

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

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

Complainant

Court of Appeal Case No.
CA(PHC)APN 76/2016

High Court Kandy Case
No. HC 108/2015

V.

Kumarasinghe Arachchilage Sunil Premathilaka
alias Kumarasinghe Arachchilage Sunil
Premasiri alias Aththa

Accused

AND NOW BETWEEN

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

Complainant Petitioner

V.

Kumarasinghe Arachchilage Sunil Premathilaka
alias Kumarasinghe Arachchilage Sunil
Premasiri alias Aththa

Accused Respondent

BEFORE : **K. K. WICKREMASINGHE, J**
K. PRIYANTHA FERNANDO, J

COUNSEL : Shanaka Wijesinghe DSG for the
Complainant Petitioner.

ARGUED ON : 08.10.2019

WRITTEN SUBMISSIONS
FILED ON : 23.01.2019 by the Complainant Petitioner.

JUDGMENT ON : 26.11.2019

K. PRIYANTHA FERNANDO, J.

01. Accused Respondent (Respondent) was indicted in the High Court of Kandy for one count of kidnapping punishable in terms of section 354 of the Penal Code and one count of grave sexual abuse punishable in terms of section 365(B)2(b) of the Penal Code. Upon serving the indictment, Respondent pleaded not guilty to the charges and the learned High Court Judge fixed the case for trial. On 15.10.2015 counsel for the Respondent moved to re-fix the case for trial on personal grounds. Witnesses were warned to appear on the next date and the trial was re-fixed for 17.12 2015.
02. On 17.12. 2015 the Respondent moved to withdraw his early guilty plea and to plead guilty. Upon reading the charges and Respondent pleading guilty,

learned High Court Judge proceeded to sentence the Respondent after hearing the counsel for the State and the Respondent in mitigation. For both counts 1 and 2, the learned High Court Judge sentenced the Respondent for 1 year rigorous imprisonment suspended for 15 years and fine of Rs. 10,000/- on each count and in default 1 year rigorous imprisonment. Further the Respondent was ordered to pay Rs. 250,000/- as compensation to the victim child and in default 4 years rigorous imprisonment. Being aggrieved by the above sentence, the Petitioner preferred this application to get the sentence revised and substituted with an adequate sentence according to law.

03. Notices were sent to the Respondent by this court on several occasions by registered post and also served through process server of the District Court. However, Respondent failed to appear and therefore the case was fixed for argument. I have carefully considered the proceedings in the High Court, application and the submissions made by the counsel for the Petitioner and the relevant legal provisions.
04. Prescribed sentence for the offence of kidnapping (Count No.1) in terms of Section 354 of the Penal Code is a term of imprisonment of either description which may extent to seven years and also be liable to a fine.
05. Prescribed sentence for the offence of grave sexual abuse (Count No. 2) in terms of section 365 B(2)b of the Penal Code is a term of rigorous imprisonment of not less than seven years and not exceeding 20 years and with a fine and also be ordered to pay compensation of an amount determined by court to the victim for the injuries caused to that person. Injuries to the victim includes psychological or mental trauma.

06. Counsel for the Petitioner submitted that when the legislature has clearly prescribed the minimum mandatory term of imprisonment of 7 years for the offence in count No. 2, the learned High Court Judge has given a term of imprisonment for 1 year suspended for 15 years which is illegal and grossly inadequate in the circumstances.
07. Learned High Court Judge in his sentencing remarks has not given any reason to deviate from the sentence prescribed by law, other than to say that the Respondent is being remorseful and that he is not a registered criminal. Learned High Court Judge has further said that he is also giving consideration to the Judgment of the Supreme Court in case No. 17/2013.
08. Facts and circumstances of this case are totally different to that of case No.SC Appeal 17/2013. In that case the victim of rape has delivered a baby as a consequence of sexual intercourse between the victim and the Accused. Accused had been looking after the child and supporting the mother (victim) right through out. Their Lordships of the Supreme Court were of the view in that case in the circumstances, in the best interest of the child, the Appellant should not be incarcerated as the Appellant was supporting the victim and the child genuinely. The facts and circumstances in SC Appeal 17/2013 have no application to this case other than to say that the court has the right to use its discretion. That discretion has to be used judicially.
09. It is the duty of the court to give effect to the law enacted by the legislature. To deviate from the prescribed minimum mandatory sentence, there has to be compelling reasons. Reasons have to be so compelling unless otherwise the court would not be acting in the best interest of Justice.

10. The only mitigatory circumstances submitted and available for the Respondent were that he was a first offender and that he tendered an early guilty plea. Those mitigating factors would make the Respondent entitle to a sufficient discount in his sentence, but would not be a compelling reason to deviate from the prescribed minimum mandatory sentence of imprisonment.
11. The aggravating factors override the mitigating factors in this case. The victim child had been 4 years old. The Respondent is her granduncle who was 46 years old at the time the sexual offence was committed on the victim child. Being her granduncle (mother's sister's husbands' father), what is expected of him is to protect the grandchild, not to sexually abuse her. Respondent has therefore breached the trust reposed on him which is a serious aggravating factor. Hence, I am of the firm view that the sentence imposed on the Respondent by the learned High Court Judge is illegal, wrong in principle and grossly inadequate. Therefore, we set aside the sentence imposed by the learned High Court Judge and taking into account the sentence prescribed by law, the aggravating and mitigating factors, the following sentence is substituted.

Count No.1. Rigorous imprisonment for 1 year

fine of Rs. 10,000/-, in default of payment 3 months
simple imprisonment.

Count No.2. Rigorous imprisonment for 8 years

fine of Rs. 10,000/-, in default of payment 3 months
simple imprisonment.

Rs.250,000/- to be paid to the victim as compensation,
in default of payment simple imprisonment for 2
years.

Revision application allowed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL