

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

Konara Mudiyanseelage Kusumsiri

Accused Appellant

Vs.

CA Appeal No: 147/2007
HC Kandy: 26/2003

The Attorney General

Respondent

Before : Sisira de Abrew J &
Sunil Rajapakshe J
Counsel : DP Kumarasinghe PC with Mahendra Kumarasinghe
for the accused appellant.
Dilan Ratnayake SSC for the Respondent.
Argued on : 1.11.2012 and 2.11.2012
Decided on : 6.12.2012

Sisira de Abrew J.

The accused appellant in this case was charged under section 365 B(2)(b) of the Penal Code for committing the offences of grave sexual abuse on one Nilanthi Kumari and Anoja Pathirana and was on each count sentenced to a term of 14 years rigorous imprisonment (RI), to pay a fine of Rs.2000/- carrying a default sentence of one year imprisonment and to pay a sum of Rs.25,000/- as compensation to the victim carrying a default sentence of 3 years imprisonment.

Learned trial judge directed that both terms of imprisonment should run consecutively. Thus total sentence, apart from default sentences, imposed on him is 28 years. Being aggrieved by the said conviction and the sentence, the accused appellant has appealed to this Court. Facts of this case may be briefly summarized as follows:

Nilanthi Kumari and Anoja Pathirana who were returning home around 4.30 p.m. after attending grade five scholarship classes were dragged by the accused appellant to a jungle area which was about 95 feet from the road. Thereafter the accused appellant placed a sarong on the ground and told them to lie on the ground. The accused appellant after removing the undergarment of Anoja Pathirana kept his male organ on her private part and after finishing with her he did the same thing to Nilanthi Kumari. The accused appellant whilst doing the said sexual act on Nilanthi Kumari held the hand of Anoja Pathirana. After doing the said sexual acts on both girls he threatened the girls not to tell this story to their parents.

According to Anoja Pathirana when they were being dragged, the accused appellant with one hand closed their mouths and held their hands with the other hand. Learned President's Counsel (PC) for the accused appellant contended that it was not practically possible to do the said acts in the manner described by them. Anoja Pathirana, in her evidence, demonstrated the manner in which the accused appellant closed their mouths and dragged. When considering this contention one must not forget that the accused appellant, at this time, was not acting as a father or an uncle and that there was no love between him and the girls. Further these girls, at this time, were of nine/ ten years of age. When I consider all these matters I am unable to agree with the said contention of learned PC.

According to the evidence of the two girls when the accused appellant was doing the sexual act on one girl he was holding the other girl. Learned PC referring to this evidence again contended that it was not practically possible to do these acts in the manner described. But one must not forget the fact that these girls, at this time, were small girls in grade five and that the accused appellant was a grown up married man. When I consider all these matters, I am unable to agree with the above contention of learned PC.

According to the evidence of Nilanthi Kumari after the 1st sexual act by the accused appellant, he ,again on the following day, committed the same sexual act on her details of which were not given by her. Learned PC contended that this evidence is not admissible as it amounts to evidence of bad character of the accused appellant. When considering this contention it is necessary to consider Section 8(2) of the Evidence Ordinance which reads as follows:

“The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.”

When I consider this section I hold that the evidence that the accused appellant committed the 2nd sexual act is admissible under section 8(2) of the Evidence Ordinance. I therefore reject the contention of learned PC.

Learned PC next contended that the judgment had not been signed by the learned trial Judge and that therefore he had violated section 283 of the Criminal Procedure Code. He drew our attention to page 280 of the brief and contended that

there was no signature at the end of the judgment. When considering this contention I must consider whether the learned trial judge, in open court, read out the judgment which had been previously typed or whether she dictated the judgment in open court to be taken down by the stenographer and placed her signature at the end of the day's proceedings. If she dictated the judgment in open court to be taken down by the stenographer and signed the day's proceedings after imposing the punishment, then it cannot be contended that the trial judge had not signed the judgment. If the learned trial judge has followed the said procedure then it can safely be concluded that she has signed the judgment. I now advert to this contention. Learned PC in order to support his contention drew our attention to a certified copy of the judgment of the learned trial judge which is at page 11 of the brief. The learned trial judge's signature does not appear in this copy. But I must mention here that it is possible for the Registrar of the High to take a copy of the judgment from the computer and certify it. In such an event signature of the judge does not appear in the copy of the judgment. Therefore the fact that the judge's signature does not appear in the certified copy does not support his contention. At the end of the judgment at page 220 of the brief the learned trial judge has made the following observation. "At this stage an opportunity is given to make submission to mitigate the sentence." If the learned trial judge on the date of the delivery of the judgment, in open court, read out the judgment which had been previously typed then the above sentence cannot be found on the last page of the judgment. The fact that above sentence is found on the last page of the judgment indicates that the learned trial judge had dictated the judgment in open court to be taken down by the stenographer. It has to be stated here that she has placed her signature at the end of the day's proceedings. In view of the above matters it cannot be contended that the learned trial judge had not signed the judgment.

When I consider all these matters I hold that the learned trial judge has signed the judgment. I therefore reject the contention of the learned PC.

When I consider the evidence led at the trial, I hold that there is no reason to interfere with the judgment of the learned trial judge and therefore affirm the conviction. The learned trial judge directed that both terms of imprisonment should run consecutively. Thus apart from the default sentences he has to undergo a total term of 28 years. When I consider the offences, I hold that this term of imprisonment is excessive. I therefore set aside the sentence imposed by the learned trial judge and impose the following sentence. On the first count, I sentence the accused appellant to a term of ten (10) years RI, to pay a fine of 2000/-carrying a default sentence of 3months imprisonment and to pay a sum of Rs.100,000/- as compensation to the victim carrying a default sentence of 2 years imprisonment. I impose the same sentence on the 2nd count. I direct that both terms of ten years RI should run concurrently. Thus apart from the default sentences the total term of imprisonment he has to undergo is ten years RI. Subject to the above variation of the sentence the appeal of the appellant is dismissed. The learned High Court Judge is directed to issue a fresh committal. The sentence should run from the date of this judgment.

Conviction affirmed. Sentence altered.

Judge of the Court of Appeal

Sunil Rajapakshe J
I agree.

Judge of the court of Appeal