

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

In the matter of an appeal under Section 331
of the Code of Criminal Procedure
Act No. 15 of 1979 as Amended.

CA/HCC/244/2024

HC of Kandy Case No: HC 216-20

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

COMPLAINANT

Vs.

Pathane Gedara Bandula Senarath
Jayathunga

No: 228, Pahalagama, Mahamulgama

ACCUSED

AND NOT BETWEEN

Pathane Gedara Bandula Senarath
Jayathunga

No: 228, Pahalagama, Mahamulgama

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

Before: B. Sasi Mahendran, J.
Amal Ranaraja, J

Counsel : Prashan Wickramaratne for the Accused- Appellant
Dileepa Pieris, ASG for the State

Written 28.04.2025 (by the Accused-Appellant)

Submissions: 30.09.2025 (by the Respondent)

On

Argued On : 02.10.2025

Judgment On: 12.11.2025

JUDGEMENT

B. Sasi Mahendran, J.

The Accused Appellant (hereinafter referred to as 'the Accused'), was indicted before the High Court of Kandy on two counts of Rape and one count of Grave Sexual Abuse on a date between a time period of 01.01.2018 and 06.12.2018 to one Saumya Madushani Jayathunga punishable under Section 364 A (3) and Section 365B (2)(b) of the Penal Code as amended by Act no. 22 of 1995.

At the trial, the prosecution led evidence through 4 witnesses and marking productions P1-P3, and thereafter closed its case. The Accused, in his defence, gave evidence in the witness box and called one witness.

After the conclusion of the trial, the Learned High Court Judge, by a judgment dated 23.01.2024, found the accused guilty on all three counts. Accordingly, for the first count and second count, the Learned High Court judge imposed 20 years of rigorous imprisonment with a fine of Rs. 15,000/-, with a default sentence of 6 months rigorous imprisonment and sentences to be run concurrently. For the 3rd count, 10 years of rigorous imprisonment along with a fine of Rs. 15,000, with a default sentence of 2 months simple imprisonment. Furthermore, a compensation in sum of Rs. 1 million carries in default term of 02 years rigorous imprisonment.

Being aggrieved by the afore-mentioned conviction and the sentence, the Accused has preferred this appeal to this Court. The following grounds for appeal were set out in the written submission.

1. The learned High Court Judge has failed to appreciate the fact that the Appellant had neither any opportunity nor any access to the Victim (PW 01) in committing the alleged offences during the said time period specified in the indictment;
2. The learned High Court Judge has failed to analyse the material inter-se contradictions between the Prosecution Witnesses, which significantly affects the credibility, consistency and probability of the Prosecution Version;
3. The learned High Court Judge has erred in law by failing to consider that PW 01 (Victim) was neither Cogent nor Credible, and that her testimony, in the absence of material corroboration, ought not to have been acted upon;
4. The learned High Court Judge erred in failing to consider that there was no substantive evidence on record to support the 02nd and the 03rd counts mentioned in the indictment;
5. The conviction on the 01 Count mentioned in the indictment is bad in law, as the Appellant was deprived of effective legal representation during the trial, thereby violating the Appellants right to a fair trial;
6. The learned High Court Judge has failed to expressly reject or properly address the version of the defence, and the judgement is not in compliance with the requirements of Section 283 of the Code of Criminal Procedure Act;
7. The investigation into the alleged offences was neither fair nor impartial, thereby violating the Appellant's right to a fair investigation, as guaranteed under the Constitution;

8. The learned High Court Judge erred in law by failing to draw an inference in favour of the Appellant under Section 114 (f) of the Evidence Ordinance, due to the Prosecution's failure to call material witnesses to give evidence;
9. The Appellant has been deprived of a Fair Trial as envisaged under Article 13(3) of the Constitution;

During the argument stage, Learned Additional Solicitor General Deleepa Peries PC has informed the court that he is not supporting the conviction of the 2nd and 3rd counts on the basis that the prosecution has failed to call material witnesses to prove both counts. Therefore, this court has to consider whether the prosecution has proved 1st charge against the Accused. It is pertinent to refer to the 1st count of the indictment,

“වර්ෂ 2018 ක් වූ ජනවාරි මස 1 වන දින සහ වර්ෂ 2018 ක් වූ දෙසැම්බර් මස 06 වන දින අතර කාලය තුළ වූ දිනයකි මෙම අධිකරණයේ අධිකරණ බල සීමාව තුළ පිහිටි මහමුල්ගම හිදී යුෂ්මතා 1995 අංක 22 දරන දණ්ඩ නීති සංග්‍රහය (සංශෝධන) පනතින් සංශෝධිත දණ්ඩ නීති සංග්‍රහයේ 364 (අ) (1) වගන්තියෙහි දක්වා ඇති ආකාරයේ දොති සම්බන්ධතාවයක් යුෂ්මතාට ඇත්තා වූ එනම් යුෂ්මතාගේ සහෝදරයාගේ දියණිය වන වයස අවුරුදු 16ට අඩු තැනැත්තියක වන පනන් ගෙදර සෞමාා මධුශානි ජයතුංග යන යට දුෂණය කිරීමෙන් 1995 අංක 22 1998 අංක 29 සහ 2006 අංක 16 දරණ සංශෝධිත පනත් මගින් සංශෝධිත දණ්ඩ නීති සංග්‍රහයේ 364 (අ) (3) වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදු කල බවය.”

The facts of this case and the background to the incident may be set out briefly as follows:

According to the testimony of PW 01, Saumya Madushani Jayathunga, the victim who is the niece of the Accused—was 14 years old when she gave her evidence. At the time relevant to the case, she and her brother were living at their grandmother’s residence, while their parents stayed at ‘Uda Gedara’ due to limited space. The grandmother’s home was also shared by her sister, the victim’s paternal uncle and his wife, and the Accused, who is the younger brother of the victim’s father. During the period of the alleged incident, the victim was a Grade 5 student.

According to the testimony of PW 01, on the day of the incident, she was sleeping alongside her grandmother's sister. In the morning, while the grandmother's sister had gone to prepare the Buddha Pooja, the accused entered the premises and sexually assaulted her. It is relevant to reproduce that portion of her testimony.

Page 85 of the brief,

ප්‍ර : වූවි බාප්පා මොකද කලේ කියල උත්තරයක් දෙන න පුලුවන්ද?

උ : වූවි බාප්පාවූවි බාප්පා ඇග උඩ නැගලා දූෂණය කලා

Then the court has asked the following questions,

අධිකරණයෙන්

ප්‍ර : මධුෂානි කිව්වා නේද වූවි බාප්පා දූෂණය කලා කියලා?

උ : ඔව්.

ප්‍ර : ඉස්කෝලේ කීවෙනි පත්තියේදීද එහෙම වුනේ?

උ : 05 හේ පත්තියේ

ප්‍ර : එක පාරයිද ඔහොම වුනේ අවස්ථා කීපයක් වුනාද?

උ : මතක නැහැ.

ප්‍ර : පහේ පත්තියේදී කීප වතාවක් වුනාද?

උ : ඔව්

During the examination, she has described how the sexual intercourse took place.

The witness stated that during the incident, she was positioned face down on the bed in the room. She further testified that the accused engaged in non-consensual sexual intercourse by penetrating her vaginally.

Page 87 of the brief,

ප්‍ර : මධුශානිට කියන්න පුලුවන්ද වූවි බාප්පා කොහොමද මදුශානිව දූෂණය කරේ කියල?

උ : නිශ්ශබ්දව සිටි

ප්‍ර : වූවි බාප්පාගේ මොකෙන්ද තමුන්ව දූෂණය කලේ?

උ : මුත්‍රා මාර්ගයෙන්

ප්‍ර : වූවි බාප්පාගේ වූ කරන එකෙන් කිව්වොත් පිළිගන්න පුලුවන්ද?

උ : පුළුවන්

ප්‍ර : තමන්ගේ ශරීරයේ කොහොටද ඔය දූෂණය කලේ?

උ : මගේ මුත්‍ර මාර්ගයට

ප්‍ර : වූ කරන එකට කියල කිව්වොත් පිළිගන්නවද?

උ : ඔව්

The witness further stated that she experienced pain when the accused inserted his male organ into her vagina.

Page 88 of the brief,

ප්‍ර : වූටි බාප්පාගේ වූ කරන එකෙන් තමන්ගේ වූ කරන එකට මොකද්ද කලේ ?

උ : ඇතුල් කලා.

ප්‍ර : එහෙම ඇතුල් කරන කොට තමන්ට මොන වගේ දෙයක්ද දැනුනේ?

උ : රිද්දනා.

ප්‍ර : ඒ වෙලාවේදී මධුෂානි එතනින් බේරෙන්න හැදුවේ නැද්ද?

උ : බේරෙන්න උත්සහ කලා.

When asked if she had any further trouble after this incident, she replied that she did not remember and remained silent and did not answer. Next, she stated that two other incidents had occurred. She also said that it was in the morning on the porch of her grandmother's house that the Accused had inserted his finger into the witness's vagina. The witness testified that she told the grade 5 teacher about the incident and that the principal informed the police in 2018. Then the police informed about this incident to the witness's family.

During the cross-examination, when questioned by the defence about alleged physical abuse by her stepmother, she responded by denying it. When the witness was questioned regarding a dispute that arose between the Accused and the PW 02 regarding plucking tea leaves in the accused's land, the witness indicated that she was unaware of such an incident. She further stated that this incident was reported to the witness's school teacher, called Kamani. PW 1 rejected the defence's suggestion that any incident had occurred at her Uda Gedara, and the witness denied it. The defence suggested that she should have informed about this incident in the first place to PW 02 and the witness has remained silent. PW 01 denied the proposition that the Accused had not committed rape against her, and that it had been committed by someone else.

Upon analysis of the evidence, it was evident that the witness remained resolute in her assertion that the incident occurred at her grandmother's residence. It is acknowledged that her testimony was provided four years after the event, and that many of the questions

posed by the defence were unrelated to the core incident. Evaluating her testimony in its entirety, she maintained consistency throughout, and the defence did not highlight any contradictions in her account. The primary defence advanced by the accused was that the allegation was a fabrication by PW 2, stemming from an ongoing land dispute.

According to the testimony of PW 06, Judicial Medical Officer Dr Danushka Thilina Bandara, he examined PW 01 on 07.12.2018. Upon examination, the witness observed medical evidence consistent with chronic anal penetration and signs of repeated vaginal penetration. He noted positive anal dilation and confirmed that the clinical findings aligned with the brief history given by the witness. He further opined that PW 01 had been subjected to sexual abuse on multiple occasions over an extended period. This medical evidence supported the evidence of the prosecutrix about the penetration.

During her testimony, PW 2, Edirisinghe Gedara Leelawathi, who is the stepmother of PW 1, stated that she could not recall the exact month in which the incident occurred. She recounted that, on one occasion, while walking toward the kitchen, she observed the Accused placing his genitalia between the legs of the witness. She confronted the Accused about the incident and subsequently informed family members; however, her disclosure was met with indifference

During cross-examination, the witness firmly denied any hostility toward the Accused and rejected the defence's allegation that she had verbally abused PW 01. She affirmed that she witnessed the incident on 22 August 2015. In 2018, she received a letter from the police requesting her presence at the station, where she was informed that PW 01 had allegedly been abused by the Accused. The complaint had been filed by the witness's school principal. However, she noted that the police did not proceed with further investigations or summon the PW 01 for inquiry. Approximately a week later, the victim complained of nausea and dizziness, prompting the witness to take her to the hospital. She categorically denied having any relationship with the victim's school principal or having influenced him to file a false complaint against the Accused.

According to the accused, a dispute had arisen with PW2 over the alleged plucking of tea leaves from his land. He further claimed that, on one occasion, PW2 attempted to poison him. It is noted that the defence did not cross-examine the relevant witness on these assertions. Additionally, it was alleged that PW2 assaulted PW1. The accused also stated that his statement to the police was obtained under duress, with officers allegedly pointing a firearm at his head during the process

The defence witness, P.G. Agalin, mother of the accused, testified that the dispute originated when PW2 allegedly entered the accused's land and plucked tea leaves. She further stated that, on the day in question, PW2 shouted without any valid provocation and accused PW2 of stealing from the accused's residence. It is noted that the defence did not question this aspect during the cross-examination of PW 02.

We are mindful of the observation made by Justice Takar J in *Bhoginbhai Hirjibhai V. State of Gujarat*, AIR 1983 SC 753, which held that;

“By and large a witness cannot be expected to possess a photo graphic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time plan. A witness is liable to get or mixed up when interrogated later on”.

Therefore, it cannot be reasonably expected from a person in the prosecutrix's circumstances to recall the horrendous turn of events she experienced as a child with absolute precision. Furthermore, it is not uncommon for a victim of an unfortunate event to feel diminished and remain silent rather than be vocal about it. It is also noted that the victim was 10 years old at the time of the incident and 14 years old when she gave her testimony.

Further, we note that although there was a fight between the accused and PW 2, the incident was reported to the police by the school principal, based on the victim's disclosure to the school teacher. Therefore, we observe that PW 2 is not deliberately providing evidence to implicate the accused for this offence.

We note that the prosecution failed to call material witnesses in support of the second and third counts, failing to establish both counts beyond a reasonable doubt. Accordingly, the conviction and sentence on 2nd and 3rd counts are set aside. In my considered opinion, the prosecution has proved the 1st count beyond a reasonable doubt.

For the foregoing reasons, I find no justification to interfere with the sentence imposed by the Learned High Court Judge on the first count—namely, 20 years of rigorous imprisonment and a fine of Rs. 15,000/-, with a default sentence of six months' rigorous imprisonment and the compensation in sum of Rs. 1 million carries in default term of 02 years rigorous imprisonment.

The appeal is partly allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL