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

CA/HCC/160 /2023

HC Anuradhapura : HC/97 /19

Democratic Socialist Republic of Sri Lanka

Complainant

V.

Fawool Hameed Muhuthar

Accused

And Now between

Fawool Hameed Muhuthar

Accused-appellant

Vs.

The Attorney general

Attorney general's Department

Colombo 12.

Complainant- Respondent

Before: **B. Sasi Mahendran, J.**
Amal Ranaraja, J

Counsel: Shanaka Ranasinghe, PC with Sandamali Peiris for the Accused-Appellant
Maheshika Silva, DSG SSC for the Respondent

Written Submissions On: 30.01.2024 (by the Accused-Appellant)

Argued On: 06.03.2025

Judgment On: 01.04.2025

Judgment

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of Anuradhapura on the count of rape committed on one Halwathage Achini Dilshika Maduwanthi punishable under Section 364 (2)(e) of the Penal Code.

At the trial, the prosecution led evidence of 15 witnesses and marked 4 productions.

The Accused pleaded not guilty to the said charge and gave a dock statement calling one witness on his behalf.

At the conclusion of the trial, the Learned High Court Judge by judgment dated 25.05.2023 found the Accused guilty of the charge and imposed a sentence of 15 years of rigorous imprisonment and a fine of Rs. 10,000/- and 6 months of rigorous imprisonment in default. Further, a compensation of Rs. 300,000/- was ordered to be paid to the victim, and in default a fine would be imposed, if failed a term of 2 years of simple imprisonment is imposed.

Being aggrieved by the afore-mentioned conviction and the sentence, the Accused has preferred this appeal to this Court.

The following are the grounds of appeal as pleaded by the Accused.

1. Did the Learned High Court Judge fail to consider that the version of the prosecution has failed the test of probability.
2. Did the Learned High Court Judge misdirect himself by failing to judicially evaluate the evidence before him

When the matter was supported on 19.12.2024, the Counsel for the Accused informed the Court that he only challenged the sentence imposed and sought a mitigation in the sentence based on the medical condition of the Accused.

In this context, this Court has to consider what is the punishment imposed by the legislature.

Section 13 of the Code of Criminal Procedure Act No. 15 of 1979 stipulates that;

"The High Court may impose any sentence or other penalty prescribed by written law"

In the instant case, the said sentence or penalty prescribed by written law is found in Section 364 (2)(e) of the Penal Code;

(2) "Whoever—

(*e*) commits rape on a woman under eighteen years of age;

shall be punished with rigorous imprisonment for a term not test than ten years and not exceeding twenty years and with fine and shall in addition 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;"

The Courts take into consideration that the Legislature has considered rape a very serious offence. The prescribed punishment of rigorous imprisonment for a term not less than ten years and not exceeding twenty years reflects the intention of the Legislature.

In this context, since the Counsel for the Accused sought a mitigatory sentence, I am mindful of the sentiments expressed by His Lordship Basnayake ACJ in The Attorney General v. H.N. De Silva 57 NLR 121 at page 124 in the matter of assessing the sentence to be imposed for an offence.

"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 incidence of crimes of the nature of which the offender has been found to be guilty [Rex v. Boyd (1908) 1 Cr. App. Rep. 64.] and the difficulty of detection 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 are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail."

This dictum was followed by His Lordship Gunasekara J in The Attorney General v. Mendis 1995 1 SLR 138 and held that;

"In our view once an accused is found guilty and convicted on his own plea, or after trial, the Trial Judge has a difficult function to perform. That is to decide what sentence is to be imposed on the accused who has been convicted. In doing so he has to consider the point of view of the accused on the one hand and the interest of society on the other. In doing so the Judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organisation in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime. The Trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should in our view not to surrender this sacred right and duty to any other person, be it counsel or accused or any other person. Whilst plea bargaining is permissible in our view, sentence bargaining should not be encouraged at all and must be frowned upon."

Further held that;

"We are in agreement with the observations of Basnayake, A.C.J. that whilst "the reformation of the criminal though no doubt is an important consideration in assessing the punishment that should be passed on an offender, where the public interest or the welfare of the state outweighs the previous good character, antecedents and age of the offender, that public interest must prevail." Having regard to the manner and the ingenuity with which the crimes that the Accused-Respondent has committed to which he

has pleaded guilty, we are of the view that the sentence imposed is grossly inadequate. In our view the crimes to which the Accused-Respondent pleaded guilty are of a very serious nature and have been committed with much planning, deliberation and manipulation and called for an immediate custodial sentence."

The above dictum was considered by His Lordship S.N. Silva J (as he was then) in The Attorney General v. Ranasinghe and Others 1992 2 SLR 81 at page 88;

"It is also appropriate to cite an observation made by the Lord Chief Justice in the Court of Appeal of England, with regard to the sentence to be imposed for an offence of rape. In the *case of Roberts* at page 244. It was observed as follows:

"Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasise public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these, in cases of rape vary widely from case to case."

Further held that

"It is seen that several of these aggravating circumstances are present in the case. The forcible removal of the prosecutrix when she was sleeping with her mother, the fact that she was very young, below the age where she may consent to sexual intercourse, the degree of preplanning by the accused and the repeated commission of the offence for 2 days until the Police rescued the prosecutrix are some of these aggravating circumstances. On the whole we are of the view that public interest demand that a custodial sentence be imposed in this case."

With the above dictums in mind, we consider the present appeal regarding mitigation of the sentencing.

The facts and circumstances of this case are as follows:

According to PW1, Halwathage Achini Dilshika Maduwanthi, the victim of this case, when she was right after her O/Ls, one of the uncles whom they know from the neighbourhood namely, Jayaratne had told her parents about a vacancy in a fancy shop. Despite her parents' disapproval, she had agreed to work. On 31.12.2013, PW1 along with her parents and the said uncle namely Jayaratne had gone to the house of the Accused, who was introduced as the owner of the said shop. According to PW1, at the Accused's place, the Accused's wife and his daughter were also there. After having some tea, the PW1's parents and the said Jayaratne had left the place leaving PW1 at the Accused's house. Later, they had dinner and the PW1 had a call with her parents informing them that she was ok at the said place. Then she was directed to a room where she was provided with accommodation, the door lock of which was broken. She states that she was given a purple skirt by the Accused and she wore a blouse that she brought from home. She testified that she could not sleep till dawn because she was scared. Then, she got up at around 3 o'clock in the morning, refreshed herself, and sat on the bed for about an hour. Then the Accused came to the room where PW1 was staying and sat on the bed. Thereafter, he asked whether she could stay there.

Then, the Accused told her that no need to go home, they could buy some clothes. Later, he slept on the same bed where PW1 was sleeping and hugged her. PW1 states that she was terrified and she did not have the strength to shout or ask for help. Then he told her not to go home and removed all her clothes. Then he had come on top of her body and raped her. She states that the Accused left the room after his wife called him. Then she went to the washroom, washed the clothes, and refreshed herself. Later, she said that she wanted to go home and then the Accused called the said uncle Jayaratne. Later she was dropped at the workplace where her mother worked by the Accused and the said Jayaratne. She had told her mother what happened when she returned from work then her mother called her

father and told the story. PW1 states that then she was taken to the hospital where her father works and was examined by a doctor. Then they lodged a complaint to the Police.

In the instant case, the Accused had pleaded for a mitigatory sentence on the basis of his medical condition.

We are mindful that, our Courts have considered the following mitigatory factors with regard to rape and grave sexual abuse when sentencing;

a. Age of the victim
b. Repeated acts committed
c. Relationship between the parties
d. Mental impact on the victim

In the instant case, the Accused has failed to plead any facts which could be considered as a mitigatory factor. Further, the Court takes into consideration the fact that the Accused has taken advantage of the vulnerability of the victim who came to his house on the previous day to work in his shop and was then obviously a stranger to the place.

This Court is mindful of the statement made by the victim which is reproduced below.

On page 73 of the brief;

> "මට ඒ වෙලාවේදී ඇදගෙන සිටපු ඇදුම කවදාවත් අමතක වෙන්නේ නැහැ. මම මහත්තයත් එක්කත් කිව්වම මහත්තය හයි කෝට් නඩුව අඩ ගහනවා කියලා මට එන්න එපා කියල ඇත්තටම ගැහුවා. ඒත් මට වෙච්ච අසාධාරණය තවත් කාට හරි වෙයි කියලා මම ආවේ. (සාක්ෂිකාරිය හඬමින් සාක්ෂි ලබා දෙයි)"

This piece of evidence elaborates on the vulnerability of the victim and the mental pressure this incident had upon the victim as well as the societal impact. This also indicates the potential for injustice to repeat itself and the reliance of the general public upon the justice system for the deterrent effect to maintain social order and

prevent crime from escalating. These words uttered by the victim who came in seek of justice shock the conscience of this Court.

For the above-mentioned reasons, we see no reason to intervene with the sentence imposed on the Accused by the Learned High Court Judge on 25.05.2023.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL