IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRILANKA

In the matter of an appeal under and in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979 as amended rea with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs

1. Danansuriya Mudiyanselage Sampath Nalinda Wijesinghe
2. Halketiya Loku Naidelage Nimantha Madhushanka Jayaratne

Accused

Court of Appeal Case No:

CA/HCC/19-20/23

High Court of Colombo Case No:

HC 6907/2013

AND NOW BETWEEN

1. Danansuriya Mudiyanselage Sampath Nalinda Wijesinghe

Presently:
Prisoner's number A 22099, Welikada Prison.

1st Accused – Appellant

2. Halketiya Loku Naidelage Nimantha Madhushanka Jayaratne

2nd Accused – Appellant

Vs

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

Respondent.

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

Pradeep Hettiarachchi, J.

Counsel : MalinduSarathchandra with S. Galagedara for the 1st Accused-Appellant.
Hafeel Fariz with Shehan Silva and Shannon Tillekeratne for the 2nd Accused – Appellant.
Yohan Abeywickrama, DSG for the Respondent.

Argued on : 02.07.2025

Decided on : 12.09.2025

Pradeep Hettiarachchi, J

Judgment

1. The 1st and 2nd accused-appellants (hereinafter referred to as "the 1st and 2nd appellants") has filed the instant appeal against the judgment dated 13.10.2022 delivered by the learned High Court Judge of Colombo.

2. The charges in the indictment are as follows:

Charge 1

On or about 10th June 2011, the Accused – Appellants have kidnapped Susei Thilini Maduwanthi aged 16 years, in order that she may be forced or seduced to illicit sexual intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse without her consent, thereby committing an offence punishable under section 32 of the Penal Code read together with Section 357 of the Penal Code.

Charge 2

On or about 10th June 2011, the Accused – Appellants have kidnapped Warnakulasuriya Hansani Kavitha Thisera aged 16 years, in order that she may be forced or seduced to illicit sexual intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse without her consent, there by committing an offence punishable under Section 32 of the Penal Code read together with Section 357 of the Penal Code.

Charge 3

On or about 10th June 2011, the Accused-Appellants have wrongfully confined Susei Thilini Maduwanthi at Ajantha Rest in Pettah, Colombo in order to prevent her from leaving the building, thereby committing an offence punishable under Section 32 of the Penal Code read together with Section 333 of the Penal Code.

Charge 4

On or about 10th June 2011, the Accused-Appellants have wrongfully confined Warnakulasuriya Hansani Kavitha Thisera at Ajantha Rest in Pettah, Colombo in order to prevent her from leaving the building, thereby committing an offence punishable under Section 32 of the Penal Code read together with Section 333 of the Penal Code.

Charge 5

On or about 10th June 2011, the 1st Accused-Appellants has committed grave sexual abuse by using his hands to inappropriately touch the breasts of Susei Thilini Maduwanthi in order to gain sexual gratification, which is punishable under Section 365B (2) (b) of the Penal Code (Amendment) Act.

Charge 6

On or about 10th June 2011, the 1st Accused-Appellants has committed grave sexual abuse by using his hands to inappropriately touch the body of Warnakulasuriya Hansani Kavitha Thisera in order to gain sexual gratification, which is punishable under Section 365B (2) (b) of the Penal Code (Amendment) Act.

3. The trial was conducted before the High Court of Colombo. For the prosecution, twelve (12) witnesses, namely PW2, PW3, PW4, PW6, PW1, PW20, PW18, PW10, PW13, PW14, PW19, and PW5, testified. Upon the conclusion of the prosecution case, the 1st Appellant made a dock statement, while the 2nd Appellant and N.D. Weerasinghe, Inspector of Police, testified for the defence.

4. At the conclusion of the trial, the learned trial judge found the appellants guilty of counts 3 and 4 of the indictment. With respect to counts 1, 2, 5, and 6, the learned trial judge found the appellants guilty of lesser offences, namely, offences punishable under Sections 356 and 345 of the Penal Code.

5. Accordingly, the Learned High Court Judge sentencedthe Appellants as follows:

   - For the 1stcount: -three years rigorous imprisonment and a fine of Rs 5000.00 carrying a default sentence of one year imprisonment.
   - For the 2ndcount: - three years rigorous imprisonment and a fine of Rs 5000.00 carrying a default sentence of one year imprisonment.
   - For the 3rdcount: - one-year rigorous imprisonment.
   - For the 4thcount: - one-year rigorous imprisonment
   - For the 5thcount: -two years rigorous imprisonment and a fine of Rs 5000.00 carrying a default sentence of one year imprisonment.
   - For the 6thcount: - two years rigorous imprisonment and a fine of Rs 5000.00 carrying a default sentence of one year imprisonment.

6. Being aggrieved by the said judgment and sentence, the 1st and 2ndAppellants preferred the present appeal. Although the 1st and 2ndAppellants have filed two separate appeals, the grounds urged by them are substantially similar, if not identical. Accordingly, I shall consider the grounds of appeal of both Appellants together hereinafter.

7. Therefore, following grounds are to be considered in the present appeal.

   a) Whether the learned High Court Judge failed to take into account the contradictory and inconsistent nature of the evidence of PW1.

b) Whether the learned High Court Judge failed to consider that the evidence of PW1 and PW2 was contradictory to each other.

c) Whether the learned High Court Judge failed to consider that the evidence of PW6, PW3, and PW4 undermined the prosecution case.

d) Whether the learned High Court Judge failed to properly analyze the defence version.

e) Whether the learned High Court Judge failed to consider the motive of the investigating officer?

8. The first witness called for the prosecution was Hansani Kaveetha MadhushaniThisera (PW2), who was one of the victims in the case. According to her testimony, PW1 and PW2 were attending the same school during the relevant period. On the day of the incident, both were reprimanded by their teachers after the school principal discovered a love letter addressed to PW1. As a result, PW1 and PW2 were humiliated in the presence of other students. Thereafter, they went to the Chilaw Railway Station. However, as they were unable to catch a train, they boarded a bus to Colombo, and upon arrival, took another bus to Galle Face, where they met two boys and engaged in conversation with them. While proceeding towards the Railway Station with those boys, a police jeep arrived, and an officer in the vehicle instructed them to get into the police jeep.

9. After travelling a short distance, the police officers instructed the two boys to alight from the vehicle, and thereafter proceeded to Galle Face with PW1 and PW2. Upon arrival, PW1 and PW2 were asked to get down from the vehicle, questioned by the police, and informed that they would be taken home.

10. Subsequently, PW1 and PW2 were taken to a hotel room by the Appellants, instructed to remain there, and thereafter the Appellants left the premises.

11. It is interesting to note that, on the first date of trial, PW2 in her evidence-in-chief stated that they were not subjected to any harassment by the Appellants. PW2 firmly stated that nothing had happened to them other than the Appellants holding their hands. However, on the second trial date, while giving further evidence, she stated that the Appellants had touched her chest, hands, legs, and face. PW2 further stated

that she saw the first Appellant kissing PW1. When PW1 and PW2 were taken to the hotel room by the Appellants, they were provided with meals, but both refused to eat. The place where they were kept was identified as "Ajantha." Around 10:00 a.m., the Appellants returned to the room and began touching them.

12. Subsequently, PW1 managed to call one of her friends using the 1st Appellant's phone. Following the instructions of that friend, PW1 then called a police officer at the Chilaw PoliceStation, as well as one of her uncles. Thereafter, the 1st Appellant decided to take both PW1 and PW2 to Chilaw. It is significant to note that at no point were PW1 and PW2 taken to a police station by the Appellants. According to PW1, they were at the hotel for approximately 4 to 5 hours. When they left the hotel, they proceeded to the Pettah bus stand with the 1st Appellant. After they boarded the bus, the 2nd Appellant also arrived at the bus stand in uniform.

13. Then the 1st Appellant travelled to Chilaw with PW1 and PW2. By that time, PW2 knew the names of both the 1st and 2nd Appellants. After reaching Chilaw, they first went to the school and thereafter were taken to the Police. Although it was a holiday, the principal, vice-principal, and their class teacher were present at the school. When they were taken to the Police, PW1 and PW2 were questioned by the Chilaw Police, where they narrated the entire incident.Subsequently, the police produced PW1 and PW2 before a doctor at the Chilaw Hospital, where they narrated the incident to him as well.

14. It is the contention of the Appellants, as reflected in their grounds of appeal, that the Learned High Court Judge failed to take into account the contradictions inter se, the discrepancies, and the overall credibility of the testimonies of PW1 and PW2.

15. Furthermore, the appellants have contended that the prosecution has failed to discharge the burden of proof required in a criminal case, and that the learned High Court Judge did not adequately analyze the dock statement of the appellants.

16. Moreover, it is submitted that the judgment is erroneous and bad in law, as the learned Trial Judge did not give any indication, prior to the commencement of the defence case, that he would convict the appellants for offences other than those mentioned in the indictment.

17. In the impugned judgment, the learned trial judge convicted the 1st and 2nd appellants under Section 356 instead of Section 357. The learned trial judge also convicted the 1st and 2nd appellants on counts 3 and 4 of the indictment. Furthermore, instead of convicting them under Section 365B(2)(b) of the Penal Code, the learned trial judge convicted the 1st and 2ndappellants under Section 345 of the Penal Code.

18. One of the grounds advanced by the Appellants is that they were not afforded an opportunity to defend themselves against the charges for which they were ultimately convicted. This contention is based on the fact that the Learned Trial Judge convicted the Appellants of lesser offences, namely under Section 356 instead of Section 357, and under Section 345 instead of Section 365B(2)(b) of the Penal Code. It is further submitted that, since the Learned Trial Judge failed to inform the Appellants prior to the commencement of the defence case that they could be convicted of offences other than those for which they had been initially indicted, grave prejudice was caused to them.

19. Furthermore, it was submitted that although an application was made under Section 200(1) of the Code of Criminal Procedure Act, the Learned Trial Judge declined the same on the basis that there was sufficient evidence to convict the Appellants for lesser offences in terms of Section 177 of the Code of Criminal Procedure Act. However, the Appellants were not informed of this prior to the commencement of the defence evidence. It was therefore contended that the Appellants were denied the opportunity to present a defence against the newly intended charges, thereby causing them grave prejudice and amounting to a gross violation of the principles of natural justice.

20. In view of the foregoing submissions, it becomes necessary to consider the applicability and scope of Section 177 of the Code of Criminal Procedure Act, particularly in situations where the evidence adduced is insufficient to sustain a conviction for the offences specified in the indictment, but sufficient to warrant a conviction for some other offence.

21. *Section 177 reads:*

177. When a person charged with one offence may be convicted of a different offence.

If in the case mentioned in section 176 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

Illustration—

A is charged with theft. It appears that he committed the offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence.

22. The above section is clear and unambiguous. It permits the trial judge to convict a person of an offence, even if that person was not formally charged with it, provided that the evidence presented during the trial establishes that the person may have committed the offence.

23. However, the question to be determined in the present appeal is whether the conviction of the appellants for lesser offenses without informing them of the said charges prior to the commencement of the defense case was prejudicial to their right to a fair trial and thereby caused them grave injustice.

