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

In the matter of an application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 32/2020

SC SPL LA No. 232/2017

Court of Appeal Case No. CA 243/2013

HC Anuradhapura Case No. 177/2013

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Hattuwan Pedige Sugath Karunarathne

(Presently incarcerated in Welikada Prison)

Accused

AND

Hattuwan Pedige Sugath Karunarathne

Accused-Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant-Respondent

AND NOW BETWEEN

Hattuwan Pedige Sugath Karunarathne

Accused-Appellant-Petitioner

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent-Respondent

Before: Buwaneka Aluwihare PC J

P. Padman Surasena J

E. A. G. R. Amarasekara J

Counsel: Asthika Devendra with Kaneel Maddumage for the Accused-Appellant-Petitioner.

Lakmali Karunanayake DSG for the Attorney General.

Argued on: 28. 01. 2020

Decided on: 20.10.2020

Judgement

Aluwihare PC J.,

1. Although a judgement should restrict itself to the grounds urged in appeal, owing to the special circumstances, this court feels obliged to address another issue as well, namely the duty of a judge to ensure that an Accused is manifestly accorded a fair trial. This court notes with grave concern that in this fundamental duty, the learned High Court Judge has lamentably failed and reasons for arriving at this conclusion will be specified in the course of this judgement.

2. The Indian Supreme Court in the case of **Zahira Habibullah Sheikh and Others v. State of Gujarat** [Appeal (crl.) 446-449 of 2004] held that:
"*Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involve a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public.*"

3. The court went on to hold that; "*As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence. There is, however, an overriding and, perhaps, unifying principle.*" The court went onto quote Justice Deane's statement to the effect that "*It is desirable that the requirement of fairness be separately identified since it transcends the context of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law.*" Further, fair trial was delineated thus by the

court; "*…Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.*"

4. There is an additional matter that this court was called upon to decide in the instant case. That is, as to whether the application for Special Leave to Appeal is out of time. The impugned judgement of the Court of Appeal is dated 22nd May 2017 and the formal Petition in conformity with the Supreme Court Rules had been filed on 17th October 2017, which is almost five months after the delivery of the judgement of the Court of Appeal. In that sense this application is clearly out of time.

5. The learned counsel for the Accused-Appellant, however, explaining the delay submitted, that the Bar Association of Sri Lanka (the BASL) conducted a 'clinic' at the Welikada prison as a part of a legal aid program to render legal assistance to its inmates. The learned counsel submitted that at this 'clinic', the Accused-Appellant had intimated to the BASL officials that, aggrieved by the Court of Appeal judgement, he had forwarded an appeal to the Supreme Court on 1st July 2017 through the Superintendent of Prisons. It appears that the Superintendent of Prisons had referred it to the prison headquarters to be forwarded to the Supreme Court. This court called for a report from the Superintendent of Prisons, Welikada regarding this matter and a report was duly furnished on 2nd August 2018, which is filed of record. According to the same, the Assistant Superintendent of Prisons M. M. B. Senevirathne has confirmed the fact that the Accused-Appellant had in fact handed over an appeal against the judgement of the Court of Appeal to be forwarded to the Supreme Court, which the Assistant Superintendent of Prisons says he forwarded to the Commissioner of Prisons (Establishments) at the Prison Headquarters. A copy of the entry made in the register maintained to record

requests by prisoners was also submitted to this court along with a copy of the hand-written appeal, addressed to the Supreme Court by the Accused-Appellant. The appeal is dated 1st July 2017, which is within the time stipulated under the Supreme Court rules to file a Special Leave to Appeal application.

6. The entry in the said register is dated 4th July 2017. In addition, a copy of the covering letter addressed to the Commissioner of Prisons (Establishments) stating that the appeal submitted by the Accused-Appellant is forwarded (with his recommendation) to be submitted to the Supreme Court, was also tendered to this Court, along with the report of the Assistant Superintendent of Prisons, aforesaid.

7. The point I wish to stress is that, the Accused-Appellant has expressed every intention to appeal against the judgement of the Court of Appeal and has done whatever possible within the limited means available to him, despite the constraints he faced.

8. The learned Deputy Solicitor General upholding the highest traditions of the Attorney General's Department, submitted that she would not, in the interest of justice, be raising the technical objection of the time bar.

9. I am also reminded of the words of Chief Justice Abrahams in the case of **Velupillai v. Chairman, Urban District Council** 39 N.L.R 464, where His Lordship referring to a procedural defect said, at page 465 "*I think that if we do not allow the amendment in this case we should be doing a very grave injustice to the plaintiff. It would appear as if the shortcomings of his legal adviser, the peculiarities of law and procedure and the congestion in the Courts have all combined to deprive him of his cause of action …*" In the case before us the Accused-Appellant did not have the benefit of a legal adviser. Chief

Justice Abrahams went on to emphasize, that "*this* [the Supreme Court] *is a court of justice, it is not an Academy of Law.*"

10. In the circumstances aforesaid, the matter was taken up for support on 28th January 2020 and the court granted Special Leave to Appeal on the question of law referred to in sub-paragraph (e) of paragraph 23 of the regularized petition dated 19th October 2017, which is reproduced below;

> *"(e) Did the learned High Court Judge and the judges of the Court of Appeal err in law and in fact by failing to consider the fact that imposing a term of rigorous imprisonment for 81 years for two types of offences included in six counts in the indictment, which alleged [sic] to have been committed by the Petitioner* ***(accused)*** *on the victim within a period of 3 months is excessive and against the well-accepted principles of sentencing and theories of punishment."* [emphasis added]

11. As the question of law is confined only to the issue of the imposition of an excessive sentence, both the learned counsel for the Petitioner as well as the learned Deputy Solicitor General agreed to make submissions on behalf of the respective parties on the aforestated question of law with a view to an early disposal of this matter. Accordingly, this court, acting under the proviso Rule 16(1) of the Supreme Court Rules, dispensing with the requirement of complying with the provisions of the Rules regarding the steps preparatory to the hearing of the appeal, heard the learned counsel on the very day that Special Leave to Appeal was granted.

The Sequence of Events

12. The Accused-Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of Anuradhapura on six counts. (As the victim was a girl below the age of 16, I shall refer to her as "SK").

13. Count Nos. 1, 3 and 5 on the indictment were counts of Kidnapping (SK) whilst count Nos. 2, 4 and 6 were counts of Rape. According to the indictment, these offences had been committed between 01st December 2011 and 20th February 2012, within a time span of roughly 3 months.

14. According to the proceedings of 25th September 2013, the Accused had been served with the indictment and the learned High Court judge had ordered bail and had granted the Accused time until 21st October 2013 to furnish bail.

15. On the 21st of October 2013 the indictment had been read over to the Accused and he had pleaded not guilty to all the counts. As the Accused had not been represented by a lawyer, the Court had assigned Attorney-at-Law Ms. Priyanthi Hettiarchchi (hereinafter referred to as the 'assigned counsel') and accordingly, the trial had been fixed for the 5th of November 2013.

16. At this point, I also wish to refer to the fact that the procedure adopted by the learned High Court Judge was erroneous. This matter was mentioned on the 21st of October 2013 only to ascertain as to whether the Accused had furnished bail. The learned High Court Judge (predecessor of the trial judge) however, caused the indictment to be read to the Accused and the Accused had been asked to plead to the charges. The arraignment of an Accused is specifically provided for in Section 196 of the Code of Criminal Procedure, which states that, ***"when the court is ready to commence the trial…..****the*

indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged." [emphasis added]

17. Thus, it's clear that the indictment should be read and explained to the Accused only when the case is fixed for trial.

18. The trial had commenced on 5th November 2013 and the Prosecution had led the evidence of SK, the Prosecutrix. The assigned counsel represented the Accused. In the course of the examination-in-chief SK had said that the Accused happened to be her mother's ex-husband [it is not clear from the evidence as to whether the Accused was legally married to SK's mother]. In relating her story, she had commenced her evidence by narrating the last incident referred to in the indictment. She had said that on 21st February 2012, [this date in fact is outside the period referred to in the indictment in which the prosecution alleges the incidents of kidnapping and rape took place] she came by bus to go to school and got off at Thambuththegama town and when she walked towards a shop (the purpose has not been disclosed) the Accused came on a motorcycle and forced her to get on to the bike and had brought her to a house. After taking her to a room there, the Accused had forcibly removed her clothes. She had said that she was wearing a skirt and a blouse at the time. When the State Counsel questioned her about the school uniform, she said that she brought a change of clothes as she was supposed to practice for the school sports meet. It was on the way to the said house, that the Accused had got her to change into the skirt and the blouse.

19. SK had said in her testimony that the Accused had had sexual intercourse with her forcibly and that she had observed blood stains on her underwear. She had also said that while she and the Accused were in the room, the Accused received a telephone call which SK presumed was from her mother.

After the incident the Accused had dropped SK at the house of one Keshani, a schoolmate of hers.

20. SK had been questioned by the State Counsel with regard to the other incidents alleged to have taken place prior to the incident of the 21st of February on which count Nos. 1 to 4 were based. SK's testimony was that she was previously taken to a lonely spot and that the Accused tried to remove her clothes, but she did not allow him to do so. Her answer was, "ඇඳුම් ගලවලා මේවා කරන්න හැදුවා, මුකුත් කරන්න දුන්නේ නැහැ මං."

21. In response to the question as to what the Accused did after her clothes were removed, SK's response was that there was no complete removal of clothes "සම්පූර්ණ ගැලෙව්වේ නැහැ". After each of these incidents, SK had been brought back to coincide with the time that the class she was due to attend was scheduled to be over. In the course of the examination-in-chief the learned State Counsel has asked a specific question as to what the Accused did after her clothes were removed.

Q. "එදා ඇඳුන් ගලවලා මොකක්ද කළේ? "

A. "එහෙම මොකුත් කළේ නැහැ, ඉඹින්න ආව"

22. SK had thereafter been questioned about the 1st incident referred to in the indictment, *vis-a-vis* the sequence of the counts [1 and 2] on the indictment. To appreciate the evidence given by SK in relation to this incident, I have reproduced the relevant portion of the evidence.

Q. "එක්ක ගිහිල්ල මොකක්ද කළේ?"

A. "එදත් ඒවගේම කළා"

Q. "ඒ කියන්නේ? කරපු දේ කියන්ඩ"

A. "ඉඹින්න හැදුව"

Q. “ඒ වෙලාවේ SK ඇඳුම් ඇඳගෙනද හිටියේ?”

A. “ඔව්”

Q. “ඉඹින්න හදනකොට ඇඳුම් ඇගේ තිබුනද?”

A. “ටී ෂට් එක ඉස්සුවා”

23. From the above testimony of SK, it is clearly established that the Accused had had sexual intercourse with SK only on the 21st of February but on the two previous occasions referred to in the indictments, on which counts 2 and 4 were based, SK appears to have been sexually harassed, but the evidence emanating from the Prosecutrix herself clearly rules out sexual intercourse on those occasions. At this point it would be pertinent to consider the medical evidence as well.

24. Dr. D. L. Waidyaratne, consultant Judicial Medical Officer, (JMO) Teaching Hospital, Anuradhapura had examined SK on 24th February 2013, which was three days after the alleged incident.
He has recorded his findings as follows:

“No external injuries seen.

Hymen: Fresh, partly healed 6 o’clock Hymenal tear was present.

Vulva and labia swollen, red and tender.

Opinion: Features of recent sexual penetration were present.”

The JMO in his testimony had affirmed what he had stated in his report (the Medico-Legal Report) and had said that the last incident referred to by SK, is compatible with his observations.

25. This confirms the version of SK, that she had been subjected to sexual intercourse only once. Had she been subjected to such acts previously it was

very likely for the JMO to have observed old hymenal tears or may not have observed a "*fresh*" hymenal tear.

26. With regard to the two incidents prior to the incident of the 21st of February 2013, only a solitary question had been put to the doctor by the Prosecution. Upon being asked whether it is his position that previous instances of penetration cannot be ruled out, Dr. Waidyaratne had answered "*yes*". The Prosecution has, however, failed to ask the consultant JMO, the reasons for him to entertain such an opinion, which was mandatory on the part of the Prosecution. To facilitate the evaluation of the evidence of an expert, the expert must furnish the court with the rationale and the reasoning of the expert for forming a particular opinion. The State Counsel should have elicited his reasons, the media and the grounds from the medical expert for him to express such an opinion. In terms of Section 45 of the Evidence Ordinance, the expert's opinion is only relevant and ***not conclusive***. The learned State Counsel has totally overlooked the fact that the burden is on the Prosecution to establish the charges beyond reasonable doubt. I regret to state that the manner in which the Prosecution had been conducted in this case is far from satisfactory.

27. SK's mother, Samanmali too had testified and had stated that at the time relevant to the incident, she was living with the Accused and his son at the Accused's house. In addition, her brother one Vijitha Kumara, also had given evidence. None of these witnesses had added much to the Prosecution case.

28. The Prosecution also called a witness by the name of Vishaka Priyadarshini who had testified to the effect that on the day in question (21st February) SK came to their place with the Accused, whom the witness referred to as SK's father. It appears that SK and the daughter of this witness were friends. When this witness questioned SK the reason for her coming, SK has said that

she came because she cannot live with her mother. This witness, however, had contacted SK's mother over the phone and had requested her to pick SK up.

29. It is significant to note that although the learned counsel assigned by the court to defend the Accused, had represented him on all trial dates, she had not put a single question in cross-examination and it is recorded at the end of the examination-in-chief of each Prosecution witness "*no cross examination*". In short, the Prosecution version went unchallenged.

30. On 18th December 2013, the case took a different turn. When the case was taken up before the court, the Accused was represented by a different counsel, Kalinga Ravindra, Attorney-at-Law. The proceedings recorded on that day, is confusing to say the least. The counsel Kalinga Ravindra had submitted to court that "if a counsel has been assigned [to the Accused] and if the assigned counsel has been instructed, the case be taken up later" implying that he does not want to represent the Accused and that the assigned counsel be permitted to continue defending the Accused. When the case was called for the second time on that day, only the assigned counsel represented the Accused. It is recorded that the charges on the indictment were read over to the Accused severally and that the Accused pleaded guilty to each of the counts severally.

31. The proceedings did not disclose the reasons as to why the indictment was read over to the Accused for a second time, almost at the tail end of the trial. This was a matter where, at the inception, the Accused had elected to plead not guilty. Neither does the record bear out whether the Accused had wished to withdraw his earlier plea of not guilty not whether he has subsequently expressed his desire to plead guilty (I have adverted to this aspect later in this judgment). In fact, there is nothing to indicate that the Accused had

withdrawn his previous plea of not guilty, without which the court could not have recorded a guilty plea.

32. The court, however, had proceeded to record a plea of guilty which was followed by the submissions by the learned State Counsel with regard to the imposition of an appropriate sentence on the Accused while the assigned counsel pleaded in mitigation. Thereafter, the learned High Court Judge proceeded to impose the following sentence.

33. In respect of the counts of kidnapping, under Section 354 of the Penal Code, (Counts 1, 3 and 5) a sentence of 7 years rigorous imprisonment on each count (to run consecutively), a total of 21 years was imposed on the Accused. 7 years is the maximum sentence that is prescribed for the offence of kidnapping, under Section 354 of the Penal Code.

34. In respect of the counts of Rape, under Section 364(2) of the Penal code (counts 2, 4 and 6) the Accused was imposed a sentence of 20 years rigorous imprisonment on each count (to run consecutively), amounting to a total of 60 years. The maximum term of imprisonment that is prescribed for the offence of Rape under Section 364(2) is also 20 years.

35. Cumulatively, a sentence of 81 years rigorous imprisonment was imposed on the Accused.

36. In addition, fines totalling to Rs.7500/= with a default sentence of 1 years simple imprisonment and compensation in a sum of Rs.150, 000/= payable to SK, with a default sentence of 3 years simple imprisonment was imposed on the Accused.

The Concept of Fair Trial

37. In the instant appeal, this court is only called upon to consider the issue as to whether the sentence imposed on the Accused is excessive. Before that issue is considered, I wish to express certain reservations regarding the manner in which this case was conducted before the High Court.

38. From the copies of the proceedings made available to this court, as referred to earlier, no reason was adduced as to why the indictment was read to the Accused for the second time. Furthermore, this had taken place almost at the tail end of the Prosecution case, after the evidence of all the lay witnesses and the expert witness were led. The investigating officer, probably, would have been the only witness that the Prosecution had had to lead to close its case. There is no record of the Accused withdrawing his earlier plea of "not guilty". No doubt, the Accused has a right to withdraw his initial plea of not guilty at any time before the judgement is delivered and a plea of guilty can be advanced. In such an instance the court has a duty to act cautiously; not only must the court be satisfied that the withdrawal of the plea is out of the Accused's own free will but must also satisfy itself that the withdrawal of the initial plea was only after having fully understood the consequences of his act. Further, it is the duty of learned High Court Judge to have it recorded that the Accused had retracted his earlier plea of not guilty and that the court is satisfied that the Accused did so having full knowledge of his actions and the consequences. As the decisions of the High Courts are subject to review by the appellate courts, it is vital that the procedural steps referred to above are followed. There are statutory safeguards put in place. One example is where an Accused is indicted with the offence of murder (Section 296 of the Penal Code). The court is required to proceed with the trial as if the Accused had pleaded not guilty, even if the Accused tenders a plea of guilty to the

charge [Proviso to Section 197(1) of the Code of Criminal Procedure Act of 1979, hereinafter also referred to as the (CPC)].

39. In terms of Section 183 of the CPC, an Accused is entitled to withdraw his plea of guilty any time before the sentence is passed, with the leave of the magistrate. These are safeguards provided by the legislature to prevent any injustice being caused to an Accused and they cannot be dismissed lightly. When an Accused pleads guilty, it is not to be taken at its face value, unless the plea is expressed in an unmistakable term with full appreciation of the essential ingredients of the evidence.

40. In the case of **R.J. Henderson v. T.G. Morgan** 426 U.S. 637 (1976), the US Supreme Court held; "*Since Respondent (the Accused) did not receive adequate notice of the offence to which he pleaded guilty, his plea was involuntary, and the judgment of conviction was entered* ***without due process of law.*** (emphasis added) *The plea could not be voluntary in the sense that, it constituted an intelligent admission that he committed the offence, unless the Respondent received* "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process. **Smith v. O'Grady** 312 U.S. 329, 334." *Where the record discloses that defence counsel did not purport to stipulate that the respondent had the requisite intent or explain to him that his plea would be admission of that fact, and he made no factual statement or admission necessarily implying that he had such intent, it is impossible to conclude that his plea to the unexplained charge of second-degree murder was voluntary."* (pages 2257-2259)

41. Albeit in dissent, Justice Rehnquist summarised the law on the point, referring to earlier decisions; *"Out of just consideration for persons accused*

of crime, Courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." (at page 2261)

42. The question presented in the said case of **Henderson v. Morgan** (*supra*) was whether a Defendant may enter a voluntary plea of guilty to a charge of second-degree murder without (the Defendant) being informed that intent to cause the death of his victim was an element of the offence.

43. The Respondent was indicted for first-degree murder, but by agreement with the Prosecution and on counsel's advice, the Respondent pleaded guilty to second-degree murder and was sentenced. Subsequently, after exhausting his state remedies in an unsuccessful attempt to have his conviction vacated on the ground that his guilty plea was involuntary, the Respondent filed a *habeas corpus* petition in Federal District Court, alleging that his guilty plea was involuntary because, *inter alia*, he was not aware that intent to cause death was an element of second-degree murder. The District Court ultimately heard the testimony of several witnesses, including the Respondent and his defence counsel in the original Prosecution; and the transcript of the relevant state-court proceedings and certain psychological evaluations of the Respondent, who was substantially below average intelligence, were made part of the record. On the basis of the evidence thus developed, **the District Court found that the Respondent had not been advised by counsel or the state court** that an intent to cause death was an essential element of second-degree murder, and, based on this finding, held that the guilty plea was involuntary and had to be set aside. Both the Court

of Appeals and the Supreme Court affirmed the judgment of the Federal District Court.

