictions.

(iii) The accused was only 21 years of age by the time of this unfortunate incident and he was a painter in his job he had been carrying on this affair with the Victim girl with intention of entering into married life with her and still, the accused is unmarried and repenting for what had happened in this incident.

(iv) As per the short history given in Medico-Legal Report by the patient the Victim hereto that there was a love affair between both the Victim and the accused-appellant which led to this incident.

(v) That the Victim the PW 01 had wilfully and voluntarily eloped with the accused-appellant.

(vi) That it was with the consent of the victim that both of them had engaged in sexual activities and not by force. (Vide page 09 of the appeal brief for the short history in MLR).

(vii) There is no evidence that the accused acted violently or used force to commit the offence.

(viii) No bodily injuries were present on the Victim.

(ix) There is no medical evidence of abuse on the girl as there were no hymeneal or genital injuries as per the Medical-Legal Report and the status of the anus of the girl was normal.

(x) Sexually transmitted disease referrals are negative for the Victim. (Vide pages 10 of the appeal brief for the Medical-Legal Report).

The learned assigned counsel appearing for the accused-appellant further submits that he is seeking to convert the custodial sentence imposed on the accused-appellant on the count number 01 in terms of Section 354 of the Penal Code to one of a non-custodial sentence. In the High Court reference, the Supreme Court Application 03 of 2008 the Supreme Court was very clear that the law cannot be mechanically applied but the judicial discretion should be exercised in imposing a sentence. The learned counsel for the accused-appellant says that this is a fit case for the exercise of that discretion to prevent a young person's life from being crushed in the prime of his life and to confine him to prison for no justifiable grounds.

After considering the facts and the circumstances of the case and the submissions of the counsel for both parties, I hold that this is not a case where the accused-appellant should be given a custodial sentence.

Section 13 of the Amended Act No. 22 of 1995 of the penal code is as follows;

> 13. Section 364 of the principal enactment is hereby repealed and the following section substituted therefor: -
>
> 'Punishment for rape 364.

(1) Whoever commits rape shall, except, in the cases provided for in subsections (2) and (3), be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to each person.

(2) Whoever-

(a) .....

(b) .....

(c) .....

(d) .....

(e) commits rape on a woman under eighteen years of age;

(f) commits rape on a woman who is mentally or physically disabled;

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with a fine and shall, in addition, be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to such person;

Provided, however, that where the offence Is committed in respect of a person under sixteen, years of age, the court may, where an offender is a person under eighteen years of age and the intercourse has been with the consent of the person, impose a sentence of imprisonment for a term less than ten years,

It was revealed during the trial that the prosecutrix (PW 1) in the case was 15 years of age when the alleged act of kidnapping and rape occurred. As per the prosecutrix, she has been having a serious love affair with the appellant she decided to elope with him.

It is my view that the crime committed by the appellant overrides his intention to get marry the victim. The appellant has no prior similar convictions. Although he was having 6 previous convictions for charges of theft, housebreaking and illegal possession of cannabis, except one all the other convictions do not within the period covering 7th July to 10th July 2012. The offence he committed and convicted on 18.07.2008 regarding housebreaking and theft of Rs. 300/- was within the period that comes under the present offence. The punishment imposed on him was 6-month simple imprisonment suspended for 5 years with effect from 18.07.2008. For the present conviction the accused-appellant has already served more than 2 years and

therefore the suspended term of 5 years should not be considered as the imprisonment period was only 6 months for the offence of housebreaking and theft.

We are of the view that the accused-appellant should be given a relief to go back to society and stay with his family to correct his mistakes.

Thus, we set aside the sentence of 3 years of rigours imprisonment in respect of count 1 and impose 2 years of rigours imprisonment for count 1. It will be suspended for 7 years from today.

The sentence of 10 years of rigours imprisonment imposed on the accused-appellant in respect of counts 2, 3 and 4 is set aside and imposed 2 years of rigours imprisonment. It will be suspended for 15 years with effect from today. The main reason for this suspended jail term is the love affair and the young age between the prosecutrix and the appellant.

The fine, the compensation and the default term ordered by the learned trial judge for each count are affirmed. The default term is backdated to the date of conviction namely, 18.05.2020.

We direct all sentences to run concurrently.

Appeal dismissed. The sentence is differed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal