

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

In the matter of an appeal in terms of Section 331 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.

**CA No: CA/HCC/ 0333/2018**

**HC: Kandy: HC 221/2017**

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

**Complainant**

**Vs.**

Hettige Rasike Chulankumara  
Jayawardena (Raale Mama)

**Accused**

**And now between**

Hettige Rasike Chulankumara  
Jayawardena (Raale Mama)

**Accused- Appellants**

**Vs.**

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

**Complainant-Respondent**

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

**&**

**R. Gurusinghe J.**

**Counsel:** K. Kugaraja, AAL for the Accused-Appellant

Azard Navavi, DSG for the Complainant-Respondent

**Written Submissions:** By the Accused-Appellant – 06.08.2019

By the Complainant-Respondent – Not filed

**Argued on** : 14.10.2022

**Decided on** : 31.10.2022

**N. Bandula Karunarathna J.**

This appeal is preferred against the Judgement, delivered by the learned Judge of the High Court of Kandy, dated 19.09.2018, by which, the accused-appellant, was convicted and sentenced to 12 years rigorous imprisonment and Rupees Twenty Thousand fine in default 06 months simple imprisonment and Rupees Five Hundred Thousand compensation in default 24 months simple imprisonment.

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

**Count 01:** that on or about 24.06.2012 at Udasgiriya in Matale within the jurisdiction of Kandy High Court, you the above-named accused did commit rape on under 16-year-old girl Madiththa Kumbure Gedara Ishara Sewwandi Samaranayaka 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-appellant and he imposed the following sentences.

1. A sentence of 12 years of rigorous imprisonment was imposed.
2. A fine of Rs. 20,000/= was imposed.
3. In the event of default of the payment of the fine 06 months of simple imprisonment was imposed.
4. A sum of Rs. 500,000/= must be paid to the victim girl Madiththa Kumbure Gedara Ishara Sewwandi Samaranayaka.
5. In default of the payment of the above-stated compensation, 24 months of simple imprisonment was imposed.

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 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 Mudiyanseleage 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 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 12 years rigorous imprisonment 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-appellant and that the learned High Court Judge has not imposed an excessive sentence prescribed by the statute on the accused-appellant. 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-appellant was 49 years and the Prosecutrix was 07 years old at the time of the commission of the offences as such the accused-appellant being an adult was 42 years older than the Prosecutrix.
- (b) 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-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.

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 7 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 16 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 the 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.

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

- (i) That the accused-appellant had no previous convictions.
- (ii) The accused was 49 years of age by the time of this unfortunate incident and he is a married person with 3 children.
- (iii) There is no evidence that the accused-appellant acted violently or used force to commit the offence.
- (iv) No bodily injuries were present on the Victim.
- (v) No vaginal penetration.

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.

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-appellant should be given a very 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 is 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 this case was 7 years of age when the alleged act of rape occurred.

The appellant has no prior convictions.

We are of the view that the accused-appellant should be given relief to go back to society and stay with their family after the punishment for his mistake.

We set aside the sentence of 12 years of rigorous imprisonment.

The sentence is altered as follows;

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 the fine 04 months of simple imprisonment is imposed.
4. A sum of Rs. 500,000/= 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 is backdated to the date of conviction namely, 19.09.2018.

Appeal dismissed.

The sentence is altered.

**Judge of the Court of Appeal**

**R. Gurusinghe J.**

**I agree.**

**Judge of the Court of Appeal**