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

In the matter of an application for Revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal
Application No:
CA (PHC)APN 0115/2022

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

High Court of Ampara
No.HC/1668/16

1. Mahagodage Ajith Kumara
2. Attanayake Mudiyanselage Samantha Kumara

Accused

AND BETWEEN

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

Appellant

Vs.

1. Mahagodage Ajith Kumara
2. Attanayake Mudiyanselage Samantha Kumara

Accused-Respondents

BEFORE : **Sampath B. Abayakoon, J.**

P. Kumararatnam, J.

COUNSEL : **Maheshika Silva, DSG for the Appellant.**

ARGUED ON : **13/10/2023.**

DECIDED ON : **15/02/2024.**

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JUDGMENT

P. Kumararatnam, J.

This is an application in Revision preferred by the Hon. Attorney General challenging the sentence imposed by the Learned High Court Judge of Ampara on 12.11.2021 against the 1st Accused- Respondent (Hereinafter referred to as the 1st Respondent) and the acquittal of the 2nd Accused-Respondent (hereinafter referred to as 2nd Respondent) who were indicted before the High Court of Ampara.

When this matter was considered, the relevant notices were issued to the 1st and 2nd Respondents by this Court twice under the registered cover, but the Respondents have not appeared before this Court and failed to responded to the notices.

At the very inception, the Learned Deputy Solicitor General representing the Hon. Attorney General, informed this Court that she is now not perusing the application for the acquittal of the 2nd Respondent, but making submissions only with regard to the illegality of the sentence imposed by the Learned High Court judge of Ampara in relation to the 1st Respondent after he was found guilty to the offence of Gang Rape.

The 1st Respondent along with 2nd Respondent were indicted in the High Court of Ampara on two separate counts of Gang Rape each committed on Vithanage Somawathie on the 29.10.2011 which is punishable under Section 364(2) read with section 364(2) (g) of the Penal Code as amended.

After the conclusion of the full trial, the Learned High Court Judge had pronounced the Judgment on 05.03.2021. In his judgment he had acquitted the 2nd Respondent from the 02nd charge and convicted the 1st Respondent for the 1st charge in the indictment.

The Learned High Court Judge had imposed the following sentence on the 1st Respondent on 12.11.2021:

- 10 years rigorous imprisonment **suspended for 15 years.** [Emphasis added]
- A fine of Rs.30,000/- was imposed with a default sentence of 6 months rigorous imprisonment.
- A compensation of Rs.100,000/- was ordered to be paid to the victim with **default sentence of 8 years rigorous imprisonment.** [Emphasis added]

Being aggrieved by the sentence imposed on the 1st Respondent by the learned High Court Judge of Ampara, the Petitioner had preferred this Revision application before this Court.

The background of the case briefly as follows:

The victim in this case is a 52-year-old married person with three children. She was running a small shop near the Mahaoya temple and was returning home around 5.30-6.00 p.m. after day's work, when the 1st and 2nd Respondents who are known persons to her previously greeted her. After passing short distance, the Respondents having closed the victim's mouth, forcibly dragged her to a shrub area.

Thereafter, the 1st Respondent had raped her and the 2nd Respondent was stood by the head of the victim. Although the victim had plead to release her, but the 1st Respondent had threatened to kill her. Thereafter, the 2nd Respondent had had dragged her to another location and when he about to suck one of her breasts, seen a flash of a torch light, the victim was released by the 2nd Respondent.

Upon seeing PW2 and PW3 who had come there after hearing wailing of the victim, the victim had informed them that the Respondents had raped her. These witnesses had noted that the buttons of the prosecutrix's bouse was broken and her body was covered with mud. The victim's pair of sleepers was found on the opposite ends of the bridge. The witnesses further had observed that the victim was weeping at that time. After a prompt complaint to the police investigation was commenced and the Respondents were taken in to police custody by the police.

The Respondents took up the position that they were drunk and requested to engage in sexual intercourse with the victim for money. They had been interrupted by PW2 and PW3 prior to any sexual act taking place.

The offence of Gang Rape was introduced to the Penal Code by the amendment Act No. 22 of 1995 which was came into operation on 31.10.1995. The punishment for Gang Rape under Section 364(2) of the Penal Code is stipulated below:

> "Whoever commits gang rape shall be punished with rigorous imprisonment for a **term of not less than ten years and not exceeding twenty years".** [Empasis added].

The Learned High Court Judge has misdirected himself and failed to address his judicial mind to the Section 364(2) of the Penal Coade as amended by Act No.22 of 1995 which makes provisions for enhancement of punishment with a minimum mandatory punishment of 10 years imprisonment for the offence of Gang rape which is defined in the Section 364(2) (g) of the Penal Code.

The primary intention of the legislature in enacting the Penal Code amendment Act. No.22 of 1995 is to bring enhancement of punishment in the form of a minimum mandatory sentence for Gang Rape to prevent of sexual exploitation of women and children and protection of women and children. Hence, statutory provisions enacted by the said Act should be interpreted and applied in a manner that will give effect to the intention of the legislature.

When the amendment Act No.22 of 1995 was presented to the Parliament, Hon. Prof: G.L Peiris- The Minister of Justice and Constitutional Affairs and Deputy Minister of Finance stated:

> *" We have therefore looked closely at the relevant provisions and* ***we are asking that they be changed in such a manner as to enable a far greater degree of protection to be accorded to vulnerable interests in society, principally in this instance, women and children."***
>
> *Even a consensual act of intercourse with a girl below the age of 12 years constitutes rape in accordance with a girl below the Criminal*

Laws of our county. We are now proposing that, that age be increased from 12 to 16 years. The effect of that provision is that sexual intercourse with any girl below the age of 16 years, even if the girl consents, still constitutes rape in our country. I think that is very necessary. ***A child of 15 years does not really have the mental maturity or perception to give consent to an act of sexual intercourse. The child is not mindful of the gravity of the consequences attendant upon the physical act of intercourse and the criminal law should provide protection to that child*** *by declaring that the act of intercourse per se, whether there is consent or not, constitutes rape.*

"It is only maximum penalty that is generally prescribed by penal legislation. But we think that ***in certain circumstances the offences are so severe they damage the fabric of society to such an extent that the substantive law must prescribe the minimum penalty."***

"We have also thought it proper in introduce an enhanced penalty in circumstances where a girl below the age of 18 years is raped, or where a pregnant woman is raped, or where a woman mentally disturbed is raped. In those circumstances not only is there liability for rape, but, we think, it is also just and equitable that a more onerous and enhanced punishment be imposed. In the case of statutory rape, Mr Deputy Speaker, there is minimum penalty of 7 years rigorous imprisonment, but in circumstances ***where the girl raped in below 18 years, or is mentally disturbed, or is pregnant, we are proposing that there should be a mandatory minimum sentence of imprisonment of 10 years. That again is necessary to protect the vulnerable interests of women in our community."***

"That is restriction of judicial discretion with regard to sentencing. Where the facts of the offence are established, the ***court is under a***

> ***duty to impose a minimum sentence*** *ad in this area* ***where we are dealing with the protection of women and children, we thin the prescription of minimum penalty is justified in certain circumstances."*** [Empasis added].

The validity of a legislation passed by Parliament cannot be called into question after the stage set out in Article 80(3) of the Constitution. The said Article reads as follows:

> "Where a Bill becomes law upon the certificate of the President, or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever."

An important bench of five Justices of Supreme Court in **Attorney General and Others v. Sumathipala** [2006] 2 SLR 126 held that:

> *"A judge cannot* ***under a thin guise of interpretation*** *usurp the function of the legislature to achieve a result that the Judge thinks is desirable in the interests of justice. Therefore, the role of the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any Court and the function of every Judge to do justice within the stipulated parameters."* [Empasis added].

As stated by **Salmond**, "by interpretation or construction is meant, the process by which the courts seek to ascertain the meaning of the legislature through the medium of authoritative forms in which it is expressed".

Interpretation of statutes is the process of ascertain the true meaning of the words used in a statute. When language is of the statue is clear, there is no need the rules of Interpretation, But, in certain cases, more than one meaning may be derived from the same word or sentence. It is therefore necessary to interpret the statue to find out the real intention of the statute.

In this regard, a Constitution Bench of five Judges of the Supreme Court of India in **R.S.Nayak v.A.R.Antulay,AIR 1984 SC 684** has held:

> *"…. If the words of the Statute are clear and unambiguous, it is the plainest duty of the Court to give effect to the natural meaning of the words used in the provision. The question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the Statute would be self-defeating". (para 18)*

The purpose of Interpretation of Statutes is to help the Judge to ascertain the intention of the Legislature-not to control that intention or to confine it within the limits, which the Judge may deem reasonable or expedient.

