

REPUBLIC OF SRI LANKA

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal Case No.
CA/HCC/ 0128/2022
High Court of Embilipitiya
Case No. HCE/18/2022

Hapugastenna Manannalage
Shantha Kumarasiri

ACCUSED-APPELLANT

VS.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Sachithra Harshana for the Appellant.**
Jayaluxshi de Silva, SSC for the
Respondent.

ARGUED ON : **17/01/2023**

DECIDED ON : **06/05/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General under Sections 354 and 364 (2) of the Penal Code for committing the offence of Kidnapping from lawful guardianship and Statutory Rape on Bibilegama Divulkarage Iresha Malkanthi on 27/08/2019.

Before the commencement of the trial, on 25.07.2022 the Appellant, through his Counsel informed the Court that he wants to conclude the matter by tendering a plea. Accordingly, the Appellant had tendered his guilty plea and both parties made their submissions.

The Learned High Court Judge after considering the submissions made by both parties, convicted the Appellant as charged and sentenced the Appellant to 02 years rigorous imprisonment and imposed a fine of Rs.5000/- subject to a default sentence of 06 months simple imprisonment for the 1st Count.

For the 2nd Count, he was sentenced to 10 years rigorous imprisonment and imposed a fine of Rs.10,000/- subject to a default sentence of 06 months simple imprisonment for the 1st Count but compensation was imposed by the Learned High Court Judge.

Being aggrieved by the aforesaid sentence the Appellant preferred this appeal to this Court.

The Submission of the Appellant at the High Court revealed that the Appellant and the prosecutrix were lovers and had sexual intercourse in many occasions with consent. When the incident pertaining to this case happened, the prosecutrix was 15 years old and the Appellant was 23 years old unmarried at that time. In the history given to the JMO, the prosecutrix endorsed the fact that she had sexual intercourse with the Appellant with consent. Further, it was brought to the notice of this Court that this position was also reported to the Magistrate Court when the Appellant was produced.

The Learned Counsel for the Appellant, citing as a special circumstance, drew the attention of this to the Probation Report filed in this case. According to the report filed on 10.12.2020, the prosecutrix had eloped with the Appellant after she returned home from a children home.

Due to this incident a complaint was lodged at Godakawela Police by aunt of the prosecutrix and the Appellant was arrested thereafter. While she was under the care of her aunt after the court order, the mother of the prosecutrix under the guise of taking her out, handed over the prosecutrix to the Appellant.

Considering these circumstances in relation to the matter and therefore, urges the indulgence of this court to consider applying the principles laid down in the Supreme Court determination **No. 03 of 2008** decided on 15.08.2008.

In the aforementioned SC Reference, the High Court of Anuradhapura by its communication dated 14/05/2008, made a reference to the Supreme Court in terms of Article 125(1) of the Constitution of Sri Lanka. In that reference, the Learned High Court Judge of Anuradhapura had queried whether Section 364(2) of the Penal Code as amended by the Penal code (Amendment) Act No.22 of 1995, had removed the judicial discretion when sentencing an accused convicted of an offence in terms of that section.

In the said reference His Lordship Justice P. A. Ratnayake held that:

“the minimum mandatory sentence in Section 364(2)(e) is in conflict with Article 4(c), 11, and 12(1) of the Constitution.”

“Article 80(3) (of the Constitution) only applies where the validity of an Act is called into question. However, Article 80(3) does not prevent a court from exercising its most traditional function of interpreting laws. Interpretation of laws will often require a court to determine the applicable law in the event of a conflict between two laws. This is a function that has been exercised by this court from time immemorial.”

In the event of a conflict between an ordinary law and the Constitution, the constitutional provisions must prevail over an ordinary law.”

“The minimum mandatory sentence in Section 364(2)(e) of the Penal Code is in conflict with Article 4(e), 11 and 12 of the Constitution and 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.”

In this case the Appellant was charged under section 364(2)(e) of the Penal Code as amended. The Section 364(2)(e) reads as:

Whoever;

e) commits rape on a woman under eighteen years of age;

shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall in addition 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;

In this case the Appellant was sentenced to 10 years rigorous imprisonment with a fine for the 2nd Count. Also sentenced to 02 years rigorous imprisonment with a fine for 1st Count and further ordered to run both sentences concurrently. According to the Counsel for the Appellant the Appellant was 23 years old when he had committed the offence. When he pleaded guilty, he was 28 years, married and father of a child aged 02 years. It must be noted that the sexual intercourse had taken place with consent of the prosecutrix who was 15 years old at that time. Further, the mother of the prosecutrix had handed over the prosecutrix to the Appellant when she was placed under the aunt's custody upon a Court order.

Hence, the Appellant pleads to this court to re-consider his sentence.

Jayant Patel, J. in the case of **Jusabbhai Ayubhai v. State of Gujarat** CR.MA/623/2012 stated that:

“.....It is by now recognized principles that justice to one party should not result into 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 this case there is no doubt that the Appellant had committed a very serious offence punishable under the law. But one cannot forget the fact that he is entitled to the protection by the law. In the present circumstances he needs protection as he is married and has a child. The Appellant need guidance and supervision, reformation, and rehabilitation rather than punishment and branding as a criminal.

Considering the facts of the case and the submissions made by both counsels I conclude that this is not an appropriate case to order minimum custodial sentence against the Appellant.

I, therefore, with the guidance of the judgment given in SC Reference **No.3 of 2008**, set aside the sentence of 10 years rigorous imprisonment on count two, to run concurrent to 02 years rigorous imprisonment imposed on count one to the Appellant by the Learned High Court Judge of Embilipitiya and substitute the sentence as follows:

For **first Count** 02 years rigorous imprisonment with a fine of 5000/- subject to a default sentence 06 months simple imprisonment.

For **second Count** 03 years rigorous imprisonment with a fine of 10,000/- subject to a default sentence 06 months simple imprisonment.

I order the above sentences to run concurrent to each other.

In addition, I order a compensation of 100,000/- payable to the prosecutrix with a default sentence of 01-year simple imprisonment.

Therefore, the Appeal is dismissed subject to above variation of the sentence.

The Registrar of this Court is directed to send this judgment to the High Court of Embilipitiya along with the original case record.

Further, the Learned High Court Judge of Embilipitiya is hereby directed to issue notice on the Appellant to appear before the High Court, as he is on bail pending appeal, and to comply with this judgement.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL