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

In the matter of an appeal in terms of Section 15(b) of the Judicature Act No. 02 of 1978 read with Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0061/2018

Complainant

High Court of Avissawella
Case No. HC/160/2008

Vs.

Hettiarachchige Sunil Hettiarachchi.

Accused

AND NOW BETWEEN

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

Complainant-Appellant

Vs.

Hettiarachchige Sunil Hettiarachchi.

Accused-Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Maheshika Silva, DSG for the Complainant-Appellant.
Sahan Kulatunga for the Accused-Respondent.

ARGUED ON : 25.06.2024

DECIDED ON : 24.07.2024

WICKUM A. KALUARACHCHI, J.

This appeal has been preferred by the Hon. Attorney General to set aside the sentence imposed against the accused-respondent by the order of the learned High Court Judge of Avissawella dated 09.02.2018 and substitute a lawful and an adequate sentence according to law.

The accused-respondent was indicted in the High Court on two charges of rape against one Achini Almeda who is the daughter of the accused's sister and was below 16 years of age. The offence relating to the two charges is punishable under Section 364(3) of the Penal Code as amended by the Penal Code (Amendment) Act No. 22 of 1995. After trial, the accused-respondent was convicted for both counts. The learned High Court Judge imposed eight years of rigorous imprisonment and a fine of Rs. 7500/- with a default sentence of one-year simple imprisonment on each count and ordered the sentences of imprisonments to run concurrently. In addition, a compensation of Rs. 50,000/- was ordered and if defaulted to pay the said amount, the amount was ordered to be recovered as a fine with a default sentence of two years of rigorous imprisonment.

The accused has not appealed against the conviction or the sentence. The Hon. Attorney General, being aggrieved by the said sentence, preferred this appeal against the sentence. Prior to the hearing of the

appeal, both parties filed written submissions. At the hearing, the learned Deputy Solicitor General (DSG) for the appellant and the learned Counsel for the accused-respondent made oral submissions.

The main contention of the learned DSG was that the sentence is illegal because the minimum mandatory sentence prescribed by the Section 364(3) of the Penal Code is 15 years. The learned DSG contended that the victim was 11 years of age at the time of the incident and the accused was 33 years at that time. The learned DSG stated further that the sexual intercourse had taken place without the consent of the prosecutrix and she was raped by her uncle with whom she was living. Therefore, the learned DSG submitted that there were only aggravating factors in this case and when considering the gravity of the offence, the learned High Court Judge had no reason to disregard the minimum mandatory sentence of 15 years.

The learned Counsel for the accused-respondent contended that the learned High Court Judge has not just disregarded the minimum mandatory sentence. He submitted that the learned Judge considered the mitigatory factors and aggravating factors correctly in making the sentencing order. The learned Counsel pointed out that there are Judgments in which it was held that the minimum mandatory sentence is in conflict with some articles of the Constitution. He contended further that the accused-appellant could not understand the gravity of the offence because he was young at the time of committing the offence, and thus, the eight years of imprisonment is reasonable.

When perusing the sentencing order dated 09.02.2018, the learned High Court Judge considered the offence as serious because she stated that when the victim was under the protection of her uncle, he committed this offence. However, the learned Judge stated in her order that the accused is a father of 45 years of age with a child and thus,

she considers the harm that could be caused to the family of the accused, if he is given a long-term imprisonment.

The learned High Court Judge has drawn her attention to the case of ***Karunaratne V. The State*** reported in 78 NLR 413 in sentencing the accused-appellant. In the aforesaid case, the accused-appellant was charged for committing criminal breach of trust of a sum of Rs. 9,450.84 entrusted to him between 25th May, 1965 and 29th May, 1965, in his capacity as a Cashier of the Co-operative Wholesale Establishment, Minuwangoda, an offence punishable under Section 389 of the Penal Code.

It was held by Rajaratnam, J. and Ratwatte, J. (Vythialingam, J. dissenting) that while the trial judge was right in sentencing the accused to a term of two years rigorous imprisonment and to pay a fine of Rs. 1000 and that even if the provisions relating to the suspension of sentences were in operation at that time and the case was concluded in due time, this was not a case where the sentence would have been suspended, having regard to the gravity of the offence. But, on the other hand, when a deserving conviction and sentence have to be confirmed ten years after the proved offence, the judge cannot disregard the serious consequences and disorganization that it can cause to the accused's family.

It is to be stated that the learned High Court Judge has wrongly applied the decision of *Karunaratne V. The State* in sentencing the accused in the instant case because the offence relating to the said case has no minimum mandatory sentence. The legislature has prescribed a minimum mandatory sentence of 15 years for the offence relating to the instant case. In addition, I regret to state that the learned judge has seen only the harm that could be caused to the family of the accused, but not the grave harm done by the accused to her own sister's 11 years old daughter. The accused had forgotten his family and forgotten that

he is also a father of a child, when raping his sister's child. The learned Judge has not paid her attention about the message that she is giving to the society by punishing the accused so leniently by imposing a sentence of seven years less than the minimum mandatory sentence. The harm that could be caused to the family of the accused by imposing a long-term imprisonment cannot be considered as a mitigatory factor, according to the circumstances of this case.

The learned High Court Judge has also stated in her sentencing order that the accused-respondent had stated about his remorsefulness about the incident. It must be noted that early guilty plea and the accused's remorse together are mitigatory factors to be considered. In the instant action, the accused pleaded not guilty to both charges and after full trial, the accused was convicted for both charges. If the accused pleaded guilty without going for trial and stated that he is remorseful about the offence that he committed, that can be taken into consideration as a mitigatory factor. However, in the instant case, the accused-respondent pleaded not guilty to both charges as stated previously. When the accused said that he is remorseful, after he was convicted for both charges, it is doubtful whether he is actually remorseful or he states so only to get a reduction of the sentence.

The learned Judge has also considered twelve years period between the offence and the conviction. The said period could be considered in sentencing. However, lapse of twelve years from the date of the offence and the conviction alone is not sufficient to disregard the minimum mandatory sentence, especially as the accused-respondent was on bail even before appearing in the High Court.

There were no other mitigatory factors submitted on behalf of the accused-appellant. In considering the facts and circumstances of this case, the offences committed by the accused are very serious. For the reasons stated above, it is apparent that the learned High Court Judge

had no reason to disregard the minimum mandatory sentence of 15 years and impose only eight years of imprisonment. In fact, the main issue pertaining to the sentencing order is that the learned High Court Judge has not even mentioned in her order that she imposes a lesser sentence notwithstanding the minimum mandatory sentence. It is apparent from the sentencing order that the learned Judge has completely ignored the fact that there is a minimum mandatory sentence prescribed by law for the offence that the accused-appellant was convicted.

In the case of ***Rohana alias Loku V. Hon. Attorney General*** – (2011) 2 Sri L.R. 174, it was held that the minimum mandatory sentence in Section 362(2)(e) of the Penal Code is in conflict with Articles 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.

According to the aforementioned decision, the High Court Judge can impose a sentence less than the minimum mandatory sentence in appropriate cases, exercising the judicial discretion. However, it must be noted that just because the Judge has the discretion, the said discretion cannot be exercised arbitrarily and an accused cannot be sentenced without considering the relevant mitigatory and aggravating factors. When the discretion is exercised, the said discretion must be exercised judicially. Consideration of the issue whether the learned Judge has exercised the said discretion judicially does not arise in the instant case because the learned High Court Judge has never stated in her sentencing order that she is exercising the said discretion to deviate from the minimum mandatory sentence and impose a lesser sentence than the minimum mandatory sentence. The learned Judge has not at least mentioned about the minimum mandatory sentence in her sentencing order. The learned Judge has completely overlooked or

ignored the minimum mandatory sentence and has given eight years of imprisonment to the accused-respondent. Imposing a sentence lesser than the minimum mandatory sentence exercising the judicial discretion is entirely different from completely ignoring the minimum mandatory sentence for the offence and sentencing the accused. In the case at hand, the learned Judge has never considered that there is a minimum mandatory sentence of 15 years for an offence under Section 364(3) of the Penal Code. Therefore, the sentence imposed on the accused-respondent is illegal and cannot be allowed to stand.

I must mention at this stage the following paragraph from the Judgment of ***Asan Mohamad Rizwan V. Hon. Attorney General*** – C.A. Revision No. CA (PHC) APN 141/2013, decided on 25.03.2015.

"The judges are to pass lawful and appropriate sentence upon the accused being convicted. In doing so, judges are to address their minds to the objective of sentencing particularly when exercising the discretion given to them under the law. Then only a correct sentence could be passed upon a convicted accused. If not, criticism on lack of uniformity, consistency and transparency in imposing sentences are bound to surface. Therefore, it is necessary for the judges to keep in mind the objectives of sentencing and also the sentencing guidelines, in order to arrive at the correct and appropriate decision."

Even though the learned High Court Judge has not considered the minimum mandatory sentence, this Court considered whether this is a fit and proper case to disregard the minimum mandatory sentence and impose a lesser sentence. However, I find no reason in this case to exercise the judicial discretion to impose a lesser sentence than the minimum mandatory sentence specified by law as explained previously. Considering the aforesaid twelve years period between the date of the offence and the conviction, and considering the fact that eighteen years have passed by now from the date of offence, I am of the opinion that it

is appropriate to impose the minimum mandatory sentence of 15 years rigorous imprisonment on each count although the conviction is after the trial. Accordingly, sentences imposed by the learned High Court Judge are enhanced to 15 years of rigorous imprisonment on each count. The sentences of each count should run concurrently and the sentences should be operative from the date of the conviction, which is 09.02.2018. The fine, compensation and default sentences imposed by the learned High Court Judge should remain as it is.

The appeal of the complainant-appellant is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL