

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979, and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:

CA/HCC/0135/2025

High Court of Anuradhapura Case No:

HC/84/2017

Vs

Thilakaratnege Nandana Upul Thilakaratne

Accused

AND NOW BETWEEN

Thilakaratnege Nandana Upul Thilakaratne

Accused – Appellant

Vs

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

Complainant - Respondent

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

Pradeep Hettiarachchi, J.

Counsel : Saliya Pieris, PC, with Sarinda Jayawardana for the Accused-Appellant.
: Akila Dalpatadu, SC, for the State.

Argued on : 02.07.2026

Decided on : 03.09.2026

Pradeep Hettiarachchi, J

Judgment

1. The Accused-Appellant (hereinafter referred to as “the Appellant”) in the instant appeal was indicted in the High Court of Anuradhapura on the following count;

On or about 01.05.2009, within the jurisdiction of the High Court of Anuradhapura, the Accused committed the offence of rape upon one Hemapalage Subhashini Hemapala, who is a physically disabled woman, an offence under Section 364(2)(f) of the Penal Code as amended by the Act No. 22 of 1995, punishable under Section 364(2) of the Penal Code.

2. As elected by the Appellant, the trial was conducted before the Judge of the High Court sitting without a jury. The prosecution called seven witnesses in support of its case. In addition, the Court Interpreter also testified.
3. At the conclusion of the trial, the Learned Trial Judge found the Appellant guilty on the count and convicted him accordingly. The Appellant was consequently sentenced to 14 years’ rigorous imprisonment and ordered to pay a fine of Rs. 50,000, with a default sentence of six months’ simple imprisonment. In addition, he was directed to pay Rs. 300,000 as compensation to the prosecutrix, with a default sentence of one years’ simple imprisonment.

4. Aggrieved by the said conviction and sentence, the Appellant has preferred the present appeal. The following grounds of appeal are advanced by the Appellant;
 - a. Whether the Learned High Court Judge had erred in law and in fact in convicting the Accused when the prosecution has failed to prove its case beyond reasonable doubt;
 - b. Whether the Learned High Court Judge had erred in law and in fact in convicting the Accused by failing to consider that PW1 had not accurately given evidence using sign language; and
 - c. The Learned Trial Judge failed to properly evaluate the reliability and credibility of the identification evidence.
5. At this stage, it would be appropriate to briefly summarize the version of the prosecution as follows;
6. The prosecutrix was dumb and deaf by birth, and she was not conversant with the sign language at the time of the alleged incident, and she had no formal education in the sign language. Further, it was elicited in her evidence that the prosecutrix was not certain about the exact date on which the alleged act of rape had occurred.
7. On the day of the alleged incident, the prosecutrix was alone at her residence. While she was walking near the trees within the premises of her house, the Accused allegedly grabbed her by the hand and engaged in sexual intercourse with her on a rock located near the said trees. The prosecutrix further testified that she attempted to escape by pushing the Accused away; however, her efforts were unsuccessful.
8. Following the alleged sexual intercourse, the Accused moved away from the prosecutrix. Thereafter, the prosecutrix remained at the said location and cried for some time before returning to her home.
9. According to the evidence of the prosecutrix, she did not disclose the alleged incident to any person immediately after its occurrence due to fear arising from the said incident.

However, subsequently, only upon her menstruation having ceased, she disclosed the incident to her sister, PW3. Thereafter, PW3 informed their parents about the alleged incident, following which the prosecutrix identified the house of the Accused to her family members. Subsequently, a complaint was lodged with the police on 28.05.2009, approximately one month after the alleged incident.

10. I shall now proceed to consider the first ground of appeal advanced by the Appellant, namely, whether the Learned High Court Judge had erred in law and in fact in convicting the Appellant when the prosecution has failed to prove its case beyond reasonable doubt.
11. In a prosecution of this nature, where the prosecutrix is above the age of consent, the prosecution is required to establish that the alleged act of rape was committed by the Appellant without the consent of the prosecutrix and prove the same beyond reasonable doubt.
12. However, upon considering the surrounding circumstances of the present case, it is apparent that the alleged act of rape had occurred with the consent of the prosecutrix. It is only after the prosecutrix realized that her menstruation had ceased as a result of the said act that she disclosed the alleged incident to her family members, following a delay of approximately one month. This delayed disclosure is a relevant circumstance that must be considered in assessing the credibility and reliability of her testimony. This position is reflected in the evidence of the prosecutrix herself, PW2, and PW3.
13. However, it is significant to note that there is no evidence before the trial court to establish that the Accused had threatened the prosecutrix in any manner to prevent her from disclosing the incident to any person. Further, having regard to the age of the prosecutrix at the material time and the surrounding circumstances of the alleged incident, the explanation given by the prosecutrix for her failure to disclose the incident at an earlier stage appears to be difficult to accept.

“ප්‍ර: තමුන් මේ ගැන මුලින්ම කාටවත් කියන්නේ නැතුව ඉඳලා පසු වෙලාවක අක්කට කිව්වේ ඇයි?”

උ: මගේ ඊලඟ මාසේ ඔසප් වීම සිද්ධ වුනේ නැහැ. ඒ නිසා අක්කට කිව්වා. අක්කා පුදුම වුන. ඇඩුවා. අපරාදේ කියලා.” (at vide page 66 of the Appeal Brief)

14. The aforesaid evidence indicates that the prosecutrix did not disclose the alleged incident immediately after its occurrence, but only after she realized that her menstruation had ceased. This circumstance gives rise to a reasonable inference that the alleged act of rape had occurred with the consent of the prosecutrix and that the disclosure was made subsequently due to the fear of becoming pregnant.

15. Further, it was elicited during the evidence of PW2 that, upon becoming aware of the alleged incident, the father of the prosecutrix had assaulted her, questioning why she had gone with the Accused. This evidence is also indicative of the circumstances surrounding the alleged incident and suggests that the conduct of the prosecutrix was perceived by her father as having involved her consent.

“ප්‍ර: තමුන්ලා කොයි වෙලාවකදිවත් ඔය තමුන්ගේ දුටට බැන්නේ, සැර කලේ නැද්ද? උ: ඒ සිද්ධිය වුනාට පස්සේ තමයි බැන්නේ.” (at vide page 117 of the Appeal Brief)

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ප්‍ර: කාටද ගැහුවේ?

උ: කිව්වා කියලා. ඇයි උඹ ගියේ කියලා දුටට ගැහුවා. (at vide page 118 of the Appeal Brief)

16. Furthermore, according to PW3, the sister of the prosecutrix, the prosecutrix disclosed the matter by coming to her house while crying and stating that her menstruation had stopped. PW3 testified that she attempted to comfort the prosecutrix; however, the prosecutrix continued to cry, repeatedly stating that her menstruation had stopped. Thereafter, PW3, in a joking manner, stated that if her menstruation had stopped, it could mean that she was pregnant and would have to be married. The prosecutrix then responded in the affirmative. Upon further inquiry, the prosecutrix identified the Accused to PW3; however, she did not disclose any details regarding the alleged act of rape at that time.

“ප්‍ර: කොහොමද තමුන්ට මේ සිද්ධිය ගැන දැන ගන්න හම්බ වුනේ?

උ: නංගි අපේ ගෙදර ඇවිල්ලා අන්න ගන්නා. ඊට පස්සේ මම ඇහුව ඇයි කියල. ඊට පස්සේ එය කිව්වා එයට මාසික ශුද්ධිය හැදුනේ නැහැ කියල කිව්වා ස්වාමිනි. ඊට පස්සේ මම කිව්වා කමක් නැහැ එහෙම හැදෙන්නත් පුළුවන් ඒක අපි පස්සේ බලමු මොකද කියල කියන කොට එය කිව්වා නැහැ හැදුනේ නැහැ. ඊට පස්සේ මම කිව්වා එහෙම හැදෙන්නේ නැත්නම් ඔය කසාද බැඳපු කෙනෙක් වෙන්න ඕන. එහෙනං බබෙක් හම්බ වෙන්නද දන්නේ නැහැ කියලා මම විහිලුවට වගේ කිව්වා. ඊට පස්සේ එය කිව්වා ඔව් කියල. ඒ වෙලාවේ මත බය වුණා. ඊට පස්සේ මත ඇහුව කොහොමද ඒක වෙන්නේ කියල. ඊට පස්සේ කිව්වා අපේ සියලාගේ ගෙදරට ඉස්සරහ ගෙදර එක්කෙනෙක් කියල මට පෙනුණා. අත පයෙන් පෙනුණා මෙහෙම කියල.” (at vide page 121 of the Appeal Brief)

17. Further, according to the evidence of PW3, the prosecutrix stated that the Accused had induced her by stating he would marry her and thereafter the alleged incident had occurred. This evidence is significant, as it indicates that the prosecutrix’s version was not that the act was committed by force or against her will, but that she had been allegedly persuaded by the promise of marriage.

“පු: ඊට පස්සේ නංගි මොනවද කිව්වා? මේ විත්තිකරු මොනවා කළා කියලද කිව්වේ?

උ: නංගි කිව්වා එය කසාද බඳිනවා කියල එයා පොළඹවා ගන්නා කියන එක කිව්වා. එයට මෙහෙම අවහිරයක් කළා කියන එක කිව්වා.” (at vide page 123 of the Appeal Brief)

18. The aforesaid evidence is inconsistent with the prosecution case that the alleged act of rape was committed by the Appellant without the consent of the prosecutrix. Rather, it suggested that there was an understanding between the Appellant and the prosecutrix, which preceded the alleged incident. The subsequent discourse of the incident only after the cessation of menstruation. Further, creates a doubt as to whether the alleged act of rape was committed without the consent of the prosecutrix, as alleged by the prosecution.

19. In these circumstances, when the totality of the evidence and the surrounding circumstances are considered, there exists a reasonable doubt as to the manner in which the alleged act had occurred and whether the same was committed without the consent of the prosecutrix. It is a well-settled principle of criminal law that where a reasonable doubt arises regarding the guilt of an accused person, such doubt must necessarily be resolved in favour of the accused. Accordingly, I am of the view that the prosecution

has failed to establish the charge against the Appellant beyond reasonable doubt, and therefore, the conviction of the Appellant cannot be safely sustained.

20. Then, turning to the second ground of appeal, as it was argued on behalf of the Appellant that the Learned High Court Judge had erred in law and in fact in convicting the Accused by failing to consider that the evidence of PW1 was not accurately conveyed through sign language.
21. In this regard, a perusal of the evidence of the prosecution witnesses reveals that the prosecutrix had not received any formal education in sign language. Consequently, she gave evidence before the trial court with the assistance of a sign language interpreter.
22. The admissibility of the evidence of a dumb and deaf witness is governed by Section 119 of the Evidence Ordinance.
23. Section 119 of the Evidence Ordinance reads as follows;

“A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court. Evidence so given shall be deemed to be oral evidence.”

24. The admissibility and evidentiary value of the testimony of a dumb and deaf witness were recognized and emphasized by the Supreme Court in ***Gunawathie Vs. Priyalal (2007) 2 Sri L.R. 58***, *“I am of the opinion that despite the obvious and reasonable constraints on communication, the witness, Sriyani Pushpalatha, was fully capable of comprehending the questions put to her and of communicating her responses through signs, despite her lack of formal training in sign language.”*

Further held that *“The reliability of evidence adduced by a dumb witness must be considered in the light of the facts and circumstances of each case. There exists no general standard or straight jacket formula applicable to such cases.”*

“Under the Common Law, it is accepted that a person who is deaf and dumb is not incompetent, if he or she can be made to understand the nature of an oath and if intelligence can be conveyed to and received from him or her by means of signs. He or she may be examined through a sworn interpreter who understands her signs.”

25. In the present case, the evidence of PW16, the sign language interpreter, was that the prosecutrix was capable of giving evidence before the trial court by communicating through her own signs, notwithstanding the fact that she had not received any formal education in sign language.

ප්‍ර: මා කිව්වොත් මෙම වින්දිත තැනැත්තියගේ සංඥා භාෂා මට්ටම කුමක කියල ඒ සම්බන්ධයෙන් තමුන්ට හැකියාවක් තියෙනවද කුමක් හෝ කරුණක් පැහැදිලි කරන්න?

උ: මූලික වශයෙන් නඩු විභාගයක් ආරම්භ කිරීමට ප්‍රථම ශ්‍රවණ හෝ කථන උනතා ඇති තැනැත්තියක් ලැබුනම අපි මූලිකව පරීක්ෂ කර බලනවා මෙම තැනැත්තාගේ භාෂා පරිවර්තන සහ සන්නිවේදන හැකියාව කොපමණ දුරට තියෙනවද කියල. සමහර විට එය මූලිකවම පාසලකින් අධ්‍යාපනය ලබල ගන්නත් පුළුවන්. නැත්නම් සමාජ අභාගයකින් ගන්නත් පුළුවන්. ඒ නිසා මූලික ප්‍රශ්න කිරීම් ඒ කියන්නේ ඒ තැනැත්තා ඉන්න තැන, ගෙදර විස්තර, ඒ වගේ කෙටි ප්‍රශ්න ප්‍රමාණයක් විමසල මා විසින් සැහීමට පත් වෙනවා නම් ගරු අධිකරණයට සල කර සිටිනවා මෙම තැනැත්තා සමග සන්නිවේදන කටයුතු කල හැකි තැනැත්තෙක් කියල.

ප්‍ර: මෙම තැනැත්තියගේ සංඥා භාෂාව සම්බන්ධයෙන් කුමක්ද තිබුණු මට්ටම. ඇය විසින් මේ සම්බන්ධයෙන් ඉගෙන ගෙන තිබුනද කොහෙන් හරි?

උ: මැයට ප්‍රශ්න විමසීම සිදු කරන විට එම තැනැත්තියට බාධාවකින් තොරව අධිකරණය විසින් අසනු ලබන ප්‍රශ්න වලට පිළිතුරු ලබා දීමේ හැකියාවක් තිබුන.

ප්‍ර: ඒ අනුව තමුන්ට හැකියාවක් තිබුනද ඇය ලබා දුන් සාක්ෂි නිසි ආකාරයෙන්, විධිමත්ව ගරු අධිකරණයට පරිවර්තන කිරීමට?

උ: එහෙමයි. මා හට හැකියාවක් ලැබුන එම තැනැත්තිය සමග සංඥා භාෂා පරිවර්තනය කිරීමට.” (at vide page 180 of the Appeal Brief)

26. On this basis, it should be noted that the absence of formal education or training in sign language did not, by itself, seriously impair or hinder the prosecutrix’s ability to understand the questions conveyed to her through the qualified interpreter or to effectively communicate her responses before the trial court.

27. The evidence of a dumb and deaf witness must be evaluated in the same manner as the evidence of any other witness. Accordingly, the mere fact that a witness is dumb and deaf does not, itself, render his or her evidence unreliable or untrustworthy.
28. Accordingly, I am of the view that the ground of appeal advanced by the Appellant, namely, that the Learned High Court Judge failed to consider that the prosecutrix's evidence was not accurately conveyed through sign language, is without merit. The mere fact that the prosecutrix was a dumb and deaf witness does not, by itself, render her evidence unreliable. In the absence of any material demonstrating that the interpretation was inaccurate or that the prosecutrix was unable to understand the questions put to her or effectively communicate her answers, there is no basis upon which this ground of appeal can succeed.
29. I shall now proceed to consider the third ground of appeal as the identification of the Appellant by the prosecutrix is questionable and cannot be considered as reliable.
30. According to the evidence of PW2, she explained the manner in which the prosecutrix identified the accused, stating that three boys were residing in the house of the accused. Thereafter, the prosecutrix was shown each of the individuals and was asked to identify the perpetrator. However, the prosecutrix stated that none of those persons shown to her was the person who committed the alleged offence. Subsequently, the prosecutrix identified the photograph of the Appellant as the alleged perpetrator.

“ප්‍ර: ඒ වෙලාවේ තමුන්ට කිව්වද තමුන්ගේ බාල දියණියට කවුද මේක කලේ කියල?
 උ: එහෙමයි ස්වාමිනි. එයාලගේ ගෙදර හිටිය පිරිමි දරුවෝ තුන්දෙනෙක් ද, හතර
 දෙනෙක්ද, අපේ ගෙදරට ඉස්සරහ ගෙදර. ඊට පස්සේ මෙයාගෙන් ඒ ළමයි ගෙන්වල
 අහන කොට නැහැ කිව්වා. නැහැ කිව්වට පස්සේ කවුද කියන්න කිව්වම අහවලා කියලා
 තමයි ලොටෝ එකකින් පෙන්වල, මගේ ස්වාමි පුරුෂයන් එක්ක ගිහිල්ල පෙන්නුවේ ඒ
 ලොටෝ එකෙන්.” (at vide page 111 of the Appeal Brief)

31. This account of identification of the Appellant raises serious doubt as to the reliability and impartiality of the identification process. The circumstances under which the identification was made indicate that the prosecutrix was not able to identify the

Appellant independently and without any influence or suggestion. Therefore, the reliability of such identification becomes highly questionable.

32. The Learned Trial Judge's failure to undertake a proper judicial evaluation of the evidence has rendered his finding as to the identity of the Appellant both unsatisfactory and unsafe.

33. Concerning identification, the following was held in **S v Mthetwa 1972(3) SA 766 (A)**;

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities.”

34. A careful perusal of the impugned judgment reveals that the Learned Trial Judge failed to evaluate the identification evidence with the requisite degree of caution and judicial circumspection mandated by law. He did not subject the evidence relating to the identification of the Appellant to the careful scrutiny mandated by law, nor did he adequately assess its integrity, reliability, and sufficiency before concluding that the Appellant had been identified beyond reasonable doubt.

35. Furthermore, during cross-examination, the prosecutrix testified that she had sustained injuries to her back when the Accused pressed her against a rock during the alleged sexual intercourse. She further testified that she showed such injuries to her mother.

ප්‍ර: ගලක් උඩ ඔය සිඳ්දිය වුණා නම් තමුන්ගේ පිට කොහෙවත් තුවාල වුනේ නැද්ද?

උ: තුවාල වුණා.

ප්‍ර: තමුන් ඔය තුවාල කට හරි පෙන්වුවද?

උ: පෙන්වුවා.

ප්‍ර. කාටද පෙනේනුවේ?

උ. අම්ම බැලුවේ.' (at vide page 104 of the Appeal Brief).

36. Furthermore, it is significant to note that although the prosecutrix testified that she sustained injuries during the alleged incident and that she showed such injuries to her mother, PW2, while narrating the circumstances of the alleged incident before the trial court, did not make any reference to the existence of such injuries. This omission raises a doubt regarding the alleged injuries and their occurrence in the manner described by the prosecutrix.
37. PW7, JMO was called by the prosecution to testify regarding the Medico-Legal Report prepared in respect of the prosecutrix. According to the evidence of the JMO, the history relating to the alleged incident was obtained from the prosecutrix with the assistance of her mother. As per the history provided by the prosecutrix, the incident had occurred on the day following the Vesak Poya Day.
38. Further, the JMO testified that he observed a partly healed tear in the hymen at the 7 o'clock position, which was indicative of a previous penetration. He further stated that such an injury could have occurred approximately one week prior to the medical examination.
39. Furthermore, the JMO testified that, apart from the aforementioned injury, no other external injuries were observed on the body of the prosecutrix. This evidence is inconsistent with the testimony of the prosecutrix, who testified that she had sustained injuries to her back when the accused allegedly pressed her against a rock during the sexual intercourse. The absence of any such injuries noted during the medical examination creates a doubt regarding the manner in which the alleged incident is said to have occurred.
40. The JMO further provided an explanation regarding the possible medical reasons for the absence of the alleged injuries on the body of the prosecutrix, which is as follows;

“ප්‍ර: ඔබට පැහැදිලි කරන්න පුළුවන්ද ඔබ පරීක්ෂා කරන ලද අවස්ථාවේදී මෙම තැනැත්තියගේ ශරීරයේ සිරිම් තුවාල නොතිබීමට වෛද්‍යමය හේතුවක්?

උ: සිරිම් තුවාල හෝ මෘදු පටක ආශ්‍රිතව තුවාල නොතිබෙන්න පුළුවන්. මෙම තැනැත්තිය මෙය සිදු කරන අවස්ථාවේදී යම් ආකාරයක ප්‍රතිරෝධයක් නොදැක්වීම මත. එසේත් නොමැති නම් මෙම දින හතක කාලය තුළ තැලීම් තුවාල වැනි ලක්ෂණ නොමැති වී තිබෙන්න පුළුවන්. එවැනි කාරණා මත වගේම මේ වින්දිත තැනැත්තිය වියපත්ව සිටින අවස්ථාවකදී යම් ආකාරයක ප්‍රතිරෝධයක් දක්වන්නේ නොමැති අවස්ථා තිබෙනවා. එවැනි තත්ත්වයකදීත් තුවාල ඇති නොවීමේ හැකියාවක් තිබෙනවා.” (at vide page 174 of the Appeal Brief)

41. It is well established that the presence of injuries is not an indispensable requirement in a prosecution for rape. Accordingly, the mere absence of injuries on the prosecutrix does not, itself, negate the prosecution’s allegation that force was used in the commission of the offence.
42. However, in the present case, the significance lies not merely in the absence of injuries, but in the inconsistency between the testimony of the prosecutrix and the medical evidence. While the prosecutrix asserted that she sustained abrasions on her back during the alleged incident and showed such injuries to her mother, this assertion is not supported by the evidence of the JMO, who found no such injuries during the medical examination. This contradiction undermines the reliability of the prosecutrix’s account and raises reasonable doubt as to the accuracy of her testimony regarding the manner in which the alleged incident occurred.
43. In the present case, it is significant to note that, although the prosecutrix was capable of giving evidence before the Court as a witness with the assistance of sign language, despite not having received any formal education in sign language, the reliability of her identification of the Appellant remains questionable. Where the identity of the Appellant as the perpetrator remains doubtful, the Appellant is entitled to the benefit of that doubt. Furthermore, the surrounding circumstances of the present case give rise to a doubt as to whether the alleged act of rape occurred with the consent of the prosecutrix.

44. Having considered the aforementioned authorities in the context of the facts and circumstances of the present case, I am unable to agree with the findings of the Learned High Court Judge.

45. For the foregoing reasons, the conviction and sentence imposed on the Appellant by the Learned High Court Judge of Anuradhapura in respect of the charge of rape are hereby set aside, and the Appellant is acquitted of the charge. Accordingly, the appeal is allowed.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree

Judge of the Court of Appeal