IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC APPEAL No. 239/2017
SC SPL LA No. 156/2017
CA No. 241/2013
HC Rathnapura case No. 75/2010

The Republic
Complainant

Vs.

Yahalawatte Wilbert,
Medawaththa, Palawela,
Udaniriella,
Rathnapura.
Accused

AND BETWEEN

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant - Appellant

Vs.

Yahalawatte Wilbert,
Medawaththa, Palawela,

Udaniriella,
Rathnapura.
Accused - Respondent

AND NOW BETWEEN

Yahalawatte Wilbert,
Medawaththa, Palawela,
Udaniriella,
Rathnapura.
Accused - Respondent - Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant - Appellant - Respondent

Before : **P. PADMAN SURASENA J**
JANAK DE SILVA J
ARJUNA OBEYESEKERE J

Counsel : Shanaka Ranasinghe, PC. with N. Mihindukulasuriya for the Accused - Respondent - Appellant.
Shanil Kularatne, SDSG for the Complainant - Appellant - Respondent.

Argued on : 06.04.2022

Decided on : 31.05.2022

P Padman Surasena J

The Accused - Respondent - Appellant (hereinafter sometimes referred to as the Accused) was originally indicted in the High Court of Rathnapura under section 364(2) (e) of the Penal Code for committing the offence of rape on Yamanthalage Chathurika Madhushani, a girl below 16 years of age at the time of the incident. The offence was alleged to have been committed at Palawela, Udaniriella during or around the period 01-01-2004 - 24-05-2004.

The prosecution commenced leading the evidence of the victim Chathurika Madhushani on 23-10-2013. In the course of the examination in chief, on 24-10-2013 the prosecution with the permission of Court, amended the charge to be one under section 365B (2) of the Penal Code. Thereafter, upon the amended indictment being read over and explained, the Accused had pleaded guilty to the charge under section 365B (2) of the Penal Code (as per the amended indictment). Thereafter, the Court had heard the submissions of both parties relating to the sentence to be imposed on the Accused.

After the conclusion of the submissions of the parties, the learned High Court judge by his order dated 24-10-2013, imposed on the Accused, a term of ten (10) months rigorous imprisonment and a fine of Five Hundred Rupees (Rs. 500/-) with a default sentence of one (01) week of imprisonment. The learned High Court judge had also awarded a compensation of Fifty Thousand Rupees (Rs. 50,000/-) payable to the victim with a default sentence of one (01) year imprisonment.

Being aggrieved by the above sentence, the Complainant - Appellant - Respondent (hereinafter sometimes referred to as the Attorney General), appealed to the Court of Appeal complaining that the sentence passed by the learned High Court judge is illegal and inadequate. After hearing the appeal, the Court of Appeal, by its judgment dated 09.06.2017 enhanced the sentence imposed by the learned High Court judge to a sentence of seven (07) years rigorous imprisonment and a fine of One Thousand Rupees (Rs. 1000/-) with a default sentence of six (06) months imprisonment. The Court of Appeal had affirmed the sum awarded by the High Court as compensation payable to the victim and its default sentence of one (01) year rigorous imprisonment.

Being aggrieved by the above judgment of the Court of Appeal, the Accused invoked the jurisdiction of this Court seeking to challenge the said judgment of the Court of Appeal which revised and enhanced the sentence imposed on him by the High Court. Upon supporting the special leave to appeal application relevant to this appeal, this Court on 04-12-2017 had granted special leave to appeal on the following questions of law.

1. *Did the Court of Appeal err by upholding the submission of the State that the sentence was illegal and/ or inadequate?*
2. *Was the appeal to the Court of Appeal filed in compliance with the time frame stipulated by the Code of Criminal Procedure Act No. 15 of 1979?*

Although this Court has granted special leave to appeal in respect of the above two questions of law, the learned President's Counsel who appeared for the Accused at the very commencement of the argument, informed Court that he would neither make submissions nor pursue the 2nd question of law in respect of which special leave to appeal has been granted. Therefore, I would not proceed to consider the 2nd question of law.

The main submission made by the learned President's Counsel for the Accused is the fact that the Accused was 71 years of age at the time he had pleaded guilty to the amended charge. However, it is a fact that the Accused had committed the instant offence of grave sexual abuse on the victim who was 8 years of age (at the time of committing the offence i.e., in the year 2004) (the victim was born on 06-04-1996). If the Accused was 71 years in the year 2013 as claimed by him, he would have been born in the year 1942. Therefore, the Accused would have been 62 years of age when he had committed the offence for which he had pleaded guilty.

The 62-year-old Accused was the younger brother of the victim's maternal grandfather. The Accused had 5 children who were elder to the victim. The victim used to visit the house of the Accused regularly. The age gap between the Accused and the victim is about 54 years. Thus, it is not unreasonable for anyone to expect that the Accused should have conducted himself with an attitude generally expected of an adult of his age. This is because one would reasonably expect the Accused to have a fiduciary relationship with such young girl as they are not strangers to each

other. The Accused was more than seven times elder to the victim when he had abused her. Let me now consider how the learned High Court judge had looked at this incident.

