IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No: **CA / HCC / 241 / 20**

High Court of Vauniya Case No: **HCV/2937/19**

Hon. Attorney General,

Attorney General's Department

Colombo 12.

Complainant

Vs.

Sangarapillai Sangarganesh

Accused

AND NOW BETWEEN

Sangarapillai Sangarganesh

Accused – Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant – Respondent

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Samantha Premachandra – Assigned Counsel for the Accused –

Appellant.

A.Navavi, DSG for the State.

Argued on: 22.03.2023

Decided on: 10.05.2023

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgement dated 11.11.2020 of the High Court of Vavuniya. The appellant had been indicted for kidnapping an underage girl and for committing rape on her on 1.1.2017.

The appellant had pleaded not guilty and upon the conclusion of the trial the trial judge had convicted the appellant for both charges.

When the matter was taken up for argument the Counsel appearing for the appellant submitted that he is only canvassing the sentence imposed by the trial judge. The learned Counsel for the respondents did not object to the application but both parties made their submissions.

The Counsel for the appellant referred to case no 261-2020 and said that the appellant had been indicted for the same offence more than once. But the learned Counsel for the respondents submitted that the offences set out had been taking place repetitively and as such the charges has been framed so, but

he also drew the attention of Court that although the appellant has pleaded that there was a love affair between the two that the appellant is twice the age of the victim.

Having considered the submissions of both parties the trial judge had sentenced the appellant for,

1) for the first count 2 years rigorous imprisonment with a fine of Rs 3000/ in default one month imprisonment,

2) for the second count 10 years rigorous imprisonment , with a fine of Rs 5000/ in default 12 months imprisonment, and sentences to run consecutively.

This Court observes that for the second charge the learned trial judge had imposed the minimum sentence but taking in to account the legal principle laid down in the case of **Maramba Liyanage Rohana alias Loku vs AG SC Appeal No 89A-2009 decided on 12.5.2011by Amaratunga J** it has been held with regard to the minimum sentence being stipulated by the legislature for the offence the appellant has been sentenced 10 years RI that

"In terms of Section 363 of the Penal Code, as amended by Penal Code (Amendment) Act No.22 of 1995 sexual intercourse with a woman under sixteen years of age is rape irrespective of the consent of the women.

Accordingly, the learned trial Judge, by his judgement dated 31.10.2006 quite rightly held that the accused was guilty of the offence punishable under Section 364 (2) (e) of the Penal Code and sentenced him to ten years rigorous imprisonment, the mandatory minimum period of imprisonment prescribed by law, and a fine of Rs.2500/- with a default term of imprisonment for one year. There was no finding on the charge of abduction.

The accused appealed to the Court of Appeal against the conviction and sentence. Whilst this appeal was pending a Judge of the High Court in the course of the proceeding in a case where the accused in that case was charged under section 364 (2) (e) of the Penal Code, (identical offence with which the accused was charged) submitted a reference to this Court in terms of Article 125 (1) of the Constitution. In that reference the learned High Court Judge has posed the question whether Section 364 (2) of the Penal Code as amended by Penal Code (amendment) Act No.22 of 1995 has removed the judicial discretion when sentencing an accused convicted for an offence punishable under section 364 (2) (e) of the Penal Code.

This reference was taken up for determination before a Bench of three Judges of this Court on 29.07.2008 with notice to the Attorney General and after considering the submissions of the learned Senior State Counsel who appeared as amicus curiae on behalf of the Attorney General, this Court pronounced its determination on 15.8.2008 on the question submitted to it. SC Reference 3/2008,H.C. Anuradhapura Case No.333/2004, SCM 15.10.2008, (reported in 2008 BLR in Part II – The Bar Association Law Journal (2008) vol. XIV, page 160).

The unanimous opinion of the Court in that determination was that "the minimum mandatory sentence in Section 362 (2) (e) Is in conflict with Article 4 (c), 11 and 12 (1) of the Constitution and that 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".

This determination removed the knot of mandatory sentence which up to that time tied hands pf the trial Judges with regard to the appropriate sentence to be imposed in the circumstances of the particular case tried by them."

Hence taking in to consideration the legal principles decided above this Court is of the view that in the instant matter the sentence should be varied as below, exercising our inherent judicial discretion,

1) **For the first count 3 years RI reduced to 2 years RI and the rest of the sentence to remain the same,**
2) **For the second charge the 10 years RI reduced to 7 years RI and rest of the sentence to remain the same.**

Both the sentences mentioned above to be operative from the date of the conviction and both sentences to run concurrently.

Subject to the above variation the instant appeal is hereby dismissed.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.