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

In the matter, of an Appeal with Special Leave to Appeal granted by Supreme Court under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 17/2013

S.C.Spl. LA No. 207/2012
C.A.No. . 297/2008
HC. Kurunegala No. 259/2006

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

Complainant

Vs.

Ambagala Mudiyanselage Samantha Sampath,
No. 03,
Urupitiya.

Accused

And Between

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

Complainant-Appellant

Vs.

Ambagala Mudiyanselage Samantha Sampath,
No. 03,
Urupitiya.

Accused-Respondent

And Now Between

Ambagala Mudiyanselage Samantha Sampath,
No. 03,
Urupitiya.

Accused-Respondent-Appellant

Vs.

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

Complainant-Appellant-Respondent

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BEFORE : **Eva Wanasundera, PC. J**
Sarath de Abrew, J. &
P. Jayawardena,PC. J.

COUNSEL : Nimal Muthukumarana for Accused-Respondent-Appellant.
Yasantha Kodagoda, DSG. for Attorney-General.

ARGUED ON : **05.11.2014**

DECIDED ON : **12.03.2015**

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EVA WANASUNDERA, PC.J.

In this case, Special Leave to Appeal was granted on the questions of law contained in paragraph 21(a) of the Petition dated 01.10.2012. The said question is as follows:-

"Is the judgment of the Court of Appeal contrary to law and bad in law?"

The Attorney General who is the Complainant-Appellant-Respondent in this case (hereinafter referred to as the 'Respondent'), forwarded an indictment on 04.08.2006 against the Accused-Respondent-Appellant(hereinafter referred to as the "Appellant") to the High Court of Kurunegala for having, on a day between 01.08.2003 and 31.3.2004 committed the offence of rape punishable in terms of Section 364(2)(e) of the Penal Code with regard to W.C. Janitha Perera, a girl under 16 years of age. On 28.10.2008 when the case was taken up for trial in the High Court of Kurunegala, the Appellant-pleaded guilty to the charge and the learned High Court Judge committed the Appellant on his own plea of guilt. Thereafter, the High Court imposed a term of 2 years rigorous imprisonment suspended for a period of 10 years and a fine of Rs.5000/- with a default sentence of 1 year rigorous imprisonment and also ordered the payment of Rs.200,000/- as compensation to the victim of the crime W.C. Janitha Perera.

Being aggrieved by the punishment imposed on the Appellant by the High Court, the Respondent Attorney General preferred an appeal to the Court of Appeal. On 24.07.2012, the Court of Appeal pronounced the judgment setting aside the punishment in the nature of the suspended term of imprisonment imposed by the High Court and substituting therefor the minimum term of imprisonment that may be imposed for the offence, ie. 10 years rigorous imprisonment. However the Court of Appeal did not interfere with the fine and the order for compensation imposed by the Learned High Court Judge. The Appellant has appealed from the judgment of the Court of Appeal and Special Leave was granted by this Court as aforementioned on one question of law.

The argument of the Appellant at the hearing of this appeal was that the judgment in the case of SC. Reference No. 03/2008 recognizes the imposing of sentences below the minimum mandatory sentence after considering the circumstances of the particular case and that the present case should be reviewed accordingly. The Appellant prays that this Court should exercise its discretionary power and affirm the High Court judgment which imposed a sentence below the minimum mandatory sentence to the Appellant setting aside the Court of Appeal judgment. The argument of the Respondent was that the judgment in SC. Reference 03/2008 with regard to the constitutionality of the penal provision in Section 364(2)(e) of the Penal Code amended by Act No. 22 of 1995 concerning the minimum mandatory term of imprisonment, is outside the jurisdiction of

the Supreme Court and should therefore not serve as a valid or binding precedent. The Deputy Solicitor General further argued that upon the conviction of any person for having committed an offence in terms of Section 364(2)(e) of the Penal Code, i.e. 'statutory rape', the Court is obliged to impose a term of rigorous imprisonment which is not less than 10 years.

The facts in this case can be narrated as follows. The Appellant, a labourer in occupation had married the victim's sister. They had no children in that marriage. The victim's sister had left the country without the consent of the husband about an year after the marriage. The Appellant was then invited by the victim's parents ie. his mother in law and father in law, to come and live with them in their house. The victim was a 15 year old girl attending school. Only four of them lived in that house. The girl was found to be pregnant when her mother took her to the hospital when she was unwell. Then the pregnancy was 5 months old. The parents stopped her going to school; told the Appellant not to come home again; took her to another village and kept her there, with an older married couple who had no children, having in mind to hand over the baby to them when it is born. The parents did not go to the Police. The victim girl did not make any complaint at that time to the Police.

Most unexpectedly, some outsider had informed the Police of the area that the Appellant and the victim were mysteriously missing from that house. It is only then that the Police had launched an investigation and found that the girl was away in another house whereas the Appellant was living with his parents in his village close by. The statement made to the Police revealed that the girl was only 15 years old, and then the Appellant was taken into custody and was later enlarged on bail.

The victim gave birth to a baby girl on 19.07.2004 in the Kuliyapitiya Base Hospital. It is the Appellant who informed the Registrar of Births of the area that the baby girl was born, according to her birth certificate filed of record. It is mentioned therein that the father of the baby is the Appellant, A.M. Samantha Sampath and that the parents were not legally married. It is accepted that at the time of her birth, the baby girl Sanduni Wasana had a father, the Appellant and a mother, the victim.

The Attorney General forwarded an indictment to the High Court dated 04.08.2006. It was taken up for trial on 28.10.2008 for the first time. The Appellant pleaded guilty to the charge of rape of a girl below 16 years and he was subject to punishment by the High Court under Section 364(2)(e) of the Penal Code as amended by Act No 22 of 1955. The baby Sanduni Wasana is being paid maintenance by the Appellant and moreover he visits the school as the father of the child when called upon to do so; has arranged the transportation to and from the school and sends money to maintain the child. The High Court imposed a punishment of 2 years RI. suspended for 10 years and imposed a fine and compensation.

The Attorney General appealed against this sentence to the Court of Appeal. It was argued on 24. 07.2012 and decided also on 24.07.2012, i.e. on the same day and the Court of Appeal set aside the suspended sentence and imposed a punishment of 10 years rigorous imprisonment. It is from that judgment that the Appellant is before this Court.

In my mind, the sole question to be decided is whether a mandatory minimum sentence imposed by statute i.e. Section 364(2)(e) of the Penal Code stifles the hands of the Court imposing the punishment thus taking away the judicial discretion in sentencing or whether Court is bound to impose the mandatory minimum sentence. Since the said sentence, according to the judgment of the Supreme Court in S.C. Reference 03/2008, is in conflict with Articles 4(c), 11 and 12(1) of the Constitution, the High Court held that it is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence.

I believe that every Judge who sits in a Court and hears the case in the Court of first instance gets the opportunity not only to hear the case but also to see the case with the physical eye, to smell the case, to feel the case and to fathom the case with the present mind. The Judge could hear the words of evidence and observe the body language of those who give evidence.

In this case, leave aside the victim of rape and the Appellant, there exists a child born into this world as a consequence of the sexual intercourse between the two and that child is a girl child who is now over 10 years of age. She is getting the benefit of the

presence of the father and the mother as at present. The Appellant is willingly working for the support of the child.

The Charter on the Rights on the Child as declared in the Children's Charter 1992 to which Sri Lanka has proclaimed to be a party, Article 03(2) reads thus:- "The best interest of the child shall be the primary consideration in any matter, action or proceeding concerning a child, whether undertaken by any social welfare institution, court of law, administrative authority or any legislative body ". Article 7 of the same reads:- "A child shall be registered immediately after birth and shall have the right from birth to a name, right to acquire a nationality and as far as possible the right to know and be cared for by his parents".

In the case of *Dharma Sri Tissa Kumara Wijenaike Vs. Attorney General (SC. Appeal No. 179/2012- minutes of 18.11.2013*) Justice Tilakawardane commented that "the decision appears to be based on the reality that the Court is the upper guardian of a child".

In the present case, there is an existing 3rd person in the picture, ie. the 10 year - old girl who is born and living in this world as a result of the victim and the Appellant having had sexual intercourse. It is the Appellant who is the father of the child who at all times concerned has truly and sincerely declared to be the father and is parenting and minding the child born to the victim. It is a special case where the Court has to give its mind to a 3rd party who happens to be in existence as a consequence of statutory rape to which the father of the child has pleaded guilty to. Supposing the Appellant is sent to jail for 10 years to come, the girl child of 10 years at present will not get the love and affection, care and support of the father to whom she looks up to at present and would not ever understand the concept of the State punishing him for 'statutory rape' committed on her mother, for which the girl is made to suffer for no wrong committed by her at any time in her life, during her prime childhood which is included in the 10 years of rigorous imprisonment i.e. until she is 20 years of age. This fact is a matter of grave concern of this Court as "the Court is the upper guardian of any child on earth".

I would like to analyse the judgment in the case of S.C. Reference 03/2008. It was a matter of a Reference made to the Supreme Court in terms of Article 125(1) of the

Constitution of the Democratic Socialist Republic of Sri Lanka, made by the High Court Judge of Anuradhapura inquiring "whether Section 364(2) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995 has removed the judicial discretion when sentencing an accused convicted of an offence in terms of that Section." The Learned High Court Judge had submitted her observations to the effect that the medical report negates the use of force and support the position that sexual intercourse had been consensual. The Supreme Court stated that even though the woman's consent was immaterial for the offence of rape when she is under the age of 16 years, a woman's consent is relevant for a Court, in the exercise of its discretion in deciding the sentence for such an offence. The High Court Judge had also noted that a custodial sentence of 10 yrs. R.I. would not benefit the complainant. The Supreme Court had also observed that there was no mandatory minimum sentence before the Amendment No. 22 of 1995 to the Penal Code, when it made the determination in SC Ref. 03 / 2008.

The Supreme Court considered Article 4(c), Article 11 and Article 12(1) of the Constitution, in S.C. Reference 03/2008. This case discussed many Special Determinations such as SC./SD 6/98, 7/98, 4/2003 and 5/2003 where it was decided that the Bills before Parliament in the respective Determinations which tried to impose 'mandatory minimum sentences' were held to be inconsistent with Articles 4(c), 11 and 12(1) of the Constitution. The reasons attributed to the said decisions were as follows:-

(a) The imposition of mandatory minimum sentences would result in legislative determination of punishment and a corresponding erosion of a judicial discretion and a general determination in advance of the appropriate punishment without a consideration of relevant factors which proper sentencing policy should not ignore; such as the offender and his age, and antecedents, the offence and its circumstances (extenuating or otherwise), the need for deterrence and the likelihood of reform and rehabilitation.

(b) The imposition of mandatory minimum sentences would result in imposing identical sentences in case where court thinks it appropriate and where Court

thinks it most inappropriate which amounts to treating unequals as if they were equals, in violation of Article 12(1).

(c) The effect of imposition of mandatory minimum sentences would amount to an erosion of an essential judicial discretion in regard to sentencing. There would be gross disparities in sentences, which will not only violate the principles of equal treatment but may even amount to cruel punishment.

The Supreme Court held in S.C. Reference 03/2008 that "as far as Section 364(2)(e) of the Penal Code is concerned, the High Court has been prevented from imposing a sentence that it feels is appropriate in the exercise of its judicial discretion due to the minimum mandatory punishment prescribed in Section 364(2)(e). Having regard to the nature of the offence and the severity of the minimum mandatory sentence in Section 364(2)(e) is in conflict with Articles 4(c), 11 and 12(1) of the Constitution."

In the present case in hand, the learned Deputy Solicitor General argued that S.C. Reference 03/2008 judgment is contrary to the limitation on judicial review as contained in Article 80(3) of the Constitution and is therefore unconstitutional and outside the jurisdiction of the Supreme Court.

In that case, the Supreme Court also held that,

> "Article 80(3) 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".

I find that the issue in the present case is a conflict between the provisions in an ordinary law, ie. the Penal Code and the provisions in the Constitution. The Constitution is accepted as the Supreme Law of the country and the ordinary laws derive their validity from the Constitution. The provisions in the ordinary law should be interpreted in the light of the Constitutional provisions. The Constitution should be used as a flash-light on the provisions of the ordinary law. Any mandatory minimum sentence imposed

by the provisions of any ordinary law, in my view is in conflict with Article 4(c) 11 and 12(1) of the Constitution in that it curtails the judicial discretion of the Judge hearing the case. For example, the State files criminal cases against persons in the society; then these persons face the charges in Court and defend themselves; at the time of conviction, Court hearing the criminal case has no doubt that the accused is guilty or not. If the State proves its case without any doubt, the suspect is found guilty; otherwise he is acquitted. Court has 'no discretion' in that part of the trial which is decided on the evidence before court. It is only in deciding on the punishment that the Court has a discretion. When a minimum mandatory sentence is written in the law, the Court looses its judicial discretion. That part of the law with the minimum mandatory sentence, acts as a bar to judicial powers in sentencing or punishing the wrong doer. The Judge who has seen, felt and smelt the case should be given the discretion in sentencing, considering all the circumstances of the case, the consequences of a sentence, whether it serves as cruelty to the wrong doer, the victim or any other person affected by that sentence etc. Sentencing is the most important part of a criminal case and I find that provision in any law with a minimum mandatory sentence goes against the judicial discretion to be exercised by the Judge.

In the present case, we must look at the big picture with the victim of rape the Appellant, the father of the child born, and the 10 year- old girl child who was born into this world as a result of the victim having been raped. The victim of rape never complained to the Police until after a pregnancy of 5 months when Police on its own came to the victim in search of her when an outsider informed the Police of her missing from home. There was no chance for the victim to give evidence as the Appellant pleaded guilty to the charge of statutory rape of the victim. There is a bar for the victim and the Appellant to enter into a marriage as the Appellant is already legally married to the victim's sister who is living abroad. The child is being looked after by the Appellant father in the eyes of the society, and the child is dependent on the income earned by the Appellant.

In these circumstances I hold that the Learned High Court Judge had correctly imposed a suspended sentence of "2 years RI. suspended for 10 years". I agree with the decision of the Supreme Court in S.C. Reference 03/2008 and uphold the conclusion of that case that the minimum mandatory sentence in Section 364(2)(e) 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.

I set aside the judgment of the Court of Appeal dated 24.07.2012 and affirm the judgment of the High Court dated 28.10.2008. However, I order no costs.

Judge of the Supreme Court

Sarath de Abrew, J.

I agree.

Judge of the Supreme Court

P. Jayawardena,PC. J.

I agree.

Judge of the Supreme Court