

**LSTREPORT**

**A SNAPSHOT OF THE  
CRIMINAL JUSTICE  
SYSTEM: BUILDING A  
PICTURE THROUGH  
SEXUAL VIOLENCE  
CASES IN THE COURT  
OF APPEAL**

**SHENALI DE SILVA**





# **A Snapshot of the Criminal Justice System: Building a Picture Through Sexual Violence Cases in the Court of Appeal**

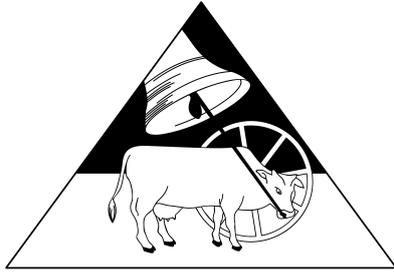
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**APRIL 2018†**

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† The content of the report is as at the time of writing, in November 2017.



## LAW & SOCIETY TRUST

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### **Dedication**

This report is dedicated to the late Vijay K. Nagaraj, LST's former Head of Research. Vijay was the driving force behind LST's research focus into the criminal justice system from the 'everyday' perspective. His unwavering insistence into asking 'why' and going beyond straight forward analyses of issues provided an intellectual rigour and passion that was a privilege to be around. Vijay was a visionary, a term I would often use to describe him during the time we worked together. The following paragraphs are extracts from our concept note for the project; paragraphs that are Vijay's words, and one can hear his voice speaking them:

This project is also especially interested in the how the criminal justice system responds to, refracts, repairs, remedies, or reproduces key social cleavages pertaining to class, gender, and ethnicity/religion. In this sense, the project approaches the criminal justice system as a permeating presence within society, one that exceeds the governance of crime and deviance and impacts, and is in turn impacted by, political, economic, and social relations at large.

The second aim of the project is to consider the norms/rules, procedures, and institutional characteristics of the criminal justice system and their workings in the context of existing relations of power in society. Therefore, rather than take an uncritical functionalist or a human rights-based normative view, the project will embrace a constructivist view, one which will go beyond assessing the system with respect to given standards, such as human rights benchmarks, to documenting how the criminal justice system is implicated in and reproduces broader socio-political patterns of power. A key question then is, in what ways do class, gender, or ethnic identities precipitate conflict with and within the criminal justice system?

Vijay saw the beginnings of this research, and was emphatic about the importance of reforming law and society when it came to issues of sexual violence. We had extensive discussions about findings that were arising from the cases and how 'we must do something about this'; these conversations served as constant memories and reminders that helped me write the report. I am truly sorry that Vijay is not here; thank you Vijay for your leadership, your friendship, and ever expansive questioning of everything.

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<sup>1</sup> Entitling incorrect on court judgment as: *Kona Gedara Podi Mahattaya v AG* CA 124/2009, 4 April 2013.

<sup>2</sup> Entitling incorrect on court judgment as: *Shantha (alias Ran Mama) v AG* CA 150/2010, 16 July 2014.

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# Executive Summary

## Purpose

In the current environment of transitional justice in Sri Lanka, there is an inevitable focus on considering the criminal justice system from the perspective of the most 'egregious' crimes. For this reason, it is imperative to ensure the 'everyday' workings of the criminal justice system do not get overlooked. The Law & Society Trust, therefore, is undertaking ongoing research to inquire into the 'everyday' workings of the criminal justice system. The purpose of the ongoing research is to begin the process of building a picture of how the system operates on an 'everyday' basis to highlight the areas that require reform. This study evolved from the ongoing research. Sexual violence offending was selected as a thematic focus for the study. Court of Appeal judgments were selected as the focus of the data compilation as they are in the public domain and could be systematically studied. In short, the study compiled a set of 121 Court of Appeal judgments on sexual violence (rape and grave sexual abuse) and asked the question: *What do Court of Appeal judgments on sexual violence reveal about the workings of the criminal justice system?*

## Methodology

The rationale for selecting court judgments was as a pragmatic starting point to the collection of empirical information about the criminal justice system. Court judgments are official documents which are meant to detail the process, reasoning, and outcome of a trial, as well as contain information about victims, the accused, and the operations of the police, prosecutors, and judges. Court judgments are also, theoretically, in the public domain. Given the overall purpose of the research is to look into the 'everyday' workings of the criminal justice system, the study only utilised publicly accessible material.

Within the category of theoretically publicly available court judgments, Court of Appeal judgments were selected as the focus because they are, in fact, in the public domain, exist in a sufficiently large number (over 100), and could be compiled spanning a period of five years. Compiling information about sexual violence cases from Court of Appeal judgments enabled two tiers of information to be collected: (1) information on trial court decisions that formed the basis of the Court of Appeal judgments, and (2) information on the Court of Appeal judgments themselves. A meta-analysis was undertaken on this set of Court of Appeal judgments relating to sexual violence cases: disaggregated information (individual court judgments) was compiled together to form a corpus of information.

## Findings

The analyses of the dataset revealed a number of key findings, highlighted below. In addition, the analyses of the dataset also revealed a number of issues and concerns that warrant further inquiry. These findings and the questions raised are critical to inform and shape discussions on criminal justice reform.

The key findings arising from the study include the following:

- ✧ There was visible disparity in the sentencing of rape and grave sexual abuse, at trial and upon appeal.
- ✧ The disparity in sentencing related to all three components of a sentence – custodial sentences, fines, and compensation imposed.
- ✧ The disparity also related to default sentences imposed for non-payment of compensation.
- ✧ Despite mandatory minimum custodial sentences for rape and grave sexual abuse, custodial sentences were ordered below mandatory minimum sentences, at trial and upon appeal.
- ✧ Despite mandatory minimum custodial sentences for rape and grave sexual abuse, and despite the Criminal Procedure Code excluding suspended sentences as an option where an offence

contains a mandatory minimum sentence, suspended sentences were ordered, at trial and upon appeal.

- ✧ All suspended sentences ordered in the trial phase involved guilty pleas.
- ✧ While the State pursued prosecutions that resulted in convictions, upon appeal, the State conceded that convictions could not be supported.
- ✧ Where convictions were overturned upon appeal, victim credibility (not believing the victim's evidence) was the recurring reason.
- ✧ Vast amounts of information that ought to be in the public domain (lower court judgments) were inaccessible to the public.
- ✧ The existing court judgments that were in the public domain (Court of Appeal judgments) had unclear, ambiguous, or erroneous information.

### **Observations**

The disparity in sentences illustrated a lack of uniformity and consistency in judges' approaches to sentencing sexual violence offending. The non-adherence to statutory minimum sentences and ordering suspended sentences compounded the lack of consistency in sentencing. The existence, and extent, of sentencing disparities alerts to larger issues around the exercise of judicial discretion and the need for sentencing guidelines and other parameters to ensure consistency, fairness, and to minimise arbitrariness in judicial decision-making. Disparity in judicial decision-making, including non-observance of legislative constraints, indicates the exercise of judicial discretion is an area of the criminal justice system that requires attention when discussing reform.

The existence of cases where, upon appeal, the State conceded the convictions could not be supported – in other words, that they should not have occurred – indicates prosecutorial policy also requires attention when discussing reform. Further, it demonstrates a need for monitoring and oversight of prosecutions and the trial process.

Victim credibility was the recurring reason in cases where the Court of Appeal overturned trial convictions. Other reasons included the emphasis placed on the existence, or otherwise, of medical evidence and the emphasis placed on the delay in reporting the incident to anyone, including the police. The recurrence of victim credibility as the reason for overturning convictions upon appeal indicates the evaluation of evidence undertaken by judges in sexual violence cases and the factors that influence their decision-making requires attention when discussing reform. As does the emphasis placed on medical evidence and the delay in reporting the incident.

The impediment that existed in the public accessibility of court judgments (lower court judgments) was an overriding finding. Although Court of Appeal judgments were publicly available (on the Court of Appeal's website), they contained unclear, ambiguous, or erroneous information (such as cases where the Penal Code offence was not specified). This information could not be clarified because the trial court information that would be required to clarify it could not be publicly accessed. The inability to access key material about the criminal justice system – court judgments – is a significant factor that prevents the ability to understand and assess the multitude of processes in the criminal justice system.

More broadly, the study illustrates the importance of compiling detailed information and adopting an empirical approach to understanding how the criminal justice system operates in practice. Extensive analytical work can be undertaken from even a limited catchment of publicly available official material. Aggregating similar information (such as court judgments) results in issues becoming visible, which would otherwise not be obvious in isolated judgments (such as the extent of disparities in sentencing). An empirical approach is crucial to identify, understand, and substantiate issues.

The study highlights the quantum of details necessary to be able to build a picture and understand the workings of the criminal justice system in practice. The judgments studied are an illustration of how sexual violence cases operate. This in turn is an illustration of how the criminal justice system operates. The study highlights the importance of compiling information that exists about an issue. On the flipside, the study also demonstrates the limitations that exist in being able to compile information – that there is actually very little official information that is publicly available *to be* compiled. Further, even in the catchment studied, ambiguities in the material could not be clarified as this would require information that *is not* in the public domain. The existence of publicly available information, and the absence of what ought to be publicly available information, are both significant factors in being able to understand, and then assess, the operation of the criminal justice system, especially as a precursor to reform discussions.

The study represents a snapshot of the criminal justice system, as visible through the study of 121 Court of Appeal judgments on sexual violence offending. It starkly highlights the need for further inquiry into a raft of issues, including practices, such as the restriction on access to court judgments; decision-making by key functions, such as the rationale for sentencing practices or the decision to indict an accused; and court processes, such as handwritten record keeping and the quality of information in court judgments. Approaching criminal justice reform is an enormous undertaking that requires time and a systematic approach. The issues identified and the questions raised by the study are important to recognise and incorporate in future approaches and processes when reforming the criminal justice system.

# Introduction

## Purpose of the study

In the current environment of transitional justice in Sri Lanka, there is an inevitable focus on considering the criminal justice system from the perspective of the most ‘egregious’ crimes. For this reason, it is imperative to ensure the ‘everyday’ workings of the criminal justice system do not get overlooked. The Law & Society Trust, therefore, is undertaking ongoing research to inquire into the ‘everyday’ workings of the criminal justice system. The purpose of the Law & Society Trust’s long term research project is to look at the ‘everyday’ workings of the criminal justice system: it is interested in mapping, in great detail, the routine functioning of the system and the issues that shape the lived experience of ordinary people in their interactions with the criminal justice system. Sexual violence was selected as a thematic area of focus, within the criminal justice system, given the prevalence of sexual violence in Sri Lanka, and the complex dynamics of gender, class, and ethnicity triggered in sexual violence offending. With the underlying goal of collecting empirical information – to illustrate the various workings of the criminal justice system – the study sought to analyse court judgments on sexual violence. The inquiry was: *What do court judgments on sexual violence reveal about the workings of the criminal justice system? What do they tell us about how the criminal justice system operates?*

## Methodology of the study

The rationale for selecting court judgments was as a pragmatic starting point to the collection of empirical information about the criminal justice system, in an environment where official information is difficult to obtain. Court judgments are official documents which are meant to detail the process, reasoning, and outcome of a trial (or other court proceeding), as well as containing information about victims, the accused, and the operations of the police, prosecutors, and judges. Court judgments are also, theoretically, in the public domain. Given that the overall purpose of the research is to look into the everyday workings of the criminal justice system, the study only utilised publicly accessible material.

Court of Appeal judgments were selected as the focus because they are, at least to some extent, in the public domain, exist in a sufficiently large number (over 100), and could be compiled spanning a period of five years. In other words, Court of Appeal judgments on sexual violence offences was a catchment of publicly available information that could be systematically compiled and analysed. Compiling information about sexual violence cases from Court of Appeal judgments enabled two tiers of information to be collected: (1) information on trial court decisions that formed the basis of the Court of Appeal judgments and (2) information on the Court of Appeal judgments themselves. In addition, the Court of Appeal has jurisdiction over *all* criminal appeals across the entire country: all criminal appeals are channelled through one court. As such, the current research sample was able to include *all* Court of Appeal judgments that were available<sup>4</sup> on the website<sup>5</sup> coming within the study parameters. Whereas, analysing *all* lower court decisions would not be possible (given the volume of cases and different locations of trial courts) and a selection criteria would have been required to obtain a sample size. The natural consequence of selecting Court of Appeal judgments meant that information regarding sexual violence cases that were not appealed could not be collected and analysed. Nevertheless, it was deemed important and revealing, in and of themselves, to utilise Court of Appeal judgments, as the only catchment of official information that was publicly available, to start this process of building a picture of the workings of the criminal justice system. A meta-analysis was undertaken on a set of sexual violence Court of Appeal judgments: disaggregated information (individual court judgments) were compiled together to form a corpus of information, to see what that corpus of information revealed.

Judgments relating to cases of sexual violence that were available for downloading from the Court of Appeal website between March and June 2017 were obtained, spanning a period of five years, from 2012 to 2016. From the available judgments, the following parameters were set to arrive at a dataset (*n*):

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<sup>4</sup> It is noted that there may be Court of Appeal judgments that are not published on the Court of Appeal website at all, as well as judgments published after this research was conducted.

<sup>5</sup> Court of Appeal Sri Lanka, <http://courtofappeal.lk>.

- (1) Where a High Court trial process resulted in a conviction and sentence, OR where there was a guilty plea followed by a sentence; AND
- (2) The conviction and/or sentence was appealed OR there was a revision application relating to the conviction and/or sentence; AND
- (3) The Court of Appeal disposed of the case by making a decision on the appeal or revision application.

Cases relating to issues on appeal from trial rulings, where the trial conviction did not relate to rape or grave sexual abuse, where the Court of Appeal had not finally disposed of the case, or the issue was bail pending appeal were excluded from the data set.<sup>6</sup>

The resulting dataset comprised 121 Court of Appeal judgments ( $n = 121$ ).

For the purposes of this study, 'sexual violence' offences means rape and grave sexual abuse, as defined by the Penal Code of Sri Lanka.<sup>7</sup>

This report uses the term 'accused' to refer to the accused-appellant. The term 'victim' is used to refer to the complainant or the prosecutrix. Also for ease of use, custodial sentences will be written in their numerical form.

The report replicates, verbatim, extracts from the appeal judgments. As such, spelling, grammar, and other errors contained in the appeal judgments are also present in the extracts provided in the report.

### **Structure of the report**

Chapter 1 of this report discusses the prevalence of sexual violence in Sri Lanka, issues relating to approaching criminal justice reform, and the inaccessibility of court judgments. Chapter 1 also sets out the Penal Code offences of rape and grave sexual abuse, as well as providing an overview of criminal appeals and revisions.

Chapter 2, which is structured into four parts, contains the findings when the 121 Court of Appeal judgments were analysed. Part 1 of Chapter 2 contains findings relating to the profile of the cases. Part 2 contains findings relating to the trial court decisions from the cases. Part 3 contains findings about the cases that were resentenced upon appeal. Part 4 contains findings about cases where the convictions were overturned upon appeal and the accused were acquitted.

Chapter 3 of this report discusses observations about sexual violence cases and the broader criminal justice system, as a result of studying the 121 Court of Appeal judgments.

To note, Chapter 2 comprises a large body of findings. The findings have been presented in their entirety in order to ensure that: (1) the findings upon which the observations in Chapter 3 are made are visibly substantiated and (2) to ensure the findings are available in the public domain.

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<sup>6</sup> Four judgments were excluded.

<sup>7</sup> Rape – Penal Code ss 364(1), 364(2), and 364(3). Grave sexual abuse – Penal Code ss 365B(2)(a) and 365B(2)(b).

# Chapter 1 – Sexual Violence and the Criminal Justice System

Chapter 1 provides the backdrop to the study by discussing the prevalence of sexual violence crimes in Sri Lanka – as an illustration as to *why* sexual violence requires attention in reform discussions. It also discusses the importance of adopting an empirical approach to addressing criminal justice reforms and the inaccessibility of information as a significant issue. Finally, Chapter 1 contains an overview of sexual violence offences (rape and grave sexual abuse), as contained in the Penal Code, and an overview of criminal appeals, as the research dataset is based on appeal judgments.

## Prevalence of sexual violence crimes in Sri Lanka

Sexual violence crimes were selected as the thematic focus for the study for a number of reasons. Firstly, the prevalence of sexual violence in Sri Lanka is extremely high, as can be seen from the police statistics in Figure 1. Secondly, sexual violence offences are extremely grave violations against a person and therefore, fall into the category of serious crimes. Thirdly, sexual violence offending is complex offending, in that there are dynamics of gender, class, and ethnicity involved. Fourthly, sexual violence cases are an indicative example of how the criminal justice system works in general and engage three of the key criminal justice functions: the police, prosecutors, and judges. There are victims and accused; the police are engaged in investigating the crime; the Attorney-General's Department is engaged in prosecuting the case and in preparing a case for trial; the judiciary are engaged in adjudicating over the trial and any subsequent appeals.

The police website statistics from 2012 to 2016<sup>8</sup> provide figures for what the police term “grave crimes”.<sup>9</sup> As can be seen from the official information in Figure 1, in the last five years (2012 to 2016), there were 8,718 cases of “rape/incest”<sup>10</sup> recorded by the police. The police considered 8,702 cases as “true cases”. Out of this figure, 159 cases were disposed due to the accused being unknown, the case ending in conviction, the case ending in “discharge acquitted”, or was otherwise disposed of. This left a total of 8,543 cases that were pending at the investigation stage (5,365 cases), pending in the Magistrate's Court (955 cases), pending with the Attorney-General's Department (2,191 cases), and pending in the High Court (32 cases). There are two crucial points to highlight from this information. Firstly, to emphasise that between 2012 and 2016, police recorded 8,718 cases of “rape/incest” and deemed 8,702 cases as “true cases”. The police information, of course, does not include rape cases that are not reported, nor does it include instances of rape where the police do not record a complaint. Nevertheless, even the recorded number of cases – which is the official information – is an alarmingly high figure. Secondly, that at the end of 2016, out of the 8,702 cases deemed “true cases” over the last five years, nearly all of the cases (8,543) – which is 98% – were still pending at some point in the criminal justice system, between a police investigation and the High Court.

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<sup>8</sup> The website provides full year figures for 2013 to 2016. For 2012, the website provides figures for the first quarter only.

<sup>9</sup> Sri Lanka Police, “Grave crime abstract for 01<sup>st</sup> quarter for the year 2012”,

[https://www.police.lk/images/others/crime\\_trends/2012/grave-crime-abstract-for-01st-quarter-for-the-year-2012.pdf](https://www.police.lk/images/others/crime_trends/2012/grave-crime-abstract-for-01st-quarter-for-the-year-2012.pdf);

Sri Lanka Police, “Grave crime abstract for the year 2013 for whole island from 01.01.2013 to 31.12.2013”,

[https://www.police.lk/images/others/crime\\_trends/2013/grave\\_crime\\_abstract\\_2013.pdf](https://www.police.lk/images/others/crime_trends/2013/grave_crime_abstract_2013.pdf);

Sri Lanka Police, “Grave crime abstract for the year 2014”,

[https://www.police.lk/images/others/crime\\_trends/2014/grave\\_crime\\_abstract\\_for\\_the\\_2014.pdf](https://www.police.lk/images/others/crime_trends/2014/grave_crime_abstract_for_the_2014.pdf);

Sri Lanka Police, “Grave crime abstract for the year 2015”,

[https://www.police.lk/images/others/crime\\_trends/2015/grave\\_crime\\_abstract\\_for\\_the\\_year\\_2015.pdf](https://www.police.lk/images/others/crime_trends/2015/grave_crime_abstract_for_the_year_2015.pdf);

Sri Lanka Police, “Grave crime abstract for the year 2016”,

[https://www.police.lk/images/others/crime\\_trends/2016/grave\\_crime%20.pdf](https://www.police.lk/images/others/crime_trends/2016/grave_crime%20.pdf).

<sup>10</sup> “Rape/Incest” is the manner in which the police statistics expressed the information. The information is not defined or broken down further.

Figure 1 - Police statistics - grave crimes - 2012-2016

	Rape/Incest <sup>11</sup>			Rape of women over 16 years of age <sup>12</sup>		Statutory rape (women under 16 years) with the consent of the victim		Statutory rape (women under 16 years) without the consent of the victim		Total	Unnatural offences/Grave sexual abuse				
	2012 <sup>13</sup>	2013	2014	2015	2016	2015	2016	2015	2016	5 years	2012	2013	2014	2015	2016
Cases recorded	460	2181	2008	379	350	1339	1394	315	292	<b>8718</b>	122	571	560	833	716
Mistake of law fact	2	1	0	0	1	0	0	0	0	<b>4</b>	0	1	0	0	0
Complaint designedly false	0	5	0	2	3	1	0	0	1	<b>12</b>	1	1	0	2	1
Total true cases	458	2175	2008	377	346	1338	1394	315	291	<b>8702</b>	121	569	560	831	715
Plaints filed	44	234	249	88	67	117	168	34	33	<b>1034</b>	7	50	54	81	125
Accused unknown	10	37	25	9	7	14	8	1	2	<b>113</b>	0	13	3	6	7
Otherwise disposed of	0	8	10	3	2	3	3	1	2	<b>32</b>	0	1	4	0	2
Ending in conviction	0	7	1	0	0	1	0	0	0	<b>9</b>	0	1	1	7	2
Ending in discharge acquitted	0	4	0	0	0	1	0	0	0	<b>5</b>	0	0	0	1	1
Total disposed	10	56	36	12	9	19	11	2	4	<b>159</b>	0	15	8	14	12
Investigation pending	393	1410	1159	232	230	705	855	189	192	<b>5365</b>	114	388	334	528	435
Pending in MC	44	209	235	83	58	109	153	33	31	<b>955</b>	7	43	48	72	120
Pending with AG	11	494	576	48	42	502	363	91	64	<b>2191</b>	0	118	169	216	148
Pending in DC/HC	0	6	2	2	7	3	12	0	0	<b>32</b>	0	5	1	1	0
Total pending	448	2119	1972	365	337	1319	1383	313	287	<b>8543</b>	121	554	552	817	703

<sup>11</sup> For 2012, 2013, and 2014, the police statistics provided figures (for sexual violence offences) only for what was called “rape/incest” and “unnatural offences/grave sexual abuse”.

<sup>12</sup> For 2015 and 2016, the police statistics no longer said “rape/incest”. Instead, there were three categories of rape: “rape of women over 16 years of age”, “statutory rape (women under 16 years) with the consent of the victim”, and “statutory rape (women under 16 years) without the consent of the victim”. For 2015 and 2016, the statistics still provided figures for “unnatural offences/grave sexual abuse”.

<sup>13</sup> The police website provides figures for the first quarter of 2012 only. For the other years, full year figures are provided on the website.

## **Approaching criminal justice reform**

A recent report<sup>14</sup> published by the Law & Society Trust highlighted the importance of addressing and developing a comprehensive criminal justice reform agenda, as a central part of reforming the legal system of the country, and particularly in tandem with the transitional justice agenda in the current environment. The report brought together an extensive collection of reform recommendations relating to various parts of the criminal justice system.

Addressing criminal justice reforms requires a systematic approach. The first part of any reform process must inquire into how the procedure/institution/entity – whatever is under query – currently operates. The question to answer is *how does x work?* It is only through investigating how *x* works will the problems and challenges – the way in which *x* is not working and needs improvement – can be brought to the surface. Building a picture of how *x* operates may itself be a complex and comprehensive process. Nevertheless, this is an essential undertaking to do in order to create a foundation of information, which can then be used as the platform for considering reform. An integral part of creating that information foundation is the collection of empirical data. Anecdotal information is useful to alert to a problem, but is insufficient, as a category of information, to build a foundation of robust information upon. The collection of empirical data is paramount. Collecting empirical information means collecting as much information as possible on *x*, both qualitative (information relating to the qualities of *x*) and quantitative (information relating to the quantities of *x*).

Processes in the criminal justice system lend themselves to be measured because of the sheer volume of engagement. At any given time, there are hundreds of ongoing criminal cases in courts around the country: there are always people being prosecuted; there are always people seeking bail; there are always people being investigated by the police; there are always people being sent to prison; there are always people appealing the decision to be sent to prison; there are always people making complaints to police; there are always people being examined by Judicial Medical Officers. This means that there will always be some form of information available for analysis. The barrier, however, to the collection of empirical information will be whether access to the information is possible, including whether it is properly recorded, documented in the first place, and whether access will be prevented. In a country where there is a culture of secrecy in state-related information and the Right to Information movement is at its infancy, accessing empirical information on, for example, the police, the Attorney-General's Department, and the judiciary to build a picture on how these key criminal justice institutions operate, is a difficult task.

## **Inaccessibility of information**

When looking at the enormity of information that requires compilation to create an empirical foundation about the criminal justice system, the inevitable question is *where does one start?* It is naturally the State that must undertake this task. However, in a country such as Sri Lanka where recommendations for reform (see Law & Society Trust publication referred to above) cover the entirety of the criminal justice system, in particular, the police, the Attorney-General's Department, and the judiciary, it is also crucial that addressing reforms and compiling information relevant to reforms is also undertaken by non-state entities. In other words, ordinary citizens. Unfortunately, this is where the barriers to information are acutely visible.

Information relating to state institutions, such as those described above, are, obviously, only going to be held by those state institutions. There is difficulty in accessing them absent the voluntary provision of that information by the state institutions. The Right to Information Act 2016 may assist in some instances. However, accessing information through the Right to Information regime is one aspect; whether the state institutions even have the information sought (properly compiled information and properly maintained records) is a whole other issue. Right to Information is an important vehicle through

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<sup>14</sup> Shenali De Silva, *The Politics of Criminal Justice Reforms in Times of Transitional Justice*, Law & Society Trust, June 2017, <https://www.lstlanka.org/wp-content/uploads/2017/11/english-20170609102840-1.pdf>.

which to obtain official information. However, it is also important to look at and compile information that is already in the public domain.

Court judgments (decisions) are a category of criminal justice information that is in the public domain, or at least ought to be. Subject to *in camera* hearings, anonymised witnesses, name suppression, or other confidentiality aspects that exist by the operation of law, court judgments are, by definition, public. It is an aspect of the criminal justice system that is meant to be open and accessible to the general public. A criminal trial (and any subsequent appellate hearings) is the State carrying out its inherently public function of punishing individuals accused of deviating from accepted societal behaviour and committing acts that are deemed 'wrong' in the country's penal laws (criminal laws). The two matters flowing as a consequence are that: (1) a trial ought to be public *and* (2) the judgment that culminates in the trial concluding and a decision on the conduct of the accused, ought to also be public.

The Constitution of Sri Lanka enshrines the principle of open court:

**Public sittings.**

106. (1) The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and **all persons shall be entitled freely to attend such sittings.** [emphasis added]
- (2) A judge or presiding officer of any such court, tribunal or other institution may, in his discretion, whenever he considers it desirable –
- (a) in proceedings relating to family relations,
  - (b) in proceedings relating to sexual matters,
  - (c) in the interests of national security or public safety, or
  - (d) in the interests of order and security within the precincts of such court, tribunal or other institution.
- exclude there from such persons as are not directly interested in the proceedings therein.

If "all persons shall be entitled to freely attend" court sittings, it necessarily follows that all persons should also be entitled to freely access court judgments. However, in Sri Lanka, the restrictions on access to official information also flow into court judgments – court judgments are *not* publicly accessible. A citizen cannot simply go to a court registry and obtain a copy of a court judgment. Obtaining a court judgment first requires the filing of a motion by a lawyer seeking access to the court judgment, and second, requires a judge to consider the motion and grant permission. Predicating access to court judgments on those two requirements automatically removes court judgments as material in the public domain.

In terms of criminal cases, the courts that are relevant in Sri Lanka are the Magistrates' Courts and High Courts, which exercise original jurisdiction for criminal matters, and next, the Court of Appeal and Supreme Court, which exercise appellate authority for criminal appeals. Court judgments from the Court of Appeal and Supreme Court are now accessible, to some extent, on their respective websites in English. However, only judgments from certain years are available and there is no certainty that all judgments of the years available are in fact online on the websites of the Court of Appeal and Supreme Court.

The fact that Court of Appeal and Supreme Court judgments are accessible (in terms of physical access and not in terms of accessibility in one's own language preference) is acknowledged as significant. A further issue is that the extent of leave to appeal decisions on the websites is not clear. Whether or not leave to appeal is granted determines whether the accused or State can engage with the appellate criminal process (the higher courts). Therefore, decisions on leave, which should theoretically contain the reasons for granting or denying leave, are significant. Further, there is no way to ascertain whether, for example, all Court of Appeal judgments are, in fact, on the website. As the only reference point is what is contained on the website, there is no way of knowing whether there are Court of Appeal judgments that exist but are not on their website. In addition, the existing barrier, of requiring a lawyer to file a motion and a

judge to grant permission, is not completely obviated. If, for example, a Court of Appeal judgment that is on the website has a page missing (depriving access to essential information regarding the case), the only way to overcome the defect is to file a motion to obtain the certified copy of the proceeding.<sup>15</sup> This, obviously, defeats the purpose of online accessible information. There are also difficulties around the functionality and ability to search for documents on the Court of Appeal and Supreme Court websites (neither website is organised in a manner to facilitate finding cases). However, these can be deemed as subsidiary challenges, when the primary challenge is in obtaining physical access to court judgments. Court judgments from the Magistrates' Courts and High Courts are not available online. Which, given the barriers referred to above, means such cases are not accessible to the general public.

### **Sexual violence offences under the Penal Code**

The Penal Code defines the offences of rape and grave sexual abuse, and stipulates the punishment to follow upon conviction.

#### ***Rape***

Section 363 of the Penal Code defines rape.

- 363.** A man is said to commit "rape" who has sexual intercourse with a woman under circumstances falling under any of the following descriptions:-
- (a) without her consent even where such woman is his wife and she is judicially separated from the man;
  - (b) with her consent, while she was in lawful or unlawful detention or when her consent has been obtained, by use of force or intimidation, or by threat of detention or by putting her in fear of death or hurt;
  - (c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person;
  - (d) with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believed herself to be, lawfully married;
  - (e) with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man.

#### **Explanation**

- (i) Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape;
- (ii) Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.

For clarity, rape as defined by s 363(e) is also called statutory rape.

#### ***Punishment for rape***

Section 364 of the Penal Code provides the punishment for rape. For the purposes of sentencing ranges (the punishment that is available to be ordered for an accused convicted of a particular offence), rape sentencing falls into three categories. For each of these categories, the Penal Code provides a minimum and maximum custodial sentence:

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<sup>15</sup> In the current research, one Court of Appeal judgment was missing page 2, which meant vital information, including the offence and the trial court's decision, was not available. Upon presenting this physical defect to the Court of Appeal Registry, the Registry's response was to file a motion to obtain the certified copy of the judgment.

- (1) Rape – between 7-20 years rigorous imprisonment.
- (2) Aggravated rape, including statutory rape – between 10-20 years rigorous imprisonment.
- (3) Incest statutory rape – between 15-20 years rigorous imprisonment.

*(1) Rape*

**364** (1) Whoever commits rape shall, except, in the cases provided for in subsections (2) and (3), be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine, and shall in addition be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.

*(2) Aggravated rape*

Section 364(2) of the Penal Code enumerates seven scenarios considered to be aggravated circumstances of rape, and consequently has a higher custodial sentencing range. Rape which falls into these categories is punishable with a custodial sentence that ranges between 10-20 years rigorous imprisonment.

**364.** (2) Whoever-

- (a) being a public officer or person in a position of authority, takes advantage of his official position, and commits rape on a woman in his official custody or wrongfully restrain and commits rape on a woman;
- (b) being on the management, or on the staff of a remand home or other place of custody, established by or under law, or of a women's or children's institution, takes advantage of his position and commits rape on any woman inmate of such remand home, place of custody or institution;
- (c) being on the management or staff of a hospital, takes advantage of his position and commits rape on a woman in that hospital;
- (d) commits rape on a woman knowing her to be pregnant;
- (e) commits rape on a woman under eighteen years of age;
- (f) commits rape on a woman who is mentally or physically disabled;
- (g) commits gang rape,

shall be punished with rigorous imprisonment for a term not test than ten years and not exceeding twenty years and with fine and shall in addition be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;

However, there is an exception to the above sentencing range under s 364(2). Where the victim is under 16, thereby statutory rape (s 363(e)), AND the accused is under 18 AND the intercourse was with the consent of the victim, the court can impose a sentence that is less than 10 years rigorous imprisonment.

**364.** (2)[...]

Provided however, that where the offence is committed in respect of a person under sixteen, years of age, the court may, where the offender is a person under eighteen years of age and the intercourse has been with the consent of the person, impose a sentence of imprisonment for a term less than ten years.

*(3) Incest statutory rape*

- 364.** (3) Whoever commits rape on a woman under sixteen years of age and the woman stands towards the man in any of the degrees of relationships enumerated in section 364A shall on conviction be punished with rigorous imprisonment, for a term not less than fifteen years and not exceeding twenty years and with fine.

Under s 364(3), if the victim is under 16 AND the relationship between the victim and accused falls into the category of incest (as provided in s 364A<sup>16</sup>), the minimum mandatory sentence is increased to 15 years rigorous imprisonment.

*(4) Fine and compensation for rape*

A conviction for rape under s 364(1) and s 364(2) is also liable for a fine and compensation as part of the sentence, at amounts at the discretion of the sentencing judge. Rape under s 364(3) specifies a fine only.

Section 364(4) provides that a default sentence for non-payment of compensation can also be ordered, up to a maximum of 2 years of either simple or rigorous imprisonment.

- 364.**(4) Where any person fails to pay the compensation he is ordered to pay under subsection (1) or subsection (2), he shall, In addition to the imprisonment imposed on him under subsection (1) or subsection (2) be punished with a further term of imprisonment of either description for a term which may extend up to two years.

The default sentence for non-payment of a fine is not specified.

***Grave sexual abuse***

- 365B.** (1) Grave sexual abuse is committed any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person, being an act which does not amount to rape under section 363, in circumstances falling under any of the following descriptions, that is to say-
- (a) without the consent of the other person;
  - (aa) with or without the consent of the other of person when the other person is under sixteen years of age;
  - (b) with the consent of the other person while such other person was in lawful or unlawful detention or where that consent has been obtained, by use of force, or intimidation or threat of detention or by putting such other person in fear of death or hurt;
  - (c) with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or was in a state of intoxication induced by alcohol or drugs.

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<sup>16</sup> **364A.** (1) Whoever has sexual intercourse with another, who stands towards him in any following enumerated degrees of relationship, that is to say-

- (a) either party is directly descended from the other or is the adoptive parent, adoptive grandparent, adopted child or adopted grandchild or the other; or
- (b) the female, is the sister of the male, either by the full or the half blood or by adoption, or is the daughter of his brother or of his sister, by the full or the half blood or by adoption, or is a descendant from either of them, or is the daughter of his wife by another father, or is his son's or grandson's or father's or grandfather's widow; or
- (c) the male, is the brother of the female either by the full or the half blood or by adoption, or is the son of her brother or sister by the full or half blood or by adoption or is a descendant from either of them, or is the son of her husband by another mother, or is her deceased daughter's or granddaughter's or mother's or grandmother's husband, commits the offence of 'incest'.

### ***Punishment for grave sexual abuse***

The punishment for the offence of grave sexual abuse in the Penal Code falls into two categories:

- (1) Grave sexual abuse where the victim is 18 or over, with a custodial sentence range between 5-20 years rigorous imprisonment.
- (2) Grave sexual abuse where the victim is under 18, with a custodial sentence range between 7-20 years rigorous imprisonment.

#### *(1) Grave sexual abuse 18 or over*

**365B. (2)** Whoever-

- (a) commits grave sexual abuse shall be punished with rigorous imprisonment for a term not less than five years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;<sup>17</sup>

#### *(2) Grave sexual abuse under 18*

**365B. (2)** Whoever-

- [...]
- (b) commits grave sexual abuse on any person under eighteen years of age, shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;<sup>18</sup>

#### *(3) Fine and compensation for grave sexual abuse*

Grave sexual abuse under s 365B(2)(a) and s 365B(2)(b) permit a fine and compensation to be ordered as part of the sentence, at the discretion of the judge. Default sentences for non-payment are not specified.

### **Appellate procedure in Sri Lanka**

The essence of a criminal appellate court is to supervise the trial process and correct errors made by reversing or modifying trial court decisions. Primarily, a trial process concludes in one of two ways:<sup>19</sup> (1) the accused is found not guilty of the charge for which she or he is tried, and is acquitted (set free), or (2) a conviction is entered against the accused either because she or he was found guilty of the charge, or pleaded guilty to the charge. If a conviction is entered against an accused (now a convicted person), the next stage is where a judge sentences the convicted person and determines the punishment for the crime committed. A criminal appeal is effectively the accused or the prosecutorial authority (the Attorney-General's Department in Sri Lanka) asking a higher court to review the case because of some legal or

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<sup>17</sup> Section 365B(2)(a) of the Penal Code available on the Ministry of Justice website is incorrect and does not contain the 2006 amendment reducing the term of imprisonment from 7 years to 5 years. Therefore, an extract from a paid subscription to the Penal Code, from Law Lanka had to be used for the purpose of this research.

<sup>18</sup> Section 365B(2)(b) of the Penal Code available on the Ministry of Justice website is incorrect and does not contain the 2006 amendment reducing the term of imprisonment from 10 years to 7 years. Therefore, an extract from a paid subscription to the Penal Code from Law Lanka had to be used for this research.

<sup>19</sup> There are other scenarios possible, such as mistrials and hung juries. However, this study only addresses appeals resulting from an acquittal, a guilty verdict, or a guilty plea.

factual error that is considered to have occurred. A criminal appeal can relate to either a conviction and sentence or a sentence only.<sup>20</sup>

If an accused is found not guilty, obviously the accused has no need to review that decision as she or he is 'free'. The prosecution, however, may consider that the acquittal was wrong in law and should be reconsidered. In Sri Lanka, the State can appeal an acquittal if the Attorney-General considers the acquittal to be a miscarriage of justice. If an accused pleads guilty, she or he is accepting the charge against them and appealing the conviction is not at issue. They can, however, appeal the sentence handed down and seek to have it reduced, if they consider it excessive. Similarly, the State can appeal the sentence and seek to have it enhanced, if they consider the sentence to be inadequate. If an accused is found guilty, it means they have not accepted the charges against them. An accused who is found guilty can appeal to a higher court to have the conviction quashed or overturned. The consequence of quashing or overturning a conviction is that the accused is then 'free'. An accused found guilty and sentenced can appeal the sentence to have it reduced, and the State can appeal the sentence to have it increased.

Additionally, in Sri Lanka, either party can invoke the revisionary jurisdiction of the Court of Appeal on a matter of law.<sup>21</sup> Revision exists as an extraordinary remedy based on exceptional circumstances. Revision relates to an order of a judge and can relate to conviction and sentence.

	Appeal				Revision			
	Can the accused appeal?		Can the State appeal?		Can the accused seek to revise?		Can the State seek to revise?	
Outcome of trial	Conviction	Sentence	Conviction	Sentence	Conviction	Sentence	Conviction	Sentence
Acquittal	N/A	N/A	Yes	N/A	N/A	N/A	Yes	N/A
Guilty plea	N/A	Yes	N/A	Yes	N/A	Yes	N/A	Yes
Guilty verdict	Yes	Yes	N/A	Yes	Yes	Yes	N/A	Yes

Figure 2 - Appeals and revisions

<sup>20</sup> Constitution, art 139; Code of Criminal Procedure Act 1979, s 328.

<sup>21</sup> Constitution, art 138.

## Chapter 2 – Findings

Chapter 2 contains the findings from the study of 121 Court of Appeal judgments on rape and grave sexual abuse. Part 1 contains findings relating to the profile of the cases. Part 2 contains findings compiled relating to the trial court decisions that sit below the appeal cases. Part 3 contains findings relating to the cases that were resentenced upon appeal. Part 4 contains findings relating to the cases where the convictions were overturned upon appeal and the accused were acquitted.

### PART 1 – PROFILE OF CASES

Part 1 contains findings relating to the 121 cases in the context of a dataset. The inquiry was: *what types of information can be extracted and compiled from the corpus of information that comprises the 121 judgments?* The findings related to the following categories:

1. Types of appeals and revision applications.
2. Outcomes of appeals and revision applications.
3. Incidence of guilty pleas in the cases.
4. State appeals and revision applications.
5. Nature of the offences in the cases.
6. Profiles of the victims and accused.
7. Locations of trial courts.
8. Cases that were appealed to the Supreme Court.

#### Types of appeals/revision applications

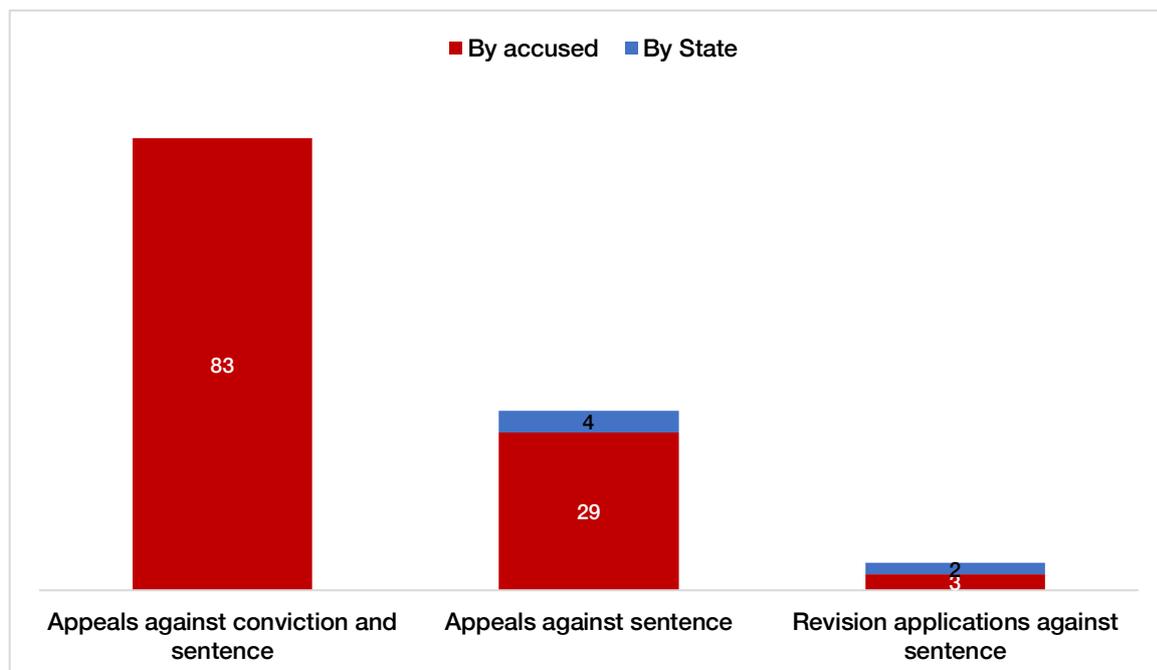


Figure 3 - Types of appeals/revisions

Out of the 121 cases considered, 83 were appeals relating to conviction and sentence – where the accused was challenging the guilty verdict as well as the sentence imposed as punishment. Thirty-three cases were appeals challenging the sentence only.<sup>22</sup> In 29 of these cases, it was the accused seeking to reduce the sentence (where the conviction entered against the accused was not contested, either because they pleaded guilty, or they accepted the guilty verdict against them). In four cases, the State sought to increase the sentence. Five cases were revision applications relating to the sentence imposed. In three of these cases, the accused sought to revise the sentencing order and reduce the sentence. In two cases, the State sought to revise the order and increase the sentence.

### Outcomes of appeals/revision applications

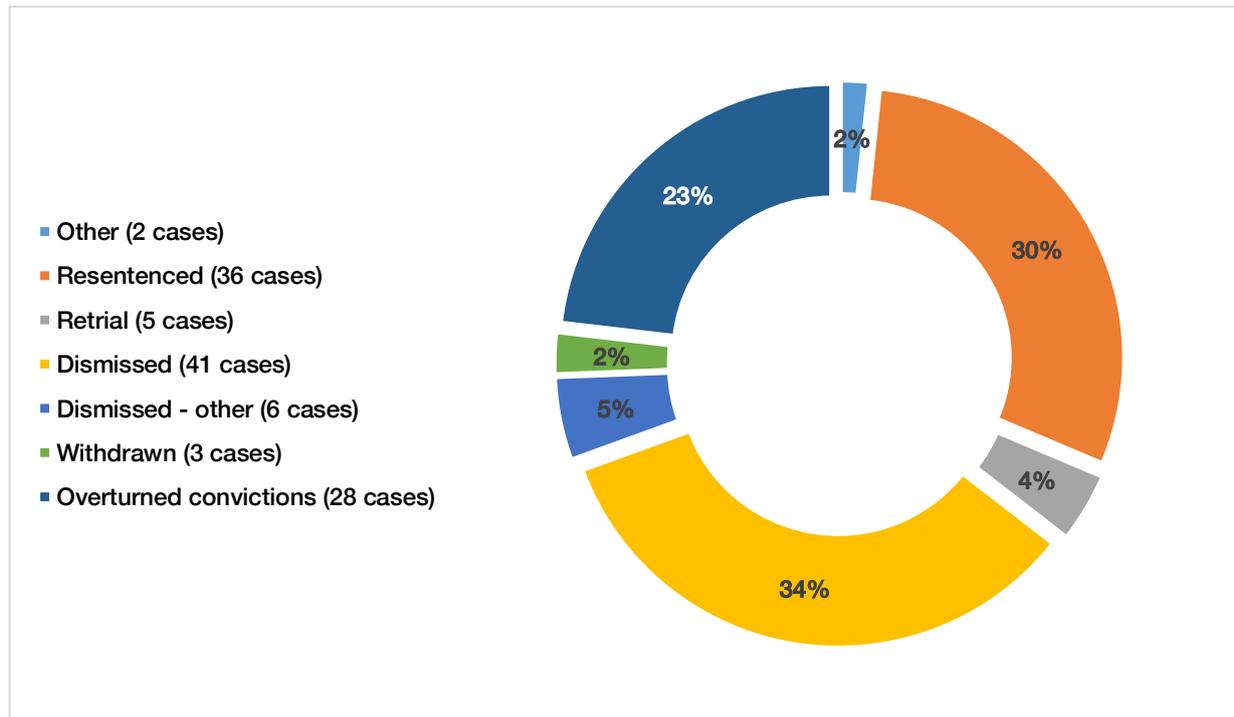


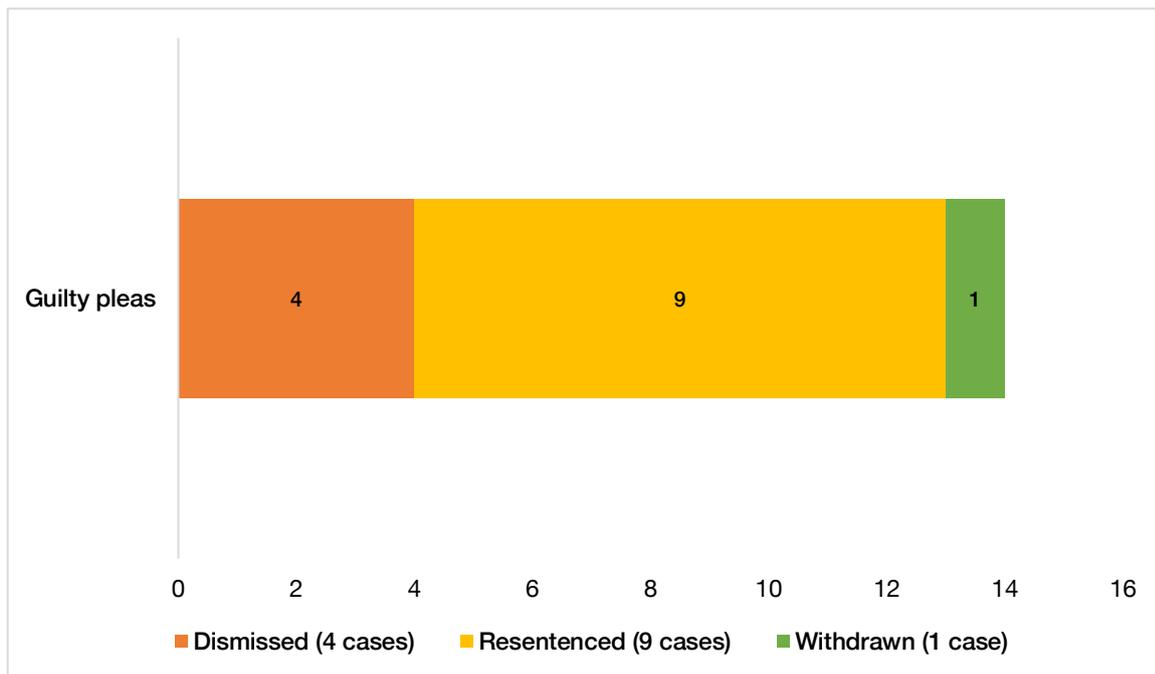
Figure 4 - Outcomes of appeals/revisions

The outcomes of the appeals and revisions applications fell into a number of categories. Forty-one cases involved the appeal or revision application being dismissed by the Court of Appeal (where the original trial conviction and/or sentence was confirmed). In six cases, the appeals were dismissed other than the Court of Appeal ordering to backdate the sentence and/or ordering the sentences to run concurrently. Thirty-six cases involved the Court of Appeal varying (changing) the sentence imposed by the trial court and resentencing the accused. Five cases involved the Court of Appeal overturning the original conviction and sentence and sending the accused for retrial. Twenty-eight cases involved the Court of Appeal overturning the conviction and sentence and acquitting the accused. Three cases involved the substantive appeal being withdrawn. Two cases involved other matters.<sup>23</sup>

<sup>22</sup> In a number of cases, the judgment would state “being aggrieved by the said conviction and sentence” the accused appeals to this Court. However, in subsequent sentences, it would also state that only the sentence is being appealed. For example: “Being aggrieved by the said conviction and the sentence, he has appealed to this Court. Learned President's Counsel appearing for the accused-appellant does not challenge the conviction.”

<sup>23</sup> In one case the conviction was altered from rape (s 364(1)) and grave sexual abuse 18+ (s 365B(2)(a)) to sexual harassment (s 345). In the second case the sexual violence convictions and sentences on appeal were quashed (grave sexual abuse under 18 (s 365B(2)(b))) but the sentence for the remaining conviction for kidnapping (s 354) was increased.

## Incidence of guilty pleas

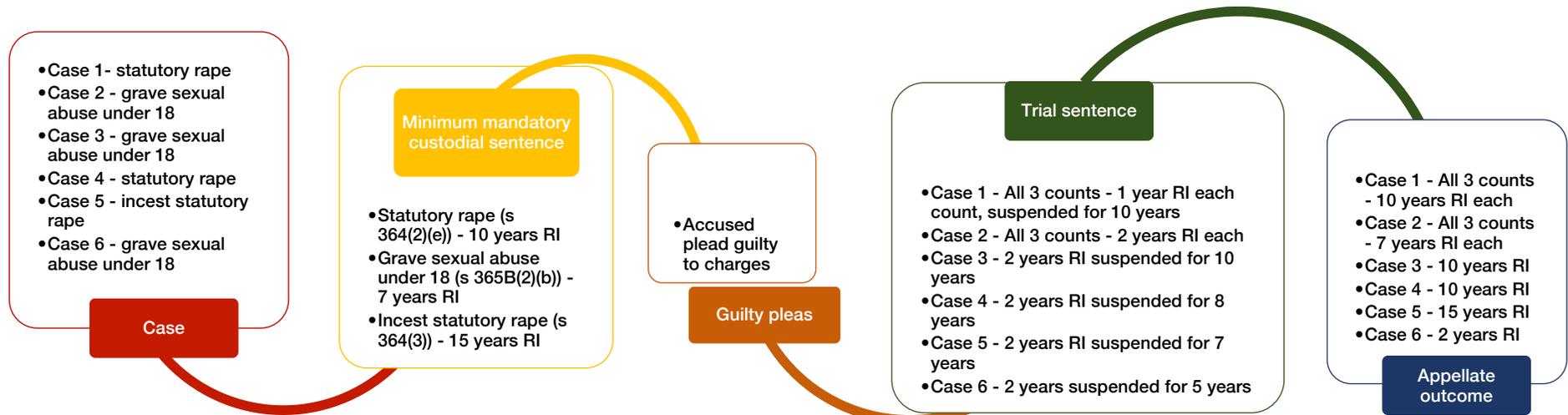


*Figure 5 - Cases comprising guilty pleas*

Out of the 121 cases, 14, involved guilty pleas. In four of them, the appeal/revision application was dismissed. In nine cases, the convicted person was resentenced. In one case, the appeal was withdrawn.

### State appeals/revisions

In five of the six State appeals/revision applications, the sentences ordered by the trial court involved suspended sentences, despite a statutory minimum mandatory custodial sentence.<sup>24</sup> The other case did not involve a suspended sentence, but nevertheless involved a custodial sentence well below the statutory minimum mandatory custodial sentence.<sup>25</sup> All six cases involved guilty pleas. Upon appeal, the accused were resentenced to higher custodial sentences. The statutory rape and incest statutory rape cases were increased to the minimum mandatory custodial sentence (10 years and 15 years rigorous imprisonment, respectively). One of the grave sexual abuse under 18 cases was increased to the minimum mandatory custodial sentence (7 years rigorous imprisonment) and one to above the minimum mandatory custodial sentence (10 years rigorous imprisonment). The sentence on the third grave sexual abuse under 18 case was increased to 2 years rigorous imprisonment. Nevertheless, this was still below the mandatory minimum sentence.



RI: Rigorous Imprisonment

Figure 6 - State appeals/revisions - custodial sentences at trial and appeal

<sup>24</sup> AG v Perera CA (PHC) APN 147/12, 1 June 2016; AG v Shantha (alias Ran Mama) CA 150/2010, 16 July 2014; AG v Dharmalingam CA 91/2012, 9 November 2016; AG v Nagesh CA (PHC) APN 87/2012, 25 April 2016; AG v Kona Gedara Podi Mahattaya CA124/2009, 4 April 2013.

<sup>25</sup> AG v Thissa Thero CA 270/2013, 30 April 2015.

## Nature of the offences

The cases were categorised into the specific offence provisions in the Penal Code, to the extent possible. However, in a significant portion of the judgments (26%), the specific Penal Code provision was not mentioned. Where possible, the offence provision was deduced through surrounding information in other parts of the court judgment. In the end, there were 31 out of the 121 cases where the specific offence of the case involved was not clear.

### Rape

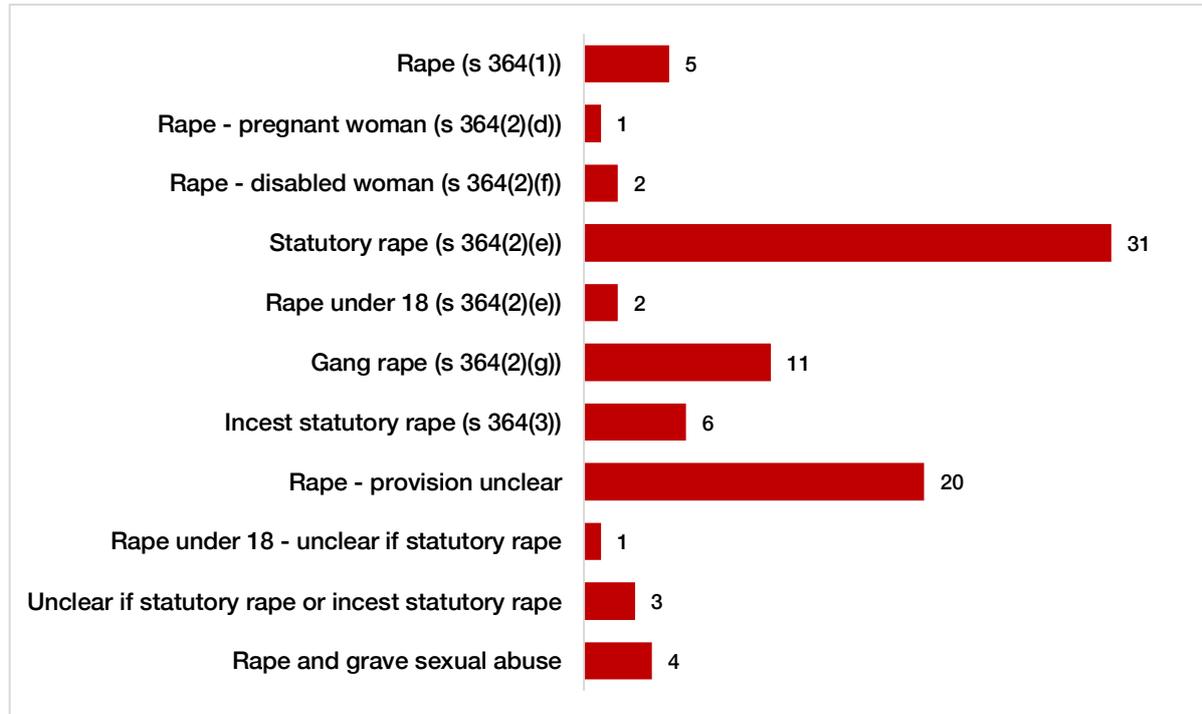


Figure 7 - Rape (82 cases)

Out of the 121 cases, 82 related to some form of rape (78 were exclusively rape and four were a combination of rape and grave sexual abuse offences).

Five cases involved the first kind of rape under s 364(1). There were a number of cases of aggravated rape under s 364(2) – where the Penal Code recognises the offending as a graver form of rape. One case involved rape of a pregnant woman (s 364(2)(d)). Thirty-one cases involved statutory rape (s 364(2)(e)). Two case involved rape under 18 (s 364(2)(e)). Two cases involved rape of a disabled woman (s 364(2)(f)). Eleven cases involved gang rape (s 364(2)(g)). Six cases involved incest statutory rape (s 364(3)). One case involved rape under 18, but it was not clear whether it was statutory rape. Three cases involved rape under 16, however, it was not clear whether it was statutory rape (s 364(2)(e)), or incest statutory rape (s 364(3)).

In total, there were 24 cases of rape where the Penal Code offence provision was unclear. The judgments used the word rape in describing the offending, but did not proceed to specify which form of rape, or provide the specific Penal Code provision.

Four cases involved combination offences. One case involved gang rape (s 364(2)(g)) and grave sexual abuse under 18 (s 365B(2)(b)). One case involved rape (s 364(1)) and grave sexual abuse 18 or over (s 365B(2)(a)). Two cases involved statutory rape (s 364(2)(e)) and grave sexual abuse under 18 (s 365B(2)(b)).

### *Grave sexual abuse*

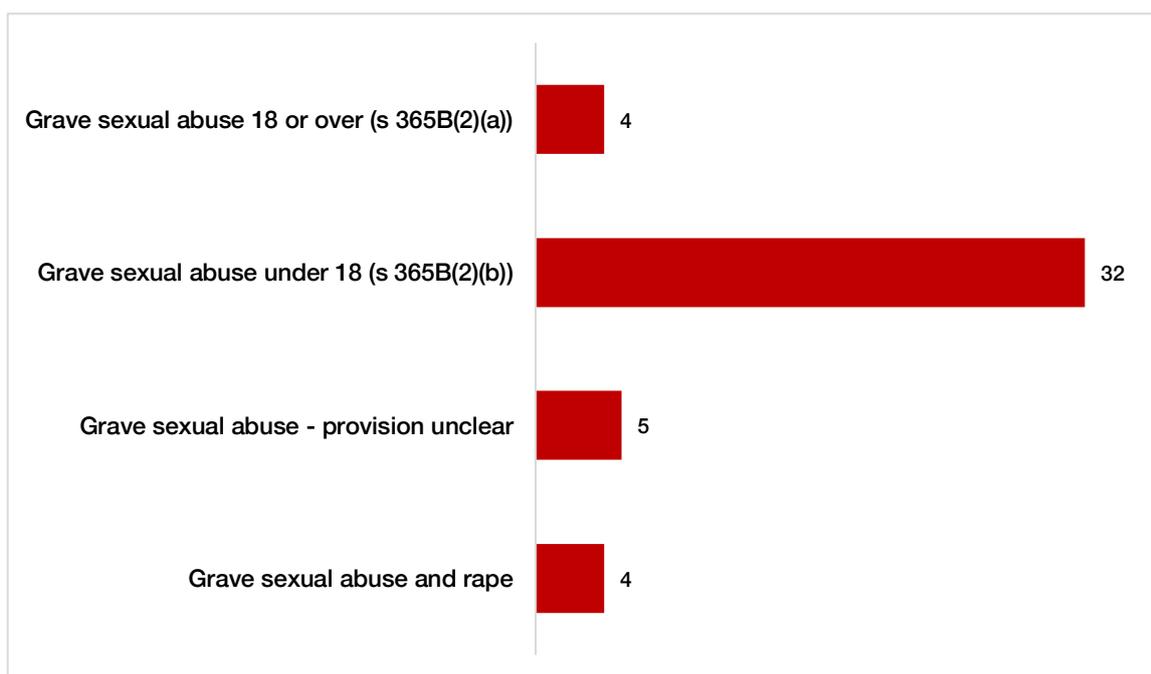


Figure 8 - Grave sexual abuse (41 cases)

Forty-one cases involved some form of grave sexual abuse (37 cases were exclusively grave sexual abuse and four were combination offences of grave sexual abuse and rape). Four cases involved grave sexual abuse 18 or over (s 365B(2)(a)). Thirty-two cases involved grave sexual abuse under 18 (s 365B(2)(b)). Five cases involved grave sexual abuse, however, it was unclear which of the two Penal Code offence provisions the cases related to.

Four cases involved combination offences. One case involved gang rape (s 364(2)(g)) and grave sexual abuse under 18 (s 365B(2)(b)). One case involved rape (s 364(1)) and grave sexual abuse 18 or over (s 365B(2)(a)). Two cases involved statutory rape (s 364(2)(e)) and grave sexual abuse under 18 (s 365B(2)(b)).

### **Other**

Two cases involved some kind of unclear sexual violence offence. In one case, by reading the judgment, it was clear that it involved some form of sexual violence offending. However, unlike the 24 unclear rape cases which specifically used the word 'rape', this case neither used rape nor grave sexual abuse. As such, no further categorisation was deemed possible. In the second case, page 2 of the appeal judgment, which should have contained information on the offence and the trial court sentence, was absent. Inquiries were made with the Court of Appeal Registry to clarify the two cases. The response from the Registry was to file a motion to obtain certified copies of the judgments.

### **Profiles of victims and accused**

As part of the analyses, the study attempted to build a picture of the victims and accused in the cases. However, the judgments lacked uniformity in the information that was recorded. Details regarding the victim and accused varied significantly, and on a whole, only certain types of information – primarily age and gender – were specified with any degree of consistency. In some cases, even this information was ambiguous. Other types of information, such as ethnicity, socio-economic background, and family circumstances (including marital status) could not be extracted, as the judgments did not record such information consistently.

### *Gender of victims*

In the overwhelming majority of cases studied – 88% – the victim was female (106 out 121 judgments). Eighty-two of the 121 cases related to some form of rape. In this 68% of cases (which related to rape), the victim could *only* be female as rape under Sri Lankan law can only be committed by a *man* against a *woman*:

**363** A man is said to commit “rape” who has sexual intercourse with a woman under circumstances falling under any of the following descriptions [...]

There were only nine cases where the victim was male and in all of the cases, the offence was grave sexual abuse. There were no male victims of rape, as defined in the Penal Code, as rape can only be committed by a *man* against a *woman*. In terms of the background of the cases, based on the available information, it is unclear whether the charge of grave sexual abuse was used in these cases due to the absence of rape being an available offence against a man, or whether the offence actually came within the ambit of grave sexual abuse. Whatever the actuality, this raises the question of whether additional acts of violence, such as rape, were committed against these victims, which were not accounted for.

In six cases, the gender of the victim was unclear, as the gender was not specifically stated. All six cases related to grave sexual abuse, which can be committed by “any person” against “any other person” (s 365B(1)). As such, no inference of gender could be made, as in the case of the gendered elements of rape. In three cases, the victims’ names were stated in the Court of Appeal judgment.<sup>26</sup> While the names suggested a particular gender, there were no explicit references to the victim being female or male.<sup>27</sup> For this reason, it was deemed too ambiguous to derive any conclusion on the gender. In another case, the decision contained no details, nor any reference, to the victim at all and hence the gender was not decipherable.<sup>28</sup> In two other cases, the victim was referred to, however, not in a way that established the victim’s gender.<sup>29</sup>

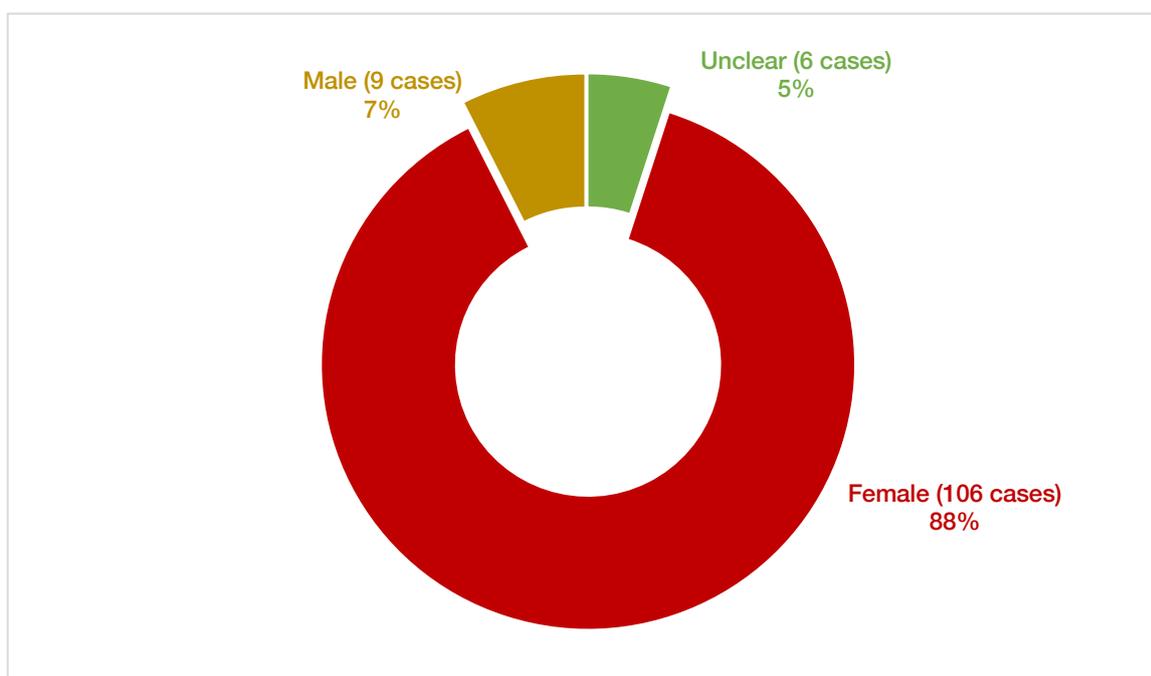


Figure 9 - Gender of victims

<sup>26</sup> *AG v Shantha (alias Ran Mama)* CA 150/2010, 16 July 2014; *Arfeth v AG* CA 66/2014, 20 January 2016; *Bandara v AG*, CA 117/14, 12 February 2016.

<sup>27</sup> The judgments did not refer to the victim using words such as girl, boy, her, him, woman, man, female, male.

<sup>28</sup> *Siripala v AG* CA 09/2014, 2 May 2016.

<sup>29</sup> *Mihira v AG* CA 75/2009, 30 April 2015; *Kona Gedara Podi Mahattaya v AG* CA 124/2009, 4 April 2013.

## *Age of victims*

### *Minor under 16*

In 67 cases (55% of the cases), the victim was a minor under 16 years of age. The ages of minors ranged from 4-15 years of age. The offences involved in these cases related to statutory rape (s 364(2)(e)), incest statutory rape (s 264(3)), gang rape (s 364(2)(g)), and grave sexual abuse under 18 (s 365B(2)(b)). The 67 cases could be disaggregated as: 29 cases of statutory rape; six cases of incest statutory rape; one case of gang rape; 24 cases of grave sexual abuse under 18; one case of gang rape and grave sexual abuse under 18; two cases of statutory rape and grave sexual abuse under 18; three cases where it was unclear whether it was statutory rape or statutory incest rape; and one case where the offence was not clear.

### *Minor under 18*

In eight cases, the victim was a minor under 18. In three of these cases, the age was described as “16”, “about 16”, and “under the age of 18”. In four of these cases, there was no reference to the age of the victim in the judgments. An age description of ‘under 18’ was inferred as the Penal Code provision of these cases required the victim to be under 18 (all four cases were grave sexual abuse under 18 (s 365B(2)(b)). In the remaining case, *Banda v AG*,<sup>30</sup> there was conflicting content in the judgment regarding the victim’s age. The beginning of the judgment stated “raping a girl who was 16 years of age”, yet the judgment later stated “raped a girl below 16 years age”. The difference between ‘16’ and ‘under 16’ has significant legal implications for the elements of rape that need to be proved by the prosecution. In the former, proving the lack of consent is a constituent element of the crime. Whereas the latter is statutory rape and consent is irrelevant – 16 is deemed the statutory age of consent to sexual relations, and a minor under 16 years of age is deemed incapable of consenting to sexual relations. In other words, based on the appeal judgment, it is unclear whether *Banda v AG*<sup>31</sup> was a case of statutory rape or not.

### *Above 16*

There were two cases where the only decipherable age was that the victim was ‘above 16’. While the issue of consent does not arise in these two cases, the age of the victim determines the applicable Penal Code provision, which in turn, determines the available custodial sentencing range. If the victims were 16 or 17, the sentencing range is between 10-20 years rigorous imprisonment (s 364(2)(e)), and if the victims were 18 years or above, the sentencing range is between 7-20 years rigorous imprisonment (s 364(1)). In one case, *Jayatissa v AG*,<sup>32</sup> the custodial sentence was 10 years rigorous imprisonment. The absence of the Penal Code provision and/or the age of the victim, means that it is not clear where the trial judge’s sentence fits on the spectrum of the available sentencing range. For example, it is unclear whether the trial judge ordered the minimum mandatory sentence (10 years rigorous imprisonment, if it was rape under s 364(2)(e) or rape of a pregnant woman<sup>33</sup> under s 364(2)(d)) OR whether there were aggravating circumstances of the offender or offending that necessitated ordering a sentence more than the minimum mandatory sentence (7 years rigorous imprisonment increased to 10, if it was rape under s (364(1)). Upon appeal, the Court overturned the conviction and sentence and acquitted the accused. In the other case, *Naufar v AG*,<sup>34</sup> the custodial sentence was 5 years rigorous imprisonment. This term is below the minimum mandatory custodial sentence for *any* form of rape<sup>35</sup>. The appeal judgment does not mention this fact, including whether this matter was raised by State Counsel in written submissions, or in the substantive hearing. Upon appeal, the Court of Appeal overturned the conviction and sentence and acquitted the accused.

### *Adults*

Given the legal implications of the age of the victim in sexual violence offences (whether or not consent needs to be proved and the permissible sentencing ranges under the Penal Code), no conclusions were

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<sup>30</sup> *Banda v AG* CA 83/2010, 8 July 2013.

<sup>31</sup> *Banda v AG* CA 83/2010, 8 July 2013.

<sup>32</sup> *Jayatissa v AG* CA 30/2008, 17 January 2014.

<sup>33</sup> The victim was pregnant at the time of the incident.

<sup>34</sup> *Naufar v AG* CA 99-2011, 8 November 2012.

<sup>35</sup> 7 years rigorous imprisonment – s 364(1).

drawn regarding age unless: (i) the exact age was given in the judgment, (ii) the Penal Code offences provision given in the judgment had an age implication relating to the victim,<sup>36</sup> or (iii) there was sufficient surrounding information in the judgment to suggest the victim was over 18 years of age.

Only in nine cases was the age of the victim explicitly provided (as 18 or above years of age) enabling the categorisation as adult.

In six cases, the Penal Code provision provided in the judgment required the victim to be 18 years of age, or above this age. In one such case, *Athurupana v AG*,<sup>37</sup> the accused was originally charged with rape under s 364(2)(e) (requiring the victim be under 18). However, the prosecution could not prove the victim was under 16, and as such, the trial judge amended the indictment and convicted the accused under s 364(1) (rape 18 year or over).

In two cases, the surrounding information in the judgment indicated the victim was over 18 years of age.

#### *Unclear age*

In 27 cases, the age of the victim was not explicitly stated in the judgments, nor was the age decipherable from the Penal Code provision provided, if it was provided at all.

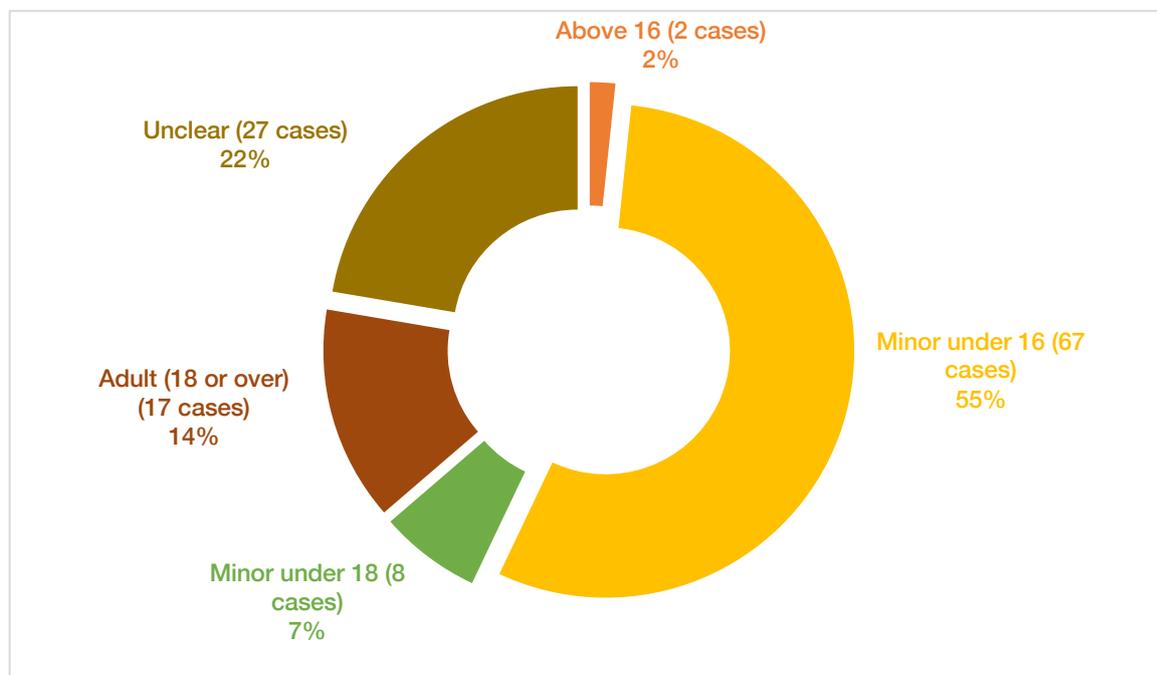


Figure 10 - Age of victims

#### ***Single/multiple victims***

The majority of cases involved a single victim (115). One case involved two victims and in five cases, the number of victims was not decipherable.

#### ***Gender of the accused***

In 118 cases, the accused was male. In three cases, the judgments suggested the accused was male. However, there were no personal pronouns or other terms used in relation to the accused to confirm this.

<sup>36</sup> For example, incest statutory rape under s 364(3), which requires the victim to be under 16, or rape under s364(1), which requires the victim to be 18 or over, or grave sexual abuse under s 365B(2)(b), which requires the victim to be under 18.

<sup>37</sup> *Athurupana v AG* CA 129/2009, 6 February 2014.

**Age of the accused**

In one case, the accused was a minor under 16. In three cases, the accused was a minor under 18. In 26 cases, the exact age of the accused was mentioned, ranging from 19 to “about 70” years. In the remaining 91 cases the exact age of the accused was not specified.

**Single/multiple accused**

The majority of cases involved a single accused (107). Fourteen cases involved multiple accused, ranging between two to six persons

**Trial court locations**

The trial court (High Court) locations for the 121 cases were spread across the country.

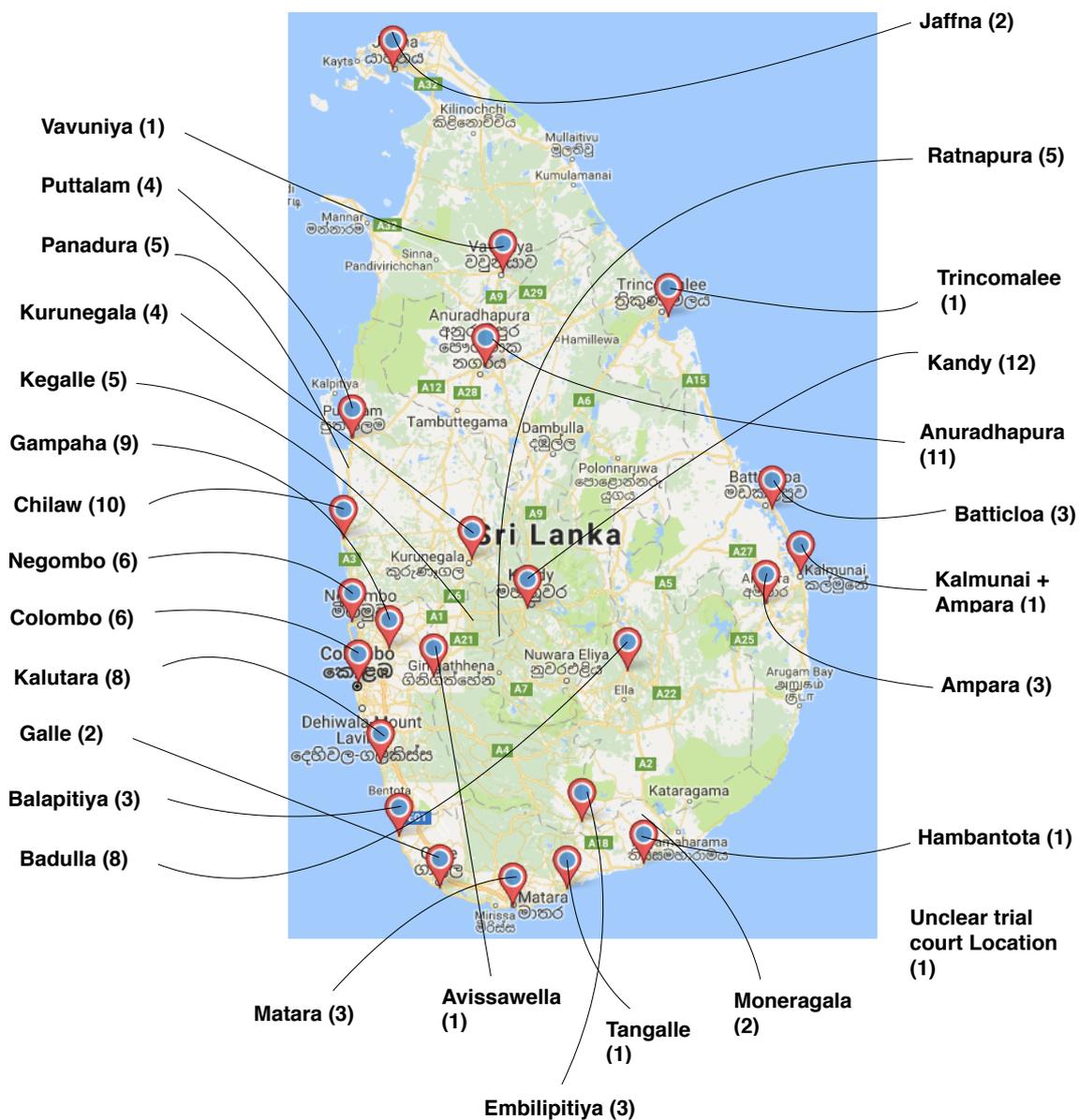


Figure 11 - Trial court locations

## Appeals to the Supreme Court

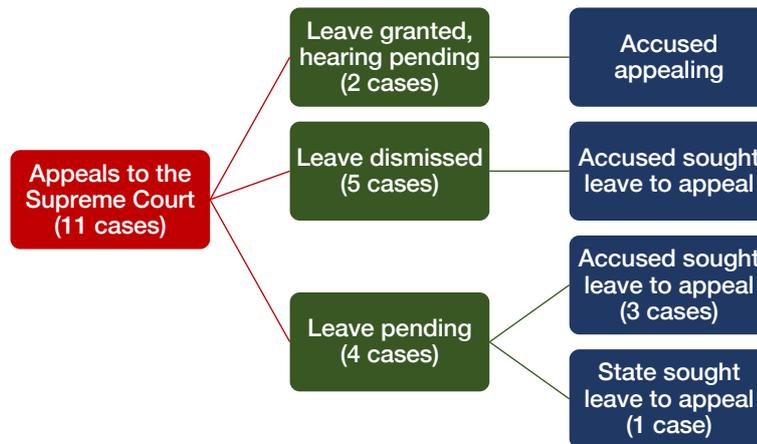


Figure 12 - Appeals to Supreme Court

In 11 cases,<sup>38</sup> the decisions of the Court of Appeal were appealed to the Supreme Court. Information was sought from the Supreme Court Registry about the status of the 11 cases. In 10 of these, it was the accused making the appeal and in one case it was the State making the appeal. In other words, in 10 cases, the accused was not satisfied with the decision of the Court of Appeal and sought review of the decision by the Supreme Court. In two cases, leave to appeal was granted by the Supreme Court and the substantive hearing was pending as at the time of writing this report.<sup>39</sup> In five cases, leave to appeal was denied.<sup>40</sup> In four cases, the decision on the leave to appeal application was pending.<sup>41</sup>

In *Haaris and another v AG*,<sup>42</sup> the three accused were convicted of gang rape, robbery, and murder. The sentences ordered were not clear as they were not given in the appeal judgment. The first and third accused appealed their convictions and sentences. The Court of Appeal dismissed the appeal. The accused were granted leave to appeal to the Supreme Court. The substantive hearing is pending.

In *Indika v AG*,<sup>43</sup> the accused was convicted of grave sexual abuse 18 or over (s 365B(2)(a)). He was sentenced to 7 years rigorous imprisonment, a fine of Rs 5,000 with a default sentence of 1 month simple imprisonment, and compensation of Rs 50,000 with a default sentence of 1 year simple imprisonment. His appeal to the Court of Appeal was dismissed. The accused was granted leave to appeal to the Supreme Court. The substantive hearing is pending.

<sup>38</sup> This information is as at the time of writing, in November 2017.

<sup>39</sup> *Haaris and another v AG* CA 212-213/12, 25 October 2016. *Haaris and another v AG* SC 257/16; SC 118/2017. *Indika v AG* CA 88/2013, 15 December 2015. *Indika v AG* SC 16/16; SC 40/2017.

<sup>40</sup> *Kusumsiri v AG* CA 147/2007, 6 December 2012; SC 08/13. *Karunanayake and another v AG* CA 82/2012, 13 October 2015; SC 238/15. *Priyathilaka v AG* CA 113/2008, 7 March 2014; SC 58/14. *Sabaratham v AG* CA 127/2012, 3 August 2015; SC 179/15. *Saibu v AG* CA 106/2012, 30 March 2015; SC 80/15.

<sup>41</sup> *AG v Perera* CA (PHC) APN 147/12, 1 June 2016; SC 122/16. *Kumara v AG* CA 222/10, 24 October 2013; SC 299/13. *Palitha v AG* CA 166/14, 26 January 2016; SC 35/16. *Ekanayka v AG* CA 203/2013, 2 September 2015; SC 213/15.

<sup>42</sup> *Haaris and another v AG* CA 212-213/12, 25 October 2016. *Haaris and another v AG* SC 257/16; SC 118/2017.

<sup>43</sup> *Indika v AG* CA 88/2013, 15 December 2015. *Indika v AG* SC 16/16; SC 40/2017.

## Part 2 – Trial Court Decisions

Ascertaining the original sentences handed down for sexual violence offences (upon the conclusion of a trial) is an important aspect of understanding the punishment given by judges for these offences. However, as stated earlier, this information, which one would ordinarily extract from trial judgments (and sentencing decisions), is not publicly accessible. Therefore, there is currently a vacuum relating to this type of information.

As a secondary method of obtaining this information, the current study attempted to compile this information from the Court of Appeal judgments (where the appeal judgment begins by stating what the original sentence was). Obviously, this in no way presents a holistic picture – it only contains the original sentences of cases that were appealed. For all other sexual violence cases – that were *not* appealed – the original sentences handed down are not ascertainable. Nevertheless, the study deemed it important to compile this information, from the only material that is publicly accessible.

The study attempted to cluster all cases with the same offence in order to present the sentences that were ordered for each offence by the trial courts. This was to enable comparisons of sentences for a given offence across the trial courts in this dataset of 121 appeal judgments. For example, to compare the sentences ordered for incest statutory rape (s 364(3)), or for rape (s 364(1)). However, an obstacle to this approach was that a significant number of appeal judgments did not state the specific offence. The specific offence provision is required to ascertain the permissible sentence range for any given offence. In 31 of the 121 judgments (26% of the dataset) the Penal Code offence provision was not decipherable from the appeal judgment. The absence of the specific offence prevented the proper categorisation of the trial court sentences.

### Rape

There were 82 rape cases in the dataset.

The punishment for rape falls into three broad categories:

- (1) Rape – with a custodial sentence range between 7-20 years rigorous imprisonment (s 364(1)).
- (2) Aggravated rape, including statutory rape – with a custodial sentence range between 10-20 years rigorous imprisonment (s 364(2)(a)-(g)).
- (3) Incest statutory rape – with a custodial sentence range between 15-20 years rigorous imprisonment (s 364(3)).

### *Trial court sentences – rape – s 364(1)*

As noted previously, there were five cases that could be categorised as rape under s 364(1). The other 20<sup>44</sup> cases that comprised some form of rape, but where the specific offence provision was not clear, may or may not fall into the category of rape under s 364(1). This lack of clarity in the appeal judgments limits understanding of sentences for rape under s 364(1) as well as the other categories of rape that the ‘unclear’ cases could fall within.

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<sup>44</sup> In total there were 24 cases of rape where the Penal Code provision was unclear. In four of those cases, the ambiguity was around whether it was statutory rape or incest statutory rape, or whether it was rape under 18 or statutory rape. In both scenarios, the Penal Code provision could not be s 364(1).



Figure 13 - Rape - custodial sentences (5 cases)



Figure 14 - Rape - fines (5 cases)

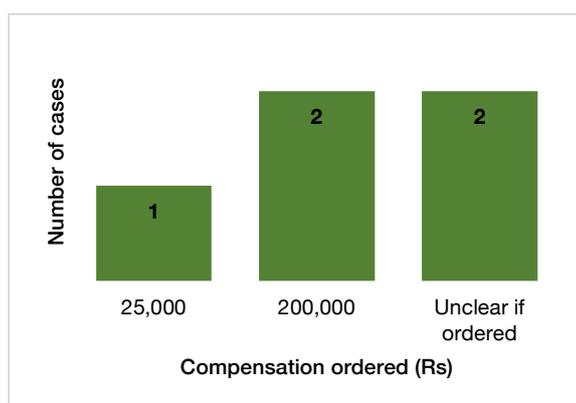


Figure 15 - Rape - Compensation (5 cases)

### ***Trial court sentences – aggravated rape – s 364(2)(a)-(e)***

In terms of the categories of rape that are defined as aggravated forms of rape, not all of the seven categories were explicitly present in the dataset of cases (the reference to *explicitly* is due to the significant number of cases (26%) where the specific offence was not clear). There were cases of rape of a pregnant woman (s 364(2)(d)), statutory rape and rape under 18 (s 364(2)(e)), rape of a disabled woman (s 364(2)(f)), and gang rape (s 364(2)(g)). Rape by a public officer (s 364(2)(a), custodial rape (s 364(2)(b)), and rape by hospital staff (s 364(2)(c)) were not explicitly present in the dataset.

### ***Sentences for statutory rape – s 364(2)(e)***

There were 31 cases that could be categorised as statutory rape,<sup>45</sup> where the victim was a minor under 16 years of age (the appeal judgment contained the specific Penal Code provision, or there was sufficient surrounding information in the judgment to infer statutory rape). Two cases involved combination offences (statutory rape and grave sexual abuse under 18). In the case of *Karunanayake and Karunathne v AG*,<sup>46</sup> the victim was also under 16 (11 years), however, the appeal judgment specifically states that the Penal Code provision under which the accused was charged and convicted was s 364(2)(g) (gang rape) and s 365B(2)(b) (grave sexual abuse under 18). For this reason, the case has been included in the gang rape section and not the statutory rape section.

<sup>45</sup> Defined under s 363(e) and with punishment under s 364(2)(e).

<sup>46</sup> *Karunanayake and Karunathne v AG* CA 82/2012, 13 October 2015.

Section 364(2)(e) of the Penal Code provides the sentencing range for statutory rape as between 10-20 years rigorous imprisonment. As can be seen in Figure 16, in five cases, the sentences were explicitly below the minimum mandatory sentence stipulated by statute. Further, in three of those cases, the accused was given a suspended sentence, despite the Penal Code requiring a minimum custodial sentence of 10 years rigorous imprisonment.

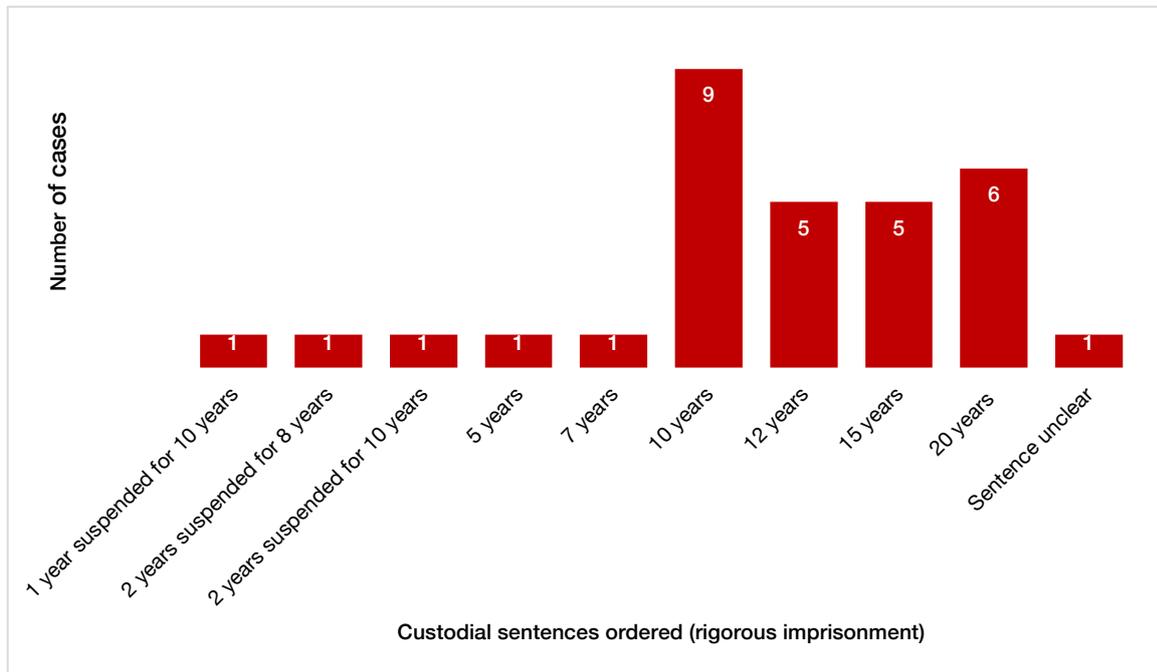


Figure 16 - Statutory rape - custodial sentences (31 cases)

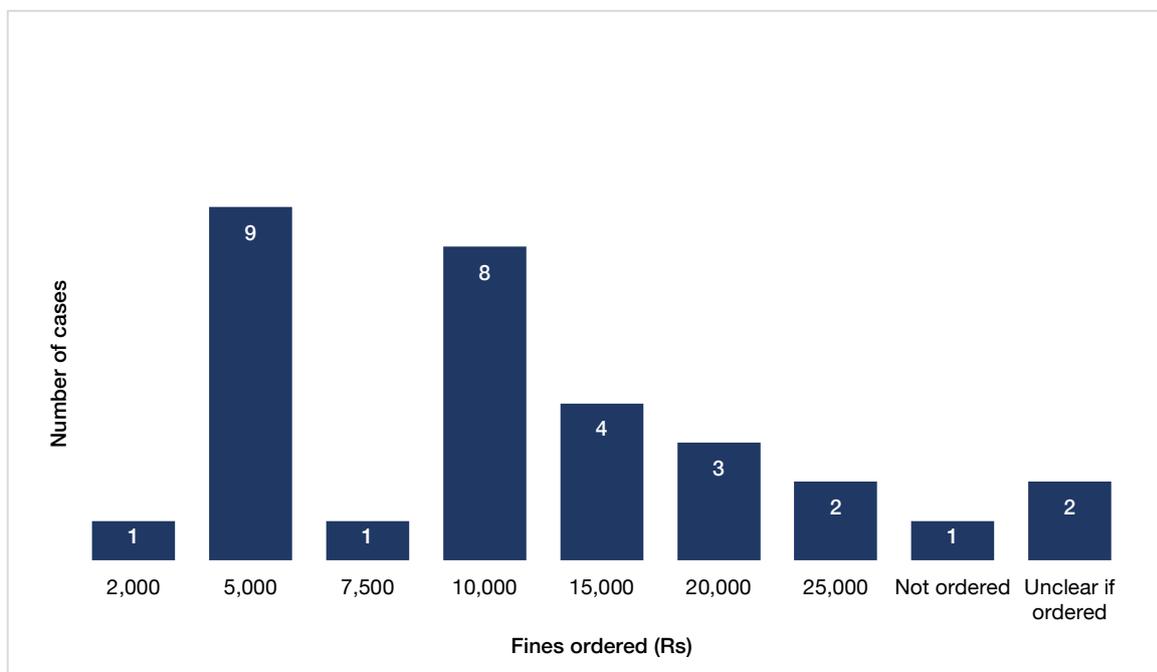


Figure 17 - Statutory rape - fines (31 cases)

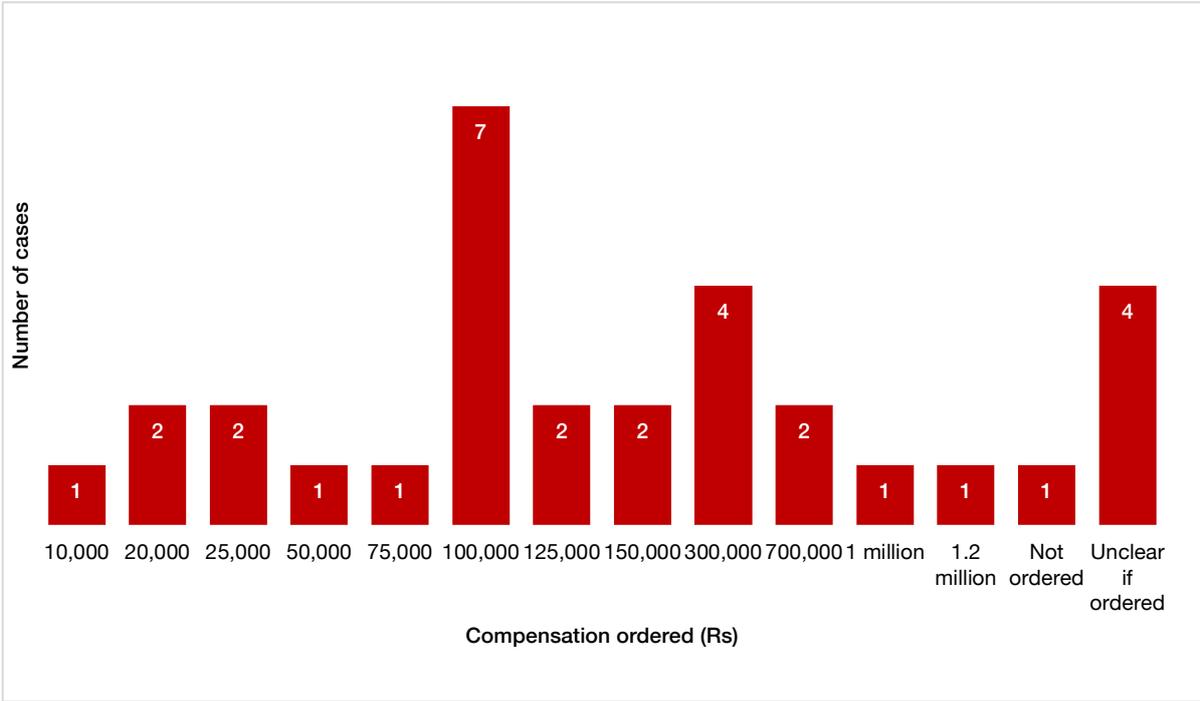


Figure 18 - Statutory rape - compensation (31 cases)

Sentences for gang rape – s 364(2)(g)

There were 11 cases of gang rape. The Penal Code provides that the sentencing range for gang rape is between 10-20 years rigorous imprisonment. In one case, the gang rape counts were acquitted at trial but the gravel sexual abuse counts resulted in convictions.

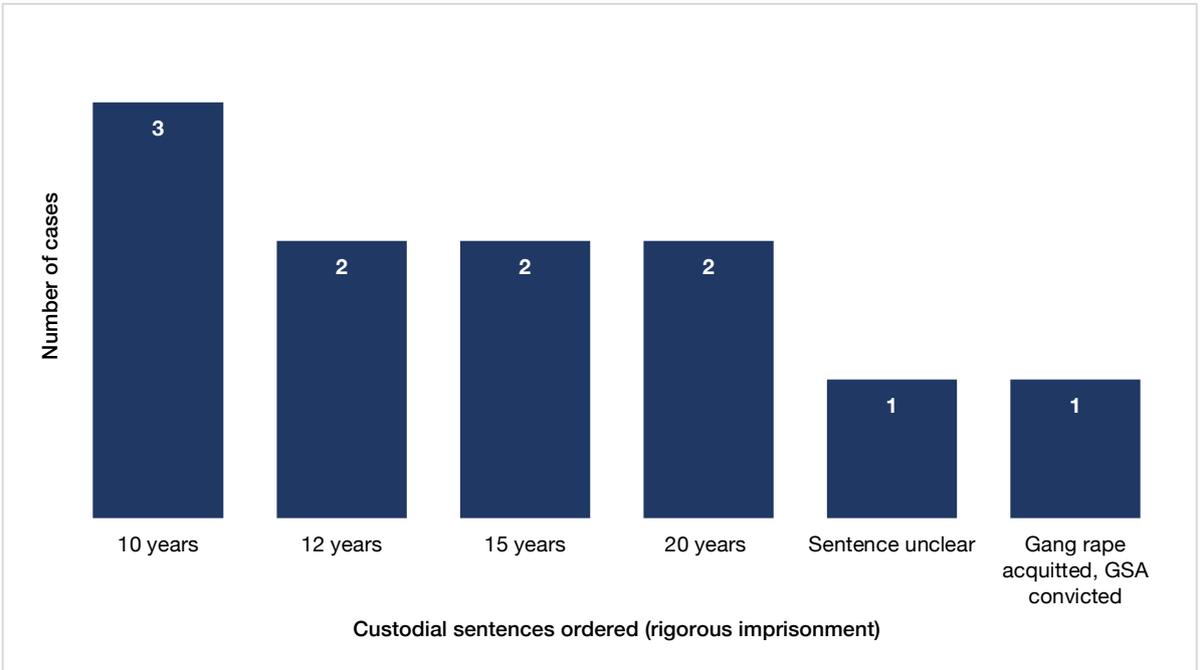


Figure 19 - Gang rape - custodial sentences (11 cases)



Figure 20 - Gang rape - fines (11 cases)

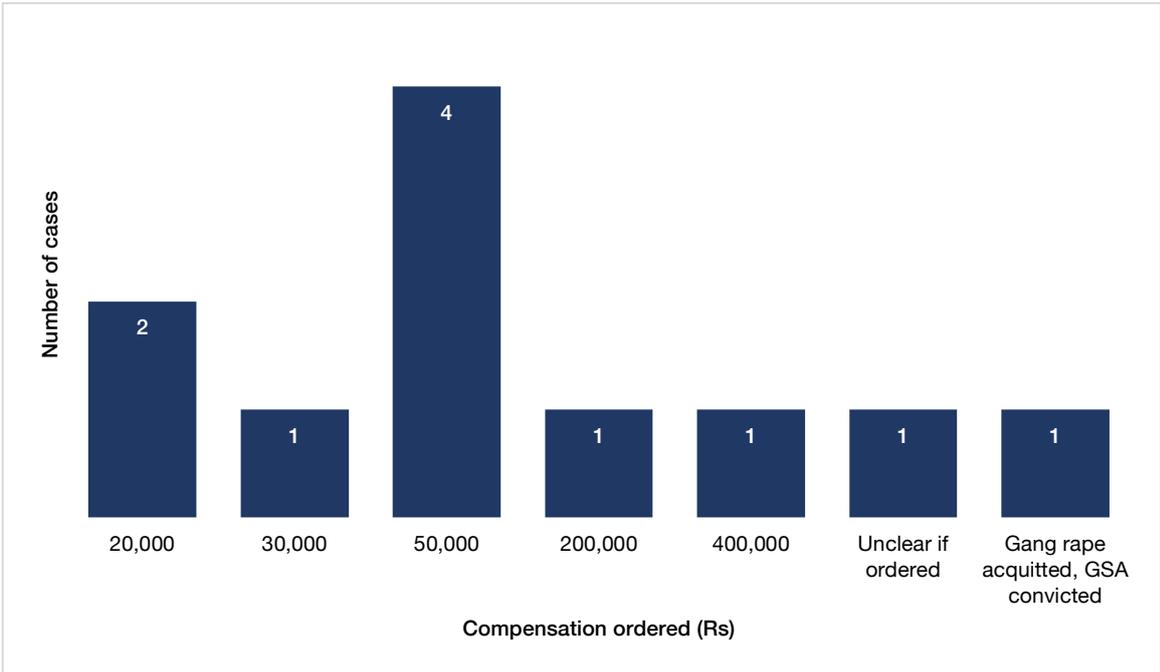


Figure 21 - Gang rape - compensation (11 cases)

Other aggravated circumstances – s 364(d),(e),(f)

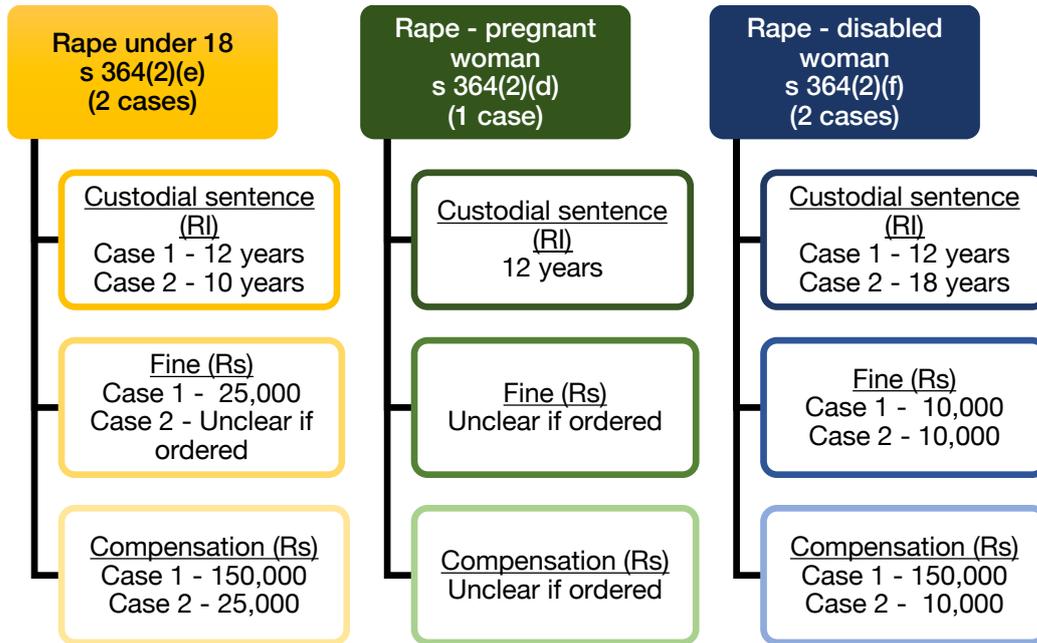


Figure 22 - Other aggravated rape

In the 121 cases, there were five cases that could be categorised as aggravated rape under s 364(2) of the Penal Code, other than gang rape and statutory rape (already addressed above). As these were smaller in number, they are represented together. To be clear, these five cases do not represent the rape cases where the statutory offence provision was unclear. These five cases explicitly provided the Penal Code provision in the appeal judgments (as in the two cases of rape of a disabled person, the one case of rape of a pregnant woman, and one of the cases of rape under 18), or the appeal judgment provided an approximate age to be able to deduce the offence category as rape under 18 (the second case of rape under 18).

***Trial court sentences – incest statutory rape– s 364(3)***

There were six cases of incest statutory rape (categorised as such, either because the specific Penal Code provision was provided, or there was sufficient surrounding information in the appeal judgment (such as where the victim was the biological daughter of the accused), enabling the inference to be made that the offence was incest statutory rape (s 364(3)).

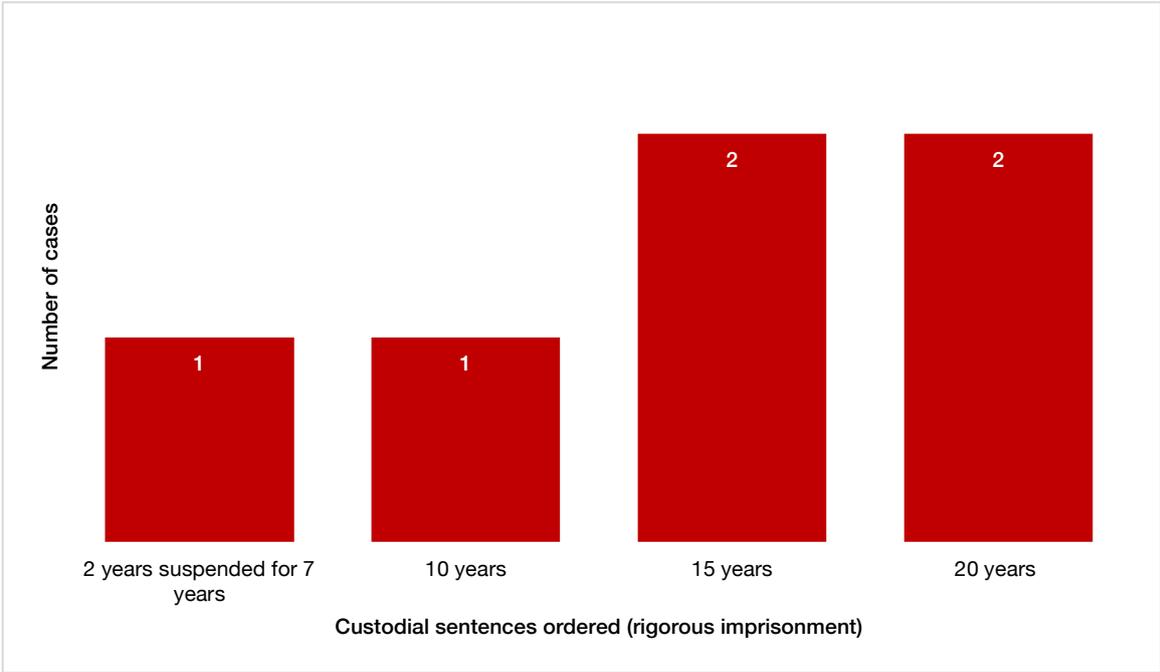


Figure 23 - Incest statutory rape - custodial sentences (6 cases)

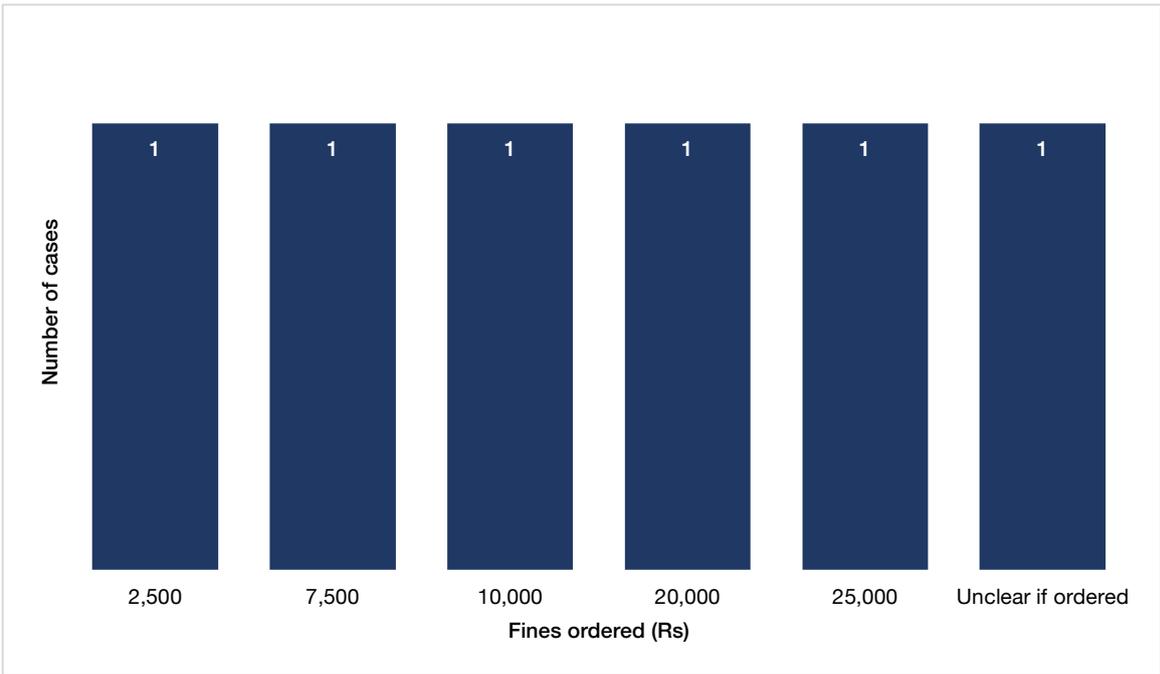


Figure 24 - Incest statutory rape - fines (6 cases)

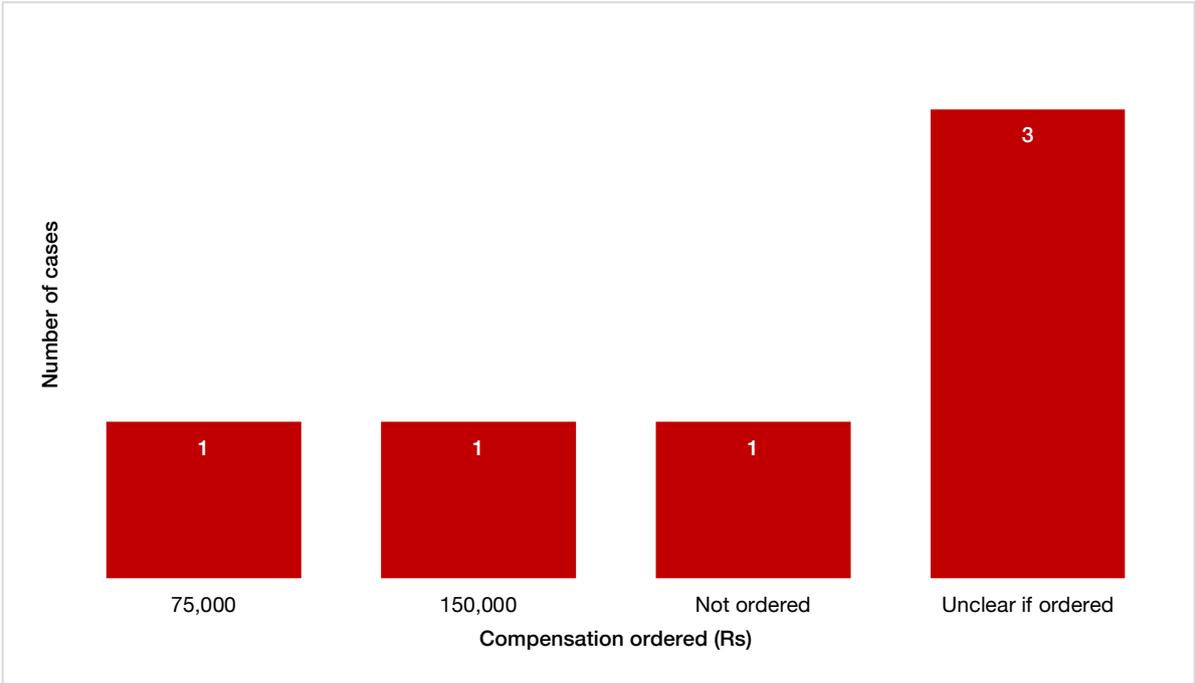


Figure 25 - Incest statutory rape – compensation (6 cases)

**Rape cases where provision is unclear**

There were 24 cases of rape where the specific offence was unclear. This means the appeal judgment described rape offending and used the word rape, but gave no further details to ascertain whether it was: (i) rape under s 364(1), (ii) rape under the categories of s 364(2)(a)-(e), (iii) statutory rape as the victim was under 16, or (iv) incest statutory rape under s 364(3).

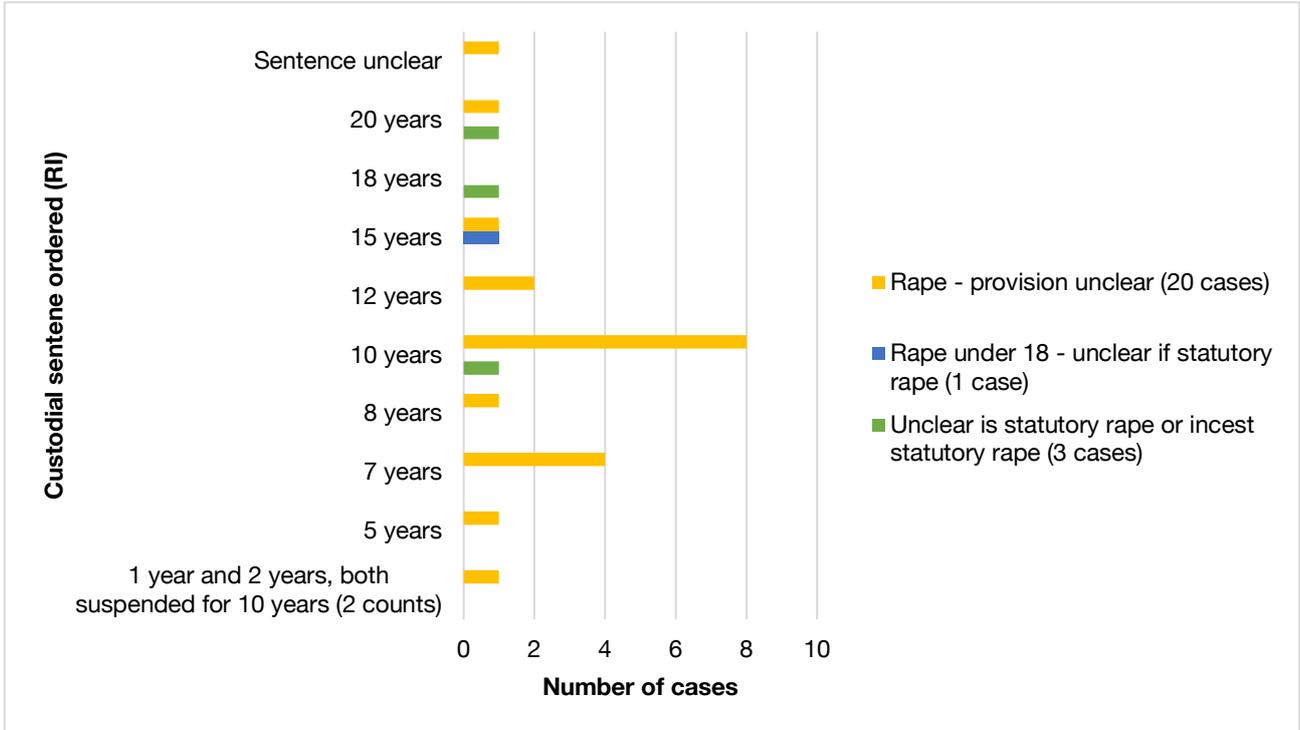


Figure 26 - Rape - unclear statutory provision - custodial sentences (24 cases)

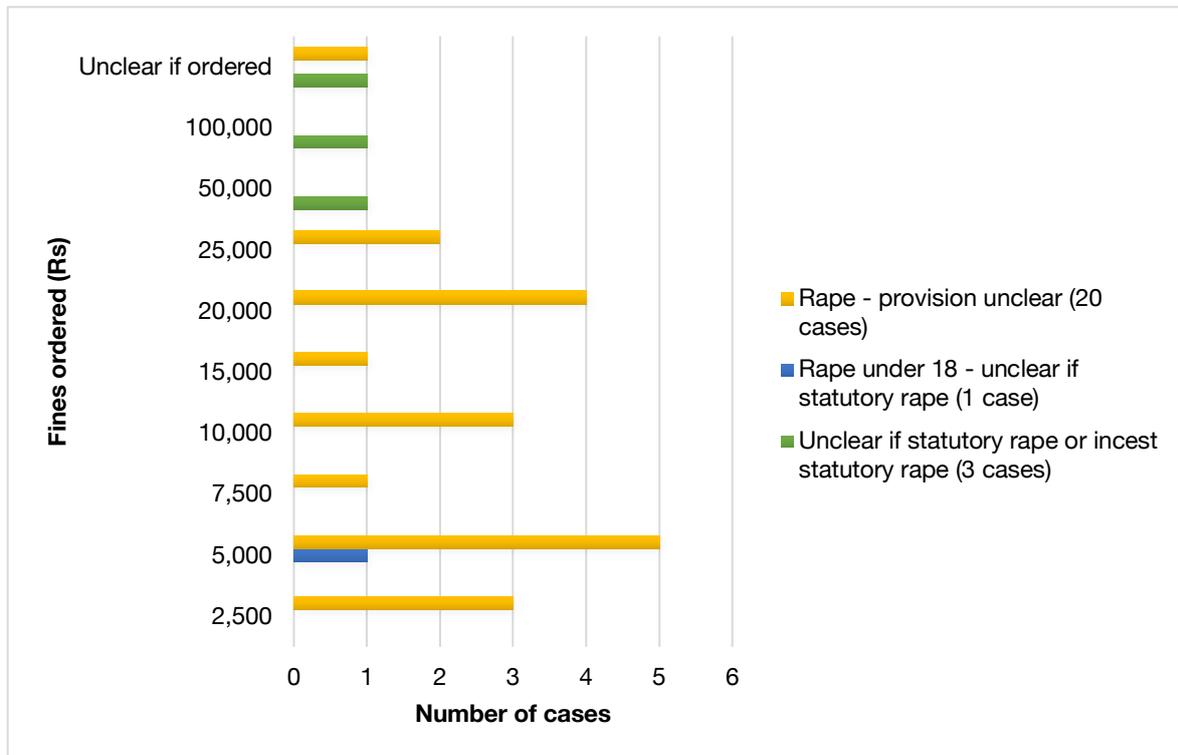


Figure 27 - Rape - unclear statutory provision - fines (24 cases)

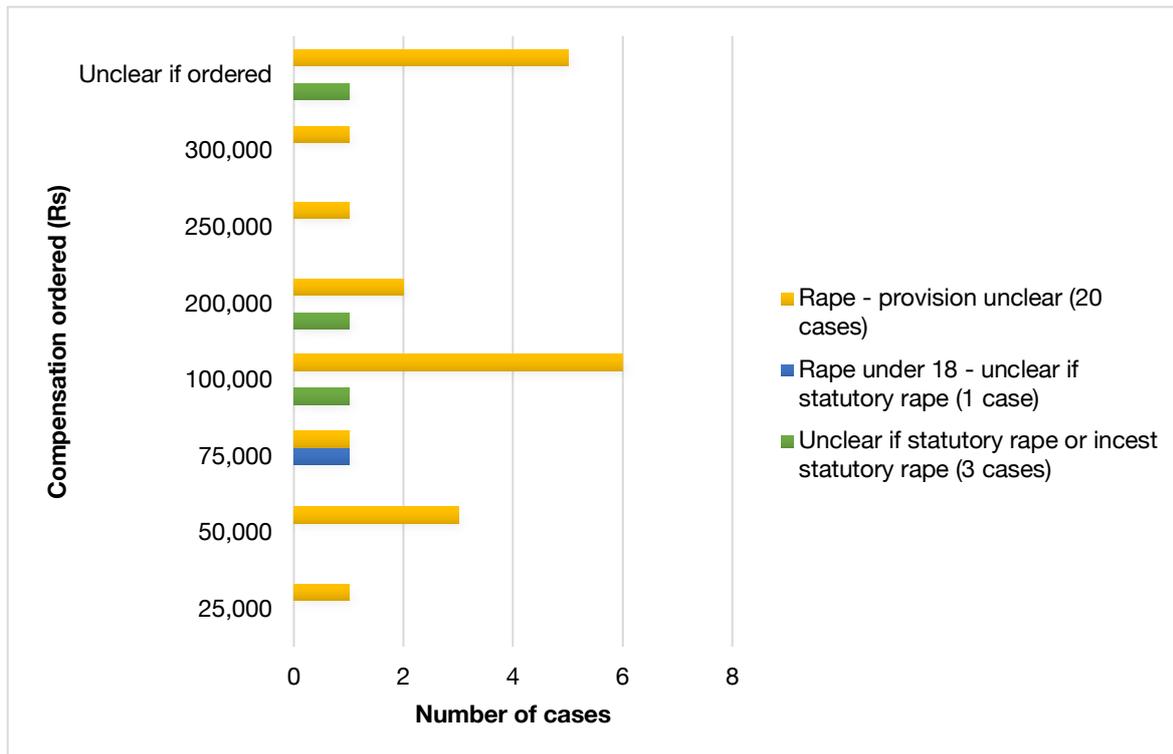


Figure 28 - Rape - unclear statutory provision - compensation (24 cases)

### Grave sexual abuse

There were 41 cases of grave sexual abuse in the dataset.

The punishment for grave sexual abuse falls into two broad categories:

- (1) Grave sexual abuse where the victim is 18 or over – with a custodial sentence range between 5-20 years rigorous imprisonment (s 365B(2)(a)).
- (2) Grave sexual abuse where the victim is under 18 – with a custodial sentence range between 7-20 years rigorous imprisonment (s 365B(2)(b)).

### *Grave sexual abuse 18 or over*

There were four cases of grave sexual abuse where the victim was 18 or over. In one case, the grave sexual abuse count was acquitted at trial but the rape count resulted in conviction.

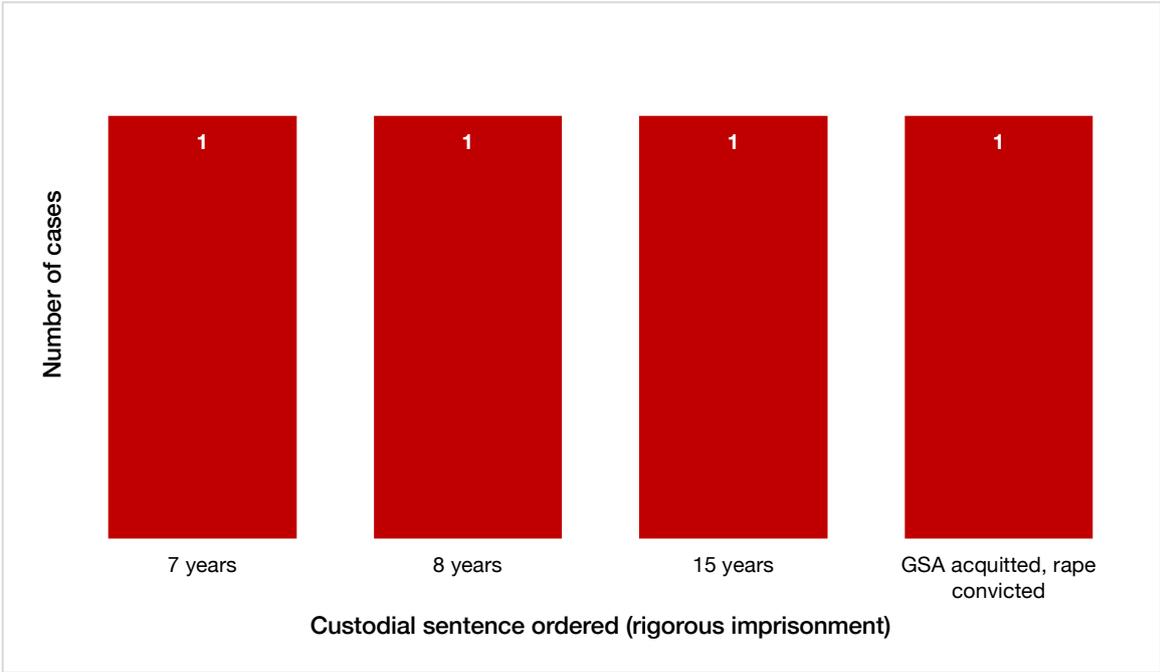


Figure 29 - Grave sexual abuse 18 or over - custodial sentences (4 cases)

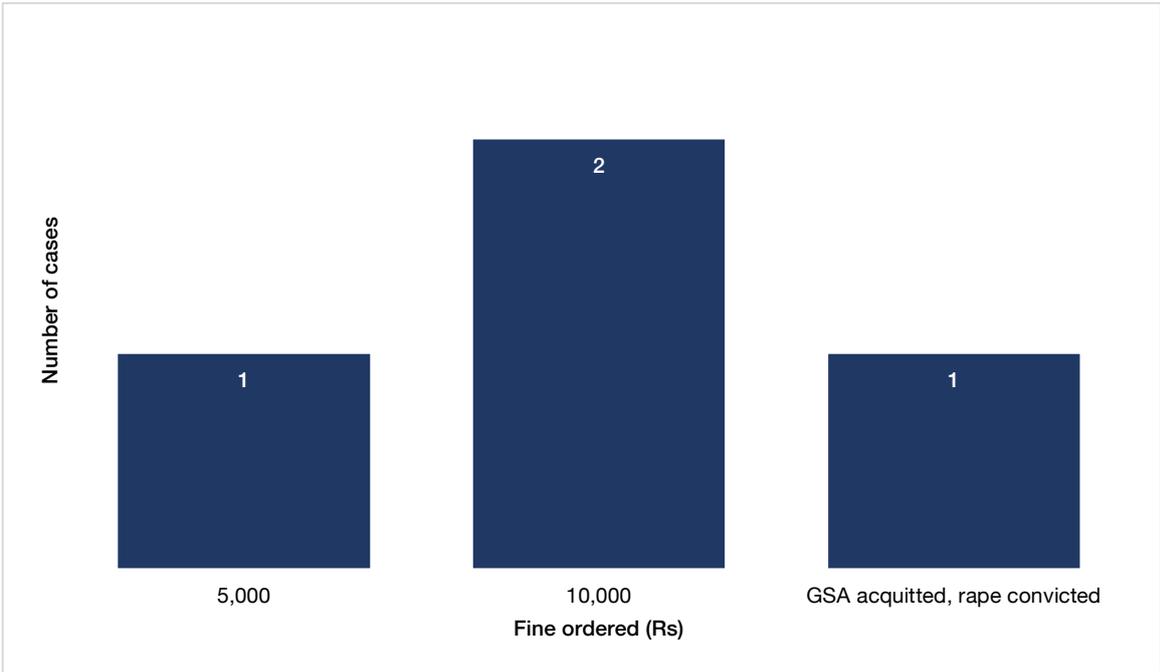


Figure 30 - Grave sexual abuse 18 or over - fines (4 cases)

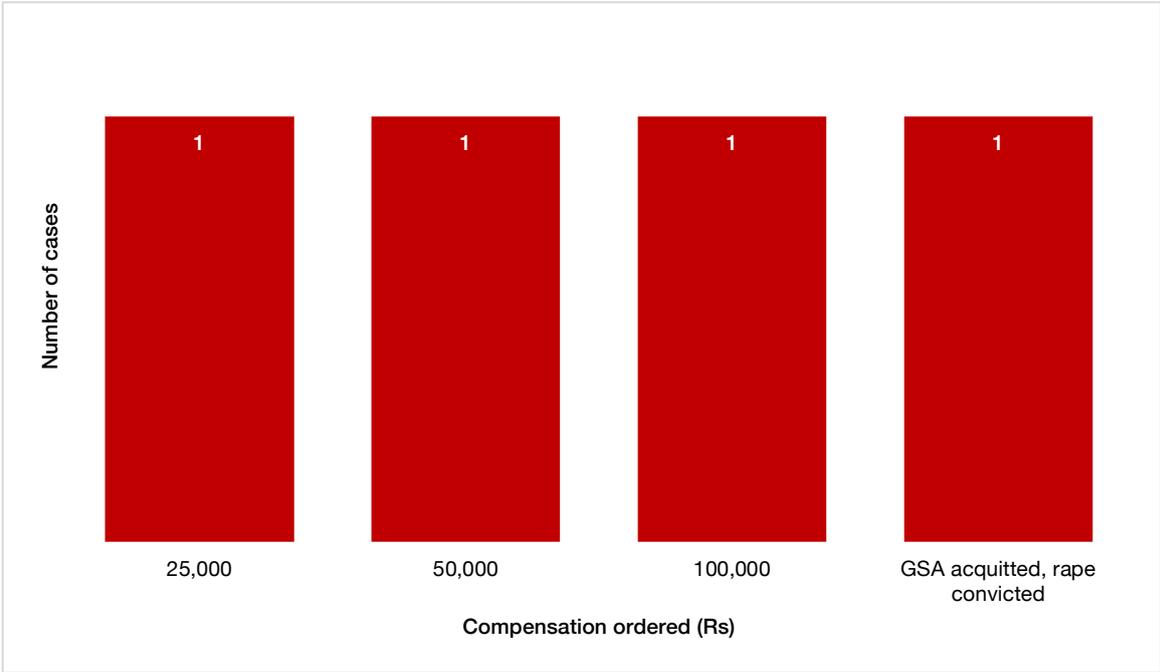


Figure 31 - Grave sexual abuse 18 or over - compensation (4 cases)

**Grave sexual abuse under 18**

There were 32 cases of grave sexual abuse under 18 (categorised as such either because the specific Penal Code provision was provided, or there was sufficient surrounding information in the appeal judgment (such as the age of the victim) enabling the inference to be made that the offence was grave sexual abuse under 18 (s 365B(2)(b)). Three cases involved combination offences – grave sexual abuse and rape. In one case, the grave sexual abuse count was acquitted at trial but the rape count resulted in conviction.

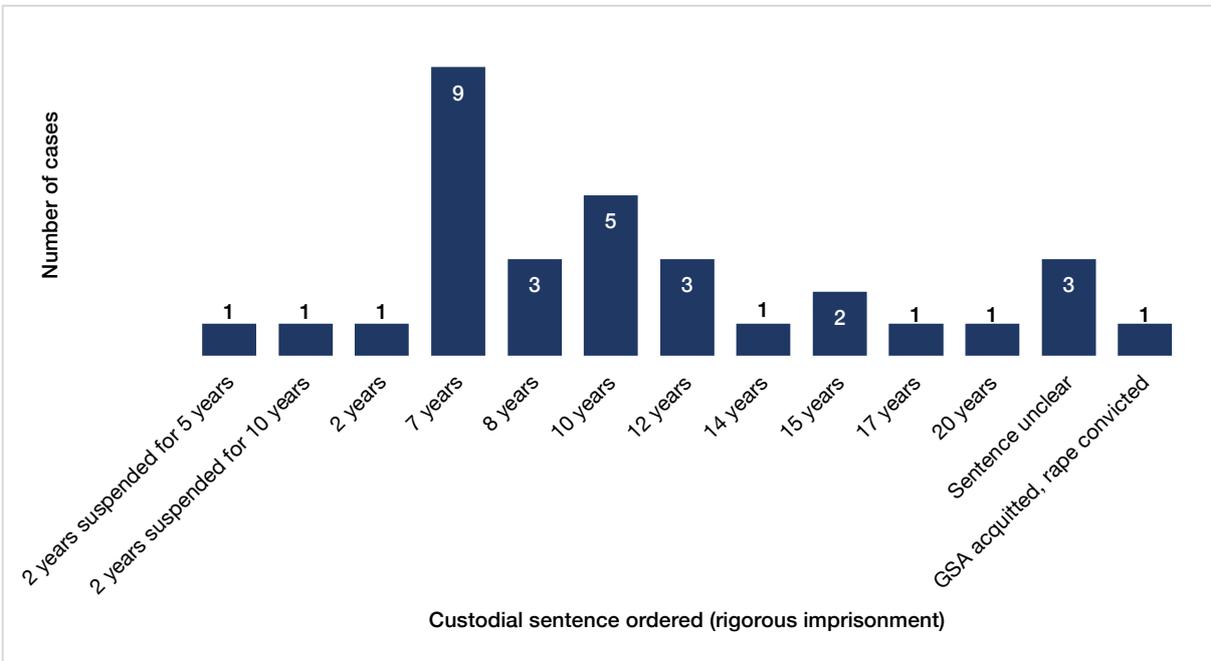


Figure 32 - Grave sexual abuse under 18 - custodial sentences (32 cases)

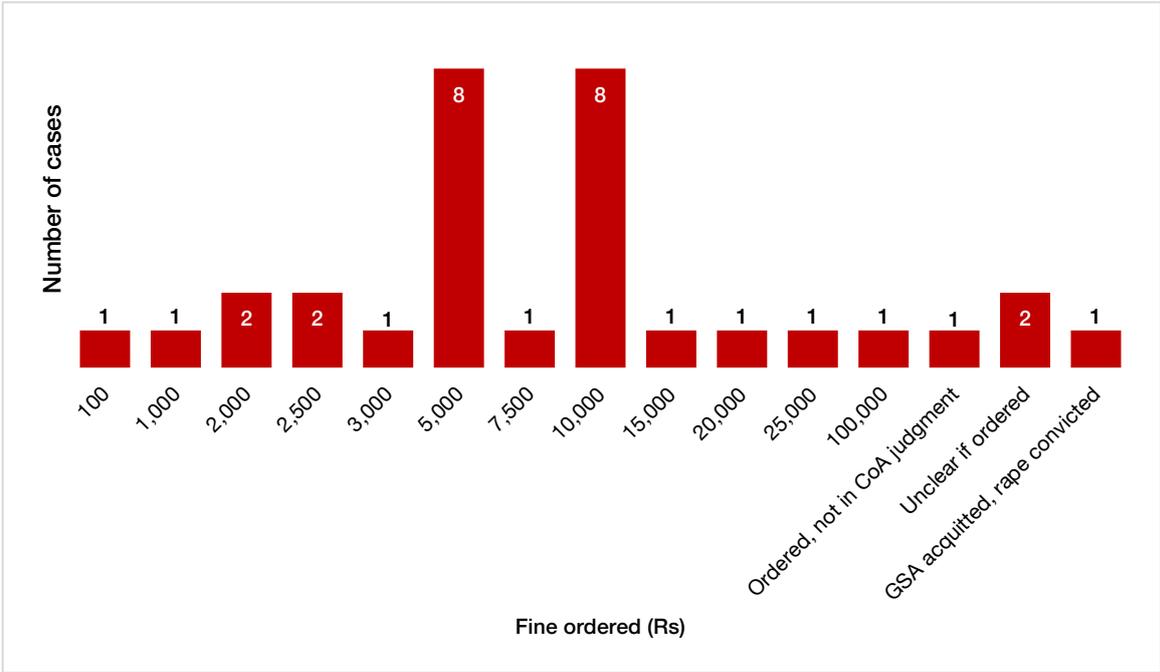


Figure 33 - Grave sexual abuse under 18 - fines (32 cases)

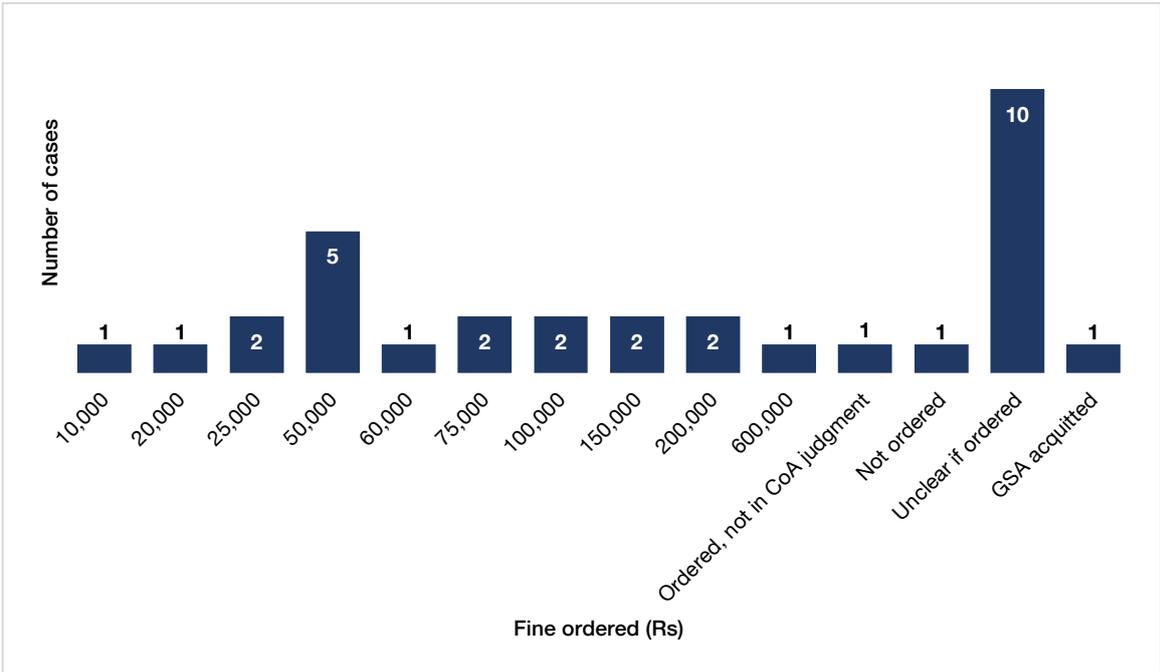


Figure 34 - Graves sexual abuse under 18 - compensation (32 cases)

**Grave sexual abuse – provision unclear**

There were five cases of grave sexual abuse where the specific Penal Code provision was not clear in the appeal judgment.

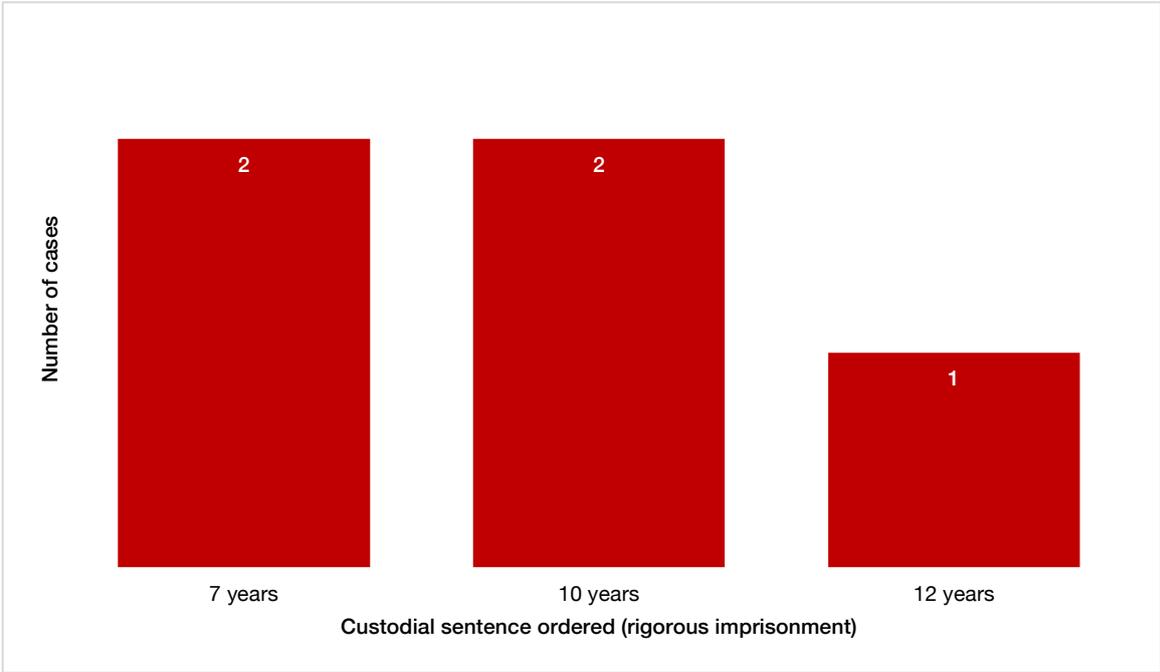


Figure 35 - Grave sexual abuse - unclear statutory provision - custodial sentences (5 cases)

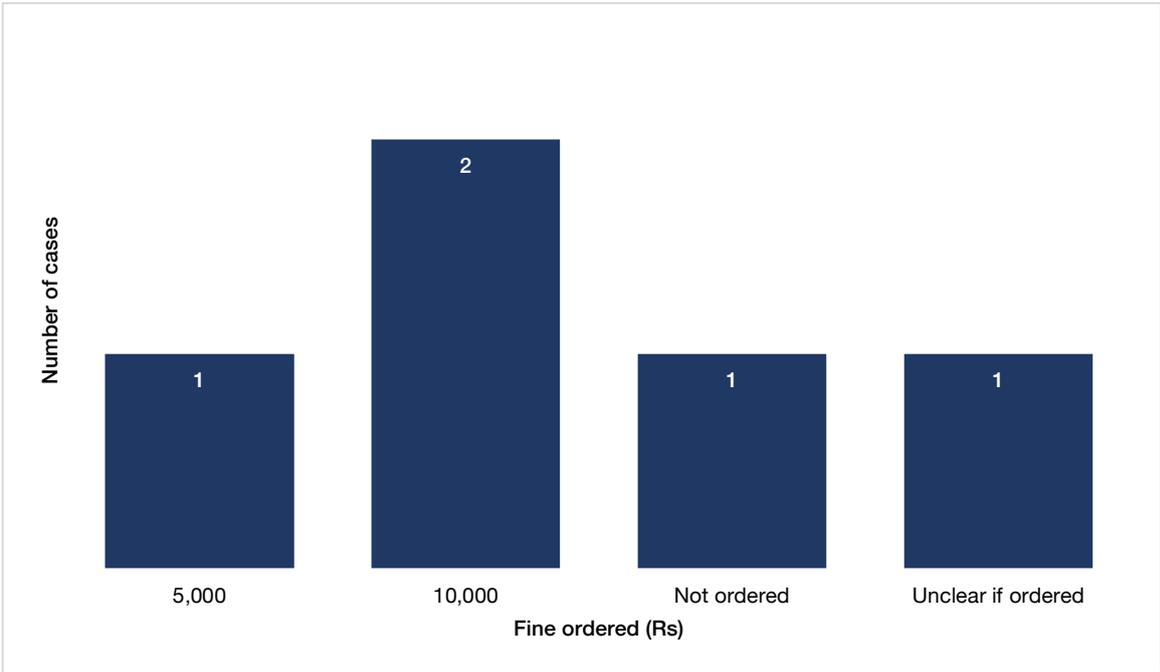


Figure 36 - Grave sexual abuse - unclear statutory provision - fines (32 cases)

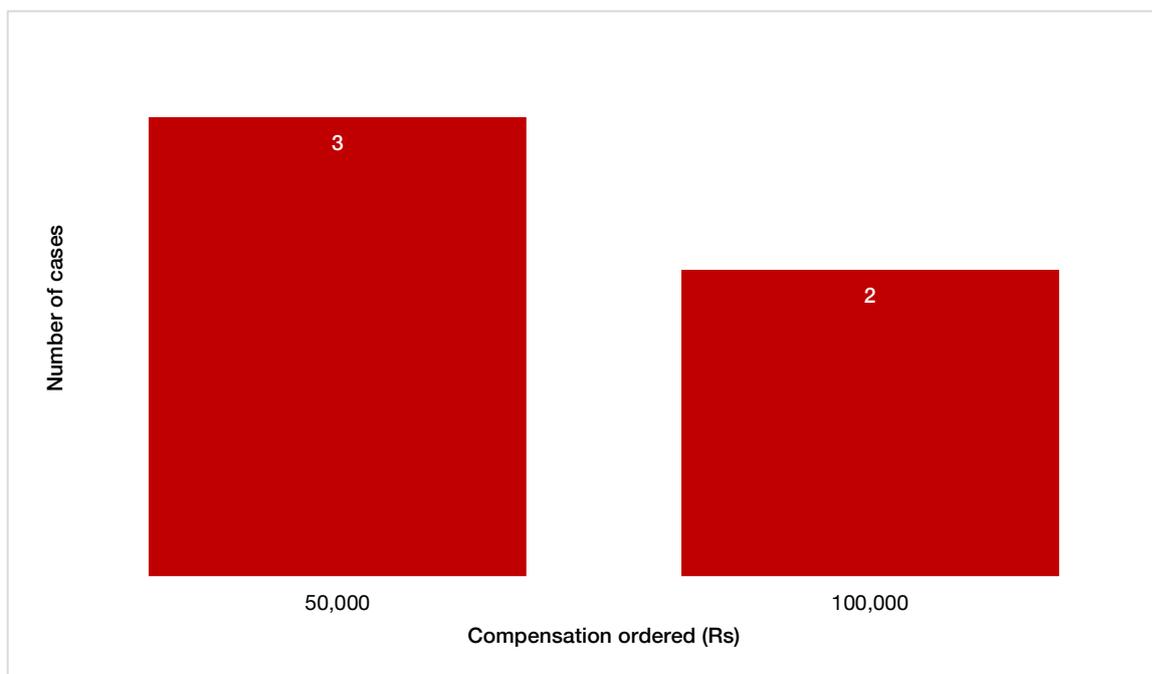


Figure 37 - Grave sexual abuse - unclear statutory provision - compensation (5 cases)

### Compensation ordered at trial

In 27 of the 121 cases, the appeal judgment did not give the trial court sentence on compensation. It is not clear whether this omission is because there was no compensation ordered in those cases, or because the appeal judgment did not record it.<sup>47</sup>

In another case, the appeal judgment affirmed the trial court's order of compensation but did not state the amount of the compensation ordered. In three cases, the trial court did not order compensation but, on appeal, the Court of Appeal did. In another case, there was no compensation, at trial nor upon appeal.

The tabulated information in Chapter 2 – Part 2 illustrates the disparity in compensation ordered by trial courts. For example, in the two cases of rape against a disabled woman (s 364(2)(f)), one trial court ordered compensation of Rs 10,000 and the other ordered compensation of Rs150,000. In the five cases of rape under s 364(1), the compensation ordered ranged between Rs 25,000 and Rs 200,000. In the 31 cases of statutory rape (s 364(2)(e)), the compensation ordered ranged between Rs 10,000 and Rs 1,200,000. In the 11 cases of gang rape (s 364(2)(g)), the compensation ordered ranged between Rs 20,000 and Rs 400,000. In the 24 rape cases where the statutory provision was unclear, the compensation ordered ranged between Rs 25,000 and Rs 300,000. In the 32 cases of grave sexual abuse under 18, the compensation ordered ranged between Rs 10,000 and Rs 600,000.

The sentencing notes of the sentencing judges would be required to further analyse their reasoning in the construction of the sentence, and what factors led them to arrive at the compensation figure ordered.

Figure 38 illustrates the compensation ordered in the 91 cases where compensation was ordered at trial and where the amount of compensation ordered was explicitly provided in the appeal judgment.<sup>48</sup> There were 60 cases of rape, 27 cases of grave sexual abuse, two cases of combination rape and grave sexual abuse, and in one case, the offence was not clear.

<sup>47</sup> In one case, the compensation for the rape count was given but not the grave sexual abuse count. So there is one case overlap in the figures of 27 (compensation unclear) and 91 (compensation ordered).

<sup>48</sup> In one case, the appeal affirmed the compensation ordered at trial, however, did not provide the amount of compensation that was ordered.

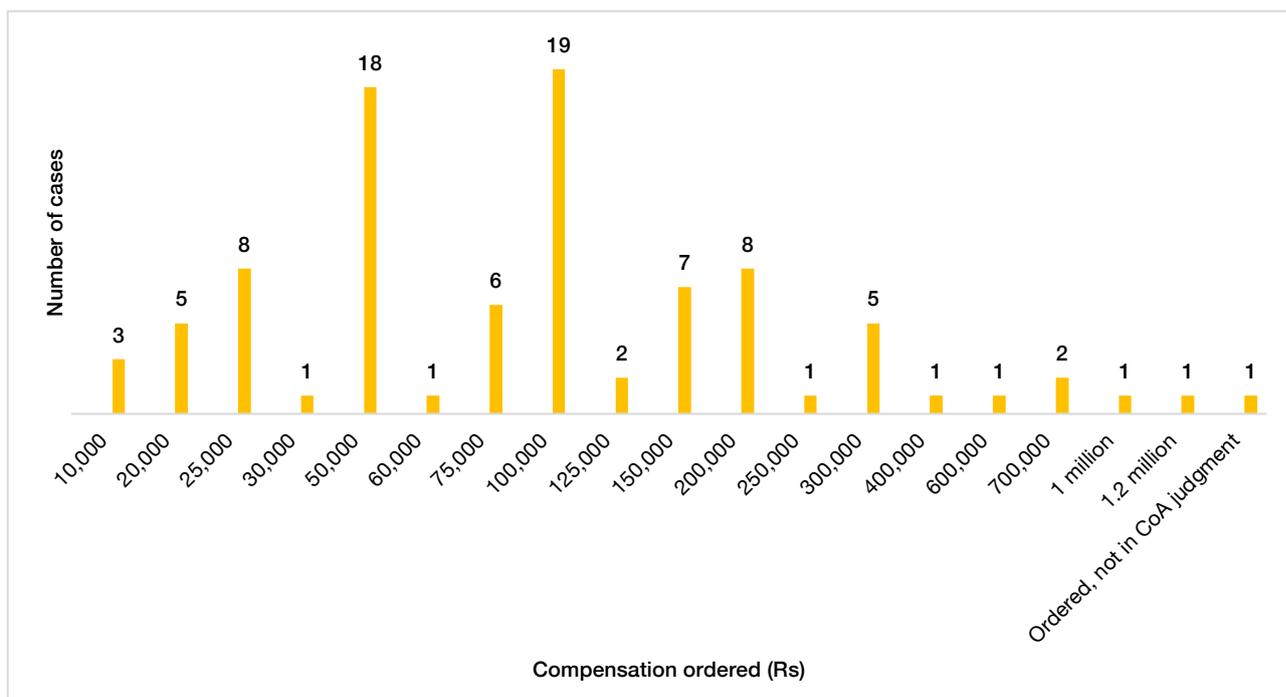


Figure 38 - Compensation ordered at trial (91 cases)

### Default sentences for compensation at trial

The order of compensation also included (for most of the compensation orders) default sentences for non-payment. Figure 39 illustrates that, in the 91<sup>49</sup> cases where compensation was ordered at trial, there was significant variance in the default sentences ordered for non-payment. The section of Figure 39 that is framed by a thick black box indicates the default sentences that exceeded the 2 years permissible by law (discussed in Chapter 3).

<sup>49</sup> In 1 case, the compensation for the rape count was given but not the grave sexual abuse count. So there is 1 case overlap in the figures of 27 (compensation unclear) and 91 (compensation ordered).

Compensation ordered (Rs)		Default sentence ordered for non-payment of compensation																	
		# – Unclear if default sentence ordered at trial ## – Default sentence ordered at trial, amount absent in appeal judgment										SI – Simple imprisonment RI – Rigorous imprisonment * – Did not specify whether SI or RI							
		#	##	6 months SI	6 months RI	6 months *	9 months RI	1 year SI	1 year RI	1 year*	2 years SI	2 years RI	2 years *	2.5 years SI	3 years SI	3 years *	4 years RI	4 years *	5 years SI
10,000							1		1	1									
20,000			1				2	1			1								
25,000		1	1	1					1		2		1		1				
30,000										1									
50,000		1	2		2		6		3	1	2					1			
60,000	1																		
75,000	1					1			1		1			1				1	
100,000	3				1		1	5		2	7								
125,000		1						1											
150,000	1									1	2	1		1				1	
200,000	1						1			1	2	1				2			
250,000															1				
300,000	2									1	1							1	
400,000	1																		
600,000										1									
700,000										2									
1 million											1								
1.2 million																		1	

Figure 39 - Default sentences for non-payment of compensation ordered at trial

### Compensation orders varied by the Court of Appeal

In three cases where compensation was ordered at trial, upon appeal, the Court of Appeal increased the compensation amount.

	Trial order of compensation		Appellate order of compensation	
	Compensation (Rs)	Default sentence <sup>50</sup>	Compensation (Rs)	Default sentence <sup>51</sup>
Case 1 <sup>52</sup>	25,000	3 years*	100,000	2 years*
Case 2 <sup>53</sup>	50,000	2 years RI	100,000	2 years RI
Case 3 <sup>54</sup>	20,000	1 year SI	50,000	1 year SI

Figure 40 - Compensation increased by Court of Appeal

In 11 cases where compensation was ordered at trial, upon appeal, the Court of Appeal reduced either the compensation amount or the default sentence amount.

	Trial order of compensation		Appellate order of compensation	
	Compensation (Rs)	Default sentence <sup>55</sup>	Compensation (Rs)	Default sentence <sup>56</sup>
Case 1 <sup>57</sup>	150,000	5 years SI	150,000	2 years*
Case 2 <sup>58</sup>	300,00	2 years SI	200,000	2 years SI
Case 3 <sup>59</sup>	700,000	2 years SI	300,000	10 months SI
Case 4 <sup>60</sup>	75,000	5 years SI	75,000	6 months SI
Case 5 <sup>61</sup>	300,000	4 years*	300,000	2 years*
Case 6 <sup>62</sup>	1.2 million	5 years SI	100,000	1 year SI
Case 7 <sup>63</sup>	700,000	2 years SI	100,000	1 year SI
Case 8 <sup>64</sup>	50,000	4 years RI	50,000	2 years SI
Case 9 <sup>65</sup>	100,000	2 years RI	Set aside	/
Case 10 <sup>66</sup>	600,000	2 years SI	100,000	2 years SI
Case 11 <sup>67</sup>	300,000	2 years RI	100,000	1 year*

Figure 41 - Compensation or default sentences for non-payment reduced by Court of Appeal

<sup>50</sup> SI – Simple imprisonment. RI – Rigorous imprisonment. \* – Did not specify whether SI or RI.

<sup>51</sup> SI – Simple imprisonment. RI – Rigorous imprisonment. \* – Did not specify whether SI or RI.

<sup>52</sup> *Kusumsiri v AG CA 147/2007*, 6 December 2012.

<sup>53</sup> *Ariyadasa v AG CA 219/2007*, 12 November 2013.

<sup>54</sup> *Ambrose v AG 328/2012*, 21 July 2016.

<sup>55</sup> SI – Simple imprisonment. RI – Rigorous imprisonment. \* – Did not specify whether SI or RI.

<sup>56</sup> SI – Simple imprisonment. RI – Rigorous imprisonment. \* – Did not specify whether SI or RI.

<sup>57</sup> *Ajith v AG CA 127/2009*, 28 February 2013.

<sup>58</sup> *Abeyasinghe v AG CA 90/2011*, 15 May 2015.

<sup>59</sup> *Galahitiya v AG CA 262/2012*, 4 June 2014.

<sup>60</sup> *Jamis v AG CA 318/2006*, 7 March 2014.

<sup>61</sup> *Karunaratne (alias Danapala) v AG CA 246/2012*, 6 February 2014.

<sup>62</sup> *Balangne v AG CA 110/2014*, 29 May 2015.

<sup>63</sup> *Chandramohan v AG CA 111/2004*, 4 August 2015

<sup>64</sup> *Sinnaiah v AG CA 58/2011*, 8 May 2015.

<sup>65</sup> *Galoluwage v AG CA 218/11*, 2 December 2013.

<sup>66</sup> *Ekmon v AG CA 190/2012*, 10 October 2013.

<sup>67</sup> *Appuhamy v AG CA 108/2012*, 30 January 2014.

## Suspended sentences

Out of the 121 trial sentences, seven involved suspended sentences.<sup>68</sup> This is despite all seven cases relating to offences where the Penal Code prescribed a minimum mandatory custodial sentence – for rape, statutory rape, incest statutory rape, and grave sexual abuse under 18. All seven cases also involved guilty pleas. In the five cases where the appeal/revision was initiated by the State, upon appeal, all five cases resulted in the sentences being increased to custodial sentences (actual jail time). The sentences at trial and after appeal are addressed earlier in Figure 6. In the two appeals/revisions initiated by the accused, one case was dismissed and in the other case the appeal was withdrawn and the sentence was sought to be implemented from the conviction date (which was granted). Therefore, in both cases, upon appeal, the original suspended sentences remained. In three other cases, the accused received custodial sentences at trial. However, upon appeal, the sentences were varied and suspended sentences were instead imposed by the Court of Appeal. In only one was a guilty plea involved. These three cases are discussed below.

In *De Silva v AG*,<sup>69</sup> the accused was convicted of two counts of statutory rape (and one count of abduction) and received a sentence of 20 years rigorous imprisonment for each of the two statutory rape counts.<sup>70</sup> Upon appeal, the Court of Appeal set aside the custodial parts of the sentences for all counts and substituted count 2 (the first statutory rape count) with 2 years rigorous imprisonment suspended for 10 years. The case was a ‘love affair’ case. The victim and accused were having a relationship for some time before the incident. The victim willingly went to live with the accused and refused to return when her parents attempted to take her back to her parental home. Following the incident, the victim was willing to marry the accused but her parents objected. The facts were admitted by the victim. The Court found that the trial judge had:

[...] failed to give due consideration to the difference between a brutal rape committed on a child using force and having a sexual intercourse with his lover with consent. In the first said situation the rapist must be punished severely, but in a latter situation can the Court act in the same way?

Therefore, despite the mandatory minimum sentence for statutory rape, the Court relied on a Supreme Court case (SC Reference No 03/2008) and held that the circumstances in which the offence was committed needed the imposition of a non-custodial sentence, and the “Petitioner as well as the prosecutrix are happily married and having their own family lives”. It is not clear whether the last sentence means the victim and accused are married to each other, or to separate people. This case raises a few issues. Firstly, to go from the maximum custodial sentence permissible for any sexual violence offence to no jail time is an extraordinary change in sentence. Despite a ‘love affair’ scenario in the four page appeal judgment, queries arise about the reasoning of the sentencing judge in imposing the absolute maximum custodial sentence. Secondly, it raises queries about prosecutorial policy in pursuing a prosecution such as this one, given that not all offences are prosecuted.

*Riswan v AG*<sup>71</sup> was another ‘love affair’ case where the accused pleaded guilty to grave sexual abuse under 18 and was sentenced to 7 years rigorous imprisonment.<sup>72</sup> Upon appeal, the Court of Appeal set aside the custodial sentence and instead imposed 2 years rigorous imprisonment suspended for 10 years. The reasoning of the Court of Appeal is unclear. The trial began in May 2006. The accused was present at the trial from the beginning until March 2009, after which point he went overseas. He was produced in the High Court again in August 2011. In December 2011, he pleaded guilty and the conviction was entered

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<sup>68</sup> A suspended sentence is a custodial sentence period that is ‘suspended’ or not implemented for an operative period of time. In that operative period, the accused is not in prison, unless a further offence is committed. If during the operative period the accused commits an offence, the custodial sentence ordered would be implemented.

<sup>69</sup> *De Silva v AG* CA PHC APN 52/2015, 7 September 2016.

<sup>70</sup> He also received a fine of Rs 10,000 and compensation of Rs 300,000 for each of the 2 statutory rape counts, and 7 years rigorous imprisonment and a fine of Rs 10,000 for the abduction count.

<sup>71</sup> *Riswan v AG* CA 39/2012, 25 November 2013.

<sup>72</sup> He also received a fine of Rs 10,000 with a default sentence of 6 months imprisonment and compensation of Rs 150,000 with a default sentence of 2 years imprisonment.

against him. In February 2012, “punishment was imposed on him”. From February 2012 to February 2013, the accused was in prison as a result of the punishment imposed. In February 2013, the accused was released on bail. The appeal judgment reads that during the “love affair”, the accused had kept his male organ between the thighs of the victim on several occasions. The victim’s parents had got to know about the incidents and requested the accused marry the victim. This request was refused by the parents of the accused. Next, the parents and sisters of the accused had assaulted the victim, resulting in the filing of a separate case. The judgment reads:

It appears that the accused-appellant had gone aboard during the pendency of the trial. But he has gone aboard after 4 1/2 years of trial in the original Court.

It is not clear why the Court is emphasising that the accused only went overseas after 4.5 years of the trial. It is also not clear where the period 4.5 years is from, as the chronology in the appeal judgment puts the trial beginning in May 2006 and “Infact he had been present as the accused in this case in the trial Court till 25/3/2009. Thereafter he has gone aboard.” The appeal judgment does not specifically state when (which month) the accused went overseas. It is not clear from the appeal judgment whether the reason the accused was next produced in the High Court was August 2011 was because he absconded. Based on the information in the judgment, the accused served only 1 year of his 7 year term. Yet the Court said:

Grave sexual abuse had been committed by the accused-appellant when there was a love affair between the girl and the accused-appellant. The girl was at that time 15 ½ years old. The accused at the time of the incident was a 23 year old boy. The complaint against the accused-appellant has been made nearly after two years of the incident. When we consider all these matters we feel that sending the accused-appellant again to the custody of the prison of the officers is not appropriate. We feel that the Justice would be done if he is given a suspended sentence.

In *Galoluwage v AG*,<sup>73</sup> the accused was convicted of grave sexual abuse (the specific provision was unclear from the appeal judgment) and sentenced to 7 years rigorous imprisonment.<sup>74</sup> Upon appeal, the Court of Appeal varied the sentence to 2 years rigorous imprisonment suspended for 15 years.<sup>75</sup> The appeal judgment reads:

According to the facts of this case Senanayake Arachchilage Sashika Maduwanthi is a prostitute. She has, at page 80, admitted that she was a prostitute. She has admitted to the doctor who examined her that she had had sexual intercourse with over hundred people. When we consider these matters, we are of the opinion that the sentence imposed by the learned trial Judge is highly excessive.

The extract above was the extent of the Court’s reasoning. The Court relied on SC Reference No 03/2008 to impose a non-custodial sentence.

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<sup>73</sup> *Galoluwage v AG* CA 218/11, 2 December 2013.

<sup>74</sup> He also received a fine of Rs 5,000 with a default sentence of 1 year rigorous imprisonment and compensation of Rs 100,000 with a default sentence of 2 years rigorous imprisonment.

<sup>75</sup> The fine and compensation were set aside.

## Part 3 – Appellate Decisions – Resentencing

Resentencing is when part of the trial court decision stands (the conviction remains) and part of the trial court decision (the sentence imposed for punishment) is varied in some manner. The original sentence is either increased or reduced from what was ordered by the trial sentencing judge. There were 36 cases where the appellate outcome resulted in resentencing – where the original sentence of the trial court was varied in some manner by the Court of Appeal. Figure 42 reflects the resentencing decisions of the Court of Appeal in these 36 cases.

Nine cases involved a partial increase of one or more aspect of the original sentence. Nineteen cases involved a partial reduction of one or more aspect of the original sentence. Three cases involved a reduction of the entire original sentence. Three cases involved both an increase and reduction of different aspects of the original sentence. In all three cases, the increase related to the compensation ordered, and the reduction related to the custodial sentence and/or fine ordered. In two cases, the original sentence was varied, however, it was not clear how the original sentence was varied (because the trial sentence was not given in the appeal judgment).

Figure 42 - Resentenced cases on appeal - trial and appeal sentences

**Key**

- RI – Rigorous imprisonment.
- SI – Simple imprisonment.
- DS – Default sentence.
- \* – Unclear whether the default sentence was simple or rigorous imprisonment.
- Blue – Resentencing resulted in a reduction of the original sentence.
- Yellow – Resentencing resulted in an increase of the original sentence.
- Unchanged – The original trial sentence was not altered by the Court of Appeal.
- Where there were multiple counts, only the sexual violence counts are reflected in the table.

Case	Offence	Trial court sentence			Appellate outcome			Comments	
		Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)	Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)		
1	<i>Kusumsiri v AG</i> CA 147/2007	Grave sexual abuse under 18 (s 365B(2)(b)) 2 counts	Each count, 14 years. Serve consecutively	Each count, 2,000. DS 1 year*	Each count, 25,000. DS 3 years*	Each count, 10 years each. Serve concurrently	Each count, 2,000. DS 3 months*	Each count, 100,000. DS 2 years*	Accused sought leave to appeal to the Supreme Court. Leave to appeal was denied.
2	<i>Ajith v AG</i> CA 127/2009	Statutory rape (s 364(2)(e))	15 years	10,000. DS 3 years SI	150,000. DS 5 years SI	Unchanged	10,000. DS 6 months*	150,000. DS 2 years*	
3	<i>Samankumara et al v AG</i> CA 20 A-B/2010	Gang rape (s 364(2)(g))	All 5 accused, 15 years	All 5 accused, 5,000. DS 1 year*	All 5 accused, 20,000. DS 2 years*	3, 4, 5 accused appellants, 10 years	Unchanged	Unchanged	
4	<i>AG v Perera</i> CA (PHC) APN 147/12	Statutory rape (s 364(2)(e)) Counts 2, 4, 6	Each count, 1 year suspended for 10 years each. Serve concurrently and to be over within 2 years	Each count, 10,000. DS 6 months RI	125,000. DS 1 year RI (unclear if each count)	Each count, 10 years. Serve concurrently	Unchanged	Unchanged	Accused sought leave to appeal to the Supreme Court. A decision on leave to appeal is pending.

Case		Offence	Trial court sentence			Appellate outcome			Comments
			Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)	Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)	
5	<i>Kaleel v AG</i> CA 285/2008	Grave sexual abuse under 18 (s 365B(2)(b))	Unclear (suggests more than 10 years)	5,000 (DS ordered by trial judge, amount of DS not given in appeal judgment)	50,000 (DS ordered by trial judge, amount of DS not given in appeal judgment)	10 years	Unchanged	Unchanged	Unclear if sentence reduced to 10 years from something higher.
6	<i>Ariyadasa v AG</i> CA 219/2007	Grave sexual abuse under 18 (s 365B(2)(b))	12 years	10,000. DS 6 months*	50,000. DS 2 years RI	Unchanged	Unchanged	100,000. DS 2 years RI	
7	<i>AG v Thissa Thero</i> CA 270/2013	Grave sexual abuse under 18 (s 365B(2)(b)) 3 counts	Each count, 2 years	Each count, 100. DS 1 week SI	Not ordered	Each count, 7 years. Serve concurrently	Unchanged	Each count, 50,000. DS 6 months RI	Unclear if Rs 100 fine is a typographical error.
8	<i>AG v Shantha (alias Ran Mama)</i> (2014) [original entitling wrong] CA 150/2010	Grave sexual abuse under 18 (s 365B(2)(b))	2 years suspended for 10 years	2,000. DS 6 months SI	60,000	10 years	10,000. DS 1 year RI	Unchanged	
9	<i>AG v Dharmalingam</i> CA 91/2012	Statutory rape (s 364(2)(e))	2 years suspended for 8 years	Not ordered	125,000 (DS ordered by trial judge, amount of DS not given in appeal judgment)	10 years	10,000. DS 6 months SI	Unchanged	
10	<i>AG v Nagesh</i> CA (PHC) APN 87/2012	Incest statutory rape (s 364(3))	2 years suspended for 7 years	2,500. DS 1 year RI	150,000. DS 2 years RI	15 years	Unchanged	Unchanged	
11	<i>Wijewardhana v AG</i> CA 140/13	Statutory rape (s 364(2)(e))	15 years	10,000. DS 2 years RI	Not ordered	Unchanged	Unchanged	50,000. DS 1 year RI	
12	<i>Abeyasinghe v AG</i> CA 90/2011	Statutory rape (s 364(2)(e)) 3 counts	Each count, 10 years each. Serve concurrently	Each count, 5,000. DS 6 months SI	300,000. DS 2 years SI (unclear if each count)	Unchanged	Unchanged	200,000. DS 2 years SI	
13	<i>Galahitiya v AG</i> 262/2012	Statutory rape (s 364(2)(e))	20 years	20,000. DS 2 years RI	700,000. DS 2 years SI	15 years	10,000. DS 10 months SI	300,000. DS 10 months SI	

Case	Offence	Trial court sentence			Appellate outcome			Comments	
		Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)	Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)		
14	<i>Jamis v AG</i> 318/2006	Incest statutory rape (s 364(3))	20 years	25,000. DS 3 years SI	75,000. DS 5 years SI	Unchanged	25,000. DS 6 months SI	75,000. DS 6 months SI	
15	<i>Karunaratne (alias Danapala) v AG</i> 246/2012	Statutory rape (s 364(2)(e))	12 years	25,000. DS 4 years*	300,000. DS 4 years*	Unchanged	25,000. DS 1 year*	300,000. DS 2 years*	
16	<i>Padmasiri v AG</i> 56/2010	Grave sexual abuse under 18 (s 365B(2)(b))	Unclear (suggests more than 7 years)	Ordered by trial judge, amount not given in appeal judgment	Ordered by trial judge, amount not given in appeal judgment	7 years	Unclear	Unclear	Unclear if sentence reduced to 7 years from something higher
17	<i>Sirisena v AG</i> 157/2011	Grave sexual abuse - provision unclear	10 years	Not ordered	50,000. DS 1 year*	5 years	Not ordered	Unchanged	
18	<i>Ambrose v AG</i> 328/2012	Statutory rape (s 364(2)(e))	12 years	5,000. DS 3 months SI	20,000. DS 1 year SI	10 years	Unchanged	50,000. DS 1 year RI	
19	<i>De Silva v AG CA</i> (PHC) APN CA 52/2015	Statutory rape (s 364(2)(e)) Counts 2-3	Each count, 20 years. Serve concurrently	Each count, 10,000 (unclear if DS ordered)	Each count, 300,000 (unclear if DS ordered)	Count 2, substituted with 2 years RI suspended for 10 years. Count 3 set aside	Unchanged	Unchanged	Count 1 abduction also set aside.
20	<i>Siripala v AG CA</i> 09/2014	Grave sexual abuse 18+ (s 365B(2)(a))	8 years	10,000. DS 1 year*	25,000. DS 1 year*	7 years	Unchanged	Unchanged	
21	<i>Balangne v AG CA</i> 110/2014	Statutory rape (s 364(2)(e))	20 years	20,000. DS 2 years SI	1.2 million. DS 5 years SI	12 years	20,000. DS 6 months SI	100,000. DS 1 year SI	
22	<i>Chandramohan v AG CA</i> 111/2004	Statutory rape (s 364(2)(e))	Count 2, 20 years. Serve consecutively	20,000. DS 1 year*	700,000. DS 2 years SI	Count 2, 12 years. Serve consecutively	20,000. DS 1 year SI	100,000. DS 1 years SI	
23	<i>Kumara v AG CA</i> 163/2013	Grave sexual abuse 18+ (s 365B(2)(a))	15 years	10,000. DS 6 months SI	100,000. DS 1 year RI	10 years	Unchanged	Unchanged	

Case	Offence	Trial court sentence			Appellate outcome			Comments	
		Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)	Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)		
24	<i>Kumarasiri v AG</i> CA 131/2012	Statutory rape (s 364(2)(e)) AND grave sexual abuse under 18 (s 365B(2)(b))	Count 1, rape 15 years	7,500 (DS ordered by trial judge, amount of DS not given in appeal judgment)	25,000 (DS ordered by trial judge, amount of DS not given in appeal judgment)	Count 1, 10 years	Unchanged	Unchanged	Count 2 grave sexual abuse acquitted at trial
25	<i>Mihira v AG</i> CA 75/2009	Grave sexual abuse under 18 (s 365B(2)(b))	17 years	100,000. DS 1 year RI	Unclear if ordered	8 years	Unchanged	Unclear	
26	<i>Furukhan v AG</i> CA 207/2013	Incest statutory rape (s 364(3)) 3 counts	Each count, 15 years. Serve consecutively	Each count 10,000. DS 1 year RI	Not ordered	Each count, 18 years each. Serve concurrently	Unchanged	Unchanged	
27	<i>Perera v AG</i> CA 77/2011	Rape (s 364(1))	18 years	5,000. DS 6 months SI	Not ordered	12 years	Unchanged	2,500. DS 6 months SI	
28	<i>Sinnaiah v AG</i> CA 58/2011	Offence unclear	Count 1 and 2 12 years (unclear if 12 years is for each). Serve consecutively	7,500. DS 8 months RI	50,000. DS 4 years RI	Unchanged. Serve concurrently	7,500. DS 8 months SI	50,000. DS 2 years SI	Offence not clear in judgment. Custodial sentence also not clear.
29	<i>Vigneshwaram v AG</i> CA 123/2011	Grave sexual abuse under 18 (s 365B(2)(b))	10 years	1,000. DS 1 month*	50,000. DS 6 months*	2.5 years	Unchanged	Unchanged	
30	<i>Kumara v AG</i> CA 39/2010	Grave sexual abuse under 18 (s 365B(2)(b))	7 years	15,000. DS 1 year RI	75,000. DS 2 years RI	4 years	Unchanged	Unchanged	
31	<i>Riswan v AG</i> CA 39/2012	Grave sexual abuse under 18 (s 365B(2)(b))	7 years	10,000. DS 6 months*	150,000. DS 2 years*	2 years suspended for 10 years	Unchanged	Unchanged	
32	<i>Kona Gedara Podi Mahattaya Ihalagama v AG</i> CA 124/2009	Grave sexual abuse under 18 (s 365B(2)(b))	2 years suspended for 5 years	3,000. DS 3 months SI	100,000. DS 2 years SI	2 years	Unchanged	Unchanged	
33	<i>Galoluwage v AG</i> CA 218/11	Grave sexual abuse - provision unclear	7 years	5,000. DS 1 year RI	100,000. DS 2 years RI	2 years suspended for 15 years	Set aside	Set aside	

Case		Offence	Trial court sentence			Appellate outcome			Comments
			Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)	Custodial sentence (RI)	Fine (Rs)	Compensation (Rs)	
34	<i>Ekmon v AG</i> CA 190/2012	Grave sexual abuse under 18 (s 365B(2)(b))	Count 2, 20 years. Serve consecutively	20,000. DS 6 months SI	600,000. DS 2 years SI	Count 2, 10 years. Serve concurrently	10,000. DS 3 months SI	100,000. DS 2 years SI	
35	<i>Anuruddha v AG</i> CA 223/2012	Grave sexual abuse - provision unclear	Count 2, 12 years.	10,000. DS 3 months SI	50,000. DS 1 year SI	Count 2, 5 years. Serve concurrently	5,000. DS 3 months SI	Unchanged	
36	<i>Appuhamy v AG</i> CA 108/2012	Rape - provision unclear	Count 2, 15 years	15,000	300,000. DS 2 years RI	Count 2, 10 years. Serve concurrently	Unchanged	100,000. DS 1 year*	

## Part 4 – Appellate Decisions – Overturned Convictions

Overturned convictions or acquittals in the Court of Appeal are when the entire decision of the trial court judge (the decision to convict<sup>76</sup> and the sentence imposed) is quashed (overturned) and the accused no longer has a conviction entered against their name. The accused can no longer be in state custody and must be set free. This category of case is, arguably, the most significant exercise of the Court of Appeal's error correction role – deciding to correct a trial court guilty verdict and overturning a conviction, thereby acquitting the accused. In 28 of the 121 cases studied, the Court of Appeal concluded that the guilty conviction against the accused was unsound and needed to be corrected. In other words, despite the trial court concluding that the prosecution had proved its case beyond a reasonable doubt, the Court of Appeal disagreed. Therefore, the Court of Appeal interfered with the decision of the trial court and corrected the error – that the accused was found guilty when he<sup>77</sup> ought not have been.

### Reasons for overturning convictions

In the vast majority of the cases (22 out of 28), the reasoning of the Court of Appeal in overturning the convictions related to the credibility of the victim's testimony. In other words, the Court of Appeal concluded that the victim's version of events – her evidence – was *not credible* and, therefore, should not be relied upon. In the other six cases, convictions were overturned for reasons other than victim credibility. Four convictions were overturned due to the Court of Appeal concluding that the identity of the accused had not been established beyond a reasonable doubt. One conviction was overturned due to the failure of the prosecution to establish the date of the offence. Another conviction was overturned due to insufficiency of evidence.

#### *Insufficiency of evidence*

In *Kumara v AG (2013)*,<sup>78</sup> the conviction was overturned due to the Court of Appeal finding that there was insufficient evidence with which to have convicted the accused of statutory rape and murder. Victim credibility was not at issue, as the victim was deceased. The prosecution's case depended entirely on circumstantial evidence. Further, the trial judge had excluded two pieces of evidence, leaving only the accused's torn shirt pocket as material evidence, which was deemed insufficient to convict upon.

#### *Failure to establish date of offence*

*Susantha Bandara v AG*<sup>79</sup> concerned a case of rape against a woman with a "lower mental capacity comparing her age", a fact confirmed by two doctors. The appeal judgment reads:

The accused-appellant had been indicted on the footing that the offence of rape on D.M. Shayamali was committed by the accused-appellant on a date between 01.01.2000 and 30.02.2000. The first complaint has been made by one R.P. Jayanthi on 31.08.2000. Prosecutrix was not in a position to state the exact date of the incident.

[...]

The witness R.P. Jayanthi who made the first complaint has very categorically testified that she complained to the police in respect of an incident that took place on 31.08.2000.

The appeal judgment reads that the witness who made the first complaint (not the victim) did so in relation to an incident that occurred on 31 August 2000. The police officer's evidence was that the first complaint was made on 31 August 2000 and he made inquiries on 14 September 2000. The doctor who examined the victim on 15 September 2000 observed a tear of the hymen but "he categorically expressed the opinion that the tear had taken place at least two weeks prior to his examining the prosecutrix".

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<sup>76</sup> This category of cases obviously only relates to where the accused was *found guilty* and convicted after a trial. Where an accused pleads guilty, a judge (or jury) does not find the person guilty as they themselves have accepted guilt, and hence overturning a conviction does not arise.

<sup>77</sup> There were no female accused in the 28 cases.

<sup>78</sup> *Kumara v AG CA 222/10*, 24 October 2013.

<sup>79</sup> *Susantha Bandara v AG CA 176/2013*, 7 November 2014.

There is the obvious problem that the indictment has an inconceivable date (30 February). It is not clear whether that is a typographical error in the appeal judgment or whether the indictment in fact contained that date. In any case, it is not clear how the indictment has the incident occurring within a date range of January-February 2000, given that the witness evidence (first complainant) places it at the end of August 2000 and the medical evidence places the injuries (tear of hymen) at least two weeks before mid-September, which is evidence that one would expect to have been available at the time of drafting the indictment. The Court held the medical evidence and the evidence of the first complainant created “a serious dent in the version of the prosecution that the prosecutrix was ravished by the accused-appellant” on a date within the date range given in the indictment. The Attorney-General’s Department also conceded that the prosecution had failed to establish the date of offence as mentioned in the indictment.

### ***Failure to establish identification of accused***

*Karunaratne and Wickremaratne v AG*<sup>80</sup> involved a gang rape by two accused. The victim identified the first accused by his voice. The victim admitted she had not previously spoken to the first accused, and had only heard him speak on the road. At trial, no evidence was led as to how familiar the victim was with the voice of the first accused. The second accused was identified by the victim as the first accused had referred to him by name during the incident. At trial, no evidence was led to establish that the second accused was the only person with that name in the village.

At several points, the judgment refers to “both witnesses” that testified.

Both witnesses have testified that both accused had their faces fully covered with a cloth. According to the evidence of witness Kalyani she had never spoken or had any dealings with the accused before. Therefore one has to be alert and careful in accepting her evidence as it could be an afterthought. [...]

Both witnesses had very categorically testified that both accused had their faces covered with cloths and they do not testify that the cloths had come out enabling them to identify the accused.

One of the witnesses is the victim. However, the appeal judgment makes no mention of who the second witness was. In any case, the Court found that the voice identification by the victim was “wholly unsafe, unreliable and unsatisfactory”.



In *Sarath and Siripala v DSRSL*,<sup>81</sup> six persons entered a house with their faces covered, held the husband in a room, took the victim to another room, and three of them raped her. The case was appealed by the first and second accused. The accused faced multiple offences, including gang rape, trespass, and theft. The victim and husband identified the first and second accused in an identification parade, as they removed the cloth covering their faces during the incident. There was no circumstantial evidence against the accused, only the direct evidence of the victim and husband. The victim’s evidence was that she could identify the accused when their face coverings came off while she was being raped. At that time, the husband was being held in another room. The exact moment when the husband was in a position to identify the accused was not clearly mentioned, according to the Court. The husband had known the accused since childhood. He had also admitted that their names were not mentioned in the police complaint because he could not properly identify them. There appeared to also be an allegation that the witnesses (victim and husband) were shown the accused prior to the identification parade.

Despite the fact that the Accused Appellants had allegedly been shown to the witnesses prior to the identification parade, identification of them in the parade couldn't be considered as an act of so much validity, because witness should have been aware that two neighbors had been arrested in this connection. If the police were able to take two persons into

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<sup>80</sup> *Karunaratne and Wickremaratne v AG* CA 18/2009, 8 February 2013.

<sup>81</sup> *Sarath and Siripala v DSRSL* CA 297/12, 12 March 2015.

custody out of the six, the police could have been able to elicit several more matters with regard to the incident through these two persons such as the others involved, jewelry and money robbed and weapons and other materials used. However, the police have not discovered any of the above.



In *Appuhamy v AG*,<sup>82</sup> six persons entered the victim's house, three of them dragged her out, and one raped her. The accused was convicted of kidnapping and rape. The appeal judgment is not clear about the status of the other two accused on the indictment. The Court found the identification of the accused (the one who was convicted of rape) was not established because, despite the victim knowing the accused for 10 years (including having been a witness at her wedding), the victim did not tell her husband, the police, nor the doctor that it was the accused who raped her.

In the short history given by her to the doctor she has mentioned names of the accused-appellant's and the two accused as the person who entered her house. But she failed to state in the short history that the accused appellant raped her. What did she say in the short history? An unidentified person forced her to have sexual intercourse with him. According to the Doctor who examined her she had told that an unidentified person raped her. The accused appellant was known to her for about 10 years. If an unidentified person raped her it can't be the accused appellant who raped her. The above items of evidence clearly show that the prosecutrix had not identified the 1st accused as a person who raped her. This clearly shows that the identity of the accused-appellant has not been established by the prosecution beyond reasonable doubt.

It is not clear from the appeal judgment what the evidence was that resulted in the accused being indicted and then convicted of rape. At trial, the victim's evidence was that the accused raped her. But prior to her trial testimony, the appeal judgment states that she did not name the accused as her rapist to her husband, the police, or doctor. In such circumstances, it is unclear what the evidence was that made the police charge the accused and made the Attorney-General's Department indict the accused of rape.

In addition, the Attorney-General's Department was "unable to support the conviction".



In *Bandara and others v AG (2013)*,<sup>83</sup> three accused were convicted of multiple offences, including gang rape. They entered the house, tied the hands of the victim and her husband, took the victim away from the house, and each accused raped her.

The Court considered the victim's evidence regarding the identity of the accused as very doubtful. At trial, the victim admitted she knew the second accused by name. She also admitted knowing the three accused by name but did not give the names to the police due to fear. She also did not mention the names to her husband. Two weeks after the incident, she identified the three accused in an identification parade. At trial, the victim's evidence was that she did know the three accused prior to the incident. However, in the non-summary proceedings, her evidence was that she did not know the accused prior to the incident. The Court's view was that even the husband had not identified the accused.

In addition, the Attorney-General's Department was "unable to support the conviction".

### ***Victim credibility***

In *Banda v AG*,<sup>84</sup> the medical evidence found no evidence of sexual intercourse nor of any physical injuries. This meant the medical evidence did not corroborate the victim's evidence, leaving the case

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<sup>82</sup> *Appuhamy v AG* CA 66/2011, 15 October 2013.

<sup>83</sup> *Bandara and others v AG* CA 190-192/11, 15 March 2013.

<sup>84</sup> *Banda v AG* CA 129/2013, 7 October 2015.

entirely dependent on the victim's evidence. According to the victim, she fell, was dragged into a jungle area, her clothes were removed, and she was raped. The Court considered that, if this version of events occurred as the victim described, one would expect physical injuries to the posterior side of her body. As the doctor who examined the victim three days after the alleged incident found no such injuries, the victim's evidence was not deemed to satisfy the test of probability. Further, there was no evidence to show that the accused hid or attempted to hide the victim's bicycle, which had fallen on the side of the road when the accused dragged the victim 100m into the jungle. The bicycle would have been lying on the ground until the victim return home with it after the incident. A person leaving a bicycle lying on a neighbourhood road in the middle of the afternoon for it to be observed and where queries about whereabouts of the owner of the bicycle (while he took the victim away), was considered "highly unlikely". The victim's evidence was held not credible, not reliable, and could not be believed.



In *Fernando v AG*,<sup>85</sup> there was only the victim's evidence and "no iota of evidence that corroborates the evidence of the victim". The victim's evidence was that her step-father had raped her several times on several days. The Judicial Medical Officer concluded that sexual intercourse had occurred about four/five days prior to the examination. The appeal judgment reads:

As the short history given by the patient, namely, Sriya Sumudu Kumari, Judicial Medical Officer has stated its history of a rape by a relative brother, namely, Indika. The incident had taken place about 5 days prior to the date of medical examination. Judicial Medical Officer had observed reddish, swollen vulva and hymen tear in five o'clock position on hymen wall. The Judicial Medical Officer in her evidence has stated that Sumudu Kumari had not mentioned any other name connected to the incident of rape. She has expressed her opinion that the sexual intercourse had taken place about four or five days prior to her examination.

It is unclear if the "incident" (line 2 of the extract) refers to when the victim said the brother raped her (referred to in the previous sentence), or if it refers to the incident of sexual intercourse that the Judicial Medical Officer found occurred four/five days prior to the examination. The Court held that the medical evidence contradicted the victim's evidence because the victim had "not mentioned a word about any kind of sexual act which involves the accused-appellant" and the medical officer was not questioned about any sign of previous sexual intercourse prior to the one in the report. It is not entirely clear what the Court meant when it said the medical evidence contradicted the victim's evidence. The Court held it was "unsafe to act upon uncorroborated evidence of a rape victim when her evidence is inconsistent with the medical evidence".



In *Dharmadasa v AG*,<sup>86</sup> the victim went to the accused's house and his wife asked the victim to cook some rice. The wife then went to a neighbour's house and the accused raped the victim and threatened her with a knife. Subsequently, the victim returned to the accused's house on several occasions and was raped by the accused two further times. She informed her mother of the rapes in August 2001, and upon a medical examination, it was discovered that she was pregnant. The victim gave birth in October 2001. The credibility of the victim was in question for a number of reasons, resulting in the Court concluding that the prosecution had not proved its case beyond a reasonable doubt. Firstly, the incident was said to have occurred in April 2001 (as per the indictment). The victim stated it was her first sexual intercourse and that the child born was as a result of the rape. If her first sexual intercourse was in April 2001, a child (who was not premature) could not have been born as a result, in October 2001.

If this was her first sexual intercourse and the first sexual intercourse took place in the month of April, it is impossible to have a child born on 24.10.2001. She admitted, in her evidence, that the baby was not a premature baby. Therefore on this ground itself the prosecution case

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<sup>85</sup> *Fernando v AG* CA 21/12, 16 July 2015.

<sup>86</sup> *Dharmadasa v AG* CA 201/2011, 17 February 2014.

should fail.

Secondly, in the victim's evidence, she said her first sexual intercourse was in March 2001, but later said her menses stopped in the first week of May. However, the indictment puts the incident at April 2001.

Thus, if the sexual intercourse was in the month of March accused could not be convicted on the indictment. Here too the prosecution case should fail.

Thirdly, the Court queried the delay in telling her mother (incident was in March, mother was told in August). The victim's evidence was that the accused was armed with a knife and threatened her not to tell her mother.

Then the question arises as to why she went to the accused-appellant's house on several occasions and faced sexual intercourse with the accused-appellant. This also raises a very serious doubt in the prosecution case. Learned trial Judge has failed to consider the above matters.



*Kumara v AG (2015)*<sup>87</sup> was a case of incest statutory rape where the victim was examined by two doctors. To the first doctor, she had said she had intercourse with a known person four months ago, but no name was mentioned. The medical evidence was that the hymen was not intact. To the second doctor, she had said she was raped by a known person but no name was mentioned. The medical evidence was that the hymen was lacerated and bleeding. The Court considered the contradiction in the history given to the doctors, which favoured the accused and should have been considered by the trial judge.

The Court also placed weight on an allegation by the victim's brothers (as well as the accused himself) of a relationship between the victim and a boy, and a letter she had written which mentioned the boy.

In the said letter she had referred to the person Eranda and asked whether Eranda has come to the village. She has further stated that she does not think that he will come back to the village because he destroyed her character (respect). There is no mercy from her to him. This clearly indicates that something really serious has taken place between her and Eranda. And that she is not prepared to forgive him for the harm done. This evidence is very important when one consider the fact that there was an allegation made by her brothers that she was having an affair with the said person. In fact the prosecutrix has admitted whilst giving evidence that her younger brother Anuradha advised against it. The prosecutrix had failed give a plausible explanation for stating so. The accused-appellant had in his dock statement has clearly referred to this piece of evidence. But the learned trial Judge had clearly failed to consider and analyse the said evidence which in my opinion is very favourable to the accused-appellant in this case. In *Kathubdeen V. Republic of Sri Lanka* [1998]3 SrLL.R 107 it was held that it is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt.

It is not clear from the appeal judgment whether the victim, in her testimony, admitted a relationship with Eranda. However, the Court placed weight on the evidence by the brothers of such a relationship.

The Court considered that the victim had not given a plausible reason for the delay in making a complaint to the police (nor in not telling her mother). The victim's evidence established that she made the complaint about nine months after the incident and only after being taking into custody after attempting to commit suicide.

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<sup>87</sup> *Kumara v AG* CA 72/2014, 14 October 2015.

Further, the evidence led on the date of the incident was contradictory. The prosecution case was that it was August 2001, the victim's evidence at trial was June 2001 or after, the victim had told the police in August 2001, the history the victim gave the doctor was that the incident took place about four months prior to the examination – making it February 2002. The evidence of the victim was held not credible, not reliable, and could not be believed.



*Bandara and others v AG (2014)*<sup>88</sup> concerned a gang rape by five accused. On the first day of trial, the victim named the five accused. However, on the second day of trial, the victim could not identify four of the five accused by name (she correctly mentioned the name of the fourth accused). The Court considered the identity of the first, second, third, and fifth accused had not been proved beyond a reasonable doubt.

In terms of consent, the appeal judgment reads:

According to her, the incident of rape took place in an abandoned house. Thereafter the 2nd accused took her to his house and the mother of the 2nd accused offered her lunch. She however did not take lunch. After the parents of the 2nd accused left the house for the purpose of taking a bath, sexual intercourse was performed on her by the 2nd accused. Thereafter 3rd accused came near the house and both 2nd and 3rd accused took her in a vehicle that was plying on the road and dropped her near her house. Learned Additional Solicitor General submits that the said conduct of Koin Menike suggests that the 2nd accused performed sexual intercourse on her with her consent. This is evident by the fact that she was dropped by 2nd and 3rd accused in a vehicle near her house. This shows that she had sexual intercourse with the 2nd accused with her consent.

It is not clear from the judgment how the Attorney-General's Department arrived at the conclusion that intercourse with the second accused was consensual. The extract appears to suggest that, because the second accused took the victim to his house, his mother offered her lunch, the parents left the victim and accused at the house, then sexual intercourse took place, and then the second accused (along with the third accused) dropped her home, that the victim's 'conduct' suggested she consented to intercourse with the second accused.

Additionally, the Court considered there was a major contradiction with the participation of the fourth accused in the incident, but did not elaborate beyond stating it.

She says in her evidence that 4th accused too raped her. But in a statement made to the Police she has said that 4th accused only touched her breast. This contradiction was marked as V7 [page 168 of the brief]. The learned trial Judge has not considered the above matters.

Based on the above, and as the Attorney-General's Department was "unable to support the conviction", the convictions against all five accused were overturned.



In *Kudabandara v AG*,<sup>89</sup> the victim's evidence was that the accused raped her on three occasions. On the first occasion, the victim, accused, and the victim's daughter were gathering firewood in the jungle. The accused sent the daughter to collect some fruit and then raped her. On the second occasion, when the accused's wife "went to the neighbouring house to watch television, he sent her daughter to the temple. But surprisingly Kanchana remains at home", and then he raped her. On the third occasion, when the accused's wife went to hospital, the accused raped her. It is not clear from the appeal judgment what the context was in terms of the reference to "remains at home" and if the victim and accused lived in the same house.

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<sup>88</sup> *Bandara and others v AG* CA 196-200/2011, 7 February 2014.

<sup>89</sup> *Kudabandara v AG* CA 191-2009, 7 March 2014.

The victim's evidence was that the accused had threatened to kill her parent if the incident (the appeal judgment uses the singular) is divulged. However, the Court stated:

But the question that arises is that if he had so threatened as to why she remained in the house of the accused-appellant after the wife of the accused-appellant left the house. From the above evidence it appears that there is a reasonable doubt whether she consented to the sexual intercourse.

Further, when the victim was questioned by the accused's counsel at trial about sexual intercourse with a certain police officer, the victim admitted having a relationship (a "love affair") but did not admit to sexual intercourse. However, later in her evidence, she admitted to sexual intercourse with the police officer in March 1999. The indictment also placed the incident in March 1999. The appeal judgment reads as the accused was convicted on one count of rape. It is not clear from the judgment, which of the three occasions of rape formed the basis of the charge.

From the admission of the sexual intercourse with the police officer in March 1999, the Court said:

From this evidence we doubt whether she was trying to attribute the sexual intercourse that she had with Upananda to the accused-appellant. This doubt arises only if she had had sexual intercourse with the accused-appellant.

The judgment appears to be saying that, either the accused *did not* have intercourse with the victim (because the victim had sex with someone else and was trying to attribute it to the accused) or the accused *did* have sex with the victim but she consented (because she remained in the house).

The Attorney-General's Department, in view of the contradictory nature of the prosecution evidence, was "unable to support the conviction".



In *Jayatissa v AG*,<sup>90</sup> the victim's father was employed by the accused and the rape occurred in a room which was housed in the compound owned by the accused. The accused entered the room and raped the victim. Although she tried to shout, the accused stopped her. At the time of the incident, the accused's wife was in the kitchen, which the victim said was 100 feet from the room. The police evidence was that the distance was 100 m.

The Court has observed that this distance to be a distance of 100 feet. However, the investigating Police Officer says that this distance was 100 meters. Since the distance shown by the witness was calculated to be 100 feet by court, I believe the distance shown by the witness in court is the correct distance. I further note that the distance of 100 meters was calculated by the Police Officer. But the distance 100 feet was calculated by the Trial Judge.

It appears from the above extract that the distance between the room and the kitchen was accepted as 100 feet.

The victim's evidence was that the sexual intercourse was committed without her consent. In the Court's view the case turned on whether the accused would rape the victim when his wife and child were only 100 feet away in the kitchen:

The most important question that must be decided in this case is whether the Accused-Appellant would commit the act of sexual intercourse on the victim, when his wife was within a distance of 100 feet. According to the victim, at this time, the Accused Appellant's child was also in the kitchen. I am unable to believe the contention that the Accused-Appellant would commit an act of sexual intercourse on a girl without her consent when his

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<sup>90</sup> *Jayatissa v AG* CA 30/2008, 17 January 2014.

wife was within a distance of 100 feet. I therefore hold that the evidence of the victim does not satisfy the test of probability. On this point alone in my view the Accused should be acquitted.

The victim had a baby after the incident, allegedly as a result of the incident. The accused had agreed to have a DNA test. However, the Magistrate had not ordered one. In the Court's view:

If the D.N.A. test was carried out and the negative results were shown, the accused could not have been convicted by the Trial Judge. Thus the benefit of this failure on the part of the Magistrate should be given to the Accused- Appellant.

As the victim was above 16, the prosecution had to prove the sexual intercourse was not consensual. In terms of consent, the Court's view was:

Can the court believe that the sexual intercourse as alleged by the victim was committed without her consent under the above circumstances. I say "no" to this question.

The Court's view was that, from the prosecution evidence, it was "difficult to believe that if sexual intercourse was committed on the girl, it was committed without her consent".



In *Naufar v AG*,<sup>91</sup> at the time of the rape, the victim was pregnant with her married cousin's child. The Court found that, when the evidence was examined, there was no clear evidence of penetration. The Attorney-General's Department also admitted this. The appeal judgment does not mention the findings of the medical evidence. Prior to the incident, the victim had had sexual intercourse with her cousin on 20-30 occasions, for a period of five months. The victim failed to disclose the fact she was raped to anyone, despite rape occurring on five occasions. The appeal judgment reads as the indictment containing one count of rape. It is not clear from the appeal judgment which of the five incidents of rape the indictment is premised on.

The Court commented on the circumstances under which the victim made a statement to the police, particularly that the victim did not make a statement of her own volition. Further, that the complaint was made two months after the incident.

Rasaiah Saraswathi who is the sister of the mother of the victim heard this incident from an uncle of the victim. When she did not take any action on the information received by the said uncle, the villagers of the village tried to assault her for not taking any action. As a result of the said action by the people of the area, the said Rasaiah Saraswathi had to take the victim to the police station.

In the Court's view, the question was, if sexual intercourse was committed on the victim by the accused without her consent, why did she not bring this issue to the notice of any relation even after five times?

The appeal judgment reads:

We note that at the time of the alleged incident, she was pregnant. Her story has not been corroborated by medical evidence.

It is not clear from the appeal judgment whether the Court is inferring a connection between the victim being pregnant and the medical evidence that did not corroborate her story.

The Court found the prosecution had not proved sexual intercourse occurred without consent:

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<sup>91</sup> *Naufar v AG* CA 99/2011, 8 November 2012.

When we consider the evidence led at the trial, we are of the opinion that the element of consent was there on the part of the prosecutrix.



*Senarathne v AG*<sup>92</sup> concerned a case of rape by the man the victim had eloped with. The appeal judgment states that the victim had eloped as she was harassed by her grandmother. It is not clear from the judgment what the circumstances of harassment were. After the accused and victim eloped, they had spent the night at the house of another man. The victim's evidence was the accused raped her on the same night that they had eloped. She states that it was her first sexual intercourse. The Court found that medical evidence contradicted the victim's evidence. The victim was examined four days after the incident and old tears in the hymen were found. The medical evidence was inconsistent with the victim's evidence of the date of first intercourse. The Court found it difficult to accept the victim's story that she had had first sexual intercourse on the date of the incident. The Attorney-General's Department was also "unable to support the conviction".



In *Sumathipala and others v AG*,<sup>93</sup> the pregnant victim was gang raped by four army officers. The victim and two others (witness Sampath and witness Jayaratne) were travelling in a three wheeler owned by witness Sampath. They were stopped at an army checkpoint. The two witnesses were ordered out of the vehicle and forced to kneel down, but the victim was ordered to remain in the vehicle. The two witnesses were assaulted by the army officers and then chased away. The victim was then made to exit the vehicle, was taken towards the backyard of the army bunker, and raped by the four army officers. The two witnesses corroborated the victim's evidence that they were all travelling together, they were stopped by the four army officers at a checkpoint near the Siddhalepa hospital, they were ordered out of the vehicle and ordered to kneel, and then they were assaulted by the four accused army officers. The accused admitted the prosecution's version of events up to the point of forcing the two witnesses to kneel down. The accused denied taking the victim behind the bunker and raping her.

The first complaint, by witness Sampath, was a prompt one that said a woman had been kidnapped. Almost immediately afterwards, the four accused were taken into custody (by witness Major Lansakkara). The following morning, the victim and the two witnesses went to the camp where the victim saw the four accused and identified them as the four who raped her. The two witnesses also identified the four accused. Witness Sampath testified that, after he was assaulted and was chased away, he noticed the four accused taking the victim behind the bunker.

The Court found the medical evidence did not corroborate the victim's evidence. The victim's evidence was she was dragged into the jungle and was raped while she was naked on the ground. If this was the case, in the Court's view, one had to expect injuries on the posterior side of her body. The doctor, who examined her the day after the incident, found no injuries to her vagina or any other part of her body.

The Doctor states that the prosecutrix was 20 weeks pregnant and no injuries were found either in her vaginal area or any other part of her body. He also categorically states that there would have been injuries in the genital area if there was any resistance on her part, but that there was no injuries found. The Dr. Karunathilake also had stated that there was no sperms found in her vaginal area and that there was no evidence of penetration. This too raises a serious doubt in the truthfulness of the victim's evidence. The prosecutrix evidence in my view does not satisfy the test of probability.

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<sup>92</sup> *Senarathne v AG* CA 25/09, 6 March 2014.

<sup>93</sup> *Sumathipala and others v AG* CA 09/2013, 9 November 2015.

In the Court's view, it was very clear from the victim's evidence that she was not interested in making a prompt complaint to the police. Witness Sampath had gone to the police the night of the incident. However, the victim "avoided going to the police".

It is therefore very clear from the evidence led by the prosecution in this case that the prosecutrix did not make a prompt complaint to the army or to the police and that she in fact admitted that she avoided going to the police to make complaint with the witness Sampath. She also failed to make a complaint at the very next opportunity she got when the witness Major Ajith Lansakkara came to investigate the matter on the night of 22nd November.

The Court also made the following comments:

The prosecutrix has not stated as to what she did that night after the four accused-appellants were taken into custody by the witness Major AjithLankassara. She has not stated clearly whether she met the witness Sampath later that night or where she stayed during the night. The prosecutrix later admitted that she was a married woman with two children residing at Eppawala and on the day of the incident came to Anuradhapura to go to the Clinique on the next day. She also admitted that she was not legally married to Sampath. Witness Sampath has referred to the prosecutrix as a prostitute. When we consider the above material we are of the opinion that victim is not a credible witness and it is not safe to act on the evidence of the victim.

The Court held the evidence given by the victim was not convincing and was not corroborated.



In *Ameen v DSRSL*,<sup>94</sup> the victim was employed at the accused's restaurant as a waitress for about eight months prior to the incident. On the days she worked late, the accused (her employer) dropped her at the boarding house. One night, on the way to the boarding house, the accused stopped at a house to collect some parcels and asked her to help. The rape occurred inside one of the rooms. The victim went back to work the day after the incident and remained at the restaurant for about two more weeks. After this, the victim fell ill and went home. Her mother took her to a doctor and she discovered she was pregnant. After the mother "threatened" the victim, she told the mother that she was raped by her boss. Subsequently, the mother took the victim to the police and she underwent a medical examination. The police complaint was over four months after the incident. The Court considered the issue to be the lack of spontaneity and promptness in the victim's evidence.

The victim said she did not go to work for three days after the incident, however, this was contradicted by the work attendance register, which she accepted showed her signature as being present the day after the incident. The Court considered the fact that the victim told the police only after she found out she was pregnant (over four months after the incident) cast a shadow on her evidence.

If she was raped on the 04<sup>th</sup> of July beign a girl of such tender years would she go back to work for her assailant on the following day and keep quiet about the whole episode for months?

The Court placed weight on the fact that the victim did not immediately tell her mother and returned to work after the incident.

When she was asked why she did not tell the mother about the incident she has said that she was threatened by the accused appellant. If so why did she go back to the same place for work after the incident? It is hard to believe that a girl of such young age after been raped

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<sup>94</sup> *Ameen v DSRSL* CA 110/2010, 20 October 2016.

goes back to the rapist to work and keeps silent for months till the mother finds out she's pregnant! There was no spontaneous or prompt complaint. And the evidence of the victim is not consistent. She has given different answers when cross examined, on the incident and the delayed complaint was explained by saying she was threatened by the accused appellant. If so why did she go back to the same place to work after the incident and continued to do so? I therefore hold that the story of the victim that sexual intercourse was performed without her consent does not satisfy the test of probability.

The Court concluded that the victim's evidence did not satisfy the test of probability and there was reasonable doubt as to the second ingredient of the charge (consent).



In *Perera v AG*,<sup>95</sup> the victim worked at the accused's mother-in-law's house as a domestic worker (the victim's mother had given the victim to the accused's mother-in-law for adoption). In December 1999 or January 2000 (the victim could not give an exact date), the accused came to his mother-in-law's house and raped the victim. The accused and his wife would sometimes leave their 2.5 year old child with the mother-in-law, while the accused and his wife went to work. The accused's wife worked at a batik factory in the mother-in-law's compound. The distance between the batik factory and the mother-in-law's house was about 10 feet. In February 2000, the accused again made an improper suggestion for the victim to have intercourse with him and attempted to drag her into a room. As she could not bear the suggestion, the victim poured kerosene on herself and set herself alight. The mother-in-law and batik workers came to her aid and took her to hospital. One of the batik workers, who was first on the scene, testified that the victim had told her she was trying to light the stove and accidentally caught fire herself. In the Court's view:

The question that arises is if she set herself ablaze as she could not bear up the suggestion made by the accused-appellant as to why she did not divulge this incident to Hemamali who came for her rescue. This question remains un-answered. It has to be noted here Malkanthi admitted to Hemamali that she caught fire by an accident. This was the first reaction of Malkanthi to the people who were present at the scene.

Further, the Court considered the fact that the accused's wife was at the batik factory on that day and the mother-in-law was looking after the child.

The question that arises is, when the wife of the accused-appellant is present 10 feet away from the house of the old lady, whether he would force Malkanthi to have sexual intercourse with him. The learned Senior State Counsel is also unable to answer this question. Will a person try to commit sexual intercourse on a woman without her consent when his wife was present 10 feet away? I think not.

[...]

Thus, it is possible for the mother of the child to visit the old lady's house in short intervals. The question that arises is whether the accused-appellant would make suggestions to Malkanthi to have sexual intercourse with him, when it was possible for the accused's wife to visit this house. This question too remains unanswered.

There was also a contradiction in the victim's evidence. She maintained that the batik factory was not in existence at the time of the incident. However, the evidence of the Grama Sevaka (government servant) of that area was that the batik factory was functioning during December 1999. In her statement to the police, the victim had admitted the existence of the batik factory before Christmas 1999.

Why was she trying to hide the existence of the batik factory? Is it because that it was within her knowledge that her story would be rendered unacceptable if she admitted the existence

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<sup>95</sup> *Perera v AG* CA 24/2010, 27 June 2013.

of the batik factory. This question has not been considered by the learned trial Judge.

The victim, at one stage, had admitted the incident took place prior to Christmas 1999, that she went home on Christmas Day, and returned after Christmas. Her evidence was that the accused had threatened her with death.

The question that arises is whether she would come back to the old lady's house if the incident of rape was true especially to face sexual intercourse against her will. I think not. This question too has not been considered by the learned trial Judge. This question remains unanswered.

The victim did not divulge the rape incident to anyone at home during Christmas. She only divulged the incident after she was admitted to hospital after the burn injuries.

Thus, it is clear that the story of rape had come up only in the hospital when she was receiving treatment for her burn injuries.

The Court considered there was a contradiction in the number of occurrences of rape. She had told the doctor she was raped by the accused on two occasions. At trial, she admitted the accused raped her once only.

The Court also considered the medical evidence did not support the victim's evidence. The doctor found three old tears in her hymen, which could have taken place on any day prior to two weeks of the examination.

The Court found that the victim's evidence was not corroborated by any independent evidence and did not pass the test of probability.



In *Sanjeeva v AG*,<sup>96</sup> the victim said she was raped, however, under cross-examination, admitted that the incident did not happen at the hands of the accused. This meant admitting that the accused did not commit sexual intercourse on her. Further, she admitted that her evidence in court was what her father had told her to say. The Court stated there was evidence the victim's father had assaulted the accused, but the judgment did not provide details regarding the assault, or the bearing of that assault on the Court's consideration of whether or not the accused committed sexual intercourse on the victim. The Court found that the first ingredient of a rape charge – that sexual intercourse was committed on a woman – was not proved beyond reasonable doubt. The appeal judgment was silent on the findings of the medical examination with respect to intercourse.

The accused had also raised a defence of alibi at trial, but did not call either of the two witnesses to corroborate the alibi. The trial judge found this meant the alibi was not corroborated by the accused and the failure to do so meant the prosecution case had been corroborated. The Court considered the trial judge's finding a misdirection in law, as there was no burden on the accused to prove a defence of alibi when raised, as the burden remained with the prosecution to prove beyond reasonable doubt that the accused was not elsewhere as claimed.

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<sup>96</sup> *Sanjeeva v AG* CA 05 / 09, 4 March 2014.

In *Peiris v AG*:<sup>97</sup>

According to the prosecutrix she was sleeping in the night with her four year old child on the bed and she woke up due to a flash light of a torch and she saw a person covering his face below the mouth level from a handkerchief. Her version is that she struggled but did not scream and the accused-appellant put pressure on her neck from the bed sheet. When she was struggling the torch fell down and she says she identified the accused-appellant from the voice and from the rest of the body which was not covered. She did not make any attempt to hit him or bite him or even did not attempt to wake up the child who was sleeping close by on the bed. She further states that the accused-appellant told her that he was having a knife and because of that she did not scream but did not see a knife.

The medical examination took place about 15 days after the rape incident. The victim had told the doctor that a person known to her had raped her. The doctor found no injuries to the victim's vagina, as she was a married woman with a child, but stated penetration was still possible without injuries to the vagina. The Court found the medical evidence did not support the victim's evidence, and so the case depended solely on the victim's evidence. The accused claimed that intercourse was consensual.

The victim's evidence was that she did not tell anyone about the incident, including her parents who lived close by, and her brother-in-law who also lived close by and with whom she was in good terms. The Court found the victim had failed to give any reason for this. Further, the Court found she failed to give any plausible reason for not making a prompt complaint to the police. The complaint was made five days later as she was waiting for her husband to return. The husband was not called as a witness.

In considering the truthfulness of the victim's evidence, the Court said:

The victim was a married woman with a child of four years old at the time of the incident. Her husband was employed as an army officer and came home once in two weeks. Unlike other innocent women the evidence in this case disclose that she sold liquor in the house and that the friends of her husband came to consume liquor at her place when the husband was not there. According to the prosecutrix the accused-appellant came to her house with two other friends, both of them are known to her one being Nalaka spent about half an hour and went.

The victim said she met with one of the witnesses in the case three days after the incident to ask him to pass on a message to the accused to see her at her house. She stated that she wanted to ask the accused "why he has done a thing like that to her". She also has stated that the accused promised to give her a gold chain of five sovereigns and she would be able to see him if she comes to the boutique the next day. The witness testified to meeting the victim about three days after and that the victim inquired after the accused. He also testified that he told the victim's husband that the victim was always inquiring about the accused. The contention was that the victim made a false allegation of rape because the husband got to know about the victim inquiring after the accused.

The Court considered:

The conduct of the prosecutrix in trying to contact the person who had raped her is rather strange. It is clearly seen from the evidence of the prosecutrix that she has not tried to inform anybody about this incident although she had ample opportunity to do. She could have informed this incident to her parents or the brother-in-law who was living close to her residence and could have made a prompt complaint about this incident to the police. But instead she had tried to contact the accused-appellant and waited a long time until her

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<sup>97</sup> *Peiris v AG* CA 155/2014, 9 October 2015.

husband had questioned her about the accused- appellant to inform about this incident to him. Her evidence in my view does not satisfy the test of probability.

The Court concluded the victim was not a credible witness. Her story that sexual intercourse was performed without consent did not satisfy the test of probability as it was not corroborated by any other evidence and was not “cogent and impressive”.



In *Premajayantha v AG*:<sup>98</sup>

When the prosecutrix (Hemalatha) was caging hens in the rear side of her house, the Accused-Appellant came to this place. He closing the mouth of the prosecutrix with one hand and putting the other hand around her waist, in a loving manner, took her to the front room of the house. The Accused-Appellant thereafter, put her on the bed in the room and raped her. The prosecutrix says that she tried to push the Accused-Appellant but failed. She had also told the Accused-Appellant that there was no one at home. The Accused-Appellant then said that he would go without wasting much time.

After the incident, the victim washed herself and her clothes. There were “reddish liquid and some liquid in solid form (“possibly sperms”) on her cloth”. The victim then told the accused’s sister-in-law about the incident, who had advised the victim not to tell her mother as she “was very rough and tough”. The victim told the mother six days later, after which she made a complaint to the police. Prior to telling her mother, the victim had told the accused’s sister-in-law, the accused’s mother, the victim’s aunt, and another woman.

The accused’s position was that sexual intercourse was consensual and that it had also occurred the previous day, including that he went to her house upon her invitation. The Court found the trial judge had not rejected the accused’s evidence, but had failed to state whether the accused’s evidence created any reasonable doubt in the prosecution case. The trial judge found the accused had not challenged the victim’s evidence and so the victim’s credibility had not been impeached. The Court considered this a factual error – by the accused saying intercourse was consensual, he was challenging the victim’s evidence and creating reasonable doubt in the truth of the prosecution case.

The Court considered the fact the victim washed her clothes:

If her intention was to make a complaint of rape against the Accused-Appellant, the said evidence would have been the best evidence. But if the Accused-Appellant admits that sexual intercourse was committed on her with her consent, the said evidence would not be important. We do not know as to why the prosecutrix washed her clothes.

It is unclear how the Court reasoned that the *accused* admitting the intercourse was consensual would deem the evidence of washing clothes unimportant.

The delay in telling the mother was also at issue. Despite the victim saying that her mother is “rough and tough”, prior to telling her mother, the victim had told several other women in the village.

I have to ask the question as to why she did not bring this matter to the notice of her mother. Is it Because that she had a guilty conscious with regard to the incident? Is it because she consented to the act of sexual intercourse? In this connection, it is pertinent to observe that the way in which the accused-appellant took her to the front room of the house. The Accused-Appellant closing her mouth with one hand and putting the other hand around her waist in a loving manner, took her to the front room and committed sexual intercourse. When we consider these observations, we feel that there is a reasonable doubt with regard

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<sup>98</sup> *Premajayantha v AG* CA 211/2012, 21 October 2014.

to the question that she had given her consent to the sexual intercourse.



In *Athurupana v AG*,<sup>99</sup> the accused came to the victim's house, blindfolded her and carried her on his shoulders for some distance. The accused then put her on the ground, raised her frock, removed her knickers, and raped her. The victim said the accused had a knife. The victim said she was raped on a shrub jungle with thorny bushes and she sustained injuries. She also said it was her first sexual intercourse. The accused denied the incident and said he was working on a paddy field near the victim's house on the day of the incident, and went to fetch water from a well, also near the victim's house, on two occasions. A witness also working on the paddy field testified that the accused was working on the paddy field and that he fetched water twice.

The accused was originally charged with rape under s 364(2)(e). However, the prosecution could not prove the victim was under 16, and as such, the trial judge amended the indictment and convicted the accused under s 364(1) (rape 18 years or over). A consequence of amending the indictment from s 364(2)(e) and statutory rape to s 361(1) is that consent becomes a live issue and must be considered. If the prosecution was able to prove the victim was under 16, whether or not she consented would be an irrelevant issue as it would be statutory rape. The Court of Appeal noted that, after amending the indictment, the trial judge failed to allow the defence to cross-examine the victim as to whether or not she consented to the sexual intercourse. On appeal, the Court of Appeal found there was reasonable doubt on the question of consent. The Court found the victim had given false evidence in relation to the incident being her first sexual intercourse and physical injuries sustained. The medical examination, which occurred on the same day as the incident, found old tears in the hymen and found no abrasions on her legs as claimed. The Court considered that, if the evidence is true that the victim was raped on thorny bushes, there should be injuries on her buttocks and legs. The doctor found no injuries on her buttocks or legs.

Then, the issue of consent appeared to be determined by the Court of Appeal based on an inconsistency in the distance the accused allegedly carried the victim – she claimed she was carried four kilometres, whereas the police officer's evidence was that it was 500 metres.

Assuming without conceding that the accused-appellant committed sexual intercourse on her, was it committed without her consent or against her will? When I consider this matter I must not forget her evidence that she was carried on his shoulder for four kilo meters. According to the Police Officer this distance was 500 meters. Assuming without conceding that it was 500 meters, can he carry her this distance on his shoulder without her consent? I think not. Therefore it appears that she had consented to the journey.

It is wholly unclear how the Court came to the conclusion that the accused *could not* have carried the victim 500 metres without her consent.



*Rajendran v AG*<sup>100</sup> is the only appeal judgment where two opinions were provided by the judges. The outcome was the same, however, how the two judges arrived at the outcome differed.

The victim was employed as a domestic worker at the accused's house, starting from around 4 April 1999. She was brought to the house by another employee of the accused. She remained at the house only for about 2.5 days from when she began. On the first day of employment, the accused had shown the victim some semi-nude photographs. Within a few hours of beginning employment, she was raped for the first time (her evidence was that she was raped on two days).

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<sup>99</sup> *Athutupana v AG* CA 129/2009, 6 February 2014.

<sup>100</sup> *Rajendran v AG* CA 234/2011, 4 April 2014.

The accused was married with a child, and they occupied a two-story house in Bambalapitiya. The accused and his family occupied an upstairs room. The victim was given a room a “few yards or feet away” from that room. The accused’s parents or the wife’s parents<sup>101</sup> occupied the ground floor.

The first incident occurred on the first night of employment. The accused entered the room while the victim was sleeping. He stroked her body, removed her clothes, and had sex with her. As the wife was in a nearby room, the accused placed his hand over the victim’s mouth to stop her shouting or making any noise. The accused did the same thing to the victim on the following day, but the victim could not remember what time it was. Two days later, on 6 April, the victim wanted to go home. She did not want to tell the accused’s wife or the police what had happened. She wanted to go home and tell her mother. She begged people for the bus fare home and went to the Pettah bus stand. There she was taken into custody by the army as she did not have her identity card (which had been taken by the accused’s wife). The army handed the victim to the police at which point she disclosed the rape incidents.

After the accused was arrested, the victim, her father, and the employee who had initially brought the victim to the house accepted Rs 200,000 from the accused’s family and gave a letter to them saying the allegation against the accused was false. In the letter, she “apologised for her wrong deed”.

#### Judge 1<sup>102</sup>

In the judge’s view, certain vital elements and aspects of the case gave rise to substantial doubts of the prosecution case, which the trial judge had failed to consider. The identity of the accused and the place of incident, both in contention, needed to be considered. The Court considered the victim had an opportunity to “see the accused and fathom who he is only within a few hours of her arrival in the house or from the time she was brought to the house or place of business by the person called Kumara an employee of the Accused”.

The judge noted the prosecution had failed to produce the semi-nude photographs as documentary evidence. Even if there was no necessity to produce the photographs and the Court was called upon to act on oral evidence, the judge considered “still a doubt surface in view of the peculiar circumstances of the case”. The judge connected this with the following:

- (a) Alleged incident took place at night and there was no light at all. No acceptable details of identity of accused elicited by the prosecution.
- (b) Place of incident in very close proximity to the bedroom of the Accused and his wife. The room of the prosecutrix where the offence was committed had no door.
- (c) Wife and child present in the room and no evidence placed before court to suggest that none other occupied the premises more particularly upstairs at the time of alleged incident. In other words can such an act of rape be committed when others are found in and around the place of incident? There is no proof or evidence of wild and or unacceptable behavior or conduct of Accused prior to incident or thereafter. Was the Accused conduct so unnatural? What sort of evidence led to prove such behavior in the past of the Accused? Had the Accused suffered spells of insanity?
- (d) Prosecution relies only on a dock identification (after 10 years). The prosecution has not led evidence to exclude the presence of any other from the place of incident to decide whether an opportunity was available to the Accused to commit rape.
- (e) Failure of prosecutrix to complain of such an act to any person other than those law enforcement authority, within a short space of time.

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<sup>101</sup> This fact is unclear. One judge states the accused’s parents, the other judge states the wife’s parents.

<sup>102</sup> *Rajendran v AG CA 234/2011*, 4 April 2014, p 2 (p 10/21 of PDF).

(f) inconsistent and uncertain evidence of prosecutrix as to the date of the incident i.e whether it was the 4<sup>th</sup> or 5<sup>th</sup>. Medical evidence does not support the view of the prosecution on this aspect.

(g) The contradiction (pg. 109) marked as vi and omission at pg. 110. This relates to the victim not resisting when the Accused committed the act. Omission as regards Accused closing her mouth to prevent any noise, emanating from her.

In the judge's view:

When I consider the items of evidence and facts referred to in (a) to (g) above from the point of showing a photograph as stated above a reasonable doubt as to accused guilt arise and it is safer that the conviction should not be allowed to stand.

This judge stated that his "views are further fortified" by *Jayatissa v AG* (discussed earlier in this Part) in relation to point (c) he had listed.

[...] whether the Accused-Appellant would commit the act of sexual intercourse on the victim, when his wife was within a distance of 100 feet. According to the victim at the time, the Accused-Appellant's child was also in the kitchen. I am unable to believe the contention that the Accused-Appellant would commit an act of sexual intercourse on a girl without her consent where the wife was within a distance of 100 feet. Evidence of the victim does not satisfy the test of probability.<sup>103</sup>

In the present case, the Court found "the distance is even shorter than the above decided case. It being within the same premises in close proximity to the bed room of the husband and wife".

This judge also found the trial judge had erred in concluding the medical evidence placed the injuries as only three days old, when the medical officer had said an extension of dates was also possible. This created two possibilities of dates for the rape.

#### Judge 2<sup>104</sup>

The judge accepted the victim's evidence about the identity of the person who had had sex with her, as the victim was in no doubt about the identity and was sure that there were two occasions.

Therefore I do not think Wasantham had made a mistake of identity about the person who had sex with her and falsely put the blame on Accused Appellant nor do I suppose that Wasantham leveled entirely an imaginary allegation against the Accused Appellant.

The victim's evidence was that she was a virgin when the rape occurred. The judgment reads:

Wasantham says that she was a virgin up to the time that the Accused Appellant had sex with her but according to the evidence she has given, there was no resistance from her to the act of the Accused Appellant. Her evidence before the trial court with regard to the resistance and screaming was contradicting with evidence given by her at the Magistrate Court in non summary proceedings. The contradiction marked as V 1 is "I did nothing and just waited".

The contradiction aside, the judge nevertheless appears to be basing his decision on whether the victim was a virgin on the basis of her resistance or otherwise, and with no reference in the passage to any medical evidence.

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<sup>103</sup> *Jayatissa v AG* CA 30/2008, 17 January 2014, pp 2-3.

<sup>104</sup> *Rajendran v AG* CA 234/2011, 4 April 2014, p 3 (p 3/21 of PDF).

The judge said what must be considered is (1) whether the accused had sex with the victim against her will and without her consent and (2) if it was with consent, whether the consent was taken forcibly.

Showing nude photos cannot be considered as an act within the above stated wrongful persuasion. It is obvious that Wasantham wanted to protect herself and the Accused Appellant from Accused Appellant's wife and the other inmates of the house at the time of her having sexual intercourse with the Accused Appellant. There is no evidence before us whatsoever of any shocked or frustrated behaviour of Wasantham even though it was her first sexual intercourse according to her. Instead, what we can observe is her waiting silently till the same act again took place. Even after the second incident, she expressed her need to go home only after attending to some domestic chores.

Can a woman who co-operates with a man in sexual act subsequently say that it took place against her will, after getting the feeling that she should not have done it? Obviously it is not the law in force.

Returning to the issue of resistance, the judge noted the victim was wearing a frock/nightdress and knickers when the accused approached her.

What did she do whilst Accused Appellant was removing her clothes? There is no evidence about any kind of resistance. In Medical Officers testimony we don't find any evidence whatsoever as to a rape except the fact that she had indulged in sexual intercourse prior to the date, 09th of April when Wasantham was examined.

When taking all those facts as a whole, the judge concluded that there was reasonable doubt as to whether the sexual act occurred with the victim's consent. Therefore, the "irresistible interference resulting from that is that the prosecution has failed to prove the case beyond a reasonable doubt".



In *Gamini v AG*,<sup>105</sup> the victim was returning from a shop when she met the accused, who then dragged her about 25 feet to a nearby jungle and raped her. Afterwards, she went home and washed her clothes. She said she did not tell anyone at home about the incident as the accused threatened to kill her.

The incident has come to light nearly three weeks after the incident. Two weeks after the incident when one day the accused-appellant and the prosecutrix were at home, the sister of the prosecutrix noticed that both of them were at home. Sister who felt suspicious about their behaviour questioned the prosecutrix and slapped her. Thereafter the prosecutrix revealed the story to the sister.

The Court found that the victim's evidence regarding the delay in bringing the matter to the notice of her mother and sister had to be rejected.

It is interesting to find out whether the said evidence regarding the death threat can be accepted by Court. The prosecutrix after the incident went to the accused-appellant's house. Further, the accused-appellant too came to the prosecutrix's house on several days. The prosecutrix admits that the accused-appellant when came to her house was cracking jokes. When we consider the above evidence it is difficult to believe that the prosecutrix did not complain to the mother or the sister due to the deaththreat made by the accused-appellant.

The Court found the medical evidence did not corroborate the victim's version. Her evidence was that it was her first and last sexual intercourse. The medical evidence found no hymen in the victim's vagina

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<sup>105</sup> *Gamini v AG* CA 139/2011, 19 February 2014.

and the doctor's evidence was that the absence was due to penetration. The Court found it difficult to believe that she had undergone only one sexual encounter. The appeal judgment reads:

In our view the evidence of the prosecutrix does not inspire any confidence. Charge of rape being the easiest charge that a woman can make against a man in this world, Courts in evaluating the evidence of a prosecutrix must be careful.

The Court concluded that, based on the evidence, the victim had consented to the sexual intercourse. In light of the evidence, Attorney-General's Department was "unable to support the conviction".



In *Gunapala (alias Kade Mama) v AG*,<sup>106</sup> the victim had said she was abused by the accused about six days prior to her 10<sup>th</sup> birthday. The victim was examined about three weeks after the incident but the doctor had not observed any internal or external injuries. However, he did not exclude the possibility. The Court considered the medical evidence did not support the victim's evidence, therefore, the case depended entirely on the victim's evidence. The victim's evidence was contradictory about the number of occasions of the abuse – she had first said she was abused twice, but under cross-examination stated it was only once. The victim's mother's evidence confirmed that the victim was "imagining or being delusional".

Witness Sanjeevani who is the victim's mother said that her daughter told her about the incident on 4.11.2011. She further state that her daughter came home around 2.pm. She said she went to the boutique leaving the daughter with her brother and came back within 15 minutes. Then her daughter said 'that a man showed a knife to her and called her'. Witness Sanjeevani said her daughter had claimed that the man was on the other side of the window. It is clear that the mother had checked with others and has found out that there was no such person. Again in the evening the girl has claimed she could see someone waving at her with a knife in hand. She also has claimed that she saw someone hiding in the shrubs behind her house, which could not be seen by anyone else, and she got frightened by the same.

The trial court found the victim was suffering from some mental confusion, but nevertheless convicted the accused. The Attorney-General's Department conceded the approach of the trial judge was incorrect.



In *Chandrasomasiri v AG*,<sup>107</sup> he victim and his brother went to the accused's house to collect some books. The accused sent the brother out to buy some goods.

According to the evidence of the victim, after the brother left, the accused closed the door of the hut and has placed him on the bed. Thereafter the accused placed his male organ in between the legs of the victim, moved it up and down and he stopped the act after the sperms shredded all over the thighs of the victim. When the brother was coming back the victim was outside the hut with eyes filled with tears. Thereafter the accused had given some books, pencils, etc... to both of them and then the victim had come home with his brother.

The victim told his father and aunt about the incident in the evening. Two days later, the victim and aunt made a complaint to the police. The victim's statement was not recorded at the time, rather one month after the incident. The victim was examined by the doctor 1.5 months after the incident, and the doctor observed no injuries. There was a period of 11 years between the incident and trial testimony. The Court

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<sup>106</sup> *Gunapala (alias Kade Mama) v AG* CA 219/12, 15 May 2015.

<sup>107</sup> *Chandrasomasiri v AG* CA 191/2013, 30 April 2015.

found there were “some major contradictions, omissions and also loopholes on the part of the prosecution case”.

When we analyze the evidence given by the victim in court, as pointed out by the learned counsel for the accused-appellant, it is clear that the victim has stated that 'he does not remember the incident that happened on the particular day completely' as an answer to a suggestion made by the defense counsel. The answers he had given to the questions put to him at the stage of examination, cross-examination and re-examination also proves that he has given evidence without a clear memory of the incident.

The testimony of the victim, brother, and father contradicted information they had given to the police. Further, the aunt was not called by the prosecution and did not testify at trial to clarify the complaint she made to the police. The reasons given by the victim and the father for the delay of two days in complaining to the police were considered doubtful, particularly in the absence of the aunt's testimony. No reasons were given for the delay in having the doctor examine the victim.

Accordingly, except the evidence of the victim which was with a lot of infirmities, there was no other evidence to prove the commission of the alleged offence beyond a reasonable doubt.



In *Kusumsiri Peiris v AG*,<sup>108</sup> the Court found the victim's version of events did not satisfy the test of probability, due to the discrepancy between the victim's evidence and her mother's evidence.

According to the victim her mother was going to wake up the brother the accused- appellant called her, took her by the hand and then sat on a chair and kept her on his lap, raised the dress she was wearing and touched her vagina. When this happened her mother was inside the room. Contrary to the evidence of the victim the mother of the victim denies ever going inside the room and waking the brother. According to her as usual the boy had been brought and given to her. If the mother's evidence is to be believed then the said incident could not have happened the way alleged by the victim of this case. This certainly creates a grave doubt in the prosecution case as to whether the accused-appellant had an opportunity to commit the alleged offence as stated by the victim. It is very unlikely that a person would engage in such a sexual act under the given circumstances. The victim has further stated that the son of the accused-appellant too was inside the room at the time. I therefore hold that the story of the victim that grave sexual abuse was committed by the accused-appellant does not satisfy the test of probability.

Further, the Court found the medical evidence did not support the victim's evidence of grave sexual abuse by the accused. The doctor found evidence of repeated vaginal penetration over a period of time, indicating abuse over 1.5 months. This evidence did not support the victim's evidence that grave sexual abuse occurred only on one occasion.



In *Sampath v AG*,<sup>109</sup> it was not clear whether the offending related to grave sexual abuse of a victim under 18 (s 365B(2)(b)) or 18 or over (s 365B(2)(a)). The accused attempted to insert his male organ into the victim's vagina. The victim, who lived with her grandparents, told the grandmother five days later. Initially, the accused was charged with rape, but the Attorney-General's Department later amended it to grave sexual abuse. At trial, the victim admitted that she exaggerated the incident in her statement to the police. The Court considered the admission by the victim demonstrated that she was not truthful in her statement to the police. The Court found that the delay of five days in telling her grandmother, because

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<sup>108</sup> *Kusumsiri Peiris v AG* CA 271 / 2013, 5 June 2016.

<sup>109</sup> *Sampath v AG* CA 82 / 2011, 31 October 2013.

she “could not keep the incident in her mind anymore”, was an unacceptable explanation. The Court found it was significant that the victim did not mention the name of the accused to her doctor, even though he was her uncle.

According to the evidence she knew the name of the accused appellant who is an uncle of her. If she knew the name of the accused-appellant, question arises as to why she did not mention his name in the short history. According to the evidence led at the trial by the prosecution, there was displeasure between families with regard to a land matter. She says that they were not on visiting terms. One Gamini, who was staying in the house of her grandfather where Gayangani was living, had on an earlier occasion, tried to cause trouble to the sister of the accused appellant. Gayangani reluctantly admitted this matter. Thus it appears from the evidence of the prosecution itself that there were reasons for her to falsely implicate the accused appellant with the alleged incident.

The Court found that the trial judge had failed to consider the displeasure between the families and failed to consider the exaggeration in the victim’s police statement. Further, the trial judge erred in rejecting the accused’s dock statement. The dock statement denied the incident and stated that the victim’s family were angry with the accused over the Gamini incident.

### **Themes in the evaluation of evidence**

Victim credibility – that the victim’s evidence was deemed *not credible* – was an overriding theme in the cases where the Court of Appeal overturned the trial convictions. In simplistic terms, a victim who is not credible is a victim the Court does not believe.

The following extracts appeared repeatedly in the judgments:

*Premasiri V. The Queen* 77 N.L.R 86 it was held:-

In a charge of rape it is proper for a Jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the Jury that she is speaking the truth.”

*Sunil and another V. The Attorney General* 1986 1 S.L.R 230 it was held that:-

Corroboration is only required if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.

It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration.

Beyond what is contained in the appeal judgments – and many were very short – it is not possible to know the exact circumstances of the trial and evidence presented. Therefore, in this study, it is not possible to draw conclusions on whether the Court of Appeal was right or wrong in deciding a victim was not credible in a particular case. However, purely on the content of the appeal judgments, there were trends that were evident in the types of issues considered by the Court of Appeal, which lead the Court to conclude that the victim/victim’s evidence was not credible. Some trends raised concerns. In addition, the way some of the judgments read appeared to be a through process of ‘if the victim is telling the truth, why did *x* occur?’ Or, ‘the victim cannot have been telling the truth because *x* occurred’, therefore, the victim is lying, or it must have been consensual sex, and not rape.

Many of the cases revolved around consent. On reading the judgments, they appeared to be saying that, given the circumstances, either the victim was lying about the rape, or if sexual intercourse occurred at all, it must have been consensual. In *Jayatissa v AG*,<sup>110</sup> the most important question to the Court was whether the accused would have sexual intercourse with the victim without her consent – rape her – while his wife and child were 100 feet away in the kitchen. The implication appears to be that if sexual intercourse did occur, it must have been consensual – “Can the court believe that the sexual intercourse as alleged by the victim was committed without her consent under the above circumstances. I say “no” to this question.” In *Ameen v DSRSL*,<sup>111</sup> the fact that the victim returned to work at the accused’s restaurant after the rape, affected her credibility. As she was “a girl of such a young age”, the Court found it hard to believe she would go back and continue to work for her rapist and keep silent for months. In *Perera v AG*,<sup>112</sup> the victim was a domestic worker. The Court questioned why the victim returned to the house after she was raped. Also, the Court deemed it unlikely the accused would rape the victim when the accused’s wife was 10 feet away. Further, that it was possible for the wife to return to the house at any time – “Will a person try to commit sexual intercourse on a woman without her consent when his wife was present 10 feet away? I think not. [...] The question that arises is whether she would come back to the old lady’s house if the incident of rape was true especially to face sexual intercourse against her will. I think not.” In *Athurupana v AG*,<sup>113</sup> the Court considered that, if the accused carried the victim 500m on his shoulders, it could not have been without consent. Then, as she must have consented to the journey, she must have also consented to the sexual intercourse. In *Rajendran v AG*,<sup>114</sup> the victim was again a domestic worker and again she did not leave the employer’s house immediately. The Court noted how the distance in the case between the incident location and where the accused’s wife and child slept, was even shorter than in *Jayatissa v AG*.<sup>115</sup> The Court also appeared to decide that, as the victim said she was a virgin, there should have been some sort some resistance when the accused removed her nightdress and knickers and “shocked or frustrated behaviour” after the rape. Instead there was no evidence of resistance and she was silent until another rape occurred and only then did she leave the house – “Can a woman who co-operates with a man in sexual act subsequently say that it took place against her will, after getting the feeling that she should not have done it? Obviously it is not the law in force.” In *Bandara and others v AG (2014)*,<sup>116</sup> based on the Attorney-General’s Department submission, the conduct of the victim suggested she consented to sex with the second accused (gang rape case). The apparent conduct being that the second accused took the victim to his house, his mother offered her lunch, the parents left the victim and accused at the house, then sexual intercourse took place, and then the second accused (along with the third accused) dropped her home. In *Kudabandara v AG*,<sup>117</sup> because the victim remained in the accused’s house after the accused’s wife had left the house, the Court considered this was reasonable doubt as to consent. In *Premajayantha v AG*,<sup>118</sup> the Court questioned why the victim washed her clothes after the incident. The Court also said it was pertinent to observe the way in which the accused took the victim to the room (to be raped) – “The Accused-Appellant closing her mouth with one hand and putting the other hand around her waist in a loving manner, took her to the front room and committed sexual intercourse.”

The two following cases involved statutory rape, which makes consent irrelevant. Therefore, the Court deeming the victim’s version as not credible could not be linked to raising doubts about whether she consented or not. In *Dharmadasa v AG*,<sup>119</sup> the fact that the victim returned to the accused’s house after the rape, affected her credibility. The appeal judgment suggests that the victim may have been a maid or domestic worker (the accused’s wife had asked her to cook some rice), although this is not definitive. The appeal judgment reads “Then the question arises as to why she went to the accused-appellant’s house on

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<sup>110</sup> *Jaytissa v AG* CA 30/2008, 17 January 2014.

<sup>111</sup> *Ameen v DSRSL* CA 110/2010, 20 October 2016.

<sup>112</sup> *Perera v AG* CA 24/2010, 27 June 2013.

<sup>113</sup> *Athutupana v AG* CA 129/2009, 6 February 2014.

<sup>114</sup> *Rajendran v AG* CA 234/2011, 4 April 2014.

<sup>115</sup> *Jaytissa v AG* CA 30/2008, 17 January 2014.

<sup>116</sup> *Bandara and others v AG* CA 196-200/2011, 7 February 2014.

<sup>117</sup> *Kudabandara v AG* CA 191-2009, 7 March 2014.

<sup>118</sup> *Premajayantha v AG* CA 211/2012, 21 October 2014.

<sup>119</sup> *Dharmadasa v AG* CA 201/2011, 17 February 2014.

several occasions and faced sexual intercourse with the accused-appellant.” In *Banda v AG*,<sup>120</sup> the accused leaving the victim’s bicycle (as he dragged the victim away) on the side of a road, in the middle of the afternoon, where people would ask where the bicycle’s owner was, was considered “highly unlikely”.

The recurrence of cases where the victim’s credibility was detrimentally affected in the eyes of the Court because the victim returned to her accused employer, or did not leave employment immediately, is of concern. These cases paid no attention to the inherent power imbalance between a male employer and a female domestic worker. There was no discussion to even entertain the idea that the victim may have returned or not left immediately for other reasons, such as feeling compelled to return for lack of economic choice, or cultural/societal stigma, or simply fear, given that she was a domestic worker and he was her boss.

There was also significance placed on what was called ‘medical evidence’ but did not relate to the clinical findings of the doctor. In particular, whether the victim named the accused, to the doctor, as the person who raped her. In *Fernando v AG*,<sup>121</sup> the victim told the doctor of a rape by a relative brother, and the accused’s name was not mentioned to the doctor. As the victim had not mentioned a rape by the accused to the doctor, the Court said the medical evidence contradicted the victim’s evidence. In *Kumara v AG (2015)*,<sup>122</sup> the victim was examined by two doctors. The Court considered it a contradiction that to one, she had said she had intercourse with a known person, and to the other, she had said she was raped by a known person. In neither instance had she named the person. In *Sampath v AG*,<sup>123</sup> the victim did not mention the name of the accused to her doctor, even though he was her uncle.

Another recurring theme was the weight placed on the “delay” in the victim making a complaint to the police, or in fact telling anyone about the rape at all. In *Sumathipala and others v AG*,<sup>124</sup> the delay was that the victim did not make a complaint on the night of the gang rape, nor when the army officer came around in the evening to investigate the incident (as the witnesses had immediately complained about a kidnapping), but instead waited until the following morning. From that, the Court found it very clear that she was not interested in making a prompt complaint to the police and that “she avoided going to the police”. The Court also factored in that she was a married woman with children, that she was not legally married to one of the witnesses, and that the witness had referred to the victim as a prostitute. In *Naufar v AG*,<sup>125</sup> the police complaint was made two months after the incident and not of the victim’s own volition. In *Dharmadasa v AG*,<sup>126</sup> the delay was that the incident occurred in March and the victim told the mother only in August. In *Naufar v AG*,<sup>127</sup> the victim was raped on five occasions but did not tell any family about it, and the police complaint was only made two months later. In *Ameen v DSRSL*,<sup>128</sup> the police complaint was made over four months after the incident, and only after she found out she was pregnant. The victim also did not tell her mother about the rape until she found out she was pregnant. In *Peiris v AG*,<sup>129</sup> the victim told her husband about the rape five days later when he returned home, and then made a police complaint. The Court thought that her reason for the delay in telling anyone, including family nearby – that she was waiting for her husband to come home – was not plausible and she had opportunity to tell someone. The Court also factored in that the victim was a married woman with a child, that she sold liquor at her home in the absence of her husband, and the accused and his friends also came to her home to drink – “Unlike other innocent women the evidence in this case disclose that she sold liquor in the house and that the friends of her husband came to consume liquor at her place when the husband was not there. According to the prosecutrix the accused-appellant came to her house with two other friends”. The Court also thought the fact that the victim tried to contact the

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<sup>120</sup> *Banda v AG* CA 129/2013, 7 October 2015.

<sup>121</sup> *Fernando v AG* CA 21/12, 16 July 2015.

<sup>122</sup> *Kumara v AG* CA 72/2014, 14 October 2015.

<sup>123</sup> *Sampath v AG* CA 82/2011, 31 October 2013.

<sup>124</sup> *Sumathipala and others v AG* CA 09/2013, 9 November 2015.

<sup>125</sup> *Naufar v AG* CA 99/2011, 8 November 2012.

<sup>126</sup> *Dharmadasa v AG* CA 201/2011, 17 February 2014.

<sup>127</sup> *Naufar v AG* CA 99/2011, 8 November 2012.

<sup>128</sup> *Ameen v DSRSL* CA 110/2010, 20 October 2016.

<sup>129</sup> *Peiris v AG* CA 155/2014, 9 October 2015.

accused after the incident was “rather strange”, indicating this was an instance of false rape as the husband got to know about the victim trying to contact the accused. In *Kumara v AG (2015)*,<sup>130</sup> the Court noted that the victim made the police complaint nine months after the incident, and only when she was taken into custody for attempted suicide. In *Gamini v AG*,<sup>131</sup> there was a three week delay. Within those three weeks, the victim had gone to the accused’s house and the accused had gone to the victim’s house, where he was “cracking jokes”. She told her sister after her sister “felt suspicious about their behaviour questioned the prosecutrix and slapped her”. The Court thought the victim’s reason for the delay in telling her mother and sister– that the accused threatened her – had to be rejected. The Court also said the “Charge of rape being the easiest charge that a woman can make against a man in this world, Courts in evaluating the evidence of a prosecutrix must be careful.” In *Sampath v AG*,<sup>132</sup> the delay of five days in the victim telling her grandmother, because she “could not keep the incident in her mind anymore”, was an unacceptable explanation.

The lack of an immediate complaint to the police, or indeed telling anyone about the incident, appeared to significantly detrimentally impact on victim credibility. Here again though, there appeared to be no discussion about factors or considerations that may explain the victim’s decision to initially keep quiet about the incident. Even where the victim stated fear as the reason for the delay (as the accused threatened her in some way), the judgments appeared to reason that the explanation of fear was not plausible given other factors in the case (such as returning to, or remaining at, the accused’s employment).

The information contained in the appeal judgments is not enough to make an assessment on the veracity (truth) of a victim’s evidence. The entire trial court proceedings and all evidence by that victim would need to be analysed. However, the factors the Court of Appeal took into consideration, and influenced its decision the victim was not credible, suggest further inquiry is important. In particular, as the appeal judgments did not discuss other issues that may have been relevant to, or explained, the behaviour of the victim. Further, it is important to note that, at appeal, the victim’s evidence is not being assessed for the first time. Where the Court of Appeal identify factors resulting in the determination the victim was not credible, a trial judge had assessed the evidence and had come to the opposite conclusion (hence the trial resulting in a conviction).

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<sup>130</sup> *Kumara v AG* CA 72/2014, 14 October 2015.

<sup>131</sup> *Gamini v AG* CA 139/2011, 19 February 2014.

<sup>132</sup> *Sampath v AG* CA 82/2011, 31 October 2013.

## Chapter 3 – Observations About Sexual Violence Cases and the Criminal Justice System

This chapter discusses observations about sexual violence cases and the broader criminal justice system, based on the analyses of the 121 rape and grave sexual abuse Court of Appeal judgments.

### Observations about sentencing practices

#### *Disparity in sentences ordered at trial*

The tabulated information in Chapter 2 – Part 2 illustrates the disparity in sentences imposed by trial courts for rape and grave sexual abuse. The disparity is present in all three components of the sentence ordered – the custodial sentences, fines, and compensation. Even with the limitation that 26% of the cases could not be categorised into the Penal Code offences, the disparity is evident. If in 121 cases of trial court sentences, such disparity exists, it raises concerns about the existence and extent of the disparity of sentencing for rape and grave sexual abuse in *all other* trial decisions. It alerts to a lack of clarity in how, what, and why the disparity is occurring, and a need to understand the factors that are influencing judges.

#### *Non-adherence to mandatory minimum sentences*

All rape and grave sexual abuse offences prescribe a mandatory minimum custodial sentence. This means that if a person is convicted of a particular rape or grave sexual abuse offence, there is legislative guidance to ensure a minimum custodial sentence as punishment. When looking at the tabulated information in Chapter 2 – Part 2, it is clear that sentencing for rape and grave sexual abuse, judges do in fact sentence below the statutory minimum. The 31 cases where the exact Penal Code offence is unclear impedes the complete analyses of the cases and the ability to see how many of the cases do in fact have sentences below the statutory minimum. Nevertheless, even in the cases that could be categorised, there were overt examples of sentencing below the statutory minimum. For example, the tabulated information for custodial sentences for statutory rape (Figure 16), incest statutory rape (Figure 23), and grave sexual abuse under 18 (Figure 32), provide clear illustrations. Even in the 20 cases of rape where the exact offence of rape was unclear, sentencing below the statutory minimum was obvious – the absolute minimum for any form of rape is 7 years rigorous imprisonment (Figure 26).<sup>133</sup>

As already emphasised, the lack of specificity of offences in 26% of the cases is a barrier that prevented each and every case being clustered by the offence it related to. The ambiguity in the appeal judgments meant the cases could not be clustered according to offences to see how, in practice, sentencing for a particular offence operates. For example, no inferences can properly be drawn on rape cases with a custodial sentence under 10 years being rape under 364(1) (with a sentencing range of 7-20 years) and *not* aggravated rape under s 364(2) (with a sentencing range of 10-20 years). A rape sentence of under 10 years could very well be rape under 364(1), but it could equally be aggravated rape under 364(2) but where the mandatory minimum sentence was overridden.

Imposing sentences below the statutory mandatory minimum, including suspended sentences, is said to be authorised by Supreme Court decision SC 03/2008 (15 October 2008) which is understood to have held the prescription of a minimum mandatory sentence by statute removed the exercise of judicial discretion to impose a sentence the court deems appropriate based on the circumstances of the case, and therefore, was in conflict with the Constitution:

As far as Section 364(2)(e) of the Penal Code is concerned, the High Court has been prevented from imposing a sentence that it feels is appropriate in the exercise of its judicial discretion due to the minimum mandatory punishment prescribed in Section 364(2)(e). Having regard to the nature of the offence and the severity of the minimum mandatory

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<sup>133</sup> The exception being statutory rape where the accused was under 18 and the victim consented. However, none of the cases fell into this category.

sentence in Section 364(2)(e) is in conflict with Articles 4(c), 11 and 12(1) of the Constitution.<sup>134</sup>

Of note, is that this Supreme Court decision is not publicly available – it is not on the Supreme Court website.

### ***Suspended sentences***

Of particular concern is the occurrence of suspended sentences. The imposition of suspended sentences for sexual violence offences is a doubly problematic approach. It disregards both the requirement to impose a custodial sentence *and* the requirement to impose a custodial sentence of a certain period. In essence, a suspended sentence means no jail time (unless there is subsequent offending within the period of suspension). Further, it effectively means overriding two separate statutory provisions: the sexual violence offence provision in the Penal Code stipulating a mandatory minimum custodial sentence, *as well as*, the Code of Criminal Procedure Act 1979 (“Criminal Procedure Code”) provision stipulating that a court shall not order a suspended sentence if a mandatory minimum sentence has been prescribed by law for the offence.<sup>135</sup>

Imposing a suspended sentence also disregards the gravity of the offending, as established through the fact that the offence has a mandatory minimum custodial sentence. At the point at which sentencing occurs (in the trial process), the case had reached that point based on offending of a particular gravity – the police arrested and the Attorney-General’s Department indicted upon an offence with a mandatory minimum custodial sentence because it was offending of a particular gravity. Further, in the seven cases of suspended sentences at trial in this study, there was an acknowledgement of the gravity of the offending, as the accused pleaded guilty to the offence. Compounding this, are the three cases of suspended sentences imposed by the Court of Appeal, which also disregarded the trial court’s recognition of the gravity of the offending in imposing a custodial sentence. In particular, two of these Court of Appeal cases did not involve a guilty plea, meaning there was no acknowledgement of guilt, and guilt had been proved beyond reasonable doubt. Nevertheless, the Court set aside the custodial sentences imposed by the trial courts and instead imposed suspended sentences.

### ***Correlation between guilty pleas and suspended sentences***

In the 14 cases involving guilty pleas (where the accused pleaded guilty to the charges, thereby obviating the need for a trial), in half of the cases (7) the accused received a suspended sentence (despite a mandatory minimum custodial sentence). Out of the other half, in six cases, the accused received the mandatory minimum custodial sentence for the particular offence and in one case the accused received a sentence well below the statutory minimum mandatory sentence.

Without the sentencing notes of the sentencing judge, it is not possible to analyse the role the guilty plea played in the construction of the sentence. In particular, the discount given by the judge for the guilty plea and the weight given to the guilty plea as compared to the weight given to other mitigating and/or aggravating circumstances.<sup>136</sup> However, a pattern that is evident is that in all seven cases where a suspended sentence was ordered at trial, the accused had pleaded guilty. This information suggests a correlation between pleading guilty and receiving a suspended sentence. This also suggests that a guilty plea plays a greater role in sentencing than does the gravity of the offending itself.

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<sup>134</sup> Cited in *AG v Shantha (alias Ran Mama)* CA 150/2010, 16 July 2014.

<sup>135</sup> Code of Criminal Procedure Act 1979, s 303(2).

<sup>136</sup> Section 197 of the Criminal Procedure Code provides that a guilty plea is relevant to sentencing:

197. (1) [...]  
(2) The Judge shall in sentencing the accused have regard to the fact that he so pleaded.

Section 303 of the Criminal Procedure Code, which guides suspended sentences, provides:

303. (1) [...]  
(k) the fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or

### ***Utility of monetary punishment (fines and compensation)***

A matter that is beyond the scope of this study is delving into the details of fines and compensation, and default sentences for non-payment. In almost every case, either a fine or compensation or both, was ordered alongside the custodial sentence. In the majority of cases, default sentences for non-payment were also ordered. What is not known is, in these cases, whether the fines and compensation were, in fact, paid by the accused. Whether or not fines and compensation are paid impacts on assessing whether they serve their function as a sentence and whether they are useful as a sentence. Further, it is important to know the frequency and reasons for default sentences for non-payment being triggered. This is particularly important given the significant variation in compensation and default sentences ordered in the cases reviewed in this study. This will also impact on assessing the utility and function of a monetary punishment. Where default sentences are triggered, that means the fine and/or compensation has not been paid by the accused and consequently he or she will spend an additional amount of time in prison. While further jail time is a penalty for the accused defaulting in payment, it questions the value of ordering monetary punishment, particularly vis-à-vis the victim and compensation ordered. The rationale of a monetary payment as punishment is to 'give something' to the victim. If an accused, who is ordered to pay compensation to the victim, cannot or does not pay, the victim obviously then does not receive anything. If non-payment of compensation is occurring on a systematic basis, that would indicate the existence of a futile process. The pertinent questions therefore are: *Do fines and compensation get paid, routinely, by the accused? How often do default sentences get triggered? Do monetary punishments, in the form of fines and compensation, have value in a developing country where poverty is a material concern and when the majority of the criminal justice system is likely overrepresented by individuals from a low socio-economic background?*

### ***No compensation for incest statutory rape***

Of note is the Penal Code's silence on compensation with respect to incest statutory rape under s 364(3). For all other categories of rape, as well as grave sexual abuse, the Penal Code expressly provides for compensation to be ordered to the victim (see Chapter 1). This anomaly raises questions about why, only for rape involving an incestuous relationship, the Penal Code does not expressly provide for compensation as it does for the other sexual violence offences.

In the six cases of incest statutory rape, two cases did have compensation ordered as part of the trial sentence. Another case did not order compensation at trial and nor was it ordered upon appeal. In the remaining three cases, the appeal judgments do not mention compensation. It is not clear if compensation was ordered and not recorded, or not ordered at all. In the three other cases where it was not clear if the offence was statutory rape or incest statutory rape, two cases also had compensation ordered.

### ***Disparity in default sentences for non-payment of compensation***

Of concern is the disparity in default sentences ordered for non-payment of compensation in relation to rape and grave sexual abuse sentences at trial. For example, 2 years rigorous imprisonment was ordered as a default sentence for non-payment of compensation of Rs 10,000 as well as Rs 1 million. Two years simple imprisonment was ordered as a default sentence for non-payment of compensation of Rs 10,000 as well as Rs 700,000. One year rigorous imprisonment was ordered as a default sentence for non-payment of compensation of Rs 10,000 as well as Rs 125,000. One year simple imprisonment was ordered as a default sentence for non-payment of compensation of Rs 20,000 as well as Rs 200,000.

When looking at the figures from another angle, when Rs 10,000 compensation was ordered, the default sentence for non-payment was either 1 year rigorous imprisonment, or 2 years simple imprisonment, or 2 years rigorous imprisonment. When Rs 25,000 compensation was ordered, the default sentence was either 6 months simple imprisonment, 6 months rigorous imprisonment, 1 year imprisonment of an unknown variety, 2 years rigorous imprisonment, 2.5 years simple imprisonment, or 3 years simple imprisonment. When Rs 50,000 compensation was ordered, the default sentence was either 6 months simple imprisonment, 6 months imprisonment of an unknown variety, 1 year simple imprisonment, 1 year imprisonment of an unknown variety, 2 years simple imprisonment, 2 years rigorous imprisonment,

or 4 years rigorous imprisonment. When Rs 75,000 compensation was ordered, the default sentence was either 9 months rigorous imprisonment, or 1 year imprisonment of an unknown variety, or 2 years rigorous imprisonment, or 3 years simple imprisonment, or 5 years simple imprisonment. When Rs 100,000 compensation was ordered, the default sentence was either 6 months imprisonment of an unknown variety, 1 year simple imprisonment, 1 year rigorous imprisonment, 2 years simple imprisonment, or 2 years rigorous imprisonment.

It is unclear why default sentences accompanying non-payment vary so much, for the same amount of compensation ordered. While compensation is a constituent part of the sentence (along with the custodial sentence and fine) that varies, or is tailored, according to the circumstances of a particular case, this does not explain why the default sentence for non-payment should also vary. Further inquiry would be required to see if trial judges provide explanations for the default sentences ordered.

Under s 364(4), for rape, the maximum default sentence for non-payment of compensation is 2 years imprisonment (either simple or rigorous) for rape under s 364(1) and aggravated rape under s 364(2):

**364. (4)** Where any person fails to pay the compensation he is ordered to pay under subsection (1) or subsection (2), he shall, In addition to the imprisonment imposed on him under subsection (1) or subsection (2) be punished with a further term of imprisonment of either description for a term which **may extend up to two years.** [emphasis added]

For grave sexual abuse, the Penal Code is silent on the maximum term of a default sentence for non-payment of compensation. As mentioned above, for incest statutory rape, the Penal Code is silent on compensation and consequently the default sentence for non-payment. It is not clear why the Penal Code is silent on the cap of a default sentence for grave sexual abuse. However, as the maximum term is 2 years imprisonment for rape, one would expect that for grave sexual abuse and incest rape the term *cannot be more* than it is for rape. In particular, as for all such offences – all categories of rape under s 364, both categories of grave sexual abuse under s 365B, and incest statutory rape – the maximum custodial sentence permissible is 20 years rigorous imprisonment.

Therefore, of particular concern is that there were multiple cases where the default sentences exceeded the 2 year statutory limit (Figure 39<sup>137</sup>). In 12 cases, the offences involved statutory rape, gang rape, rape under 18, rape where the Penal Code provision was unclear, incest statutory rape, grave sexual abuse under 18, and a case where the offence was unclear.<sup>138</sup> In these 12 cases, the default sentences ranged from 2.5 years simple imprisonment (one case), 3 years simple imprisonment (two cases), 3 years imprisonment of an unknown variety (two cases), 4 years rigorous imprisonment (three cases), 4 years imprisonment of an unknown variety (one case), and 5 years simple imprisonment (three cases). Further inquiry would be required to assess how, and if, the sentencing judges in these cases justified the imposition of default sentences over 2 years imprisonment. On appeal, five cases that had default sentences exceeding the 2 year limit were reduced to 2 years or below (Figure 41) when the sentence was varied. In one case, the compensation amount was increased upon appeal, however, the default sentence for non-payment was reduced (Figure 40). In the remaining six cases, two resulted in convictions being overturned (thereby the sentence no longer stood). Four resulted in the appeal being dismissed, which meant the default sentence remained in force.

Further inquiry would also be required to see how default sentences for non-payment of compensation operate in practice. In other words, to see how many compensation orders are satisfied (paid out) and how many require the default sentence to be triggered. This is important in order to assess the impact of

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<sup>137</sup> The information contained inside the thick black box comprises the default sentences for non-payment of compensation that exceed the 2 year statutory limit.

<sup>138</sup> The words rape or grave sexual abuse were not used in the appeal judgment. However, there was content in the appeal judgment which enabled the deduction that it was some form of sexual violence offending. Such as, references to medical evidence and tears to the hymen and references to a previous sexual relationship with the accused.

compensation orders in sexual violence cases, as a means of benefit to the victim and additional punishment to the accused.

### ***Disparity in sentencing for other offences***

The disparity in trial sentences, evident only because these 121 Court of Appeal judgments were collated and studied together, highlights the importance of knowing how the trial judge constructed the sentence, and the factors the judge took, and did not take, into consideration. The natural question this raises is *why is there such disparity?* This requires inquiry into the process of sentencing conducted by High Court judges. What is known is that there is legislative guidance on the sentencing range for all offences within rape and grave sexual abuse – as there is a minimum and maximum custodial sentence. *How do sentencing judges approach sentencing for rape and grave sexual abuse? How are aggravating and mitigating circumstances of the offending and offender considered? What factors of the accused and victim are deemed as relevant? Do judges consider other sentencing decisions of similar offending in deciding on a sentence?*

### ***Need for sentencing guidelines***

It is unrealistic to think that the disparity of sentencing for rape and grave sexual abuse offences would not be found for any given offence under inquiry. There is no reason to think that the disparity in custodial sentences, fines, and compensation ordered for rape would not also exist for murder or domestic violence, or any other offence. Disparate sentences highlight the lack of uniformity in sentencing practices. Sentencing is not intended as, and never should be, a mere mathematical exercise. However, similar criminal offences and similar criminal offenders should receive similar sentences. If they do not – if similar criminal offences and similar criminal offenders receive vastly differing sentences, it raises issues on the fairness of the system in treating one accused a particular way and another accused an entirely different way. The aim is to have consistency of sentences for similar offending, while also acknowledging a judge should be able to act upon an atypical situation and in the interests of justice to sentence an accused according to the circumstances of a particular case.

In the absence of sentencing guidelines and legislative guidance on sentencing, sentencing is at the discretion of judges. For sexual violence offences, there are in fact legislative constraints upon the exercise of judicial discretion – mandatory minimum sentences. Yet, as can be seen in the cases studied, those constraints are not always adhered to. This raises concerns about, in essence, what is arguably judicial disregard of legislative direction. While legislation should not, and cannot, prescribe for every eventuality of sentencing – thereby removing judicial discretion entirely – when a legislative enactment provides for a minimum sentence for an extremely grave crime, it raises concerns about whether it is appropriate for judges to ignore that. The flipside of the discretion is also the potential for arbitrariness. Related to the comment above about fairness in sentencing, arbitrariness in judicial decision-making is counter to fairness in outcomes. *Should there not be a transparent sentencing policy? Should there not be consistency in practice between different courts and judges?*

The Ministry of Justice progress report for 2016 states:<sup>139</sup>

#### **f. Comprehensive study into sentencing patterns in Sri Lanka**

The findings of the study into the legal proceedings carried out covering High Courts and Court of Appeal in 08 Districts, to identify tendencies and practices, are being categorized and analyzed in terms of qualitative and quantitative perspective. The study will consider the appropriateness of certain penal practices with an eye to submit a need for a comprehensive sentencing policy.

The formal inquiry into sentencing practices, with a view to creating a comprehensive sentencing policy, is a positive step.

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<sup>139</sup> Ministry of Justice Performance Report, January-December 2016, p 20,  
[http://www.moj.gov.lk/web/images/pdf/progress\\_report/pr\\_january\\_december\\_2016\\_en.pdf](http://www.moj.gov.lk/web/images/pdf/progress_report/pr_january_december_2016_en.pdf).

Further research and analysis is also required on trial courts that impose suspended sentences in reliance of SC Reference No 03/2008 in order to build a picture of the impact that the Supreme Court decision is having on the sentencing of sexual violence offences, as well as potentially other offences.

## **Observations about the exercise of criminal justice functions**

### ***Parameters of judicial discretion***

The larger issue that concerns such as the disparity of sentencing and the imposition of suspended sentences overriding statutory minimum sentences signals is around the exercise of judicial discretion. In particular, the parameters within which judges ought to operate in decision-making in criminal cases. The importance of having parameters is to prevent decision-making that, in the exercise of judicial discretion, smacks of arbitrariness. In this study, a clear example of judicial decision-making that comes across as arbitrary are the default sentences for non-payment of compensation. The extent of the variance in default sentences ordered, even in just 91 cases, begs the question, *on what basis did these judges decide to impose such sentences? What is the criteria upon which judges construct sentences?*

### ***Prosecutorial policy***

In 121 trial convictions and sentences, the State challenged six trial decision (5%). In 5% of the cases, the State considered there was an error of fact or law to rectify. That means, *prima facie*, in the other 95% of cases, the State accepted the trial court decisions. The State deemed no errors requiring rectification on appeal, or if there were errors, they were not sufficient to warrant an appeal. This becomes problematic when the cases are delved into. An obvious instance is where there is a mandatory minimum custodial sentence for an offence, but where trial judges order sentences that are below the mandatory minimum custodial sentence, or worse yet, order suspended sentences (which means no custodial time). This is further compounded when looking at the cases which had convictions and sentences overturned on appeal and where the State conceded that it could not support the convictions. The figure of 5% out of 121 also raises queries around what the State policy is on criminal appeals, particularly, the circumstances in which a trial conviction and/or sentence will be appealed.

This dataset does not include any cases where the State is appealing a trial acquittal. The dataset does, however, include 28 out 121 cases with convictions overturned on appeal. In other words, in the 28 cases, the Court of Appeal thought the trial court got it wrong, and therefore overturned the convictions and acquitted the accused. If in 23% of cases the trial court got it wrong in *convicting* someone, it raises questions about the possibility of other errors made by trial courts – such as *acquitting* an accused at trial when she or he ought to have been convicted. In order to analyse this issue further, information would be required on (i) all sexual violence offence trials that resulted in convictions and (ii) all sexual violence offence trials that resulted in acquittals. These two categories of information are presently unknown variables, as such information is not publicly accessible. It may be possible to obtain this information through Right to Information requests, assuming the information is compiled and updated by the Attorney-General's Department, the Ministry of Justice, or some other government institution. The essential point is, it appears unrealistic to think that in *all* cases of trial acquittals, the trial court got it right. This also raises the issue of what the circumstances are and what the threshold is for the Attorney-General's Department to appeal a trial acquittal.

Of particular concern is the concession by the Attorney-General's Department that convictions could not be supported. In six<sup>140</sup> of the 28 cases (21%) where the Court of Appeal overturned the trial convictions and sentences, the Attorney-General's Department conceded, at the appeal hearing, that the convictions could not be supported. This raises concerns about the number of conviction cases outside of this study that the State would accept should not have resulted in a conviction – where accused have been convicted but they have not appealed the convictions, for whatever reason. The larger policy issue this

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<sup>140</sup> *Bandara and others v AG* CA 190-192/11, 15 March 2013; *Appuhamy v AG* CA 66/2011, 15 October 2013; *Bandara and others v AG* CA 196-200/2011, 7 February 2014; *Gamini v AG* CA 139/2011, 19 February 2014; *Senarathne v AG* CA 25/09, 6 March 2014; *Kudabandara v AG* CA 191-2009, 7 March 2014.

raises is about prosecutorial policy. If on appeal, the State concedes that convictions could not be supported, it begs the question *why were prosecutions pursued in the first place?*

### ***Oversight and monitoring of prosecutions***

While it is laudable that State Counsel upon appeal would in fact concede that an accused ought not have been convicted, that does not address the larger issue on prosecutorial policy in pursuing such prosecutions. If in six out of 121 sexual violence trials that resulted in convictions, the Attorney-General's Department conceded that a conviction was wrong, it raises concerns about the soundness of convictions that *do not* appear before the Court of Appeal, on sexual violence offences and any other offence. This raises questions on two interrelated issues: (i) prosecutorial policy on the one hand and (ii) oversight and monitoring on the other hand. In terms of prosecutorial policy, the very obvious question is *what is the prosecutorial policy in Sri Lanka for pursuing prosecutions, for any offence? Are there prosecution guidelines that provide a framework for when a prosecution should and should not be pursued? Are there guidelines for when a prosecution should be withdrawn?* In terms of oversight and monitoring, there are various phases and time that passes between a decision to indict an accused and an appeal hearing where a concession of unable to support conviction arises. *What are the oversight procedures in place for prosecutions? Are decisions to indict subjected to any oversight procedure? Are there procedures within the Attorney-General's Department that monitor trials that result in conviction to assess whether there are problems with the soundness of the conviction?*

### ***Oversight of counsel***

While the arguments and submissions put forward by accused's counsel and State Counsel are not possible to know, in their entirety, from the appeal judgments, there were two cases that warranted noting due to the arguments put forward by accused's counsel. In *Kumara v AG (2013)*,<sup>141</sup> a case of grave sexual abuse under 18, the accused's counsel did not challenge the conviction, only that the sentence of 7 years rigorous imprisonment was excessive. In support, he argued:

Further he submits that the accused-appellant has respected the virginity of the victim girl. According to the evidence, the accused-appellant attempted to insert his male organ to the anus of the victim girl but did not pursue it because of the complaint of pain made by the victim girl.

The appeal judgment contains no response to that submission, so it is not known if the submission was considered by the judges. The result was that the accused's sentence was reduced to 4 years rigorous imprisonment. The judgment contains no information as to why the Court thought the custodial sentence should be reduced.

*AG v Shantha (alias Ran Mama)*<sup>142</sup> was also a case of grave sexual abuse under 18. The accused pleaded guilty, after proceeding with the trial for four years, and received a sentence of 2 years rigorous imprisonment suspended for 10 years. The State appealed in order to increase the custodial sentence. In mitigation of the sentence, the accused's counsel argued:

1. Incident occurred about 9 years ago (prior to 30.7.2010). Age of the Accused as at 30.7.2010 was 29 years.
2. Tolerated the charge for 9 years
3. No other offence committed during the 9 years period.
4. Only this incident occurred during the Accused 29 years of age,
5. These are normal happenings in the society [Sinhala text not included]
6. These things are done by the ordinary people [Sinhala text not included]
7. According to his experience these are normal happenings [Sinhala text not included]
8. There is something special to impose a lenient sentence. Accused had kept all this in

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<sup>141</sup> *Kumara v AG*, CA 39/2010, 14 November 2013.

<sup>142</sup> *AG v Shantha (alias Ran Mama)* CA 150/2010, 16 July 2014.

mind and lived, without causing any problem.

The Court stated the submissions were “surprising and intolerable”. Further that:

The points urged to a court of law as in 5, 6 & 7 above are intolerable and may give the Wrong signal to the younger generation since the record maintained by the High Court and the Appellate proceedings would be a public document and as such access to same cannot be denied. In the medical science such sexual acts would be described and explained in medical parlance in relation to biological and or other reasons but the law of the land and all over the globe makes it an offence and a prohibition.

The Court increased the custodial sentence to 10 years rigorous imprisonment.

The submissions by the accused’s counsel in these two cases raise concerns about the appropriateness and ethics of legal arguments. It is alarming that such arguments were made before any court, let alone the Court of Appeal. It raises questions about other similarly questionable arguments put forward by counsel and raises questions on a larger policy level about the regulation of counsel’s conduct in the discharge of their duties as officers of the court.

### ***Police investigations***

Although the police statistics referred to in Chapter 1 are outside the Court of Appeal judgments studied, they deserve mention. The police website statistics from 2012 to 2016<sup>143</sup> provide figures for what the police call “grave crimes” including:<sup>144</sup> “rape/incest”, “rape of women over 16 years of age”, “statutory rape (women under 16 years) with the consent of the victim”, “statutory rape (women under 16 years) without the consent of the victim”, and “unnatural offences/grave sexual abuse”. The website does not provide explanations on how the categories were arrived at.

The official information published by the police by way of their statistics raises concerns about how sexual violence offences are understood for the purposes of a criminal investigation. As a police criminal investigation is the first phase of the criminal process, how police understand the offences and how a criminal investigation is framed, is of crucial importance. Merely looking at the police statistics in Figure 1 raises questions about how the police operationally understand sexual violence offences. For 2012 to 2014, the statistics only refer to “rape/incest” and “unnatural offences/grave sexual abuse”. This broadly links with the chapter sub-headings in the Penal Code. This, however, does not take into account the different offences within each chapter sub-heading. Under “of rape and incest” in the Penal Code, there are different rape and incest offences. For example, from the information given, it is not known how many cases of statutory rape there were from 2012 to 2014. Similarly, the chapter sub-heading of the Penal Code that provides for “of unnatural offences and grave sexual abuse” contains three distinct types of offences: unnatural offences (s 365), acts of gross indecency between persons (s 365A), and grave sexual abuse (s 365B). As the police statistics provide figures for “unnatural offences/grave sexual abuse”, it is not possible to know the exact figures relating to grave sexual abuse.

Of particular concern is the way rape offences have been organised for 2015 and 2016: “rape of women over 16 years of age”, “statutory rape (women under 16 years) with the consent of the victim”, and “statutory rape (women under 16 years) without the consent of the victim”. This is alarming as, by dint

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<sup>143</sup> The website provides full year figures for 2013 to 2016. For 2012, the website provides figures for the first quarter only.

<sup>144</sup> Sri Lanka Police, “Grave crime abstract for 01<sup>st</sup> quarter for the year 2012”,

[https://www.police.lk/images/others/crime\\_trends/2012/grave\\_crime\\_abstract\\_for\\_01st-quarter-for-the-year-2012.pdf](https://www.police.lk/images/others/crime_trends/2012/grave_crime_abstract_for_01st-quarter-for-the-year-2012.pdf);

Sri Lanka Police, “Grave crime abstract for the year 2013 for whole island from 01.01.2013 to 31.12.2013”,

[https://www.police.lk/images/others/crime\\_trends/2013/grave\\_crime\\_abstract\\_2013.pdf](https://www.police.lk/images/others/crime_trends/2013/grave_crime_abstract_2013.pdf);

Sri Lanka Police, “Grave crime abstract for the year 2014”,

[https://www.police.lk/images/others/crime\\_trends/2014/grave\\_crime\\_abstract\\_for\\_the\\_2014.pdf](https://www.police.lk/images/others/crime_trends/2014/grave_crime_abstract_for_the_2014.pdf);

Sri Lanka Police, “Grave crime abstract for the year 2015”,

[https://www.police.lk/images/others/crime\\_trends/2015/grave\\_crime\\_abstract\\_for\\_the\\_year\\_2015.pdf](https://www.police.lk/images/others/crime_trends/2015/grave_crime_abstract_for_the_year_2015.pdf);

Sri Lanka Police, “Grave crime abstract for the year 2016”,

[https://www.police.lk/images/others/crime\\_trends/2016/grave\\_crime%20.pdf](https://www.police.lk/images/others/crime_trends/2016/grave_crime%20.pdf).

of it being *statutory* rape, consent is an irrelevant consideration. The only exception in the Penal Code where consent is relevant is for sentencing in a particular scenario.<sup>145</sup> It is, therefore, not clear what the category “statutory rape (women under 16 years) with the consent of the victim” translates into in the Penal Code. Nor is it clear why police have made a point about separating statutory rape along the lines of consent. Further, it is not clear, conceptually, what offence it is that is being investigated and prosecuted. Statutory rape with the consent of the victim, on the police statistics analysis, is in effect consensual sex. This is particularly important given that it presents as the highest category of rape figures (1,338 and 1,394 “true cases” for 2015 and 2016, respectively). *What is the Penal Code offence that this category would then get charged with? Why is this separation being done in the first place? Does it suggest an issue about understanding of sexual violence offences that needs addressing?* The larger question this also raises is whether the existing Penal Code offences for rape adequately respond to the circumstances of rape offending that occur in society.

### ***Evaluation of evidence – victim credibility***

As already stated, without the High Court proceedings it is not possible to make any assessment of the veracity of the victim’s evidence – to assess, based on the totality of the evidence given by a victim, whether a third party would come to the conclusion of the trial judge (in believing the victim’s version of events), or the appellate judges (in not believing the victim’s version of events). However, leaving aside drawing a conclusion on ‘is the victim lying or not’, traversing the cases that had convictions overturned due to victim credibility, raises concerns about the reasoning put forward and the factors that appeared to influence the reasoning. As stated, in each of the cases where the Court of Appeal overturned a conviction due to, in essence, not believing the victim, the trial court below had arrived at the diametrically opposite conclusion – believing the victim. *What lead the trial court to believe the victim’s version and the Court of Appeal to disbelieve the victim’s version?* Of concern is that the judgments appeared to contain no discussion of other possibilities that might explain the victim’s behaviour (for example, in returning to her attacker’s place of employment or not immediately making a complaint to the police). The judgments appear to read very simplistically as, because the victim behaved in that way, either she was lying about the incident, or if occurred, it could only have been with consent.

The acquittal cases also relied heavily on what the forensic medical evidence found, or did not find. Again, conclusions cannot be drawn on that. However, what this does illustrate is the significance placed, in sexual violence trials, on the medical examination process. In particular, what the victim says to the doctor appears to be as important as what the clinical examination reveals. Questions then arise about the medical examination process in sexual violence trials. *What is the framework that doctors follow in the examination of victims of sexual violence? Given that medical evidence will become part of the trial evidence, how is the medical examination process regulated? Are there oversight procedures in place?* The appeal judgments also contained no discussion on the latest research, nationally or internationally, on forensic medical evidence in sexual violence trials. *Is the way that forensic medical evidence is used in sexual violence trials in Sri Lanka on par with the latest research and scientific methods globally?*

### **Observations about the lack of transparency in the criminal justice system**

#### ***Vast amount of information not in the public domain***

The discovery High Court judgments were not accessible, or that gaps in information from the Court of Appeal judgments could not be rectified, is in and of itself, important to note when trying to build a picture of how the criminal justice system works. It highlights, quite starkly, the extent of information this is *not* in the public domain. These are illustrations of ‘in practice’ criminal justice system processes that can often get lost or are insufficiently addressed. However, they are absolutely basic features of a properly functioning criminal justice system. If the only way to clarify ambiguous or unclear information is to trigger a process whereby a lawyer has to file a motion and a judge has to grant permission (to obtain a court judgment), that fundamentally contradicts the principle of open court, which is a basic

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<sup>145</sup> Under s 364(2), the sentencing range for statutory rape and rape under 18 is 10-20 years rigorous imprisonment. The exception is that a sentence below 10 years is permissible where the victim is under 16, thereby statutory rape, AND the accused is under 18, AND the intercourse was with the consent of the victim.

tenet of a criminal justice system, as enshrined in the Constitution. The notion of requiring a lawyer to file a court document to obtain a court document – that ought to be in the public domain anyway – is a restrictive and illogical situation. This removes a citizen’s direct access to theoretically public information. One has to seek the assistance of a lawyer to start this process. Further, the motion then becomes part of the official court record of that case, even though citizen *x* seeking the court judgment has no bearing whatsoever on the case. Of greater concern is the permission of a judge that is required. A judge must grant the motion for access to the court documents. The danger with building in a discretionary element such as this, is that it can go one of two ways: the judge may grant the motion or the judge may deny it. Denying a motion is then denying access to theoretically public information. It is also unclear if, and how, this discretion is regulated. The essential point is that these two elements – a lawyer having to file a motion and a judge having to grant permission – should not be preconditions to accessing court judgments. Beyond an administrative payment to the court registry for the collection and photocopying of a court judgment, there ought to be no other preconditions to the access of court judgments. For example, this study could not clarify the portion of cases where the offence at hand was not clear in the appeal judgment, nor could it compile information about the High Court trial judgment dates (to map the duration of cases), nor could the reasoning of the sentencing judge in constructing a trial sentence be found out, nor could the evidence of a victim at trial be read, nor could the case with a missing page be rectified – all of which requires access to court judgments that are not in the public domain.

### ***Inability to access court judgments***

The problem about the inability to access court judgments permeates through the entire system, irrespective of the offence under inquiry. Whether it is rape, or murder, or drug offences, trial judgments are not publicly accessible. A derivative construction of trial court decisions could be done from Court of Appeal judgments, as in this study, for any selected offence. Any unclear information in the Court of Appeal judgments would similarly remain ambiguous, as the lower court material is not in the public domain. As a matter of principle, a deliberate decision was made to avoid utilising contacts, or any other means to provide the current study with preferential access to such material, over and above that of other citizens. Also as a matter of principle, a decision was made not to engage in the process of filing motions and awaiting a judge’s permission to grant access to court judgments, to highlight the absurdity of that requirement.

The notion that a court document (a motion) and a judge’s permission is required to obtain a document that ought to be in the public domain (a court judgment) is a ludicrous assertion and fails any argument that court judgments are public. Questions arise about the continuation of this indefensible restriction of citizens’ access to court judgments. As pointed out at the start of this report, the imposition of a process that requires permission to be granted (by a judge), is diametrically opposed to the principle of open court. Court judgments, of any court, ought to be available, as of right, to any member of the public in Sri Lanka. There ought not be any restrictions or barriers imposed on this feature (other than those by the operation of law). It is of grave concern that this restriction, as at 2017, is still operational and the only official means by which court judgments can be obtained. It is of fundamental importance that this restriction is addressed. *Why does this restriction exist? How is it justified when it categorically breaches the principle of open court? Why is this restriction accepted by the legal profession and others engaged in the criminal justice system?*

### ***Lack of clarity of offences***

A significant drawback identified was the inability to completely categorise all of the Court of Appeal cases into their exact Penal Code offences. Given there was a finite catchment of material (121 cases) and each case existed entirely because there were one or more Penal Code provisions that were engaged (the offences upon which the accused were convicted), it was extraordinary to encounter that 26% of the appeal judgments did not specifically state what the Penal Code provision was. The lack of clarity and specificity in the appeal judgments on the specific offences that were involved in cases, was a significant impediment to analysing the trial court sentences, and then subsequently to examine how they were dealt with upon appeal. The inability to group like-offences together is not a mere administrative or

academic issue. The barrier in being unable to compare means disparities in sentencing practices cannot be properly identified. In order to examine, for example, how statutory rape is addressed at trial and upon appeal by the criminal justice system, it is a prerequisite to first be able to identify all such cases.

### ***Inability to determine duration of cases***

The study sought to chart the duration of proceedings, beginning from the year of the incident (if that was ascertainable), but in particular from the trial judgment date to the appeal judgment date. In essence to answer the question, *how long have these sexual violence cases taken? How long has it been between the incident, the trial judgment, and appeal judgment?*

Unfortunately, the information required to answer the above questions was unattainable. The dates of the appeal judgments were identifiable, as they were part of the entitling (cover) page of the appeal judgments. The dates of the trial judgments (whether it was the conviction date or sentencing date or both) for most of the cases, were not identifiable from the appeal judgments. The incident date was only available in the appeal judgment when the date of incident was contested in some way. For example, where a victim gave  $x$  as the date of rape, but the medical examination did not support the incident occurring on  $x$  date. In some judgments, where the decision was to affirm the decision of the High Court, at times the date of the High Court judgment was given. Even in those instances, dates were ambiguous, as some cases would refer to the High Court conviction date and some would refer to the High Court sentencing date. As conviction and sentencing can occur on two separate occasions or on the same day, the cases did not provide sufficient information to clarify this matter.

Given the inconsistency with which the conviction and/or sentencing dates were provided in the appeal judgments, inquiries were made as to how this information could be obtained. A lawyer suggested obtaining the appeal briefs for the cases, which would have all court documents from the lower court proceedings, including the trial judgment. When law students made inquiries with the Court of Appeal Registry to access the appeal briefs, the response was: (1) the appeal briefs were not retained by the Registry after the conclusion of the appeal, (2) the appeal briefs were sent back to the respective High Courts and visits to each High Court to obtain this information would be required, and (3) given the number of cases being inquired into (121), even if the Registry had the information, permission from the Superintendent of the Registry would be required.

The duration of sexual violence cases impact on a number of issues, including the quality of evidence (in terms of the recollection of events) and the availability of evidence (in terms of available witnesses). There is also the retraumatisation of the victim in repeated court appearances. Further, there is the psychological impact on the victim and accused in being in limbo for years on end. Therefore, the inability to map the duration of cases also means these significant issues are prevented from being assessed.

### ***Digitising registries***

The process that had to be undertaken in order to find out which out of the 121 cases had been appealed to the Supreme Court was unnecessarily convoluted, and fraught with possibilities of error. A list containing the case names and Court of Appeal case identification numbers was taken to the Supreme Court Registry. The Registry said this information was insufficient and required the dates of the Court of Appeal judgments. The Supreme Court Registry records information in a large handwritten book. To search this book, the Registry advised the following process: for each case, to count 42 days (6 weeks) from the date of the Court of Appeal judgment and to look within those 42 days to see if the case appeared in the handwritten book. This process was performed for each of the 121 judgments. At the end of the search, a total of 11 cases were found to have been appealed (Figure 12). Initially, based on the handwritten book search, there were five cases where leave to appeal was denied, two cases where leave was granted, and four cases that were unclear (the relevant column in the handwritten book was blank). The Registry was unable to clarify the 'blank column' cases. Further inquiries from the Registry were necessary to clarify these unclear cases. The Registry advised that the four unclear/blank column cases involved two cases where leave was denied and two cases where leave was granted. A follow-up inquiry,

to obtain a status update of the four cases where (supposedly) leave was granted and the substantive hearing was pending, resulted in the discovery that the information provided by the Registry was incorrect.<sup>146</sup> The four unclear/blank column cases were, in fact, cases where the leave decision was pending (not leave denied or leave granted as previously advised by the Registry).

This manual method of record keeping of the highest court in the country, in 2017, is alarming. Aside from the human error factor inherent in a handwritten method of record keeping, it is also highly inefficient and cumbersome. A mere Microsoft Excel spreadsheet would enable a more accurate and efficient method of record keeping. In particular, it would enable the cross-referencing of information.

Cumbersome processes, such as handwritten records, still in existence for basic information, at best signal an unwieldy system and at worst, serve a purpose. For example, if the Court of Appeal Registry kept records electronically, even by way of Microsoft Excel sheets, the inquiry which the study was unable to make – the duration of cases – would readily have been possible. In any criminal case, particularly once it is at appellate level, there is a chronology of dates. Even if the minutia of events in a case is not recorded, there are key dates that any case that has reached the Court of Appeal stage would have, including the date/dates of the incident, the date of arrest, the date of indictment, the date the trial began, the date of conviction, the date of sentencing, the date an appeal to the Court of Appeal was lodged, the date leave was granted or denied, the date of the substantive hearing, and the date of the appeal judgment. If these dates across all 121 cases were ascertainable, it would enable a picture of how long each case has taken. In such a situation, questions can then be raised relating to why a particular phase took so long.

### ***Difficulties in conducting legal research***

Further questions that arise from this study, given the absence of a systematised database of court decisions, is *how do judges and lawyers conduct legal research? How do judges find cases of similar offending to be guided by? How do lawyers find similar cases to submit in support of their arguments?*

The current study found, for example, that even the process of identifying which judgments on the Court of Appeal website were actually sexual violence cases, was a laborious process. It necessitated the perusal of all judgments available, as the website only lists case names by month and year, and there is no other format of categorisation of cases. The current research overcame this difficulty by delegating a law student to open the PDF link for every case listed on the website, in every month, for every year from 2012 to 2016. After opening every link, if the judgment related to sexual violence offences, it was downloaded and saved in a folder. Naturally, this process is open to human error. But this was the only method by which sexual violence judgments on the website could be identified and collated. Given this laborious process for the mere identification of relevant material for this study, *how do lawyers, for example, find previous High Court decisions of gang rape in the preparation for a new gang rape trial? How do judges find previous High Court decisions of gang rape to know how the judges in the previous cases sentenced the accused?*

Further, related to the issue of language, it raises questions about the influence of appellate authority on lower court judges, given that all Court of Appeal and Supreme Court judgments are in English, and High Court judgments are in Sinhala and Tamil. *Is it assumed that all High Court judges are conversant in English to have the language capacity to be guided by appellate authority contained in Court of Appeal and Supreme Court judgments?* The inability to systematically access previous court decisions is a significant barrier to judges and lawyers being adequately informed about how a court has previously dealt with a particular scenario of offending (the notion of precedents). A larger question this raises is, *in the absence of systematised access to information to serve as a reference point and to be guided by, how does the criminal justice system prevent arbitrariness of judicial decisions?*

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<sup>146</sup> Inquiries had to be made from the Registry over numerous days, to clarify this situation and seek answers to the very basic inquiries of: Which of the Court of Appeal cases were appealed to the Supreme Court? Of those appealed, how many had leave granted and leave denied? Of those where leave was granted, what was the outcome of the substantive hearing?

### ***Language barriers***

Language adds a further, and significant, layer of inaccessibility of court documents to the general public. In the rape and grave sexual abuse cases of this study, the trial judgment (and the rest of the proceedings) for the 121 cases would have been in Sinhala or Tamil. Yet, the matter switches language upon appeal, as Court of Appeal judgments are English. Even in one's own language, the comprehensibility of court judgments is questionable to those without legal training or are unfamiliar with legal processes. Added to that, here, Court of Appeal judgments are not even in the same language of the trial court determination. The question this raises is, *how do the accused and victims in these cases access (read and comprehend) the Court of Appeal judgments relating to them?*

For example, if an accused is found guilty of statutory rape and sentenced accordingly, those decisions are officially recorded in a court judgment in Sinhala or Tamil. He then appeals the conviction and sentence. The Court of Appeal affirms the conviction but varies the sentence. Those decisions are officially recorded in a court judgment in English. If the accused cannot read English, he then cannot directly access a document that is quintessentially about his liberty. *Are Court of Appeal judgments in English officially translated into Sinhala and Tamil? If not, does the court system, or other government institutions, offer translation services if translation is sought?*

### ***Quality of official information***

It must be noted that spelling and grammatical errors were rife throughout the appeal judgments. However, these can be overlooked, to the extent that the actual meaning is decipherable. The reader could glean that “vegina” must mean vagina, and that “tare” must mean tear (of the hymen). These typographical errors become problematic when the information being presented becomes ambiguous.

In a number of cases, information was inconsistent about which aspect of the trial court judgment – conviction, sentence, or both – was actually being challenged. The appeal judgment would initially state the accused was aggrieved by the conviction and sentence and was therefore, appealing to the Court. However, a few paragraphs later, the judgment would state that the accused was not challenging the conviction and was only challenging the sentence. To have both statements is a contradiction. It occurred enough times in the cases studied for it to be noticed. Clarity on what the accused is challenging is important. If a conviction is challenged, this means the accused does not accept the trial finding (whether by jury or judge-alone) that she or he is guilty of the offence charged. Conversely, if after a trial, the accused only challenges the sentence ordered at trial, implicitly this means the accused is accepting the guilty verdict at trial. For example, in *Banda v AG (2013)*,<sup>147</sup> the judgment states “Being aggrieved by the said convictions and the sentence, the accused-appellant has appealed to this court” and then later states “Learned Counsel for the accused-appellant submits that there is sufficient evidence against the accused-appellant. He does not challenge the conviction”. The way the judgment reads, it is not clear if the appeal began as an appeal of conviction and sentence, and at the substantive hearing, counsel for the accused (appellant) withdrew the appeal against conviction (the appeal judgment does not say the appeal against conviction was withdrawn). Or, if from the beginning the appeal was only a sentence appeal and the first sentence is merely a typographical error. In *Galoluwage v AG*,<sup>148</sup> the inconsistency is present in two consecutive sentences: “Being aggrieved by the said conviction and the sentence, he has appealed to this Court. Learned President's Counsel appearing for the accused-appellant does not challenge the conviction.”

In *Banda v AG (2015)*,<sup>149</sup> the appeal judgment describes the offending as rape. The word ‘rape’ and ‘raping’ is present in the appeal judgment throughout. However, the appeal judgment provides grave sexual abuse as the offence provision – “[...] offences punishable under section 354 and 365 B (2) B of the Penal Code”. The appeal judgment also states:

The accused-appellant also removed his clothes and inserted his penis into her vagina until it

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<sup>147</sup> *Banda v AG* CA 83/2010, 8 July 2013.

<sup>148</sup> *Galoluwage v AG* CA 218/11, 2 December 2013.

<sup>149</sup> *Banda v AG* CA 129/2013, 7 October 2015.

was painful, lay on top of her for about five minutes and got up.

Section 365B(1) of the Penal Code provides:

**365B** (1) Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person, **being an act which does not amount to rape under section 363**, in circumstances falling under any of the following descriptions, [...] [emphasis added]

Under s 363, rape is sexual intercourse, and penetration constitutes sexual intercourse.

**363** A man is said to commit “rape” who has sexual intercourse with, a woman under circumstances falling under any of the following descriptions:-  
[...]

**Explanation**

(i) Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape;

Therefore, by definition, inserting a penis into a vagina is penetration, and consequently would be sexual intercourse. In other words, it would be rape. Grave sexual abuse is, by definition, not rape. It is not clear if this case is one of rape or grave sexual abuse. Unsuccessful clarification was sought from the Court of Appeal Registry. As the specific Penal Code provision for grave sexual abuse under 18 was provided in the appeal judgment, a decision was made to categorise the case as one of grave sexual abuse under 18. This, obviously, raises concerns about the Penal Code provisions provided in the other appeal judgments. Inquiries into this is beyond the scope and capacity of this study.

In *Jayasundara v AG*,<sup>150</sup> the appeal judgment reads:

Learned Counsel appearing for the accused-appellant submits that he does not challenge the conviction in this case. He makes an application to implement the sentence from the date of conviction.

[...]

We direct the Prison Authorities to implement the sentence from the date of sentencing by the learned High Court Judge.

The appeal sought to implement the date from the conviction date. The Court of Appeal ordered the implementation from the sentencing date. Conviction and sentencing can both occur on the same date, but they can also occur on two different dates. Therefore, it is not clear which date the Court is referring to.

In *Anuruddha v AG*,<sup>151</sup> the appeal judgment reads:

Heard both Counsel in support of their respective cases. Learned Counsel for the accused-appellant after arguing the case makes an application to withdraw the appeal. The application for the withdrawal of the appeal is allowed. He further makes an application to grant concession on the sentence on the basis that the sentence imposed by the learned trial judge is highly excessive.

The case proceeded as a sentence appeal and resulted in the accused being resentenced. Then, it is unclear what appeal was withdrawn. It may have been that the accused initially sought to appeal the

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<sup>150</sup> *Jayasundara v AG* CA 250/2010, 27 November 2013.

<sup>151</sup> *Anuruddha v AG* CA 223/2012, 1 November 2013.

conviction as well, but withdrew it. The appeal judgment does not say so.

In two cases that were in fact *State* appeals, the entitling pages were incorrect. Both cases incorrectly named the accused as the appellant and the State as the respondent. Similarly, in a third case, the entitling page recorded the case as a State appeal when it was the accused appealing. This type of error has consequences, given the reliance placed on the construction of a legal citation. The importance of an entitling page is that it reflects the position of the parties to the proceedings. In criminal appeals, as the role of the appellant can be either the accused or the State, the entitling page of an appeal judgment, establishes which party is the appellant and which party is the respondent. Further, from the entitling page derives the case name for citation, and from a citation, it is possible to ascertain the appellant and respondent to an appeal. An incorrect entitling page results in an incorrect citation, which means the information reflected will also be incorrect. *Shantha (alias Ran Mama) v AG*<sup>152</sup> and *Kona Gedara Podi Mahattaya v AG*<sup>153</sup> both incorrectly reflect that it was the accused who appealed before the Court of Appeal. *AG v Dharmadasa v AG CA*<sup>154</sup> incorrectly reflects that it was the State who appealed before the Court of Appeal.

These errors point to concerns about the quality of official information (court judgments) that is being recorded and the ability of citizens to rely on information contained in court judgments. The quality of official information – or rather the lack thereof – is more than a mere administrative concern. In this study, for example, it has meant that the court judgments could not be grouped according to the offences at hand, and consequently the court judgments could not be analysed in their entirety for the sentences ordered. Poor quality official information also raises concerns about the quality of the legal reasoning and evaluation of evidence applied in arriving at the decisions contained in the court judgments. If court judgments are riddled with unclear, ambiguous, or erroneous information, it does not instil confidence about the process that sits behind court judgments, including the quality of the trial, arguments of counsel, and judicial decision-making.

### **Observations about the ‘big picture’**

#### **An indicator of the ‘bigger picture’**

The scope of this study was limited to 121 Court of Appeal judgments on rape and grave sexual abuse. The rationale behind the scope was simple: the study would only use completely open source court documents, and from there, attempt to build a picture. There were several consequences that flowed from the rationale that only publicly accessible information would be used (ie the 121 open source Court of Appeal judgments) as the base of this study. Firstly, it meant that extensive portions of unclear information could not be clarified (discussed further below). Secondly, it meant that complete analyses could not be conducted on trial sentences and appellate outcomes. Thirdly, it curtailed the ability to identify patterns and draw conclusions.

This study looked at sexual violence offences as a category of offences within the criminal justice system. However, the information revealed, by studying sexual violence cases, is illustrative of the bigger picture of the criminal justice system. For example, if the thematic focus was replaced with other categories of offending – such as violent crimes against a person (murder and manslaughter), or drug offences or domestic violence – there would be many common issues. Sexual violence cases are not unique: the issues discussed relating to sexual violence cases vis-à-vis the criminal justice system would also be relevant to a discussion where the offence category under inquiry was anything other than sexual violence. In other words, the problems encountered and information unearthed by studying 121 Court of Appeal judgments on rape and grave sexual abuse, are actually reflective of the *entire* criminal justice system.

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<sup>152</sup> Corrected – *AG v Kona Gedara Podi Mahattaya CA 124/2009*, 4 April 2013.

<sup>153</sup> Corrected – *AG v Shantha (alia Ran Mama) CA150-2010*, 16 July 2014.

<sup>154</sup> Corrected – *Dharmadasa v AG CA 187/2011*, 7 December 2016.

### ***Beyond rectifying technical problems***

Of critical importance is to emphasise that reform must delve beyond rectifying seemingly technical problems. This study has illustrated, for example, that the vast majority of court judgments are not publicly available and that publicly available court judgments contain errors and ambiguous information. It is important to ensure such issues are not conceived of as *purely technical*, whereby a technical response as a remedy would resolve the problem. These two situations can be remedied – by making all court judgments publicly available and ensuring court judgments are devoid of omissions (such as the Penal Code offence) and errors. However, such remedies will not address the root cause of this situation, nor its consequences. A technical remedy only will not address substantive issues, such as the disparity in sentencing for like-offences, the treatment of victims and the accused, the approach to victimhood, and the evaluation of evidence.

It is also important to place issues like inaccessible court judgments and unclear and ambiguous information in the context of the system in which they occur. They are not isolated or mutually exclusive occurrences but are symptomatic of larger issues. The inaccessibility of court judgments – and the permission required to gain access – is part of an existing status quo where state-related information can, at best be viewed as inaccessible to the public, and at worst be viewed as deliberately restricted from public access. The existence of a permission requirement in relation to court judgments, in and of itself, demonstrates the existence of a factor that overrides the open court principle and transparency of information. As noted at the beginning, the Right to Information movement is at its infancy in Sri Lanka and may be successful in achieving the paradigm shift from the existing ‘secrecy’ of state/official information, to one of ‘openness’ of state/official information. With respect to gaining access to court judgments, however, using Right to Information warrants caution. Right to Information is a vehicle through which official information that is *not* in the public domain can be obtained by the general public. It should not be resorted to as the vehicle through which official information that *ought to be* in the public domain, but is being unjustifiably restricted, is obtained by the general public. Such a move would present a conceptual misunderstanding of its purpose. Further, it would result in perpetuating the existence of the restriction on court judgments that is currently in place (as Right to Information involves a decision-making process of whether or not to grant access to the information). Using Right to Information to access court judgments would simply be a solution of ‘working around’ the problem, which would do nothing to actually address the problem.

### ***Legal culture***

The findings of the study also alerts to the importance of focusing on non-legal factors as part of reform discussions. In this study alone, there are clear instances of the law being ignored – the law says do *x* (for example, order a custodial sentence within a certain range for a particular offence or not to order a suspended sentence when a mandatory minimum custodial sentence is provided for an offence or not to exceed 2 years imprisonment as a default sentence for non-payment of compensation) yet judges have *not done x* (judges *have* ordered custodial sentences below the given range for an offence, judges *have* ordered suspended sentences despite mandatory minimum custodial sentences, and judges *have* ordered default sentences for non-payment of compensation that exceed 2 years imprisonment). Another instance is in the organisation of police statistics. The law says rape under 16 is statutory rape, whereby consent is irrelevant. Yet as can be seen, police are operationally approaching cases of rape under 16 based on whether the victim consented or not. What this suggests is the existence of other factors, beyond the law, that are at play in the operation of criminal proceedings. These factors, which could include a variety of factors such as culture, biases, corruption, resources, and ignorance, require inquiry to understand their scope of influence and their impact. Further, it suggests the need for inquiry and reflection on the conceptual framework within which criminal justice operates, and whether that framework and the key players in that framework, actually meet the goal of (i) on the individual level, addressing harm done by one individual to another and (ii) on the societal level, minimising the recurrence of that harm.

### ***Focus on details is crucial***

When trying to build a picture of how an aspect of the criminal justice system works, the process must necessarily incorporate as much information as is possible. Crucially, the compilation of information

must delve into a great level of detail in order to understand the complexities of the criminal justice system that occurs in practice; on an everyday workings basis. Barriers that obstruct the detailed compilation of such a picture – such as vast amounts of material being publicly inaccessible – highlights the importance of drawing attention to, and addressing those barriers. Ignoring such barriers as incidental, or of a lower importance, means the reality of the operation of the system is also overlooked.

### ***Importance of compiling empirical information***

The findings and concerns raised in this report are as a result of undertaking a task to compile and analyse a set of 121 Court of Appeal judgments about a category of offences (sexual violence). The mere act of bringing together large amounts of information is a method that can be used to identify and illustrate commonalities and differences in the information brought together. When information is compiled, matters that are ‘the same’ – patterns – become visible, as well as anomalies and discrepancies. Information that may not have significance when taken in isolation, may gain significance when it occurs repeatedly. Compiling information enables issues to be identified and pointed to – there is then black and white information that is not mere conjecture.

For example, in this study, the compilation of information illustrated that judges sentence below statutory minimum custodial sentences. It is not conjecture nor supposition nor an unsubstantiated claim – the compilation of these court judgments illustrated it as *a matter of fact*. The compilation of information also illustrated that there are cases where, despite the State pursuing a prosecution and conviction at trial, later, on appeal, the State takes the opposite position regarding the conviction. Similarly, other matters of fact illustrated by the compilation of information include: that trial convictions do get overturned on appeal; that despite the same amount of compensation ordered, the accompanying default sentences for non-payment can be different; that all of the suspended sentences ordered at trial related to accused who had pleaded guilty; that compensation ordered for rape and grave sexual abuse can range anywhere from Rs 10,000 to Rs 1.2 million; that not every Court of Appeal judgment explicitly provides the Penal Code provision of the offence at hand in the case; that the Court of Appeal also impose suspended sentences for rape and grave sexual abuse; that there are 8,543 “rape/incest” cases pending in the system. These are all matters of fact. They can be very overtly pointed out when looking at the information compiled.

The other side of the coin when the unknown becomes known, is that it may create an unpalatable situation. The haze of ‘unknowns’ create a sphere of safety – when something is not known, there is no impetus to act. However, when information becomes known, that sphere of safety is greatly reduced, or eliminated completely. The compilation of information about the workings of the criminal justice system will, in many ways, be demonstrating the problems of the system. Such information may not be desirable to display in the public domain. When such weaknesses are neutrally illustrated, through the compilation of factual evidence, the State and state institutions are then on notice that there are problems, that can be pointed to, and that raise questions that then need to be addressed.

### ***Incomplete picture***

This study was an exploratory study into the workings of the criminal justice system within the limited scope of sexual violence cases. The findings indicate that the picture in relation to the workings of the system is far from complete for a number of reasons. Firstly, even the finite catchment of 121 cases could not be completely utilised due to the significant volume of unclear or ambiguous information in the court judgments, discussed in detail throughout this study. Secondly, even if all 121 judgments were able to be utilised to their full extent, court judgments cannot reveal the entire workings of the system. There is immense value in the information contained in court judgments – hence the study – nevertheless, there are workings of the system that cannot be captured by court judgments. For example, court judgments do not capture the experience of the central features of a criminal proceeding: the victim and the accused. There would be no trial absent a victim and an accused, yet the experiences of victims and accused do not transfer into the understood concept of a court judgment. Court judgments cannot answer questions such as: *What is it like to be a victim or an accused in a sexual violence case or any criminal case? What has a victim or accused had to endure in the process of a criminal trial? How does the law and the system deal with those who are engaged within it?* To begin to answer those questions, inquiries beyond court judgments must

necessarily be made. Thirdly, the study illustrates that vast amounts of information is required, from a variety of sources, and in great detail, to acquire an understanding of the full extent of the workings of the criminal justice system. In other words, approaching criminal justice reform is an enormous undertaking that takes time and a systematic approach.

## Conclusion

The purpose of this study was to conduct a meta-analysis on court judgments on sexual violence crimes, to begin the process of building a picture of the everyday workings of the criminal justice system: *What do Court of Appeal judgments on sexual violence reveal about the workings of the criminal justice system?* The significant findings of the study are stated below and are relevant to discussions about approaching reform of the criminal justice system.

The significant findings, addressed below, were the result of extensive analyses conducted into 121 Court of Appeal judgments relating to rape and grave sexual abuse offending. The wealth of information compiled as a result of this study provides a platform to undertake further inquiries into the findings, as well as further inquiries from issues raised in the study, when addressing reform discussions. Significant findings included disparities in sentences relating to rape and grave sexual abuse, prosecutorial concessions that convictions could not be supported, a persuasion towards disbelieving victims, and inaccessible 'public information'.

A significant finding was the **disparity in sentencing** that was visible across the 121 rape and grave sexual abuse judgments, at trial and upon appeal. The disparity in sentencing related to all three components of a sentence – custodial sentences, fines, and compensation imposed. With respect to custodial sentences, a significant difficulty was that 26% of the appeal judgments did not specifically state the Penal Code offence in relation to the case. Nevertheless, the disparity in custodial sentences was visible across the board *despite* the cases that could not be categorised into the specific Penal Code offences. Orders of fines and compensation were also visibly disparate. Further, the disparity also related to default sentences imposed for non-payment of compensation, including orders exceeding the statutory limit (in the Penal Code) permissible for a default sentence.

Another significant finding was that **custodial sentences** for rape and grave sexual abuse were **ordered below the mandatory minimum** as prescribed in the Penal Code, both at trial and upon appeal. Further, **suspended sentences were also ordered** despite the Penal Code prescribing a custodial sentence and the Criminal Procedure Code excluding suspended sentences as an option for offences containing a mandatory minimum sentence. In addition, all cases of suspended sentences at the trial phase involved guilty pleas. Where guilty pleas resulted in suspended sentences, this **overrode mandatory minimum custodial sentences** for the offences contained in the Penal Code, and this also overrode the gravity of the offences involved.

The disparity in sentences illustrated a lack of uniformity and consistency in the approach by judges to sentencing sexual violence offences. The non-adherence to statutory minimum sentences and suspended sentences compounded the lack of consistency in sentencing. The existence, and extent, of sentencing disparities alerts to larger issues around the **exercise of judicial discretion** and the need for **sentencing guidelines** and other parameters to ensure consistency, ensure fairness, and to minimise arbitrariness in judicial decision-making. Disparity in judicial decision-making, including non-observance of legislative constraints, indicates the exercise of judicial discretion is an area of the criminal justice system that requires attention when discussing reform.

Another finding was the existence of cases where, although the State pursued prosecutions that resulted in convictions, upon appeal, the State conceded that the **convictions could not be supported**. This concession, which essentially means that the convictions should not have occurred, indicates that prosecutorial policy also requires review when discussing reform. Further, it demonstrates a need for monitoring and oversight of prosecutions and the trial process.

Another significant finding related to **victim credibility**. Disbelieving the victim's evidence was the recurring reason in cases where the Court of Appeal **overturned trial convictions**. Other reasons included the emphasis placed on the existence, or otherwise, of medical evidence and the emphasis placed on the delay in reporting the incident to anyone, including the police. This recurrence of victim

credibility as the reason for overturning convictions upon appeal points to an urgent need to further explore the evaluation of evidence undertaken by judges in sexual violence cases and the factors that influence their decision-making, when discussing reform. As does the emphasis placed on medical evidence and the delay in reporting the incident.

The **impediment** that existed, and continues to exist, in the **public accessibility** of court judgments (lower court judgments) was an overriding finding. Although Court of Appeal judgments were publicly available, they contained unclear, ambiguous, or erroneous information (such as cases where the Penal Code offence was not specified). This information could not be clarified because the trial court information that would be required to clarify them could not be publicly accessed. The fact that Court of Appeal judgments were the only publicly accessible official material available to systematically compile illustrates the **volume of information about the criminal justice system that is not in the public domain**.

Despite the above drawbacks, the current study reveals that extensive analytical work can be undertaken even with a limited catchment of publicly available official material. All of the current findings are drawn exclusively from compiling and studying only the catchment of 121 Court of Appeal judgments on rape and grave sexual abuse. Aggregating similar information (such as court judgments) results in issues becoming visible, which would otherwise not be obvious in isolated judgments (such as the extent of disparities in sentencing).

The study highlights the **quantum of detail necessary** to build a picture and to understand the workings of the criminal justice system in practice. The judgments studied are an illustration of how sexual violence cases operate. This in turn, is an illustration of how the criminal justice system operates. It highlights the importance of compiling information that exists about a topic. The analytical work undertaken through this study used information that is available in the public domain, but it also identified information that is absent from the public domain (lower court judgments). The existence of publicly available information, and the absence of what ought to be publicly available information, are both significant factors in the process of understanding and evaluating the operations of the criminal justice system, especially as a **precursor to reform discussions**.

The current study is a **snapshot of the criminal justice system**, as visible through the analyses of 121 Court of Appeal judgments on sexual violence cases. It starkly highlights the need for further inquiry into a raft of issues including; practices, such as the restriction of access to court judgments; decision-making by key functions, such as the rationale for sentencing practices or the decision to indict an accused; and court processes, such as handwritten record keeping and the quality of information in court judgments. Approaching **criminal justice reform** is an **enormous undertaking** that requires time and a **systematic approach**. The issues identified and the questions raised by the current study are important to recognise and incorporate in future approaches and processes for reforming the criminal justice system. The key findings and the body of work presented in this report demonstrates the value of adopting an **empirical approach to understand the workings the criminal justice system**. This process can be used for the inquiry and analysis of any number of concerns about the criminal justice system, and to also improve the quality of the discussions around criminal justice reform.

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