

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

In the matter of an appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No: 15 Of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Court of Appeal Case No: CA /HCC/445-446/17
HC Kalmunai Case No: HC/385/2017**

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

Complainant

Vs.

1. Sulthan Ibrahim Rizwan alias Sulthan Ibrahim Rizwath.
2. Nagoorthamby Athamlebbe alias Razick alias Nagoorthamby Athamlebbe

Accused

And Now Between

1. Sulthan Ibrahim Rizwan alias Sulthan Ibrahim Rizwath.
2. Nagoorthamby Athamlebbe alias Razick alias Nagoorthamby Athamlebbe

Accused-Appellants

Vs.

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

Complainant-Respondent

Before: N. Bandula Karunarathna J.

&

R. Gurusinghe J.

Counsel: Indica Mallawaratchy AAL for the 01st and 02nd accused-appellant
Riyaz Bary DSG for the complainant-respondent

Written Submissions: By the accused-appellant on 09.03.2021
By the complainant-respondent 11.10.2021

Argued on : 08.06.2022

Decided on : 14.09.2022

N. Bandula Karunarathna J.

This appeal is preferred against the Judgement, delivered by the learned Judge of the High Court of Kalmunai, dated 29.11.2017, by which, the accused-appellants, were convicted and sentenced to 45 years rigorous imprisonment and Rupees Eighty Thousand fine in default 30 months simple imprisonment and Rupees Six Hundred Thousand compensation in default 3 years simple imprisonment.

The accused-appellants, hereinafter referred to as the "appellants", were indicted in the High Court of Kalmunai on the following charges;

Count 01: that on or about 21.04.2015 at Akkaraipattu within the jurisdiction of this court, you the above-named 1st accused kidnapped the under 16-year-old girl Arulanathan Piritha alias Arulanantham Piritha from her lawful guardian of Kannappan Arulanantham and that you have thereby committed an offence punishable under section 354 of the Penal Code.

Count 02: on the date, place and in the course of the same transaction mentioned under charge one above, you the 2nd accused named above did aid and abet the 1st accused to commit the offence mentioned under charge one above and consequence of which the 1st accused above-named has committed the said offence mentioned under charge one above and that you the 2nd accused above named have thereby committed an offence punishable under section 354 of the Penal Code read with section 102 of the Penal Code.

Count 03: On the date and in the course of the same transaction mentioned under charge 1 above at Addalaichchenai within the jurisdiction of this Court, you the above-named 1st accused did commit rape on the under 16-year-old girl Arulanathan Piritha alias Arulanantham Piritha contravening the Section 364 (2) (e) as amended by the Amendment Act No. 22 of 1995 and thereby you have committed an offence punishable under Section 362 of that Act.

Count 04: On the date and in the course of the same transaction mentioned under charge 1 above at Addalaichchenai within the jurisdiction of this Court you the 2nd accused above named did commit rape on the under 16-year-old girl Arulanathan Piritha alias Arulanantham Piritha contravening the Section 364 (2) (e) as amended by the Amendment Act No. 22 of 1995 and thereby you have committed an offence punishable under Section 364 (2) of that Act.

Count 05: In the course of the transaction mentioned under charge one above on or about the 22nd of April 2015 at Addalaichchenai within the jurisdiction of this Court you the 2nd accused above named did commit rape on the under 16-year-old girl Arulanathan Piritha alias Arulanantham Piritha contravening the Section 364 (2) (e) as amended by the Amendment Act No. 22 of 1995 and thereby you have committed an offence punishable under Section 364 (2) of that Act.

After the trial, the learned High Court Judge convicted the accused-appellants in respect of all 5 counts and he imposed the following sentences.

The sentence against the 01st accused

The sentence for the 01st charge.

1. A sentence of 03 years of rigorous imprisonment is imposed.
2. A fine of Rs. 10,000/= is imposed.
3. In the event of default of the payment of the fine 06 months of simple imprisonment is imposed.

The sentence for the 03rd charge

1. A sentence of 15 years of rigorous imprisonment is imposed.
2. A fine of Rs. 20,000/= is imposed.
3. In default of payment of fine 06 months of simple imprisonment is imposed.
4. A sum of Rs. 200,000/= must be paid to the victim girl Arulanantham Piritha.
5. In default of the payment of the above-stated compensation, one year of simple imprisonment is imposed.

The sentence against the 02nd accused

Sentence for the charge 02

1. 03 years of rigorous imprisonment is imposed.
2. A fine of a sum of Rs. 10,000/= is imposed.
3. In default of the payment of the fine 06 months of simple imprisonment is imposed.

The sentence for charge 04.

1. Twelve (12) years of rigorous imprisonment is imposed.
2. A fine of Rs. 20,000/= is imposed.
3. In default of the payment of the fine 06 months of simple imprisonment is imposed.
4. Compensation of Rs. 200,000/= must be paid to the victim girl Arulanantham Piritha.
5. In default of the payment of the above compensation, 01 year of simple imprisonment is imposed.

The sentence for charge 05.

1. Twelve (12) years of rigorous imprisonment is imposed.
2. A fine of Rs. 20,000/= is imposed.
3. In default of the payment of the fine 06 months of simple imprisonment is imposed.
4. Compensation of Rs. 200,000/= must be paid to the victim girl Arulanantham Piritha.
5. In default of the payment of the above compensation, 01 year of simple imprisonment is imposed.

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

When this appeal was taken up for argument the learned counsel for the accused-appellants informed Court that her 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 01, 02, 03, 04 and 05 of the indictment based 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 lesser custodial sentence for the same offences.

The issue of statutorily provided mandatory sentences has already been decided by the Supreme Court in Supreme Court Reference No.03 of 2008 and the case of Attorney General Vs. Ambagala Mudiyansele 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-appellants before this Court in trying to obtain a lesser custodial sentence for the accused-appellant are tenable in law, though the learned High Court Judge had imposed the maximum sentences considering the circumstances of the crime.

The learned counsel for the respondent argued that there is no illegality in the sentence imposed on the accused-appellants and that the learned High Court Judge has imposed the maximum sentence prescribed by the statute on the accused-appellants. 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 1st accused-appellant was 24 years and the Prosecutrix was 16 years old at the time of the commission of the offences as such the accused-appellant being an adult was 8 years older than the Prosecutrix
- (b) The 2nd accused-appellant was 36 years and the Prosecutrix was 16 years old at the time of the commission of the offences as such the accused-appellant being an adult was 20 years older than the Prosecutrix.
- (c) The offence was repeated (three charges of Statutory Rape)
- (d) 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

The learned counsel for the respondent argued that the accused-appellant has exploited the immaturity of the Prosecutrix and caused her to engage in sexual activities with the accused-appellants. 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.

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 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;

It is important to draw 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-appellants by the High Court of Kalmunai.

The learned counsel for the appellants argued that the decision by the learned High Court Judge to impose long custodial sentences on the appellants was unreasonable and unjustifiable. The learned counsel for the accused-appellants further requests that the Court can impose a lesser custodial sentence for all counts based on statutory rape on the following grounds that make this case a fit and appropriate, to do so;

- (i) That the accused-appellants had no previous convictions.
- (ii) The 01st accused was 24 years of age by the time of this unfortunate incident and he is a married person with 2 children.
- (iii) The 02nd accused was 36 years of age by the time of this unfortunate incident and he is a married person with 3 children.
- (iv) That it was with the consent of the victim that both of them had engaged in sexual activities and not by force.
- (v) There is no evidence that the accused-appellants acted violently or used force to commit the offence.
- (vi) No bodily injuries were present on the Victim.

The learned counsel appearing for the accused-appellants further submits that she is seeking to convert the custodial sentence imposed on the accused-appellants on the count number 01 & 02 in terms of Section 354 of the Penal Code to a lesser custodial sentence.

The learned counsel for the accused-appellants 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.

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. 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-appellants should be given a long 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 16 years of age when the alleged act of kidnapping and rape occurred.

The appellants have no prior convictions.

We are of the view that the accused-appellants should be given a relief to go back to society and stay with their families after the punishment for their mistakes.

Thus, we do not set aside the sentence of 3 years of rigorous imprisonment in respect of counts 1 & 2.

We set aside the sentences imposed on counts 3, 4 & 5 and impose the following sentences in respect of counts 3, 4 & 5.

The sentence against the 01st accused;

The sentence for the 03rd charge

1. A sentence of 10 years of rigorous imprisonment is imposed.
2. A fine of Rs. 10,000/= is imposed.
3. In default of payment of fine 06 months of simple imprisonment is imposed.
4. A sum of Rs. 200,000/= must be paid to the victim girl Arulanantham Piritha.
5. In default of the payment of the above-stated compensation 10 months of simple imprisonment is imposed.

The sentence against the 02nd accused

The sentence for charge 04.

1. Twelve (10) years of rigorous imprisonment is imposed.
2. A fine of Rs. 10,000/= is imposed.
3. In default of the payment of the fine 06 months of simple imprisonment is imposed.
4. Compensation of Rs. 200,000/= must be paid to the victim girl Arulanantham Piritha.
5. In default of the payment of the above compensation, 10 months of simple imprisonment is imposed.

The sentence for charge 05.

1. Twelve (10) years of rigorous imprisonment is imposed.
2. A fine of Rs. 10,000/= is imposed.
3. In default of the payment of the fine 06 months of simple imprisonment is imposed.
4. Compensation Rs. 200,000/= must be paid to the victim girl Arulanantham Piritha.
5. In default of the payment of the above compensation, 10 months of simple imprisonment is imposed.

All sentences are backdated to the date of conviction namely, 29.11.2017.

We direct all sentences to run concurrently.

Appeal dismissed. The sentences are differed.

Judge of the Court Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal