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

In the matter of an appeal in terms of section 331 (3) of the Code of Criminal Procedure Act.15 of 1979 read with Article 139 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs

Widana Gamage Sudesh Milan

Accused

And now between

Widana Gamage Sudesh Milan

Accused-Appellant

Vs

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

Complainant - Respondent

Court of Appeal Case No:
CA/HCC/0059-2023

High Court of Embilipitiya Case No:
HCE-19-2021

Before : **P. Kumararatnam, J.**

Pradeep Hettiarachchi, J.

Counsel : Amila Palliyage with Sandeepani Wijesooriya, Savani Udugampola, Lakitha Wakishta Arachchi and Subaj De Silva for the Accused - Appellant.

Azad Navavi DSG for the Complainant-Respondents.

Argued on : 09.09.2025

Decided on : 02.12.2025

Pradeep Hettiarachchi, J

Judgment

1. The accused-appellant (hereinafter referred to as the appellant) was indicted in the High Court of Embilipitiya for committing grave sexual abuse on two occasions on a child of under 16 of age. These offences are punishable under sections 365B(2)(b) of the Penal Code, as amended by Acts No. 22 of 1995, No. 29 of 1998, and No. 16 of 2006.

2. At the trial, 5 witnesses testified for the prosecution. At the end of the prosecution case, the appellant made a dock statement. At the conclusion of the trial, the learned High Court Judge found the appellant guilty of the first count and convicted him. The appellant was acquitted from the 2nd charge. For the first count, the appellant was sentenced for 10 years rigorous imprisonment and also was imposed a fine of Rs 10000.00 carrying a default sentence of 12 months simple imprisonment. Additionally, the appellant was ordered to pay Rs 50000.00 to the victim with a default sentence of 12 months simple imprisonment.

   Being aggrieved by the said conviction and the sentence, the appellant has preferred the instant appeal.

3. Following are the grounds of appeal urged by the appellant.
   a. The learned High Court Judge erred in law by failing to consider probability and also failed to evaluate the testimony of PW2;
   b. Section 114(f) of the Evidence Ordinance was not considered;
   c. The learned High Court Judge has failed to evaluate medical evidence; and
   d. The procedure adopted by the High Court Judge and prosecutor to remove evidence of PW9, a lay witness, from the proceedings is wrong in law.

Background to the appeal:

4. The prosecution story was that PW1 the victim when going home riding his bicycle was halted by the appellant and pulled the victim to the side of the road and removed his trouser and inserted the appellant's penis twice into his anus.

5. I will first consider whether the learned trial Judge had failed to evaluate the testimony of PW1 in particular the probability of his story. According to PW1, when he was riding a bicycle, the appellant blocked him and made him to fall. Thereafter, the appellant removed the victim's trouser and inserted his penis to the victim's rectum. At that time a person called Priyankara PW9 came and questioned the appellant. Thereafter, the victim went home crying and informed the incident to his mother PW1.

6. According to the victim, the alleged offence was committed at the side of the road and it was a sandy place. The victim was laying on his stomach when the alleged offence was being committed by the appellant.

7. The offences of this nature are normally committed in discreet places where no eye witnesses are found. Therefore, court has to rely on the evidence of the victim and if available on medical evidence. Very rarely, an eye witness could be found in this kind of offences.

8. PW2 clearly stated that while he was being subjected to the alleged offence, PW9 arrived at the scene and questioned the appellant about his actions. According to PW2, when PW9 came there, the appellant was positioned on top of him. If that was indeed the case, PW9 would have been able to witness the incident firsthand, providing the prosecution with a valuable opportunity to corroborate the testimony of PW2 by calling PW9 to testify. PW2 testified as follows:

ප්‍ර : ප්‍රියංකර අයියා එන විට ඔය සිදුවීම නතර කලා කියලා කිව්වේ ?

උ : ඔව්.

ප්‍ර : ප්‍රියංකර අයියා හොඳටම දැක්කා ?

උ : ඇඳුම් නැතුව කලිසම ගලවලා තියෙනවා දැක්කා.

ප්‍ර : කලිසම නැතුව ඉන්නවා දැක්කා ප්‍රියංකර අයියා ?

උ : ඔව්.

ප්‍ර : ඇයි ප්‍රියංකර අයියා ඇහුවේ නැද්ද මොකද කරන්නේ කියලා ?

උ : මොකක්ද කරන්නේ කියලා ඇහුවාම මම මොකුත් නැහැ කිව්වා.. ඊට පස්සේ මම ගෙදර දිව්වා.

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9. However, without any apparent justification, the prosecution failed to call PW9 as a witness, despite having listed him during the trial.

10. Regrettably, the evidence of the PW6 the Medical Officer who examined the victim is not convincing at all. According to the Medico Legal Report (MLR) the victim was examined by PW6 on 23.01.2010 at 10.50 am. The alleged offence was committed on 22.01.2010.

11. According to PW6 he observed no injuries on the body of the victim expect redness around the anus. It could be observed in the MLR, when PW6 recorded the injuries, he had written that there was no evidence of anal penetration but cut it off and later wrote on the Report that there is medical evidence of recent penetration. It is significant to note that PW6 when stated his opinion on the MLR did not even describe it as anal penetration but recent penetration.

12. Furthermore, it is significant to note that there were two Medico-Legal Reports prepared by the same doctor in respect of the victim, marked as X1 and X2. Report X1, dated 03.08.2012, states that there was medical evidence of recent penetration. However, Report X2, dated 10.05.2022, states that there was no evidence of anal penetration. The same report further confirms that there was no medical evidence of vaginal or anal penetration. No satisfactory explanation was provided by the doctor for these conflicting conclusions.

13. More importantly, when he was being cross-examined, he gave some conflicting opinions as follows:

ප්‍ර : වෛද්‍යතුමා ගුද මාර්ගය ආසන්නයේ රත් පැහැ වීමක් විතරයි සිද්ධ වෙලා තියෙන්නේ ?

උ : එහෙමයි.

ප්‍ර : වෛද්‍යතුමාට කියන්න පුලුවන්ද මෙහෙම රත්පැහැ ගැන්වීම ලිංගික ප්‍රවේශයක් සිදු වූ නිසාම කියලා වෛද්‍යතුමාට කියන්න හැකියාවක්

තියෙනවාද ?

උ : ඒ නිසාම කියන්න හැකියාවක් නැහැ. මෙම දරුවා දෙන ලද ඉතිහාසය අනුව වෙත් ආකාරයේ දෙයක් සිදු වී නැහැ. එම නිසා මෙම ක්‍රියාව නිසා සිදු වූ බව මා විසින් නිගමනය කලා ගරු මැතිතුමනි.

ප්‍ර : දරුවාගේ රෝග ඉතිහාසය අනුව වෛද්‍යතුමා නිගමනය කරනවා මේ ආකාරයේ ලිංගික ප්‍රවේශයක් නිසා තමයි රත් පැහැ ගැන්වීම ඇති වුනේ කියලා?

උ : එහෙමයි.

ප්‍ර : ගුද මාර්ගය ආසන්නයේ කිසිදු ලේ ගැලීමක් වෛද්‍යතුමාට දක්නය ලැබුනාද ?

උ : නැහැ.

ප්‍ර : ඒ වගේම ඒ ඇරෙන්න වෙනත් කිසිදු සිරීමක් හෝ තුවාලයක් වීමක් වගේ දෙයක් වෛද්‍යතුමාට දැකගන්න ලැබුනේ නැහැ ?

උ : නැහැ.

ප්‍ර : ඒ අනුව වෛද්‍යතුමා මේ ආකාරයේ තුවාලයක් හෝ සිරීමක් හෝ මේ ආකාරයෙන් තුවාලයක් නැති නිසා වෛද්‍යතැමාට බරපතල ලිංගික අපයොජනයක් වුනා කියලා කියන්න හැකියාවක් නැහැ නේද ?

උ : බරපතල ආකාරයේ යමක් සිදු වූ බව නිශ්චිතව කියන්න හැකියාවක් නැහැ ගරු මැතිතුමනි.

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14. When the evidence of the Medical Officer who examined the victim is uncertain and inconsistent, it would be dangerous to rely upon such evidence to corroborate the testimony of PW2.

15. It is also important to note that PW2 when testifying clearly stated that he was placed on his stomach when the appellant was allegedly committing the offence of grave sexual abuse. According to MLR, the victim was examined by PW6 on the following day. In his evidence, the victim stated that he was fallen when the bicycle was stopped by the appellant. Furthermore, he stated that his hands were held behind his back by the appellant and that he was forced to lie on the road while being sexually abused by him. If this evidence is true, there should be injuries on his body. But PW6 observed no injuries on the victim. He testified as follows:

ප්‍ර : එහෙම එතනට එනකොට මොකද වුනේ ?

උ : මාව තල්ලු කරලා බයිසිකලයෙන් වට්ටවා ගත්තා.

ප්‍ර : කවුද එහෙම කලේ ?

උ : සුදේශ්.

ප්‍ර : එහෙම බයිසිකලයෙන් වට්ට ගත්තාට පස්සේ මොකද වුනේ ?

උ : මගේ කලිසම ගැලෙව්වා.

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16. Thus, it is difficult, if not impossible, to accept that the victim sustained no injuries, as reflected in the Medico-Legal Report, if the alleged offence was indeed committed upon him by the appellant, as per his evidence.

17. In view of the unconvincing medical evidence, and particularly when the victim's narrative remains uncorroborated by such evidence, it was incumbent upon the prosecution to call PW9, an eyewitness to the alleged incident. However, for reasons best known to the prosecution, PW9 was not summoned to testify.

18. In these circumstances, the presumption under Section 114 illustration (f) of the Evidence Ordinance becomes applicable, whereby the Court may presume that evidence which could be and is not produced would, if produced, be unfavorable to the prosecution. The failure to call PW9, who was in a position to materially support or contradict the version of PW2, casts a serious doubt on the reliability of the prosecution's case. The Court cannot lightly disregard the non-production of such a crucial witness, particularly when his testimony would have provided direct evidence of the alleged incident. In this regard, the following authorities would be of much relevance.

19. In ***Walimunige John v. The State 76 NLR 488***, it was held:

> **"***that the prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross-examination. Further, it is not incumbent on the trial Judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114 (f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all.*
>
> *" The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the ' prosecution and the*

failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance."

20. Similarly, the case of ***Kumara De Silva and Two Others vs. Attorney General [2010] (2) SLR 169*** reinforced the principle that an adverse presumption under Section 114(f) can be drawn when a witness's evidence is willfully withheld by the prosecution and constitutes a vital missing link in the case.

21. In ***R vs. Stephen Seneviratne 38 NLR 208***, the Privy Council held that the prosecution must call witnesses whose evidence is essential to the unfolding of the narrative of the case. It was further held inter alia that: The prosecution is not bound to call witnesses irrespective of considerations of number and of reliability. 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.

22. In the present case, there was no justifiable reason for the prosecution to refrain from calling PW9, who, according to the testimony of PW2, was an eyewitness to the incident. Furthermore, a careful examination of the High Court proceedings reveals that the learned Judge had permitted the expunging of PW9's evidence after the same had been recorded. In my view, this action has gravely impaired the appellant's right to a fair trial.

23. What then was the nature of PW9's evidence? Why was it expunged? Was it because such evidence was unfavorable to the prosecution's case? No satisfactory explanation emerges from the record, nor is any reasonable justification discernible.

24. Moreover, the location where the alleged incident took place further casts doubt on the prosecution story. According to PW1, the offence was committed by the appellant on a roadside, which is not a secluded place, and PW3 also purportedly witnessed it.

When the medical evidence fails to support the prosecution's version, the probability of the prosecution story is further called into question.

25. The aforesaid discrepancies and inconsistencies discernible in the prosecution evidence appear to have escaped the attention of the learned High Court Judge. Moreover, the learned trial Judge has failed to properly appreciate the inconsistent nature of the medical evidence, particularly the fact that the Medical Officer based his findings predominantly on the history provided by the victim rather than on any definitive clinical observations of his own.

26. It is also pertinent to highlight that the victim's testimony is not corroborated by the medical evidence due to its inconsistent nature, and therefore, the evidence of the other eyewitness, PW9, would have been of immense assistance in ascertaining the truth of the case had he been called. Furthermore, upon a perusal of the proceedings of the High Court, it appears that the learned High Court Judge has erred in concluding that the failure to call PW9 had no impact on the prosecution case.

27. In these circumstances, when the independent medical evidence does not support the version of the victim, and when the failure to call a material eye witness remains unexplained, the benefit of the doubt must necessarily be extended to the appellant. It is a well-established principle of criminal jurisprudence that where doubt arises with respect to the prosecution's narrative, such doubt must operate in favour of the accused.

28. Upon a consideration of the totality of the evidence placed before this Court, it becomes evident that the prosecution has failed to establish the charge beyond reasonable doubt. The learned High Court Judge, with respect, has erred in failing to properly evaluate the material inconsistencies and contradictions in the prosecution evidence, particularly the uncertainty arising from the medical opinion which undermines the victim's testimony, as well as the unexplained exclusion of the testimony of PW9, an alleged eyewitness whose evidence would have been of substantial relevance.

29. In the circumstances, I am compelled to hold that the conviction entered against the appellant is unsafe and cannot be permitted to stand. The shortcomings in the medical evidence, the failure to call PW9 whose testimony was material, and the misdirection

in evaluating the reliability of the prosecution witnesses cumulatively give rise to a reasonable doubt which must necessarily accrue to the benefit of the appellant.

30. On the above premise, I set aside the conviction and sentence imposed upon the appellant by the learned High Court Judge.

31. Accordingly, the appeal is allowed.

Judge of the Court of Appeal

P. Kumararatnam,J

I agree,

Judge of the Court of Appeal