In **Tennakoon v. Dissanakayake** 50 NLR 403 the court held that:

> *"..the plain meaning of the language of an antiquated statute cannot be given an extended judicial interpretation so as to cope with modern methods of corruption".*

In **Nandasena v Senanayake and Others** [1981] 1 SLR 238 the Court held that:

> *"Statures should be construed, as far as possible, to avoid absurdity or futility. A statute should be construed in manner to give it validity rather than invalidity- ut res magis valeat quam pereat".*

The judicial decisions cited above and the writings amply demonstrate that the Court cannot under the guise of interpretation usurp the intention of the legislature.

In this case, the Learned High Court Judge not imposing a legal sentence had imposed an illegal sentence. The 1st Respondent was sentenced to 10 years rigorous imprisonment and suspended the same for 15 years.

Section 303(2) of the Code of Criminal Procedure Act No.15 of 1979 states:

> (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
>
> (b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or (c) the offence was committed when the offender was subject to a probation order or a conditional release or discharge; or
>
> (d) the term of imprisonment the aggregate terms where the offender is imposed, or of imprisonment Where the offender is convicted for more than one offence in the same proceedings exceeds two years.

The Learned High Court Judge not comprehending subsection (a) of Section 303(2) of the Code of Criminal Procedure Act properly, had imposed a suspended sentence to an offence of Gang Rape which requires a minimum mandatory sentence of 10 years.

Next, the Learned High Court Judge has suspended the same for a period of 15 years which is contradictory to Section 303(2)(d) of the Code of Criminal Procedure Act whereas the suspending a sentence only be imposed when aggregate terms of imprisonment do not exceed two years.

As the sentence imposed is illegal and contrary to the procedural law, I first set aside sentence imposed against the 1st Respondent.

Further, the Learned High Court had ordered a compensation of Rs.100,000/- and in default ordered 08 years rigorous imprisonment.

The default sentence ordered also not in conformity with Section 291(d) of the Code of criminal Procedure Act No.15 of 1979.

Section 291(d) of CPC states;

> "the term for which the court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence if the offence be punishable with imprisonment we well as fine;

Hence, the default sentence ordered above also set aside.

Rape including Gang Rape is the most heinous crime amongst all crimes committed on women. Rape not only hurts the soul of women at the point of crime taking place but it also hurts women socially, physically, and mentally. After the crime is committed, the life of women become miserable.

In **Dhananjay Chatterjee alias Dhana v State of West Bengal** [1194] 2 SCC 220 the Indian Supreme Court held:

> *"15. In our opinion, the measure of punishment in a given case must depend upon* ***the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim****. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals.*
>
> ***Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights***

of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment". [Empasis added]

The Learned State Counsel in his sentencing submission highlighting the prescribed punishment for Gang Rape under Section 364(2) of the Penal Code as amended, very correctly pleaded the Court to impose an appropriate and legal sentence on the Respondents. But Learned High Court Judge disregarding both the submission of the State and the applicable law, imposed an inappropriate and illegal sentence on the 1st Respondent which paved the way for him to go free after exploiting poor and helpless victim. This could not be the intention of the legislature which considered Gang Rape to be such heinous crime to attract with a mandatory sentence.

Considering heinous nature of the crime, the Learned High Court Judge should have imposed stern sentence which not only reflect the ghastly and inhuman act of the 1st Respondent, but also serves as an example for the others who might also venture on the same atrocity in future.

In view of the above consideration and discussion, I conclude that an appropriate and legal sentence is warranted against the 1st Respondent in this case.

Hence, the 15 years suspended sentence is modified to 10 years rigorous imprisonment. The fine of Rs.30,000/- with the default sentence of six months rigorous imprisonment will remain same. Further, the compensation Rs.100,000/- also will remain same subject to a default sentence of two years rigorous imprisonment.

Therefore, the revision application allowed subject to above modification of the sentence.

The Registrar of this Court is directed to send this Judgment to the High Court of Ampara.

The Learned High Court Judge of Ampara is hereby directed to issue notice on the 1st Respondent to appear before the High Court, as he is released on a suspended sentence earlier, to comply with this judgement. Further, the sentence will come into operation on the day it is communicated to the 1st Respondent.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL