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

In the matter of an Appeal
Against an order of the High
Court under Sec. 331 of the
Code of Criminal Procedure
Act No. 15 of 1979 and in terms of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

The Hon. Attorney General

Attorney General's Department,
Colombo 12.

Complainant

Vs

Hakmana Kankanamage Sunil
Kekuluwa Mulle Gedera
Udugalmotyia
Nihiluwa

Accused

C. A. Case No. : 08 /2013

H. C.Tangalle Case No. : 03/2001

And now between

The Hon. Attorney General

Attorney General's Department,
Colombo 12.

Complainant -Appellant

Vs

Hakmana Kankanamage Sunil

Accused-Respondent

BEFORE : **P. R. Walgama, J &**

K. K. Wickramasinghe, J

COUNSEL : AAL Suranga Bandara for the Accused-Respondant.

PC Sarath Jayamanne ASG for the Attorney General.

ARGUED ON : 07th October 2016

WRITTEN SUBMISSIONS FILED ON: 1st December2017

DECIDED ON : 16th June 2017

K. K. WICKRAMASINGHE, J.

The Accused Respondent (herein after referred to as the Accused) was indicted in the High Court of Tangalle on the following charges:-

Charge 1:-

On or about 18thof July 1990 in Udugalmotiya, within the jurisdiction of this court the accused along with another unknown to the prosecution kidnapped or abducted one Senarath Yapa Deepika in order that she will be forced or seduced to illicit intercourse, or knowingly it to be likely that she will be forced or, seduced to illicit intercourse and thereby committed an offence punishable under section 357 read with section 32 of the Penal code.

Charge 2:-

At the time and place aforesaid and in the course of the same transaction, the accused along with another unknown to the prosecution kidnapped or abducted one Senarath Yapa Priyanthi (younger sister) in order that she will be forced or seduced to illicit intercourse, or knowingly it

to be likely that she will be forced or, seduced to illicit intercourse and thereby committed an offence punishable under section 357 read with section 32 of the Penal code.

Charge 3:-

At the time and place aforesaid and in the course of the same transaction, the accused committed rape on Deepika and thereby committed an offence punishable under section 364 of the Penal Code.

Charge 4:-

At the time and place aforesaid and in the course of the same transaction, the accused committed rape on Priyanthi and thereby committed an offence punishable under section 364 of the Penal Code.

The instant state appeal is arising in pursuant to the conviction and the sentence imposed on the Accused-Appellant.

The indictment was read over to the Accused Respondent and the trial was commenced before the Learned High Court Judge. Prosecution led evidence of four witnesses including victim Priyanthi. Since the other victim (Deepika) the sister of Priyanthi was then a deceased, her deposition was marked by the Registrar of High Court. After closing of the prosecution case, the trial judge had called for the defence. Before closing of the prosecution, the learned judge had instructed the state counsel to amend the charge from 364 to section 345 of the Penal Code, as there was no sexual penetration committed on Priyanthi. Thereafter the accused respondent had pleaded guilty to all four charges levelled against him. The Learned High Court Judge of Tangalle found the accused guilty of all charges levelled against him.

On 23nd January 2013 Learned Judge imposed following sentences on the accused Respondent;

Charge 1:- 1 ½ years Rigorous Imprisonment Suspended for 5 years and a fine of Rs. ,5000 if default 6 months Simple Imprisonment.

Charge 2:- 1 ½ years Rigorous Imprisonment Suspended for 5 years and a fine of Rs. 5,000 if default 6 months Simple Imprisonment.

Charge 3:-2 years Rigorous Imprisonment Suspended for 10 years and a fine of Rs.15,000 if default 12 months Simple Imprisonment.

Charge 4:-6 months Rigorous Imprisonment Suspended for 2 years and a fine of Rs.5,000 if default 12 months Simple Imprisonment.

Being aggrieved by the said conviction and sentence the Complainant Appellant, made the instant appeal to this court for the vacation of the same on the ground that the sentence pronounced by the Learned High Court Judge was highly inadequate, unreasonable and unjust.

Shortly the prosecution case is as follows:-

On the day in question, on 18th July 1990 both victims another younger sister, and brother were living with their father. Their mother deserted them as she was married to another person.

The prosecutrix Deepika was 16 years and her younger sister Priyanthi was only 12 years at the time of the alleged offence was committed. After forcefully breaking open the door, two persons armed with two guns came inside the house. There was a lamp illuminated in the hall. The two witnesses were able to identify the accused respondent with the help of the light of the lamp. He was known as Sunil alias Sathyapala from the same village. Witness Priyanthi known him for 10 years .He was an employee of the post office in the same village.

[The other person who accompanied the said accused was unknown to the prosecution and he was never arrested].

Thereafter both the sisters were taken out of the house on gun point by the above mentioned to a paddy field. The accused grabbed Priyanthi to a nearby hut and committed a sexual act by placing his penis in between her thighs. She categorically stated that there was no penetration. [At that time the other person unknown to the prosecution raped Deepika on the ground of the paddy field. Thereafter, the accused took over Deepika and raped while the unknown person committed the sexual act on Priyanthi. Thus the learned judge instructed the learned state counsel to amend the 4th charge to **section 345** of the Penal code].

Section 171 of the Criminal Procedure Act provides that, "if the indictment or charge as altered *by the court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine with reference to such alteration any witnesses who may have been examined"[Emphasize added]*

By perusing the brief it is evident that the accused respondent pleaded guilty only at the later stage after cross examining all the prosecution witnesses, when the prosecution was closing the case. Thus, the amendment made to the indictment would not result a fresh trial but merely a re-examination or recalling a witness relating to the amended charge of the indictment. Therefore the learned trial judge cannot give such a large reduction to the sentence for the fact that the accused pleaded guilty at the tail end of the trial.

It is pertinent to note that this incident had taken place prior to the amendment in1995, where a term of 20 years RI could have been imposed. According to section 6 of the Interpretation Ordinance a trial could be commenced and the accused could be convicted as per repealed section 364 of the Penal Code.

Learned ASG submitted that the learned trial judge has failed to give weight to the following factors and impose a just and reasonable sentence:-

(1) The two victims were in the custody of their father and they were abducted at gun point using the prevalent volatile condition and situation in the country.
(2) The victims were helpless and could not forcefully resist the accused.
(3) They made the prompt complaint within few hours to the police station.
(4) When incident of rape against young and vulnerable children are being committed around the country, it would invariably convey a wrong signal and message to the society that perpetrators of heinous crimes of this nature are being dealt leniently. Therefore this sentence violates the principal of deterrence to the society.
(5) Though the case was hanging over the head of the accused for 20 years the victim also had to undergo a situation worse than the accused- respondent.

We are also mindful that after pleading guilty to the amended indictment by the accused respondent, the learned counsel for the defence brought forward following considerations before the learned high court judge:-

(1) The accused pleaded guilty at an earliest possible stage.
(2) The accused was 54 years old and a government servant working in the post office at the time the judgement was delivered by the High Court.
(3) Since 23 years have lapsed after the commission of the alleged offence it is unreasonable to impose a custodial sentence against the accused who regularly attended court.
(4) Accused had no previous convictions and he had to undergo a serious mental stress due to this case for 23 years.

The learned ASG contended that the learned trial judge had;

(1) Erroneously given an undue advantage to the accused on the ground that he pleaded guilty.
(2) Erroneously considered the extreme age and the occupation of the accused in mitigating sentence.
(3) Erroneously considered the 23 years of delay in concluding the matter as a mitigatory factor in favour of the accused respondent.

According to section 364 of the Penal Code prior to the amendment in 1995, a term of 20 years RI could have been imposed. In 1995, this section had been amended. Under section 6 of the **Interpretation Ordinance**, a trial could be commenced and the accused could be convicted as per repealed section.

Section 6 (3) (c) of the Interpretation Ordinance reads as follows:-

6(3) *"Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected.....*

(c) any action, proceeding or thing pending or incomplete when the repealing written law comes into operation, but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal....."[Emphasize added]

In the recent case of **Bandage Sumindra Jayanthi Vs AG, CA251-267/2004 decided on 03.07.2015,** guidelines on reduction of punishment in the case of guilty plea, provided in an English **case R Vs Caley and others(2002) EWCA Crim 2821** was considered,

"The well-established mechanism by which the difference between defendants who required the public to prove the case against them and those who accepted their guilt was by reducing the sentence which would have been imposed after trial by a proportion, on a sliding scale depending on when the plea of guilty was indicated. The largest reduction was about one- third, which was to be accorded to defendants who indicated their plea of guilty at the first reasonable opportunity. Thereafter the proportionality reduction diminished and a plea of guilty at the door of the trial court would attract a 'reduced reduction'...."[emphasize added]

As per Justice **S.N. Silva in AG vs Ranasinghe and others (1993) 2 Sri LR 81** an offence of Rape calls for an immediate custodial sentence. Reasons for such contention are;

(i) To make the gravity of the offence
(ii) To emphasize public disapproval
(iii) To serve as a warning to others
(iv) To punish the offender
(v) To protect women

The above mentioned case can directly apply to the instant case, since facts of the cited judgement are the same as the present case.

Justice S.N.Silva has given due consideration to the following aggravated circumstances:-

(a) Use of violence over and above force necessary to commit rape

(b) Use of weapon to frighten or wound victim
(c) Repeating acts of rape
(d) Careful planning of rape
(e) Previous convictions for rape or other offences of sexual kind
(f) Extreme youth or old age of victim
(g) Effect upon victim, physical or mental
(h) Subjection of victim to further sexual indignities or perversions.[emphasize added]

As per **section 303 of the Code Criminal Procedure Act** as amended by Act No.15 of 1979, the legislature had laid down guidelines which a court must bear in mind, before such court decides to suspend a sentence upon conviction.

Section 303 of the Code as amended read as follows:-

Section 303(1) *Subject to the provisions of the section, on sentencing an offender to a term of imprisonment, a court may make an order suspending the whole or part of the sentence if it is satisfied, for reasons to be stated in writing, that it is appropriate to do so in the circumstance, having regard to;*

(a) The maximum penalty prescribed for the offence in respect of which the sentence is imposed;
(b) The nature and gravity of the offence;
(c) The offender's culpability and degree of responsibility for the offence;
(d) The offender's previous character;
(e) Any injury, loose or damage resulting directly from the commission of the offence;
(f) The presence of any aggravating or mitigating factor concerning the offender;
(g) The need to punish the offender to an extent, and in a manner, which is just in all of the circumstances;
(h) The need to deter the offender or other persons from committing offences of the same or of a similar character;
(i) The need to manifest the denunciation by the court of the type of conduct in which the offender was engaged in ;
(j) The need to protect the victim or the community from the offender;
(k) The fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or
(l) A combination of two or more of the above

(2) A court shall not make an order suspending a sentence of imprisonment if,

(a) Mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed; or

(b) The offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or

(c) The offence was committed when the offender was subjected to a probation order or a conditional release or discharge; or

(d) The term of imprisonment imposed, or the aggregate terms of imprisonment where the offender is convicted for more than one offence in the same proceedings, exceeds two years.

It is further elaborated and had observed the matter of sentencing by Basnayake A.C. J in the case of **AG Vs H.N. de Silva 57 NLR 121** as follows:-

".....in assessing the punishment that should be passed on an offender, a judge should consider the matter of sentence both from the point of view of the public and the offender. A judge should in determining the proper sentence, first consider the gravity of the offence, as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other Statute under which the offender is charged. The reformation of the Criminal, though no doubt an important consideration is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail....."[Emphasize added]

In the case of **AG Vs Janak Sri Uluwaduge and another (1995) 1 Sri LR 157**, it was held that, *'.....in determining the proper sentence, the judge should consider the gravity of the offence as it appears from the nature of the act itself.....He should also regard the effect of the punishment as a deterrent .....the judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non-detection. Another matter to be taken into account is that the offences were planned crimes for wholesale of profit. The judge must consider the interests of the accrued on one hand and the interests of society in the other".*

In **Bandara Vs Republic of Sri Lanka (2002) 2 Sri LR 277** the Court of Appeal while convicting the accused- appellant on his own plea, upheld the right of the Court of appeal to enhance a sentence given by the High Court. Amaratunga J stated that,

'....However, I am of the view that it is sufficient to impose a period of 60 months imprisonment on the accused-appellant to deliver a message to all those who have no respect for other person's rights to life and property that this court will never hesitate to use its powers under section 336 in appropriate cases".[Emphasize added]

In this instant case, medical evidence corroborates the version of the witness Priyanthi. JMO testified that there was an injury between vaginal lips and the anus. Since there was penetration between labia majora that would still constitute a sexual penetration. Therefore the trial judge would not have been amended the charge for a lesser offence but could have convicted the accused for committing rape. If there was a doubt he would even convicted him for attempted rape, since the act was amply demonstrated by evidence. Any way at this juncture we do not wish to amend the charge to attempted rape punishable under section 364 read with section 490 of the Penal Code. Since the prosecuting state counsel without any hesitation or objection had brought down the charge punishable under section 345, we do not intent to interfere with the order of the Learned High Court Judge, with regard to the amendment. After considering above mentioned judgements, It is being observed by this court that the gravity of the offence was not considered by the Learned High Court Judge. Considering all above, we are of the view that the sentence is in appropriate and illegal. Therefore we set aside the sentence imposed by the Learned High Court Judge and thereby enhance the sentence by imposing following sentences to run concurrently.

1;-7yrs.RI

2:-7yrs.RI

3:-15 yrs. RI

4:-2 yrs. RI,

Fines and the default sentences stand the same to run consecutively.

Hereby the Appeal is allowed.

Judge of the Court of Appeal

P.R.Walgama, J

I Agree

Judge of the Court of Appeal