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.

Court of Appeal Case No.
CA/HCC/ 0043/2021

High Court of Kegalle
Case No. HC/3879/2018

Ihala Gedera Hewage Lionel Thilakarathne

APPELLANT

vs.

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

RESPONDENT

BEFORE : **P. Kumararatnam, J.**
K. M. G. H. Kulatunga, J.

COUNSEL : **Sandamal Rajapaksha for the Appellant.**
Maheshika Silva, DSG for the Respondent.

ARGUED ON : **19/02/2025**

DECIDED ON : **20/03/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted in the High Court of Kegalle for committing one count of grave sexual abuse on the victim Palle Gedera Induwari Samithma Wijetunga, punishable under Section 365(B) 2 (b) of the Penal Code as amended by Acts No.29 of 1998 and No.16 of 2016.

The trial commenced on 27.03.2019 and after leading all necessary witnesses, the prosecution had closed the case on 24/09/2020. The Learned High Court Judge had called for the defence on the same day and the Counsel for the Appellant had moved for a day to call witnesses on his behalf. The Appellant had made a dock statement and closed his case on 02.11.2020.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant as charged under Section 365(B) (2) (b) of the Penal Code as amended, and sentenced the Appellant to 15 years rigorous imprisonment and imposed a fine of Rs.10,000/- subject to a default sentence of 06 months simple imprisonment. No compensation was ordered by the learned High Court Judge.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant had given consent to argue this matter in his absence. The Appellant was connected via Zoom from prison during the argument.

The following grounds of appeal were raised on behalf of the Appellant at the argument.

1. Whether the prosecution proved the case beyond reasonable doubt on the basis that the material witness was not called to give evidence.
2. Whether the contradiction marked as V1 was considered in the correct perspective.
3. The probability of the incident.

Background of the case *albeit* **as follows:**

In this case the victim was less than five years old when she faced this abominable violation. According to PW1, in the evening of the day of the incident, the victim was standing close to her father while her father was having a bath. At that time, the Appellant who is a known to the victim had arrived and the victim's father had asked the her to go home as she was getting wet from the water splashing on her from his bath. As such, the Appellant carried the victim to her house and placed her on the bed. Thereafter, the Appellant had removed the undergarment of the victim up to her knee. Simultaneously, the Appellant too had lowered his trouser and his undergarment and rubbed his penis on the victim's vagina.

While the Appellant was on the victim's body, PW3, the brother of the victim had arrived and reprimanded the Appellant. Thereafter, he had informed the incident to his father. According to the victim her father had assaulted the

Appellant at that time. Thereafter, PW1 had first told the incident to her grandmother Seelawathi. A maid namely Ranjani was employed at the victim's house. Even though Ranjani was the first person to lodge the complaint with the police, she was not called to give evidence at the trial.

According to PW3, the brother of the victim, he himself had witnessed the Appellant lying on top of her sister's body and committing intercrural sex. Further, when he shouted, the victim had run up to PW2 Ranjani and recounted the incident to her.

The JMO had examined the victim on 11/05/2013 at the Base Hospital, Mawanella. In the history, the victim had stated that a known person had attempted to touch her inappropriately and had removed her clothes while she was home. The victim had not revealed any vaginal, or oral penetration. The Medico legal Report, except the history, was admitted under Section 420 of the Code of Criminal Procedure act No.15 of 1979 by the defence.

As the grounds of appeal raised by the Appellant are interconnected, all grounds will be considered together in this appeal.

In the indictment filed by the prosecution, it had only referred to the act of intercrural sex committed on the victim by the Appellant. But when the victim was giving evidence before the High Court, she restricted her evidence to the act of the Appellant rubbing his penis on her vagina. Further, in the history to the doctor the victim had not revealed any sexual act committed by the Appellant.

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

In **Ranjeet Kumar Ram v. State of Bihar** [2015] SCC Online SC 500 the court held that:

> *"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one".*

Considering the above cited judicial decision, as the credibility of the evidence of a child witness would depend on the circumstances of each case, it is the duty of the Learned Trial Judge to assess and decide on the evidence given by child witness.

The learned Counsel drew the attention to the history narrated to the doctor by the victim. In her history she had stated that a known person had attempted to touch her and remove her clothes while she was at home. In the history to the doctor the victim had not mentioned any sexual act committed on her by the Appellant. But in her evidence, she had said that the Appellant had rubbed his penis on her vagina. Hence the Counsel argued that the evidence given by the victim is not consistent with her history to the doctor.

The basic foundation in a criminal trial is the charge. By charging, an accused is provided information as to the nature of the allegation levelled against him. The charge must identify the act committed by the accused, the law alleged to have been violated by him and it should also specify particulars pertaining to the alleged offence.

It is the profound duty of a prosecutor to frame the charge/s after careful consideration of evidence available in the case at the time of drafting the charge. The requirements of a valid charge are set out in Sections 164 and 165 of the Code of Criminal Procedure Act No.15 of 1979.

In this case, although the Appellant had been charged for intercrural sex, the victim had given evidence that the Appellant had rubbed his penis on her vagina. Further, at the doctor's, she had not mentioned any sexual act committed by the Appellant. The defence had not admitted the history given to the doctor under Section 420 of the Code of Criminal Procedure Act. Therefore, I conclude that this has caused great prejudice to the Appellant.

According to the victim she had informed first the grandmother and then the domestic aid Ranjani of the alleged act of abuse. The prosecution had not called any of them to give evidence in the trial. Even though Ranjani had lodged the first complaint at the police, she was not called to give evidence.

Essential witnesses" in a criminal trial are those individuals who possess crucial firsthand information about the crime, directly linking the defendant to the alleged crime and whose testimony is considered vital for the prosecution to prove their case beyond a reasonable doubt.

In **King v. Seneviratne** 38 NLR 208 the Court held that:

> *"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".*

Witness evidence can even be acted upon without corroboration where no inhibition or unreliability has been attached or suggested against such testimony.

In this case PW02, Ranjani is an essential witness to corroborate the evidence given by the victim regarding the act of abuse. She is essential as she is the one who lodged the first complaint to the police.

His Lordship Justice Dheeraratne in **Sunil and others v. Attorney General [1986] 1 S. L. R 230** held that:

> "*Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.*
>
> *It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even the absence of corroboration."*

In **Premasiri v. Attorney General [2006] 3 Sri.L.R** held that:

> *"The rule is not that corroboration is essential before there can be a conviction in a case of rape but the necessity of corroboration as a matter of prudence except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge".*

In **State of Andra Pradesh v. Garigula Satya Vani Murty** AIR 1997 SC 1588, it was held that:

> *" …the courts are expected to show great responsibility while tying an accused on a charge of rape. They must deal with such cases with utmost sensitivity".*

Considering the evidence given by the victim, her evidence is not corroborated by very important witness PW2, who heard the victim's story first. As such the victim had failed to satisfy the court on the test of consistency, spontaneity and probability.

The learned Counsel contended that the learned High Court Judge had failed to take into consideration the material contradictions in the evidence of PW3 who was called to give evidence in order to corroborate the evidence of the victim. PW3 is the brother of the victim. In his evidence it was revealed that he had failed to tell the Police about the incident as witnessed by him. Hence, he gave evidence pertaining to the incident for the very first time directly in courts. He admitted that he did not tell the police as he gave evidence before the High Court. Defence had marked a vital contradiction as V1. This contradiction certainly attacks the root of the matter and provides a strong challenge to the prosecution version.

The book **Sarkar on Evidence, 15th Edition** at page 112 states:

> *"Minor discrepancies are possible, even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence.* ***[Sidhan v. State of Kerela [1986] Cri LJ 470, 473(Kerala)].*** *But discrepancies in the statements of witnesses on material points should not be passed over, as they seriously affect the value of their testimony* ***(Brijlal v.Kunwar, 36A 187: 18CWN 649: A1914PC38).****The main thing to be seen is whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtained in the evidence. In the latter, however, no such benefit will be available to it.* ***(Krishna Pillai Sree Kumar v. State of Kerala A [1981] SC 1237,1239).****"*

In **The Attorney General v Sandanam Pitchai Mary Theresa** [2011] 2 SLR 292 the court held that:

> *"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are true material to the facts in issue".*

In this case PW1, and PW3 are the key witnesses. Their evidence is not clear and not matched on material points discussed above. Their evidence is tainted with much ambiguity and uncertainty which definitely affects the root of the case. This has aggravated more due to not calling an essential witness PW2.

Taking into consideration, all these circumstances, I am of the view that the conviction of the Appellant cannot be allowed to stand as the prosecution had failed its duty to prove this case beyond a reasonable doubt. I set aside the conviction and sentence imposed by the learned High Court Judge of Kegalle dated 05/04/2021 on the Appellant. Therefore, he is acquitted from this case.

Therefore, the appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

K. M. G. H. Kulatunga, J.

I agree.

JUDGE OF THE COURT OF APPEAL