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

In the matter of an Application for Revision made under Article 138 of the Constitution read with S.364 of the Code of Criminal Procedure Act No.15 of 1979

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

Complainant

V.

Court of Appeal Case No. CA (PHC) APN 136/16

High Court of Kandy Case No. HCR 28/2015

Premadasa Nilantha Jayakody,
Dambagahawela, Pattiyamulla,
Thalathuoya

OR

Alagalla,
Vavuniya

Accused

AND NOW BETWEEN

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

Complainant - Petitioner

V.

Premadasa Nilantha Jayakody,
Dambagahawela, Pattiyamulla,
Thalathuoya

OR

Alagalla,
Vavuniya

Accused - Respondent

BEFORE : **ACHALA WENGAPPULI, J**

K. PRIYANTHA FERNANDO, J

COUNSEL : Lakmali Karunanayake, DSG for the Complainant-Petitioner.

Ruwan S. Jayawardene for the Accused-Respondent.

ARGUED ON : 12.10.2020

OBJECTIONS FILED ON : 18.02.2020 by the Accused-Respondent.

JUDGMENT ON : 16.11.2020

K. PRIYANTHA FERNANDO, J.

01. The accused-respondent (hereinafter referred to as the respondent) was indicted in the High Court of Kandy on one count of rape punishable in terms of section 364(2) of the Penal Code. Upon pleading guilty to the charge, the respondent was sentenced to two years rigorous imprisonment suspended for two years, a fine of Rs. 10000/- with a default sentence of imprisonment for 1 year. The respondent was also ordered to pay Rs.100000/- to the child victim as compensation with a default sentence of imprisonment for 2 years.

02. Being aggrieved by the above sentence, the complainant-petitioner (hereinafter referred to as petitioner) preferred the instant application seeking to revise the sentence, on the basis that the sentence is illegal and inadequate.

03. Learned Deputy Solicitor General for the petitioner submitted that the sentence imposed on the respondent by the High Court is illegal as it is not in accordance with the prescribed punishment by law. It was further submitted that the circumstances do not warrant deviation from the prescribed minimum mandatory imprisonment sentence. According to the facts related to the offence, the learned High Court Judge has failed to consider the tender age of the child victim and the age difference between the victim and the respondent, learned DSG submitted.

04. Learned counsel for the respondent submitted that the learned High Court Judge has rightly considered the early guilty plea tendered by the respondent without wasting the time of court. In terms of the decided case authorities, learned High Court Judge has the power to deviate from the prescribed minimum punishment. As the respondent had no previous convictions, taking into account the above mentioned mitigatory circumstances, the learned High Court Judge has imposed a legal sentence, counsel submitted.

05. The prescribed punishment for the offence charged in terms of section 364(2) of the Penal Code is, rigorous imprisonment for a term not less than

ten years and not exceeding twenty years and a fine. The Court shall, in addition, order the accused to pay compensation of an amount determined by court, to the victim.

06. The learned High Court Judge in his sentencing remarks has taken into account that the respondent had no previous convictions, his family background, and the fact that he was remorseful. He has also considered what was mentioned in the case of ***Attorney General V. A.M. Samantha Sampath SC Appeal No. 17/2013*** by the Supreme Court. Learned counsel for the respondent also invited the attention of this Court to the case of ***M. L. Rohana V. Attorney General SC Appeal 89A/2009***.

07. In both decided cases mentioned above, the Supreme Court referred to and followed the determination pronounced by the Supreme Court in ***SC Reference 3/2008 (pronounced the determination on 15.08.2008)***, 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".

08. Therefore, it is settled law that the High Court Judge has the discretion to deviate from the prescribed minimum sentence if the Court deems it appropriate. Hence, I will now turn to consider whether it was appropriate for the High Court in this instance to refrain from imposing the prescribed minimum sentence.

09. In the instant case, the child victim was less than 11 years of age at the time she was raped by the respondent. The respondent was a 30-year-old married man. The child victim was being looked after by her aunt as her mother was abroad. During this period the respondent committed this offence on the child. The respondent had taken advantage of the vulnerability and the age of the child. The tender age of the victim, age gap between the victim and the respondent and the relationship between the victim and the respondent being close relatives are aggravating factors that clearly warrant a custodial sentence. The child victim would have

expected security from the respondent, and instead the respondent raped her. It is a clear breach of trust, which is a serious aggravating factor. Although there were no physical injuries to the child, it is obvious that when a child is raped or sexually assaulted by an adult relative it adversely affects that child mentally for life. Rape is the most serious sexual offence. It is aggravated when it is committed on a child. The prescribed sentence reflects the seriousness with which the Legislature has considered this offence. The instant case is not on an incident that had taken place consequent to a love affair between a young girl below the age of 16 and a boy, like in the cases referred to by the counsel for the respondent, that may warrant deviation from the prescribed minimum mandatory sentence considering the strong mitigatory circumstances.

10. In the case of ***Attorney General V. Ranasinghe and Others [1993] 2 Sri L.R. 81*** *at page 87,* Justice S.N Silva (as he then was) reproduced what was observed by Basnayake A.C.J. in the case of ***Attorney General V. H. N. de Silva 57 NLR 121***:

"... 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 to consider to what extent it will be effective. If the offender held the 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 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. When the public interest or welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail."

11. These observations were also followed in the case of ***Gomas V. Leelaratne 66 NLR 233***.

12. Section 303(2) of the Code of Criminal Procedure Act (CPC) provides for instances where Court should not make an order suspending a sentence of imprisonment.

Section 303(2);

"A Court shall not make an order suspending a sentence of imprisonment if-

(a) A mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed or..."

13. As mentioned before, there is a minimum mandatory sentence prescribed by law for the offence charged in the instant case. Therefore, Court shall not make an order suspending a sentence of imprisonment as per section 303(2) of the CPC. Hence the learned High Court Judge has erred in imposing a suspended sentence of imprisonment.

14. An early guilty plea is a mitigating factor when sentencing an accused. Especially in a case of this nature, it not only saves the time of the court, but also prevents the embarrassment that may be caused to the child victim in giving evidence and being cross examined. The respondent is entitled to a sufficient discount for the early guilty plea. The respondent being a first offender is also another mitigating factor. The fact that there were no physical injuries to the victim should also be taken into consideration. Personal circumstances such as being the bread winner of the family may also be taken into consideration when sentencing. However, the above mitigating factors are subordinate to the serious aggravating factors mentioned before in paragraph 9, and the fact that a minimum mandatory sentence of imprisonment is prescribed by law. The circumstances in this case do not warrant a deviation from the prescribed minimum mandatory sentence.

15. For the reasons stated above. I find that the sentence imposed on the respondent by the learned High Court Judge is not in accordance with the law and also wrong in principle. It is grossly inadequate and therefore is set aside.

16. Taking into consideration the aggravating factors, mitigating factors mentioned before, and the prescribed sentence to the offence of rape, the following sentence is substituted on the respondent.

17. Ten years rigorous imprisonment. In addition, a fine of Rs. 5000/- with a default sentence of three months simple imprisonment. Further, the respondent is ordered to pay Rs. 100000/- as compensation to the victim, in default of payment of the said compensation respondent is to serve another term of two years simple imprisonment.

Revision application is allowed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE COURT OF APPEAL