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

In the matter of an Appeal made under 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 Case No.
CA/HCC/ 0070/2022
High Court of Mannar
Case No. HC/07/2020

Warnakulasooriya Jude Kumara alias

Antony Marcus Jude Kumar

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL	:	**Ershan Ariaratnam for the Appellant.** **Nishanth Nagaratnam, SC for the Respondent.**
ARGUED ON	:	**09/03/2023**
DECIDED ON	:	**02/05/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General for committing an offence under Section 354 and 365B (2) (b) (Three Counts) of the Penal Code that is, Kidnapping from lawful guardianship and Grave Sexual Abuse respectively, on Galkissage Lakmal alias Galkissage Vijitha Lakmal between the period of 01.04.2003 and 01.02.2004.

The trial commenced on 08/12/2020. After leading all necessary witnesses the prosecution had closed the case. The Learned High Court Judge had called for the defence and the Appellant had made a dock statement and closed the defence case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant only for the 4th count under Section 365B (2)(b) and sentenced the Appellant to 07 years rigorous imprisonment and imposed a fine of Rs.15000/- subject to a default sentence of 02 months simple imprisonment. No compensation is ordered.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he has been connected via Zoom platform from prison.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. The Learned Trial Judge has failed to consider the test of probability and improbability of the testimony of PW1 in convicting the Appellant.
2. The Appellant was under 18 years old at the time of committing the offence.

Before commencement of the argument, as a preliminary issue, the Learned Counsel for the Appellant informed this court that as the Appellant and PW1 were children when the incident had taken place, urges the indulgence of this court to consider applying the principles laid down in the Supreme Court determination **No. 03 of 2008** decided on 15.08.2008.

The exclusive reason for the above preliminary application is that the Appellant was 16 years of age when he committed the offence and now, he is married and is a father of three children aged 16 years and 02 years(twins).

The Learned State Counsel having considered the submissions made by the counsel for the Appellant, informed the court that given the facts and the circumstances that led to the conviction and other incidental matters, if the court decides to apply the relevant principle due to the uniqueness of this case and only in relation to the facts of this case, he would not be standing

in the way as sentencing is a matter that which entirely vests with the court.

<u>The Facts of this case *albeit* briefly are as follows.</u>

The victim was 12 years old and was schooling at the time of the incident. He cannot remember the exact date or the time of the incident. The Appellant was a neighbour and always inviting the victim to go to play. The alleged incident was taken place in a hut in the seashore. The Appellant had indulged with anal sex with the victim inside the hut. After the act when he was coming out of the hut, the victim was seen by his brother who informed this her mother immediately. Thereafter a complaint was lodged in the police. According to the victim, he had been abused by the Appellant for a longer period.

The doctor who had examined the victim made no reference regarding the examination of the anal of the Appellant. Instead, he had remarked that the victim's hymen is intact whereas the victim is a male.

The Appellant had made a dock statement when the defence was called by the Learned High Court Judge. In the closing submission on behalf of the Appellant it was brought to the notice of the Learned High Court Judge that the Appellant was only 16 years of age when he allegedly has committed the offence.

Now the Appellant seeks the courts indulgence only to reconsider his jail sentence on the application of the Supreme Court determination given in **No. 03/2008** decided on 15/08/2008.

In the SC Reference, the High Court of Anuradhapura by its communication dated 14/05/2008, made a reference to the Supreme Court in terms of Article 125(1) of the Constitution of Sri Lanka. In that reference, the Learned High Court Judge of Anuradhapura had queried whether

Section 364(2) of the Penal Code as amended by the Penal Code (Amendment) Act No.22 of 1995, had removed the judicial discretion when sentencing an accused convicted of an offence in terms of that section.

In the said reference Justice P. A. Ratnayake held that:

> *"the minimum mandatory sentence in Section 364(2)(e) is in conflict with Article 4(c), 11, and 12(1) of the Constitution."*
>
> *"Article 80(3) (of the Constitution) only applies where the validity of an Act is called into question. However, Article 80(3) does not prevent a court from exercising its most traditional function of interpreting laws. Interpretation of laws will often require a court to determine the applicable law in the event of a conflict between two laws. This is a function that has been exercised by this court from time immemorial."*
>
> *In the event of a conflict between an ordinary law and the Constitution, the constitutional provisions must prevail over an ordinary law."*
>
> *"The minimum mandatory sentence in Section 364(2)(e) of the Penal Code is in conflict with Article 4(e),11 and 12 of the Constitution and the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence."*

In this case the Appellant was charged under section 365 B (2) (b) of the Penal Code as amended. The Section 365B (1) reads as:

> "Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any instrument on any orifice or part of the body of any other person, being an act, which does not amount to

> rape under section 363, in circumstances falling under any of the following descriptions, that is to say-….”

(2) (b) of the Section states:

> “Commits grave sexual abuse on any person under eighteen years of age shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine and shall also 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.”

In this case the Appellant was sentenced to 7 years rigorous imprisonment with a fine as stated above. According to the Counsel for the Appellant the Appellant was 16 years old when he had committed the offence.

On perusal of the court record the Appellant was 16 years old when he allegedly committed the offence. When he faced the trial, he was 32 years, married and blessed with three children aged 16 years and 02 years (Twins). Considering the age of the Appellant and the victim, the incident pertaining to this case has happened between children.

Under Section 364(2) of the Penal Code as amended there is a proviso to deal with the offence of rape committed by a child under the age of 18 years on a child under the age of 16 years with consent. On that occasion the court can pass a sentence of imprisonment on the offender of up to 10 years. No minimum mandatory sentence has been prescribed under the said proviso.

But, when the offender is a person under 18 years of age and the sexual act has taken place with or without the consent of the other party who is also a child, the court has no discretion to impose a sentence of imprisonment for a term less than seven years for the Grave Sexual Abuse charge.

Hence, the Appellant pleads to this court to re-consider his sentence as he was only a 16-year-old child when he committed the offence.

When considering this plea/submission, it is important to recall the principle recognised by our court system that the court is the upper guardian of a child.

In **Dharma Sri Tissa Kumara Wijenaike v. Attorney General SC Appeal 179/2012** decided on 18/11/2013 Justice Tilakawardena held that:

> *"the decision appears to be based on the reality that the Court is the upper guardian of a child".*

Article 3(1) of the Convention on the Rights of the Child (CRC) states:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

According to the above-mentioned CRC provision, the primary consideration in the implementation of legislation aimed at protecting children should be the best interest of the children. For the purpose of the Convention, a child is defined as a person who has not reached the age of eighteen years.

Hence, it is very clear that when imposing a custodial sentence on a child, preferably with a minimum mandatory sentence, the court being the upper guardian of the child, should have considered an appropriate sentence only after evaluating all the evidence presented by both parties to the case.

In **Dharma Sri Tissa Kumara Wijenaike v. The Attorney General** (supra) the court further held that:

> *"In such cases, it would be incumbent upon the judge to set out, with clarity, all the reasons which are relevant and salient for not imposing the mandatory statutory minimum period of 7 years or in the case of a person under 18 years, a mandatory period of 10 years, and the court would have the power to do so as only where the accused is under 16 years of age, as the court in its capacity of the upper guardian of each and every child has the inherent power to consider such matters and reduce the statutorily mandated minimum sentence."*

Jayant Patel, J. in the case of **Jusabbhai Ayubbhai v. State of Gujarat** CR.MA/623/2012 stated that:

> *"…..It is by now recognized principles that justice to one party should not result into injustice to the other side and it will be for the Court to balance the right of both the sides and to up hold the law."*

In this case there is no doubt that the Appellant had committed a very serious offence punishable under the law. But one cannot forget the fact that he was also a child who was entitled to the protection by the law at the time he committed the crime. In the present circumstances he is married and has three children. To be a good parent, he needs guidance and supervision, reformation, and rehabilitation rather than punishment and branding as a criminal.

Considering the facts of the case and the submissions made by both counsel I conclude that this is not an appropriate case to order a mandatory sentence against the Appellant.

I, therefore, with the guidance of the judgment given in SC Reference **No.3 of 2008**, set aside the sentence of seven years rigorous imprisonment imposed on the Appellant by the Learned High Court Judge of Mannar and substitute a sentence of two years rigorous imprisonment operative from the date of the conviction of the High Court of Mannar which is on 05/04/2022.

The Registrar of this Court is directed to send a copy of this judgement to the High Court of Mannar along with the original case record.

Subject to above variation, the appeal is partly allowed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL