

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979, read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:

CA/HCC/0205/2020

High Court Vavuniya Case

No. **HC-2758-2018**

Vs

Sellaiah Nithy

Accused

AND NOW BETWEEN

Sellaiah Nithy

Accused – Appellant

Vs

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

Respondent

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

Counsel : Gayal Kalatuwawa for the Accused-Appellant.
Azard Navavi ASG for the Respondent.

Argued on : 12.12.2025

Decided on : 31.03.2026

Pradeep Hettiarachchi, J

Judgment

1. The Accused-Appellant (hereinafter sometimes referred to as “the Accused”) was indicted before the High Court of Vavuniya for committing rape on Vijenthiran Thisanthini, a girl under the age of 16 years, an offence punishable under Section 364(2) of the Penal Code, as amended by Act No. 22 of 1995.
2. The trial was conducted before the Learned Judge of the High Court without a jury. At the conclusion of the trial, the Learned High Court Judge found the Accused guilty of the charge and accordingly convicted him. The Accused was sentenced to sixteen (16) years’ rigorous imprisonment and a fine of Rs. 10,000.00, with a default sentence of six (6) months’ imprisonment. Furthermore, the Learned Trial Judge ordered the Accused to pay a sum of Rs. 300,000.00 as compensation to the victim, with a default sentence of two (2) years’ imprisonment.
3. Being aggrieved by the said conviction and sentence, the Accused-Appellant has preferred the present appeal. The following are the grounds of appeal advanced by the Accused-Appellant:

- a. Evidence of the Prosecutrix is fraught with serious infirmities enumerated below which renders, the conviction of the Accused-Appellant unsafe.
 - b. Following closely on the heels of Ground 01, evaluation of the credibility and testimonial trustworthiness of the Prosecutrix on the part of the trial court is deficient and defective.
 - c. The Learned High Court Judge has totally failed to evaluate the evidence of the Accused in its correct judicial perspective.
 - d. The basis of the conviction on the part of the Court, being that the evidence of the victim is corroborated by medical evidence, is totally untenable.
 - e. The Learned High Court has failed to afford an opportunity to the Accused to present mitigating circumstances, prior to the imposition of sentence.
 - f. The Trial Court has misdirected itself in law on the principles relating to the burden of proof on the Accused-Appellant.
 - g. The Trial Court has failed to evaluate the evidence of the defence witnesses in its correct judicial perspective. Consequently, causing serious prejudice to the Accused-Appellant.
4. The prosecution has primarily relied upon the testimony of PW 01, the prosecutrix of this matter. According to her evidence, she was 14 years of age at the time of the alleged offence. She testified that the incident occurred on 20.08.2010, between 2:00 p.m. and 3:00 p.m., at her residence, a temporary tent occupied by her displaced family. The Accused-Appellant is well-known to the victim, as he is her paternal uncle and the husband of her maternal aunt.
 5. The prosecutrix testified that the alleged incident took place inside the aforementioned tent while she was alone. Describing the sequence of events, she stated that the Accused entered the tent, forcibly grabbed her by the hand, and initiated non-consensual intercourse. She further testified that the Accused forced her to the floor, removed her

clothing, and penetrated her. Following the incident, the prosecutrix did not disclose the matter to her parents. Her mother only became aware of the assault two months later, after realizing the prosecutrix had missed her menstrual period for two consecutive months.

6. The prosecutrix further testified that she visited a private medical practitioner with her mother. After undergoing a blood test, it was revealed that she was pregnant.
7. Another vital witness for the prosecution was Dr. D.L. Waidyaratne, the Judicial Medical Officer (JMO) who examined the prosecutrix. The JMO testified that the prosecutrix was initially admitted to the Vavuniya General Hospital before being transferred to the Anuradhapura Teaching Hospital on 29.12.2010, where she was admitted to Ward No. 23 under Bed Head Ticket No. 10124716. According to the JMO's evidence, the victim was three to four months pregnant at the time of the examination. Furthermore, the JMO observed a healed tear at the 6 o'clock position on the victim's hymen.
8. PW8 is a retired Sub-Inspector of Police. According to his evidence, the prosecutrix, accompanied by her mother, lodged a complaint against the Accused at the Police Station. He further testified that he was unaware as to whether the Accused had himself previously come to the Police Station and made a complaint.
9. The first two grounds of appeal are interrelated; accordingly, they will be considered together. During the course of cross-examination, no contradictions or omissions were marked in the testimony of the prosecutrix. Nevertheless, a substantial number of material infirmities have been identified in her evidence, which significantly undermine her credibility and reliability.
10. The prosecutrix initially stated that she could not recall the exact date on which the alleged incident had taken place. Upon being asked whether the incident took place on 20.08.2010, as recorded in the case record, she admitted.
11. During her Examination-in-Chief, the prosecutrix was questioned as to whether anyone had come to the house at the time when she was alone at home after returning from school. Initially, she admitted that no one had come to the house, but upon further

questioning, she revised her testimony and stated that it was the Accused who had come to the house. This inconsistency in the prosecutrix's testimony regarding the presence of the Accused at the relevant time constitutes a material contradiction, which affects the credibility of her evidence.

“Q: When you were alone at home, did anyone come to your house?”

A: No.

.....

Q: At a time when you were alone at home, this incident occurred; who came to your house on that occasion, that is, did you not say that you were raped? Who came and raped you?

A: It was he who came.” (vide page 72-73 of the Appeal Brief)

12. During her Examination-in-Chief, the prosecutrix was asked whether the alleged act of rape had been reported to her mother following the incident. Then, the Prosecutrix answered that her mother had been acquainted with the alleged incident after a period of two months. However, the prosecutrix did not provide a clear explanation as to how her mother came to be informed of the circumstances surrounding the alleged incident.

“Q: Did you tell your mother, after this incident happened?”

A: My mother got to know after two months.

Q: How did she get to know.

A: I did not get menstrual periods for two months, when we went to a private medical practitioner, my mother learnt of it.

Q: You said that you missed your menstrual periods for two months, whom did you tell?

A: We went to the hospital and had a test done.

Q: How did your mother get to know of it?

A: Since my menstrual periods were missed, when a test was done of my blood sample, it was revealed that I was pregnant.” (vide page 76 of the Appeal Brief).

13. Further, the Prosecutrix was questioned as to the manner in which the Accused used force against her, and further, in questioning, asked how the alleged act of rape had taken place. In both instances, the Prosecutrix remained silent, which cumulatively highlights the improbability and lack of clarity of the evidence adduced by the prosecutrix. She testified as follows:

“Q: You stated that the said incident took place due to the force used by the accused. Please tell how did the accused use force? Did the accused touch you?”

A: Witness is silent

Q: Did you tell mother, after this incident happened?

A: My mother got to know after two months.

Q: How did she get to know?

A: I did not get menstrual periods for two months; when we went to a private medical practitioner, my mother learnt of it.” (vide page 76 of the Appeal Brief)

14. Moreover, the explanation offered by the prosecutrix during her Examination-in-Chief as to why she did not inform her parents of the alleged incident is inherently improbable. Being a Grade 10 student at the relevant time, she would have possessed a basic understanding of the nature and seriousness of the alleged act. Consequently, her justification for not reporting the incident to her parents cannot be reasonably accepted, thereby undermining the credibility of her account. She testified as follows:

“Q: Why did you not tell your mother and father no sooner this incident took place?”

A: I did not tell, I was very young age, I was studying in year 10, these matters are not understood when one is very young, later, I went along with my mother to a private place and had a blood test done.” (vide page 81 of the Appeal Brief)

15. The prosecutrix mentioned that during the Examination-in-Chief, after learning about the alleged act of rape, none of her parents went to the Police Station to lodge a complaint against the Accused. According to the evidence of the prosecutrix, her parents did not initiate any legal action against the Accused; instead, they allegedly attempted to place

her in a hostel. This conduct, as admitted by the prosecutrix, is highly unusual and inconsistent with what would ordinarily be expected of a parent in such circumstances. The prosecutrix testified as follows:

“Q: After knowing that you were pregnant, what were the steps taken by your parents?”

A: They did not do anything; they said they will leave me at a hostel; but I remained at home.” (vide page 81 of the Appeal Brief)

16. The prosecutrix further testified that it was the Accused who first went to the Police Station regarding the above incident, which raises further questions regarding the genuineness of the prosecutrix’s version.

Q: Are you aware as to how the Police knew about this?

A: They knew because they informed.

Q: Who do you refer to as, ‘they’?

A: The Accused lodged a complaint. (vide page 82 of the Appeal Brief)

17. Further, the evidence of the prosecutrix revealed that when her child was born after a nine-month pregnancy, she was neither taken to a hospital nor was a DNA test conducted to ascertain the identity of the alleged perpetrator. *(vide page 82 of the Appel Brief)*

18. During the Cross-Examination, it was suggested to the prosecutrix that the Accused was not responsible for her pregnancy, for which the prosecutrix remained silent without denying that suggestion. She testified as follows:

“Q: Witness, I put it to you on behalf of the Accused that, the reason for your pregnancy is not the Accused?”

A: Witness is silent.” (vide page 86 of the Appeal Brief)

19. Further, it was suggested to the prosecutrix that some other individual had sexual intercourse with her. In response to this material suggestion, the prosecutrix remained silent without denying the above suggestion.

“Q: Witness, I put it to you on behalf of the Accused that, some other individual, who had sexual intercourse with you, is the cause of you becoming pregnant; do you concede to it?”

A: Witness is silent.” (vide page 88 of the Appeal Brief)

20. As stated earlier, the victim admitted that none of her family members lodged a complaint until the police started inquiries, which was upon receiving a complaint from the Appellant. There is no plausible explanation, either from the victim or from any of her family members, as to why a complaint was not made to the police even after they became aware of the alleged incident, until the police commenced investigations.
21. It is also noteworthy that, according to PW8, Punciappuge Saranapala (Retired Sub-Inspector of Police), the prosecutrix had stated in her complaint that the date of the offence was 20.09.2010.

“Q: When the said victim was in hospital, had she specified the date on which the said incident had taken place?”

A: She has mentioned in her complaint that it was on 20.09.2010.” (vide page 117 of the Appeal Brief)

22. However, during her examination-in-chief, the prosecutrix testified that the alleged offence occurred on 20.08.2010. This discrepancy regarding the date of the alleged act of rape constitutes a material inconsistency in the prosecutrix’s evidence, thereby undermining the consistency and reliability of her testimony.
23. The Learned Trial Judge has not paid adequate attention to the aforementioned infirmities discernible in the prosecution evidence, particularly in the testimony of the prosecutrix. Needless to state, in a trial of this nature, the burden rests on the prosecution to prove the charge against the Appellant beyond a reasonable doubt.
24. It is true that the evidence of a child witness cannot be expected to be entirely free from discrepancies, as such evidence must be evaluated in light of the circumstances of each case. Further, delay in making a complaint is not, in itself, a ground to disbelieve or doubt the testimony of the victim, as such delay may be attributable to various factors.

In certain instances, there may be justifiable and reasonable grounds for the delay, such as threats made by the perpetrator, ignorance of legal consequences, inability to comprehend the gravity of the offence due to tender age, or lack of education or illiteracy. In the present case, none of the aforementioned factors prevented the victim or any of her family members from making a complaint to the police at the earliest opportunity.

25. In the present case, the mother of the victim became aware of the victim's pregnancy on the day they consulted a private medical practitioner. Despite this, neither the victim nor her mother took steps to lodge a complaint with the police regarding the incident. At the relevant time, the victim was a student in Grade 10 and could reasonably be expected to understand the nature of the incident and its consequences. Likewise, her mother ought to have appreciated the seriousness of the ordeal faced by the victim.
26. Nevertheless, for reasons best known to them, they remained silent until the police visited their residence, which occurred only after the Accused had made a complaint to the police. Such lackadaisical conduct on the part of the victim and her family members casts serious doubt on the credibility of the prosecution's version.
27. Had the mother of the victim been informed of the identity of the person responsible for the pregnancy of the prosecutrix, she could have readily lodged a complaint with the police, without waiting until the police commenced inquiries, which occurred only after the Accused had made a complaint.
28. Furthermore, no evidence was led to establish that either the victim or any of her family members were subjected to threats by the Accused or by any other person, preventing them from reporting the incident to the police. In the circumstances, there is little, if any, justification for the delay in making the complaint to the police.
29. Furthermore, the evidence of Dr. Dananjaya Laksiri Waidyaratne, the Judicial Medical Officer who examined the prosecutrix, contradicts her testimony. According to the prosecutrix, the Accused had sexual intercourse with her only on the particular day in question. However, according to the history provided by the victim to the Judicial Medical Officer, there had been several instances of forced sexual intercourse.

30. As evidenced by the testimonies of the prosecution witnesses, the victim delivered a stillborn child. Upon a perusal of the case record, it is apparent that the police had obtained an order from the court to extract samples from the body of the child for the purpose of DNA profiling. However, for no apparent reason, no DNA test was carried out, which calls into question the fairness of the investigation.
31. Had the investigators proceeded with the DNA test, the identity of the perpetrator could have been conclusively established. These shortcomings on the part of the investigators indicate that the investigation was neither proper nor fair. In the absence of a fair investigation, a fair trial cannot reasonably be expected. The following authorities underscore the importance of conducting a fair investigation, which is essential to ensuring a fair trial:
32. In **Navinchandra N. Majithia vs. State of Meghalaya & Ors.** AIR 2000 SC 3275, the Indian Supreme Court considered a large number of its earlier judgments to the effect that investigating agencies are guardians of the liberty of innocent citizens. Therefore, a heavy responsibility devolves on them to see that innocent persons are not charged on an irresponsible and false implication.
33. The significance of a fair investigation is articulated in ***Babubhai vs State of Gujarat & Ors (2010 INSC 541)*** as follows:

The charge sheets filed by the investigating agency in both the cases are against the same set of accused. A charge sheet is the outcome of an investigation. If the investigation has not been conducted fairly, we are of the view that such vitiated investigation cannot give rise to a valid charge sheet. Such investigation would ultimately prove to be precursor of miscarriage of criminal justice. In such a case the court would simply try to decipher the truth only on the basis of guess or conjunctures as the whole truth would not come before it. It will be difficult for the court to determine how the incident took place wherein three persons died and so many persons including the complainant and accused got injured. Not only the fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. Investigating agency cannot be permitted

to conduct an investigation in tainted and biased manner. Where non-interference of the court would ultimately result in failure of justice, the court must interfere.

34. In ***Nirmal Singh Kahlon vs. State of Punjab & Others*** reported as (2009) 1 SCC 441, the Supreme Court of India held that "fairness of the investigation is meant not only for the accused but even for the victim." In paragraph 28 of the report, the Supreme Court expounded: -

"An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation."

35. Hence, the failure of the investigators to arrange a DNA test, despite there being an order by the Magistrate to do so, would adversely affect the strength of the prosecution's case and cast doubt on the prosecution's version.
36. I shall now proceed to consider the evidence of the defence witnesses, where the Second Defence witness, Sathiyaraj Vijayaletchami (Aunt of the Prosecutrix), testified that the allegation in question was motivated by an existing land dispute between the family of the prosecutrix and that of the Accused. In this regard, the witness expressly stated that the complaint had been fabricated as a consequence of the said dispute. Accordingly, the evidence of the said witness suggests that the complaint may not have been made *bona fide*, but rather as a result of ulterior motives arising from the said land dispute, thereby casting doubt on the credibility of the allegation.

"Q: Witness, was there a dispute between you and your elder sister, Thisanthini's mother?"

A: There is a land dispute; I think due to the land dispute, they said that an incident of this nature took place." (vide page 157 of the Appeal Brief)

37. The witness further testified that it was she who took the prosecutrix to a private hospital upon learning of her pregnancy. This account directly contradicts the evidence of the

prosecutrix herself, who categorically stated that it was her mother who accompanied her to the said private hospital. Significantly, this contradiction was not put to the said witness during the course of the Cross-Examination; this inconsistency gives rise to a material contradiction in the prosecution's case, thereby affecting the credibility and reliability of the testimony of the prosecutrix.

“Q: Witness, did you get to know that Thisanthini had become pregnant?”

A: Yes, it was I who took her to a private hospital in Mangkulam, where she was found to be 4 months pregnant, problem regarding my mother happened, after that, they blamed it in him.” (vide page 158 of the Appeal Brief)

38. The witness in her Examination-in-Chief asserted that the pregnancy of the prosecutrix was attributable to her stepfather.

Q: Who told you that Nithy, who has been accused, is the reason for it?

A: A number of individuals who were there said so; that my brother-in-law is the reason.

Q: Whom did you refer to as brother-in-law?

A: Thisanthini's father. (vide page 158 of the Appeal Brief)

39. The witness further testified that at the time the prosecutrix gave birth to a child, no one else was present in the house apart from herself and another female. However, this version stands in direct contradiction to the evidence of the prosecutrix, who stated that both her mother and maternal aunt were present at the time of the birth. This discrepancy constitutes a material inconsistency in a significant factual circumstance.

Q: Witness, was anyone else in that house, at the time Thisanthini's baby was born?

A: There was no one else in that house; only another female and I were there.

Q: Where were Thisanthini's mother and father?

A: They were not at home; father was at work and the mother had gone to collect the relief assistance. (vide page 160 of the Appeal Brief)

40. The third defence witness, Ramalingam Ranjini (Wife of the Accused), testified to the fact that the prosecutrix, after being assaulted and subjected to torture by her step-father, told that it was the Accused who was responsible for her pregnancy.
41. The fourth defence witness, Ramalingam Mutthukkili (Mother of the Prosecutrix), testified as to the manner in which she became acquainted with the fact that the prosecutrix was pregnant, stating that upon observing that the prosecutrix appeared unwell and dull, she inquired from her, whereupon the prosecutrix herself disclosed that she was pregnant. However, this account is inconsistent with the version of the prosecutrix, who testified that her pregnancy was discovered by her mother following a blood test. This inconsistency gives rise to a material contradiction with regard to the initial discovery of the pregnancy.

“Q: Witness, when did you get to know that the said victim had become pregnant?”

A: After my mother’s death in the year 2011, on the day we had the funeral rites performed for her, I asked my daughter why she looked unwell and dull, she told she was pregnant, it was then we knew of it.” (vide page 177 of the Appeal Brief)

42. Further, the said witness expressly admitted the fact that despite having knowledge of the alleged incident of rape, no complaint was lodged with the Police by them. Instead, it was the Accused who had first approached the Police in relation to the said incident. In the circumstances, the failure on the part of the witness and the family of the prosecutrix to make a prompt complaint, coupled with the fact that the Accused himself initiated contact with the Police, raises serious doubt as to the natural conduct expected in such a situation and thereby affects the credibility of the version of the prosecution.

“Q: As such, will it be correct to say that, it was Sellaiah Nithy who went to the Police first?”

A: Yes.

Q: Will it be correct to say that, you neither went to the Police Station nor did you have any complaint recorded?”

A: Yes.” (vide page 178 of the Appeal Brief)

43. The voluntariness of the prosecutrix's statement is also questionable. According to the testimony of the defence witness, Ramalingam Rajini, the prosecutrix disclosed the name of the Accused as the person responsible for her pregnancy only after she had been severely assaulted by her stepfather. She testified as follows:

Q: What happened thereafter?

