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/ 0016/2023
High Court of Badulla
Case No. HC/46/2017

Rathnayake Mudiyanselage Karunarathne

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL	**:**	**Shanaka Ranasinghe,PC with Niroshan Mihidukulasuriya and V. Abeysooriya for the Appellant.** **Lakmini Girihagama, DSG for the Respondent.**
ARGUED ON	**:**	**25/07/2024**
DECIDED ON	**:**	**22/11/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General under Section 365B (2) (b) of the Penal Code for committing three counts of grave sexual abuse on Dissanayake Mudiyanselage Sachini Hansika Dissanayake between 01.12.2013 and 03.02.2014

The trial commenced on 30.11.2020. After leading all necessary witnesses, the prosecution closed the case. The learned High Court Judge had called for the defence and the Appellant had given evidence from witness box 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 only on the 3rd count and sentenced the Appellant to 10 years of rigorous imprisonment and 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 12 months rigorous imprisonment.

The Appellant was acquitted from 1st and 2nd counts.

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 10 years old when she faced this bitter ordeal. When she gave evidence, she was 16 years old and was schooling. The victim has two siblings and she had been in grade 05 when she encountered this incident. The Appellant was her class teacher at B/Arawa Maha Vidyalaya.

The alleged incident had happened during the afternoon Mathematics class conducted by the Appellant. The Appellant had called her behind the teacher's desk on several times and under the guise of helping her with sums, has squeezed her breasts. Additionally, he had inserted his finger into her vagina.

Due to fear and the respect placed on the Appellant she did not divulge these incidents to anybody initially. The Appellant had also told her not to tell anybody. As the victim could not bear these abuses anymore, she had divulged these incidents to her mother on 04.02.2014. A complaint was lodged at the Mahinyangana Police Station on 05.02.2014.

The JMO who had examined the victim had opined that the findings upon conducting an examination of the genital area are consistent with the alleged type of digital penetration as he had observed a superficial tear in the victim's hymen at the 3 o'clock position.

After the closure of the prosecution's case, the defence was called, and the Appellant denied the charges while he gave evidence form witness box.

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

1. Did the learned High Court Judge fail to consider the inconsistencies and contradictions between PW1's evidence and the short history given to the Medical Officer.
2. Did the learned High Court Judge fail to properly evaluate the prosecution evidence particularly on the consideration of improbability.
3. Has the learned High Court Judge erred in law by considering the portion of the statement made by the Appellant which were not marked during the defence.
4. The learned Trial Judge erred in law by placing the burden on the Appellant to prove his innocence.

In a case of this nature, the testimonial trustworthiness and credibility of PW1, mainly the probability of the occurrence of events as recounted by her? should be assessed with utmost care and caution by the Trial Judge. The learned Trial Judge must satisfy and accept the evidence of a child witness after assessing her competence and credibility as a witness.

In the first ground of appeal, the learned Counsel argued that the learned High Court Judge misdirected himself about the medical evidence.

The learned Counsel drew attention to the history narrated by the victim to the doctor. In her evidence she had said that the Appellant had inserted his

finger into her vagina only on one occasion. But in her short history she had said that the Appellant inserted his finger into her vagina several times. Hence the Counsel argued that the evidence given by the victim is not consistent with the history provided by her to the doctor.

The admissibility of the recorded history in the Medico-Legal Report as evidence in criminal trials has been discussed in several decided cases.

In **Gamini Dolawatte V. Attorney General [1988] 1 Sri. L. R 221** held that:

> "*While a Medico-Legal Report is admissible in evidence under Section 414(1) of the Code of Criminal Procedure Act, hearsay evidence by way of the case history embodied in such a report is not admissible as such history is information not ascertained by the Doctor from his own examination of the injured".*

In **Bhargavan v. State of Kerala AIR 2004 SC 1058 (Supreme Court of India)**

> "At para 20*: So far as non-disclosure of names to the doctor, same is really of no consequence. As rightly noted by the Courts below, his primary duty is to treat the patient and not find out by whom the injury was caused".*

Although the victim had given evidence that the Appellant had inserted his finger into her vagina only once, the doctor found a superficial tear in the hymen at 3 O'clock position when he subjected the victim to a genital examination. The doctor had opined that the findings from the examination of the genital area are consistent with the alleged digital penetration.

As the doctor's findings are consistent with the evidence given by the victim in court, there is no justification for undervaluing the victim's testimony in this case. Hence, this ground has no merit.

