

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

In the matter of an Appeal under Section 154(P) of the Constitution read with Section 331 of the Criminal Procedure Act No. 15 of 1979.

**CA No: CA/HCC/ 0183/20**  
**HC: Kalutara: HC/504/05**

The Democratic Socialist Republic of Sri Lanka,

**Complainant**

**Vs.**

1. Kalugala Vithanage Wasantha Kumara
2. Hettiarachchige Sanjeewa Hettiarachchi alias Jamba
3. Don Danushka Hewa Vitharana alias Pola

**Accused**

**And now between**

Don Danushka Hewa Vitharana alias Pola

**Accused- Appellant**

**Vs.**

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

**Complainant-Respondent**

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

**&**

**R. Gurusinghe J.**

**Counsel:** Neranjan Jayasinghe, AAL for the Accused-Appellant

Rohantha Abeysuriya, ASG for the Complainant-Respondent

**Written Submissions:** By the Accused-Appellant on 11.11.2021

By the Complainant-Respondent – Not Filed

**Argued on :** 10.01.2023

**Decided on :** **19.01.2023.**

**N. Bandula Karunarathna J.**

This appeal is preferred against the Judgement, delivered by the learned Judge of the High Court of Kalutara, dated 23.07.2020, by which, the accused-appellant, was convicted and sentenced to 18 years rigorous imprisonment and imposed a fine of Rupees Ten Thousand with a default term of 06 months Simple Imprisonment and Rupees Two Hundred and Fifty Thousand compensation with a default term of 12 months Simple Imprisonment.

The 3<sup>rd</sup> accused-appellant, hereinafter referred to as the "appellant", was indicted with two others in the High Court of Kalutara on the following charge;

**Count 04:** that on or about 15.01.2003 at Mathugama within the jurisdiction of Kalutara High Court, the above-named accused did commit rape on an under aged 16-year-old girl Gamaathige Ruwandika Shamanee 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.

The 1<sup>st</sup> accused person married PW 1 Gamaathige Ruwandika Shamanee who was the prosecutrix and thereafter he was discharged by the learned High Court Judge, considering a probation report on the 25.11.2008.

The 2<sup>nd</sup> accused person was absconding right throughout and the trial proceeded against him under section 241 of the Criminal Procedure Code.

The 3<sup>rd</sup> accused person who is the appellant in this matter was convicted after the trial and this appeal preferred against the said conviction and the sentence.

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 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 is tenable in law, though the learned High Court Judge had imposed 18 years rigorous imprisonment considering the circumstances of the crime.

The learned President's 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 17 years and the prosecutrix was 15 years old at the time of the commission of the offence as such the accused-appellant being a teenager was 2 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.

Learned Additional Solicitor General who appeared on behalf of the Attorney General indicated that he has no objection for a concession being given to the appellant as long as the custodial sentence is not less than the mandatory sentence which is 10 years rigorous imprisonment.

The issue of statutorily provided mandatory sentences has already been decided by the Supreme Court in Supreme Court Reference No.03 of 2008 and in the case of Attorney General Vs. Ambagala Mudiyansele Samantha, Supreme Court Reference 17 of 2013, where it has been held that a statutory mandatory sentence would not prevent a court from exercising its discretion in an appropriate case.

The learned counsel for the respondent further 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 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 attended 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 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 President's 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 fit and appropriate, to do so;

- (i) That the accused-appellant had no previous convictions.
- (ii) The accused was 17 years of age by the time of this unfortunate incident and now 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.

The learned counsel for the accused-appellant further says that this case is fit to exercise the 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 decision 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 15 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 the society and stay with his family after the punishment for his mistake.

We set aside the sentence of 18 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 6 months of simple imprisonment is imposed.
4. A sum of Rs. 250,000/= must be paid to the victim girl Gamaathige Ruwandika Shamanee.
5. In default of the payment of the above-stated compensation, 12 months of simple imprisonment is imposed.

The sentence is backdated to the date of conviction namely, 23.07.2020.

Appeal dismissed.

The custodial sentence is differed.

**Judge of the Court of Appeal**

**R. Gurusinghe J.**

**I agree.**

**Judge of the Court of Appeal**