The learned High Court judge also has had no doubt that the offence committed by the Accused is a very serious one which warrants calling for a heavy punishment on him. However, he had decided to impose a sentence less serious than that prescribed by law, for the following reasons:

i. old age of the Accused,
ii. the fact that he had not engaged in any violent activity,
iii. the fact that ten years had elapsed since the date of commission of the offence,
iv. the fact that the Accused was suffering from a heart ailment,
v. the fact that the Prison authorities would have to bear expenses to look after the Accused in the Prison.

In my view, the 2nd ground above, i.e., the absence of any violent act by the Accused, in the circumstances of this case, is not a relevant fact that the learned High Court judge should have considered. This is because of the fact that it is a 08-year-old girl that the Accused had abused. Thus, obviously, there was no necessity for the Accused to engage in any violent act before he could abuse the victim. I fail to understand how that ground could be used in this case, to mitigate the sentence to be imposed on the Accused.

The 3rd ground above, in the circumstances of this case, is also not a ground that the learned High Court judge should have considered in favour of the Accused. If Courts are to seriously take into account, 'a lapse of ten years' as a common mitigatory circumstance in sentencing, such attitude would certainly not fulfil the aspirations of the common citizen of this country. They would then lose their confidence in the criminal justice system of the country. This must be averted as it will erode the Rule of Law in the country.

The Government has set up and continue to maintain the Prisons Department as a permanent department of the state. Expenses incurred in maintaining prisoners are borne by the state, for the benefit and welfare of the general public. That is an integral part of maintaining the Rule of Law in the country. It is not restricted to this country

alone, but adopted worldwide as a necessary part of any criminal justice system. In such a scenario, I am at a loss to understand as to why the learned High Court judge had given an undue consideration as to the expenses the state would incur in maintaining a prisoner. Thus, in my view, the learned High Court judge had erred when he considered the fact that the Prison authorities would have to bear expenses to look after the Accused.

The considerations pertaining to the old age of the Accused and his heart ailment, to mitigate the sentence indicate that the learned High Court judge had given an undue weight to the welfare of the Accused while disregarding the specific submission made by the learned State Counsel urging the Court to take into consideration, the seriousness of the crime and impose an adequate and suitable sentence on the Accused. Except a bear statement (just one sentence) in the submission made by the learned counsel who appeared for the Accused, I find that no acceptable material had been placed before the High Court which would have enabled the learned High Court judge to conclude that the Accused was suffering from a heart ailment. Perusal of the order made by the learned High Court judge shows that he had gone on inquiring in this regard, from the Prison officers present in Court who had not produced any document at least for the inspection by Court. In any case, our Courts have held that such ground is not decisive when deciding the quantum of the sentence to be imposed on a convicted accused.

In the case of The Attorney-General Vs. H. N. De Silva,[1] Basnayake, A.C.J. (as he then was) stated as follows:

> *"In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the*

[1] 57 NLR 121.

Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty [2] and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail. "

Sri Skanda Rajah J. while citing with approval, the above passage from Basnayake, A.C.J.'s judgment, went ahead in the case of M. Gomes (S. I. Police, Crimes) Vs. W. V. D. Leelaratna,[3] to add three more grounds which a trial judge should consider in the assessment of the sentence to be imposed on a convicted accused. Two of those three additional grounds are firstly, the nature of the loss to the victim and secondly, the profit that may accrue to the culprit in the event of non-detection. (The third additional ground is the use to which a stolen article could be put which is not relevant to the case at hand).

Thus, the consideration of the order of the High Court in the background of the principles set out in the above judgements clearly shows that the learned High Court judge had given an undue weight to the welfare of the Accused while failing to consider the other aspects which he ought to have considered. As this Court had held in The Attorney-General Vs. H. N. De Silva,[4] the age of the Accused, his previous good character are certainly matters to be taken into account but not to the exclusion of the other aspects of sentencing which are of greater importance.

[2] Rex v. Boyd (1908) 1 Cr. App. Rep. 64.
[3] 66 NLR 233.
[4] Supra.

Perusal of the judgment of the Court of Appeal shows clearly, that it has considered all relevant matters before enhancing the sentence imposed by the trial Judge. The sentence imposed by the Court of Appeal is the minimum sentence, the law has prescribed for the relevant offence. I have no basis to disagree with the said enhancement. Perusal of the judgment of the Court of Appeal shows that it had enhanced the sentence imposed by the trial Judge on the basis of its inadequacy. Thus, I answer the question of law in respect of which Special Leave to Appeal has been granted, as follows:

> The Court of Appeal has not erred by upholding the submission of the State that the sentence was inadequate.

I dismiss the appeal and direct the learned High Court judge to take prompt steps to implement the balance part of the enhanced sentence imposed on the Accused.

JUDGE OF THE SUPREME COURT

Janak De Silva J

I agree,

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere J

I agree,

JUDGE OF THE SUPREME COURT