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, read with Article138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 193/2018

High Court of Kuliyapitiya
Case No: HC 64/2017

Vs.

1) Jayasinghe Mudiyansalage Gamini Dayaratne

Accused

And Now Between

1) Jayasinghe Mudiyansalage Gamini Dayaratne

Accused-Appellant

Vs.

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Duminda de Alwis

For the Accused-Appellant

Anoopa de Silva, DSG

for the Respondent

ARGUED ON : 06/09/2022

DECIDED ON : 22/09/2022, along with HCC 175-18

R. Gurusinghe, J.

The accused-appellant was indicted in the High Court of Kuliyapitiya for having kissed/sucked the lips of a 15-year boy, an offence punishable in terms of Section 365 B (2) b of the Penal Code.

The Honorable Attorney General filed two indictments (CA HCC175/18, HC 65/2017and CA HCC193/18, HC 64/2017) against the appellant in the High Court of Kuliyapitiya for having committed the offences under Section 365 B (2) b. The appellant offered to plead guilty even before the trial. The appellant pleaded guilty to both indictments, and upon the plea, the appellant was convicted. In both cases, the appellant was sentenced to 15 years of Rigorous Imprisonment and a Rs. 25,000/- fine with a default term and further ordered

to pay Rs. 200,000/- as compensation to the victim. Cumulatively, a sentence of 30 years of Rigorous Imprisonment. We affirmed the conviction in HCC 175/18.

In both cases, the evidence-in-chief of the victim (PW1) was led and not cross-examined. As per the evidence, the relationship between the victim and the appellant was very cordial. There was no violence or threat and no physical injury was caused to the victim. The victim, although a 15-year-old boy, had not complained about the appellant to anybody, not even to his parents.

In his testimony, PW1 never said that the appellant had kissed or sucked his lips. The history given to the Judicial Medical Officer does not reveal such an incident. As the evidence of PW 1 is completed, the charge is not established by the evidence. On this testimony, the appellant could not have been convicted if the trial proceeded to a conclusion. However, I am mindful that once an accused pleads guilty to the charge, there is no necessity for a Trial Judge to go into the evidence. On the other hand, since both offences are arising from the same facts, the appellant would have been confused when pleading guilty; As a result he might have pleaded guilty only to one indictment that is; CA HCC175/18, HC 65/2017 and not to the other indictment CA HCC193/18, HC 64/2017.

I shall now consider whether this court can set aside a conviction entered upon a plea of guilty. I shall refer to the decision of the Supreme Court SC Appeal 32/2020 SC SPL LA No. 232/2017 Hattuwan Pedige Sugath Karunarathne v. Hon. Attorney General, decided on 20/10/2020, in this regard.

In that case, the accused-appellant was indicted before the High Court of Anuradhapura on six counts.

Count Nos. 1, 3 and 5 on the indictment were counts of kidnapping a girl under 16 years of age, whilst count Nos. 2, 4 and 6 were counts of Rape. According to the indictment, these offences had been committed within a time span of roughly three months. After the evidence of the victim, her mother and the Judicial Medical Officer was led, the accused appellant pleaded guilty. Upon the plea of guilty, the accused was convicted. In respect of the counts of kidnapping, under Section 354 of the Penal Code (Counts 1, 3 and 5) a sentence of 7 years rigorous imprisonment on each count (to run consecutively), a total of 21 years was imposed on the Accused. Seven years is the maximum sentence prescribed for the offence of kidnapping under Section 354 of the Penal Code. In respect of the counts of Rape, under Section 364(2) of the Penal Code (counts 2, 4 and 6) the Accused was imposed a sentence of 20 years rigorous imprisonment on each count (to run consecutively), amounting to a total of 60 years. The maximum term of imprisonment that is prescribed for the offence of Rape under Section 364(2) is also 20 years. Cumulatively, a sentence of 81 years rigorous imprisonment was imposed on the Accused. In addition, fines totaling to Rs.7500/= with a default sentence of 1-year simple imprisonment and compensation in a sum of Rs.150, 000/= payable to the victim with a default sentence of 3 years simple imprisonment were imposed on the Accused.

The Supreme Court found that only one kidnapping charge and one rape charge were established by the evidence. The Supreme Court observed as follows in para 46 of the Judgment.

In the circumstances, the learned High Court judge, the State Counsel as well as assigned counsel, undoubtedly, were fully aware of the evidence that was before the court to substantiate the charges and furthermore, what exactly had taken place between the Accused and SK on the three distinct occasions referred to in the indictment.

The Supreme Court further held as follows.

63. It would be a travesty of justice to allow the conviction on the two counts of Rape and two counts of Kidnapping which had not been established, to remain. No reasonable court, by any stretch of imagination could have convicted the Accused of those offences had the trial proceeded to a conclusion.

65. I am reminded of the words of his Lordship Justice Soza in the case of Somawathie v. Madawela (1983) 2 SLR 15, at page 31; "If as a result of such persistent and blatant disregard for the provisions of the law a miscarriage of justice results as here, then this Court will not sit idly by. Indeed, the facts of this case cry aloud for the intervention of this Court to prevent what otherwise would be a miscarriage of justice."

67. As pithily stated in Jennison v. Backer (1972 (1) All E.R. 1006), "The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope."

The Supreme Court exercising its powers vested in court by Articles 127 and 128 of the Constitution, quashed the conviction and sentence imposed on counts 1, 2, 3, and 4 and affirmed the conviction on counts 5 and 6. The 81-year prison term was reduced to 14 years.

The provisions of law, especially in terms of Article 138 and Article 145, is wide enough for this court to intervene to prevent what otherwise would be a serious miscarriage of justice.

The provisions of Articles 138 and 145 of the Constitution are as follows.

138. (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all

errors in fact or in law which shall be 111[committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things 112[of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance: (proviso is omitted.)

145. The Court of Appeal may, ex mero motu or on any application made, call for, inspect and examine any record of any Court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require.

In the case of Mariam Beebee v Seyed Mohamed 68NLR 36, Sansoni, C.J held as follows;

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result."

Article 145 of the Constitution gives revisionary powers to this court to act its own motion to make any order as the interests of justice may require. Though this is not a revision application as there exist exceptional circumstances for this court to use its revisionary powers to avert injustice.

When the evidence clearly negates the charge, even though the appellant had pleaded guilty, this court cannot allow standing the conviction and16 years jail

term. In the circumstances, acting in revision, I set aside the conviction and the sentence imposed on the appellant which has resulted in a serious miscarriage of justice. The appellant is acquitted.

The Appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal