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

In the matter of an appeal against the Order of the High Court under section 331 0f the Code of Criminal Procedure Act No.15 0f 1979 as amended.

Rathnasiri Silva Kaluperuma

Accused-Appellant

C.A.Case No:-248/13

H.C.Kalutara 384/11

V.

The State

Complainant-Respondent

Before:-H.N.J.Perera, J.

P.R.Walgama, J. &

K.K.Wickremasinghe, J.

Counsel:-Dr. Ranjith Fernando for the Accused-Appellant

Suhada Gamlath S.G with Himali Jayanetti for the State

Argued On:-28.05.2015/28.07.2015

Written Submissions:-06.10.2015

Decided On:-18.12.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Kalutara for committing grave sexual abuse on one Hewamadi Arachchilage Damith Sampath on 25.07.2004, 26.07.2004 and on 27.07 2004 offences punishable under section 365 B (2) B of the Penal Code amended by Act No.22 of 1995 and 29 of 1998.

The accused-appellant pleaded guilty to all three charges against him and on his plea learned High Court Judge convicted him on the charges and sentenced him to 7 years R.I and to a fine of Rs. 2500/-and in default 6 months S.I on each count. The accused-appellant was also ordered to pay Rs.200,000/- as compensation to the victim and in default 1 year S.I. on each count. The court also ordered the said jail terms to run concurrently. Aggrieved by the said sentence the accused-appellant had preferred this appeal to this court.

In this appeal the main thrust of the argument advanced on behalf of the accused-appellant was that the sentence of 7 years imprisonment by the High Court Kalutara is excessive compared to that of the suspended sentence imposed by the Kandy High Court and therefore, the need to consider reducing of the sentence of 7 years imprisonment, on the ground of disparity, so that it would be considerably compatible with the sentence imposed in the High Court of Kandy.

In the case 191/2011 before the High Court Kandy related to similar incidents during the same period between the same accused and the same victim the learned trial Judge in Kandy has imposed on count 1, 1 year R.I and suspended for 7 years and the accused was also ordered to pay as compensation to the victim Rs.250,000/- in default 2 years R.I. On count 2 to 6 months R.I. suspended for 7 years and to pay as compensation a sum of Rs.250,000/- in default 2 years R.I. And on count 3 sentenced the accused to 6 months R.I. suspended for 7 years and also

ordered to pay as compensation a sum of Rs.250,000/in default 2 years R.I.

Originally there were two applications challenging the sentence of Kalutara High Court. C.A Appeal 248/13 and the Revision Application bearing No CA (PHC) APN 166/2013. Thereafter the court decided to refer this matter to be heard on a consolidated basis by a Divisional Bench.

In Queen V.David 1 N.L.R 87 it was held that there is an appeal on a point of law regarding the punishment when the trial Judge has clearly erred in law by awarding a punishment which has no power to give, or when a minimum amount of penalty is prescribed and the Judge has not imposed it.

In C.A.297/08, decided on 24.07.2012- W.L.R.Silva. J observed thus:-"The legislature has imposed a minimum mandatory sentence for this type of offences, carrying a maximum sentence up to 20 years of imprisonment. It is not for this court to trifle with the intentions of the legislature. We must not encroach the domain of the legislature, because the legislature thinks and acts according to the wishes of the people and the judiciary is to carry out the wishes of the people. Therefore it is not proper to trifle with this type of offences and allow the people to commit offences and escape lightly."

Dealing with the subject disparity of sentence as a ground of appeal Archbold recognizes that there are "a number of forms of disparity and it can occur in a number of different ways."(Archbold 2012, 5 – 159, p.608.}

"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason

for the differentiation, the court of appeal may reduce the sentence, but only if the disparity is serious. It has been said that the court would interfere where "right-thinking members of the public, with full knowledge of the relevant facts and circumstances (would) consider that something had gone wrong with the administration of justice."(per Lawton I .J. in R. V. Fawcett 5Cr.App. R.(s) 15 C.A.

It was the contention of the learned S.G for the State that considering the facts of this case and its attendant circumstances that no right thinking members of the public , with full knowledge of relevant facts and circumstances (would) consider that something had gone wrong with the administration of justice in the Kalutara High Court for imposing the sentence of 7 years R.I. on the accused-appellant, which is in fact the prescribed minimum sentence as per the amendment made to the Penal Code.

It was further submitted on behalf of the State that the sentence of imprisonment in Kandy High Court may well be a cause for public disquiet, had the public had the access to the nature of the sentence imposed in Kandy, which was an overtly lenient sentence despite the abominable conduct of the accused-appellant as revealed in the evidence-in-chief of the victim.

In Attorney General V.Jinak Uluwaduge and another 1995 (1) S.L.R 157, it was held that:-

"In determining the proper sentence the Judge should 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. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also

matters which should receive due consideration. The Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non-detection. Another matter to be taken into account is that the offences were planned crimes for wholesale profit. The Judge must consider the interests of the accused on the one hand and the interests of the society on the others; also necessarily the nature of the offence committed, the machinations and manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organization 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."

Per Gunasekera, J.

"The trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should not in my view surrender the sacred right or duty to any other person , be it Counsel or accused or any other person. Whilst plea bargaining is permissible sentence bargaining should not be encouraged at all and must be frowned upon."

See also Attorney General V. Mendis [1995]1 Sri.L.R 138.

In our view the offences for which the accused-appellant had pleaded guilty are far too grave to be dealt with non-custodial sentence and the material discloses that it was a planned crime.

In Attorney General V. H.N.De Silva (supra) it was further held that if the offender held a position of trust or belonged to a service which enjoys public confidence that must be taken into account in assessing the punishment. The accused-appellant was a Pradeshiya Sabha Member belonged to a service which enjoys the public confidence. The said fact

is not a sound reason for not imposing a term of imprisonment where his offence merits it. It is of vital importance that the confidence of the public in the services managed by the State should be preserved. It would be extremely detrimental to the public interest that the betrayal of that trust should not be met with such punishment as will safeguard the interests of the public and the honour of the profession to which the offender belongs.

According to the narration in the examination-in chief, at the time when the accused-appellant lured the victim to indulge in the alleged relationship, he was still passing through his adolescence, a student at Aluthgama Maha Vidyalaya. The family had been unable to take effective measures to rescue the victim from the predicament brought upon him by the appellant, for he was a local politician wielding a considerable degree of power in the locality in which they were living.

The narration further reveals on one hand the obsessive extent to which the accused-appellant had been pursuing the drive to gain sexual gratification through the victim and on the other hand the most unfortunate resultant negative impact it has had on the entire life of the victim. Taking in its totality, his narration in the Kandy High Court was a stark revelation of a terrible victimization of a school boy by a senior citizen of society, who in social structure occupied a position that was wholly superior and incompatible with that of the victim and his family.

However, notwithstanding the availability of and the accessibility to the full scope of the facts and the attendant circumstances of the victimization of the victim of the case, the learned trial Judge of Kandy used his discretion in suspending the sentence of imprisonment. According to the amendment to the Penal Code, the said offence carries a minimum mandatory sentence of 7 years imprisonment.

Disparity between the two sentences imposed by the said two Judges of the High Court cannot be considered on the same level as the Kandy High Court Judge has proceeded to exercise his discretion acting outside the relevant provisions of law and without giving due consideration to the facts and circumstances in this case. Disparity could be considered on equal grounds. The disparity in the instant case has arisen due to the fact that the High Court Judge Kandy had exercised his discretion to suspend the said term of imprisonment when in fact law expects him to give at least the minimum term of 7 years imprisonment.

We are of the view that the accused-appellant had been the perpetrator of a very serious crime which had been committed with much deliberation and planning. At the time of committing the above offences the accused-appellant was over 50 years of age and the victim was below 18 years. Thereafter the victim was taken to Wattegama area and kept under unlawful detention for a period of four months. The accused-appellant was arrested with the victim in Wattegama area while they were sleeping on the same bed around 1.30 am on 25th November 2004. The victim was procured by the accused-appellant for other men including foreigners. At the time of the offences were committed the victim was 16 years of age. The accused-appellant has a previous conviction and a pending case against the victim.

It was the submission of the learned S.G that the appellate court should not lightly interfere with the sentence imposed by the learned High Court Judge unless the sentence imposed by the trial Judge is ex-facie, illegal and not in accordance with the law. In the instant case the learned trial Judge has imposed 7 years R.I and a fine of Rs. 7,500/- and in default 6 months S.I and further ordered Rs. 6 lakhs be paid as compensation or in default 1 year R.I .

In case No S.C 03/2008 Ratnayake, J. held 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. The trial Judge in his judgment considered all of the relevant provisions of law and very correctly drew a distinction between the situation in this case and the instances where the said case No 3/2008 could be followed. In S.C 03/2008 the court found it necessary to have the best interests of both the victim and the Accused, in mind, despite the minimum mandatory statement, as both parties were children in the eyes of the law.

This was a case of sexual abuse where the accused should be deterrently dealt with. If a trial Judge wishes to impose a suspended sentence of imprisonment, he should address his mind to all the issues listed under section 303 (1) (a) – (I) of the Criminal Procedure Code. In case No.191/11 which was before the High Court of Kandy the learned trial Judge has not addressed his mind to these issues.

In the order of the trial Judge in the case 191/2011 it is specifically stated that a non-custodial suspended sentence was being imposed on the accused as it appeared that there was consent between the parties over a period of time and further confirmed the fact that the victim never attempted to escape even when he had such opportunity over a period of months.

Jayant Patel, J. in Jusabbhai V. State CR.MA/623/2012 9/9 order stated that:-

" ..... It is by now recognized that justice to one party should not result to injustice to the other side and it will be for the Court to balance the right of both the sides and to up-hold the law."

In S.C.Appeal No.179/2012 Tilakawardene, J held that with regard to sentencing, the views of all parties involved in the case must be considered in a balanced manner, in particular where violations are carried out with impunity, even after the Legislature has placed minimum mandatory sentences.

Primarily the punishment for crime is for the good of the state and the safety of society. Rex V. Dash (1948) 91 Can C.C. 187. It is also intended to be a deterrent to others for committing similar crimes.

In Rajive V. State of Rajastan (1996)2 SCC 175 it was held that the court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual but also against the society to which the criminal belong.

In State of M.P V. Bablu Natt (2009) 2 SCC 272 it was held that"-

"The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with. Socio economic status, religion, race, caste or creed of the accused and the victim although may not be wholly irrelevant, should be eschewed in a case of this nature, particularly when parliament itself had laid down minimum sentence."

The learned Counsel for the accused-appellant contended that a wrong procedure prejudicial to the accused-appellant has been adopted by the learned trial Judge in calling for the victim impact statement, before the sentence was passed on the accused-appellant.

In the United Kingdom, the legislative development relating to this aspect commenced on 1st October 2001, and the scheme that came in to exist provides to the victim "a formal opportunity to say how a crime has affected them.; It may help to identify whether they have a particular

need for information, support and protection. It will also enable the court to take the statement into account when determining sentences." Archbold -2012, para.5-104 pg 585.

In R.V Perks (2001) 1 Cr.App.R.(s)19.C.A it was held that:-

"If an offence has had an essentially damaging or distressing effect on the victim, this should be taken into account by the court; but evidence of the victim alone should be approached with care, especially if it related to matters that the defence could not realistically be expected to investigate; and as appropriate sentence might be moderated to some degree where the victims forgiveness or unwillingness to press charges suggested that any suffering was significantly less than might have been expected."

With the introduction of the Assistance to and Protection of Victims of Crime and Witnesses Act No 4 of 2015, a due recognition has been given to the suffering of a victim in Sri Lanka.

Part II paragraph 3 (o) provides thus:-

3. A victim of crime shall have the right :-

(o) following the conviction of the offender and prior to the determination of the sentence, either personally or through legal counsel, to submit to court the manner in which the offence concerned had impacted on his life, including his body, state of mind, employment, profession or occupation, income, quality of life, property and any other aspects concerning his life.

This court cannot agree with the submissions made by the learned Counsel for the accused-appellant that any prejudice has been caused to the accused-appellant in calling for the victim impact statement before passing sentence on the accused-appellant by the learned trial judge.

In the instant case the learned trial Judge has imposed a 7 years R.I and also had ordered heavy compensation to be paid by the accused-appellant to the victim. For the above reasons I see no reason to interfere with the sentence imposed by the learned Trial judge on the accused-appellant in this case.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.R.Walgama, J.

I agree.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL