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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/ 0012/2022
High Court of Hambantota
Case No. HC/17/2012

Saliladeera Kankanamlage Sunith Nimal

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL	:	**Nuwan De Alwis for the Appellant instructed by Mirthula Skandarajah. Maheshika de Silva, DSG for the Respondent.**
ARGUED ON	:	**27/08/2024**
DECIDED ON	:	**18/12/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General under Sections 354 and 364(2) of the Penal Code for committing the offence of kidnapping from lawful guardianship and for committing statutory rape on Walpola Hewage Pushpakumari on 27/06/2003.

The trial commenced on 31/01/2013. After leading seven witnesses and marking productions P1-P4, the prosecution closed the case. The learned High Court Judge had called for the defence and the Appellant had made a statement from the dock and adduced evidence from his wife and closed his case.

The learned High Court Judge after considering the evidence presented by both parties before him and his predecessor, convicted the Appellant as charged, and sentenced the Appellant to 01 year of rigorous imprisonment and imposed a fine of Rs.10,000/- subject to a default sentence of 06 months simple imprisonment for the first count.

For the second count the Appellant was sentenced to 10 years of rigorous imprisonment and was imposed a fine of Rs.10,000/- subject to a default sentence of 06 months simple imprisonment.

In addition, a compensation of Rs.100,000/- was ordered with a default sentence of 01-year rigorous imprisonment. The learned High Court Judge had further ordered the sentences imposed on count one and two to run concurrent to each other.

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

The Facts of this case *albeit* briefly are as follows.

According to PW1 - the victim of this case, she had been about 08 years and 05 months old when she faced this bitter ordeal. When she gave evidence, she was 19 years old. The victim had been staying with her mother and stepfather along with her siblings as her father had passed away some time back. Both her mother and step-father were employed at that time.

In the afternoon on the day of the incident, when the victim was at home, the Appellant had taken the victim to the Hambantota town for her to get a haircut. Thereafter he had taken her to a closed boutique owned by himself and had made her lie on the floor of the boutique. As directed by him, the victim had removed her clothes and the Appellant had slept over her body, committing the grave offence of rape. She had felt pain and noticed blood

coming from her vagina. She had told the incident to her mother when she returned from work

According to PW2, the mother of the victim when she came home at about 7.30 p.m. the victim had first complaint of headache and body pain. Thereafter, she had divulged the entire incident to her. As it was night she did not go to the police but had taken steps to lodge her complaint on the following day. When they went to the police station the victim was suffering from severe pain from her vagina.

The JMO who had examined the victim had opined that the examination findings of the genital area are consistent with alleged sexual intercourse. He has noted that the hymen of the victim is not intact. The victim had given a very consistent history to the doctor.

After the closure of the prosecution's case, the defence was called, and the Appellant had given a statement from the dock and called his wife as defence witness.

The following Grounds of Appeal were raised on behalf of the Appellant:

1. The Appellant was not afforded a fair trial.
2. The case is not proven beyond reasonable doubt.
3. That the witnesses are not credible and trustworthy.
4. That the learned High Court Judge had failed to evaluate the dock statement of the Appellant.

In this case I decided to consider all the grounds of appeal simultaneously hereinafter.

In a case of this nature, the testimonial trustworthiness and credibility of PW1, mainly the probability of the incidents happening as described by her should be assessed with utmost care and caution by the trial judge. The

learned Trial Judge must be satisfied and be able to accept the evidence after assessing her competence and credibility as a witness.

In **Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 His Lordship held that;

> *"In considering the question as to whether evidence given by the witness should be accepted or not, the court has, no doubt, to examine whether the witness is an interested witness and to enquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is - whether there is a ring of truth surrounding his testimony."*

In this case, the creditworthiness of the evidence given by the victim did not suffer at any stage of the trial. The contradictions and the omissions which were highlighted in her evidence were not forceful enough to attack the core of the case. The learned High Court Judge had considered the evidence given by PW1 with caution and care and correctly held that her evidence is convincing and cogent and sufficient on its own to prove the case against the Appellant.

Further, it should be borne in mind that the victim was only 08 years old when she was raped by the Appellant. She has given evidence very clearly in her examination-in-chief. As it was a severe trauma that she had undergone at a tender age, nobody in the predicament she was in can be expected to disclose all the facts accurately. But the victim had given evidence without any contradiction or omission in the trial. Therefore, I conclude that the evidence of the victim passed the test of probability and credibility.

In the infamous case of **Woolmington v DPP** (1935) the Court ruled that in criminal cases, the burden of proof is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt. The defendant is presumed innocent until proven guilty, and it is not for the defendant to prove his innocence.

In this case the prosecution had led cogent evidence against the Appellant without any ambiguity. She had narrated the entire incident to her mother who in return had seen blood oozing from the victim's vagina. The Appellant had threatened PW2 twice stating that he will cut and stab her for going to police and thereafter to court.

The doctor who examined the victim had clearly stated that the victim has been subjected to sexual intercourse. Further he had noticed that the hymen of the victim was not intact which is very significant considering the tender age of the victim. As the finding of the doctor is immensely consistent with the evidence given by the victim in court, there is no justification for undervaluing the victim's testimony in this case. Considering all this evidence the only conclusion that can be reached is that the prosecution had proved the case beyond a reasonable doubt.

Although the learned Counsel for the Appellant contended that the learned High Court Judge had failed to analyse the dock statement of the Appellant, at pages 365-367 of the brief the learned Judge had accurately analysed and laid down the criteria under which the dock statement should be considered.

Finally, the Appellant complains he was not afforded a fair trial. The right to a fair trial is one of the basic rights guaranteed to a party to a legal dispute. It promises fair court proceedings. It ensures that all parties are treated equally, the applicable procedures are followed properly so that the trial is fair and effective irrespective of the decision and the outcome of the case.

In this case, there is no any reason to say that the trial afforded to the Appellant was in any way unfair. His rights had been very well protected during the trial and He had had been given ample opportunity to defend himself. Hence, complaining that the Appellant was not given a fair trial is a completely a baseless argument in this appeal. Considering the grounds of appeal submitted, I conclude that none of them carry any merit whatsoever.

Considering the evidence led in this case and guided by the judgements mentioned above, I conclude that this is not an appropriate case in which the judgement delivered by the learned High Court Judge on 06/08/2021 against the Appellant should be interfered upon. Therefore, his appeal is hereby dismissed.

Having considered the circumstances of this case, I order the sentence be operative from the date of sentence namely on 06.08.2021.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL