

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

Mataralage Nishantha Sampath

Accused-Appellant

-Vs-

CA. Appeal No. 82/2011

H.C.(Kegalla)1872/2003

The Attorney-General.

Respondent.

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

Counsel : Niranjan Jayasinghe for the Accused-
Appellant.
Kapila Waidyaratne DSG for the AG

Argued &

Decided on : **31.10.2013**

Sisira J.De Abrew, J

Heard both counsel in support of their respective cases. The accused – appellant in this case was convicted for the offence of grave sexual abuse committed on a girl named Mataralage Gayangani and was sentenced to a term of seven years rigorous imprisonment and to pay a sum of

Rs.50,000/- as compensation to the victim carrying a default sentence of six months imprisonment. Being aggrieved by the said conviction and the sentence he has appealed to this court. Facts of this case may be briefly summarised as follows:

Gayangani lives in her grandmother & grandfather's house. On 30.06.1999 (the day of the alleged incident) when the grandfather of Gayangani went to the back garden to tie cattle, the accused appellant who was living in the neighbourhood entered her room and threatened her with death and removed her clothes. The accused appellant too removed his clothes. He has attempted to insert his mail organ to her vagina. When he failed in his attempts he went away from the place. She did not bring this matter to the notice of grandparents or her parents soon after the incident. She brought this incident to the notice of the grandmother only after five days of the incident. It is significant to note that the original indictment contained a charge of rape. But later prosecuting State Counsel amended the said charge to one of grave sexual abuse. Gayangani, at page 45 of the brief, admits that she said many more things done by the accused appellant in her statement made to the police. In short, in my view, she admits that she exaggerated the incident when she made the statement to the police. This is a matter that should have been considered by the learned trial judge very seriously. Unfortunately the learned trial judge has failed to consider this matter. This admission by Gayangani demonstrates that she was not truthful when she made the statement to the police.

She brought the alleged sexual assault to the notice of the grandmother only after five days of the incident. She says that as she could not keep the incident in her mind any more, she told this incident to the grandmother. This is not an acceptable explanation for the delay. She made a statement to the police only on the 6th (6 days after the alleged incident). It is significant to note that she failed to mention the name of the accused appellant in her short history given by her to the doctor. The accused appellant is an uncle of Gayangani . According to the evidence she knew the name of the accused appellant who is an uncle of her. If she knew the name of the accused-appellant, question arises as to why she did not mention his name in the short history. According to the evidence led at the trial by the prosecution, there was displeasure between families with regard to a land matter. She says that they were not on visiting terms.

One Gamini, who was staying in the house of her grandfather where Gayangani was living, had on an earlier occasion, tried to cause trouble to the sister of the accused appellant. Gayangani reluctantly admitted this matter. Thus it appears from the evidence of the prosecution itself that there were reasons for her to falsely implicate the accused appellant with the alleged incident.

When we consider all these matters it is difficult to accept the version of the prosecution beyond reasonable doubt. In my view it is dangerous to act on the evidence of Gayangani. Learned trial judge, at page 108 of the brief, says that the defence failed to point out a reason as to why Gayangani made this type of allegation. But the learned trial Judge has failed to consider the displeasure between the two families and the other incident relating to Gamini. Further he failed to consider the exaggeration made by Gayangani in her statement made to the police which Gayangani admitted in her evidence. Learned trial judge has rejected the dock statement on the basis of the judgement in the case of Kularatne Vs Queen 71 NLR 529. The learned trial judge observed that since the dock statement which is an unsworn statement is not subjected to cross examination it has less evidentiary value. But the learned trial judge failed to give adequate consideration to the guide lines given in the said judgement which I state below.

1. If the dock statement is believed it must be acted upon.
2. If the dock statement creates a reasonable doubt in the prosecution case defence of the accused must succeed.

The judgment in the case of Kularatne Vs Queen further says that the dock statement must be considered as evidence subject to the infirmities that it was not made under oath and it was not subjected to cross examination. It appears that the learned trial judge failed to follow the said principle. The accused-appellant in his dock statement denied the incident. He said that the two ' families were not ' on visiting terms as

there was a land dispute. This fact was admitted by Gayangani in her evidence. According to the accused-appellant Gamini who lives in Gayangani's house was caught by him when he (Gamini), in the night, was holding the window of the house of the accused. Gamini came to cause trouble to his sister. Gayangani's family was angry with him over this incident. This was the summary of his dock statement, Gayangani, in her evidence, admitted the incident relating to Gamini. When I consider the dock statement there was no reason to reject it. The decision of the learned trial judge to reject the dock statement is, in my view, wrong.

When I consider all the above matters, I am of the opinion that the prosecution has failed to prove its case beyond reasonable doubt. I therefore set aside the conviction and the sentence of the accused appellant and acquit the accused-appellant of the charge.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilaka, J

I agree

JUDGE OF THE COURT OF APPEAL

Na/-