A: After that, only when she was assaulted and tortured, after ½ of an hour, she merely said he was the reason." (vide page 166 of the Appeal Brief)

44. This evidence indicates that the identification of the Accused as the perpetrator was not made voluntarily, but rather under coercion. Consequently, the reliability of the prosecutrix's assertion as to the identity of the alleged offender is rendered doubtful. The prosecution never challenged this part of the evidence in cross-examination.

45. It is noteworthy that, although the credibility and the reliability of the prosecution's version were extensively challenged through the evidence of the defence witnesses, the Learned High Court Judge nevertheless chose to rely on the version presented by the prosecution in sustaining the conviction against the Accused-Appellant. Consequently, the Learned High Court Judge has failed to properly evaluate the evidence of defence witnesses, thereby causing serious prejudice to the Accused-Appellant.

46. I shall now address the failure of the Learned High Court Judge to consider and evaluate the defence of alibi advanced by the Accused-Appellant in his evidence.

47. At the conclusion of the prosecution's evidence, the Accused testified. In his testimony, he stated that he came to Omanthai from Kabaragala Matale on the 06th of September 2010 and stayed there for 12 days before he went to Anuradhapura to work in a rice mill. While he was there, he was taken ill and returned to Omanthai, where he stayed at his mother-in-law's house. His wife, child, and wife's younger sister were the other occupants of the house. He returned to Kabaragala Matale on 18.08.2010, but came back to Omanthai as his mother-in-law had met with an accident. That was around 16.09.2010.

48. The mother-in-law succumbed to her injuries after four days. On the 25th, the Accused returned to Matale. He subsequently returned to Omanthai on 22.12.2010 to attend his mother-in-law's obsequies, where he came to know that the victim was pregnant and that he was under suspicion. Consequently, he went to the police station on his own and reported the matter. The Accused was arrested on 24.12.2010.
49. The Accused consistently maintained that he was in Kabaragal, Matale, on 20.08.2010. Furthermore, he stated that upon his return to Omanthai, he remained there only until 18.09.2010.
50. It may be observed that the Accused's evidence regarding the dates on which he was in Kabaragala, Matale, was not disputed by the prosecution during cross-examination. No suggestion was put to the Accused that he was not in Kabaragala but was, in fact, in Omanthai on the date of the alleged offence.
51. The Indian judgment of *Sarvan Singh vs. State of Punjab (2002 AIR SC (iii) 3652)*, pages 3655 and 3656, was cited in the case of *Ratnayake Mudiyansele Premachandra vs. The Hon. Attorney General C.A Case No. 79/2011*, decided on 04.04.2017 as follows:
- "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted."*
52. In the case of *Himachal Pradesh vs. Thakur Dass (1983) 2 Cri. L. J. 1694 at 1701*, V.D. Misra CJ held that,
- "Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed."*
53. In light of the foregoing, the Accused's testimony regarding his presence in Kabaragala, Matale, during the relevant period was never challenged in Cross-Examination, nor was any contrary suggestion put to him by the prosecution. Further, as established in the cited authorities, unchallenged evidence must be accepted as undisputed. It is evident that the Learned High Court Judge failed to adequately consider and evaluate the defence of alibi

advanced by the Accused-Appellant, thereby causing serious prejudice to him and resulting in a deprivation of his right to a fair trial.

54. Moreover, it is noteworthy that the perusal of the proceedings of this case reveals that the Learned High Court Judge has failed to afford the Accused an opportunity to present any submission in mitigation of sentence before pronouncing the sentence. However, as the present appeal is decided in favour of acquitting the Accused-Appellant, this ground of appeal does not warrant further consideration.

55. Upon a careful consideration of the totality of the evidence and the material infirmities discussed above, it is my considered view that the conviction of the Accused-Appellant is unsafe and unsustainable in law. Accordingly, the conviction and sentence imposed on the Accused-Appellant are set aside, and the Accused-Appellant is acquitted of all charges.

56. The Appeal is accordingly allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal