

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

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

Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:

CA/HCC/0045/2024

High Court of Kalutara Case No:

HC/900/2014

Vs

Herath Mudiyansele Indika Thushara *alias*
Ukku Ralalage Weerasekara Indika Thushara
Herath

Accused

AND NOW BETWEEN

Herath Mudiyansele Indika Thushara *alias*
Ukku Ralalage Weerasekara Indika Thushara
Herath

Accused – Appellant

Vs

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

Complainant - Respondent

Before : **P. Kumararatnam, J.**
Pradeep Hettiarachchi, J.

Counsel : Sandeepani Wijesooriya with Gayathrika De Silva for the Accused – Appellant.
: Maheshika Silva, DSG for the State.

Argued on : 02.06.2026

Decided on : 30.07.2026

Pradeep Hettiarachchi, J

Judgment

1. This appeal arises from the judgment and sentence dated 06.10.2023 of the Learned High Court Judge of Kalutara. The Accused-Appellant (hereinafter referred to as “the Appellant”) was indicted in the High Court on three counts, namely;
 - a. On or about 05.08.2008, committing the offence of sexual harassment on one Herath Mudiyansele Nirosha Kumari, which is an offence punishable under Section 345 of the Penal Code as amended by Acts No. 22 of 1995 and 16 of 2006;
 - b. At the aforesaid time, place, and during the course of the same transaction, committing the offence of grave sexual abuse on Herath Mudiyansele Nirosha Kumari by keeping the male genital on the female’s genital, which is an offence punishable under Section 365B(2)(b) of the Penal Code as amended by Acts No. 22 of 1995 and 16 of 2006;
 - c. At the aforesaid time, place, and during the course of the same transaction, committing the offence of incest on Herath Mudiyansele Nirosha Kumari,

which is an offence punishable under Section 364(3) of the Penal Code as amended by Acts No. 22 of 1995 and 16 of 2006.

2. At the conclusion of the trial, the Learned Trial Judge found the Appellant guilty of counts 1 and 2, but acquitted him of count 3.
3. Accordingly, for count 1, the Appellant was sentenced to 7 years' rigorous imprisonment with a fine of Rs 25000.00, carrying a default sentence of 3 months' imprisonment. For count 2, the Appellant was sentenced to 15 years' rigorous imprisonment and a fine of Rs 25000.00, carrying a default sentence of 3 months' imprisonment.
4. Being aggrieved by the said conviction and sentences, the Appellant has preferred the instant appeal. Although the Appellant initially advanced several grounds of appeal, at the hearing of the appeal, he was informed that he would only challenge the sentence.
5. Hence, the only question to be determined in this appeal is whether the sentences imposed on the Appellant are excessive or disproportionate to the offences for which he was convicted, given the circumstances of the case.
6. In deciding the appropriateness of the sentence, the court will normally pay attention to the aggravating and mitigating circumstances and then impose the sentence. In this case, the aggravating circumstances can be stated as follows;
 - a. Age of the prosecutrix;
 - b. The relationship between the prosecutrix and the Appellant, as the Appellant is the father of the prosecutrix;
 - c. The manner in which the Appellant made the prosecutrix believe that her mother had returned home.

7. The offences for which the Appellant was convicted are undoubtedly grave in nature, particularly as they involve a child under the age of 16 years. The law treats such offences with the utmost seriousness, recognizing the physical and psychological harm caused to the prosecutrix. The fact that the Appellant was convicted on three separate counts of sexual harassment, grave sexual abuse, and incest further aggravates the gravity of the offences.
8. At the same time, it is incumbent upon the Court to consider whether the sentence imposed is proportionate to the culpability of the offender and the circumstances surrounding the commission of the offence.
9. In this regard, the following mitigating circumstances were submitted by the Learned Counsel for the Appellant;
 - a. The Appellant has no previous convictions and is not a habitual offender;
 - b. The Appellant has entered into a new marriage, has two children, and also takes care of his children;
 - c. The Appellant has participated in the trial before the High Court of Kalutara every day;
 - d. The Appellant was the one who found PW1 to give evidence before the High Court of Kalutara; and,
 - e. The prosecutrix is married and has a good family life.
10. The offences under which the Appellant was convicted are punishable under Sections 345 and 365B(2)(b) of the Penal Code as amended by Acts No. 22 of 1995 and 16 of 2006.

Section 345 reads:

Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment and shall on conviction be punished with imprisonment of either description for a term which

may extend to five years or with fine or with both and may also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.

Section 365B(2)(b):

Whoever commits grave sexual abuse on any person under eighteen years of age shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.