24. As reflected in the impugned judgment, the Learned High Court Judge concluded that the evidence led by the prosecution was insufficient to sustain a conviction under Section 357 of the Penal Code, but sufficient to convict the Appellants under Section 353. In a similar manner, the Learned High Court Judge proceeded to convict the Appellants under Section 345 of the Penal Code, notwithstanding that they had originally been charged under Section 365B(2)(b), on the basis of the evidence adduced at trial. This approach adopted by the Learned High Court Judge is now under challenge before this Court.

25. It is noteworthy that the ingredients required to establish the lesser offences for which the Appellants were ultimately convicted are not materially distinct from those pertaining to the offences with which they were initially charged. Consequently, the

Appellants were not required to advance a defence that was wholly or substantially different from the defence already taken in respect of the original charges.

26. In other words, as there are no appreciable differences between the offences for which the Appellants were convicted and those for which they had originally been indicted, it is unlikely that any grave prejudice was caused to them by reason of the conviction for the lesser offences, notwithstanding that the said charges were not formally communicated to them at the close of the prosecution evidence.This position is further supported by the 2nd explanation under section 345 of the Penal Code, which reads:
For the purposes of this section an assault may include any act that does not amount to rape under section 363 or grave sexual abuse under section 365B.

27. Accordingly, it cannot be held that the Appellants were denied a fair trial or that there was any violation of the principles of natural justice.

28. In view of the grounds of appeal advanced by the Appellants, it becomes pertinent to consider whether the consistency inter se of the prosecution witnesses is lacking to such an extent as to undermine the credibility of the prosecution case and thereby warrant the acquittal of the Appellants. The Appellants contended that the inconsistencies among the testimonies of the prosecution witnesses, particularly those of PW1, PW2, and PW3, have seriously weakened the prosecution case, a matter which, according to them, was not adequately considered by the Learned High Court Judge. It was further argued that the evidence of PW6 contradicts the testimonies of PW1 and PW2, and that in such circumstances, it would be unsafe to allow the conviction to stand on evidence of a contradictory nature.

29. It is observed that the Appellants, in their submissions, placed much reliance on the alleged inconsistencies in the evidence of PW1 and PW2 concerning the movements of PW6 and PW7. PW1 initially stated that all four individuals entered the police vehicle at the instance of the Appellants, but later testified that PW6 and PW7 did not enter the vehicle. PW1 further stated that while PW6 and PW7 initially entered the vehicle, they immediately got down as instructed by the 1st Appellant. In contrast, PW6 testified that although they did enter the police vehicle at the first instance as directed by the Appellants, they were subsequently allowed to alight.

30. What is discernible from the evidence of PW1, PW2, and PW6 is that all of them, including PW7, were initially asked by the Appellants to enter the police vehicle. Regardless of whether PW6 and PW7 subsequently alighted from the vehicle or did not enter it at all, it is established that both PW6 and PW7 were in the company of PW1 and PW2 at the time they were approached by the Appellants.

31. Furthermore, the fact that the Appellants took PW1 and PW2 in the police vehicle was admitted by the 1st Appellant in his dock statement. The 2ndAppellant, in his evidence, also admitted that he, together with the 1st Appellant, took PW1 and PW2 to the particular guesthouse at Pettah. In the circumstances, it appears that the minor discrepancies in the evidence concerning the precise movements of PW6 and PW7 do not materially affect the core facts of the case, nor do they undermine the credibility of the prosecution witnesses as a whole.

32. It is, of course, correct that in a trial of this nature, the burden rests on the prosecution to establish the charges against the Appellants beyond a reasonable doubt. However, it must not be misunderstood that the standard requires proof beyond any fanciful or imaginary doubt. In the present case, both PW1 and PW2 were students at the time of the alleged offences, and it cannot reasonably be expected that they would recount every detail of the incident with photographic accuracy. To elaborate, they are not required to narrate each and every event with mathematical precision. Accordingly, minor inconsistencies or omissions in their evidence do not, in themselves, render their testimonies unreliable, and the Court must evaluate their accounts in the context of the overall consistency and credibility of the evidence as a whole.

33. It is also significant to emphasize that contradictions donot always mean someone is lying. In many cases, they result from the normal variability of human perception and memory such as faulty memory. However, careful questioning and cross-examination are essential to distinguish between honest mistakes and deliberate falsehoods. Therefore, the evidence presented by the prosecution in the present case should be analyzed and evaluated within that context and should not be rejected as being false.

34. The evidence of PW1 and PW2 regarding the conduct of the 1stand 2nd Appellants contains certain contradictions; however, these do not, in any event, undermine the credibility of the said witnesses. It has been established beyond reasonable doubt that

PW1 and PW2 were taken to a guesthouse by the Appellants. The particular guesthouse was known to the Appellants, which enabled them to secure a room without making any entry in the hotel register maintained at the reception. According to the 2nd Appellant's evidence, they initially went to a guesthouse named Shalika Guest and subsequently to another named Ajantha. Further, the 2nd Appellant stated that PW1 and PW2 had informed him that they intended to commit suicide over a love affair.

35. If that were indeed the case, the Appellants should have taken PW1 and PW2 directly to the nearest police station rather than first taking them to a guesthouse and leaving them there unattended. Being police officers, the Appellants could, and indeed should, have sought the assistance of a female police officer, given that both PW1 and PW2 were young girls, had they acted in good faith. In these circumstances, the Court is satisfied that the actions of the Appellants cannot be characterized as acting in good faith and raise serious questions regarding their intent and misuse of authority.

36. It is also significant to note that the 1st Appellant, in his dock statement, stated that when they first encountered PW1 and PW2, the girls informed him that two boys (PW6 and PW7) had approached them and made improper advances. If this account were accurate, it raises the question of why PW6 and PW7 were allowed to leave without any action being taken. Further, why did the 1st Appellant take PW1 and PW2 to a guesthouse instead of bringing them to a police station or at least notifying a relevant authority until the following morning? No plausible explanation was forthcoming from the Appellants in this regard.

37. Therefore, while certain contradictions exist in the testimonies of PW1 and PW2 regarding particular acts allegedly committed by the Appellants, these, in my view, do not undermine the credibility of PW1 and PW2. Nor do they preclude the Learned Trial Judge from convicting the Appellants for lesser offences on the basis of the evidence available.

38. The 2nd Appellant placed much reliance on ***Queen v. Julius 65 NLR 505***, contending that if a witness is found to be untruthful or unreliable at one point in their testimony, it casts doubt on the veracity of their entire evidence. It is, however, significant to note that the Learned Trial Judge did not wholly disbelieve the evidence of PW1 and

PW2, nor did the Judge conclude that they were untruthful or unreliable. Rather, the Judge determined that their evidence was insufficient to establish the charges under Sections 357 and 365(B) of the Penal Code, but adequate to convict the Appellants under Sections 356 and 345. For these reasons, I am not persuaded to accept the 2nd Appellant's argument on this point.

39. The Appellants' explanation that they took PW1 and PW2 to the guesthouse to allow them to change their clothes cannot be accepted, as it was established in evidence that the girls had already changed their clothes before boarding a Colombo-bound bus. Had the Appellants genuinely acted in good faith with the intent to assist PW1 and PW2, there was no justification for keeping them in a guesthouse. As responsible police officers, instead of leaving PW1 and PW2 in a guesthouse in Pettah, they could have produced them to the Bureau for the Investigation of Abuse of Children & Women. For reasons best known to them, however, the Appellants kept PW1 and PW2 in the guesthouse until the following morning.

40. In light of the foregoing, it is evident that the actions of the Appellants, taking PW1 and PW2 to a guesthouse, leaving them unattended overnight, and failing to inform appropriate authorities, cannot be justified as an exercise of good faith or proper police procedure. Such conduct, when considered alongside the credible evidence of PW1 and PW2, supports the conclusion that the Learned Trial Judge was justified in convicting the Appellants for the lesser offences under Sections 356 and 345 of the Penal Code. The convictions, therefore, are consistent with the available evidence and do not amount to a miscarriage of justice.

41. Given that the particular guesthouse was known to the Appellants, it is needless to say that PW1 and PW2 could not have escaped from that place during the night, even if they had wished to do so, owing to their tender age and unfamiliarity with the area. The circumstances in which the Appellants took PW1 and PW2 to the guesthouse, and the manner in which the former manipulated the latter, clearly constitute an offence under Section 353 of the Penal Code, thereby rendering them liable for punishment under Section 356 of the Penal Code.

42. Furthermore, the Learned High Court Judge carefully examined and evaluated the evidence of PW1 and PW2 before convicting the Appellants under Section 356 of the Penal Code. The Judge clearly articulated why the evidence of PW1 and PW2 was

insufficient to establish the charge under Section 357 of the Penal Code, yet sufficient to constitute a lesser offence punishable under Section 356. Similarly, the Learned Trial Judge was satisfied that, although the evidence was insufficient to sustain a charge under Section 365B, it was adequate to establish a charge under Section 345 of the Penal Code.

43. It was argued that, in the absence of evidence amounting to sexual harassment, the conviction under Section 345 is erroneous. It is noteworthy that PW1, in her evidence, clearly stated how the appellants attempted to kiss her while they were in the guesthouse and also asked whether she would like to marry them. This evidence was not challenged during cross-examination and, as such, its credibility remains intact.

44. Explanation 1 to Section 345 reads:

> *Unwelcome sexual advances by words or action used by a person in authority, to a working place or any other place, shall constitute the offence of sexual harassment.*

45. In light of the foregoing, the offence of sexual harassment may be committed through words alone, without any physical contact. Accordingly, the uncontradicted evidence of PW1 clearly establishes that the appellants committed the offence of sexual harassment. Therefore, I find no merit in the argument advanced by the appellants.

46. It is also important to emphasize that, at no stage, did the defence cross-examine PW1, and consequently, the credibility of her evidence remains intact.

47. In***Ajith Samarakoon v AG. (Kobaigana Murder Case) 2004 - 2 Sri LR 209 at 230 at 230*** Ninian Jayasuriya, J. held *'that evidence not challenged or impugned in cross examination can be considered as admitted and is provable against the accused.'*

48. In ***Himachal Pradesh v Thakur Dass 1983 2 Cri LJ 1694 at 1983*** V.D. Misra, CJ. held: "*Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed."*

49. His Lordship Sisira de Abrew, J. in ***Pillippu Mandige Nalaka Krishantha Kumara Thisera v A.G., CA 87/2005 - CAM 17.5.2007*** "stated inter alia:

I hold that whenever evidence given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness.

50. For the reasons stated above, and having regard to the authorities cited, I find no basis to interfere with the findings of the Learned High Court Judge regarding the guilt of the Appellants. Accordingly, I affirm the convictions of the Appellants for the respective charges.

51. The next issue to be determined is the appropriateness of the sentences imposed on the Appellants. The Appellants submitted that the Learned Trial Judge failed to take into account mitigatory factors when imposing custodial sentences. It was further contended that directing the sentences to run consecutively was unduly harsh, given that the alleged offences were committed at the same time, in the same place, and as part of the same transaction. Accordingly, I shall consider whether the mitigatory factors relied upon by the Appellants warrant a more lenient sentence than that already imposed.

52. It is noted that both Appellants have no previous convictions. Further, there was no evidence of the use of violence at the time the offences were committed. The 1st Appellant was 23 years old at the time and it was he who accompanied PW1 and PW2 back to Chilaw and handed them over to the Chilaw Police Station. There is no evidence that the 1st Appellant threatened the victims to refrain from disclosing the incident to the authorities, nor that he attempted to influence them in any way. The 2ndappellant was 23 years old when he committed the offenses. At the time of his conviction, he had a 6-year-old child, and his wife was reportedly suffering from cancer.

53. Aggravating factors may include a vulnerable victim, the use of violence and harm, previous convictions, the fact that the offenders were on parole at the time of committing the offense, the abuse of a position of trust or power, and substantial injury, emotional harm, loss, or damage caused.

54. The mitigating factors related to personal mitigation rather than to factors diminishing the gravity of the offence, which includes no prior convictions, good character, good prospects of rehabilitation, remorse, youth, old age, physical illness/impairment, family dependence on offender, etc.

55. However, these factors must be weighed against the serious nature of the offences, which involved an abuse of authority, manipulation of vulnerable young girls, and the risk posed to the victims.

56. Numerous cases and legal principles across common law jurisdictions, illustrate the various objectives of sentencing an offender, including retribution, deterrence, rehabilitation, and incapacitation. The relative weight accorded to each objective varies depending on the specific circumstances of the offence and the characteristics of the offender.

57. In ***State of Maharashtra vs. Goraksha Ambaji Adsul, 2011 (7) SCC 437***, the Supreme Court of India made the following observation:

" The principles governing the sentencing policy in our criminal jurisprudence have more or less been consistent, right from the pronouncement of the Constitution Bench judgment of this Court in Bachan Singh v. State of Punjab,(2010) 8 SCC 775. Awarding punishment is certainly an onerous function in the dispensation of criminal justice. The court is expected to keep in mind the facts and circumstances of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in [pic]the case and the impact of awarding punishment. These are the nuances which need to be examined by the court with discernment and in depth.

58. 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."

59. In the present case, considering the appropriateness of the sentence, this Court cannot ignore the age of the victims, nor the conduct of the appellants, who abused their official positions in committing the offences against them. At the same time, I take into account the absence of violence or any bodily harm caused to the victims.

60. Furthermore, the 1st appellant has already spent nearly three years in remand, a fact that cannot be overlooked. The 2nd appellant had spent 8 months in remand from the date of conviction and is now on bail pending the appeal. I also give due consideration to the fact that, as a result of their convictions, the appellants have lost their positions in the police force and are unlikely to obtain future employment in public service.

61. More importantly, given that no prior convictions have been reported against them, the prospect of their rehabilitation cannot be ruled out. The young age of the appellants, along with the absence of any previous convictions, also persuades this Court to adopt a degree of leniency.

62. The offences for which the appellants were ultimately convicted are punishable under Sections 356 read with Section 32, Section 333, and Section 345 of the Penal Code. None of these offences prescribe a minimum mandatory sentence, thereby allowing the trial judge to exercise discretion after considering the facts and circumstances of the case.

63. Accordingly, I order that the sentences imposed on each count shall run concurrently, which means a total period of 3 years rigorous imprisonment in total. The fines imposed and the default sentences on the appellants shall remain unchanged.

64. Since the 1st appellant is in remand custody pending the determination of the appeal it is ordered that the sentence he is required to serve now should be calculated from his date of sentence, namely, from 13.10.2022.

65. It was informed that the 2nd appellant is currently on bail pending appeal. However, it appears that the 2nd appellant had already spent eight months in remand custody before being released on bail pending the present appeal.

66. Therefore, his sentence shall commence from the day he appears before the High Court, but the eight-month period he has spent in remand custody before being released shall be taken in to account as a part spent of the 3-year rigorous imprisonment period he is now required to serve. Accordingly, the 2nd appellant shall serve a term of imprisonment of two years and four months.

67. Since the 2nd appellant is currently on bail, the learned High Court Judge is directed to take appropriate steps to notify him and implement this order accordingly.

68. In the circumstances, the appeal is partly allowed, limited only to the alteration of the sentence.

Judge of the Court of Appeal

P. Kumararatnam,J

I agree,

Judge of the Court of Appeal