ATTORNEY – GENERAL
v.
RANASINGHE AND OTHERS

COURT OF APPEAL.
S. N. SILVA, ACTG P/CA.
D. P. S. GUNASEKERA, J.
CA 668/91.
HC GAMPAHA 42/89.
AUGUST 20 AND SEPTEMBER 16, 1992.

Criminal Law – Abduction and Rape – Sections 354 and 364 of the Penal Code – Sentence – Revision of sentence – Do the provisions of S. 306 of the Code of Criminal Procedure Act apply to the High Court? Section 364 of the Code of Criminal Procedure Act No. 15 of 1979 – Considerations affecting sentence for the offence of rape – Aggravating circumstances – Failure by AG to exercise right of appeal under s. 15 (b) does not preclude his right to seek revision under s. 364 of the Code of Criminal Procedure Act.

(1) An offence of rape calls for an immediate custodial sentence. Reasons are –
(1) to mark the gravity of the offence
(2) to emphasize public disapproval
(3) to serve as a warning to others
(4) to punish the offender
(5) to protect women.

Aggravating factors would be–
(a) use of violence over and above force necessary to commit rape
(b) use of weapon to frighten or wound victim
(c) repeating acts of rape
(d) careful planning of rape
(e) previous convictions for rape or other offences of a sexual kind
(f) extreme youth or old age of victim
(g) effect upon victim, physical or mental
(h) subjection of victim to further sexual indignities or perversions

In a contested case of rape a figure of five years imprisonment should be taken as the starting point of the sentence subject to aggravating or mitigating features. Where the public interest (synonymous with the welfare of the state) outweights the previous good character, antecedents and age of offender, public interest must prevail.

(2) The fact that the Attorney – General has not exercised his right of appeal in terms of section 15 (b) of the Judicature Act in respect of any inadequacy in the sentence imposed on an accused, does not preclude the Attorney-General from inviting the Court of Appeal to exercise its revisionary jurisidiction in terms of section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

(3) A delay of six months to make the application for revision of sentence will not be considered unreasonable in view of the circumstances of the case – see (6) below.

(4) The Court has a wide power of review in revision.

(5) There is no provision to discharge the accused with a warning in the High Court where the accused is tried upon indictment and he pleads guilty to the charge. The provisions of section 306 of the Code of Criminal Procedure Act apply only in relation to the Magistrates' Court.

(6) The aggravating circumstances in the case were removal of the prosecutrix when she was sleeping with her mother, the fact that she was very young (11 years old), below the age where she may consent to sexual intercourse, the degree of preplanning and the repeated commission of the offence for 2 days before rescue by the Police. Public interest demands a custodial sentence in such circumstances.

Cases referred to :

1. *Ruston v. Hapangama* [1978/79] 2 Sri LR 225, 235.
2. *Attorney –General v. H. N. de Silva* 57 NLR 121.
3. *Gomes v. Leelaratne* 66 NLR 233.
4. *Roberts* (1982) Vol 74 Criminal Appeal Reports 242, 244.
5. *Keith Billam* (1986) Vol 82 Criminal Appeal Reports 347.

APPLICATION for revision of sentence by Attorney–General.

R. Arasacularatne, SSC for Attorney–General.

Raja Peiris for 1st and 2nd respondents.

(Note by Editor: Special leave to appeal from this judgment (APPLN. No. SC 176/92) was refused by the Supreme Court on 22-01-93).

Cur. adv. vult.

September 16, 1992.

S. N. SILVA, J.

The Hon. Attorney-General has invited this Court to exercise its revisionary jurisdiction in terms of Section 364 of the Code of Criminal Procedure Act No. 15 of 1979 and to revise the sentences imposed on the accused-respondents. The record of the High Court was called for pursuant to this application and notices were issued on the accused-respondents. The 1st and 2nd accused-respondents have filed objections and a joint affidavit in opposition to the enhancement

of the sentences imposed on them. 3rd and 4th accused-respondents are absent and unrepresented notwithstanding the notices sent to them. The other accused were dead at the time of the trial.

The accused-respondents were indicated before the High Court on the following charges ;

Count (1) that on 8.11.1982 the 1st accused-respondent abducted the girl named Rasika Priyangani from lawful guardianship, an offence punishable under Section 354 of the Penal Code.

Count (2) that in the course of the same transaction the 1st accused commited rape on the said Rasika Priyangani.

Count (3) and (4) were against the other accused for having abetted the 1st accused in the commission of the offences stated above.

The accused-respondents pleaded guilty to the respective offences before the High Court. Submissions were made by learned State Counsel and defence Counsel regarding the matter of sentence. Thereupon, learned High Court Judge sentenced the 1st accused to a term of 2 years Rigorous Imprisonment on the respective charges, suspended for a period of 10 years. The 1st accused was also directed to pay a sum of Rs. 25,000 as compensation to the girl Rasika Priyangani being the victim of the offence, 2nd and 3rd and 4th accused were sentenced to a term of 1 year Rigorous Imprisonment suspended for a period of 5 years. The 5th accused who is now the 4th accused-respondent was discharged with a warning.

According to the proceedings before the High Court, the circumstances in which the offences were committed are as follows :–

The 1st accused-respondent, who was 35 years of age at the relevant time is a relative of the girl Rasika Priyangani (prosecutrix). He owned a lorry and carried on the business of transporting goods for hire. He lived in the house of the prosecutrix for about 2 years and left the house about one month prior to the date of the offence. The prosecutrix was 11 years and 7 days old at the time the offences

were committed. It appears that she attained age about 1 month prior to the incident. It was not disputed that she was below the age of 12 and as such that this case is one of statutory rape, where the presence or the absence of the consent of the prosecutrix is irrelevant.

On 8.11.1982 the prosecutrix was sleeping with her mother in a room in their house. Her father had gone to attend a pirith ceremony in a nearby house and at about 9.30 p. m. when the prosecutrix and her mother were asleep, they heard a knock on the door. Mother opened the door and saw the 1st accused who was a relative of her husband. At that stage, the 1st accused forced his way into the house and carried the prosecutrix who was lying on the bed. Mother struggled with the accused and in the process clothes worn by the prosecutrix and the sarongs worn by the 1st and 2nd accused came out. Mother was inflicted an injury with a knife on her head. Thereafter the accused took the prosecutrix away in a car. On the way, the car was stopped to get sarongs for the 1st and 2nd accused and finally, the prosecutrix was taken to the house of the 6th accused at Matale. There, she was taken to a room that had been arranged and the 1st accused committed rape on her on several occasions for two days. Mother of the prosecutrix went to the police with the bleeding injury, to make a complaint. Her complaint was not entertained at the out set. It transpired in the proceedings that the officer who had refused to record the complaint was later dismissed from service. Subsequently, her complaint was recorded and investigations commenced. The police finally tracked down the 1st accused to the house at Matale and the prosecutrix was rescued, there.

Upon the accused pleading guilty, learned State Counsel made a comprehensive submission as to the facts and circumstances of the case. She submitted that this was a case distinct from the ordinary rape case and it evoked sympathy for the hapless victim of the offence. She invited the Court to impose appropriate sentences considering the serious nature of the offence, which should serve as a deterrent. Learned High Court Judge gave the following reasons in his order for imposing suspended sentences.

(1) that although the 1st accused's conduct is disgraceful he has shown repentance in pleading guilty.

(2) that he has not had any previous convictions.

We have to note that learned High Court Judge has failed to give any reason for disregarding the specific plea of learned State Counsel as to the seriousness of the offence and the requirement to impose deterrent punishment.

Mr. Raja Peiris appearing for the 1st and 2nd accused-respondents submitted that the Hon. Attorney-General has failed to exercise the right of appeal provided in terms of section 15 (b) of the Judicature Act. It was submitted that in view of the failure to exercise the right of appeal this Court should exercise its revisionary jurisdiction only if there is an illegality and in any event in exceptional circumstances. In this connection, learned Counsel relied on the judgment of this Court in the case of *Rustom vs. Hapangama* [1]. It was also submitted that there is a delay in invoking revisionary jurisdiction, in that the application has been made 6 months after the date of conviction. Learned Counsel submitted that in the joint affidavit filed by the 1st and 2nd accused-respondents they have stated the basis on which their plea was tendered and that the sentence should not be revised in view of these circumstances. It was finally submitted that a period of over 10 years has now lapsed after the commission of the offences, and that the 2nd accused-appellants have got married subsequent to the commission of the offences, and that they have their children now to look after.

We have carefully considered the submissions of learned Counsel regarding the sentence, particularly in relation to the matters urged by learned Counsel for the 1st and 2nd respondents. It is correct that the Hon. Attorney-General has a right of appeal in terms of section 15 (b) of the Judicature Act in respect of any inadequacy in the sentence imposed on an accused. However, the fact that Hon. Attorney-General has not exercised this right of appeal, by itself, does not precluded the Hon. Attorney-General from inviting this Court to exercise its revisionary jurisdiction in terms of section 364 of the Code of Criminal Procedure Act No. 15 of 1979. In terms of section 364 this Court has power to call for and examine the record of any case whether already tried or pending, in the High Court or the Magistrate's Court. This power can be exercised for any of the following purposes ;

(1) to satisfy this Court as to the legality of any sentence or order passed by the High Court or Magistrate's Court.

(2) to satisfy this Court as to the propriety of any sentence or order passed by such Court.

(3) to satisfy this Court as to the regularity of the proceeding of such Court.

Thus it is seen that revisionary jurisdiction in terms of section 364 of the Code of Criminal Procedure Act No. 15 of 1979 is wide and is specially directed at vesting a jurisdiction in this Court to satisfy itself as to the legality or propriety of any sentence passed by the High Court or the Magistrate's Court. The judgment relied upon by learned Counsel in the case of *Rustom vs. Hapangama* (supra) relates to a civil proceeding where the matter of sentence does not arise. It is clear on a perusal of the judgment, that this Court refused to exercise revisionary jurisdiction primarily on the basis that the petitioner had not availed himself of the leave to appeal procedure set out in the Civil Procedure Code. Thus, it was observed that the petitioner should not be permitted to circumvent the procedure which requires that notice be issued on the respondent and an opportunity being given to them to object to leave being granted. We have to observe that this consideration does not apply in relation to a criminal case where the jurisdiction is exercised in terms of section 364 of the Code of Criminal Procedure. Furthermore we are inclined to agree with the submission of the learned SSC that the decisions of the Supreme Court in the cases of the *Attorney-General vs. H. N. de Silva* [2] and *Gomes vs. Leelaratne* [3] firmly establish the principle that in considering the propriety of a sentence that has been passed, this Court has a wide power of review, in revision. This jurisdiction is not fettered by the fact that Hon. Attorney-General has not availed of the right of appeal.

We are also of the view that the delay of 6 months in filing the application cannot be considered as unreasonable in the circumstances of this case. As regards the matters stated in the joint affidavit of the accused-respondents, we note that they have specifically stated that learned State Counsel agreed that a suspended term of imprisonment will be imposed in the case. It is obvious that learned State Counsel would not have had any discussion with the accused-respondents who were represented by Counsel. It may be that this statement is based on some information given to the accused by their Counsel. If so the proper course was for Counsel

to have filed an affidavit to that effect. In any event the submissions of learned State Counsel made at the High Court and referred to above, do not suggest that there was any agreement that a suspended sentence will be imposed. These submissions completely contradict the position taken by the accused in their affidavit. If learned State Counsel acted contrary to an undertaking given by her, surely Counsel for the accused would have brought this matter to the notice of the High Court whilst making his submission in reply. This has not happened. In the circumstances we place no reliance at all on this submission of learned Counsel. As regards the final submission of learned Counsel we note that although a period of 10 years has lapsed after the commission of the offence, there was a non-summary proceeding and indictment was finally sent only in 1989. The accused were obviously not married at the time the offences were committed. The fact that they got married when charges of this nature were pending against them, is not a matter that can be taken into account in considering sentence.

Learned SSC submitted that this case presents a serious incident where a 11 year old girl was forcibly removed when she was sleeping peacefully in her house with her mother. The 1st Accused-Respondent had pre-planned the commission of the offences. A car had been arranged to take the victim to a distant place to commit the offence of rape. She was there for 2 days and subjected to several instances of rape until the police finally rescued her. We are inclined to agree with learned SSC that these are aggravating circumstances. As to the matter of assessing sentence in a particular instance, Basnayake A. C. J. in the case of *Attorney-General vs. H. N. de Silva* (Supra) observed 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 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 incident of crimes of the nature of which the offender has been found to be guilty 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.

These observation were followed by Sri Skanda Raja J. in the case of *Gomes vs. Leelaratne* (supra).

It is also appropriate to cite an observation made by the Lord Chief Justice in the Court of Appeal of England, with regard to the sentence to be imposed for an offence of rape. In the case of *Roberts* [4] at page 244. It was observed as follows :-

" Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasise public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these, in cases of rape vary widely from case to case. "

In the case of, *Keith Billam* [5] the Lord Chief Justice repeated the foregoing observations and stated that in a contested case of rape a figure of five years imprisonment should be taken as the starting point of the sentence, subject to any aggravating or mitigating features. He observed further as follows :-

" The crime should in any event be treated as aggravated by any of the following factors : (1) violence is used over and above the force necessary to commit the rape ; (2) a weapon is used to frighten or wound the victim ; (3) the rape is repeated ; (4) the rape has been carefully planned : (5) the defendant has

previous convictions for rape or other serious offences of a violent or sexual kind ; (6) the victim is subjected to further sexual indignities or perversions ; (7) the victim is either very old or very young ; (8) the effect upon the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point ".

It is seen that several of these aggravating circumstances are present in the case. The forcible removal of the prosecutrix when she was sleeping with her mother, the fact that she was very young, below the age where she may consent to sexual intercourse, the degree of preplanning by the accused and the repeated commission of the offence for 2 days until the Police rescued the prosecutrix are some of these aggravating circumstances. On the whole we are of the view that public interest demand that a custodial sentence be imposed in this case. Learned High Court Judge was in error when he considered this case as merely being one of disgraceful conduct on the part of the accused where a suspended term of imprisonment may be imposed.

We accordingly set aside the sentence of 2 years Rigorous Imprisonment on counts 1 and 2 imposed on the 1st accused by learned High Court Judge which has been suspended for a period of 10 years and, sentence the 1st accused to a term of 2 years Rigorous Imprisonment on count 1 and to a term of 3 years Rigorous Imprisonment on count 2. Sentences to run concurrently. The compensation ordered by learned High Court Judge is affirmed. As regards the 2nd accused, we note that he was a employee of the 1st accused and it appears that he assisted his master in the commission of the offence. He has not committed the offence of rape. It appears that in fact he has only assisted the 1st accused in the incident of Kidnapping. In these circumstances we see no reason to interfere with the sentence imposed on the 2nd accused-respondent. These observations apply in relation to the 3rd accused-respondent and we see no reason to interfere with the sentence imposed on him as well. The 5th accused K. A. Chandrasiri who is now the 4th accused-respondent has been discharged by learned High Court Judge with a warning on the basis that he is an employee of the Air Force and that he only drove the car in which the prosecutrix was taken.

We note that there is no provision to discharge an accused with a warning in the High Court where the accused is tried upon indictment and he pleads guilty to the charge. The provisions of section 306 of the Code of Criminal Procedure Act apply only in relation to Magistrate's Court. We accordingly set aside the order of the learned High Court Judge and sentence this accused to a term of 1 year Rigorous Imprisonment suspended for 5 years. Learned High Court Judge, Western Province sitting at Gampaha is directed to comply with the provisions of Section 303 (4) and (6) of the Code of Criminal Procedure Act with regard to the suspended term of imprisonment imposed. He is also directed to give effect to the order for payment of compensation to the prosecutrix.

GUNASEKERA, J. – I agree.

Sentence enhanced.