11. Section 345 of the Penal Code prescribes a term of imprisonment of either description which may extend to five years, whereas Section 365B(2)(b) of the Penal Code stipulates a minimum mandatory sentence of seven years' rigorous imprisonment, which may not exceed 20 years. In the present case, the Learned Trial Judge sentenced the Appellant to 7 years' rigorous imprisonment on the first count and 15 years' rigorous imprisonment on the second count.
12. I shall now consider whether, in the circumstances of the present appeal, the sentence imposed by the Learned High Court Judge is manifestly excessive and thereby justifies the reduction of the said sentence.
13. In the present case, the Appellant, who was the father of the prosecutrix, had engaged in a quarrel with the prosecutrix's mother (PW2) on the night of the incident. Owing to her fear of being assaulted by the Appellant, PW2 left the house. Thereafter, the Appellant and the prosecutrix went in search of PW2; however, they were unable to locate her and subsequently returned home. Later that night, the prosecutrix and her two brothers went to sleep in a room separated by clothes. At that time, the Appellant called the prosecutrix, informing her that her mother had returned home.

14. Thereafter, the prosecutrix went in search of her mother and discovered that her mother had not yet returned home. Thereafter, the prosecutrix was subjected to sexual abuse by the Appellant, who forcibly removed her clothes. Concurrently, the Appellant placed a knife beneath the pillow to intimidate the prosecutrix and prevented her from escaping. Following the incident, the prosecutrix disclosed the incident to her family. It is clear in the evidence of the prosecutrix that the Appellant took undue advantage of the trust reposed in him by the prosecutrix.
15. It is true that the Appellant has no previous convictions; however, that fact cannot be considered in isolation. In other words, being a first-time offender does not, in itself, warrant leniency, as it must be assessed in light of the nature and the gravity of the offence, the manner in which it was committed, and the attendant circumstances. In these circumstances, while due consideration has been given to the fact that the Appellant is a first-time offender, the seriousness of the offence, the vulnerability of the prosecutrix, and the breach of trust involved far outweigh any mitigating factors.
16. Further, it should be noted that the legislature, in its wisdom, has enacted stringent laws and prescribed severe punishments in order to deter future offenders and to convey a clear message to society that offences of this nature will not be tolerated or treated lightly, as they infringe not only the rights of individuals but also their dignity. A prosecutrix of such an offence suffers not only physical harm but also profound psychological trauma, which, in many instances, may endure for the remainder of the prosecutrix's life.
17. Numerous authorities have addressed the gravity of rape, highlighting its profound physical and psychological impact on victims. These precedents underscore the importance of deterrence and the clear message that must be conveyed to society.
18. In *State of Madhya Pradesh vs. Bala alias Balaram on 3 October, 2005, Appeal (crl.) 1277 of 2005*, the Indian Supreme Court, while stressing the court's duty to society and to the prosecutrix, has emphasized that the intention of the legislature

must be honored; any departure from that intent should occur only in exceptional and compelling circumstances. In this regard, the Supreme Court has stated:

“It is true that reformation as a theory of punishment is in fashion but under the guise of applying such theory, courts cannot forget their duty to society and to the victim. The Court has to consider the plight of the victim in a case involving rape and the social stigma that may follow the victim to the grave and which in most cases, practically ruins all prospects of a normal life for the victim. Could a Court afford to forget these aspects while imposing a punishment on the aggressor? I think not. The Court has to do justice to the society and to the victim on the one hand and to the offender on the other. The proper balance must be taken to have been struck by the legislature. Hence, the legislative wisdom reflected by the statute has to be respected by the Court and the permitted departure therefrom made only for compelling and convincing reasons.”

19. Similar sentiments were expressed in ***S vs. Chapman [1997] ZASCA 45; 1997 (3) SA 341 (SCA) 345D-E***, where Mahomed CJ held that:

“The courts are under a duty to send a clear message to the accused in rape cases, to other potential rapists and to the community that the courts are determined to protect the equality, dignity and freedom of all women, and they will show no mercy to those who seek to invade those rights.”

20. Further, the fact that the Appellant has entered into a new marriage, has two children, and is responsible for the care of his children are circumstances common to many accused persons and, in themselves, do not constitute exceptional grounds warranting leniency. Accordingly, these factors do not carry any significant mitigating weight.

21. In assessing whether the sentence imposed by the Learned High Court Judge is excessive, regard must be had to established principles governing sentencing.

22. In this regard, the imposition of a sentence is not confined to punishment alone; rather, it requires a judicious balancing of the seriousness of the offence, the manner in which it was committed, and the personal circumstances of the offender. The sentence must bear a reasonable relationship to the degree of culpability attributable to the accused, where appropriate, to the objectives of deterrence and rehabilitation.
23. In the instant case, the offenses involved a grave violation of bodily integrity and trust. Offences of this nature call for the imposition of a deterrent sentence.
24. Further, it should be noted that when a perpetrator holds a position of authority, such as a parent, teacher, or guardian, the sentence is often significantly enhanced because they exploited their relationship with the victim.
25. Nevertheless, it remains incumbent upon the Court to give due consideration to any mitigating factors. Further, this Court must also examine whether the Learned Trial Judge has adequately taken into account both the aggravating and mitigating circumstances and has furnished reasons in support of the sentence imposed.
26. Accordingly, the propriety of the sentence must be determined having regard to the seriousness of the offence, the attendant circumstances, and the governing principles of proportionality and fairness, in order to ascertain whether the reduction of the sentence is warranted.
27. In ***Archbold: Sentencing Guidelines (2019), Thomson Reuters, on page 274***, under the heading of applicability of guidelines on sexual offences, it is stated that;

“Starting points define the position within a category range from which to start calculating the provisional sentence.

..... Once the starting point is established, the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial.”

28. The following authorities underscore the necessity of imposing a sentence commensurate with the gravity of the offence and lay down guiding principles to assist the court in arriving at an appropriate and just sentence.

29. In ***Karunaratne vs. The State***, 78 NLR 413, the court held that;

“Here, one would take into consideration all the aggravating factors as well as the mitigating circumstances, such as age, good character, etc.”

30. In the case of ***Alister Anthoney Pereira vs. State of Maharashtra [2012] AIR 3820 (SC)***, held that;

“Sentencing is an important task in the matters of crime. One of the prime objectives of criminal law is imposition of appropriate adequate just and proportionate sentence, commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight-jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: Twin objectives of sentencing policy are deterrence and correction. What sentence would meet the ends of Justice depends on the fact and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offense and all other attendant circumstances. The principle of proportionality in sentencing is a crime duo is well entrenched in criminal jurisprudence. As a matter of law proportion between crime and punishment bears mostly relevant influence in determination of sentencing the crime to a full stop the court has to take into consideration all aspects including social interest and consciousness of the Society for award of appropriate sentence.”

31. ***Illakotulena Gamaralalage Thilakerathna vs. Officer in Charge, Motor Traffic Division, Police Station, Kandy SC Appeal No. 173/2017***, decided on: 22-10-2024, the Supreme Court observed that:

“Consideration of aggravating or mitigatory circumstances generally, has relevance to the assessment of the seriousness of the offence. The appropriate effect on such consideration in sentence would depend on the circumstances of each case, in which the Court can take note of any factor it considers to aggravate or mitigate the imposed sentence. As such, the consideration of proportionality of the sentence to the gravity of the convicted offence must be well reasoned.”

32. Significantly, in sentencing a convicted individual, the Court must balance mitigating and aggravating factors, the legislature’s intent, and the need for justice for the prosecutrix. Furthermore, it must consider the broader message sent to society as well as the specific plight of the accused.
33. In the present case, it is pertinent to note that the Learned High Court Judge sentenced the Appellant to seven years’ rigorous imprisonment on the first count and fifteen years’ rigorous imprisonment on the second count. In respect of the first count, the applicable statutory provision prescribes a maximum term of imprisonment of five years. However, the Learned High Court Judge imposed a sentence in excess of the maximum term permitted by law. Accordingly, the sentence imposed in respect of the first count cannot be sustained. The said sentence therefore, reduce to 5 years’ rigorous imprisonment, being the maximum sentence authorized under the relevant statutory provision.
34. With regard to the second count, the relevant provision prescribes a mandatory minimum sentence of seven years’ rigorous imprisonment and permits the imposition of a sentence up to a maximum of twenty years’ rigorous imprisonment.

In the instant case, the Learned High Court Judge imposed a sentence of fifteen years' rigorous imprisonment, which is substantially below the statutory maximum.

35. In these circumstances, and having regard to the nature and gravity of the offences, the relationship between the Appellant and the prosecutrix, and the applicable sentencing provisions, there is no basis to conclude that the sentence imposed by the Learned High Court Judge in respect of the second count is manifestly excessive or disproportionate.

36. Accordingly, having regard to the totality of the circumstances, I am not persuaded that the sentence imposed by the Learned High Court Judge in respect of the second count is either excessive or disproportionate so as to warrant interference by this Court, including by way of reduction of the sentence so imposed. Accordingly, the sentence imposed in respect of the second count is hereby affirmed.

37. However, in view of the fact that the sentence imposed in respect of the first count exceeds the maximum term of imprisonment prescribed by law, thereby, the sentence on the first count is varied and reduced from 7 years' rigorous imprisonment to 5 years' rigorous imprisonment. The said sentences shall run concurrently from the date of the conviction. i.e., 06.10.2023.

38. The appeal stands dismissed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree

Judge of the Court of Appeal