

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

**S.C. Appeal No. 89 A /2009
SC Spl.L.A. 02/2009
High Court Anuradhapura
Case No. 149/2003**

In the matter of an appeal with
Special leave to appeal granted
by the Supreme Court.

Marmba Liyanage Rohana
alias Loku.

Accused-Appellant

Vs.

The Attorney General.

Respondent

Before: J.A.N. de Silva C.J.
Amaratunga J.
Ratnayake J.

Counsel: A.S.M. Perera, President's Counsel with
Neville Ananda for the accused-appellant.
Dileepa Peiris, Senior State Counsel
for the Attorney General.

Argued on: 29.03.2011

Decided on: 12.05.2011

Amaratunga, J.

The accused appellant, hereinafter referred to as the accused, was indicted in the High Court of Anuradhapura, for committing the offences of abduction and rape. The first charge was that on 29.4.1999 at Thalawa he abducted R.M.Anusha Priyadarshani, a minor below 16 years of age from the custody of her lawful guardian, an offence punishable under Section 354 of the Penal Code. The second charge was for committing the offence of rape on the said Anusha Priyadarshani, an offence punishable

under Section 364(2)(e) of the Penal Code as amended by Penal Code (Amendment) Act No.22 of 1995. The punishment prescribed for the offence falling within Section 364(2)(e) is rigorous imprisonment for a term not less than ten years and not exceeding twenty years and a fine plus compensation to the victim of rape. Thus there is a mandatory minimum sentence of ten years prescribed by law which prevents the Court from exercising its discretion with regard to the sentence.

When the accused pleaded not guilty to the charges framed against him the trial commenced on 25.4.2006, almost seven years after the date of the offence. The prosecutrix was fifteen years and three months old at the time of the offence. According to the evidence given by the prosecutrix at the trial, she was a student studying in Grade 11 in the school. She had a love affair with the accused. When her mother discovered this she (the mother) was not in favour of this love affair and wanted the prosecutrix to put an end to it. When the prosecutrix continued her association with the accused, her mother's attitude became hostile and she began to scold and harass the prosecutrix. The life at home became intolerable to the prosecutrix. One day when she left home in her school uniform she met the accused on her way to the school. She asked the accused to take her away and threatened that she would take poison and commit suicide in the event of the accused's refusal or failure to take her away from her home. The accused then took her to his uncle's house which was within walking distance from her house. In that house she stayed with the accused in a room for two days and during those two days they shared the natural sexual intimacy, natural to a man and a woman isolated in a room as willing partners. From the accused's uncle's house they moved into the accused's sisters house where they spent two more days before the police stepped in and arrested the accused.

Even in the history given by the prosecutrix to the Judicial Medical Officer she has stated that "I went with him on my own free will and lived together with him."

After the prosecution led the evidence of the other witnesses and closed its case, the accused did not give or offer evidence on his behalf. He did not even make an unsworn statement from the dock.

In terms of Section 363 of the Penal Code, as amended by Penal Code (Amendment) Act No.22 of 1995 sexual intercourse with a woman under sixteen years of age is rape irrespective of the consent of the woman.

Accordingly, the learned trial Judge, by his judgment dated 31.10.2006 quiet rightly held that the accused was guilty of the offence punishable under Section 364 (2)(e) of the Penal Code and sentenced him to ten years rigorous imprisonment, the mandatory minimum period of imprisonment prescribed by law, and a fine of Rs.2500/- with a default term of imprisonment for one year. There was no finding on the charge of abduction.

The accused appealed to the Court of Appeal against the conviction and sentence. Whilst this appeal was pending, a Judge of the High Court in the course of the proceedings in a case where the accused in that case was charged under Section 364(2)(e) of the Penal Code, (identical offence with which the accused was charged) submitted a reference to this Court in terms of Article 125(1) of the Constitution. In that reference the learned High Court Judge has posed the question 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 for an offence punishable under Section 364(2)(e) of the Penal Code.

This reference was taken up for determination before a Bench of Three Judges of this Court on 29.07.2008 with notice to the Attorney General and after considering the submissions of the learned Senior State Counsel who appeared as amicus curiae on behalf of the Attorney General, this Court pronounced its determination on 15.8.2008 on the question submitted to it. SC Reference 3/2008,

H.C.Anuradhapura Case No.333/2004, SCM 15.10.2008, (reported in 2008 BLR in Part II - The Bar Association Law Journal (2008) Vol.XIV, page 160).

The unanimous opinion of the Court in that determination was that “the minimum mandatory sentence in Section 362 (2)(e) is in conflict with Article 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”.

This determination removed the knot of mandatory sentences which upto that time tied the hands of the trial Judges with regard to the appropriate sentence to be imposed in the circumstances of the particular case tried by them.

The accused’s appeal against his conviction and sentence came up for hearing in the Court of Appeal on 24.11.2008 and it appears from the judgment of the Court of Appeal dated 24.11.2008, that their Lordships of the Court of Appeal were aware of the determination of the Supreme Court dated 15.10.2008 freeing the trial Judges from the shackles of mandatory sentences prescribed by ordinary law which prevent trial Judges from deciding the appropriate sentence to be imposed in the light of the facts and the circumstances of the case.

At the hearing before the Court of Appeal, the learned Counsel who appeared for the accused has quiet rightly not challenged the correctness of the conviction. He has only urged for the reduction of the sentence.

Their Lordships of the Court of Appeal having taken into consideration the fact, that the accused had a love affair with the prosecutrix, and that the prosecutrix urged the accused to take her away from her home and threatened to commit suicide in the event of his failure or refusal to comply with her request, have set aside the period of ten years rigorous imprisonment imposed by the trial Judge and substituted therefor a period of five years rigorous imprisonment.

The accused, not being satisfied with the reduction of the sentence granted to him by their Lordships of the Court of Appeal, filed an application for special leave to appeal against the judgment of the Court of Appeal on the question of the sentence. This Court granted leave to appeal on the question of the sentence.

At the hearing before us, the learned President's Counsel for the accused submitted that it was the prosecutrix who had prevailed upon the accused to take her away. The accused did not invite her to come with him. When the prosecutrix threatened to commit suicide, the accused, as a young lover, had acted under the impulse of his emotions. In that moment of indiscretion his reason had given way to his emotions.

The learned President's Counsel invited us to consider the conduct of the accused. He took the prosecutrix to his uncle's house where the couple was accommodated for two days. Thereafter the couple moved into the house of the accused's sister and spent two more days there. The learned President's Counsel submitted that this conduct of the accused shows that he intended to keep the prosecutrix as his partner in life with the blessings of his kith and kin.

At the time the prosecutrix gave evidence at the trial she was a mother of a child by her marriage to another person. The High Court record shows that the prosecutrix was a reluctant witness against the accused. The evasive answers given by her to the questions put to her by the prosecuting counsel clearly demonstrate her reluctance to testify against the accused. However the prosecutor had slowly and gradually extracted from this reluctant witness all the details he had to establish to prove the charge against the accused.

I do not think that the accused's case in mitigation of the sentence was placed before their Lordships of the Court of Appeal in the same way the learned President's Counsel placed his case before this Court.

There is no doubt whatsoever that the accused is technically guilty of the offence described in section 364 (2)(e) of the Penal Code. However after considering the facts of the case and the submissions of the counsel I hold that this is not a case where the accused has to suffer a custodial sentence.

I accordingly set aside the sentence of five years rigorous imprisonment imposed on the accused by the Court of Appeal and substitute therefor a sentence of two years rigorous imprisonment suspended for a period of ten years from the date of the judgment of the High Court of Anuradhapura (31.10.2006). The fine and the default term ordered by the trial Judge is affirmed.

The accused is on bail pending appeal. The learned High Court Judge of Anuradhapura is hereby directed to notice the accused to appear before the High Court and comply, in his presence before Court, with the stipulations set out in Section 303 of the Code of Criminal Procedure Act as amended, with regard to suspended sentences.

Judge of the Supreme Court

J.A.N. de Silva C.J.

I agree.

Chief Justice

P.A. Ratnayake J.

I agree.

Judge of the Supreme Court