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

In the matter of an application for Revision in terms of Article 138 of the Constitution read with section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

Hon. Attorney General

Complainant

C.A. Revision Application No:
CA (PHC) APN 183/2017

H.C. Kandy Case No: **HC 255/2014**

Vs.

Deegala Rankoth Valavve Kanlar Ganga Kularathna alias Baby Seeya
No. 36/03, Molagoda,
Pokunamuduna,
Harankahawa.

Accused

AND NOW BETWEEN

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

Complainant-Petitioner

Vs.

Deegala Rankoth Valavve Kanlar Ganga Kularathna alias Baby Seeya
No. 36/03, Molagoda,
Pokunamuduna,
Harankahawa.

Accused-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J.
COUNSEL	:	Chethiya Goonasekera, DSG for the Complainant-Petitioner AAL Shayamal A. Collure with AAL A.P. Jayaweera and AAL P.S. Amarasinghe for the Accused-Respondent
ARGUED ON	:	08.10.2018
WRITTEN SUBMISSIONS	:	The Complainant-Petitioner – On 27.09.2018 The Accused-Respondents – On 04.01.2019
DECIDED ON	:	10.05.2019

K.K.WICKREMASINGHE, J.

The Complainant-Petitioner has filed this revision application seeking to revise the judgment of the Learned High Court Judge of Kandy dated 25.02.2016 in case No. HC 255/2014. As per the journal entry on 21.06.2018, argument was fixed for 08.10.2018. The Learned Counsel for the accused-respondent has submitted that oral submissions of both parties were made on 08.10.2018. On 14.12.2018, it was again mentioned that the argument was fixed for 09.01.2019. Therefore the journal entry on 14.12.2018 should be considered as incorrect.

Facts of the case:

The accused-respondent (hereinafter referred to as the 'respondent') was indicted in the High Court of Kandy on following two counts;

1. For kidnapping one Ayesha Sewwandi, who was under 16 years from her lawful guardian, an offence punishable under section 354 of the Penal Code.
2. For committing Grave Sexual Abuse against said Sewwandi, an offence punishable under section 365B (2) (b) of the Penal Code as amended by Act No. 29 of 1998 and Act No. 16 of 2006.

The prosecution led evidence of four witnesses including the prosecutrix and her father. The respondent and his brother Deegala Rankothwalawwe Palitha Saman Kularathna testified for the defence.

At the conclusion of the trial, the Learned High Court Judge acquitted the respondent of both counts since the prosecution had failed to prove the case beyond reasonable doubt.

Being aggrieved by the said acquittal, the complainant-petitioner (hereinafter referred to as the 'petitioner') preferred this revision application.

The Learned Counsel for the respondent contended that the instant revision application has been lodged nearly two years after the judgment dated 25.02.2016 and therefore the petitioner is guilty of laches /inordinate delay.

We observe that the petitioner has initially lodged an application for revision bearing No. CA (PHC) APN 84/2016 on 01.07.2016 against the judgment dated 25.02.2016. On 20.11.2017, the Learned Counsel for the respondent raised a preliminary objection on the maintainability of the said application. On 12.01.2018, the Learned Deputy Solicitor General informed this Court that the

instant application in revision had been filed and moved that the said case bearing No. CA (PHC) APN 84/2016 to be mentioned on another day. Both parties agreed to mention both cases on the same day. On 21.06.2018, the Learned DSG for the petitioner informed Court that he was withdrawing the revision application bearing No. CA (PHC) APN 84/2016.

Accordingly the Learned Counsel for the respondent contended that the petitioner failed to lawfully avail himself of the statutory remedy available to him by failing to prefer an appeal against the judgment of the High Court within the time and in the manner prescribed by Law. We observe that the petitioner has filed the instant application in revision on or about 26.12.2017, after a lapse of one year and 10 months. The Learned DSG has not explained reasons for such delay in filing the previous application or this application to the satisfaction of this Court.

In the case of **Seylan Bank V. Thangaveil (2004) 2 Sri L.R. 101**, it was held that,

> *"Unexplained and unreasonable delay in seeking relief by way of revision, which is a discretionary remedy, is a factor which will disentitle the petitioner to it. An application for judicial review should be made promptly unless there are good reasons for the delay. The failure on the part of the petitioner to explain the delay satisfactorily is by itself fatal to' the application."*

This position has been constantly followed by our Courts since a petitioner who seeks a discretionary remedy should act promptly. Therefore an inordinate and unexplained delay in seeking such relief would disentitle the petitioner to it. The petitioner in the instant case has not explained reasons for such delay to the satisfaction of Court. However we decide to go into merits of the instant application since it will be in the interest of justice.

In the case of **Rasheed Ali V. Mohamed Ali & others (1981) 2 Sri. L.R 29,** it was held that,

> *"The powers of revision conferred on the Court of Appeal are very wide and the Court has discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the court..."*

In the case of **M. Roshan Dilruk Fernando V. AG [CA (PHC) 03/2016],** it was held that,

> *"In the present case the Petitioner as of a right would have appealed against the sentence on a question of law. Without exercising that right of appeal, he opted to move Court in revision. It is settled law that the extraordinary jurisdiction of revision can be invoked only on establishing the exceptional circumstances. The requirement of exceptional circumstances has been held in a series of authorities..."*

In light of above, it is understood that revisionary powers shall be exercised upon demonstration of exceptional circumstances.

The petitioner submitted following grounds as exceptional circumstances;

1. The Learned High Court Judge has erroneously come to the conclusion that the testimony of PW 01 was not consistent
2. No contradictions or omissions were marked when the PW 01 was being cross examined by the defence
3. The respondent was unable to challenge the creditworthiness of the PW 01

4. The Learned High Court Judge failed to realize all falsehood is not deliberate
5. There is no discrepancy between the history given to the Judicial Medical officer and the testimony of PW 01 other than a minute discrepancy which does not penetrate the root of the prosecution case
6. The Learned High Court Judge failed to infer the date of the offence having scrutinized the evidence of PW 03 and the PW 07 who was the investigating officer of the crime
7. The Learned High Court Judge failed to observe that the version of the defence is not consistent
8. The Learned High Court Judge failed to contemplate the vital admitted omission of the testimony of the respondent which was depicted on proceedings of the cross examination part of the respondent

The incident relevant to the instant application is summarized as follows;

The prosecutrix (hereinafter sometimes referred to as the 'victim' and/or 'PW 01') was 09 years old at the time of the alleged incident. She was 15 years old at the time she testified. The prosecutrix stated that she did not remember the alleged incident, and later said that she remembered a little of it. (Page 3 of proceedings on 09.02.2016)

As per the evidence of the prosecutrix, she was sent to a close by shop by her mother, with an elder sister Shashi who was related to her and two younger brothers named Malith and Shan, to buy some soap. All of them went to pick 'veralu' fruits on their way back home from the shop. The respondent came there and dragged the prosecutrix by her hand to his house. She was wearing a t-shirt, a skirt and underwear. The prosecutrix was put on a bed and when she attempted to

escape the respondent removed her underwear, She sustained an injury on her head as the respondent pushed her towards the wall.

The prosecutrix further stated that the respondent applied coconut oil on her vagina and thereafter inserted his penis in her vagina. (Proceedings on 09.02.2016- page 12). However the Learned State Counsel who led the evidence in chief had asked a leading question from her as to whether coconut oil was applied on her thighs, to which she answered in affirmative.

The respondent had threatened her to death if she tried to reveal the said incident to anyone else. Thereafter she had gone home and informed the said incident. As per the evidence of PW 07 who was the investigating officer, the mother of the prosecutrix has made the complaint to the Police Station, Galagedara on 19.04.2010 at 10am. Thereafter a team of police officers had visited the scene of crime and the distance between the two houses concerned was 50m. Thereafter they had arrested the respondent.

It was contended by the petitioner that there is no discrepancy between the history given to the Judicial Medical officer and the testimony of PW 01 other than a minute discrepancy which does not penetrate the root of the prosecution case. However the petitioner has not explained what this minute discrepancy was. The Learned Counsel for the respondent contended that the said injury on the head of the prosecutrix does not corroborate her evidence at the trial.

Dr Nimal Jayawardena (PW 11-Judicial Medical Officer) had examined the victim at the District Hospital of Galagedara at 8pm on 19.04.2010. He testified that there was a contusion about 3cm, behind the ear of victim. The JMO had further explained that such an injury remains for a few days and gradually turns from red to black in colour. However the injury on the prosecutrix's head was bright red.

Therefore the JMO expressed his opinion as to the injury must have been sustained within 24 hours prior to the examination. We observe that the JMO had examined the prosecutrix after 27 and half hours from the alleged incident.

The Learned Counsel for the respondent further contended that there had been no abrasion or any remarkable injury in thighs or vagina of the prosecutrix and the JMO had not been able to find out whether coconut oil had been applied. However we are mindful that the Legislature of Sri Lanka by bringing in an amendment (Act No. 22 of 1995) has clarified that evidence of physical injuries to the body is not essential to prove that sexual intercourse took place without consent. Even the JMO testified that the victim had a wash by the time he examined her. Therefore the said contention of the Learned Counsel is untenable. However at the same time, it is quite unsafe to stand on a sole testimony of a victim if that appears to be fabricated.

In **Sunil and another V. The Attorney General (1986) 1 Sri L.R 230**, it was held that,

> *"It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration..."*

In the case of **Premasiri V. Attorney General (2006) 3 Sri L.R 106**, Justice E. Basnayake observed that,

> *"The rule is not that corroboration is essential before there can be a conviction in a case of rape, but the necessity of corroboration as a matter of prudence, except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge. (Schindra Nath Biswas vs. State(6). In* ***Sunil and another vs. the Attorney - General*** *Dheeraratne J.*

with H. A. G. De Silva and Ramanathan JJ agreeing held that ***"if the evidence of the complainant is so convincing, they could act on that evidence alone, even in the absence of her evidence being corroborated".*** (Emphasis added)

Justice Eric Basnayake further cited the case of **Rex V. Manning (1969) 53 Cr Appl. R 15**, in which it was held that,

"In cases of sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute."

In **Premasiri V. The Queen [77 N.L.R 86]** it was held that,

"In a charge of rape it is proper for a Jury to convict on the 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 light of above it is understood that a Judge should not act upon a sole testimony of a victim unless the Judge is completely satisfied that the victim is speaking the truth. We observe that the PW 01 has remained silent for most of the questions put forth by both Counsel for the prosecution and the defence. We find that the Learned Counsel, who appeared for the respondent in the High Court, has drawn the attention of Court to a contradiction in the statement made to the Police by the prosecutrix even though such contradiction was not marked. (Proceedings at 11.15am on 09.02.2016)

As per the evidence of the father of the prosecutrix (PW 03), he was not at home when the incident said to have been occurred and he got to know about it only

when he went to the Police Station with his sister and wife. As per the said witness he did not inquire from his daughter about it and she never told him as to what happened to her on that day. The PW 01 has testified that her father was at home when she went with other children. However the PW 03, father of the PW 01 testified that he was not at home when his daughter went to the shop. Relevant portion of evidence is reproduced as follows;

PW 03 – Cross-Examination

"ප්‍ර: මෙම සිද්ධිය වුනා කියන දවසේ තමන්ගේ පියා හිටියද ගෙදර?

උ: ඔව්.

ප්‍ර: තමන් කඩේට යනකොටද හිටියේ කඩේ ගිහින් එනකොටද හිටියේ?

උ කඩේ යද්දි හිටියා ගෙදර" (Proceedings at 11am on 09.02.2016)

PW 03 – Cross-examination

ප්‍ර: කඩයට ගිහිල්ලා එද්දි තමුන් ගෙදර සිටියාද?

උ ඔව්

ප්‍ර දුව කඩයට යනකොට තමුන් ගෙදර සිටියාද?

උ නැහැ.

ප්‍ර දුව එද්දි තමුන් ගෙදර සිටියාද?

උ මම ගෙදරට ගොඩවෙනකොටම දුවයි පුතයි කොයි කියලා අහනකොට කඩයට ගියා කිව්වා" (Proceedings at 11am on 10.02.2016)

Further PW 03 testified that he was not present when the respondent was arrested or he did not see whether Police officers visited the scene of crime (Page 36 of the

brief). However the PW 07, the investigating officer, testified that the father of the prosecutrix was present when they investigated the scene of crime and he was present when the respondent was arrested as well (Proceedings on 10.02.2010 – page 03 & page 09). Even though these contradictions do not affect the root of the prosecution case, it affects the creditworthiness of such witness.

The Learned DSG for the petitioner contended that the Learned High Court Judge erred in requiring the prosecution to lead the evidence of the other children who were present at the time when the respondent dragged the victim by her hand. It is well settled law that the prosecution need not call a specific number of witnesses to prove a case against an accused.

