IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC SRI LANKA

A matter of application under in terms of section 331 of Criminal Procedure Code read together with Article 138 of the Democratic Socialist Republic of Sri Lanka.

CA/HCC/028/2021

HC Ratnapura : HCR/116/15

Democratic Socialist Republic of Sri Lanka

Complainant

V.

Galgodage Sarath Wijesiri

Alapatha, Rathnapura

Accused

And Now between

Galgodage Sarath Wijesiri

Alapatha, Rathnapura

Accused-appellant

Vs.

Democratic Socialist Republic of Sri Lanka

Plaintiff-Respondent

Before : **B. Sasi Mahendran, J.**
Amal Ranaraja, J

Counsel: Eranda S. Wanasinghe for the Petitioner
Jayalakshi de Silva SSC for the State

Written Submissions On: 08.06.2022, 20.03.2023 (by the Respondent)

Argued On: 27.01.2025

Judgment On: 28.02.2025

JUDGMENT

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of Rathnapura on two charges namely, committing the offence of abduction of one minor Dodanduwa Waduge Dulani Shanika Senevirathne on 04.03.2010 punishable under Section 354 of the Penal Code and the offence of rape of the said minor punishable under Section 364(2) of the Penal Code as amended by Act No. 22 of 1995.

The Prosecution led the evidence through nine witnesses and marking document P1 and thereafter closed its case. The Accused in his defence made a dock statement. At the conclusion of the trial, the Learned High Court Judge by his judgment dated 02.02.2021 found the Accused guilty of both the counts and sentenced for the 1st count a fine of Rs. 5000/- (6 months default term) and for the 2nd count 10 years of rigorous imprisonment and a fine of Rs. 5000/- (6 months default term). In addition, By Order dated 23.02.2021, a payment of a compensation of Rs. 50,000/- to the complainant was ordered.

Being aggrieved by the afore-mentioned conviction, the sentence of fine and the award of compensation, the Accused has preferred this application to this Court.

The following are the grounds of appeal as set out in the written submission of the Accused.

1. The Learned Judge of the High Court has failed to adhere to the basic principles of law in delivering the judgment and/or exercise of its judicial discretion when imposing of a minimum mandatory sentence and imposing the sentence against the Accused.
2. The Learned High Court Judge has failed to give the benefit of doubt to the Accused when delivering the judgment and convicting the Accused for the 1st and 2nd charges.

The facts and circumstances are that:

According to the testimony of PW1, Dodanduwa Waduge Dulani Shanika Senevirathne (the prosecutrix), during her stay for the school vacation at her uncle's place (PW3), she went to a stream near her uncle's place to have a bath in the evening on the day of the incident. While she was having a bath, the Accused approached her and called her. She has asked why and without replying the Accused has dragged PW1 by her hand to a manioc cultivation nearby.

When she was dragged away, she started to shout asking for help saying 'බේරගන්න'.

On page 58 of the brief;

"ප්‍ර : තමා ඇදගෙන යන වෙලාවේ ඇදගෙන යාම සම්බන්ධයෙන් මොකක් හරි පියවරක් තමා ගත්තාද?

උ : මම කෑ ගැහුවා.

ප්‍ර : මොනවා කියාද?

උ : බේර ගන්න කියා.

ප්‍ර : බේරගන්න කියා තමා කෑ ගැහුවේ ඇයි?

උ : කරදරයක් කරන්න යන හින්දා."

As per PW1, she was only wearing a 'දිය රෙද්ද' at that time and the clothes came off when she was trying to escape from the Accused. Thereafter, she was pushed to the bare land and the Accused pulled down his shorts halfway and laid on top of PW1's body.

It should be noted that she never said anything about bringing clothes in the bucket to the place when the Accused dragged her to the place of the incident.

According to her, thereafter, the Accused inserted his male organ into her female organ. While these were happening, she shouted for help.

On page 65 of the brief;

"ප්‍ර : තමාට ඔය කරදරය වූ මයියොක්කා ඉඩම ඇතුලේ තමා උදව් ඉල්ලා කෑ ගැහුවාද ඒ අවස්ථාවේදී?

උ : ඔව්.

ප්‍ර : මොනවා කියලද තමා කෑ ගැහුවේ?

උ : මාමේ නැන්දේ කියලා කගහුවා."

She states that there were a few houses near the stream and that the Accused had asked her not to shout in a low voice. The PW1 states that she tried to escape from the Accused by fighting.

According to her, her uncle had come there and seen the uncle, the Accused ran away from the scene.

On page 66 of the brief;

ප්‍ර : ඔය කරදර කලාට පස්සේ සරත් මොනවද කලේ?

උ : මාමා වැඩ ඇරිලා ගෙදර ආවා. මම පරක්කු මොකද බලන්න මාමා ආවා. ඒක දැකලා සරත් දිව්වා.

PW3 has chased behind him to catch him but the Accused has escaped. The PW1 then wore her clothes, ran back to the house and told the incident to her aunt. She has told her aunt that the Accused has raped her. Thereafter, the uncle and some other people have come to the house.

The PW1 states that she had no affair with the Accused before the incident. Later, the PW1 with her mother and father went to the Rathnapura Police and made a complaint in the night on the same day. Thereafter, the Police took her to the hospital where she was examined by PW8, the Judicial Medical Officer and she divulged the incident to the doctor.

When she was cross-examined, she stated that she stopped going to school after the said incident.

As per PW3, Panawela Dewage Lalith Kumara Amaradasa (the uncle of the prosecutrix), who was supposed to be an eye-witness of the said incident states that on the day of question, he was at home. He states that the PW1 has come to stay at his house during her school vacation and on the day of the incident, the PW1 has left the house to go to the canal (ala) to have a bath. He saw that she had taken the bucket and the clothes. According to him, the stream is very close to his house. He also admits that there are houses near his place. Later, since the PW1 has not returned, he has gone in search of her towards the said canal. But there was no one near the canal. Then he came back and sent his wife to the stream while staying at the house and his wife returned saying there was no one.

On page 94 of the brief;

ප්‍ර : දුලානි නාන්න ගියාට පසු සිද්ධිය වුන දිනයේ නාලා නිවසට ආවාද?

උ : කතා කළා ආවේ නැහැ.

ප්‍ර : ඒ අවස්තාවේදී තමා දරුවා ඔයා බලන්න පියවරක් ගත්තද?

උ ; මම ගියා බලන්න '

ප්‍ර : කොහාටද ගියේ ?

උ : ඇල ගාවට ගියා

ප්‍ර : කොහේ ඉදලද ගියේ?

උ : ගෙදර සිට

ප්‍ර : ඇල ගාවට ගියාම මොනවද තිබුනේ?

උ : මොකුත් තිබුනේ නැහැ.

ප්‍ර : එතන කව්ද හිටියේ?

උ : දුව හිටියේ නැහැ.

ප්‍ර : එතන කව්ද හිටියේ.

උ : දුව හිටියේ නැහැ.

ප්‍ර : ඊටපසු?

උ : අපේ හාමිනේ යැව්වා බලා එන්න කියා.

ප්‍ර : කොහාටද යැව්වේ?

උ : දොළ ගාවට. නාපු වල ගාවට

ප්‍ර ; තමා කිව්වා ඇල ගාවට නාන්න ගියා කියා?

උ :ඔව්.

ප්‍ර : ඇලයි වලයි කියන්නේ මොකද්ද?

උ : ඇලේම තමයි තිබෙන්නේ.

ප්‍ර : ඇලේ තිබෙන්නේ මොකද්ද?

උ : වලක් තිබෙනවා නාන්න.

ප්‍ර : හාමිනේ තමා කිව්වා විදියට දුව දුලානි සොයා ගෙන ඇලට යන කොට තමා කොහෙද සිටියේ?

