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

In the matter of an application for revision under article 138 of the Constitution read with section 364 of the Code of Criminal Procedure Code Act No.15 of 1979.

C.A. (PHC) APN NO. 12/2017

H.C. Kurunegala No. 75/13

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

Complainant

Vs

Ekanayake Mudiyanselage Athula Sri
Mahanama Medalanda,
Kandulawa, Ibbagamuwa.

Accused

AND NOW BETWEEN

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

Complainant-Petitioner

Vs

Ekanayake Mudiyanselage Athula Sri
Mahanama Medalanda,
Kandulawa, Ibbagamuwa.

Accused-Respondent

BEFORE : **P.Padman Surasena, J. (P C/A)**

K.K. Wickramasinghe, J.

COUNSEL : **Nalinda Indatissa with Madumathie. T. Jayathilake** for The Accused Respondent

: **Varunika Hettige DSG** for the Complainant Petitioner

ARGUED ON : **28.11.2017**

WRITTEN SUBMISSIONS FILED ON: 19/01/ 2018

DECIDED ON : **16.02.2018**

K.K.Wickremasinghe J.

This is a revision application by the state for an enhancement of the sentence imposed by the Learned High Court Judge of Kurunegala. The Accused - Respondent (herein after referred to as the respondent) in this case was indicted in the High Court of Kurunegala on three counts, in case number HC 75/2013. The three counts are as follows, - **(1st)** on or about 22.7.2006 committing the offence of rape on Rajapakse Mudiyanselage Inoka Sandamali, who was below the age of 16 years, thereby committed an offence punishable under section 364 (2) read with section 364 (2) e, of the Penal Code as amended by Act. No 22 of 1995, No 29 of 1998 and No 06 of 2006. **(2nd)** during the period of 23.7.2006 and 5.2.2007 committing the offence of rape on Rajapakse Mudiyanselage Inoka Sandamali who was below the age of 16 years, thereby committed an offence punishable under section 364 (2) read with section 364 (2) e, of the Penal Code as amended by the Penal Code amended by Act. No 22 of 1995, No 29 of 1998 and No 06 of 2006 and **(3rd)** during the period between 23.7.2006 and 5.2. 2007 on other occasions other than the occasions mentioned above , committing the offence of rape on Rajapakse Mudiyanselage Inoka Sandamali who was below the age of 16 years, thereby committed am offence punishable under section 364 (2) read with section 364 (2) e , of the Penal Code as amended by the Penal Code amended by Act. No 22 of 1995, No 29 of 1998 and No 06 of 2006.

The indictment served to the accused respondent and it was read over to him. Thereafter he had pleaded not guilty. The case was fixed for trial on 05.03.2014. On the said date of trial evidence of the victim was commenced and concluded on the 21.10.2016. On that date, the trial was postponed due to the absence of the Learned Trial Judge. The case was fixed for trial on 2.9.2014 but was postponed due to lack of time. When the case was fixed for trial on 17.3.2015 the respondent was absent and the case was refixed.

On 27.10.2016 the respondent withdrew the plea of not guilty. Thereafter the Respondent pleaded guilty to the indictment and accordingly he was convicted.

After submissions of both counsel, the Learned High Court Judge acting under section 303 (1) (e) (k) (1) of the Criminal Procedure Code sentenced the accused on the following manner: -

- 1st count - 24 months RI suspended for 10 years, a fine of 10000/- with a default sentence of 6 months SI and compensation of 100 000/- with a default term,
- 2nd count - 24 months RI suspended for 10 years, a fine of 10000/- with a default sentence of 6 months SI and compensation of 100 000/- with a default term,
- 3rd count - 24 months RI suspended for 10 years, a fine of 10000/- with a default sentence of 6 months SI and compensation of 100 000/- with a default term.

Being aggrieved by the above-mentioned sentence, the aforementioned complainant- Petitioner preferred this revision application to this court.

Learned Counsel for the petitioner invited this court to consider that the sentence imposed by the Learned Trial Judge was manifestly inadequate and wholly disproportionate.

The learned DSG submitted the inadequacy of the sentence, since its illegal as it is not according to section 364(2) of the Penal Code,

Further, following facts were also brought to the notice of court:-

1) The sentence is manifestly inadequate having regard to the nature of offence,
2) The aggravating circumstances surrounding this case is one which calls for a severe punishment ,
3) The sentence imposed on the Respondent wholly disproportionate ate to the facts of this case.

It was further submitted that the Learned Trial judge has failed to give adequate reasons for non-imposition of the minimum sentence, except for passing mention of the belatedness of the statement.

Also submitted by the state that the respondent pleaded guilty only after the cross examination of the victim..

Facts of the case: -

The victim was only 15 years at the time of the offence and was mentally retarded. The age of the accused was a 46 year old. The accused was known to the victim and had visited the victim when she was having lunch and had taken advantage of the situation. The accused has asked the victim to lie down on the bed and had removed all her clothing. Thereafter he had sexual intercourse with the victim on three times. The victim was threatened by the respondent after the act, asking her not to divulge about the act. Because she was threatened the victim had not disclosed anything to her mother for 2 days and thereafter complained to the police.

The accused respondent was found guilty for three counts of rape on his own plea by the High court.

Having considering the serious nature of the offence the prosecuting state counsel in the high court has sought a punishment of deterrent nature.

The learned DSG brought to the notice of court that the learned High Court Judge ought to have been mindful of the fact that the respondent decided to plead to all charges without proceeding to trial after due consideration of the material. Further it was argued that the Trial judge should have considered that no two cases are on the same pedestal in criminal law and that the circumstances surrounding the commission of the offence, presence of aggravation and mitigating factors, mental state of the victim and victim make a distinction in calling for different punishments and went on to say that the Trial Judge should exercise the sentencing judicially and in accordance with the law and the sentence awarded should be proportionate to the crime committed and is not exercised in the current case.

Learned counsel for the accused respondent submitted that the revision application has been filled after a lapse of three months. Furthermore the petitioner has failed to provide a justifiable reason for the delay in filing the revision application after a

lapse of three months. In support of this the learned counsel for the accused-respondent submitted following cases:-

1) **Konara Mudiyanselage Kosgolle Gedera Somapala vs Officer-In-Charge, Police Station, Theripaha. CA(Rev) 06/2012**

A.W.A. Salam, J. Observed

Even though the party aggrieved by the judgment of the learned High Court judge in the exercise of his revisionary jurisdiction against the order made by the learned Magistrate has not appealed against the said order but had chosen to file the present application in revision. It is to be noted that the impugned judgment of the learned High court judge has been delivered on 13th September 2011. However, the present revision application has been filed on 17 January 2012. The delay in filing the present application in revision is more than four months. The petitioner has failed to account for the delay. ..... As such, the revision application under consideration should stand refused.

2) **CA(Rev) 1704/2001** 5 months delay in filing the revision application was a ground for refusal.

3) **Gunesekara and Another v Abdul Latiff [1995] 1 SLR 225** *"Laches itself means slackness or negligence or neglect to do something which by law a man is obliged to do" (Stroud's Judicial Dictionary 5th Ed Pg. 1403)*

In this regard it's pertinent to note that at the time the revision was filed by the petitioner, accused respondent has already paid the compensation and fine ordered by the learned high court judge. According to the journal entry dated 24/11/16 accused paid Rs.300000 compensation to the victim.

Anyway, in the above mentioned case itself it is mentioned that "*What is reasonable time and what will constitute delay will depend upon the facts of each case.*" In the instant case the state has filled the revision application even less than 4 months. This case where there is an irregularity and an illegal sentence imposed by the learned High court judge.

In addition to the above mention objection the learned counsel for the Respondent submitted that the Petitioner failed to establish exceptional circumstances by submitting following cases:-

1) **K.W.Ranjith Samarasinghe vs K.W. Wilbert CA (PHC) 127/99 and PHC Galle No. 59198**, whereby the appellant made an appeal to the Court of Appeal from the High court Galle against the order under Section 66 of the Primary Court Procedure Act, Sisira de Abrew J held "*It is well established principal that a party who has an alternative remedy can invoke revisionary jurisdiction of a Superior Court only upon establishment of exceptional circumstances*"

2) **Bank of Ceylon V Kaleel and others [2004] 1 SLR 284** "*The court will not interfere by way of revision when the law has given the plaintiff-petitioner an alternative remedy (s.754(2)) and when the plaintiff has not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction*"

3) **AG Vs Ambagala Mudiyanselage Samantha Sampath, SC reference 3/2008** and **Kumara Vs AG [2003] 1 SLR 139**

By perusing above mentioned judgments it is abundantly clear that the facts of the instant case are totally different to the cases submitted by the learned counsel for the Respondent.

It is apparent the Prosecuting Counsel has brought to the notice of the Learned Trial Judge that under Section 364(2) of the Penal Code as amended by Act. No 22 of 1995, No 29 of 1998 and No 06 of 2006, the punishment is a term of rigorous imprisonment of not less than 10 years and not exceeding 20 years with fine and compensation.

The following decision in Sri Lanka and other jurisdictions given a light to this point:-

In the case of Hon ***AG Vs Mayagodage Sanath Dharmasiri Perera [CA (PHC) APN 147/2012] it was held, citing AG Vs Jinak Sri Uluwaduge and another [1995] 1 SLR 157*** *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 and should have regard to the punishment provided in the Penal Code other statute under which the offender is charged. He should also regard the effect of the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. The judge must consider the interest of the accused on the one hand and the interest of society on the other; also necessarily the nature of the offence committed, ..."*

In ***AG Vs H.N.de Silva [57 NLR 121]*** *"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. He should also regard the effect of the punishments a deterrent and consider to what extent it will be effective.....the reformation of the criminal, though no doubt an important consideration, is subordinate to the others 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.*

In **Bandara Vs The Republic of Sri Lanka [2002]-2-SLR-277** court held that the sentence should have a deterrent effect and should carry a message to the society.
In **Karunarathna Vs The State [78 NLR 413]**, it was held that, *"the courts should not give the impression that when they commit these offences they can get away with it by getting a suspended sentence and going scot free"*
In **Jusabhai Vs State C.R. MA/623** the court expressed 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."

A victim of a sexual offence would face a mental, physical, emotional, behavioural and development repercussions. His or her entire future will be affected. The court must consider the interests on the offender, the victim and the public, in addition to the consequences of the sentencing.

In the case of **AG Vs Hewa Welimunige Gunasena (CA (PHC) APN No. 110/2012)**, the court converted the non-custodial sentence into a custodial sentence making the following observation;
"In this case the learned High Court judge has not given proper attention to the facts of the case. The victim's age has not been considered by the learned High Court Judge. At the time of the incident the victim was a 12 year old girl and the accused respondent was 31 years older than the victim. Further I note this incident had taken place without the consent of the victim".

In the instant case, the offence committed by the accused is greatly serious. Therefore, imposing a non-custodial sentence to the accused is inadequate.

In the case of **Ukkuwa Vs AG [2002]-3-SLR-279,** Justice Shiranee Thilakawardene was of the view that, when a statute carries mandatory provision it is incumbent upon for the court to comply with it.

In the case of **Mahesh Vs Madhya Pradesh [1988] CriLJ 1380,** it was held that, *"the practice of taking a lenient view and not imposing the appropriate punishment observing that it will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and cruel acts .....to give the lesser punishment to the appellants would be to render the justice system of the country suspect and the common man will lose faith in courts..... ".*

In **Queen V David 1NLR 87** it was held that there is an appeal on a point of law regarding the punishment when the trial Judge has clearly erred in law by awarding a punishment which has no power to give, or when a minimum amount of penalty is prescribed and the Judge has not imposed it.

In **CA, 297/08**, decided on 24/07/2012 WLR Silva. J observed thus: - "*The legislature has imposed a minimum mandatory sentence for this type of offences, carrying a maximum sentence up to 20years of imprisonment. It is not for this court to trifle with the intentions of the legislature. We must not encroach the domain of the legislature, because the legislature thinks and acts according to the wishes of the people and the judiciary is to carry out the wishes of the people. Therefore it is not proper to trifle with this type of offences and allow people to commit offences and escape lightly*"

We have also considered the fact that the respondent has pleaded guilty to the charge and withdrew his plea of not guilty. At this point we are also mindful of the fact that the accused-respondent has already paid compensation to the victim.

For the above-mentioned reasons, we set aside the sentence of 2 years Rigorous Imprisonment on each count for all 3 counts imposed to the accused respondent by the learned high court judge and enhance the sentence to a minimum sentence of 10 years RI on each count to run concurrently. Further, we affirm the Fine of Rs. 10,000 along with the default sentence of 6 months simple imprisonment, affirm the compensation of Rs.100, 000 awarded to the victim and enhance the default sentence of 6 months imposed by the Learned High Court Judge to 2 years on each count. The default sentences imposed should run consecutively.

Sentence enhanced

Accordingly Revision Application is allowed

Judge of the Court of Appeal

P.Padman Surasena, J.

I agree,

President of the Court of Appeal