In **Sumanasena V. Attorney General (1999) 3 Sri L.R 137**, it was held that,

> *"Evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law..."*

It is understood that evidence given by one witness is sufficient if the Judge can be satisfied about the quality of such evidence. The Learned High Court has held as follows;

> "...ඇය සඳහන් කර සිටියේ ඇයව මෙම විත්තිකරු ඇදගෙන යනවිට ඇය සමඟ තවත් ළමුන් සිටි බවත්, නමුත් එම ළමුන්ගේ සාක්ෂි හෝ එම ළමුන් විසින් වෙනත් වැඩිහිටියෙකුට මෙම සිද්ධිය සම්බන්ධයෙන් ප්‍රකාශ කර එම වැඩිහිටියෙකු හෝ මෙම සිද්ධිය සම්බන්ධයෙන් ප්‍රකාශ කරන සාක්ෂියක් මෙම අධිකරණය ඉදිරියේ පැමිණිල්ලෙන් ඉදිරිපත් කර නොමැත. ඒ අනුව ඇත්ත වශයෙන්ම විත්තියෙන් යෝජනා කරන ආකාරයේ ඉඩම් ආරවුලක් නිසා මේ ආකාරයෙන් මෙම තැනැත්තිය වැඩිහිටියන්ගේ ඉගැන්නුම්බහ නිසා මෙවැනි ආකාරයේ සිද්ධියක්

සම්බන්ධයෙන් සාක්ෂි දෙනවාද යන්න පිළිබඳව මෙම අධිකරණයට සාධාරණ සැකයක් මතු වේ..." (Page 14 & 15 of the Judgment)

Accordingly we observe that the Learned High Court Judge was not stressing on the number of witness but about the weight of the evidence.

The version of the defence was that the allegation had been made against him because the victim's grandmother was angry with the family of the respondent. The PW 03 admitted that his mother had a land dispute with the respondent's brother. The respondent constantly denied the allegation leveled against him and testified that this was fabricated against him.

In the case of **Yodhasinghegedara Chandrasoma V. Attorney General (CA 87/2008 - Decided On 15.07.2015),** it was held that,

"Learned Counsel submitted that the evidence of Dr. Gajanayake who examined the victim and the evidence of Sumanawathi, mother of the victim cannot be considered as corroboration and in the absence of any other evidence to corroborate the victim, it is unsafe to act only on the uncorroborated testimony of the victim.

In the case of ***Gurcharen Sing Vs. State of Haryana AIR (1972) SC 2661*** *Indian Supreme Court held thus; as a rule of prudence however, court normally looks for 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 contrary the Indian Supreme Court in ***Bhoginbhai Harjibhoie Vs. State of Gujarat (1983) AIR SC 753*** *held "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 the injury."

When there is strong uncontradicted evidence and in the absence of any strong reason for falsely implicating the accused, in such a situation our courts preferred to follow the later... " (Emphasis added)

In the case of **Attorney General V. Sandanam Pitchi Mary Theresa [S.C. Appeal No: 79/2008 – Decided on 06.05.2010]**, it was held that,

"Witnesses should not be disbelieved on account of trifling discrepancies and omissions (Vide, Dashiraj v. the State AIR (1964) Tri. 54). When contradictions are marked, the judge should direct his attention to whether they are material or not and the witness should be given the opportunity of explaining that matter (Vide, State of UP v. Anthony AIR 1985 SC 48; A.G. v. Visuvalingam 47 NLR 286). It is dangerous to presume or assume that because two witnesses contradict each other, one of them must be a false witness and reject the testimony in its entirety. The judge has a duty to probe into whether the discrepancy occurred due to a lack of observation or defective memory or a dishonest motive (Vide, Colin Thom'e J in Bandaranaike v. Jagathsena 1984 2 Sri LLR 397).

In State of UP v. Anthony the Indian Supreme Court stated that 'while appreciating the evidence of a witness, the approach must be whether the evidence...read as a whole appears to have a ring of truth'. The Court went on to elaborate further that 'Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the

root of the matter would not ordinarily permit rejection of the evidence as a whole'... "

We are mindful of the fact that it is the Learned Trial Judge who has the benefit of assessing the demeanour and deportment of the witnesses before her. We observe that the evidence of the prosecution witnesses have few contradictions; both per se and inter se. Therefore we are of the view that the Learned High Court Judge came to the correct conclusion that the prosecution had not proved its case beyond reasonable doubt. Further we consider the undue delay on the part of the petitioner in filing this revision application as well.

Considering above, we are of the view that the petitioner has failed to demonstrate exceptional circumstances to the satisfaction of this Court to invoke the revisionary powers. We see no irregularity or failure of justice in the judgment of the Learned High Court Judge of Kandy dated 25.02.2016 in case No. HC 255/2014 and therefore we affirm the same.

Accordingly the revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree,

JUDGE OF THE COURT OF APPEAL