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 read with Section 331 of the Code of Criminal Procedure Act, No 15 of 1979.

Sivakavi Sivapalan

1st Accused-Appellant

-Vs-

Hon. Attorney-General

Respondent

C.A. Case No. 167/2014

High Court, Jaffna 1558.12

BEFORE : A.H.M.D. Nawaz, J **&**

M.M.A. Gaffoor, J

COUNSEL : Prof. Zaffrullah for the 1st accused-appellant

S. Thurairaja, Senior Deputy Solicitor General for AG

Decided on : 30.11.2017

A.H.M.D. Nawaz, J.

By an indictment dated 14 June 2012, the accused appellant (who was the first accused) was indicted along with Kangaratnam Kamaladas *alias* Kutty to stand trial in the High Court of Jaffna on the following counts:

1) On or around 22nd November 2007 at Chavakachcheri, the first accused by taking one Nadesan Sujatha who was under 16 years of age from her lawful guardian or from the keeping of the lawful guardian committed the offence of kidnapping-an offence punishable under Section 354 of the Penal Code.

2) At the same time, place and in the course of the same transaction, the 2nd accused by aiding and abetting the 1st accused in the commission of the offence referred to in the first count, committed an offence punishable under Section 354 of the Penal Code read with Section 102 of the said Code.

3) In the course of the same transaction referred to in the first count, on or around 23rd November 2007, at Chavakachcheri, the 1st accused committed rape on Nadesan Sujatha -a minor under 16 years of age-an offence punishable under Section 364 (2) (e) of the Penal Code, as amended by Penal Code (Amendment) Act, No 22 of 1995.

4) In the course of the same transaction on or around 24th November 2007 at Chavakachcheri, the 1st accused committed rape on Nadesan Sujatha- an offence punishable under Section 364 (2) (e) of the Penal Code, as amended by Penal Code (Amendment) Act, No 22 of 1995.

5) In the course of same transaction on or around 25th November 2007 at Chavakachcheri the 1st accused committed rape on Nadesan Sujatha -a minor

under 16 years of age-an offence punishable under Section 364 (2) (e) of the Penal Code, as amended by Penal Code (Amendment) Act, No 22 of 1995.

As could be seen, whilst the 1st count referred to kidnapping of Nadesan Sujatha on the part of the 1st accused, the 3rd, 4th and 5th counts in the indictment ascribed rape of the said Nadesan Sujatha to the 1st accused (the appellant in this Court) on three dates namely 23rd, 24th and 25th November 2007. The 2nd accused only faced a count of aiding and abetting the appellant in the commission of kidnapping Nadesan Sujatha -a charge laid in count 2 in the indictment.

The victim of the alleged offence Nadesan Sujatha testified on 6.5.2013 narrating as to how the 1st accused-her brother in law who was married to her sister set about committing the above offences. On the day in question namely 22/11/2007, When Sujatha had been staying at her sister's house in Chavakachcheri and her mother was away, the 2nd accused Kamaladas *alias* Kutti took her away on a bicycle to a place called Nunawil and left her at his relative's house. It would appear that this had been done at the bidding of the brother-in-law of the prosecutrix-the 1st accused in the case who is the appellant before this Court. The testimony of the prosecutrix Sujatha who was under 16 years of age on 22.11.2007 was that on the following day namely 23.11.2007 the appellant came to Nunawil and transported her in a bus to Irupalai. The 2nd accused had also accompanied the 1st accused in taking away the prosecutrix to Irupalai. The prosecutrix testified that the appellant had sexual intercourse with her on the night of 23rd November 2007 in a house in Irupalai where she had been taken by the appellant.

On the 24th November 2007, Sujatha's mother-Yogammah who had been frantically searching for Sujatha finally traced her in Irupalai and brought her home. This testimony of Sujatha was given in the presence of the appellant and the 2nd accused and the trial was adjourned for further examination in chief for 10th June 2013, by which time the 2nd accused began to abscond and evaded

appearing in the High Court. The State Counsel thereafter made an application for a Section 241 inquiry and while ordering a trial *in absentia* against the 2nd accused, the learned High Court judge fixed the matter for further trial.

When the further trial came up on 11.3.2014, the Counsel for the appellant intimated to Court that the appellant was *admitting the charges (sic)* laid against him namely counts 1, 3, 4 and 5 in the indictment. It would appear that the Learned High Court judge did not act on this intimation and instead fixed the matter for further examination in chief of the prosecutrix, to be conducted in the afternoon on the same day.

If there was a forthcoming plea to the indictment, the learned High Court judge could have recorded the plea and proceeded to conviction and sentence but rather in this particular instance, the prosecutrix was further examined in chief by the State Counsel in the afternoon on the same day. After the State Counsel had concluded his examination in chief, the Learned High Court Judge proceeded to pose a few questions of the prosecutrix.

Thereafter, Nadesan Yogamma, the mother of the prosecutrix Sujatha, from whose guardianship Sujatha had been taken away, testified on the same day. In her evidence Yogamma narrates as to how he tracked her daughter down in Irupalai, and she was emphatic that the 1st accused (her son in law) had taken her daughter away without her consent. Next followed the investigating officer with whose testimony the State Counsel informed Court that he was concluding the trial against the 2nd accused-see the proceedings dated 1st July 2014.

Why should the State Counsel close the case only against the 2nd accused? What happens to the trial against the appellant? Nothing is apparent on the record as to the fate of the trial against the 1st accused-the appellant in the case. This Court is kept wondering as to why the case against the absent accused alone was being concluded, whilst the case against the 1st accused (the case against the appellant)

was kept open. This Court cannot be kept in darkness by the paucity of the judge's observations and absence of journal entries that would explain as to why the learned High Court judge adopted this procedure as he did. The learned High Court Judge compounds and confounds the confusion by fixing the case for judgment on 1.07.2014 to be delivered on 25th July 2014, when the counsel for the state submitted that he was closing the case only of the absent 2nd accused. If judgment was fixed after the case against the 2nd accused had concluded, what happened to the case of the appellant who expressed willingness to plead?

Why was not that case closed? Why was not the plea of the appellant taken and disposed of before the case was fixed for judgment? This case, I must say, teems with procedural irregularities which remain unexplained. What was the rationale for not having tendered for cross examination by the defence, two stellar witnesses for the prosecution namely the prosecutrix Sujatha and her mother?

Did the defence counsel refrain from cross-examining the witnesses because she had already stated to Court on 11.03.2014 that the appellant had *admitted the counts* (*sic*) in the indictment? So when the State Counsel closed the case on 1.07.2014 and the Court fixed the case for judgment for 25.07.2014, was it on the basis that the case against the appellant had concluded? I would say *non sequitur*-it does not follow at all. The procedure adopted by the judge begs the question. One cannot make head or tail of the whys and wherefores of the procedures adopted by the Learned High Court Judge. Neither the State Counsel nor the Learned High Court Judge has been cognizant of the procedural enactment-the Code of Criminal Procedure Act, No 15 of 1979 as amended.

On the day fixed for judgment namely 26th July 2014, the judge was on furlough and the case was fixed for 7.08.2014. On 7.08.2014 the Judge has recorded that the 1st accused (the appellant) was withdrawing his previous plea of not guilty and permission was granted for this course. He has also recorded that the 1st

accused informed Court that he was *admitting the charge* (*sic*). It was on this day that the High Court Judge recorded the plea of the appellant (the 1st accused in the case) and permitted both the defence counsel and state counsel to make oral submissions.

Though Professor Zaffrullah who appeared for the appellant submitted that the procedure adopted by the judge was erroneous, there was a countervailing argument against this contention. Having kept silent right along when both the prosecutrix and her mother were giving evidence, can the defence now be heard to complain of prejudicial conduct of a case when the accused has taken the opportunity on 7.8. 2014 to plead guilty to the counts in the indictment and let his counsel make submissions on his behalf in mitigation of a sentence?

The voluntary plea and submissions in mitigation of the sentence would put paid to any argument that the whole proceedings resulted in a nullity and in fact the submissions of Professor Zaffrullah did not go so far as to invoke a nullification of the proceedings though we take the view that the learned High Court judge should have been more circumspect in the way he was conducting the course of the trial. A whole host of lingering doubts should have been clarified by the learned High Court judge. There should have been observations as to why the defence chose not to cross examine the prosecutrix and her mother. Was an opportunity to cross examine the witnesses offered at all? Even if the defence had kept mute as to cross examination owing to an earlier submission that the accused would be pleading guilty presently, there must have been recording by the learned High Court Judge of the fact that the accused was forgoing his right to cross examination. In fact cross examination being a double edged sword, the responses to questions posed in cross examination could well form a foundation for mitigatory submissions which not only the High Court judge but also this Court could take cognizance of in the dispensation of a legal sentence.

Why was the plea recorded virtually on a day long after the judgment was fixed for? Was the trial against the 1st accused (appellant) kept open? Was it the case that only the trial against the 2nd accused who was tried *in absentia* was fixed for judgment and not that of the 1st accused? In other words did the High Court separate the trials of the two accused who were jointly indicted? These are questions that remain unanswered and the record cannot be so empty and bare as Mother Hubbard's cupboard furnishing no clear answers to these questions. I must however say that these questions were not argued as determinative questions of law and I am recording them here so that presiding judges would do well to avoid these pitfalls that would expose a good case to an abortive trial.

I venture to think that it does not lie in the mouth of the appellant to argue that there has been a failure of justice in the instant case, when there was a conscious plea and a consequent mitigatory submission despite the above infirmities that preceded the plea. In fact the proviso to Article 138 of the Constitution states as follows:

> *Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*

In the circumstances this Court is not inclined to interfere with the conviction as it was entered after a voluntary plea.

Professor Zaffrullah next argued that the sentence imposed for rape namely 10 years' R.I must be lowered though it is the mandatory minimum sentence stipulated for this offence. He cited the ***SC Reference No 3/2008*** from the High Court of Anuradhapura in Case No 333/2004 wherein the Supreme Court in a unanimous determination held that "the minimum mandatory sentence in Section 362 (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 it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence"-see 2008 Bar Association Law Reports Part II in the Bar Association Law Journal (2008) Volume XIV, page 160.

Minimum Mandatory Sentences

In this case Count No 1 was on kidnapping whilst Counts No 3, 4 and 5 pertained to rape of the underaged Sujatha on three different dates. The High Court imposed a sentence of 2 years' rigorous imprisonment for kidnapping whilst a sentence of 10 years' R.I was imposed on the 3rd count of rape. Though the appellant pleaded guilty to 4th and 5th counts, the learned High Court judge quite rightly refrained from convicting and sentencing the appellant on the 4th and 5th counts as there was no evidence at all to find him guilty on the two counts. In fact the High Court Judge had due regard to the evidence of Sujatha which did not establish the offences recited in counts 4 and 5 of the indictment The High Court Judge ordered that the sentence of 2 years' R.I for kidnapping should run concurrently with the period of 10 years' R.I which was imposed for rape on the third count.

Professor Zaffrullah pleaded that the sentence of 10 years' R.I which is the stipulated minimum for rape of an underaged girl in terms of Section 362 (2) (e) of the Penal Code should be reduced below 10 years.

I have already observed in *Geoffrey Anthony Thilan Amarasekara* v *The Honourable Attorney General* (CA Case No. 149 / 2012 decided on 17.09.2015) that whether a sentence is excessive or lenient in light of the facts and circumstances of a particular case is a question of law which this Court is bound to consider in appeal and as I observed in *Bandage Sumindra Jayanthi v Hon. Attorney-General* CA 251-267/2012 (HC Vavuniya decided on 3.07.2015), the parties must be able to demonstrate to the appellate court the

existence of both aggravating and mitigatory circumstances in the case for the reviewing court to assess the propriety of the sentence meted out. Such circumstances may be manifest in the evidence led, submissions made and the judgment pronounced containing the sentence. Do these indicia apply in a case where the legislature has imposed a minimum mandatory sentence?

In fact as Justice Gamini Amaratunga J commented in ***Maramba Liyanage Rohana alias Loku v the Hon Attorney General*** (2011) 2 Sri.LR 174 at 178 (with J.A.N.de Silva C.J and Ratnayake J concurring), the unanimous determination of the Supreme Court in SC Reference No 3 of 2008 (supra) removed the knot of mandatory sentences which up to that time tied the hands of trial judges with regard to the appropriate sentence to be imposed in the circumstances of the particular case tried by them. This was the argument that Professor Zaffrullah mounted to urge a reduction in the sentence. So a quick look at SC Reference No 3 of 2008 (supra) is quite pertinent.

This is a case where both the accused and the complainant were under age and had been having a love affair consequent to which they eloped and had sexual intercourse. The respective parents finally traced and brought them back home. In light of the facts that emerged as above, the Learned High Court judge of Anuradhapura addressed a reference to the Supreme Court posing a question in the reference whether Section 364 (2) of the Penal Code as amended by Penal Code (Amendment) Act, No 22 of 1995 had removed the judicial discretion when sentencing an accused convicted for an offence punishable under Section 364 (2) (e) of the Penal Code.

When the reference was taken up for determination before a Bench of Three judges of the Supreme Court, the Learned Senior State Counsel who appeared as *amicus curiae* on behalf of the Attorney General raised the issue of a post enactment review that would loom large in the event the Supreme Court went

on to hold that the minimum mandatory sentence did not fetter the discretion of judges at all.

The Supreme Court was quite alive to the embargo on post enactment review of legislation postulated in Article 80 (3) of the Constitution, which goes as follows:

> *Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, **the validity of such Act** on any ground whatsoever.*

The Supreme Court was quick to point out that they were not venturing into a questioning of the legislation namely the validity of Penal Code (Amendment) Act No, 22 of 1995 which had brought in the minimum mandatory sentence but rather they were only indulging in an interpretation of the provision in light of the special circumstances of the case that was before them namely an underaged lover who had eloped with an equally underaged girl and had sex with her owing to an ongoing *amour*. In other words in SC Reference No 3 of 2008, the Court thought it fit to take into account the fact that both the prosecutrix and the accused were children in the eyes of the law and their best interest should be addressed. In such a situation should the accused be visited with a 10 year long incarceration? Or can they go down a sliding scale below 10 years? The Court pointed out that there was a discretion which enabled the judges to go below 10 years though this was the minimum imposed by the legislature. This interpretation is quite consistent with the view held on minimum mandatory sentences. Equitable jurisdiction possessed by our Courts also helps Court to temper the rigours of statutory law and SC Reference No 3 of 2008 was one such occasion on which this trend once again manifested.

It is not irrelevant at this stage to quote Sir Louis Blom-Cooper QC who in his compelling collection of essays titled *Power of Persuasion Essays by a Very Public*

Lawyer postulates the following articulation on minimum mandatory sentences at page 106:

> *The mandatory sentence reduces the court's normal sentencing function to the level of a rubber stamp: It negates the idea of individualism in the sentencing of an offender. The morally just and the morally reprehensible are similarly treated for their culpability in crime..... Judicial policy is opposed to mandatory sentences; indeed a separate function, even a distribution of power, should debar this legislative interference with judicial control. The sound administration of justice and its social image determines abolition in favour of a discretionary sentence. In terms of human rights law, human rights are not commodities; they are creatures inherently endowed with qualities that are ends in themselves, and not merely means to an end. One of the elements of the dignity of the individual is the 'right to hope' that an indeterminate sentence is always subject to a 'dedicated review mechanism' at the time of sentence.*

Thus the introduction of a discretionary element by common law reasoning into the minimum mandatory sentence introduced by Act No 22 of 1995 is consonant with such articulate premises as human rights law and it is settled law today that when an accused is to be sentenced for an offence under Section 364 (2) (e) of the Penal Code as amended by Act No 22 of 1999, the learned High Court Judge can go upwards and forwards having the 10 year stipulation as a benchmark.

In fact Ratnayake J pointed out the circumstances where a judge would go upwards beyond the 10 year minimum.

> *There may well be exceptional cases in which an offence may be so serious in nature that irrespective of the circumstances a Court may never exercise judicial discretion in favour of a punishment that is less than an appropriate minimum mandatory punishment. The reasoning in Re: Prevention of Organized Crime Bill relates to such an exceptional case. The Supreme Court in Re: Prevention of Organized Crime Bill in*

fact contrasted the serious nature of the offences in Re: Prevention of Organized Crime Bill with far lesser offences in Re: Prohibition of Ragging and Other Forms of Violence in Educational Institutions Bill. A minimum mandatory punishment of appropriate severity for such serious offences would not be inconsistent with Articles 4 (c), 11 and 12 (1).

As far as Section 364 (2) (e) of the Penal Code (as amended by Penal Code (Amendment) Act No 22 of 1995) is concerned, the High Court has been prevented from imposing a sentence that it feels is appropriate in the exercise of its judicial discretion due to the minimum mandatory punishment prescribed in Section 364 (2). Having regard to the nature of the offence and the severity of the minimum mandatory sentence, we hold that the minimum mandatory sentence in Section 364 (2) (e) is in conflict with Articles 4 (c), 11 and 12 (1) of the Constitution.

Thus the Supreme Court felt impelled to pinpoint that a Section 364 (2) (e) offence does not impose a fetter on the sentencer. Once the discretionary element is introduced, it is then the extenuating and aggravating circumstances that would count for consideration at the time of sentencing. It is for this reason that I posed a question in an anterior part of this judgment-Do these indicia(extenuating and aggravating circumstances) apply in a case where the legislature has imposed a minimum mandatory sentence for an offence under Section 364 (2)? The answer is in the affirmative.

I must observe that subsequent cases in the Supreme Court that turned on Section 364 (2) of the Penal Code applied the above indicia in the review of sentences which the appellants in those cases sought-see Gamini Amaratunga J in *Maramba Liyanage Rohana alias Loku v the Hon Attorney General* (supra): Shirani Tilakawardane, J in *Dharma Sri Tissa Kumara Wijenaile v Hon.Attorney General* (SC Appeal 179/2012 SC minutes of 8.9.2013) and Eva Wanasundera P.C J in *Hon.Attorney General v Ambagala Mudiyanselage*

Samantha Sampath (S.C.Appeal No 17/2013 decided on 12.03.2005). The Court of Appeal too has adopted this approach-see Anil Gooneratne J in *Hirimuthugoda Sanjeewa Shantha alias Ran Mama* v *Hon. Attorney General* (CA 150/2010 decided on 16.07.2014):

If one harks back to the underlying rationale in these cases, one could see that the Courts have looked at the objective gravity of the type of crime having regard to both aggravating and mitigatory circumstances and the fact that the necessity to ensure justice to one party should not result in injustice to the other side.

Provided that the reviewing Court can go below 10 years, has the appellant made out substantial and compelling circumstances justifying the imposition of a sentence of less than 10 years' imprisonment? After a voluntary plea, the counsel for the appellant pleaded the cause that the appellant was a father of three children and though the victim was a sister in law of the accused, she was married at the time of the trial. It was these circumstances that were placed before the learned High Court Judge in mitigation of the sentence. Even though SC Reference No 3 of 2008 has recognized that the legislative provision namely Section 364 (2) of the Penal Code as amended is not so prescriptive in its terms to strip the sentencing court of its sentencing discretion, it would entitle a Court to impose a lesser sentence than the sentence prescribed only if the Court is satisfied that substantial and compelling circumstances do exist.

Here was a brother in law who should have been in *loco parentis* to an underaged sister in law. She had repaired to the comfort of his home to go to school. He owed her what I would call fiduciary care in the absence of her father and it goes against the grain to entice and inveigle such a girl of 15 years of age, however acquiescent she might have been in accompanying his acolyte (the 2nd accused), and engage in sexual activity. It is clear that the prosecutrix was kidnapped -a charge that the appellant pleaded. This was not a case where two underaged lovers as in SC Reference No 03 of 2008 decamped from home and had sex. The

evidence of the prosecutrix was not assailed or impugned in cross examination and her testimonial creditworthiness was not dented. No compensation has been ordered against the appellant in view of the fact that the presecutrix left home consensually. However I take the view that societal mores demand that the conduct on the part of the appellant cannot be condoned and must be viewed with disfavor.

In the circumstances I take the view that a sentence of 10 years' rigorous imprisonment imposed on the appellant was quite condign and we do not wish to alter the sentence imposed by the learned High Court Judge on 7.08.2014. We therefore affirm the conviction and sentence of the appellant effective from 7.08.2014. The appeal is thus dismissed.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor, J.

I agree.

JUDGE OF THE COURT OF APPEAL