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

In the matter of an Application for Revision under Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

The Hon. Attorney General
Attorney General's Department,
Colombo12
Petitioner

Court of Appeal Number
CA (PHC) APN : 01/2017

High Court of Kandy
Case No: HC 172/15

Vs.

Hewaduragedara Nilantha Dilruksha Kumara,

No. 90/01, Ethalgala Janapadaya,

Ethalgala,

Gampola.

Accused – Respondent

BEFORE	:	K. K. Wickremasinghe, J. Devika Abeyratne J.
COUNSEL	:	Respondent is absent and unrepresented Ms. Chathuri Wijesuriya, SC for the Petitioner
ARGUED ON	:	01.07.2020 (Argued in the absence of the Accused – Respondent)
WRITTEN SUBMISSIONS	:	Petitioner on – 29.11.2019

DECIDED : 26.08.2020

K.K.WICKREMASINGHE J.

The Hon. Attorney General has filed this revision application seeking to set aside the order of the Learned High Court Judge of Kandy dated 25.04.2016 and to impose an appropriate legal sentence.

The Accused Respondent was indicted for two charges an offences alleged to have committed on or about 09.02.2007 punishable under following sections:-

(1) Section 364 (3) of the Penal Code Amended by Act No.22 of 1995

(2) Section 365 B (2) b) of the Penal Code Amended by Act No.22 of 1995

When the charges were read out to the Accused Respondent, he has pleaded not guilty and accordingly the trial was commenced. Before conclusion of the evidence of the prosecutrix the Accused Respondent has pleaded guilty to both charges.

After considering submissions of both counsel and also considering SC Appeal No. 17/2017, the Learned High Court Judge has imposed following sentences:-

1st Charge:-

(1) 1 year Rigorous Imprisonment Suspended for 20 years.

(2) A Fine of Rs.10000/= and a default sentence with a term of 1year Simple Imprisonment.

2nd Charge:-

(1) 1 year Rigorous Imprisonment Suspended for 20 years.

(2) A Fine of Rs.10000/= and a default sentence with a term of 1 year Simple Imprisonment.

In addition to above, the Respondent was also ordered to pay Rs. 200,000 as compensation to the Prosecutrix.

The Learned State Counsel for the Petitioner submitted following grounds as exceptional circumstances which warrants to exercise revisionary jurisdiction of this Court.

a) Lawful Sentence to be imposed in terms of Section 364 (3) and Section 365 B (2) (b) of the Penal Code as amended.

b) Applicability of the SC Appeal No. 17/ 2013.

c) Factors to be considered in determining a sentence.

FACTS OF THE CASE

The prosecutrix was only 12 years of age at the time of the alleged offence committed by her biological father. The prosecutrix was taken to a thicket by the Accused Respondent and undressed her garments by force. Thereafter committed the above mentioned offences.

I. I wish to discuss (a) and (c) together as both grounds are dealing with the legality and the adequacy of the sentence.

Section 364 (3) of the Penal Code as amended by Act No 22 of 1995

(3) Whoever commits rape on a woman under sixteen years of age and the woman stands towards the man in any of the degrees of relationships enumerated in section 364A shall on conviction be punished with rigorous imprisonment, for a term not less than fifteen years and not exceeding twenty years and with fine.

Section 365 B (2) (b) of the Penal Code as amended by Act No 22 of 1995 and Act No. 16 of 2006

(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."

Accordingly, the Accused Respondent should have been sentenced in accordance with the provisions of the Penal Code.

It has been held in the case of **The Attorney General v. H.N. de Silva 57 NLR 121**, that,

> *"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 3[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..."*

In the Case of **Attorney General v. Jinak Sri Uluwaduge and another [1995] 1 Sri 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 society on the other..."*

Further, in the case of **The Attorney General v. H.N. de Silva 57 NLR 121** Basnayake A.C. J observed as follows:-

> *"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*

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The above mentioned observations were followed by Hon. S.N. SilvaJ.in the case of AG Vs Ranasinghe and others, 1993 2 SLR at pages 87-88].

In the case of **The Attorney General V. Mendis [1995] 1 Sri L.R. 138** it was 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..."

In view of the above, the Accused Respondent should have been given a deterrent punishment.

I wish to discuss following cases to consider the revisionary jurisdiction of this Court.

In the case of **Rustom v. Hapangama (1978-79) 2 SLLR 225,** it was held that,

"It is established that this Court can intervene by way of revision even where right of appeal exists if the failure to exercise such right is explained to the satisfaction of court..."

In the case of **Rasheed Ali v. Mohamed Ali (1981) 2 SLR 29** it was held that,

"It is well established that the powers of revision conferred on this Court are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal where it lies has been taken or not. But this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the Court..."

In the case of **Bank of Ceylon v. Kaleel & Others (2004) 1 SLR 284,** it was held that,

"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court..."

II. Applicability of the SC Appeal No. 17/ 2013.

The Learned High Court Judge in his order considered the judgement in case SC Appeal No. 17/2013 when determining the sentence. The case which the Learned High Court Judge was relying on was a case where the prosecutrix was raped by her own brother and as a result she was pregnant by the Accused brother. Also, there was no other person to look after the new born.

Thus, it is very clear that the facts of the instant case differ from the facts of the Case No. SC Appeal No. 17/2013. Therefore the aforementioned case cannot be applied to this instant case

when considering the legality and the proportionality of the sentence imposed on the Accused – Respondent.

This Court is of the view that that the Respondent had committed this crime with preparation and pre-planning. The accused being the father should have been a caring and secured person. Irrespective of that he has committed this grave offence to his own daughter in a cruel manner. Therefore the sentence imposed by the Learned High Court Judge of Kandy is grossly in adequate.

Accordingly, the sentences imposed by the Learned High Court Judge are set aside and substitute the following sentences;

1st Charge

1. 15 Years Rigorous Imprisonment

2nd Charge

1. 7 Years Rigorous Imprisonment

Further, the sentences with regard to Fines and the compensation are affirmed. The Learned High Court Judge is directed to give effect to the order for payment of compensation of Rs. 200,000 to the prosecutrix.

Revision Application is allowed.

Judge of the Court of Appeal

Devika Abeyratne J.

I agree

Judge of the Court of Appeal