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

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

Salpadoruge Ivan Susantha Perera,
No. 76/C/1,
Dickwela Road,
Horagasmulla,
Divulapitiya.

**Accused-Appellant**

**C. A. No. : 122/2013**

**H. C. Negombo Case No. : H. C. 214/06**

**V.**

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

**Respondent**

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| **BEFORE** | : | **H. N. J. Perera, J. &**<br>**K. K. Wickramasinghe, J.** |
| **COUNSEL** | : | Nihara E. Rodrigo, PC with G. Dissanayake for the Accused-Appellant.<br>Harippriya Jayasundara, DSG for the Attorney General. |
| **ARGUED ON** | : | 27th of May 2015 |
| **WRITTEN SUBMITIONS** | : | 27th of May 2015 |
| **DECIDED ON** | : | 09th of July 2015 |

**K. K. WICKRAMASINGHE, J.**

The Accused-Appellant, herein after referred to as the 'Appellant', in this case was indicted in the High Court of Negombo on a charge of statutory rape committed on one Salpadoruge Anusha Sandamali on 29.03.2003, which is an offence punishable under the s. 364 (2) (e) of the Penal Code as amended by Acts No 22 of 1995 and No. 29 of 1998.

After the conclusion of the trial, the learned Trial Judge acquitted the Appellant of the charge he was indicted and convicted him for an offence under s. 345 of the Penal Code (as amended) for causing sexual harassment and sentenced him to a term of 4 years rigorous imprisonment and imposed a fine of Rs. 5000/= with a default term of one month simple imprisonment. The learned Trial Judge also ordered the Appellant to pay Rs. 200 000/= as compensation to the victim in this case.

Being aggrieved by the said conviction and the sentence the Appellant preferred an appeal to the Court of Appeal seeking to set aside the conviction and sentences imposed upon him.

The learned Counsel for the Appellant raised a preliminary objection on the premise that the charge of the Appellant that was ultimately found guilty of, is not a lesser offence of the charge of rape that he was initially charged with. Therefore the conviction and the sentence are bad in law as he was not given an opportunity to defend himself on a charge under s. 345 of the Penal Code.

The learned Counsel DSG for the Respondent conceded to the above mentioned objection and moved court to send this case for retrial on a charge of s. 345 of the Penal Code.

The Victim in this case was 11 years and 6 months at the time that the incident took place. The Appellant was the father of a childhood play mate of hers and he was living in front of her house. His wife was also living with him at that time in the same house. However, the Appellant had never come to the Victim's house before this incident.

On the day in question one of the aunts of the Victim called Malini Fonseka, who lived next to her house (about 10m or 12m away from her house), had called her while she was watching television in the evening at about 4.00 to 5.00 pm in the evening and requested her to allow the Appellant to collect cow dung from her compound. When she came out, the aunt was near the fence and the Appellant was at the aunt's garden. He had two small bags (about a size of tennis ball) in his hand and came to the garden of the Victim's house. She showed him the cow dung which were in front of her house but, he said that they are not dry and therefore not suitable for his purpose. Then she said to him that they have another lot at the back of the house and showed him the way to the back of her house. While the Appellant went back from outside of the house, she went back through the house. She stopped at the door of the kitchen and watched the Appellant checking the lot of cow dung at the back. The Appellant returned saying that, that lot is also not dry and asked whether he can go out through the house.

While they were going through the house and just after they entered the dining room, the Appellant hold the Victim by her shoulder and pressed her back against the wall. When she tried to shout out, the Appellant closed her mouth with his hand. Then the Appellant kissed her lips, put his tongue inside her mouth, touched her body and raised the frock that she was wearing.

Then he put the sarong which he was wearing, down, pressed his penis on the Victim's female genitals and moved it for about 3 or 4 seconds. The Victim had pushed the Appellant away and she had run to a house which belongs to another aunt (Nandawathi) of hers.

The house on the other side of the Victim's house also belonged to one of her uncles. That was also about 10m away from her house. However, the house that she ran to, just after the incident, was about 4 houses away from her house. At the time she ran to that aunt's home, her aunt, the daughter of that aunt (Upulika) and two other neighbour girls called Surangi (PW 3) and Menaka (PW 4) were there in that house. Then she informed them that the Appellant raped her. Then the daughter of the aunt Nandawathi and the prosecution witness no. 3 ran down the road and informed the villages about the incident. At that time, the aunt and the fourth witness of the prosecution had examined the Victim and they had come back to the Victim's house with the Victim. When they were coming, the Appellant was in the garden of the house next to the Victim's house which belonged to one of the Victim's uncles and the villages had gathered around at the Victim's house. Also the Appellant's wife had come to that place and she had said that her husband was innocent.

The Appellant also refused that he had committed such an offence and he had scolded the Victim for telling lies. Furthermore, it was the Appellant who had gone to the police station before the Victim.

However, after the Victim's parents arrived home they found cow dung inside the house and they argued that how can they find cow dung inside the house if the Appellant didn't come inside the house. Then the parents of the Victim had gone to the police station with the Victim, and inside the police station they met the Appellant. At that time the Victim's clothes which she was wearing at the time of the incident were given to the police by her parents. Then she was sent to the hospital by the police. According to the evidence given by the doctors who had examined her, even though they have not observed any injuries on her they have not ruled out labia majora penetration (page 243 of the brief). They were at the conclusion that an erect penis has entered but not gone deep and had given an opinion that there has been a penetration between the vaginal lips (page 284 of the brief).

When the police examined the house of the Victim, they had also observed cow dung inside the kitchen of the Victim's house (page 336 of the brief).

At the trial, the defence had not called any witnesses on behalf of the Appellant but the Appellant had made a dock statement. In his statement, he had admitted that he went to the Victim's compound to collect cow dung (page 361 of the brief). His statement totally corroborate with the Victim's evidence up to the point that he went to the back of the Victim's house to collect cow dung while the Victim was standing near the kitchen door and he came back without collecting cow dung from there as they were also not dry. According to the statement, at that time the Victim's uncle who lives next to the Victim's house was near the fence and he asked that uncle whether he can collect some cow dung from his garden. Then he jumped to the road from Victim's house and entered that Uncle's garden. There that Uncle's wife had showed the Appellant the place where the cow dung were and the Appellant had collected some cow dung from there. When he was just about to go home after collecting cow dung some villages gathered to the house of the Victim and asked the Victim what happened. Then she had told that she was raped by the Appellant. Then the Appellant had scolded the Victim saying not to lie and he had asked them to come with him to the police station. Then they all went inside the house of the Victim and some women, including the mother of the Victim and the wife of the Appellant, took the Victim in to a room and checked her. When they came back, they had informed all the others that nothing had happened to her. Then a villager called one Lal had asked the Appellant to make a complaint to the nearby police station as this will create a problem to the Appellant in future. Then he had gone to the police station and while he was inside the police station the Victim had come there with her parents. Then the police had taken statements from both the Victim and the Appellant and they had been sent to a doctor in order to examine them fully. According to the Appellant's statement, the Victim had made such a false complaint against him in order to get money from him.

After considering all these facts, the evidence given by all the witnesses and the dock statement made by the Appellant, the learned Trial Judge had come to a conclusion that the Appellant was not guilty of the offence he was indicted. Considering available evidence, we too agree with this decision of the learned Trial Judge.

As the learned DSG had clearly mentioned in her written submissions, that the Appellant was not given an opportunity to defend himself on the charge that he was ultimately convicted on. It is so true that the ingredients of the charge of rape are different from the ingredients that must be proved in a charge of sexual harassment. Therefore, both the conviction and the sentence imposed by the learned Trial Judge are bad in law.

However, although the learned Trial Judge has adopted an incorrect procedure, he has placed reliance on the evidence of the Victim when arriving at a decision in this case.

In the case of ***Upul de Silva v. Attorney General 1999 (2)*** it was held that "re-trial must necessarily be limited to the offence or offences upon which the accused had been convicted by the trial Court, and against which he had preferred an appeal and none other." In the case of ***Banda and Others v. Attorney General (1999) 3 SLR 168*** at page 171, Justice FND Jayasuriya held "The issue whether a re-trial should be ordered or not would depend on whether there is testimonially trustworthy and credible evidence given before the High Court."

By going through proceedings it is evident that the learned High Court Judge had not taken steps to amend the indictment and read the new charge to the Appellant. Therefore we too agree with the preliminary objection raised by the Counsel for the Appellant. But at this junction considering the evidence and other legal issues it would be relevant consider the full case of ***Kahandagamage Dharmasiri Bogahahena v. The Republic of Sri Lanka SC Appeal 04/2009*** decided on 3rd February 2012, Her Lordship Justice Thilakawardane held that "A criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presided to see that a guilty man does not escape. One is an important as the other. Both are public duties [**Ambika Prasad and another V State (Delhi Administration) 2000 SCC Cri 522**]".

Therefore considering the above, we set aside the conviction and the sentence imposed by the learned High Court Judge and send this case for re-trial.

Appeal of the Accused is partly allowed.

JUDGE OF THE COURT OF APPEAL

**H. N. J. PERERA, J.**

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1) ***Upul de Silva v. Attorney General 1999 (2)***
2) ***Banda and Others v. Attorney General (1999) 3 SLR 168***
3) ***Kahandagamage Dharmasiri Bogahahena v. The Republic of Sri Lanka SC Appeal 04/2009***