උ : මම ගෙදර සිටියේ.

ප්‍ර : හාමිනේ දුව සොයාගෙන ආවද?

උ : නැහැ කිව්වා බලල ඇවිත්. මම දෙවාල ගාවට ගියා. ඊටපසු දැක්කා ඉන්නවා.

Then PW3 has gone to the stream again and has seen both PW1 and the Accused at the manioc cultivation. According to him, PW1 had no cloths on her and the Accused had run away as soon as PW3 went there. As stated by him, the manioc cultivation was 100 feet away from the bathing place.

On page 97 of the brief;

ප්‍ර : ඇලේ නාන වල ගාව ලග සිට සරත් සහ දුලානි හිටිය මයියොක්කා කැල්ලට කොපමණද?

උ : ඇල ලග සිටම ඉඩම තිබෙනවා.එතන සිටම මයියොක්කා තිබෙනවා.

ප්‍ර : ඇල ගාව ඉදලා දුලානි බිම වැටී සිටි තැනට කොපමණ දුරක් තිබෙනවද?

උ : අඩි 100ක් පමණ තිබෙනවා.

ප්‍ර : තමා කොහොමද දැන ගත්තේ මයියොක්කා කැල්ලේ දුලානි ඉන්නවා කියා?

උ : මම ගිහින් සෝදිසි කලා.

ප්‍ර : තමා දුලානි නැවත අරගෙන කොහාටද ගියේ?

උ : ගෙදරට.

Thereafter, PW3 took PW1 home and later made a complaint to the Rathnapura Police on the same day.

When PW3 was cross-examined, he admitted the fact that PW1 came to his place only two weeks before. During the cross-examination, it was suggested by the Counsel for the defence that PW1 was brought to his place due to a love affair PW1 had with another man which was continuously denied by PW3.

Those portions were marked as contradictions by the defence.

Further, he stated that PW1 was naked when he saw them and later, PW1 wore her clothe which was in the bucket.

On page 104 of the brief;

ප්‍ර : එතකොට මහත්මය ඔය සිද්ධිය වුනා කියන සිද්ධිය දවසේ මයියොක්ක කොටුව අතරින් මේ විත්තිකරු සහ තමාගේ දුව හිටිය දැක්කා කිව්වද?

උ : ඔව්.

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ප්‍ර : දියරෙද්ද කොහොමද සොයාගත්තේ?

උ : බාල්දියේ තිබුනා.

On page 105 of the brief;

ප්‍ර : ඇඳුම් කොහෙද තිබුනේ?

උ : දිය රෙද්ද බාල්දියේ තිබුනේ.

ප්‍ර : බාල්දියෙන් අරන් ශානිකා රෙද්ද ඇදගත්තද?

උ : ඔව්.

ප්‍ර ; මහත්මය දැක්ක විට විත්තිකාරය දිව්වා කිව්වා?

උ : ඔව්.

ප්‍ර : විත්තිකරු තමාගේ කොහොමද ඥාති වෙන්නේ?

උ : තාත්තගේ නංගිගේ ළමයෙක් .

According to him, the Accused is related to him. Further, the Accused used to come to his house. It was suggested by the defence that they had made this allegation in order to get married PW1 to the Accused. Further, the defence proposed that PW3 did not see the incident but fabricated this story.

According to PW4, Pussawela Hewage Nimal Rathnasiri, there was only 15 meters between the stream and the manioc cultivation. Further, when he observed the place, "එම ස්ථානය බොරළු පොළවක් නිසා තණකොළ පොඩි වීමක් තිබුනේ නැහැ."

Further they observed that, a person cannot see from outside "ආදී පාර දිගේ ගමන් කරන පුද්ගලයෙකුට ඇතුලේ යම් කිසි සිද්ධියක් වුනා නම් පෙන්නේ නැහැ ස්වාමිනි. විමසිලිමත්ව බැලුවොත් පේනවා"

According to PW8, Mannalage Athula Rathnaweera, the Judicial Medical Officer examined the PW1 with the assistance of a lady doctor where PW1 stated that on the day in question when she was coming from the stream, the Accused came after her and took the towel from her and tied her mouth from the towel. Later, dragged her to the manioc cultivation and had sex with her.

On page 141 of the brief;

> ප්‍ර : ඒ අනුව ඇය මුහුණ පා සිටින සිද්ධිය සම්බන්ධයෙන් ඔබ සටහන් කරන ලද කෙටි ඉතිහාසය අධිකරණයට කියන්න පුලුවන්ද?
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> උ: ඇය මට පවසා සිටියේ 2010.03.04 දින සවස 5.00 ට විතර සිරිපාගම ලියදිවෙල මාගේ මාමගේ ගෙදර සිට දොලට ගිහින් නානවිට දුරින් මගේ මාමා කෙනෙකු වන සරත් විජේසිරි දොළ ලඟින් ගියා. ඊට පසු මා ගෙදර එන්න හදන විට මගේ පිටුපසින් ඇවිත් මයියොක්ක ගස් තිබුන හරියේදී මගේ කරේ තිබුන තුවායේන් කට වහල මාව ඇදගන ගිහින් බිම නිදි කරවා මගේ කකුල් දෙක ඇන් කරලා මා සමඟ එකතු වුනා කියල මුලින් ප්‍රකාශ කලේ.

This version of the story was not elicited in PW1's evidence. If she says that her mouth is tied, raising her voice for help is questionable. Further, the PW3 never mentioned a towel. When we consider the evidence given by PW1 to the doctor, the police and before the Courts in totality, her evidence was not consistent.

According to PW8's observations, PW1 has had several intercourses before this incident as he observed old tears were there in her vagina.

Along with the evidence of PW6, the prosecution's case was closed. Thereafter, defence was called and the Accused gave the dock statement. In his evidence, the Accused denied the said intercourse with her.

During the argument, the main defence taken by the Counsel for the Accused was that this was a fabricated story and the testimonies of PW1 and PW3 are completely untrustworthy as they contradict each other.

The question before us is whether the stories of PW1 and PW3 are credible and trustworthy enough to come to a conclusion about the Accused's guilt.

The question arises concerning the probability of the evidence of PW1 and PW3.

According to PW3, he has gone to the place of the incident twice and also he has sent his wife to find the prosecutrix. As per PW1, she has cried for help. According to the Police witness, the place where the incident took place as shown by the PW1 cannot be seen from the outside or from the footpath. The question arises then as to how PW3 exactly found the place.

Further, the Police have not seen any sign of struggling on the floor of the said place.

According to PW1, she has left the bucket at the stream but the PW3 has found the bucket at the scene.

On Page 78 of the brief;

> ප්‍ර : ඒ හෝදපු ඇඳුම් ටිකට මොකද වුනේ?
>
> උ : හෝදපු ඇඳුම් ගෙනිච්චේ නැහැ.
>
> ප්‍ර : හෝදපු ඇඳුම් දොලේ දමා ගියාද?
>
> උ : ඔව්.
>
> ප්‍ර : අයි දොලේ දමා ගියේ?
>
> උ : කරදරයක් වුනා. ඊට පස්සේ මම සරත්ට බයේ ගෙදර දිව්වා. නැන්දා ඇවිත් රෙදි ටික ගෙදර ගෙනිච්චා.

This creates doubt about whether any incident happened at the scene as divulged by the PW1 and PW3.

A similar incident was considered in the following judgments.

Ismail, J in Wijepala v. The Attorney-General, 2001 (1) 46 in page 58,

> "Learned President's Counsel for the appellant submitted, however, that the testimony of Senaratne was completely untrustworthy and of such poor quality that a conviction against the appellant cannot possibly be sustained in law. His testimonial trustworthiness on vital aspects relating to the incident was assailed in an attempt to cast a doubt even in regard to his presence at the time the deceased had received the fatal stab injury.
>
> ……
>
> Senaratne stated in his evidence that he took his injured son in a car to the hospital. The Gramasevaka Jayapala testified that he provided his car for the purpose and that he himself accompanied Senaratne and his injured son in the car to the hospital. Although the Gramasevaka testified that Senaratne was known to him, there is no evidence that Senaratne revealed the identity of the assailant to him that night or even thereafter. The failure of Senaratne to inform the Gramasevaka of the identity of the assailant therefore raises a serious doubt in regard to the presence of Senaratne at the scene of the incident and his claim to have identified the appellant as the assailant. Applying the test of spontaneity, his belatedness reduces the weight of his evidence and affects his credibility.
>
> ……
>
> The evidence of Senaratne who was the sole eyewitness to the incident is open to suspicion. The trial judge has failed to appreciate that his evidence in regard to the identity of the appellant has not been supported by any other item of evidence. There is therefore a strong doubt as to the guilt of the appellant and, as such, the benefit of the doubt should have been given to the appellant. The Court of Appeal has erred in affirming the conviction without adequately testing the evidence of Senaratne. For these reasons, I allow the appeal and set aside the judgment of the Court of Appeal. The conviction and sentence imposed on the appellant by the High Court are set aside and the appellant is acquitted."

Her Ladyship Rohini Marasinghe J. in Kalansuriya Alias Raja v. Attorney General, 2015 (1) SLR 415, held that;

> "These facts are not corroborated by the witness's mother, his sister or by Piyal. In fact, Ak's testimony was directly contradicted by the two of them.
>
> In her testimony, the witness Gnawathie (widow) stated that she did not see AK before the stabbing She had seen the witness AK only at the time the deceased was taken to hospital by AK. She also stated in her testimony that AK did not mention to her about the stabbing incident at any time during that period Strangely, the witness AK had remained silent with the name of the assailant and the entire incident of stabbing which he claimed to have witnessed that evening No reason had been advanced for this abnormal behavior of AK's silence In these circumstances only rational reasoning that could be given would be that AK had not seen the stabbing.
>
> It is natural that the first question any reasonable person would ask in these circumstances would be 'who did this?' It is strange that none of the witnesses mentioned to each other the name of the assailant, when according to AK the name of the assailant was known According to these witnesses there was no animosity between the deceased and the appellant to cause harm to the deceased The witness Piyal does not state that he met AK at the time the deceased was walking drunk and abusing Thilina. The witness Piyal also denies that AK had mentioned the name of the assailant In fact his testimony at pages 129 and 130 of the Brief, was that AK had not mentioned the name of the assailant or that he saw the stabbing when AK got into the vehicle to take the deceased to hospital.
>
> The trial court ought to have addressed its mind to all these supportive facts, before accepting those facts as proved and supportive evidence Therefore, the evidence of the sole witness AK, we find to be untrustworthy as it was discredited by the other witnesses The uncorroborated evidence is sufficient for a conviction if that evidence was not contradicted on material points by other witnesses who were material witnesses (Vide Sumanasena v Attorney General."

We further observe the contradictions in PW1's testimony that she has testified that the Accused came near the stream and asked her to come. Later, she told PW6 that while she was coming from the stream, the Accused came after her, took the towel and closed her mouth. Later, he dragged her to the manioc cultivation. Throughout the evidence, she

says that she has cried for help, but no one has heard her. She told the doctor that her mouth was tied with the towel.

We observe that PW1 was not consistent with her evidence. Therefore, we find the evidence of PW1 untrustworthy.

I am also mindful that as per the PW1, she cried for help when the Accused dragged her to the manioc cultivation. At the same time, as divulged to the Court, the PW3 and his wife came towards the stream in search of PW1. Further, PW1 has stated that she tried to escape by fighting against the Accused.

However, no one has heard the PW1's cry for help. A prudent man would think this is improbable in this situation where PW3 was looking for PW1 as she was late to come home. The PW3 or his wife in this instance would have been cautious and have heard even a mild sound if there was a cry for help or if PW1 was trying to escape as claimed by PW1. However, no such indication was made regarding this to the Court.

The question is whether she raised her voice at the time of the incident. It creates doubts about whether the incident claimed by the PW1 actually happened. The trial judge failed to consider this evidence.

We are mindful of how PW3 has known the place of the incident as it cannot be seen from the outside as stated by the Police witness unless he knows the exact place. Also, we are mindful that according to PW3, there was a bucket with clothes at the scene which contradicts the evidence of PW1.

When we consider both witnesses together, there is a strong doubt created due to the discrepancy in the testimonies of the witnesses. We hold that there is a doubt created by PW1 and PW3 whether the incident took place at the said time. This fact was not considered by the Learned High Court Judge.

Therefore, we are inclined to consider whether the testimonies of PW1 and PW3 are improbable. It directly affects the credibility of those witnesses. If so, the Learned High Court Judge has failed to consider the test of probability regarding the Prosecution's version. In the instant application, PW3 and his wife have not heard any sound or cry for help of PW1.

Probability in the context of legal matters, is defined as follows:

Sarkar and Monohara, in their book "*SARKAR ON EVIDENCE*" (Fifteenth Edition) on page 71, state,

> "...probability is meant the likelihood of anything being true, deduced from its conformity to our knowledge, observation, and experience. When a supposed fact is so repugnant to the laws of nature that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible."

According to E.R.S.R. Coomaraswamy, in "*The Law of Evidence Volume II Book 02*" on Page 1053,

> "The test of improbability has been described as essential inconsistency. There may be facts which may show it to be impossible or so highly improbable as to justify the inference that it never occurred."

Furthermore, his Lordship Justice Jayasooriya in Wickremasinghe v. Dedoleena and others 1996 (2) SLR held that;

> "A Judge, in applying the test of probabilities and improbability relies heavily on his knowledge of men and matters and the pattern of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."

This proposition was followed by his Lordship Justice Gooneratne in, Singharam Thiyagarajah v. AG CA 216/2010 Decided on 10.10.2014 wherein his Lordship held;

> "I wish to observe that the realities of life and the testimony of a witness cannot always be co-related. Nothing is perfect in life and the truth does not surface so easily as a man so bias could attempt to hide the truth or distort it. The test of probability needs to be applied and recognized to grapple with normal human behavior and problems and pave the way for the likelihood of occurrence."

His Lordship Justice K.M.G.H. Kulatunga in Weweldeniya Kushan Hasantha v. AG CA/HCC/0061/2023 decided on 17.12.2024, following the judgment of Wickremasinghe v. Dedoleena and others and held that;

> "The credibility of a witness may be impugned by employing the test of probability and improbability, consistency and inconsistency, interestedness and

disinterestedness and spontaneity and belatedness (Wickremasinghe v. Dedoleena and others – 1994 2 Sri LR 95). Improbability directly affects the credibility."

Considering the evidence of PW1, she has cried for help, but no one even her uncle and aunt who came in search of her during the same period of time did not hear her which is improbable according to this Court. Thus, the improbability of this incident directly affects the credibility of PW1. Further, when the evidence of PW1 and PW3 are carefully perused, significant contradictions can be identified as analysed above.

We note that if the PW3 and his wife had really gone near the stream, they would have seen the bucket and clothes if we were to believe the PW1's story.

The Learned High Court Jude ought to have addressed his mind to all these improbable facts.

Therefore, we hold that the prosecution has failed to prove the guilt of the Accused beyond reasonable doubt.

For the above-mentioned reasons, conviction and sentence imposed by the Learned High Court Judge on 02.02.2021 are set aside and the Accused is acquitted.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.
I AGREE

JUDGE OF THE COURT OF APPEAL