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

In the matter of an Appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

COURT OF APPEAL CASE NO:
CA/HCC/056/2024
HC KEGALLE CASE NO:
4632/21

The Democratic Socialist Republic Of Sri Lanka

Complainant

Vs.

Yatiwala Withanalage Samson Micheal Perera

Accused

AND NOW BETWEEN

Yatiwala withanalage Samson Micheal Perera

Polpitiya, weli Ihalatenn

Ledigammana

Accused-Appellant

Vs.

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

Complainant-Respondent

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

Counsel: Dr. Sunil Abeyratne with H. Gunathilake for the Accused-Appellant
Malik Azeez, SC. for the State

Written Submissions On: 27.08.2024 (by the Accused-Appellant)

Argued On: 30.01.2025

Judgment On: 27.02.2025

JUDGMENT

B. Sasi Mahendran, J

The Accused-Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of Kegalle on three counts of grave sexual abuse committed on one minor namely, Debegama Vidanalage Dilini Maheshika Sewwandi punishable under Section 365B (2)(b) of the Penal Code as amended by Acts Nos. 22 of 1995, 28 of 1998 and 16 of 2006.

The Accused on 16.01.2024 tendered an unqualified plea of guilty on all three counts levelled against him. The Counsel for the Accused sought mitigation of the sentence on the following grounds;

1. The Accused tendered the plea at the outset
2. There are no previous convictions.
3. The age of the Accused and the Accused was suffering from a nerve ailment
4. The Accused is the one who looks after the elderly parents
5. The incident took place 13 years ago.

On the other hand, the Counsel for the Prosecution pleaded to consider the following facts;

1. The Victim was 14 years of age at the time of the incident
2. The Accused had committed the acts of grave sexual abuse at the victim's residence on several occasions.
3. The incident did not occur as a result of any intimate relationship between the parties.
4. The Accused is an uncle of the Victim and there is a considerable age disparity between the two.

The Counsel for the Victim informed the Court that in order to safeguard the matrimonial life of the Victim, she is reluctant to give evidence in this matter. Further, the Victim has informed the Court that no compensation was required when inquired.

The Learned High Court Judge by order dated 29.01.2024 found the Accused guilty of all the counts and imposed for the 1st count 7 years of rigorous imprisonment and Rs. 2000 fine (Simple imprisonment of one month in default), for the 2nd count 7 years of rigorous imprisonment and Rs. 2000 fine (Simple imprisonment of one month in default), and for the 3rd count 7 years of rigorous imprisonment and Rs. 2000 fine (Simple imprisonment of one month in default), and imposed these imprisonment sentences to run concurrently.

Being aggrieved by the said sentence, the Accused has preferred this appeal in this Court.

The grounds of appeal as laid down by the Accused are;

1. The High Court has failed to suspend the sentence following the Court of Appeal decision in CA Appeal 120/2001 dated 20.05.2004 delivered by their Lordships Justice Nanayakkara and Justice Abeyratne.
2. The High Court has failed to consider the judgment of Queen v. Kularatne 71 NLR 529, wherein Justice Rajaratnam held that, if the judgment and sentence is delivered after a lapse of 10 years since the commission of the offence, the Court

could take into account the disturbance it could cause to the family of the Accused and the grave repercussions, and thereby failed to consider that the Court could have suspended the sentence

3. The High Court has failed to consider the judgment of SC Appeal 89A/2009 and the legal principle that the Court could have considered the circumstances in suspending the sentence despite the minimum mandatory sentence.

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 365B (2) (b) of the Penal Code as amended;

"(2) Whoever-

(b) 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."

When the matter came up for hearing before this Court, the main contention of the Counsel for the Accused was that the Learned High Court Judge had failed to consider any of the mitigatory factors. I am mindful of the sentiments expressed by His Lordship Basnayake ACJ in The Attorney General v. H.N. De Silva 57 NLR 121 on 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:
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> "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.

In the instant case, the Accused has pleaded for mitigation on the basis that he is the only breadwinner of the family therefore, he has to look after his elderly parents and this case has been pending for the last 14 years.

On the other hand, the State Counsel has informed the Court that three charges were levelled against the Accused, the Accused is an uncle of the Victim and the a considerable age gap between the parties.

After considering both submissions, the Learned High Court Judge delivered the order on 29.01.2024. In the said order, the Learned High Court Judge has differentiated the circumstances of SC Appeal 03/08 and the present case on the basis that the former was based on a love affair and in the latter the age gap between the parties is important and the victim was without her parents, therefore, the Accused was a guardian to the victim. Further, the Accused has abused the child on several occasions.

We are mindful that, our Courts have considered the following aggravating 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.

On the Other hand, the Prosecution has pleaded several aggravating circumstances for the Learned High Court Judge to consider when determining the sentence which was imposed.

We are mindful that the Accused pleaded guilty at the outset.

In King v. Rankira 42 NLR 145 it was held:

> "The Court of Appeal will not interfere with the judicial discretion of a Judge in passing sentence unless that discretion has been exercised on a wrong principle."

In the instant case, we see no reason to intervene with the sentence imposed on the Accused on 29.01.2024.

Application dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.
I AGREE

JUDGE OF THE COURT OF APPEAL