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

In the matter of an Appeal made in terms of Article 154 P (6) of the Constitution read with Article 138 of the Constitution.

Democratic Socialist Republic of
Sri Lanka.

Complainant

Court of Appeal Case No.:
CA HCC 92/2023

Vs.

High Court of Rathnapura
Case No.:
HCR 38/2014

Jayasinghe Arachchige Karunarathna.

Accused

AND NOW BETWEEN

Jayasinghe Arachchige Karunarathna

Accused-Appellant

Vs.

The Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

Before: **B. Sasi Mahendran, J.**

Amal Ranaraja, J.

Counsel: Kasun Sarathchandra, for the Accused- Appellant.

Azard Navavi, S.D.S.G. for the Respondent**.**

Argued on: 16.06.2025

Decided on: 08.07.2025

Judgment

AMAL RANARAJA, J.

1. The Accused-Appellant (hereinafter referred to as the "appellant") has been indicted in the *High Court of Rathnapura* in the High Court Case No. 38/2014. The charge in the indictment is as follows:

> That on or about May 08,2009, at *Galinna*, within the jurisdiction of the *High Court of Rathnapura*, the appellant did commit the act of grave sexual abuse on the female child by placing his penis between the thighs of the said female child, an offence punishable under section 365B(2)(b) of the Penal Code (as amended by Act No.22 of 1995 and Act No. 29 of 1998 and Act No.16 of 2006).

2. Upon the indictment being forwarded to the High Court, the Learned High Court Judge has caused the appellant to appear in Court and has served the indictment together with its annexures on the appellant. Upon, the appellant pleading not guilty to the charge, the matter has been taken up for trial without a jury. At the conclusion of the trial, the Learned High Court Judge by a judgment dated January 30,2023 has convicted the appellant and sentenced the appellant to 8 year's rigorous imprisonment. The Learned High Court Judge has also imposed a fine of Rs. 5000 with a term of 4 months imprisonment in default. The appellant has also been ordered to pay a sum of Rs. 100,000 as compensation to PW01 with a further term of 1-year imprisonment in default.

3. The appellant being aggrieved by the conviction and the sentencing order, has preferred the instant appeal to this Court and prayed that the judgement and the sentencing order dated January 30,2023 be set aside.

4. When the matter was taken up for argument, the Learned Counsel for the appellant urged the following grounds of appeal;

    i. Has the Learned High Court Judge failed to consider that the main ingredient of the charge has not been proven beyond a reasonable doubt by the prosecution?

    ii. Has the Learned High Court Judge erred in law by not allowing to mark a vital contradiction during the cross examination of PW01?

iii. Has the Learned High Court Judge failed to evaluate the evidence of PW12 accurately?

iv. Has the Learned High Court Judge failed to evaluate the evidence of PW02, PW03, and PW08 accurately?

5. PW01 has been born at the *General Hospital* in *Rathnapura* on October 08, 1996. She has been living with her parents and her siblings at *Gallina*, *Rathnapura* at the time referred to in the charge.

6. PW02 is the mother of PW01, PW03 a sibling of PW01 and the appellant, the son of an uncle of PW02, therefore, closely related to the mother of PW01. The appellant's house has been situated about 50 metres away from the house in which PW01 lived with her parents and siblings.

7. On May 08,2009, the appellant has come to the house of PW01, and informed her parents that the wife and children of the appellant had gone out of town. The appellant has also requested that PW01 be permitted to go along with the him to his house as the appellant was feeling uncomfortable to spend the night alone in his house. The parents of PW01 have not objected, hence, PW01 has gone to the house of the appellant along with him.

8. On the way to the appellant's house, PW01 and the appellant had met PW03 sometime before 20.00 hrs on that day close to a "*bana gedara*". The appellant has invited PW03 also to visit his house when PW03 was done, attending a "*bana gedara*".

9. When PW01 reached the house of the appellant, she had gone to sleep on a bed while the appellant occupied the adjoining bed. After a while the appellant has switched on the light in the room. Thereafter, the appellant has proceeded to undress PW01. Following which, he himself has removed the cloths he was dressed in. At first the appellant has stroked the legs of PW01. Subsequently, got onto PW01 who was lying face upwards and engaged in a sexual act with her by placing the appellant's penis between the legs of PW01. When the appellant engaged in such sexual act, PW01 has felt the penis of the appellant coming in contact with the upper parts of her inner thighs and her vagina.

10. Responding to the invitation extended to him by the appellant, PW03 has gone to the house of the appellant, but found the door of the house closed. Thereafter, at about 21.30 hrs, PW03 has returned to the house of the appellant. Observing a light burning in a room in the house PW03 has peeped into the room, through the spaces in between the wooden strips of a window of that room. PW03 has seen the appellant naked on top of PW01 engaging in a sexual act with the latter. Shortly after PW03 has informed his parents about the incident he witnessed. PW02 together with the father of PW01 have gone to the house of the appellant, there they have witnessed the appellant engaging in a sexual act with PW01. The father has screamed at the appellant, at which time the appellant has walked out of his house. The parents of PW01 have taken her to the police station immediately, logged a complaint, and provided statements. An investigation has commenced and PW01 referred to a judicial medical officer for examination. The particular judicial medical officer after examining PW01 has prepared a medico-legal report. The report has been marked 'ಪಿ೭-1'.

11. The Learned Counsel for the appellant has contended that though the main ingredient in the charge is intercrural sex, PW01 has testified to

the effect that she was penetrated by the appellant. Also, contended that, though PW01 had at the beginning only stated that the appellant had stroked her legs, following a leading question being put to PW01 by the Learned State Counsel, PW01 had gone on to testify that the penis of the appellant came into contact with the upper part of her inner thighs. In those circumstances, it has been submitted that the sexual act stipulated in the charge has not been proved beyond a reasonable doubt. PW01 narrating the sexual act committed on her by the appellant has stated that the appellant placed his penis between her legs that were spread at that moment and the penis of the appellant came into contact with her vagina. Thereafter a question has been posed to PW01 by the Learned State Counsel as to whether the penis of the appellant also came into contact with the upper part of the inner thighs of PW01. PW01 has answered in the affirmative. This is evident through portions of the evidence recorded in pages 76 to 80 of the brief;

“ප්‍ර : නමාව උඩ අනට හැරෙව්වාද?

උ : ඔව්.

ප්‍ර : නමා මොන පැත්තද එතකොට බලාගෙන හිටියේ?

උ : උඩුබැලි අන.

ප්‍ර : නමාට මාමා මොකද කලේ?

උ : ඇඟ උඩ නැගලා කරදර කළා.

ප්‍ර : නමාගේ කොතනටද කරදර කලේ?

උ : මුත්‍රා මාර්ගයට.

ප්‍ර : දැන් සාක්ෂිකාරිය මුනින් අනට හැරෙව්වද ?

උ : ඔව්

ප්‍ර : එතකොට නමාගේ කකුල් දෙක තිබුනේ කොහොමද

උ : ඇන් වෙලා.

ප්‍ර : නමාට මොනවහරි දෙයක් කකුල් දෙකට දනුනාද ?

උ : එවෙලේ දැනුනේ නෑ.

ප්‍ර : මොන වේලාවේද දැනුනේ?

උ : පැය භාගයක් විතර යනකොට දැනුනා.

අධිකරණයෙන් :-

ප්‍ර : පැය භාගයක් විතර යනකම් මොකද කලේ?

උ : අඟ උඩ නැගලා කරදර කල එක තමයි කලේ.

.....

ප්‍ර : කකුල් දෙකට මොනවද කලේ?

උ : අත ගෑවා.

ප්‍ර : මොකෙන්ද?

උ: අත් දෙකෙන්.

ප්‍ර : වෙන මොනවද වුනේ?

උ: මොකුත් වුණේ නැහැ.

ප්‍ර : තමන් කිවුවා තමන්ගේ මාමා විත්තිකරු චූ කරන එකෙන් කලා කියලා?

උ : ඔව්.

ප්‍ර : එක තමන්ගේ ඇඟේ ස්පර්ශ වෙනවා කොහොටද දැනුනේ ?

උ : චූ දාන තැනට.

අධිකරණයෙන් :-

ප්‍ර : චූ දාන තැන අතුලිනද පිටින්ද දැනුනේ?

උ : ඇතුලෙන්.

ප්‍ර : එතකොට තමන්ගේ කකුල් දෙකටත් චූ දාන තැනටත් මැදිවද මේ විත්තිකරුගේ චූ කරන එක තිබුනේ?

උ: ඔව්

ප්‍ර : එතකොට විත්තිකරුගේ චූ කරන එක තමන්ගේ කකුල් දෙකේ මැද ගාවුනාද ?

උ : ගැවුනා...."

12. PW01, has been 19 years of age when she gave evidence in the *High Court*. She is from a village situated away from the city of *Rathnapura*. The upbringing in such a village set up would have been simple. But good behaviour that aligns with the ethical standards of her community, i.e. good moral character, expected from her. The sexual

act referred to in the charge has been allegedly committed on her when she was just 12 years old. Being subjected to such sexual abuse, the experience would naturally be harrowing to her. PW01 would have preferred not to talk about the incident. She would have naturally liked to forget about the incident as soon as possible. Further, PW01 when giving evidence before the *High Court*, would have been aware of the negative association between her and the society due to the incident she was testifying to. The testimony of PW01 shows that PW01 has been reluctant to testify to the incident at the trial before the *High Court*. She has therefore been a reluctant witness. In those circumstances, a fair amount of coaxing and persuasion would have been needed to extract the relevant evidence from her.

13. In those circumstances, the contention that the sexual act stipulated in the charge has not been proved beyond a reasonable doubt lacks merit.

14. In *D. Tikiribanda vs. Attorney General,* CA 64/2003 decided on 06.10.2009, Ranjith Silva, J, has stated,

> "*Mostly the victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible (withdrawal symptom). The offenders should not be allowed to capitalize or take mean advantage of these natural inherent weaknesses of small children."*

15. The Counsel for the appellant has also contended that the Learned High Court Judge has erred in law by not allowing to mark a vital

contradiction during the cross examination of PW01. To substantiate such contention, the Learned Counsel for the appellant has drawn the attention of this Court to the following portion of evidence recorded in page 100 of the brief;

"ප්‍ර : පැහැදිළිව සාක්ෂිකාරිය කිව්වා මේ සිද්ධිය කළේ මුත්‍රා මාර්ගයට කියලා?

උ : ඔව්.

ප්‍ර : එදා මිට කලින් දිනයේ සාක්ෂිකාරිය කිව්වා මුත්‍රා මාර්ගියට කළා කියලා?

උ : ඔව්.

ප්‍ර : පොලිසියට ගොස් එදා මගේ කකුල් දෙක ඇන් කළාට පසු මාමාගේ චූ කරන එක මගේ කකුල් දෙක ඇතුලෙන් දැම්මා කියා කියලා තිබෙනවානම් පිළිගන්නවාද?

<u>අධිකරණයෙන්</u> :-

මේ අවස්ථාවේදී එම ප්‍රශ්නයට පිළිතුරු දීමට නොහැක. ඊට හේතුව සාක්ෂිකාරිය විසින් දී ඇති ප්‍රකාශය වාර්තා කළ හැක්කේ ඇයගේ සාක්ෂිය අභියෝගයට ලක්කිරීමට මිස සංසන්දනය කිරීමට නොවේ. විත්තියේ උගත් නීතිඥ මහතා අසා සිටින හරස් ප්‍රශ්න මගින් සාක්ෂිකරියගේ සාක්ෂිය අභියෝගයකට ලක් නොවේ. සංසන්දනය කිරීමක් වේ. එබැවින් එම ප්‍රශ්නය ඉවත් කරමි."

16. Section 145 of the Evidence Ordinance No. 15 of 1895 provides for the manner in which a witness could be cross examined and confronted with statements made by such witnesses previously.

17. Section 145 of the Evidence Ordinance provides,

> "(1) *A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.*
>
> *(2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistence with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such a statement.*

18. In *Agampodi Wijepala de Soyza vs. Officer-in-Charge and Another* [SC Appeal 159/2018, S.C. minute dated 07.07.2021] P. Padman Surasena, J, has stated,

> "*The scheme of the above section clearly demands that the following mandatory steps must be adhered to, when marking and proving an inconsistency.*
>
> *Firstly, a cross-examining counsel who intends to show that the evidence of the witness under cross examination is contradictory with a previous statement made by him, must*

ask questions relevant to such matters in question without such previous statements being shown to him.

Secondly, if such witness comes out with something that is prima facie inconsistent with any part of such statement, it is then only the section allows such counsel to bring such parts of such statement which are to be used for the purpose of contradicting him, to the attention of such witness.

Thirdly, if such witness has stated something inconsistent with his previous statement and does not distinctly admit making such previous statement, then the cross-examining counsel is under a duty as per sub section 2 of the above section to ask whether or not such witness has made such a previous statement.

Fourthly, it is thereafter only the cross-examining counsel can proceed to prove that such witness has in fact made such a previous statement."

19. When one examines the portion of evidence reproduced above, it is clear that the Learned Counsel who defended the appellant in the *High Court* trial has not drawn the attention of PW01 to a specific statement made by her at the investigation stage of the crime. Further, he has not posed any questions in cross examination to reveal that the evidence of PW01 is contradictory to a previous statement made by her. The relevant questions in cross examination have been put to PW01 in to seek whether the testimony of PW01 echo with that given in examination-in-chief.

20. In those circumstances, the Learned High Court Judge was correct when she made an order disallowing the Learned Counsel from posing questions in that manner to PW01**.**

21. *Dr. W. M. K. B. Wijethunga*, assistant judicial medical officer, of the provincial general hospital of *Rathnapura* has examined PW01 on 09.05.2009 and prepared a medico-legal report. The report has been marked 'ඇ1-1' through PW12 i.e. *Dr. M. R. Dissanayake,* assistant judicial medical officer of the *Kandy* general hospital. The report marked 'ඇ1-1' has been produced and marked through PW12 as *Dr. W. M. K. B. Wijethunga* could not be summoned to appear in the High Court at that particular period. Prior to *Dr. Dissanayake's* evidence being led on the report marked 'ඇ1-1', the prosecution has also led evidence to demonstrate the connection between PW12 and *Dr. Wijethunga*. The competency of PW12 to testify based on the contents in the report marked 'ඇ1-1' has also been established. The appellant has also not disputed the competency of *PW12* in that regard. Therefore, an admission in that regard has been recorded as per the provisions stipulated in section 420 of the Code of Criminal Procedure Act No.15 of 1979. PW12 has also been cross-examined by the appellant, in that instance, PW12 has explained in detail the contents 'ඇ1-1' and also about the probable causes for the findings stated therein upon the general examination of PW01. Due to the aforesaid reasons it is the belief of this Court, that the appellant cannot at this late stage state that the medical officer who prepared the report marked 'ඇ1-1' would have been the best person to give evidence based on such report and such omission has affected the outcome of the trial in an adverse manner.

22. It is also contended that, the inherent features in the window of the room in which the alleged incident took place has not been corroborated by PW08, the investigating officer who visited the scene of the incident.

23. It is the testimony of PW08 that the particular window was a wooden one. However, since he has visited the scene during the day he has not proceeded to switch on the light inside the room and probe as to whether a person could see into the room as stated by PW03. However, the testimony corroborates the fact that the room in which the alleged incident took place was fixed with a wooden window, though there had been a minor lapse on the part of PW08 as to the manner in which he has probed the particular venue. Such a lapse, in the opinion of this Court, is not material.

24. Further, PW02 and PW03 have testified before the High Court in the year 2018, i.e. nine years after the alleged incident. The Learned Counsel for the appellant has drawn the attention of Court to an inter-se contradiction regarding PW03 going back for the third time (along with his parents), to the appellant's house, and supposedly seen the appellant engaging in a sexual act with PW01.

25. PW03 has gone to the house of the appellant on three occasions that evening. On his first visit he has found the door of that particular house closed. PW03 has returned to the appellant’s house for the second time. On that occasion, he has observed a light in a room in the house was switched on. Thereafter, he has peeped into the room as described earlier and seen the appellant engaging in a sexual act with PW01. PW03 has immediately informed his parents of the incident he saw. Thereafter, the parents have rushed to the appellants’ house to free PW01 from the appellant. In those circumstances, the contradiction

marked “V2” nor the per-se contradiction referred to by the Learned Counsel for the appellant are material and, in my view, do not undermine the credibility of PW03.

26. Further, the actions of the appellant indicate preplanning and manipulation hence, the existence of aggravating circumstances to be taken into consideration when meting out punishment to the appellant.

27. Accordingly, I am not inclined to interfere with the impugned judgment together with the sentencing order. I therefore *dismiss the appeal*.

I make no order regarding costs.

28. The Registrar of this Court is directed to send a copy of this judgment to the *High Court in Rathnapura* for compliance.

Appeal dismissed.

Judge of the Court of Appeal

B. SASI MAHENDRAN, J.

I agree.

Judge of the Court of Appeal