44. Although one might argue that the case of **Henderson v. Morgan** (*supra*) may not be directly on the point that this court is called upon to answer, I am however, is of the view that, in a perspective, it has a significant bearing on the case before us.

45. At the commencement, the Accused had pleaded not guilty to the six counts on the indictment. In the course of the evidence the Prosecution was not able to establish two out of the three counts of rape. In fact, there is positive evidence emanating from the victim herself that sexual intercourse did not take place on two of the occasions referred to in the indictment. Furthermore, there is a paucity of evidence with regard to the two counts of kidnapping. One requisite element of the offence of kidnapping is taking a minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. When SK's mother testified, she had not been asked a single question as to whether she did or did not consent to SK being taken anywhere by the Accused. The only question that was posed to the mother of SK in relation to the two previous instances (of kidnapping) was whether SK complained to her about any harassment by the Accused on any previous occasions, to which she had answered in the negative. With regard to the offences of kidnapping, apart from the question referred to above, not a single question was put to the mother of SK although she was the pivotal witness to establish the charge of kidnapping from lawful guardianship.

Application of the Concept of Fair Trial

46. It is evident from the proceedings that the trial in this case commenced and proceeded before the same judge who heard the entirety of the evidence placed before court and who convicted and sentenced the Accused on his guilty plea. Same was the case with the prosecuting State Counsel as well as the counsel assigned by the court for the Accused. Thus, all of them were fully aware of SK's version. Although this court did not have the benefit of observing her demeanour, when one scrutinises her evidence with other independent material placed, she had spoken truthfully and does not appear to have suppressed any material evidence. In the circumstances, the learned High Court judge, the State Counsel as well as assigned counsel, undoubtedly, were fully aware of the evidence that was before the court to substantiate the charges and furthermore, what exactly had taken place between the Accused and SK on the three distinct occasions referred to in the indictment.

47. As referred to earlier, the record gives no indication as to the circumstances that led to the indictment being read to the Accused for the second time (almost at the tail end of the case) and more importantly the record is bereft of the reasons or circumstances under which the Accused changed his mind and pleaded guilty to the charges which he pleaded not guilty at the inception. It is clear from the proceedings that the Accused was virtually undefended and a reasonable conclusion that can be drawn from the circumstances is, that the Accused may have acted in sheer desperation to avoid the inevitable at the conclusion of the trial.

48. It is in this backdrop that one needs to consider as to whether the Accused was afforded a fair trial.

49. As stated above, at the juncture the Accused pleaded guilty to the charges, not only the learned High Court Judge, but also both the state Counsel and the assigned counsel were fully aware of the fact, that not only were **two of the rape counts not established**, but that there was also positive evidence negating such incidents having taken place [evidence of SK supported by medical evidence]. The same could be said with regard to two of the kidnapping counts as well, due to the paucity of evidence.

50. From the proceedings, it is clear that the assigned counsel, on her part, was nothing but a passive figure throughout the proceedings and did not put a single question to any of the Prosecution witnesses in cross examination. Nothing appears from the record to indicate that she had brought to the attention of the court that the Prosecution had failed to establish two of the Rape counts and the kidnapping counts.

51. Naturally the question that comes up is; was the Accused advised by the assigned counsel that the Prosecution had failed to establish two of the Rape counts and two of the kidnapping charges before the Accused pleaded guilty? I do not wish to comment on the professional conduct of the assigned counsel here as I intend to make a recommendation in that regard, in terms of Section 43 of the Judicature Act read with the Supreme Court Rules, independently of this judgement. I wish, however, to make the following observation. No counsel is compelled by court to undertake the defence of

an Accused and it's a choice an Attorney-at-Law can exercise. Thus, for moral reasons or otherwise if a counsel is not comfortable in accepting an appointment to undertake the defence of an Accused as an "assigned counsel" they are free to refrain from undertaking such duties. Once appointed, however, they cannot shirk their responsibilities and are under a professional duty, not to act in a manner detrimental to or prejudicial to the rights of the Accused that, they are defending.

52. Rule 15 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules of 1988 stipulates;

"On accepting any professional matter from a client or on behalf of any client, it shall be the duty of an Attorney-at-Law to exercise his skill with due diligence to the best of his ability and care in the best interests of his client in such a manner as he may decide and he should do so without regard to any unpleasant consequences either to himself or to any other person. Furthermore, he should at all times so act with due regard to his duty to the Court, Tribunal or any Institution established in the Administration of Justice before which he appears and to his fellow Attorneys-at-Law opposed to him."

53. No doubt the duty of a State Counsel is to present the Prosecution in an effective manner to the best of their ability in furtherance of securing a conviction, if the evidence can support the charge. The Prosecutor, however, is an officer of the court and their role is to assist the court to dispense justice. Thus, it is not for a Prosecutor to ensure a conviction at any cost, but to see that the truth is elicited, and justice is meted out. A Prosecutor is not expected to keep out relevant facts either from the court or from the Accused. If the

investigation has revealed matters which are favourable to the Accused and the Accused is unaware of the existence of such facts, it is the bounden duty of the Prosecutor to make those facts available to the court and to the defence. Rule 52 of the Supreme Court Rules (Conduct and Etiquette for Attorneys-at-Law) Rules 1988 requires "*an Attorney-at-law* ***appearing for the prosecution*** *to bring to the notice of the court any matter which if withheld may lead to a miscarriage of justice"* [emphasis added]. Although in the case before us nothing was withheld, the learned State Counsel had a professional obligation to bring to the attention of the court that the Prosecution had not established two of the Rape counts.

Constitutional Guarantees and the ICCPR Act

54. There is no question that the courts also must respect and give effect to the constitutional provisions in the conduct of court proceedings, as such Chapter III of our Constitution relating to fundamental rights is no exception. Article 4 of the Constitution which provides the form and manner by which the sovereignty of the people is exercised, in its paragraph (d) stipulates that *"the fundamental rights which are by the Constitution declared and recognised* ***shall be respected, secured and advanced by all organs of government and shall not be abridged restricted or denied,*** *save in the manner and to the extent hereinafter provided"* [emphasis added]. In my view, when one considers the wording of the sub article, the words **"government organs"** encompass **"the judiciary"** as well. Article 13(3) recognises the entitlement of a person charged with an offence to a "fair trial", a right which the state has an obligation to accord to an Accused through the courts.

55. In the case of **The Attorney-General v. Segulebbe Latheef and Another** (2008) 1 SLR 225, Justice J. A. N. de Silva, as he then was, stated (at page 228);

> *"The Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a* ***"fair trial"*** *by a competent court. This right is recognised obviously for the reason that a criminal trial (subject to an appeal) is the final stage of a proceeding at the end of which a person may have to suffer penalties of one sort or another if found guilty. The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied. The right to a fair trial was formally recognised in International law in 1948 in the United Nations Declaration of Human Rights. Since 1948 the right to a fair trial has been incorporated into many national, regional and international instruments. Like the concept of fairness, a fair trial is also not capable of a clear definition, but there are certain aspects or qualities of a fair trial that could be easily identified."*

56. His Lordship identifies 13 such rights, stated (at page 229) that the right to a fair trial amongst other things includes; "***The accused has a right to be informed of his rights; If the accused is in indigent circumstances to provide legal assistance without any charge from the accused, and the right of an accused not to be compelled to testify against himself or to confess guilt."*** [emphasis added]

57. This position is now statutorily fortified with the enactment of the International Covenant on Civil and Political Rights (ICCPR) Act No. 56 0f 2007 (hereinafter the ICCPR Act). Section 4(1) of the Act, which delineates the rights of a person accused of an offence lays down that;

"A person charged with a criminal offence under any written law, shall be entitled-… (f) not to be compelled to testify against himself ***or to confess guilt."*** [emphasis is mine].

58. Under the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007, an Accused now has a statutory entitlement for a counsel to defend him:
Section 4. (1) of the ICCPR Act stipulates;
"A person charged of a criminal offence under any written law, shall be entitled—
(c) to have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance.

Role of the Judge

59. I am mindful of the fact that the judges in criminal courts are burdened with a heavy case load. That, however, does not excuse the trial judge to not follow the procedural steps stipulated by law or to disregard the need to ensure that the Accused is accorded a fair trial, guaranteed by the Constitutional provisions and other laws.

60. Judges have a duty and are required to control the proceedings adhering to the aforesaid requirements, and to intervene where necessary to ensure the proceedings are conducted in a fair manner to all parties concerned. In this respect the judges need to follow the proceedings closely and should be alive to the events unfolding before them. If that were the case, the judge ought to have asked both the assigned counsel and the State Counsel, as to the justification for the plea of guilty by the Accused in relation to the two rape

counts that had not been established by the Prosecution. The entirety of the evidence had been led on two days, on 5th November 2013 and 27th November 2013 which was within a span of two weeks. Thus, the evidence should have been fresh in the mind of the learned High Court judge as well as the other counsel. The passive role played by the assigned counsel ought to have been noticed by the learned High Court judge. If the concept of Fair trial encompasses the right to counsel, the counsel must be 'an effective counsel'. That component, which is considered as an element of a fair trial, was visibly missing in the proceedings in relation to this case.

61. William W. Schwarzer in **'Dealing with Incompetent Counsel- The Trial Judge's Role' UC Hastings College of the Law (1980)** states (at page 641);
"*The frequency with which the issue of ineffective representation has arisen in recent cases before reviewing courts should alert trial courts to the need to monitor counsel's performance. These cases clearly suggest that the trial courts have the duty and the authority to protect the right to effective counsel. That the trial judge should not hesitate to act to assure the competent performance of counsel seems to be precisely what the Supreme Court had in mind in* ***McMann v. Richardson*** 397 US 759 (1970)*, when it said:*

> *"[W]e think the matter [whether counsel acted within the range of competence demanded of attorneys in criminal cases], for the most part, should be left to the good sense and discretion of the trial courts with the admonition that* ***if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of the incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."*** [emphasis is mine]

62. He observes further (at page 650), "*In presiding over any trial, the judge seeks to achieve fairness. Where the law affords him discretion in the application of substantive or procedural rules, fairness normally will guide its exercise. **Since the competence of counsel is an element of a fair trial, achieving fairness will require the monitoring of counsel's performance and intervention in appropriate circumstances.*** [emphasis is mine] *This does not require the judge to evaluate the relative efficacy of trial tactics or to determine whether counsel's performance should receive a passing grade. Nor is the trial judge called upon to rule whether counsel's performance satisfies one of the minimum standards formulated by the appellate courts or whether a party is being denied effective representation. Instead, his function is to remedy observed deficiencies before it is too late, resorting always to the least intrusive measure adequate to the need.*"

Article 127 of the Constitution

63. It would be a travesty of justice to allow the conviction on the two counts of Rape and two counts of Kidnapping which had not been established, to remain. No reasonable court, by any stretch of imagination could have convicted the Accused of those offences had the trial proceeded to a conclusion.

64. This court granted Special Leave to Appeal only on one issue relating to excessiveness of the sentence. In this backdrop, it would be necessary to consider the powers vested with this court to remedy the injustice caused to the Accused and to what extent the error could be rectified.

65. I am reminded of the words of his Lordship Justice Soza in the case of **Somawathie v. Madawela** (1983) 2 SLR 15, at page 31;
"If as a result of such persistent and blatant disregard for the provisions of the law a miscarriage of justice results as here, then this Court will not sit idly by. Indeed, the facts of this case cry aloud for the intervention of this Court to prevent what otherwise would be a miscarriage of justice."

66. I am of the opinion that Article 127 which states that the Supreme Court *".....shall be the* ***final court of ...criminal jurisdiction*** *for and within the Republic of Sri Lanka for the* ***correction of all errors in fact or in law*** *which shall be* ***committed by*** *the Court of Appeal or* ***any Court of first Instance****, tribunal....."* [emphasis added] is wide enough for this court to intervene to prevent what otherwise would be a serious miscarriage of justice.

67. As pithily stated in **Jennison v. Backer** (1972 (1) All E.R. 1006), *"The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope."*

68. The Supreme Court considered its Appellate powers under Article 127 of the Constitution, in the case of **Sri Lanka Ports Authority v. Pieris** (1981) 1 S.L.R 101. His Lordship Justice Sharvananda, as he then was, stated (at page108);

> "*Article 127 spells the appellate jurisdiction of this Court. The appellate jurisdiction extends to the correction of all errors in fact and/or in law which shall be committed by the Court of Appeal or any court of first instance.* ***There is no provision inhibiting this Court from exercising its appellate jurisdiction once that jurisdiction is invoked****. On reading Articles 127 and 128 together, it would appear that* ***once leave to appeal is granted*** *by the Supreme Court or the Court of Appeal and this Court is seized of the appeal,* ***the jurisdiction of this Court to correct all errors***

in fact or in law which had been committed by the Court of Appeal or court of first instance is not limited but is exhaustive.

Leave to appeal is the key which unlocks the door into the Supreme Court, and once a litigant has passed through the door, he is free to invoke the appellate jurisdiction of this Court "for the correction of all errors in fact and/or in law which had been committed by the Court of Appeal or any court of first instance". This Court, however, has the discretion to impose reasonable limits to that freedom, such as refusing to entertain grounds of appeal which were not taken in the court below and raised for the first time before this Court. This Court in the exercise of its discretion will, however, look to the broad principles of justice and will take judicial notice of a point which is patent on the face of the proceedings and discourage mere technical objections." [emphasis added]

69. In another case decided shortly after the decision of **Sri Lanka Ports Authority v. Peiris** (*supra*) the Supreme Court said, in the case of **Albert v. Veeriahpillai** (1981) 1 SLR 110, at page 113):

"Articles 118 [sic] of the constitution provides that "the Supreme Court shall be the highest and final court of record in the Republic and shall, subject to the provisions of the Constitution, exercise, inter alia final appellate jurisdiction." Appellate jurisdiction may be exercised by way of appeal or revision. Article 128 of the Constitution prescribes how the appellate jurisdiction of this Court is invoked by way of appeal. The leave of this Court or of the Court of Appeal is a sine qua non for a party to come to this Court by way of appeal. But once leave is granted, on whatever ground it be, the appeal is before this court and this Court is seized of the appeal. Its appellate jurisdiction extends to the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance (vide Art. 127 of the Constitution). Therefore, it is competent for this Court to permit parties to bring to its notice

errors of law or of fact and raise new contentions or new points of law, or ***sue motu to raise them if there is proper foundation for them in the record. Thus, this Court will allow an appellant to urge before it grounds of appeal not set out in the application for leave if the material on record warrants the determination of same.*** *This Court is not hamstrung by the fact that the Court of Appeal had not granted leave to appeal on the ground urged before the Supreme Court."* [emphasis added]

70. Thus, it is evident that there are clear precedents for this court to act uninhibited *suo motu* in the interest of justice where the Court of Appeal or the court of first instance has clearly misdirected itself which has resulted in a serious miscarriage of justice, as in the present case.

71. In the circumstances, exercising the powers vested in court by Article 127 of the Constitution, the conviction of and sentences imposed on the Accused, on counts 1, 2, 3, and 4 are hereby quashed. The conviction of the Accused on counts 5 and 6 is hereby affirmed.

72. What was challenged in these proceedings, was the quantum of the sentence imposed. What appears from the evidence is that SK had been distraught due to a strained relationship with her mother and the Accused had taken advantage of the situation by developing an intimate relationship with SK. It is also evident that SK had accompanied the Accused on these jaunts willingly. Although consent is not a material factor as far as establishing the charge of rape is concerned, the Accused does not appear to have used force, although SK has said in her evidence that her clothes were removed forcibly. From the standpoint of the Accused, his conduct cannot be condoned by any

measure. As the stepfather, he had a duty to protect SK but he had acted otherwise.

73. The High Court Judge, however, had imposed the maximum sentence on both counts and to run consecutively. Under the circumstances they are manifestly excessive. As such I set aside the sentences imposed on the Accused by the learned High Court judge on counts 5 and 6 and substitute the same with a sentence of 4 years R.I on count 5 (Kidnapping) and a sentence of 14 years R.I on count 6 (Rape). Both terms of imprisonment to run concurrently. The fines and compensation imposed by the High Court Judge and the default sentences imposed, to remain intact. As the Accused had been in incarceration since the date of conviction, the prison authorities are directed to compute the commencement of the term of imprisonment, from the date of incarceration.

Appeal allowed

Judge of the Supreme Court

E. A. G. R. Amarasekara J.

I agree.

Judge of the Supreme Court

P. Padman Surasena J.,

I had the previledge of reading in draft form, the judgment of His Lordship Buwaneka Aluwihare PC J. I regret my inability to agree with the course of action taken in the judgment by His Lordship.

Hon. Attorney General had indicted the Accused - Appellant - Appellant in the High Court of Anuradhapura on six counts.

The said six counts respectively alleged that the Accused - Appellant - Appellant;

I. during the period 2011-12-01 to 2012-02-20, at Tambuththegama, kidnapped the prosecution witness No. 1, a girl less than 16 years of age, from the custody of her lawful guardianship and thereby committed an offence punishable under section 354 of the Penal Code;
II. on the date referred to in count No. 01 above, and in the course of the same transaction, at Galgamuwa, committed rape of the prosecution witness No. 1, a girl less than 16 years of age and thereby committed an offence punishable under section 364 (2) read with section 364 (2) (e) of the Penal Code;
III. during the period referred to in count No. 01 above, at Tambuththegama, on a date other than the date referred to in the count No. 01, kidnapped the prosecution witness No. 1, a girl less than 16 years of age, from the custody of her lawful guardianship and thereby committed an offence punishable under section 354 of the Penal Code;
IV. on the date referred to in count No. 03 above, and in the course of the same transaction, at Galgamuwa, committed rape of the prosecution witness No. 1, a girl less than 16 years of age and thereby committed an offence punishable under section 364 (2) read with section 364 (2) (e) of the Penal Code;
V. on the 21st of February 2012 or on a date closer to the said date, at Tambuththegama, kidnapped the prosecution witness No. 1, a girl less

than 16 years of age, from the custody of her lawful guardianship and thereby committed an offence punishable under section 354 of the Penal Code;

VI. on the date referred to in count No. 05 above, and in the course of the same transaction, at Galgamuwa, committed rape of the prosecution witness No. 1, a girl less than 16 years of age and thereby committed an offence punishable under section 364 (2) read with section 364 (2) (e) of the Penal Code.

On 21-10-2013, the learned High Court Judge had read out the charges to the Accused - Appellant - Appellant and also assigned Priyanthi Hettiarachchi Attorney-at-Law to appear for the Accused - Appellant - Appellant at the cost of the state. As the Accused - Appellant - Appellant had pleaded not guilty to all the charges, the learned High Court Judge had fixed the case for 05-11-2013 to commence the trial.

Accordingly, the trial had begun on the said date i.e. 05-11-2013. The prosecution on that date had concluded the evidence of three witnesses including the prosecution witness No. 1. The learned High Court Judge had then fixed the case for 27-11-2013 to resume the further trial.

On 27-11-2013, the prosecution had concluded the evidence of the Judicial Medical Officer after which the learned High Court Judge had fixed the case for 04-12-2013 to resume the further trial.

It appears from the journal entry dated 04-12-2013 that the further trial could not be resumed on that date hence the further trial was re-fixed for another date i.e. 18-12-2013.

On 18-12-2013, when the case was taken up for further trial, the Accused - Appellant -Appellant had pleaded guilty to all the six counts in the indictment. This was before the prosecution closed its case. Accordingly, the learned High Court Judge had proceeded to convict the Accused - Appellant - Appellant on all counts in the indictment on his own admission of guilt. Thus, from that point onwards, the only

task left for the learned High Court Judge was to decide on an appropriate sentence to be imposed on the Accused - Appellant - Appellant. Having heard the submissions of both parties relating to sentencing, the learned High Court Judge had then proceeded to impose the following sentences on the Accused - Appellant - Appellant.

Count No. 1

Seven (07) years rigorous imprisonment.

Count No. 2

Twenty (20) years rigorous imprisonment and a fine of Rupees Two thousand five hundred (2,500/=). One year simple imprisonment in default of the payment of the said fine was also imposed.

The Accused - Appellant - Appellant was also ordered to pay Rs. 50,000/= as compensation to the victim. One-year simple imprisonment in default of the payment of the said compensation was also imposed.

Count No. 3

Seven (07) years rigorous imprisonment.

Count No. 4

Twenty (20) years rigorous imprisonment and a fine of Rupees Two Thousand Five Hundred (2,500/=). One-year simple imprisonment in default of the payment of the said fine was also imposed.

The Accused - Appellant - Appellant was also ordered to pay Rs. 50,000/= as compensation to the victim. One-year simple imprisonment in default of the payment of the said compensation was also imposed.

Count No. 5

Seven (07) years rigorous imprisonment.

Count No. 6

Twenty (20) years rigorous imprisonment and a fine of Rupees Two Thousand Five Hundred (2,500/=). One year simple imprisonment in default of the payment of the said fine was also imposed.

The Accused - Appellant - Appellant was also ordered to pay Rs. 50,000/= as compensation to the victim. One-year simple imprisonment in default of the payment of the said compensation was also imposed.

The learned High Court Judge has further ordered that none of the above terms of imprisonment shall run concurrently. This means that the Accused - Appellant - Appellant has to undergo a cumulative period of 81 years rigorous imprisonment and a further cumulative period of 06 years simple imprisonment in case he defaults the payment of the fines and the compensation ordered.

Being aggrieved by the order of the learned High Court Judge, the Accused - Appellant - Appellant appealed to the Court of Appeal. The petition of appeal submitted to the Court of Appeal dated 31-12-2013 has also been produced marked **P 3** as part and parcel of the petition.

Having considered the arguments presented before it, the Court of Appeal by its judgment dated 22-05-2017, held that;

i. the Accused - Appellant - Appellant was never misled and he was well aware of the nature of the charges when he decided to plead guilty;
ii. the performance of the counsel at the trial in the original court is not a criteria in deciding the appeal;
iii. and hence, there was no reason to interfere with the order of the learned High Court Judge.

The Court of Appeal on the above basis dismissed the appeal.

Being aggrieved by the judgment of the Court of Appeal, the Accused - Appellant - Appellant filed the instant application for special leave to appeal. He has framed following questions of law in his petition dated 17th October 2017.

a) *"Did the learned High Court Judge and the learned judges of the Court of Appeal err in law and in fact by respectively imposing and affirming a term of rigorous imprisonment for 81 years on the petitioner for two types of offences included in six counts in the indictment which alleged to have been committed by the petitioner on the victim within a period of 3 months, i.e. from December 2010 to 21st February 2011?*
b) *Did the learned High Court Judge and the learned judges of the Court of Appeal err in law and in fact by respectively imposing and affirming a term of rigorous imprisonment for 81 years on the petitioner by failing to consider the fact that the petitioner pleaded guilty without proceeding with the trial?*
c) *Did the learned High Court Judge and the learned judges of the Court of Appeal err in law and in fact by failing to consider the fact that the indictment was erroneous and defective as counts 1, 2, 3, and 4 did not appropriately specify date relating to the alleged offences?*
d) *Did the learned High Court Judge and the learned Judges of the Court of Appeal err in law and in fact by failing to appreciate that the Petitioner was deprived of a fair trial which led him to plead guilty where the counsel assigned by Court failed to discharge his duties to an acceptable standard.*
e) *Did the learned High Court Judge and the judges of the Court of Appeal err in law and in fact by failing to consider the fact that imposing a term of rigorous imprisonment for 81 years for two types of offences included in six counts in the indictment which alleged to have been committed by the Petitioner on the victim within a period of 3 months is excessive and against the well-accepted principles of sentencing and theories of punishment? "* [1]

Perusal of the averments in the petition presented by the Accused - Appellant - Appellant to this Court, shows clearly that he had admitted the fact that he pleaded guilty separately to all the six counts in the indictment on 18-12-2013. He has further stated in his petition[2] that he honestly believed that the learned High Court

[1] Quoted from paragraph 23 of the petition dated 17th October 2017.
[2] Paragraph 8 of the afore-said petition.

judge would take into consideration, the fact that he had pleaded guilty to all the counts in the indictment, when deciding the quantum of the sentence to be imposed on him.

Moreover, paragraphs 14 and 15 of the petition presented to this court by the Accused - Appellant - Appellant shows clearly that his main concern, complaint and focus in his application for special leave, is on the quantum of the sentences imposed on him. The said paragraphs are quoted below for easy reference.

14. Being aggrieved by the above sentence imposed by the learned High Court Judge of Anuradhapura, the Petitioner states that the Petitioner preferred an appeal to the Court of Appeal on 31-12-2013 inter alia on the following grounds;

a) The sentence imposed by the learned High Court Judge on the Petitioner was excessive,

b) The sentence imposed on the Petitioner was erroneous as the learned High Court Judge has not considered the principles in section 303 of the Code of Criminal Procedure Act as amended and the fact that the Petitioner did not have any previous convictions or pending cases against him.

c) The trial held against the Petitioner was illegal as the indictment filed against the Petitioner was erroneous and misconceived.

15. Accordingly, the Petitioner, by his petition of appeal, prayed for inter alia;

a) To declare that the sentence of 81 years of rigorous imprisonment imposed by the learned High Court Judge on the Petitioner on 18-12-2013 was erroneous,

b) To alter the sentence imposed by the learned High Court Judge on the Petitioner on 18-12-2013 and to make a suitable order,

c) *To acquit the Petitioner.* [3]

The afore-said leave to appeal application was supported before this bench firstly on 23-10-2019 and then on 28-01-2020.[4] (This bench commenced hearing submissions of counsel on 23-10-2019 and concluded it on 28-01-2020). Having heard the submissions of the learned Counsel for both parties, this bench by its order dated 28-01-2020, has granted special leave to appeal only in respect of the question of law set out in sub paragraph (e) of paragraph 23 of the Petition dated 17-10-2017. The journal entry dated 28-01-2020 is reproduced below for clarity.

"28-01-2020

Before: *B. P. Aluwihare PC J*

P. Padman Surasena J

E. A. G. R. Amarasekera J

Asthika Devendra with Kaneel Maddumage for the Accused-Appellant-Petitioner.

Ms. Lakmali Karunanayake DSG for A/G.

Court has heard the learned Counsel for the Petitioner as well as learned DSG for the Rspdt.

Both Counsel agree that this is a fit matter to grant spl leave to Appeal on the question of law raised in paragraph 23 (e) of the Petition & affidavit dated 17/10/2017.

This Court heard the submissions of counsel on behalf of the Petitioner-Appellant as well as the Rspdt.

[3] Paragraphs 14 and 15 of the petition dated 17th October 2017.
[4] Vide journal entries dated 23-10-2019 and 28-01-2020.

Judgement reserved by Hon. B. P. Aluwihare PC J."

The said question of law referred to in paragraph 23 (e) of the Petition is reproduced below.

"(e) Did the learned High Court Judge and the judges of the Court of Appeal err in law and in fact by failing to consider the fact that imposing a term of rigorous imprisonment for 81 years for two types of offences included in six counts in the indictment which alleged to have been committed by the Petitioner on the victim within a period of 3 months is excessive and against the well-accepted principles of sentencing and theories of punishment."

Thus, as stated in paragraph 11 of the draft judgment of His Lordship Aluwihare PC J, it was in the above circumstances that this Court immediately after granting special leave to appeal on the question of law set out in paragraph 23 (e) of the Petition, on the same day, proceeded to hear parties on the question of law. It was thereafter that His Lordship Aluwihare PC J reserved the judgment.

The said paragraph 11 is quoted below for easy reference.

"As the question of law is confined only to the issue of the imposition of an excessive sentence, both the learned counsel for the Petitioner as well as the learned Deputy Solicitor General agreed to make submissions on behalf of the respective parties on the afore-stated question of law with a view to an early disposal of this matter. Accordingly, this court, acting under the proviso to Rule 16(1) of the Supreme Court Rules, dispensing with the requirement of complying with the provisions of the Rules regarding the steps preparatory to the hearing of the appeal, heard the learned counsel on the very day that Special Leave to Appeal was granted."

Thus, it is clear that this bench on 28-01-2020 decided that special leave to appeal in respect of the questions of law set out in paragraph 23 (a) to (d) of the above mentioned petition must not be granted. This was after hearing the submissions of counsel for both parties firstly on 23-10-2019 and then on 28-01-2020.

It would be opportune at this stage, to reproduce Rule 16 (1) of the Supreme Court Rules. It is as follows.

".. If special leave to appeal is granted, the Court shall, after consulting the parties, or their attorneys-at-law if any, forthwith fix the date or dates of hearing of the appeal. If the Court for any reason does not fix the date of hearing, the date or dates of hearing shall be fixed by the Registrar on the date fixed in terms of sub-rule (2), after consulting the parties present and obtaining their assessment of the likely duration of the argument;

Provided that the Court may, with the consent of the parties or their attorneys-at-law, proceed to hear and determine the appeal, either forthwith or on another date to be then fixed, dispensing with compliance with the provisions of these rules in regard to the steps preparatory to the hearing of such appeal…."

Therefore, in the instant case it is clear that both parties of this case consented for this Court to proceed to hear this appeal only on the question of law in respect of which this Court granted special leave to appeal.

Thus, it was in the above circumstances, that this Court as per the proviso to the above Rule proceeded to hear the submissions of the parties only in respect of the question of law set out in paragraph 23 (e) of the petition on the same day. This, no doubt, gave both parties the impression that this Court would not consider the correctness of the conviction but would only confine its judgment to the question of the quantum of the sentence imposed on the Accused - Appellant - Appellant.

I would now proceed to consider the question of law in respect of which this Court has granted special leave to appeal.

As has been mentioned above, according to the order of the learned High Court Judge, it is imperative for the Accused - Appellant - Appellant to undergo a cumulative period of 81 years rigorous imprisonment. In case he defaults the payment of the fines and the compensation ordered, he also has to undergo a further cumulative period of 06 years simple imprisonment.

It is clear that the learned High Court Judge has imposed the maximum term of imprisonment provided in the penal sections of the relevant offences with which the Accused - Appellant - Appellant was charged. This is despite the Accused - Appellant - Appellant had pleaded guilty to all the charges.

There is no doubt that the sentences imposed on the Accused - Appellant - Appellant are manifestly excessive. Since it is manifest by itself, I need not further elaborate on its excessive nature.

Further the order made by the learned High Court Judge preventing to run the sentences imposed in respect of each count concurrently has also resulted in a further enhancement of the already excessive sentences imposed on the Accused - Appellant - Appellant.

Thus, I answer the said question of law referred to in paragraph 23 (e) of the Petition in the affirmative.

In these circumstances, I set aside the sentences imposed on the Accused - Appellant - Appellant by the learned High Court Judge. I substitute therefore, the following sentences on the Accused - Appellant - Appellant.

Count No. 1

Four (04) years rigorous imprisonment.

Count No. 2

Ten (10) years rigorous imprisonment and a fine of Rupees Two thousand five hundred (2,500/=). One (01) month simple imprisonment in default of the payment of the said fine is also imposed.

The Accused - Appellant - Appellant is also ordered to pay Rs. 50,000/= as compensation to the victim. Three (03) months simple imprisonment in default of the payment of the said compensation is also imposed.

Count No. 3

Four (04) years rigorous imprisonment.

Count No. 4

Ten (10) years rigorous imprisonment and a fine of Rupees Two Thousand Five Hundred (2,500/=). One (01) month simple imprisonment in default of the payment of the said fine is also imposed.

The Accused - Appellant - Appellant is also ordered to pay Rs. 50,000/= as compensation to the victim. Three (03) months simple imprisonment in default of the payment of the said compensation is also imposed.

Count No. 5

Four (04) years rigorous imprisonment.

Count No. 6

Ten (10) years rigorous imprisonment and a fine of Rupees Two Thousand Five Hundred (2,500/=). One (01) month simple imprisonment in default of the payment of the said fine is also imposed.

The Accused - Appellant - Appellant is also ordered to pay Rs. 50,000/= as compensation to the victim. Three (03) months simple imprisonment in default of the payment of the said compensation is also imposed.

I further order that the main terms of imprisonment imposed on the Accused - Appellant - Appellant i. e. each of the terms of 04 years imposed in respect of counts 01, 03 and 05 and also each of the terms of 10 years imposed in respect of counts 02, 04 and 06 shall run concurrently. Thus, the cumulative period of the said main terms of imprisonment would be 10 years.

The said cumulative period of the said main terms of imprisonment (10 years RI) must be taken as having run from the date of the conviction i.e. 18-12-2013. This is because I observe that the Accused - Appellant - Appellant has been in remand

to date since 18-12-2013 i. e. the date on which the learned High Court Judge sentenced him.

JUDGE OF THE SUPREME COURT