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

In the matter of an appeal against an order of the High Court under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

CA/HCC/311/2018

HC Colombo Case No: 7984/2015

The Attorney general

Attorney General's Department

Colombo 12.

Complainant

V.

Jayasena Ekanayaka alias Austin

No. 149/45

Ketawalamula Patumaga

Colombo 09.

Accused

And Now between

Jayasena Ekanayaka alias Austin

No. 149/45

Ketawalamula Patumaga

Colombo 09.

Accused-appellant

Vs.

The Attorney General

Attorney General's Department

Colombo 12.

Complainant -Respondent

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

Counsel: Darshana Kuruppu with Anjana Adhikramge for the Accused-Appellant
Hiranjan Peireis SDSG for the Respondent

Argued On: 10.03.2025

Judgment On: 03.04.2025

JUDGMENT

B. Sasi Mahendran, J.

The Accused- Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of Colombo on the count of grave sexual abuse committed on one minor namely, Gladwin Roshani punishable under Section 365B (2)(b) of the Penal Code as amended by Acts Nos. 22 of 1995, 28 of 1998 and 16 of 2006.

The Prosecution led the evidence of 13 witnesses and marked 5 productions. The Accused gave a dock statement and called one witness in defence. At the conclusion of the trial, the Learned High Court Judge by judgment dated 31.07.2018 convicted the Accused and sentenced him to 8 years of rigorous imprisonment and a fine of Rs. 20,000/- in default 4 months simple imprisonment. Further a compensation of Rs. 50,000 was imposed to be paid to the victim in default 10 months of simple imprisonment.

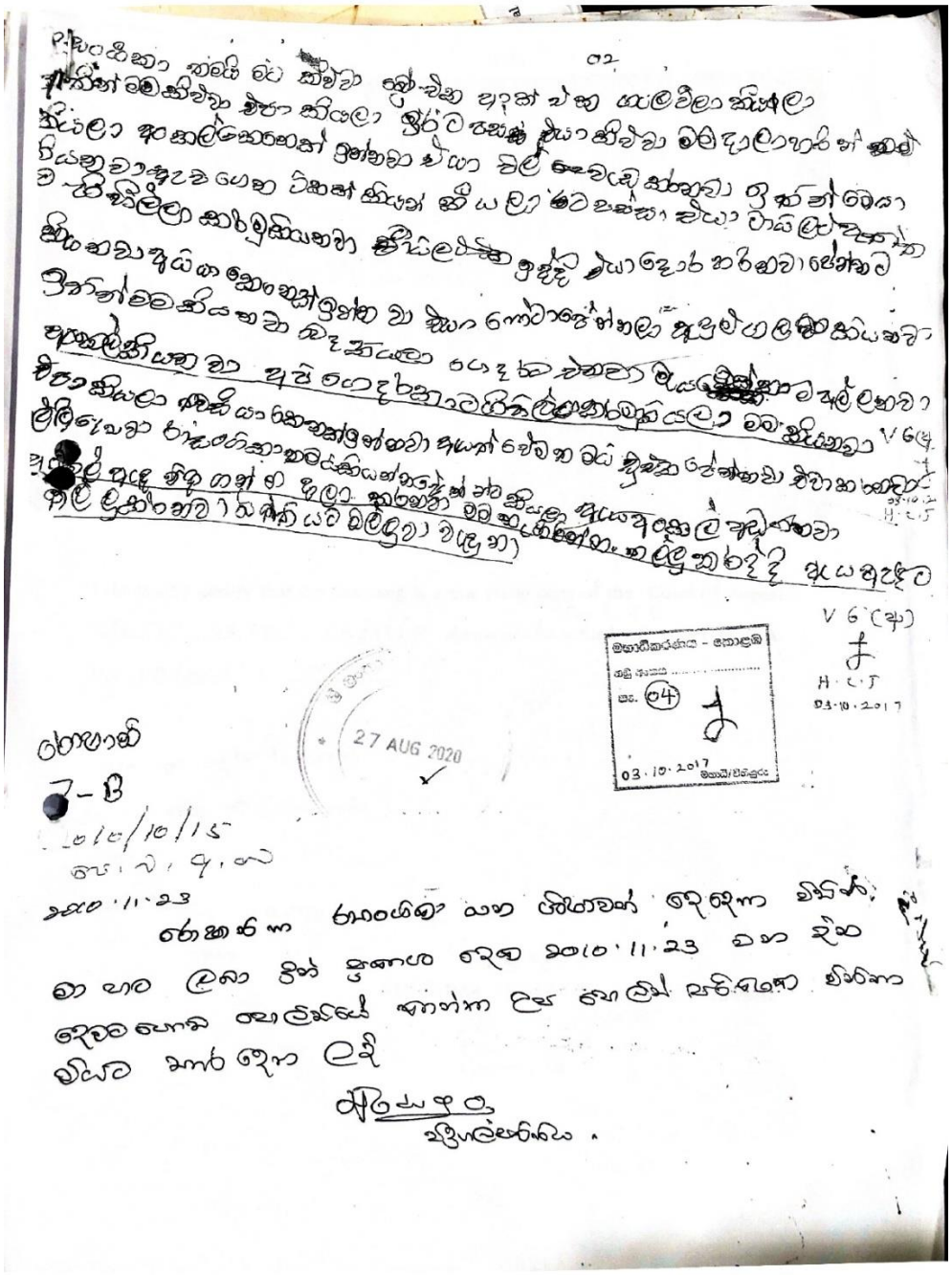
Being aggrieved by the said conviction and the sentence, the Accused filed an appeal in this Court.

The grounds of appeal as pleaded by the Accused as follows;

1. Failure to mention a specific date on the indictment.
2. Failure of the Learned High Court Judge to recognize inter se and per se contradictions of the prosecution's case.
3. PW1 is not a credible witness.
4. Learned High Court Judge has misdirected himself in stating that the evidence of the Prosecutrix is corroborated by her statement given to the JMO.

At the hearing, the Counsel for the Accused brought to notice that the Learned High Court Judge had failed to consider the document marked as P4 by the prosecution. According to the said document, the prosecutrix has failed to indicate any incident between herself and the accused but simply mentions earlier incidents.

For easy reference, letter marked P4 is reproduced below:



According to the prosecutrix, on the day in question, she visited the Accused's son's house to give some grapes to the little kid there. In the meantime, when they were watching TV, the Accused's daughter-in-law, the mother of the children went out. While they were watching TV, sitting on the bed with the child, the Accused came and sat near her. He took the child from the victim's lap. Later, he raised her dress and inserted his fingers into her vagina.

On page 78;

"ප්‍ර : එහෙම අත දාලා ඔස්ටින් මොකද කරේ?

උ : ලිංගය එයා ඇගිල්ලෙන් මේවා කරගෙන හිටියා.

ප්‍ර : පැන්ටිය ඇතුලට ඇත දාලා ඔස්ටින් මොකද්ද කලේ?

උ : මගේ ලිංගයට එයාගේ ඇගිල්ලක් දාලා අතගැහුවා.

ප්‍ර : දැන් එක කරන වෙලාවේ නංගියි මල්ලියි කොහේද හිටියේ?

උ : පිටිපස්සෙන් හිටියා."

This had happened for about 20 minutes and he had stopped it when the Accused's daughter-in-law came. After seeing her, he had taken the hand out.

According to her, the Accused had given her Rs.100 to her not to tell this incident to anyone. After going home, she did not tell anyone about the incident because of fear.

Thereafter, on the next day she went to school and told this incident to one of her friends, Rasangika. This friend of the victim namely Rasangika was listed as a witness in the indictment, but not called to give evidence. According to the victim, she was sure that she had divulged this incident to her friend the very next day. According to her, Rasangika had told the incident to the teachers and the teachers had asked her as to what happened. Thereafter, child protection authorities had directed her to a doctor and the victim had told the incident to the doctor.

In cross-examination, she affirmed that she had told the incident to her friend. Further, it was suggested that the mother of the child was inside the kitchen.

Later, she was summoned by the Court to identify the document marked P4 which was mentioned by PW9. According to PW1, she identified the document marked P4. She stated that she had referred to the incident in the said letter which was marked by the defence as V6 (a) and (b).

According to PW4, the Principal of the school, the prosecutrix gave a letter to them on 23.11.2010 through her friend which is marked as P4. According to her, one uncle and two boys had abused the prosecutrix.

The question that arises here is why she has failed to indicate the specific incident which happened two days prior to writing the said letter. In the said letter she mentioned the incidents which had happened some time ago and mentioned people who had been involved and simply mentioned about an uncle. According to evidence given by the witnesses, teachers had seen the prosecutrix and her friend inside a washroom. Thereafter, when they questioned her, she revealed what happened to her and they asked her to put it into writing.

The Learned High Court Judge has not considered the failure of the prosecutrix to indicate the incident in the letter which happened two days prior. A prudent man will disclose all the details that happened in the recent past with detail. According to her, this letter was given two days after the incident happened. The question before us is why she has failed to disclose the incident in the said letter where she has mentioned other people and not a single word about the Accused. There is no other evidence to corroborate her version of the story. It is true that there is no need for corroboration to prove this type of offences. But our Courts expect the evidence of the prosecution to be strong and consistent. In other words,

if the evidence of the victim could be relied on, and is trustworthy and firm, then there is no hindrance for the Court to act solely on the evidence of the victim. On the other hand, when the Court comes to the conclusion that if such evidence is not convincing, the Court should look for corroboration to believe her story.

The question arises whether the Court can believe the story of the Prosecutrix in view of the said letter.

I would like to quote a passage from Glanville Williams, *The Proof of Guilt*, Third Edition, page 158 in relation to uncorroborated evidence of a witness.

The Rule For Corroboration In Sexual Cases

> "On a charge of rape and similar offences it is the practice to instruct the jury that it is unsafe to convict on the uncorroborated evidence of the alleged victim, The rule applies to a charge of indecent assault, or any sexual offence, including an unnatural offence between males.?" There is a sound reason for it, because these Cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed. Of these various possibilities, the most subtle are those connected with mental complexes. Wigmore, who recites a number of instances where women have brought false sexual charges against men, explains one of the motivations as follows:
>
> "The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the

heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale."

In general, the requirement of corroboration in sexual cases follows the same rules as for accomplice evidence, though there are one or two differences of detail. Comparing the two corroboration rules, the Court of Criminal Appeal on one occasion suggested that the argument for requiring corroboration in the case of sexual complain- ants was weaker than in the case of accomplices. " This court cannot accept the contention that the evidence of a girl, the victim of the offence, is on the same plane with that of the evidence of an accomplice. The objection in such a case as this is not on the grounds of complicity, but because the case is one of an oath against an oath." Surely the reason for the objection is stronger than this. There is no general requirement that the jury should be warned that it is dangerous to convict where the evidence is in a position of oath against oath. The distinctive reason for the warning in sexual cases is that experience shows that the complainant's evidence may be warped by psychological processes which are not evident to the eye of common sense. The danger of convicting on the evidence of an accomplice who is trying to minimize his own part in the affair is obvious even to an unintelligent person; in ordinary cases, a word from the defendant's counsel is enough to bring it to the attention of the jury as a matter for serious consideration. In sexual cases, on the other hand, the danger is usually not obvious. Moreover, there is a tendency in

sexual cases for the proceedings to start with a prejudice against the defendant, if the complainant is a girl of tender years, whose appearance makes a strong appeal to the sympathy and protective feelings of the jury."

The above passage was referred by Sisira De Abrew, J. in CA/129/2002, decided on 28.06.2007, Appellate Court Judgments (Unreported) 2007 Volume I, and held that

"Court can, however act on uncorroborated testimony of a prosecutrix if her evidence appears to the Court to be completely, satisfactory and there are attending circumstances which make it safe for the Court to act upon her evidence without corroboration. If I may put it in another way that is if her evidence is capable of convincing the Court that she is speaking the truth, Court can act on such testimony without corroboration. In this regard, I am guided by the judgment of Justice Alles with whom Justice Weeramanthry and Justice Thamodaram agreed in Premasiri vs. Queen 77 NLR page 86. Justice Alles stated thus: In a charge of rape it is proper for a jury to convict on an uncorroborated evidence of the complainant only when such evidence is of such character as to convince the jury that she is speaking the truth."

In Dingiribandage Sumanadasa v. The Republic of Sri Lanka, CA No'147/2005, Decided on 18.07.2008, Sisira de Abrew, J. Appellate Court Judgment(Unreported) 2008 (Volume II) Cri.

"I hold that the medical evidence does not support the evidence of the prosecutrix. Thus the case depends only on the evidence of the prosecutrix. Can an accused person in a case of rape be convicted on uncorroborated

evidence of the victim? In this connection I would like to consider certain judicial decisions.

In ***Bhoginbhai Hirjibhai Vs. State of Gujarat (2983) AIR S.C. 753*** Indian Supreme Court *stated thus:-*

> "In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury".

However, in **Gurcharan Singh vs. State of Haryana AIR 1972 S.C. 2661** the Indian Supreme Court held thus;

> " As a rule of prudence, however, court normally looks jor some corroboration on her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated".

In **King vs. Athukorale 50 NLR 256 Justice Gratiaen** states thus:-

> "Where an accused is charged with rape, corroboration of the story of the prosecutrix must come from some independent quarter and not from the prosecutrix herself. A complaint made by the prosecutrix to the Police in which she implicated the accused cannot be regarded as corroboration of her evidence"."

In the instant case, we hold that the testimony of the prosecutrix is not consistent and reliable in view of the letter marked P4, where she had failed to disclose the incident that happened two days ago. According to P4, she has referred to a

different incident which was not corroborating with the incident that she testified in the High Court.

We further observe that the place where the incident allegedly happened creates a doubt on the probability, the reason being that the Accused knew that the mother of the children would come there anytime, as one of the children was an infant. According to the Prosecutrix, the Accused continued the act for about 20 minutes. The question is, would a mother leave an infant unattended for such a long time. This creates a doubt as to whether the incident actually happened as alleged by the prosecutrix.

Probability is an essential element in convincing the Judge as to the incident actually happened and the more the probability of the assumptions more will be chances for the judge to get convinced.

In the instant case, the entire case revolves around and rests on the testimony of the victim of the case namely Gladwin Roshani. It is true that the conviction can be based on the testimony of a single witness, provided that her evidence can be believed.

However, the trial Judge failed to consider the document marked P4 when he reached the conclusion about the prosecution witness.

An excprt of the judgment of the Learned High Court Judge is repsrduced below;

page 249

> "පැ.ස. 01 ව නැවත සාක්ෂියට කැඳවූ අවස්ථාවේදී පැ . 04 දරණ ලිපිය ඇය විසින් ලියා පාසලේ ගුරුවරියකට බාර දුන් බව ප්‍රකාශ කර තිබේ. විත්තිය විසින් වි. 06 (අ) සහ වි 06

(ආ) වශයෙන් එම ලිපියේ කොටස් දෙකක් ලකුණු කරමින් පෙන්වා දී ඇත්තේ එහි තිබෙන්නේ 'අන්කල් කියනවා අපි ගෙදරට ගිහිල්ල කරමු කියල. මම කියනවා එපා කියලා" යනුවෙන් බවයි. ඒ අනුව චිත්තිකරු විසින් කල ක්‍රියාවක් ගැන එහි සඳහන් නොවන බව පෙන්වා දීමට චිත්තිය උත්සහ කර තිබේ. නමුත් මෙහිදී අවධානය යොමු කල යුතු කරුණක් වන්නේ පැ. 04 දරණ ලිපිය රොශානි විසින් ලියා ඇත්තේ ගුරුවරිය ඔවුන්ගෙන් ප්‍රශ්න කල අවස්තාවේදී ගුරුවරියගේ කීම මතය. අනුව ඒ අවස්ථාවේදී ඇය එම ලිපිය ලියා දී තිබේ. ඒ නිසා රොශානිට සිදු වූ සම්පුර්ණ සිද්ධිය එම ලිපියේ සඳහන් දේ පමණක් බවට කිසිසේත්ම නිගමනය කිරීමට හැකියාවක් නැත.”

As a rule of prudence, it has been emphasized that courts should normally look for some corroboration of the victim's testimony in order to satisfy itself that the prosecutrix is telling the truth. Further, the advisability of corroboration should be present in the mind of the Judge and there should be an indication of such in the judgment. Nevertheless, convicting the Accused on the evidence of the prosecutrix without corroboration is admissible, provided such evidence is consistent and probable.

We are of the view that in the instant case, the evidence of the prosecutrix is not convincing enough to convict the Accused as she does not satisfy the tests of consistency and probability. On perusal and consideration of the Learned Trial Judge's judgment and the evidence placed before him, we are of the view that he has misdirected himself with regard to PW1. The evidence led by the Prosecution is not satisfactory and convincing to prove the case beyond reasonable doubt. It is my considered opinion that the testimony of the victim being uncorroborated by

other evidence fails the prosecution case for not proving the case beyond reasonable doubt.

Thus, we set aside the conviction and the sentence.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.
I AGREE

JUDGE OF THE COURT OF APPEAL