In the second ground of appeal, the Counsel for the Appellant contended that the learned Trial Judge had not properly evaluated the evidence of the Prosecution.

In this case, the creditworthiness of the evidence given by the victim did not suffer at any stage of the trial. Although the victim said that her mother had come to know the incident only from her aunt, her mother PW2 had said that she came to know the incident from her daughter. This contradiction cannot be considered an important one which affects the root of the case.

The learned DSG highlighting this evidence of the victim accurately submitted that even if this was to be considered as a contradiction, it is not forceful enough to shake the credibility of the victim or the core issues of the case against the Appellant.

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. Hence, this ground also has no merit.

In the third ground of appeal the learned Counsel for the Appellant contended that the learned High Court Judge erred in law by considering the portion of statement made by the Appellant which was not marked during the defence.

The relevant portion is re-produced below:

Page 339 of the brief.

අනෙක් අතට 2014 පෙබරවාරි 04 වන දින විද්‍යාලයේ නිදහස් උත්සවයක් පැවැති බවට ද, ඒ සඳහා පන්තියේ පුටු ද රැගෙන ගොස් ඇති බවට විත්තිකරු ප්‍රකාශ කර ඇත. මෙකී කාරණය සම්බන්ධයෙන් ද විත්තිකරු තම ප්‍රකාශයේ කිසිදු සඳහනක් සිදු කර නොමැති අතර, පැමිණිල්ලේ

සාක්ෂිකරුවන් හරස් ප්‍රශ්නයන්ට භාජනය වීමේ දී එකී ස්ථාවරය නිසි පරිදි අදාළ සාක්ෂිකරුවන් වෙත ඉදිරිපත් කර නොමැත.

The above portion of the judgment has not caused any prejudice to the Appellant as the learned High Court Judge had only commented about the defence evidence adduced in this case.

Although this is a misdirection, it had not caused any prejudice to the Appellant.

Article 138 of The Constitution of Democratic Republic of Sri Lanka states:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any court of First Instance, Tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitution in integrum, of all cases, suits, actions, prosecutions, matters and things of which such High Court of First Instance, Tribunal or other institution may have taken cognizance;
>
> **Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect, or irregularity, which has not prejudiced the substantial right of the parties or occasioned a failure of justice". [**Emphasis added**]**

The above-mentioned provision of the Constitution clearly demonstrates that misdirection can be disregarded only if such misdirection has not caused any prejudice to the substantial rights of the parties or occasioned a failure of justice. As such, the third ground is also devoid of any merit.

In the final ground of appeal, the Counsel for the Appellant contended that the learned Trial Judge erred in law by placing the burden on the Appellant to prove his innocence.

In criminal law, the presumption of innocence is a fundamental principle that requires the prosecution to prove the guilt of the accused beyond reasonable doubt.

The learned President's Counsel highlighting the following portion of the judgment contended that the learned High Court judge had reversed the burden of proof and had placed it upon the Appellant. The relevant portion is re-produced below:

කෙසේ වූවද, එකී ස්ථාවරය පැ.සා. 01 සහ පැ.සා. 02 ප්‍රතික්ෂේප කර ඇති අතර, ඉසුරු නැමැති අය පැ.සා. 01 ගේ සහ පැ.සා. 02 ගේ ඥාතියෙකු වන බවට ඔවුන්ගේ සාක්ෂි අනුව තහවුරු වේ. එහෙත්, ඉසුරු නැමැති අයවලුන්ට එරෙහිව පාසලේ විනය කමිටුව මඟින් අවවාද කිරීමක් හෝ විනය ක්‍රියා මාර්ගයක් ලබා ගත් බවට ද විත්තිකරු ද එකී විනය කමිටුවේ සාමාජියෙකු බව තහවුරු කිරීම සඳහා අදාළ විද්‍යාලයේ විදුහල්පති හෝ වෙනත් කමිටු සාමාජිකයෙකු හෝ කැඳවා එකී ස්ථාවරය තහවුරු කිරීමට විත්තියට හැකියව ලැබී නොමැත.

Considering the above quotation from the judgement, it cannot be considered that the learned High Court Judge had reversed the burden of proof. Hence it has not caused any prejudice to the Appellant. As such this ground is also devoid of any merit.

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 02/12/2022 against the Appellant can be interfered upon. I therefore, dismiss the appeal.

Having considering the circumstances of this case, I order the sentence be operative from the date of sentence namely on 02.12.2022.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL