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

In the matter of an appeal in terms of Section 331(1) 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.

The Democratic Socialist
Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0169/2022

Complainant

High Court of Kurunegala
Case No. HC/115/2017

Vs.

Warnakulasuriya Mudiyanselage
Jayantha Warnasuriya.

Accused

AND NOW BETWEEN

Warnakulasuriya Mudiyanselage
Jayantha Warnasuriya.

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J

K.M.G.H. KULATUNGA, J

COUNSEL : Rikaz Riffard with Nipun Samaratunga for the Accused-Appellant.

Hiranjan Pieris, SDSG for the Respondent.

ARGUED ON : 11.11.2024

DECIDED ON : 09.12.2024

K.M.G.H. KULATUNGA, J.

Introduction

1. When this matter was initially called in the High Court of Kurunegala my sister Justice Menaka Wijesundera (as she then was) happened to be the presiding High Court Judge but was then heard and determined by her successor. However, when this appeal was taken up for argument Mr. Rikaz Riffard AAL., was appraised of the same. Mr. Riffard then informed that as those were mere mention dates prior to the trial the appellant has no objection to Justice Wijesundera being a member of this bench considering this appeal. Accordingly, this was taken up for argument on 11.11.2024.

2. The accused-appellant was indicted with three counts of grave sexual abuse committed on a girl less than 16 years of age and was convicted of count No. 01 and acquitted of counts 02 and 03 by Judgment dated 25.05.2022. Thereafter, the learned High Court Judge imposed a sentence of ten years rigorous imprisonment and also a fine of Rs. 15,000.00 with a default sentence of three months simple imprisonment. Further, the

payment of Rs. 100,000.00 compensation to the aggrieved party was also ordered with a default sentence of six months simple imprisonment. The accused-appellant being aggrieved by the said conviction and the sentence did prefer this appeal. However, when the matter was taken up for argument on 11.11.2024. Mr. Rikaz Riffard, AAL., for the appellant informed that the appellant intends only to pursue with the appeal against the sentence and accordingly abandoned and withdrew the appeal against the conviction.

3. In respect of the sentence, the Counsel submitted that the learned Trial Judge has imposed a sentence of ten years which is above the minimum mandatory sentence and submitted the that the following mitigatory circumstances be considered and a variation of the sentence be made in favour of the appellant. The said grounds are;
    i. The incident has taken place almost ten years prior to date of sentencing.
    ii. The defence has admitted the Medico Legal Report.
    iii. The accused is a father of two children and is the sole breadwinner.

4. In addition to the above, attention was also drawn to the plea in mitigation made on behalf of the appellant on 01.06.2022. They are;
    i. Absence of any previous convictions.
    ii. Being in remand for over one year prior to the conviction.

5. Mr. Hiranjan Pieris S/DSG in his usual magnanimous form did inform that he would not seriously object to this application and submitted that he would leave the matter entirely to court.

Facts

6. The victim is a girl who was around seven years of age when this incident took place between 2011 and 2012. The accused-appellant is a person living close to their house in the village maybe about half a kilometer away. On that particular day, she had accompanied her mother who has gone for employment where her mother works on and off, along with others making bricks in a land adjacent to the accused's house. When all were at work, the accused has surreptitiously called the victim into his house, taken her to a room and has placed his penis on her female organ and pressed. After a short while having heard her mother call, she had come out of the house. She had not divulged this to her mother. At a later point of time, she had told this to her grandmother. Then her mother having been informed had taken her to the police and this complaint was thus made. The victim also narrates that she had been so abused on a few other occasions by this accused. These are the basic facts of the offending.

7. After trial, the accused was convicted of count No. 01, that of grave sexual abuse of the victim punishable under Section 365B(2)(b) of the Penal Code. Now this appeal is limited to the sentence only. The appellant moves for a variation and a mitigation of the sentence in his favour.

The Law

8. At the outset, it is prudent to consider the sentence prescribed by law for this offence. It is a term of not less than seven years and not exceeding twenty years with a fine and also compensation. Therefore, *a minimum mandatory sentence* is prescribed by law. However, the Supreme Court in SC Reference/3/2008 has decided that a Trial Judge's discretion to

determine the sentence is not circumscribed by the minimum mandatory sentence prescribed by law. Thus, it is now settled law that a Trial Judge has a discretion to decide on an appropriate sentence notwithstanding the minimum mandatory sentence prescribed by law (v*ide* SC/3/2008). The Supreme Court opined unanimously that, *"the minimum mandatory sentence in Section 362 (2) (e) is in conflict with Article 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."*

9. However, one must be mindful that penal statutes do provide for minimum mandatory sentences even as at today. Thus, a category of offences which provide for a minimum mandatory sentence is active in our statutes. No doubt, in view of the Supreme Court decision in 3/2008, the discretion of a sentencing judge is not inhibited by such limitation. This does not mean and cannot or be construed to say that where a minimum mandatory is prescribed in a penal provision now it has no meaning or relevance. Subject to the judicial discretion there exists a category of offences in which a minimum mandatory sentence is prescribed. This is buttressed by the fact that, long after the Supreme Court decision in 3/2008 the Legislator has recently in the amending Act No. 25 of 2024 referred to statutes where a *minimum mandatory sentence is stipulated* in the proviso to section 283A (1) of the Criminal Procedure Act.

10. Hence to my mind, when the legislature has prescribed a minimum mandatory sentence, it certainly is a manifestation and an indication that the said offence is considered to be serious and warrants a deterrent sentence. Parliament determines and set the parameters for such condign and appropriate punishment and in that process determines a minimum sentence of imprisonment

for certain offences to provide a deterrent impact. This is a clear insistence that manifests Legislature's resolve to meet such offences with a very strong sanction as means of deterrence. That is the policy of law. The courts are obliged to respect this legislative mandate.

11. Certainly, in view of SC Reference 3/2008 though a trial Judge is neither shackled nor inhibited by the said minimum mandatory sentence, is required to have regard to the fact that a minimum mandatory sentence is so fixed. A court now certainly has the discretion to impose a sentence of imprisonment less than the prescribed minimum. However, I am of the view that the judge should have and there should be some adequate reason/s to go below the said minimum sentence. The court should mention such reasons in the judgement when awarding a sentence less than the prescribed minimum. In order to exercise the discretion to impose a sentence less than the minimum prescribed there should be and the court has to record such reason/s which is adequate. This to my mind should necessarily be some tangible and good reason which is not fanciful. Thus, to my mind it is necessary and prudent to assign and give the reason if and when a Judge decides to impose a sentence below the minimum mandatory fixed by law.

12. At this juncture it is relevant to note that there were a series of decisions by the Supreme Court following the principle as laid down in 3/2008, acting in appeal did reduce the sentence well below the minimum mandatory. They are **Rohana alias Loku vs. Attorney General** (2011) 2 SLR 174 and **Ambagala Mudiyanselage Samantha Sampath vs. Attorney General** SC/Appeal/17/2013.

    In the case of **Rohana alias Loku vs. Attorney General** (2011) 2 SLR 174, the Supreme Court imposed a sentence below the

mandatory minimum due to several mitigating circumstances. They are that the prosecutrix was aged 15; was in a consensual romantic relationship with the accused; she had urged him to take her away from her home, where she faced harassment from her family; and she threatened to commit suicide if he refused. Acting out of emotional impulse rather than coercion, the accused took her to his uncle's and sister's homes, where they stayed for four days and engaged in consensual sexual intercourse.

The court also noted that the accused had not used force or malicious intent and that the prosecutrix was a reluctant witness against the accused. Accordingly, although the accused was considered "*technically guilty of the offence described in Section 364(2)(e) of the Penal Code,*" set aside the sentence of the High Court and the reduced five-year sentence of the Court of Appeal, substituting a sentence of two years rigorous imprisonment suspended for a period of ten years.

Then in **Ambagala Mudiyanselage Samantha Sampath vs. Attorney General** [(SC/Appeal/17/2013) decided on 12.03.2015], the accused, who was married to the victim's sister, was invited to live with the victim's family after his wife left him, the victim became pregnant, and the accused acknowledged paternity, actively supporting and caring for the child, including financial maintenance and involvement in her education. The Supreme Court prioritized the best interests of the child, emphasizing that sentencing the accused to 10 years imprisonment would deprive the child of paternal care during her formative years. Additionally, the family had initially chosen to resolve the matter privately without involving law enforcement. Following the Supreme Court's determination in 03/2008, the Court held that mandatory minimum sentences should not

override judicial discretion, particularly when constitutional rights and individual circumstances are at stake. Consequently, the court upheld the suspended sentence imposed by the High Court to balance justice and the child's welfare.

13. In these two decisions the respective Court did advert to such reasons that warrants going below the minimum mandatory sentence. Thus, as held above if and when a Judge decides to impose a sentence below the minimum mandatory fixed by law it is necessarily have and to expressly state and give the reason.

Consideration of the Sentence

14. Now to consider the Appellant's sentence, the Trial Judge upon considering the impact and the trauma suffered by the victim has imposed a deterrent sentence of ten years imprisonment. This is above the minimum mandatory of seven years. When the minimum mandatory is prescribed, no doubt, a Judge now has discretion to determine the appropriate sentence considering the circumstances of the offending and the gravity of the offence. In this instance, the victim was a girl of seven years and the accused is a known adult well above the age of the child. In the normal course of event, one would expect such an elder in a village to protect minor children. Thus, the appellant has clearly, by committing this act, breached the trust and confidence reposed in him which is a serious breach of trust so to say. Further, the appellant has very cunningly and artfully taken advantage of the innocence of this girl and committed this act of sexual abuse which is abhorrent by any civilized standard. Until the taking up of this appeal, the appellant has not demonstrated any remorse or repentance. There is almost no reason or mitigatory circumstance that is evident from the proceeding or the submission to consider in favour of the appellant, as such, there is no reasonable ground or basis to consider a sentence below the

minimum mandatory prescribed by law. As for the long-drawn-out trial I find that the appellant, himself is responsible to a great extent to this delay. Therefore, it is unfortunate that the delay also cannot be considered in his favour.

15. In sentencing and determining the appropriate punishment, a Court is required to consider the same from the point of view of the appellant as well as the public. In **Attorney General V. H.N. De Silva** 57 NLR 121 Basnayake A.C.J. clearly and concisely has explained the matters that should be considered in determining the sentence as follows;

> "*In assessing the punishment that should be passed on an offender, a judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. 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 punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidents of crimes of the nature of which the offender has been found to be guilty and the difficulty of the detection are also matters which should receive due consideration. The reformation are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration is subordinate to the others I have mentioned. Where the public interest or the welfare of the state (which is synonymous)*

outweighs the previous good character, antecedents and age of the offender, public interest must prevail".

16. In recent years, by the numerous cases in this court we have seen that crimes against women and children are on the rise. These crimes are violations of the person of the victims and an affront to the human dignity of any civilized society. Imposition of inadequate sentences is not only an injustice to the victim of the crime in particular and the society as a whole in general, but also at times encourages a criminal to act with impunity. The Courts have an obligation while awarding punishment to impose appropriate punishment particularly keeping with the intent and the mandate of the Legislature. Further the public abhorrence of the crime should be reflected through the punishment. The Courts must not only consider the rights of the criminal but also the rights of the victim of crime and the society at large whilst determining the appropriate sentence.

17. That being so, in this appeal I find no tangible or appreciable reason which justifies or enables the court to consider a sentence below the minimum mandatory. However, the fact that the appellant opted to abandon and withdraw the appeal against the conviction to some extent manifests at least a belated sense of remorse or an acknowledgment of his wrongdoing.

18. Then the Medico Legal Report has been admitted by the defence during the trial. Section 420 of the Criminal Procedure Act provides that, *the court shall, when passing sentence on the accused person have regard to the fact that he has made an admission under this section*. This is a matter that may be considered in favour of the appellant when passing the sentence, which I am inclined to. This considered along with the fact that the accused had not acted in any cruel manner or resorted to

violence in committing this offence, do give rise to some reason which may be lawfully considered in favour of the appellant in mitigation.

Conclusion

19. Accordingly, I am inclined to vary and reduce the sentence from ten years to seven years rigorous imprisonment. Subject to this variation, the fine and compensation along with the default terms as imposed by the Trial Judge are all affirmed.

20. Further, I direct that the sentence to be operative with effect from 01.06.2022, the date of sentencing. Subject to the above variation in the sentence, the appeal against the conviction is dismissed and the appeal against the sentence is partially allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL