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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal Case No.
CA/HCC/ 0195/2023

Kaiduwa Durage Lional

High Court of Monaragala
Case No. HC/160/2018

APPELLANT

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R.P.Hettiarachchi, J.

COUNSEL : **Darshana Kuruppu with Tharushi Gamage, Anjana Adhikaramge, Sahan Weerasinghe and Pramuditha Senevirathne for the Appellant.**

Jayalakshi De Silva, S.S.C. for the Respondent.

ARGUED ON : **07/07/2025**

DECIDED ON : **07/08/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted in the High Court of Monaragala for committing one count of grave sexual abuse on the victim Hewa Kankanamage Dinusha Maduwanthi, punishable under Section 365(B) 2 (b) and one count of statutory rape punishable under Section 364(2) of the Penal Code as amended by Acts No.29 of 1998 and No.16 of 2016.

The trial commenced on 30.09.2019 and after leading all necessary witnesses, the prosecution had closed the case on 30.11.2022. The learned High Court Judge had called for the defence on the same day and the Counsel for the Appellant had moved for a day to call witnesses on his behalf. The Appellant had made a dock statement and closed his case on 14.02.2023.

The learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant for the first charge under Section 365(B) (2) (b) of the Penal Code as amended. After calling sentencing submissions from both parties, the Appellant was sentenced to 08 years

rigorous imprisonment and was imposed a fine of Rs.7500/- subject to a default sentence of 03 months rigorous imprisonment. Additionally, a compensation of Rs.300,000/- was ordered by the learned High Court Judge with a default sentence of 06 months rigorous imprisonment. The Appellant was acquitted from the second charge.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court.

The learned Counsel for the Appellant informed this court that the Appellant had given consent to argue this matter in his absence. The Appellant was connected via Zoom from prison during the argument.

The following grounds of appeal were raised on behalf of the Appellant at the argument.

1. The learned Trial Judge failed to consider that, on the first day of giving evidence, the victim clearly denied being subjected to any abuse. However, almost a year later, her testimony changed and matched the police statement, creating a reasonable doubt as to whether the child was tutored or influenced after the initial hearing.
2. The Appellant was denied the right to fair trial by taking part of the evidence of the victim in his chamber and summoning the mother of the victim, PW2 to the chamber of the judge.
3. The learned Trial Judge has failed to consider that the prosecution did not summon the victim's elder brother, who is, in fact, an eye witness to the incident, thereby warranting the application of Section 114(F) of the Evidence Ordinance as amended.
4. The learned Trial Judge has failed to consider that the evidence of the victim has not been corroborated by any medical evidence.
5. The learned Trial Judge has failed to consider that the evidence of PW1 is not corroborated from any independent source, and her evidence

does not inspire confidence. Therefore, the guilt of the Appellant has not been proved beyond a reasonable doubt.

Background of the case *albeit* **is as follows:**

According to the prosecution, the Appellant is a mason by profession and had committed the alleged offence on the victim while he was attending to masonry work at the victim's house. He had committed the offence when the victim's parents were not at home and had sent the elder brother of the victim to buy cigarettes from the nearby boutique before committing the offence. Subsequently, it is alleged that the Appellant had inserted his finger in to the vagina of the victim. When her brother returned, he had witnessed the incident and had duly informed PW2. PW2, the mother of the victim, had lodged the complaint against the Appellant with the Police on the same day of the incident. The victim was 09 years old when she encountered the ordeal.

PW8, the JMO who examined the victim opined that the victim had not been subjected to vaginal penetration. But he has not excluded inter labia penetration.

In this appeal, I decided to consider the 2nd ground of appeal first.

In the Sri Lankan legal system, courts and tribunals may conduct *in camera* proceedings—closed to the public—in circumstances where the protection of sensitive information or the welfare of vulnerable individuals is paramount. Such proceedings are most commonly employed in cases involving minors or matters implicating national security. Access to these hearings is not granted as a matter of course and must be specifically restricted through a judicial order.

Article 106 of the Constitution which is stated below is vital in this regard.

(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.

(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 therefrom such persons as are not directly interested in the proceedings therein,

Exclude therefrom such persons as are not directly interested in the proceedings therein.

On the day of the trial, upon the application of the State Counsel the learned High Court Judge had decided to take up the trial in his chambers. The Counsel for the Appellant had not expressed any objection to this move. Although the trial commenced, the prosecution had been unable to conclude the evidence of the victim as the learned High Court Judge had observed some abnormality in the behaviour of the victim. Therefore, without any medical history or medical report the learned High Court Judge postponed the trial till 23.03.2020. The relevant portion of the proceedings is re-produced below:

Page 58 of the brief.

මේ අවස්ථාවේ මෙම බාල වයස්කාර වින්දිත තැනැත්තියගේ මෑත දිනයකදී සාක්ෂි විමසීම සුදුසු නොවන බව මා නිරීක්ෂණය කරමි. ඇය නිල මැදිරියට කැඳ වූ අවස්ථාවේ සිට කිසියම් නිශ්චිත වික්ෂිප්ත බවකින් සිටි බවට දක්නට ලැබූ අතර, ඇයගේ ඇස් කලු ඉංගිරියාව කැරකෙන

ස්වරූපයක් මා නිරීක්ෂණය කළෙමි. එකී නිරීක්ෂණ අනුමත කරමින් විත්දිත දැරියගේ මව පවසා සිටින්නේ, ඇයගේ ඔළුව කැරකෙන බව පවසමින් දැන් අඬමින් සිටින බවයි.

මේ අනුව මෙම නඩුව ඉදිරි මාස 06 ක කාලයේදී විභාග කිරීමට හැකියාවක් පවතින නඩුවක් නොවන බව පෙනෙන්නට ඇති බවත්, මවට ඇය සම්බන්ධයෙන් අවශ්‍ය වෛද්‍ය ප්‍රතිකාර ලබා දී ඇයට අවශ්‍ය කරුණාව දක්වන ලෙසට දැනුම් දී සිටිමි.

Judicial discretion denotes the authority vested in judges to render decisions guided by their judgment and sense of justice, provided they act within the framework of the law. This discretion enables the judiciary to take into account the particular facts and context of each case, promoting equitable application of legal principles rather than strict adherence to inflexible rules. However, such discretion is not absolute; it must be exercised judiciously and reasonably, and remains subject to appellate oversight to prevent arbitrary or capricious use.

Considering the circumstances of this particular case, the learned High Court Judge could have taken the trial in camera rather than in his chambers.

As the remaining grounds of appeal are interconnected, they will be considered together hereinafter.

The victim while giving evidence had stated that the Appellant had only attempted to commit the alleged offence. She did not reveal that any particular sexual act was in fact committed on her by the Appellant. The relevant portions are re-produced below:

<u>Pages 52-57 of the brief.</u>

ප්‍ර : දිනූෂා යම් සිද්ධියක් වුණා කියලා කියන්නේ, කරදරයක් වුණා කියලා ද ?

උ : කරදරයක් කරන්න හැදුවා වුනේ නැහැ.

අධිකරණයෙන්.

ප්‍ර : ලයනල් මාමා ගෙදර ආවානේ ?

උ : ඔව්.

ප්‍ර : එතකොට ඔයා කොහෙද හිටියේ ?

උ : මම හිටියේ ගෙදර.

ප්‍ර : ගෙදර කොහෙද හිටියේ ?

උ : සාක්ෂිකාරිය එක දිශාවක් දෙස බලා සිටි.

පිළිතුරු නොදෙයි.

ප්‍ර : ඔය සිද්ධිය ගැන කියන්න කැමැත්තක් තිබෙනවා ද නැද්ද ?

උ : මට ඒ ගැන මතක නැහැ.

ප්‍ර : දැන් මතක ද ලයනල් මාමා ගෙදර ආවා ?

උ : ඔව්.

ප්‍ර : එයා එනකොට ඔයා කොහෙද හිටියේ ?

උ : මතක නැහැ.

ප්‍ර : ඒ වෙලාවේ අයියා යම් හේතුවකට කොහෙට හරි ගෙදරින් පිටත් වෙලා ගියා ද ?

(සාක්ෂිකාරිය නැවතත් කල්පනා කරමින් සිටි.)

ප්‍ර : අයියා ඒ වෙලාවේ ගෙදරින් පිට වෙලා ගියාද නැද්ද කියලා මතක නැහැ ?

උ : ඒක මට මතක නැහැ.

ප්‍ර : දැන් දුව ගෙදර ඉන්න වෙලාවක මේ ලයනල් මාමා ගෙදර ආවට පස්සේ මොකක් හරි සිදු වුනාද ගෙදර ඉන්නකොට ලයනල් මාමා ආවට පස්සේ ?

උ : උත්තරයක් නැත.

As the victim has shown reluctance to give evidence, the learned High Court Judge had adjourned the trial citing that the trial should be delayed for at least six months' time. The trial only resumed after about 11 months of the initial trial and when it did, the victim had given evidence which was in conformity with her statement to the police.

As stated above, through part of the evidence-in-chief of the victim, the learned High Court Judge had observed that the victim was not well and was possibly suffering from a psychological disorder, however, he had not collected any medical report to prove the same. While the victim was giving evidence, her mother, PW2 had been summoned to his chambers as well and the Judge had inquired from PW2 whether the victim was suffering from any disorder at that time. After consulting PW2, the learned High Court Judge had arrived at the conclusion that the trial cannot proceed at least within the next six months. Postponing the case for such a long period of time without any plausible reason has caused great prejudice to the Appellant.

According to the victim, her brother had witnessed the Appellant leaving the room where the alleged offence took place. Further she had stated that her brother had disclosed the incident to her mother.

PW2, the mother of the victim had endorsed the same when she gave evidence. The relevant portions are re-produced below:

<u>Pages 82 and 97 of the brief.</u>

ප්‍ර : ඔය සිද්ධියෙන් පසුව විත්තිකාරයා මොකද කලේ ?

උ : අයියා හිටියානේ ගෙදර්. අයියා මම හිටපු කාමරයට මාමා එනවා දැකලා අයියා ආවා එතකොට මාමා ගියා. ඊට පස්සේ අයියා මගෙන් ඇහුවා මොකද වුනේ කියලා. මම අයියට කිව්වේ නැහැ. අම්මා වැඩ ඇරලා ආවට පස්සේ අම්මට අම්මා පොලිසියට එක්කර ගෙන ගියා.

ප්‍ර : කවුද අම්මට කිව්වේ ?

උ : අම්මට කිව්වේ අයියා.

ප්‍ර : එතකොට මේ සිද්ධිය සම්බන්ධයෙන් දිනූෂාට වෙච්ච කරදරය සම්බන්ධයෙන් ඔබට කිව්වේ කොහොමද ?

උ : මට කිව්වේ ලොකු පුතා.

ප්‍ර : ලොකු පුතා ඔබට මොනවාද කිව්වේ ?

උ : අම්මේ බාසුන්නැහේ මාමා ආවා. නංගිට කරදරයක් වුණා වගේ දැක්කා නංගිගෙන් අහගන්න කියලා මට කිව්වා.

Considering the portions of evidence referred to above, the brother of the victim is an eye witness to the incident. But the prosecution has not called the brother of the victim to give evidence on their behalf.

In a case of this nature, the testimonial trustworthiness and credibility of PW1, mainly the probability should be assessed with utmost care and caution by the Trial Judge. The learned Trial Judge has to accept the evidence of a child witness only after assessing his/her competence and credibility as a witness.

In **Ranjeet Kumar Ram v. State of Bihar** [2015] SCC Online SC 500 the court held that:

> *"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one".*

Considering the above cited judicial decision, as the credibility of the evidence of a child witness would depend on the circumstances of each case, it is the duty of the learned Trial Judge to assess and decide on the evidence given by child witnesses.

According to the victim, her brother had recounted the incident to her mother. She had then taken steps to inform the incident to the police. Therefore, the brother of the victim is an essential witness in this case.

Essential witnesses in a criminal trial are those individuals who possess crucial firsthand information about the crime, directly linking the defendant to the alleged crime and whose testimony is considered vital for the prosecution to prove their case beyond a reasonable doubt.

In **King v. Seneviratne** 38 NLR 208 the Court held that:

> *"Witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution".*

Witness evidence can even be acted upon without corroboration where no inhibition or unreliability has been attached or suggested against such testimony.

In this case brother of the victim is an essential witness to corroborate the evidence given by the victim regarding the act of abuse.

His Lordship Justice Dheeraratne in **Sunil and others v. Attorney General [1986] 1 S. L. R 230** held that:

> "*Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of 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 the absence of corroboration."

In **Premasiri v. Attorney General [2006] 3 Sri.L.R** held that:

"The rule is not that corroboration is essential before there can be a conviction in a case of rape but the necessity of corroboration as a matter of prudence except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge".

In **State of Andra Pradesh v. Garigula Satya Vani Murty** AIR 1997 SC 1588, it was held that:

"…the courts are expected to show great responsibility while trying an accused on a charge of rape. They must deal with such cases with utmost sensitivity."

Considering the evidence given by the victim, her evidence has not been corroborated by a very important witness, her brother, who had witnessed an unusual occurrence when he came home after buying cigarettes for the Appellant. Further, PW2 had confirmed that her son informed her about the incident. As such the prosecution had failed to satisfy the court that the evidence given by PW1 has passed the test of consistency, spontaneity and probability.

In this case PW1 is the key witness. Her evidence is not clear and had not tallied with material points discussed above. Her evidence is tainted with ambiguity and uncertainty which definitely affects the root of the case. This

has been further aggravated due to the prosecution's failure to call an essential witness, the brother of the victim.

Taking into consideration all these circumstances, I am of the view that the conviction of the Appellant cannot be allowed to stand as the prosecution had failed its duty to prove this case beyond a reasonable doubt. I set aside the conviction and sentence imposed by the learned High Court Judge of Monaragala dated 11/08/2023 on the Appellant. Therefore, he is acquitted from this case.

Therefore, the appeal is allowed.

The Registrar of this Court is directed to send this judgment to the High Court of Monaragala along with the original case record.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL