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 Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0022/18

High Court of Kuliyapitiya

Case No: HC/164/2012

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Meragal Pedilage Saman Kumara
2. Meragal Pedilage Sanjeewa Pushpa Kumara *alias* Kirala
3. Karuna Pedige Wijaya Kumarasinghe *alias* Samange Bappa
4. Rankoth Pedige Dinesh Madhushanka *alias* Pengutta

ACCUSED

AND NOW BETWEEN

The Attorney General,

Attorney General's Department,

Colombo 12

COMPLAINANT-APPELLANT

Vs.

1. Meragal Pedilage Saman Kumara
2. Meragal Pedilage Sanjeewa Pushpa Kumara *alias* Kirala
3. Karuna Pedige Wijaya Kumarasinghe *alias* Samange Bappa
4. Rankoth Pedige Dinesh Madhushanka *alias* Pengutta

ACCUSED-RESPONDENTS

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Haripriya Jayasundare, ASG, P.C. with Maheshika Silva, DSG for the Hon. Attorney General

: Naveen Maha Arachchige for the Accused-Respondent

Argued on : 14-02-2023

Written Submissions : 27-09-2022 (By the Accused-Respondent)

: 28-07-2022 (By the Complainant-Appellant)

Decided on : 28-03-2023

Sampath B. Abayakoon, J.

This is an appeal by the Hon. Attorney General on being aggrieved by the sentence imposed on the accused respondents by the learned High Court Judge of Kuliyapitiya.

The accused respondents (hereinafter referred to as the accused) were indicted before the High Court of Kuliyapitiya by the Attorney General on the following counts.

(1) That on 01st January 2011 in a place called Kahawala, Bingiriya, the 1st accused being a member of a gang with the 2nd, 3rd, and the 4th accused, committed the gang rape of the female mentioned in the charge and thereby committed an offence punishable in terms of section 364(2) read with section 364(2)(g) of the Penal Code as amended by Penal Code (Amendment) Act No- 22 of 1995.

(2) At the same time and at the same transaction, the 2nd accused being a member of the earlier mentioned gang, aided and abated the 1st accused to commit the offence of gang rape of the earlier mentioned female, and thereby committed an offence punishable in terms of section 364(2) read with section 364(2)(g) of the Penal Code as amended by Penal Code (Amendment) Act No- 22 of 1995.

(3) At the same time and at the same transaction, the 3rd accused being a member of the earlier mentioned gang, aided and abated the 1st accused to commit the offence of gang rape of the earlier mentioned female, and thereby committed an offence punishable in terms of the section 364(2) read with section 364(2)(g) of the Penal Code as amended by Penal Code (Amendment) Act No- 22 of 1995.

(4) At the same time and at the Same transaction the 4th accused being a member of the earlier mentioned gang, aided and abated the 1st accused to commit the offence of gang rape of the earlier mentioned female, and thereby committed an offence punishable in terms of the section 364(2) read with section 364(2)(g) of the Penal Code as amended by Penal Code (Amendment) Act No- 22 of 1995.

(5) At the same time and at the same transaction, the 3rd accused being a member of the gang with the 2nd accused, committed the gang rape of the female mentioned in the charge and thereby committed an offence punishable in terms of section 364(2) read with section 364(2)(g) of the Penal Code as amended by Penal Code (Amendment) Act No- 22 of 1995.

(6) At the same time and at the same transaction, the 2nd accused being a member of the earlier mentioned gang, aided and abated the 3rd accused to commit the offence of gang rape of the earlier mentioned female, and thereby committed an offence punishable in terms of section 364(2) read with section 364(2)(g) of the Penal Code as amended by Penal Code (Amendment) Act No- 22 of 1995.

After trial, the learned High Court Judge of Kuliyapitiya of his judgment dated 22nd March 2018 found the 1st accused guilty for the 1st count preferred against him. The 2nd accused was convicted for the 2nd and the 6th counts preferred against him. The 3rd accused was convicted for the 3rd and the 5th counts preferred, while the 4th accused was convicted for the 4th count.

Accordingly, they were sentenced in the following manner;

- The 1st accused- five-year rigorous imprisonment. In addition, he was ordered to pay compensation in a sum of rupees 50000/- to the victim. In default, two-year simple imprisonment.

- The 2nd accused- for the 6th count, five-year imprisonment. In addition, he was ordered to pay compensation in a sum of rupees 50000/- to the victim. In default, two-year simple imprisonment. It has been stated that, since he has been sufficiently punished for the 6th count, he would not be sentenced for the 2nd count.

- The 3rd accused- for the 5th count, five-year imprisonment. In addition, he was ordered to pay compensation in a sum of rupees 50000/- to the victim. In default, two-year simple imprisonment. It has been stated that, since he has been sufficiently punished for the 6th count, he would not be sentenced for the 6th count. *(It appears that this should stand corrected the 3rd count)*

- The 4th accused- for the 4th count four-year imprisonment. In addition, he was ordered to pay compensation in a sum of rupees 50000/- to the victim. In default, two-year imprisonment.

Being aggrieved by the conviction and the sentence, the accused filed four separate appeals on 2nd April 2018, the numbers being, HCC-0018-18, HCC-0019-18, HCC-0020-18 and HCC-0021-18. The Attorney General filed the appeal under consideration, challenging only the sentence imposed by the learned High Court Judge.

When this matter was mentioned before this Court on 25-02-2022, the four accused-appellants moved to withdraw their respective appeals, and accordingly, their respective appeals were dismissed. However, having considered the fact that they have been in incarceration since their date of the conviction and the sentence, it was ordered that the sentence deemed to have commenced from their date of the sentence, namely, 22nd March 2018.

The appeal by the Attorney General was on the basis that the learned High Court Judge was misdirected as to the relevant law, when he deviated from the

minimum mandatory sentence that shall be imposed on a person found guilty for a charge of gang rape. It was on the basis that the relevant illegal sentencing order should stand corrected by this Court, the appeal has been preferred.

At the hearing of the appeal, this Court had the privilege of listening to the submissions of the learned Additional Solicitor General, as well as the learned Counsel for the four accused, and also had the opportunity of scrutinizing the written submissions tendered by the parties in determining the appeal.

The penal provision of section 364(2) under which the accused were indicted and found guilty reads as follows.

> **364(2) ... shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall in addition be ordered to pay compensation of an amount determined by 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 under sixteen years of age, the Court may, Where the 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.**

The plain reading of the section makes it clear that the intention of the legislature by enacting Penal Code (Amendment) Act No-22 of 1995 had been to impose a minimum mandatory sentence for anyone found guilty for offences as described in section 364(1), 364(2) and 364(3) of the Penal Code. The only exception being the proviso to section 364(2) where the legislature in its wisdom has provided that a lesser punishment than the minimum mandatory punishment may be imposed, if the alleged victim is under sixteen years of age

and the offender is under eighteen years of age and the intercourse has been consensual.

As the submissions of the learned Counsel for the accused was on the basis that the learned High Court Judge was correct when it was decided to impose a sentence less than the minimum mandatory sentence stipulated, I find it necessary to draw my attention to the provisions as to the interpretation of statutes by the Courts of law in dispensing justice.

N S Bindra, in his book Interpretation of Statutes, 12th Edition, Chapter 1, under the heading- Law Making Roles of the Legislature and the Judiciary, at page 09 states as follows;

> *"The most fair and rational method of interpreting a statute is by exploring the intention of the legislature through the most natural and probable signs which are either words, the context, the subject matter, the effects and consequences, or the sprit and reason of the law.in the court of law what the legislature intended to be done or not to be done can only be legitimately ascertain from that what it has chosen to enact, either in express words or by the reasonable and necessary implication. But the whole of what is enacted 'by necessary implication' can hardly be determined without keeping in mind the purpose or object of the statute. A bare mechanical interpretation of the words and the application of the legislative intent devoid of concept or purpose will reduce most of the remedial and beneficial legislation to futility. The courts, however, are not entitled to usurp legislative function under the disguise of interpretation and they must avoid the danger of determination of the meaning of a provision based on their own preconceived notion of ideological structure or scheme into which the provision to be interpreted is somehow fitted.*
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> *Therefore, the meaning of the statute is primarily to be sought in the words used in the statute itself which must, if they are plain and unambiguous,*

be applied as they stand. Where the words of a statute do not form a clear guide to the real meaning, it may be necessary to get an exact conception of the aim, scope and object of the whole Act."

When it comes to the relevant sections of the Penal Code as amended by Penal Code Amendment Act No 22 of 1995, the language used in the statute is plain and unambiguous.

As pointed out correctly by the learned ASG, the intention of the legislature in bringing the relevant amendments to the Penal Code, has been to enhance the punishment meted out to those who are found guilty for such crimes in order to send a strong message out that offences of rape and other sexual abuse would not be tolerated under any circumstances.

I find that the intention of the legislature had been made clear when the legislature by its wisdom brought in a proviso to section 364(2) of the Penal Code in relation to the offences of rape as described in the said section, where it has been provided for a lesser sentence than the minimum mandatory sentence stipulated. In my view, the legislature has clearly considered the suitability of imposing a minimum mandatory sentence in relation to the age of the alleged victim and the age of the accused if the sex has been consensual, given the facts and the circumstances of each case.

However, I am very much mindful of the views expressed by their lordships of the Supreme Court in **S.C. Reference No-03/2008, decided on 15-10-2008**, and in the case of **Marmba Liyanage Rohana alias Loku Vs. The Attorney General S.C. Appeal No- 89A/2009 decided on 12-05-2011,** which are binding decisions on this Court.

It was held that the minimum mandatory sentence as stipulated in section 364(2)(e) is in conflict with Articles 4(c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that deems

appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence. It was held that the trial judges should consider the facts and the circumstances of each case and determine the appropriateness of the sentence.

With the above in mind, I will now proceed to consider the sentences imposed by the learned High Court Judge after the accused were found guilty for the offence of gang rape.

The sentencing order of the learned High Court Judge reads as follows;

> "සියලු පාර්ශවයන් වෙනුවෙන් ඉදිරිපත් සියලු කරුණු මම සලකා බලමි. මෙහිදී එක සිට හතර දක්වා කිසිදු අයෙකුට පෙර වැරදි ඇති බවට මා වෙත වාර්තා වී නොමැත. එයද ඉදිරිපත් සෙසු කරුණුද මාගේ අවධානයට ලක් කරමින් පලවෙනි චූදිතට පලවෙනි චෝදනාවට අවුරුදු පහක බරපතල වැඩ ඇතිව සිර දඬුවම් නියම කරමි. ඊට අමතරව..."

It is clear from the above order that the only consideration had been the fact that the accused had no previous convictions. Although it has been stated that the learned High Court Judge has taken other factors into account without specifying, I find that if the facts of the case were considered in its correct perspective, there could have been no basis for the learned trial judge to deviate from the minimum mandatory sentence.

It is abundantly clear from the evidence adduced at the trial Court that the four accused have ganged up together, taking the advantage of the vulnerable position of the prosecutrix and had subjected her to gang rape. I do not find any mitigatory circumstances in the way the accused have committed the crime. Although the victim had been a married woman with children, the evidence of the Judicial Medical Officer has provided clear evidence as to the injuries she has suffered. The JMO has expressed the opinion that she has been subjected to rape, given the gruesome nature of the injuries he has observed on the body of the victim.

In the case of **Dhananjay Chatterjee Alias Dhana Vs. State of West Bengal (1994) 2 SCC 220**, the Indian Supreme Court held;

> *"In our opinion the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against criminals.*
>
> *Justice demands that Courts should impose punishment fitting to the crime so that the Courts reflect public abhorrence of the crime. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large, while considering the imposition of appropriate punishment."*

In the sentence under consideration in this appeal, although the prosecuting State Counsel has brought to the notice of the learned High Court Judge, the minimum mandatory sentence that needs to be imposed on the accused, I do not find reasons to believe that requirement has drawn the attention of the learned High Court Judge. If the learned High Court Judge took guidance from the determinations by their Lordships of the Supreme Court in **S.C. Reference No-03/2008 (supra)**, and other relevant decisions, the learned High Court Judge should give clear and acceptable reasons as to why he is disregarding the minimum mandatory sentence.

It is the view of this Court that even if the learned High Court Judge decided to use his judicial discretion, still there would have been no basis for the learned High Court Judge to deviate from the minimum mandatory sentence given the heinous nature of the crime committed by the accused. Hence, I find no basis to agree with the submissions of the learned Counsel for the accused that this is a fit and proper case to exercise judicial discretion and move away from the minimum mandatory sentence.

For the reasons stated as above, I hold that the sentence imposed by the learned High Court Judge on the accused was illegal and cannot be allowed to stand. I hold that there was no basis for the learned High Court Judge to hold that since the second and the third accused had been sufficiently punished for two of the counts, he is not going to sentence them for the other two counts for which they were found guilty.

I am of the view that the learned trial Judge should have considered the fact that he is sentencing the accused after a full trial. I find no basis for the learned High Court judge to decide that no punishment would be imposed on the other counts for which the 2nd and the 3rd accused were found guilty, because they were punished sufficiently for one count.

Accordingly, I set aside the sentence imposed on the accused, as it cannot be allowed to stand, and sentence them as follows.

- The 1st accused – for the 1st count – 12 years rigorous imprisonment. In addition, to a fine of Rs. 25000/-. In default, he shall serve a period of 01-year simple imprisonment. The 1st accused is ordered to pay compensation in a sum of Rs. 50000/- to the victim PW-01 and in default, he shall serve a 02-year period of simple imprisonment.

- The 2nd accused – for the 2nd count – 10 years rigorous imprisonment. In addition, to a fine of Rs. 25000/-. In default, he shall serve a period of 01-year simple imprisonment. The 2nd accused is ordered to pay compensation in a sum of Rs. 50000/- to the victim PW-01, and in default, he shall serve a 02-year period of simple imprisonment.

- The 2nd accused – for the 6th count – 10 years rigorous imprisonment. In addition, to a fine of Rs. 25000/-. In default, he shall serve a period of 01-year simple imprisonment.

- The 3rd accused – for the 3rd count – 10 years rigorous imprisonment. In addition, to a fine of Rs. 25000/-. In default, he shall serve a period of 01-year simple imprisonment.

- The 3rd accused – for the 5th count – 12 years rigorous imprisonment. In addition, to a fine of Rs. 25000/-. In default, he shall serve a period of 01-year simple imprisonment. The 3rd accused is ordered to pay compensation in a sum of Rs. 50000/- to the victim PW-01, and in default, he shall serve a 02-year period of simple imprisonment.

- The 4th accused – for the 4th count - 10 years rigorous imprisonment. In addition, to a fine of Rs. 25000/-. In default, he shall serve a period of 01-year simple imprisonment. The 4th accused is ordered to pay compensation in a sum of Rs. 50000/- to the victim PW-01, and in default, he shall serve a 02-year period of simple imprisonment.

It is ordered that the sentences ordered on the 2nd and 3rd accused shall run concurrently to each other.

The accused were originally sentenced on 22nd March 2018 by the learned High Court Judge. The fact that they have been in incarceration until they withdrew the appeals filed by them challenging their conviction on 25-02-2022, would necessarily be required to be taken into consideration in imposing the above sentence on them.

Therefore, it is ordered that they shall be entitled to get the period they have been incarcerated until they were released upon their withdrawal of the appeals as part of their sentence now ordered against them.

It is directed that the learned High Court Judge should give necessary directions in that regard when the committals are issued.

Since it appears that the accused have paid the compensation previously ordered, if they have done so, it is directed that it shall deem that the accused have paid the compensation ordered against them.

The appeal by the Hon. Attorney General is allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal