

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

Kihaduwege Ekmon alias Harak
Balana Mama

Accused-Appellant

CA . Appeal No. 190/2012

HC-Kalutara-259/2011

-Vs-

The Attorney-General

Respondent

Before : **Sisira J. de Abrew, J. &**
P.W. D.C. Jayathilaka, J.

Counsel : N.A. Chandana Sri Nissanka for Accused
Appellant
Vijith Malalgoda, DSG for AG

Argued &

Decided on : 10.10.2013

Sisira J.de Abrew, J.

Heard both counsel in support of their respective cases.

The accused appellant in this case was convicted for kidnapping a girl under 16 years of age (count No. 01), for the offence of grave sexual abuse in respect of the said girl which is an offence punishable under Section 365 B II (b) of the Penal Code and for causing simple hurt to the said girl.(Nisansala Sandamali). He was on the 1st count, sentenced to a term of 7 years of Rigorous Imprisonment and to pay a fine of Rs. 20,000/- carrying a default sentence of 6 months of simple imprisonment. On the 2nd count he was sentenced to a term of 20 years of Rigorous Imprisonment and to pay a fine of Rs. 20,000/- carrying a default sentence of 6 months simple imprisonment and to pay a sum of Rs. 600,000/- as compensation to the victim Sandamali carrying a default sentence of 2 years simple imprisonment. On the 3rd count he was sentenced to a term of 1 year Rigorous Imprisonment. Learned trial judge directed that all three sentences should run consecutively. Being aggrieved by the said conviction and the sentence the accused appellant has appealed to this court.

The facts of this case may be briefly summarized as follows;

Nisansala Sandamali who was the victim in this case, on the day of the incident, was returning home from her school. The accused appellant who was a cattle keeper dragged Nisansala Sandamali to a nearby jungle and after removing her underwear he inserted his middle finger to her vagina. Thereafter he kicked the girl. She sustained an injury as a result of the said act of the accused appellant. Learned counsel submitted the following grounds of appeal.

1. Evidence of the prosecutrix cannot be believed as she has made a belated statement to the police.
2. Identification of the accused appellant has not been proved beyond reasonable doubt.
3. Sentence imposed on the accused is excessive.

I now advert to the ground No. 1. According to Nisansala Sandamali, soon after the incident, she went and complained the incident to her mother. However it appears that the statement to the police had been made on the 08.12.2005 and the incident had taken place on 06.12.2005. Although the learned counsel for the accused appellant raises the ground of delay, it appears from the evidence that the learned defence counsel at the trial has not suggested to the

witnesses that there was a delay in making a statement to the Police. Therefore the witnesses did not have an opportunity to explain about the delay. However it appears soon after the incident victim Nisansala Sandamali was taken to the house of Wijayananda who was the owner of the herd of cattle. The girl has pointed out the accused appellant as the person who committed the sexual offence on her. When we consider all these matters, we are of the opinion that the evidence of the witnesses cannot be rejected on the ground of delay itself.

I now advert to the 2nd ground. According to the evidence led at the trial, in the evening of the day of the incident itself victim Sandamali had been taken to the house of the Wijayananda. Sandamali had pointed out the accused appellant as the person who committed the act. Wijayananda says that the accused appellant was the only cattle keeper in the area. Further Wijayananda says that around 12.30 and 1.00 p.m on the day of the incident he took food to the accused appellant who was working under him. According to the victim Sandamali the incident has taken place little before 12.30 p.m on the day of the incident. Wijayananda between 12.30 and 1.00 p.m had given food to the accused appellant. When Wijayananda questioned the accused appellant

about the alleged act done by him, he kept quiet without answering the question raised by him (Wijayananda). Sandamali at one stage admitted that she had not seen the accused appellant prior to the incident but later she admitted that she had seen the accused appellant once before. When we consider all these matters, we are of the opinion that victim Sandamali had clearly identified the accused appellant as the person who committed the sexual act. We therefore hold that the identity of the accused appellant has been proved beyond reasonable doubt by the prosecution.

I now advert to the 3rd ground of appeal. Learned counsel submits that the sentence imposed is excessive. According to the doctor he has observed redness and swelling in the vagina of the girl. But the hymen was intact. The age of the girl was at the time of the incident only 6 years. According to the sentence imposed by the learned trial judge, the total term of imprisonment imposed on him is 28 years. When we consider all the above matters, we feel that the sentence imposed by the learned trial judge is excessive. We also observe that the accused appellant is having four previous convictions with regard to cattle theft. These offences had been committed according to the

previous convictions record during the period commencing from 1976 to 1987.

Considering all these matters we decide to intervene with the sentence imposed by the learned trial judge. We set aside the sentence of 7 years Rigorous Imprisonment and fine of Rs. 20,000/- imposed on count No. 01 and sentence him on the 1st count to a terms of 2 years Rigorous Imprisonment and to pay a fine of Rs. 10,000/- carrying a default sentence of 3 months simple imprisonment. We set aside the sentence of 20 years Rigorous Imprisonment and fine of Rs. 20,000/- and compensation of Rs. 600,000/- imposed on the 2nd count and impose the following sentence on count No. 2. We sentence the accused appellant on count No. 2 to a term of 10 years Rigorous Imprisonment, to pay a fine of Rs. 10,000/- carrying a default sentence of 3 months simple imprisonment and to a sum of Rs. 100,000/- to the victim carrying a default sentence of 2 years simple Imprisonment.

We affirm the sentence imposed by the learned trial judge on count No. 3. We direct that the sentences imposed on Count Nos.1, 2 and 3 should run concurrently. We direct

the Prison Authorities to implement the sentence imposed by this court from the date of this judgement. (10.10.2013)

We direct the learned High Court Judge of Kalutara to issue a fresh committal indicating the sentence imposed by this court. The default sentences imposed by this court should be implemented in addition to the term of imprisonment imposed by this court.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilaka, J.

I agree.

JUDGE OF THE COURT OF APPEAL

LA/-