

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

In the matter of an Application under
Section 331 of the Code of Criminal
Procedure Act No. 15 of 1979 and under
Section 11 of High Court of the Provinces
(Special Provisions) Act, No. 19 of 1990.

Democratic Socialist Republic of Sri Lanka

Complainant

CA HCC 0062/2024

Badulla High Court No.
HC 301/19 (Criminal)

Vs.

Myrvin Priyantha Balasooriya,
No. 73, Barrels Junction,
Girandurukotte.

Accused

AND NOW BETWEEN

Myrvin Priyantha Balasooriya,
No. 73, Barrels Junction,
Girandurukotte.

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: Sampath B. Abeykoon, J.
 Amal Ranaraja, J.

Counsel: Ariyapala T. Hewage for the Accused-Appellant.
Suharshi Herath, D.S.G. for the State.

Argued on: 10.10.2024

Decided on: 07.11.2024

JUDGMENT

AMAL RANARAJA, J.

1. The accused-appellant was indicted in the *High Court of Badulla*. The indictment against the accused reads as follow;

(1). The accused has committed the offence of kidnapping during the period during 01st of January 2009 and 31st of December 2009, of a minor who was less than fourteen (14) years of age at the time from the lawful guardianship of *Arabe Gedara Sanjaya Suraweera* in *Giradurukotte* located within the jurisdiction of this Court, an offence punishable under Section 354 of the Penal Code.

(2). That on the same day, at the same place and in the same transaction the accused committed the offence of grave sexual abuse on the said minor who was less than 16 years of age by sexually gratifying himself by placing his genitals between thighs of the said victim and thereby committing an offence punishable under Section 365 (B) (2) (b) of the Penal Code as Amended by Act No. 22 of 1995 and Act No. 29 of 1998 and Act No. 16 of 2006.

2. At the commencement of the trial on **13.12.2023**, the accused-appellant (hereinafter referred to as the 'appellant') pleaded guilty to the 1st and 2nd charges in the indictment. The Learned High Court Judge convicted the appellant and sentenced him to one year's rigorous imprisonment in respect of the 1st charge and seven years rigorous imprisonment in respect of the 2nd charge.

In addition, the Learned High Court Judge imposed a fine of Rs.1500 and Rs.5000 respectively for the 1st and 2nd charges. He also imposed a term of three months and six months' simple imprisonment respectively in default of payment of the fines.

3. The accused-appellant aggrieved by the sentence, has preferred the instant appeal to this Court.

Facts in Brief

4. The appellant and the minor mentioned in the indictment (PW1), were residents of *Barrel Handhiy, Girunduru Kotte* at the relevant time. The father of PW1 was a mason and the mother, a housewife. The appellant has visited the residence of PW1 often. On some of those occasions, the appellant has taken some of the toys of PW1 and hidden them in a wooded area close by. Thereafter, the appellant has taken PW1 from time to time to the wooded area on the pretext of looking for the toys hidden by him therein. When the appellant arrived in the wooded area with PW1, he undressed him, laid him on the ground, and committed sexual acts by placing the appellant's penis between the thighs of the former after he himself got undressed.

Such sexual acts have been committed on several occasions by the appellant. PW1 in his statement to the investigating officer has stated that he could not remember the exact dates in which such sexual acts were committed on him by the appellant.

5. The Learned Counsel for the appellant has contended that the Learned High Court Judge had a discretion to impose a non-custodial sentence on the appellant though he has opted not to do so. The Learned Counsel for the appellant has also directed our attention to the provisions in **Section 306 of the Code of Criminal Procedure Act No.15 of 1979.**

He has also contended that the Learned High Court Judge should have taken into consideration the age, the educational background of the appellant and other extenuating circumstances under which the offence was committed and formed an opinion that it was expedient to impose a non-custodial sentence on the appellant. Our attention was also drawn to the date the alleged offences were committed and the delay in concluding the case before the *High Court of Badulla*. The Learned Counsel contended that the delay has kept the appellant in suspense for a long period of time due to no fault of his and he had not contributed to the delay. Such circumstances, the Learned Counsel further contended, could be regarded as mitigating factors.

6. Though the Counsel for the appellant has directed our attention to **Section 306 of the Code of Criminal Procedure Act No.15 of 1979**, the Learned Deputy Solicitor General has contended the provisions in such section apply only in relation to Magistrate Courts. In support of her contention, the Deputy Solicitor General has also drawn our attention to the judgment in *Attorney General vs. Ranasinghe and Others* [1993] 2 SLR 81, at page 90, S. N. Silva J, as he was then, has stated,

"We note that there is no provision to discharge an accused with a warning in the High Court where the accused is tried upon indictment and he pleads guilty to the charge. The provisions of section 306 of the Code of Criminal Procedure Act apply only in relation to Magistrate's Court."

7. Hence, we conclude that we are unable to apply the provisions in **Section 306 of the Code of Criminal Procedure Act No. 15 of 1979** to the instant case.
8. The appellant has been previously convicted for committing rape and sentenced to rigorous imprisonment in the *High Court of Badulla* in case no. 107/2017. The appellant is still serving such sentence. The appellant has also been indicted for a similar charge as he has been in this case, in the *High Court of Badulla* in case no. 293/2019. The appellant has committed the offence on PW1 when he was just nine years old. The

appellant has befriended PW1 prior to performing such sexual acts on him. Further, the appellant has hid some of PW1's toys in a wooded area to entice PW1 to the particular location on the pretext of searching for those lost toys. Such actions on the part of the appellant indicate a great degree of pre-planning and manipulation.

9. In *Attorney General vs. Mendis* [1995] 1 SLR 138, at page 147, Gunasekara J has stated as follows,

"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".

10. It is observed that aggravating circumstances are present in this case. The prior conduct of the appellant is left to be desired and cannot be considered in his favour. The charges framed against the appellant are not trivial in nature. Section 365 (B)(2)(b) of the Penal Code prescribes a minimum mandatory sentence of 7 years' rigorous imprisonment to an accused convicted for committing grave sexual abuse. In the circumstances, the Learned High Court Judge has imposed the minimum mandatory sentence of 7 years' rigorous imprisonment on the appellant upon conviction for the 2nd charge.

11. Due to the reasons stated above, we are not inclined to interfere with the impugned order.

The application is dismissed.

The Registrar of the Court is directed to transmit this judgment to the relevant High Court together with the original case record.

Judge of the Court of Appeal

SAMPATH B. ABEYKOON, J.

I agree.

Judge of the Court of Appeal