

JUDICIAL DISCRETION VS. MANDATORY SENTENCING IN RAPE CONVICTIONS AND VICTIMS' RIGHTS IN SRI LANKA; A CRITICAL ANALYSIS

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Abstract- Despite the race, religion and culture, Rape is a heinous crime committed by men destroying the bodily integrity of women and the girl child. Hence, justice should be meted out not only to the offenders but also, to all innocent victims proportionately.

Crime is viewed as an offense against the state. In criminal justice, Sentencing plays a vital role in order to send the message of deterrence to the perpetrators of such serious crimes.

In Sri Lanka though rape is a penal offence and provides mandatory sentencing, having the adversarial and offender-centric Court procedure, in adjudication process due to infinite judicial discretion, rape offenders are often sentenced with a suspended term of imprisonment.

While significant advances in victims' rights have been made universally, it is

predominantly vital to discuss how justice should be dispensed to victims within the criminal justice system. The ultimate goal of law is to deliver justice. If criminal jurisprudence grants all advantages towards rape offenders, that would be manifestly miscarriage of justice.

The objectives of this paper are to critically analyse the existing grey areas on rape verdicts in Sri Lanka and recommend positive approaches to the criminal justice system to protect the rights of the women and the girl child of Sri Lanka tomorrow.

Key words: Judicial Discretion, Mandatory Sentencing, Rape, Victims' Rights.

1.0 INTRODUCTION

“Offences against women are not a women’s issue alone, but Human Rights issue,”¹

Literature reveals that Punishment is an essential feature of civilization.² Crime is viewed as an offense against the state. Penalizing the accused is done by numerous ways like imprisonment, fine, and death sentence etc.

The transition of ‘retribution’ justice system to rehabilitation method of offenders, restorative justice is founded as an alternative theory to the traditional methods of justice.³ Suspended sentencing is one of the methods in restorative practice. In Sri Lanka, **Section 303** of the Code of Criminal Procedure Act (CCPA) No. 15 of 1979 as amended by CCPA (Amendment) Act No. 47 of 1999 provides the procedure of Suspended Sentencing.

Rape is defined as unlawful sexual intercourse committed by a man with a

woman through force and against her will.⁴ Over one in five women will be forced to perform some sexual act within her lifetime.⁵ Most of the countries impose deterrent punishment for the culprits of rape. The Supreme Court (SC) of Louisiana affirmed that, it is Constitutional to impose death penalty for rape.⁶ In Sri Lanka (SL) **Section 363** read with 364 of the Penal Code⁷ (PC) describes rape as a penal offence and provides mandatory sentencing of Rigorous Imprisonment (RI). However in practice, offenders are sentenced with a suspended term of imprisonment.⁸

Indeterminate sentencing cause detrimental effects on Victims. The right for a fair trial is not only a right of the accused but also an inherited right of the Victim. The ultimate goal of law is to deliver justice. If criminal jurisprudence grants all advantages towards rape

¹Mukesh & Anr v. State for NCT of Delhi & Ors Nirbhaya gang rape case [CRIMINAL APPEAL NOS. 607-608 OF [2017][428]

² Vidanapathirana M, Ruwanpura PR, ‘Correction methods available for the convicts in Sri Lanka compared with American methods of correction’. Medico-Legal Journal of Sri Lanka, [2018]; 6(2): 47-54.

DOI:<<http://dx.doi.org/10.4038/mljssl.v6i2.7374>>

³Restorative justice’

Wikipedia, <https://en.wikipedia.org/wiki/Restorative_justice>

⁴ Black’s Law Dictionary (8th ed. 2004) , 3952

⁵ Reyes, Izabelle Barraquiel, ‘The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy’ [2003],UCLA Women’s Law Journal, 12(2)

<<https://escholarship.org/uc/item/0fq160dv>>

⁶ Louisiana v. Kennedy, 957 So.2d 757 [La. 2007]

⁷ Penal Code (Amendment) Act No 22 of 1995

⁸ M A D S J S Niriella, ‘Protection of Children from Sexual Violation: Adequacy of the Contemporary Legal Framework in Sri Lanka.’ Forensic Sci Add Res. 3(2). FSAR.000561.[2018.] DOI: <10.31031/FSAR.2018.03.000561,> [214]

offenders,⁹ that would be manifestly miscarriage of justice.

In this article I wish to discuss these issues and recommend measures to eliminate the gaps in administering justice.

Primary and secondary resources are used in this paper. The information has been taken from many readings, articles, books, case laws and statutes.

2.0 DISCUSSION

2.1 JUDIAL TRENDS ON SENTENCING IN RAPE TRIALS IN SRI LANKA

In SL the PC lays down categories of offences and stipulates punishment.¹⁰ The CCPA provides procedural rules for criminal trials.¹¹

The PC (Amendment) Act, No 22 of 1995 introduced the concept of minimum mandatory sentencing rule in respect of

all sexual offences.¹² Statutory rape is punishable by a minimum mandatory sentence of ten years imprisonment.¹³

The discretion on sentencing finally lies upon the judiciary. Though Section 303 of the CCPA¹⁴ provides the procedure for suspended sentences, Section 303 (2) (a) of the Code clearly states that;

‘A court cannot impose a suspended sentence for an offence where the law requires a mandatory minimum sentence of imprisonment’.

It is clear that by the above-mentioned provisions the Court cannot use its judicial discretion on suspending the sentence in rape verdicts since it is contrary with written law. Despite this, information collected by LHRD on 129 concluded sexual violence cases, from 2009 and 2010 reveal that in 114 of the cases the accused were given suspended sentences for rape.¹⁵ Series of judgments by the SC also have created troubling

⁹Flavia Agnes, ‘Violence Against Women: Review of Recent Enactments’ by. P.81116. In the Name of Justice: Women and Law in Society by SwapnaMukhopadhyay. New Delhi, Manohar Publishers and Distributors, New Delhi 2,(1998). <https://www.academia.edu/9221493/Violence_Against_Women_Review_of_Recent_Enactments>

¹⁰ Ibid, 26

¹¹ Ibid.

¹² Supra n. 8, Rape-section 364, trafficking -section 360C, Incest- section 364A and Grave Sexual Abuse section 365 B.

¹³ S. 364(2)(e) PC

¹⁴ Criminal Procedure Act No. 15 of 1979. The principal Act has been amended several times from 1979 to date.

¹⁵ ‘Report of the leader of the opposition’s commission on the prevention of violence against women and the girl child’, (2014) December, 29

confusion regarding the law on rape cases¹⁶ by imposing suspended terms, manifestly disregarding the legislative intent of protecting women and children from sexual offences.

In **S.C. Reference No. 03/2008**¹⁷, a case on Statutory Rape, the SC held 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.”

Also the Apex Court stated that minimum mandatory sentence in Section 364(2) (e) of statutory rape in the Penal Code is in conflict with Articles 4(c), 11 and 12(1) of the Constitution.

It was reiterated in **S.C. Appeal No. 17/2013**¹⁸ ;

¹⁶ Ramani Jayasundere, ‘Trivialising Statutory Rape: The Dangers of Suspended Sentences’ <https://www.academia.edu/29951065/Trivialising_Statutory_Rape_The_Dangers_of_Suspended_Sentences>

¹⁷ Marmba Liyanage Rohana vs The Attorney General, SC Appeal No. 89 A / [2009], SC Spl LA 02/2009, High Court Anuradhapura Case No. 149/2003

¹⁸ Ambagala Mudiyanelage Samantha Sampath vs The Attorney General SC Appeal No. 17/[2013], SC Spl LA No. 207/2012 CA No. 297/2008 HC. Kurunegala No. 259/2006.

“That part of the law with the minimum mandatory sentence, acts as a bar to judicial powers in sentencing or punishing the wrong doer”

Both in the above mentioned statutory rape cases the SC affirmed the High Courts’ decisions on suspending the terms of imprisonment.

Considering the above judgments it is important to discuss why the courts try to impose suspended sentence in rape trials. Is this appropriate? Generally, the intention of the Court about suspended sentencing is that,

*‘A suspended sentence is a means of re-educating and rehabilitating the offender’.*¹⁹

But in series of judgments including **AG Vs. Janak Sri Uluwaduge**^{20, 21} it was discussed in determining the proper sentence, **primarily** the Judge should consider the **gravity of the offence**, the

¹⁹Kumara v. Attorney General [2003] 1 Sri L R 139
²⁰ [1995 (1) SLR 157]

²¹ De Zoysa vs. Inspector of Police [74 NLR 425]; A.G. vs. De Silva [57 NLR 138]; Premarajh vs. Officer of In-Charge of Wattala Police [2 SLR 361].

reformation of the criminal should be taken into consideration **subsequently**.²²

A.G vs. Ranasinghe²³ is a significant case which provided guidance in considering the appropriate punishment for rape. The CA held that abducting the prosecutrix from legal guardianship, the extreme youth of the victim, repeatedly committing the act of rape and preplanning the rape should be considered as the aggravating factors of the case, and (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 and (5) to protect women are the reasons for an immediate custodial sentence for an offence of rape.

Further stated;

“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.”

²² Jeeva Niriella, 'The Most Appropriate Degree of punishment: Underline Policies in Imposing Punishment in Criminal Cases with Special Reference to Sri Lanka' (2012), 2nd International Conference on Social Science and Humanity IPEDR vol.31, © (2012) IACSIT Press, Singapore, 122
²³ (1993) 2 SLR 81

Also, in a **Revision Application** came before the CA²⁴ it was discussed the relevancy in imposing suspended sentence to a serious crime like rape. The Accused was indicted in the Colombo HC for committing statutory rape and sentenced RI and suspended for 10 years.

The Counsel for the Accused mentioned the above S.C. Reference No. 03/2008 case and submitted that the HC is not inhibited in imposing suitable punishment. Also, in this case, the accused had pleaded guilty and it has to be considered as a mitigating factor in sentencing.²⁵

CA held, regarding the facts of repeated commission of the crime, preplanning of rape and considering the gravity of the offence, it deserves a heavy custodial term.²⁶

Further held, that mere pleading guilty is not adequate to consider as a mitigating factor under Section 303 (1) (k) of the

²⁴ Court of Appeal Case No. CA (PHC) APN 147/12, High Court of Colombo Case No. 6020/12

²⁵ Ibid page 5

²⁶ Ibid pg. 7

CCPA and the offender has to be truly and sincerely repentant of what he has done.²⁷

In analysing the above cases on rape sentencing the most recent decisions appears to be more lenient on the offenders. The intention of the judiciary might be that mandatory sentencing prejudice the modern human rights response²⁸ in judiciary. But the earlier decisions were more particular on conveying the message of deterrence to the society.

2.2 ARE THE VICTIMS' RIGHTS AFFORDED IN RAPE TRIALS IN SRI LANKA?

Victims' rights are legal rights afforded to victims of crime. These may include the right to a victims' advocate, the right not to be excluded from criminal justice proceedings and the right to speak at criminal trials.²⁹

SL has ratified a number of international instruments including CEDAW³⁰ which

preserve the rights of women and children from sexual violence, but not incorporated in national legislation.³¹

The **Constitution** of Sri Lanka guarantees the Fundamental Rights³² in Article 11 and 12 the right to freedom from torture and equality before law. In this context free from sexual violence and equal treatment before law can be interpreted as fundamental rights of the women and the girl child in Sri Lanka.

The prime law to protect victims' rights in Sri Lanka is embodied in the **Assistance to and Protection of Victims of Crimes and Witnesses Act No. 04 of 2015**. Section 03 of the Act recognizes the rights of victims of crime and their entitlements.³³

²⁷ Ibid pg. 5

²⁸ Supra n. 9

²⁹ For a description of typical U.S. victim's rights, see "About Victims' Rights". VictimLaw. Office for Victims of Crime Training and Technical Assistance Center. Retrieved 1 October (2017).

³⁰UN Convention on the Elimination of All Forms of Discrimination against Women, 1981 and CRC in 1991.

³¹ Japan International Cooperation Agency. (2010). 'Sri Lanka Country Gender Profile-Final Report'. <http://www.jica.go.jp/english/our_work/thematic_issues/gender/background/pdf/e10sri.pdf>

³² Chapter III of the Constitution (Article 10-17 of the 1978 Constitution)

³³ Jayaruwan Dissanayaka , 'Balance The Rights Of The Suspect And The Victim; A Critical Analysis Of Fair Trial Rights Of Suspect And Victim In Criminal Justice System Of Sri Lanka', JSA Law Journal (2017), Volume V, Published By The Judicial Service Association Of Sri Lanka, ISSN 2357-2884, pg.158

Section 364 of the **Penal Code**³⁴ provides compensation mandatory for sexual offences.

Though enactments are available to protect the rights of the victims of crimes However, a clear criterion for compensatory scheme/mechanism is not specified in these Acts.³⁵ Uniform treatment is not equal treatment.³⁶ Though the rights are conferred to the victims, if cannot be empowered by the judiciary is miscarriage of justice.

It is clearly stated by Justice Gratiaen in **De Mel Vs. Haniffa**³⁷ that;

*“Our criminal justice system, based on principles of English Law, to a very great extent, **does not recognize the rights of victims adequately.** It has sometimes been said that the criminal justice system of Sri Lanka is **unduly favourable to accused person**”.*

The criminal justice system of SL is adversarial. In this system, The State

prosecutes the Case to punish the offender, the victim is forgotten and considers just as a witness.³⁸

Though there are certain laws to protect victim’s rights, it is completely a suspect-centred criminal justice system.³⁹ This is stated in the case **AG Vs. H.N. de Silva**⁴⁰ that;

“Judges are too often prone to look at the question only from the angle of the offender”

The argument that, most of the decisions are subjective in rape trials was apparent in the case of S.C. Appeal No. 17/2013 where the Court stated that;

*“Leave aside the **victim of rape** and the accused, there exists a child born into this world”*

The right not to be excluded from criminal justice proceedings is an inherent right of the victim. But the judiciary focused only on the rights of the

³⁴ 1995 amendment

³⁵ Supra n. 8, 214

³⁶ Supra n. 5, 376

³⁷ (1952) 53 NLR 433

³⁸ Supra n. 33, pg. 160

³⁹ *ibid*

⁴⁰ [57 NLR 121] at page 124

child, is a crystal-clear example that the rights of the victim are violated. Judiciary is the guardian of the Fundamental Rights of the society. Though the best interest of a child should be a matter before Courts the rights of the women of a serious crime like rape should also be preserved.

2.3 ISSUES IN LENIENT SENTENCING

Health Issues: Indian Supreme Court held in State of Karnataka vs. Krishnappa⁴¹ that,

“A rapist inevitably causes serious psychological as well as physical harm in the process”

In 2013, in the USA a 54-year-old convicted of statutory rape of a 14-year-old girl was held to serve only 31 days in prison. The child committed suicide subsequent to the judgment.⁴²

Faithfulness upon the Law and judiciary: In S.C. Reference No. 03/2008 and S.C. Appeal No. 17/2013 discouraged the women and young girls who seek redress in rape cases. The decisions of the cases would give a message to society

that when an adult man has sexual intercourse with a girl child under 16 years, the act alone does not call for serious punishment⁴³ and the penal laws in SL do not safeguard the victims of a brutal crime like rape.

Also, the SC mentioned that the minimum mandatory sentencing of the PC is in conflict with the fundamental rights of the Constitution. The legislative intent is to safeguard the women in SL by imposing deterrent punishment for rape. If judges are the protectors of the law and they themselves reason the written law to be unjust,⁴⁴ what is the trust the society would have upon the justice system?

Ambiguity: 2008 and 2013 SC cases paved the path to ambiguous and discriminatory reasoning⁴⁵ to statutory rape and also in most of the cases defence counsels tend to use “pleading guilty” as a mitigating factor to consider suspended sentence. This is also a playground for lawyers when the Courts always tend to impose leniency towards rape offenders.

3.0 RECOMMENDATIONS

⁴¹ [2000] A.I.R. 1470] at page 1475

⁴² Supra n. 16

⁴³ ibid

⁴⁴ ibid

⁴⁵ ibid

i. Uniform Sentencing policy

Sentencing guidelines make sentencing fairer⁴⁶. In above-mentioned cases the appropriate sentence to impose on a particular accused⁴⁷ was difficult to sentencing judges. As previously discussed, sentencing policy in Sri Lanka being not monotonous in punishment is another area where the victim has to suffer.⁴⁸ Even though minimum mandatory sentencing prevails finally, it depends on the discretion of the Judge.⁴⁹ Hence, a uniform sentencing policy is a must. In order to address the issue of determining the most appropriate degree of punishment the Judiciary should provide discretion with certain guidelines in considering the factors which help to come to a better conclusion.⁵⁰

ii. The role of the sentencing Judges

Judicial decisions and their implementation to be coloured by patriarchal values⁵¹ is not appropriate when addressing issues in rape trials. Hence, as Dias⁵² mentioned, the discretion a trial judge possess should be exercised lawfully. In Karnataka case it was observed that;

*“A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women.”*⁵³

Proportionality is also a vital concept in delivering criminal justice. In *The Attorney General v. Mahapatunage Sujewa Samanmali*⁵⁴ it was stated that;

“A trial Judge must be mindful to impose a sentence which is proportionate to the crime committed.”

And also concerning Public Interest Specially in sentencing rape trials was discussed in *Rex v. Boyd*⁵⁵ and held;

“Where the public interest or the welfare of the State outweighs the previous good

⁴⁶ Supra n. 33, Mahie Wijeweera, ‘Sentencing Guidelines From Decided Cases On Sentencing’ pg. 67

⁴⁷ I.R.M. Perera, ‘New Sentencing Structure and Policy in the Republic of Sri Lanka’ <<https://www.ncjrs.gov/pdffiles1/Digitization/45385NCJRS.pdf>>

⁴⁸ Supra n. 33, pg. 163

⁴⁹ Ibid.

⁵⁰ Supra n. 22, pg. 123.

⁵¹ Supra n. 9, pg. 34

⁵² Supra n. 16

⁵³ Supra n. 41

⁵⁴ [CA 204/2017 decided on 08.08.2019]

⁵⁵ (1908) 1 Cr. App. Rep. 64.]

character, antecedents and age of the offender, public interest must prevail.”

iii. The Role of the Legislature

It is apparent that amendment of rape laws only has focused on sentencing. Though statutes avail to protect the Victims of sexual violence, absence of a clear criterion of compensating the Victim is an issue. Hence, steps to reform the existing victim protection framework to ensure victims' Rights in rape trials is vital.

iv. Victims' Rights based Justice System

The rights of the victim are not addressed in most of the rape cases in Sri Lanka due to the offenders rights-based system. However; the concept of fair trial is not a concept solely for the accused.⁵⁶ So, the vulnerable situation of the victim and the damage or loss caused by the offence to victim should be considered within the factors relating to the victim. Hence, a **victim compensatory and offender punishment system**⁵⁷ has to be established. In that system to impose a

⁵⁶ Supra n. 33, pg. 152

⁵⁷ Supra n. 33, pg. 163

fine which would be given to the woman as compensation⁵⁸ is suggested in order to empower women.

CONCLUSION

Maneka Gandhi Case⁵⁹ opened the doors for women to get her status and position safeguarded in society through Judiciary.⁶⁰ Since rape is a brutal crime, in preserving the rights of women the Courts shoulder a greater responsibility while trying an accused on charges of rape.⁶¹

Sentencing Judges, must deal with such cases with utmost sensitivity⁶². It is apparent that the clash between the theories of Judicial Discretion and Mandatory Sentencing prevail. Judicial reasoning should be exercised in a value-added manner, not in a subjective or personal point of view. Minimum mandatory sentencing in a Criminal Justice System is effective as a partial

⁵⁸ Supra n. 9, pg. 16

⁵⁹ Maneka Gandhi v. Union of India, AIR [1978] SC 597]

⁶⁰ 'Gender Sensitization and Rehabilitation of Rape Victims', <<http://www.legalservicesindia.com/article/1913/Gender-Sensitization-and-Rehabilitation-of-Rape-Victims.html>>

⁶¹ Supra n. 41

⁶² Ibid.

remedy⁶³ in addressing this issue. It is true that judicial response to human rights cannot be blunted by legal bigotry.⁶⁴ But Justice should be dispensed not only to the offender but also to the victim and the society proportionately. As Lord Hewart CJ said “*Justice should not only be done, but should manifestly and undoubtedly be seen to be done*”.⁶⁵

Abbreviations

- HC - High Court
- PC - Penal Code
- CA - Court of Appeal
- CCPA - Code of Criminal Procedure Act
- SC - Supreme Court
- RI - Rigorous Imprisonment
- USA - United States of America

⁶³ Supra n. 5, pg. 359

⁶⁴ Supra n. 9, pg. 17

⁶⁵ R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233)

