**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.*

**Court of Appeal No:**

CA/HCC/0002/21

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

**High Court of Embilipitiya**

**Case No:** HC/98/2016

Weerappulige Upul Wijesinghe

**ACCUSED**

**AND NOW BETWEEN**

Weerappulige Upul Wijesinghe

**ACCUSED-APPELLANT**

**Vs.**

The Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT-RESPONDENT**

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| Before | : Sampath B. Abayakoon, J. |
| | : P. Kumararatnam, J. |
| Counsel | : Amila Palliyage with Buddhika Serasinghe, Sandeepani Wijesooriya, S. Udugampola, and J. de Silva for the Accused Appellant |
| | : Anoopa de Silva, DSG for the Respondent |
| Argued on | : 22-09-2023 |
| Written Submissions | : 18-02-2022 (By the Accused-Appellant) |
| | : 29-04-2022 (By the Respondent) |
| Decided on | : 23-01-2024 |

**Sampath B. Abayakoon, J.**

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Embilipitiya for having committed the following offences.

1. That he committed the offence of kidnapping of a minor on 26-06-2014 at a place called Batahenkanda, Kiramawaththa within the jurisdiction of the High Court of Embilipitiya, and thereby committed an offence punishable in terms of section 354 of the Penal Code.
2. At the same time and at the same transaction, he committed the offence of grave sexual abuse on the earlier mentioned minor by having intercrural sex with her, and thereby committed an offence punishable in terms of section 365B(2)(b) of the Penal Code as amended by Amendment Act No. 22 of 1995, 29 of 1998 and 16 of 2006.

After the commencement of the trial and at the conclusion of the evidence of PW-01, who was the victim child, the prosecuting State Counsel has moved to amend the 2nd count in the indictment against the appellant by deleting the words

intercrural sex (කකුල් අතර තැබීමෙන්) and by replacing it with the words placing his penis on the vagina of the victim child (ස්ත්‍රී ලිංගය මත තැබීමෙන්).

It appears that this amendment has been made based on the evidence of the victim child. The learned High Court Judge who heard the matter has allowed the application and after charging the appellant on the amended charge, the learned Counsel for the appellant has been permitted to cross-examine the victim child again, based on the amendment.

This means that the appellant has not been prejudiced under any circumstance because of the amendment made to the 2nd count preferred against him.

After trial, the learned High Court Judge of Embilipitiya of her judgement dated 18-01-2021 has found the appellant guilty as charged. In the sentencing order, after having considered the mitigatory circumstances pleaded on behalf of the appellant and the facts and circumstances of the matter, the learned High Court Judge has sentenced the appellant in the following manner.

1. On count 1- 2 years rigorous imprisonment, and a fine of Rs.10000/-. In default of paying the fine, 3 months simple imprisonment.
2. On count 2- 10 years rigorous imprisonment, and a fine of Rs.10000/- In default of paying the fine, 3 months simple imprisonment.

In addition to the above, the appellant was ordered to pay Rs.100000/- as compensation to the victim child, and in default he was sentenced to 6 months simple imprisonment.

Having considered the fact that he has no previous convictions, the rigorous imprisonment period imposed on the two counts had been ordered to run concurrently to each other.

Being aggrieved of the said conviction and the sentence, the appellant preferred this appeal.

## The Facts in Brief

By the time, the victim female child gave evidence before the High Court as PW-01, she had been a 14-year-old and studying at grade 09 of her school. It is clear from her evidence that the alleged incident has occurred on 26-06-2014 while she was studying at grade 5. She was 09 years of age at that time.

On the mentioned date, she has gone to her school as usual, and since a mother of a teacher has expired, she had been taken to attend the funeral by the school authorities. After coming back to the school, she has gone home with another elder girl studying in the same school who lives near their house. When she reached home, she has found that her mother and father are not at home. Her brother and younger sister were also not there.

Assuming that the mother has gone for a bath, victim child has gone near their clothes line to collect some clothes with the hope of going for a bath. Before she could reach the clothes line, the appellant whom she referred to as Upul maama who is a person living close to their house and a relative, has come and grabbed the victim child. He has taken her to a cinnamon growth behind their house, which she has referred to as the direction of Kurunda (කුරුන්ද පැත්තට). The evidence led in this action clearly establishes that what she refers to as Kurunda was the land behind their house planted with cinnamon, tea and other crops.

The evidence also establishes the fact that this land was a rocky terrain and the cultivation had been in between the rocks where cultivation was possible.

According to the evidence of the victim, when she was carried away by the appellant, she was still wearing her school uniform. After taking her behind their house, the appellant has forced her to lie down, removed her panty, lifted the school uniform, and had placed his penis on her vagina.

From the moment the victim child was forcibly taken, she has shouted and had attempted to escape.

The victim had stated in her evidence that the appellant placed his penis on her vagina after getting on top of her, but he could not do anything else, because, after hearing her cries, her mother came and shouted at him. According to the victim's evidence, when her mother came there, the appellant has released the grip he had on the victim and had run away. After the incident, the mother of the child had taken her to the hospital where she has given a statement relating to what happened to her.

In her evidence, she has stated that she came home after school at the usual time where she used to come, and faced this situation. She has admitted that their land was a rocky land and the place of the incident was also a place where lots of rocks were around.

It has been suggested to her that because of the enmity the parents of the victim child had with the family members of the appellant, she has concocted a false story against him.

For matters of clarity, I would like to reproduce the questions and answers provided by the victim child when this defence was suggested to her.

> ප්‍ර : සාක්ෂිකාරිය මම තමුන්ට යෝජනා කරනවා මේ උපුල් මාමා තමුන් කියන ආකාරයට කිසිම කරදරයක් කරේ නැහැ කියලා.
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ප්‍ර : තමුන් බොරුවක් තමයි පොලිසියට කිව්වේ කියලා කියන්නේ?

උ : නැහැ මම සත්‍යමයි කිව්වේ පොලිසියට.

ප්‍ර : ඒ එක්කම මම තමුන්ට යෝජනා කරනවා තමුන් අදත් උසාවියට සාක්ෂිදීලා කියන්නේ බොරු කියලා?

උ : පමණක් ඒවා නම් දන්නේ නැහැ. කිව්ව ටික නම් සත්‍යයයි.

The mother of the victim child (PW-02) has also given evidence in this trial. She has testified that this incident happened on 26-06-2014 around 1.45 – 2.00 p.m. However, at the same time, she has testified that while working as a tea plucker in a land belonging to someone else, she received a call from the kindergarten teacher of her younger daughter informing her that a mother of a school teacher has expired and the children will be taken to attend the funeral, and if possible, she should also come.

It had been her evidence that because of the necessity to attend the funeral she came home earlier than unusual around 12.30 - 1.00 p.m. on that day, and when she reached home, she saw the school bag and the shoes of her elder child, namely the victim, in front of their house.

According to her, she usually comes home after school around 2.00 and 2.20 p.m. Because she saw the shoes and the bag of her child, this has prompted her to call for her loud calling her “Sudu Sudu.” Since there was no response, she has walked towards the back door of the house and seen the child crying and running towards her. She has come and informed the witness that Upul maama took her. The victim child has come towards her from the direction of the cinnamon growth behind their house. When asked what happened, the child has explained that the appellant took her away, lifted her clothes, spat on her vagina and placed his penis on it.

Overwhelmed by emotion, she has run towards the direction where the child came and has seen the appellant running away. She has attempted to contact her husband over the phone and had later taken the child to Omalpe hospital.

From there, the child has been taken to Embilipitiya hospital where the child and the mother had made statements to the police in relation to the incident.

In giving evidence, the child had admitted her birth certificate marked as P-1. The panty and the uniform worn by her has been marked as P-2 and P-3 respectively.

The Judicial Medical Officer (JMO) who examined the child after she was admitted to the hospital has not observed any injuries on her body. However, he has opined, based on the history given by the child, that such an incident cannot be overruled. He has also stated that in a situation where the child is laid on a rough surface, there can be abrasions on pressure points of the body if the child attempted to escape or resisted such an incident.

It needs to be noted that the history given by the victim child to the doctor was consistent with the child's evidence as to what happened to her. The police officer who conducted the site inspection as to the place of the incident too has given evidence in this matter and had confirmed the geography of the area as stated by the witnesses.

At the conclusion of the prosecution evidence and when the appellant was called upon for a defence, he has given evidence under oath. He has claimed that he has nothing to do with this incident and police arrested him on the 28th and assaulted him.

He has been subjected to lengthy cross-examination by the prosecution. A contradiction in his evidence in the statement he made to the police in relation to his whereabouts on the day of the incident has been marked as X-1 by the prosecution.

The learned High Court Judge in her judgement has considered whether the evidence of the victim child can be believed and whether her and her mother's evidence corroborates each other.

The learned High Court Judge has considered the evidence having drawn her attention to the fact that no person can be expected to have a photographic memory of an incident of this nature. She has well considered the probability aspect as well, and has determined that the defence taken up by the appellant has not created any doubt as to the prosecution case. On the basis that the prosecution has proved both the charges against the appellant beyond reasonable doubt, the appellant has been convicted and sentenced.

**The Grounds of Appeal**

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

1. The learned High Court Judge has erred in law by failing to consider the probability factor that favors the appellant.
2. The findings of the learned High Court Judge on material points favorable to the appellant have been based on mere surmises and conjectures not supported by evidence.
3. The learned High Court Judge has come to a wrong finding that the medical evidence corroborates the version of the prosecution.

**Consideration of the Grounds of Appeal**

As the 1st and the 2nd grounds of appeal urged are interrelated, I will now proceed to consider the said grounds together.

The learned Counsel for the appellant made submissions on the basis that if the incident occurred on a rough surface as admitted by the witnesses in their evidence, there should have been more injuries observed by the doctor who examined the child, and that is a factor that should have been considered in favour of the appellant.

However, the learned High Court Judge, rather than looking at that probability factor in favour of the appellant, has decided that in favour of the prosecution by coming into various surmises and conjectures. It was his view that there was no basis for the learned High Court Judge to come to such findings based on the evidence led in this trial.

He submitted that, even the police evidence as to the observation made in relation to the place of the incident has established the fact that an incident of this nature cannot happen without any visible injuries to a victim.

It is correct to say that the victim child has received no injuries as established by the medical evidence. The doctor has clearly opined an incident of this nature can happen without visible injuries or marks. It is an admitted fact that the land on which this incident has occurred is a land with a rocky terrain and a cinnamon growth. The police officer who recorded his observations as to the place of the crime has observed fallen cinnamon leaves in the place shown as the place where the incident occurred.

As pointed out correctly by the learned Deputy Solicitor General (DSG), the evidence of the victim child had been that the appellant carried her to the place of the sexual assault and made her to lie down, removed her panty, lifted the school uniform she was wearing and committed this sexual abuse act on her. This clearly establishes the fact that although it may be a rough surface, it was a surface laid with dead leaves. The evidence also shows that the assailant could not complete his intended sexual assault in full. He has bolted from the place after hearing the mother of the victim.

The victim child's evidence had been that the appellant managed to place his penis on her vagina only once, and ran away upon hearing her mother calling her. This establishes the fact that although the victim child has stated she struggled to escape from him after she was laid down on the ground, the actions of the appellant had taken place during a time period of may be few seconds.

The possibility of receiving any bruises or abrasions as a result of her being sexually assaulted on a rough surface as claimed on behalf of the appellant is highly improbable given the facts and the circumstances.

I am in no position to agree that this is a factor that should have been considered in favour of the appellant. I find that the learned High Court Judge at page 27 and 28 of the judgement (page 257 and 258 of the appeal brief) has well considered this aspect in coming to her findings in that regard.

The learned High Court Judge has well considered the evidence of the victim child and that of her mother who has come to the scene of the crime while it was happening. According to the evidence of the victim child, it was only because of the mother's arrival, the appellant ran away after releasing the grip he had on her. The mother's evidence had been that when she was calling for the child, she came running towards her from the direction of the cinnamon growth. When asked what happened, the child has revealed what happened to her. The mother has then seen the appellant running away. The evidence of both the witnesses clearly establishes that all these events had occurred in quick succession, which shows that the mother seeing the appellant running away from the scene of the crime is highly probable.

The learned High Court Judge has clearly considered the alleged discrepancies and omissions in relation to the evidence. The mother has stated in her evidence that her daughter told her that after removing her panty, the appellant spit on her vagina and committed the sexual abuse on her. The mother's evidence had been that when she examined her daughter's private part, she saw something whitish in colour in her daughter's vagina. However, the victim child had not stated anything in her evidence about spitting on her private part by the appellant. It needs to be noted that as considered very correctly by the learned High Court Judge, the victim child was around 9 years old when this incident occurred. She has given evidence more than 4 years after the incident.

Considering the harrowing experience as narrated by PW-01, her ability to narrate everything what happened after more than 4 years cannot be expected as of a photographic memory.

On the other hand, it can be safely assumed that PW-02, the mother of the victim, being a much elderly person who may have a better capacity to narrate what she was told by her daughter, was telling the truth in that regard in her evidence. That may be the very reason why she has observed some whitish matter when she examined her child.

Another matter which has drawn the attention of the learned High Court Judge and contended during the hearing of this appeal was the timeline given by the two witnesses namely the victim child and her mother as to when this incident took place.

The girl has given clear evidence to state that after she went to the school, she was taken to a funeral house of a relative of a staff member by the school authorities, and on their return, the children were allowed to go home. She has returned home along with another elderly student who lives near their house. When she returned home, her parents and other siblings were not at home. She has assumed that her younger sister may have gone to have a bath with their mother.

According to the evidence of the mother, it was her habit to return home before her child comes home for the day after school around 2.00 – 2.30 p.m. The mother says that, on this particular day, she received a call from her younger daughter's kindergarten teacher, informing her the necessity to attend the funeral of a relative of a staff member. Her evidence clearly provides that she has returned home earlier than usual with the intention of attending the said funeral. She has seen her daughter's shoes and the bag in front of their house, which clearly indicates that the daughter has come home earlier than usual, which has prompted her to call for her.

This provides a clear picture as to the timeline of the incident. I am of the view that the discrepancies in that regard in the evidence are discrepancies that do not go into the core of the matter. I find that when taking the evidence of the two witnesses cumulatively, no doubt arises as to the incident that occurred on that day.

At this stage, I find it appropriate to refer to the Indian case of **Bhoginbhai Hirjibhai Vs State of Gujarat (AIR 1983-SC 753 at pp 756-758)** very often cited in our Courts. It was held:

1) *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

2) *Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

3) *Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

4) *A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witnesses is giving truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.*

Another matter that needs consideration is whether the victim child and her parents concocted a story against the appellant because of the alleged land dispute and the animosity they had with the appellant's family.

It is clear from the evidence that the victim child and her family had to travel over the land belonging to the appellant's family in order to reach their land. PW-02 has been clear that there was no animosity between them until this incident occurred, and they were close relatives, and it was only after the incident the appellant's family members closed down the access to their land.

I find no reason to believe that any parent would use their young child to concoct an allegation of this nature given the social stigma attached to such an allegation, even if there was a dispute between the elders of the family.

**Ranjith Silva, J.** in the case of **D. Tikiri Banda Vs. The Attorney General Bar Association Law Report 2010 (BLR 92)** observed as follows:

> *"In the Indian as well as the Sri Lankan settings, it can be safely said that rarely will a girl or a woman make false allegations of sexual assault or will a mother instigate, induce or compel her small daughter to make such allegations for fear of the lasting consequences. One cannot expect her to be so silly, not to appreciate the stigma attached and that she and the rest of her family would be virtually ostracized for rest of her life. Under the circumstances of this case to suggest that the victim in this case made a false complaint against the appellant because the mother of the victim or any member of the family had stained relations with the appellant or any member of his family is totally unacceptable."*

For the reasons as stated above, I find no merit in the two grounds of appeal considered.

The 3rd ground of appeal is that the learned High Court Judge was misdirected when it was stated that the history given by the child to the doctor when she was examined has corroborated the evidence as to the incident.

It is trite law that the history given in a Medico-Legal Report can only be considered in relation to the consistency of the evidence of a witness.

It needs to be noted that in a Medico-Legal Report that a doctor or a JMO should submit to the Court, a separate space has been provided to mention the history given by a patient. Taking down such a history becomes necessary for a doctor to express an opinion in relation to his observations of a given situation. I am of the view that the history given by a patient to a doctor becomes relevant in a criminal trial only to establish that the relevant witness has been consistent with regard to the stand as to what occurred in a given situation.

I am of the view that although the learned High Court Judge has used a wrong word in the judgement to indicate that the history given to the doctor further corroborates the evidence of the victim child, I do not find any reason to accept that misdirection has caused any prejudice towards the appellant.

I am of the view that even if considered in its correct perspective, there would not be any difference as to the final determination of the learned High Court Judge as there was ample evidence to prove the charges against the appellant beyond reasonable doubt.

I find that the learned High Court Judge has well considered the defence taken up by the appellant and has rejected it with sound reasoning. I do not find any basis to conclude that there was any matter that could have been considered in favour of the appellant in relation to the evidence presented before the Court. The learned High Court Judge has considered all the evidence in its totality and has come to a correct finding that the prosecution has proved the case beyond reasonable doubt against the appellant.

Accordingly, the appeal is dismissed, as I find no reasons to interfere with the conviction and the sentence.

The conviction and the sentence affirmed.

However, having considered the fact that the appellant had been in incarceration from the date of conviction, it is ordered that his period of sentence shall deem to have commenced from the date of the sentence, namely 18-01-2021.

Judge of the Court of Appeal

**P Kumararatnam, J.**

I agree.

Judge of the Court of Appeal