

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
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/ 0209/2024
High Court of Avissawella
Case No. HC/45/2021**

Kaleha Hettiarachchige Rumesh
Madusanka Hettiarachchi

ACCUSED-APPELLANT

Vs.

The Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam,J.
R.P.Hettiarachchi,J.**

COUNSEL : **Asthika Devendra with Lawrance Adam
Harley for the Appellant.
Janaka Bandara, DSG for the Respondent.**

ARGUED ON : **27/06/2025**

DECIDED ON : **06/08/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General for committing two counts of statutory rape on Hewa Pedige Thilini Kumari - an offence punishable under Section 364(2) of the Penal Code, between the period of 01.11.2017 and 30.11.2017.

On 21.07.2023, PW1, the victim had requested to file an affidavit in order to conclude the case in a brief and /or expeditious manner. On 15.09.2023, the Appellant had sought an adjournment to conclude the case in a brief and/or expeditious manner. On 16.10.2023, PW1 had agreed to receive a compensation of Rs.100,000/- and the Appellant requested three months' time to settle the said compensation.

On 16.01.2024, the evidence of PW1 was led with regard to the affidavit in which she had declared that she had been in a love affair with the Appellant (page 60 of the brief). However, according to the brief, on the said date upon the application of the State Counsel, the Court has proceeded with the pre-trial conference and has proceeded to take the matter for trial.

On 25.03.2024, the indictment was read to the Appellant and thereafter, he had pleaded not guilty to the charges. Thereafter, evidence of PW1 and PW2 had been led and concluded. As the Appellant expressed his willingness to plead guilty to the indictment, on 16.07.2024, the indictment was read again and the Appellant had pleaded guilty to both charges.

After the sentencing submissions of both parties, the learned High Court Judge had imposed 10 years rigorous imprisonment with Rs.10,000/- fine with a default sentence of 3 months simple imprisonment for each of the charges of rape. It was further ordered that the sentences should run concurrent to each other.

Additionally, a compensation of Rs.300,000/- was ordered with a default sentence of 6 months simple imprisonment.

The learned High Court Judge duly considered the fact that the Appellant and the victim were lovers, and which resulted in the birth of a child.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence. The Appellant was produced via zoom platform by the Prison Authorities.

At the very outset of the trial the learned Counsel for the Appellant submitted to Court that both the Appellant and the victim are now married to different persons and leading separate family lives with children as well.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. The Learned High Court Judge has failed to consider the facts/factual circumstances of the case.

2. The Learned Trial Judge has failed to consider the law and/or authorities to offences punishable under Section 364(2)(e) of the Penal Code.
3. Would a non-custodial sentence have met the ends of justice, given the circumstances of the case?

The learned Counsel for the Appellant, considering all the circumstances in relation to this matter at the very outset, 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.

The exclusive reason for the above preliminary submission is the fact that the Appellant and the victim had been in a romantic relationship, which subsequently resulted in the birth of a child.

The Learned Deputy Solicitor General having considered the submissions made by the counsel for the Appellant, informed the court that given the facts and the circumstances that led to the conviction and other incidental matters, if the court decides to apply the relevant principle due to the uniqueness of this case and only in relation to the facts of this case, he would not be standing in the way as sentencing is a matter that which entirely vests with the court.

The Facts of this case *albeit* briefly are as follows.

The victim was 14 years old when she was in a romantic relationship with the Appellant. In her cross examination she had admitted that it was the first time that she has had an affair. In this case no evidence surfaced that of any threat or force had been perpetrated on the victim by the Appellant. Although consent is immaterial when the girl is below 16 years of age, in this case their intimate relationship had occurred by way of mutual consent.

The Appellant withdrew his earlier plea of not guilty, using his entitlement under Section 183 of the Code of Criminal Procedure Act No.15 of 1979, and pleaded guilty to the charges famed against him.

Now the Appellant seeks the courts indulgence only to reconsider his jail sentence on the application of the Supreme Court determination given in **No. 03/2008** 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 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 for two counts of statutory rape under Section 364(2) of the Penal Code and the Section states:

“Commits rape on a woman under eighteen years 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 on each count with a fine and compensation as stated above.

According to the Counsel for the Appellant in SC Reference **No.03/2008** the victim was only 15 years at the time of the incident and she had given a letter to her mother that she intended to elope with the Accused, which was produced to the court where it was established that there had been a romantic relationship between them, which is similar to the present case now before this court.

Further it was submitted that in SC Reference **No.03/2008** at the time of the judgment, the Accused and the complainant were married (not to each other but to different persons) and were each leading a successful family life. Taking this fact into mind, the court recognised that imposing a long custodial sentence would effectively mean that the family life of the Accused would be disrupted.

This fact is similar to the facts of the present case since both the Appellant and PW1 is now married (again, not to each other but to different persons) and if the sentence imposed on the Appellant is allowed to stand it will

gravely affect the family life of the Appellant and would not benefit the complainant either.

The learned Counsel for the Appellant submitted to this Court that the precedent laid down by SC Reference **03/2008** had been followed by a plethora of judgments rendered by the higher courts of this country.

In **SC Appeal 17/2013** decided on 12.03.2015 the Supreme Court held;

“... The Supreme Court stated that even though the women’s consent was immaterial for the offence of rape when she is under the age of 16 years, a women’s consent is relevant for a Court, in the exercise of its discretion in deciding the sentence for such an offence”.

In this case there is no doubt that the Appellant had committed a very serious offence punishable under the law. But the Appellant and the victim had subsequently proceeded to marry different people and have become well settled in their lives. In the present circumstances both parties need care and protection as both are married and have children. In order to be good parents, both need guidance, 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 a custodial sentence against the Appellant.

Therefore, under the guidance of the judgment given in SC Reference **No.3 of 2008**, I set aside the sentence of ten years rigorous imprisonment imposed on the Appellant by the Learned High Court Judge of Avissawella and substitute a sentence of two years rigorous imprisonment operative from the date of sentence which is 06.08.2024. The fine imposed by the High Court will remain unchanged. Considering all the circumstances of the case I

substitute Rs.100,000/- as compensation with a default sentence of 6 months simple imprisonment instead of Rs.300,000/- imposed by the High Court.

Subject to above variation, the appeal is hereby dismissed.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL