

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.

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

Complainant

C. A. Case No. : 187/2011

Vs.

H. C. Embilipitiya Case No. : 87/2007

W.K.Dharmadasa
Accused

And now

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

Complainant- Appellant

Vs.

W.K.Dharmadasa
Accused-Respondent

BEFORE : **M. M. A. Gaffoor, J &**
K. K. Wickramasinghe, J

COUNSEL : **A. A. L. J. Tenny C Fernando for the Accused-Respondant**
Dileepa Peeris S.S.C.for the Attorney General.

ARGUED ON : **14th June 2016**

DECIDED ON : **07th December 2016**

K. K. WICKRAMASINGHE, J.

The Accused - Respondent (herein after referred to as the accused) in this case was indicted in the High Court of Embilipitiya on the following charges:-

- (1) On or about 20th July 2004, the accused person kidnapped W. Thushara who was under the age of 16 from his lawful guardian K.Pradeepa Malkanthi an offence punishable under section 354 of the Penal code.
- (2) At the same time and place, during the course of the same transaction the accused committed grave sexual abuse on W. Thushara an offence punishable under section 365(b)2(b) of the Penal Code as amended by Act No. 22 of 1995.

After trial the accused was convicted for both charges and following sentences imposed:-

Charge 1:- 1 year RI and a fine of Rs. 3500/=

(def. sentence of 3 months simple imprisonment)

Charge 2:- 7 years RI Rs.5000/= (def. sentence of 6 months simple imprisonment)

Compensation of Rs.10000/=(def. sentence of 2 years simple imprisonment)

When this matter was taken up for argument learned counsel for the accused appellant challenged the evidence of the victim and the eye witness and the judgement delivered by the learned high court judge.

The victim Thushara was a 12 year old school boy who was living with his parents and the accused appellant was a neighbour. On the day of the incident the accused has spoken with the boy and accompanied the victim to his residence. Thereafter having his place on a scaffold the accused had indulged in intercrural sexual-intercourse with him. The victim's mother and sister arrived at the scene when the accused was indulged in the said act. Victim's mother had assaulted both of them and the victim was taken to his home.

During cross examination the counsel was able to mark several contradictions with regard to the time and the place of offence.

The mother of the victim who is an eye witness corroborates the version of the victim with several contradictions.

The version of the accused was that he was falsely implicated and further mentioned that the victim had stolen a radio from the accused. Therefor the victim has falsely implicated the accused.

The accused has given a doc statement denying the allegation against him.

The counsel for the respondent concedes the fact that the learned trial judge should have written a detailed judgment evaluating evidence before her.

The learned counsel for the accused appellant has sited Jayathunga V AG and another 2002 (1) SLR 197 at 202 where Justice Hector Yapa mentioned that ".....the other submission that was made by learned president counsel was the failure of the learned high court judge to consider the defence evidence, specially the evidence given by the accused appellant, before he decided to sustain the conviction of the accused appellant. Counsel contended that there was complete failure by the high court judge to consider the evidence given by the defence. In support of this submission, learned counsel cited the cases of **The King V Tholis Silva**, where it has been held that it is the duty of a Court to scrutinize the defence put forward in a case and if it is rejected, to give reasons therefore. Counsel also referred to the case and if it is rejected, to give reasons therefore. Counsel also referred to the case of **Chandrasena and others V Munaweera**, where the need for a judge to analyse and evaluate the evidence of both the prosecution and the defence with reasons has been highlighted and commented upon"

In Wijeratne V Republic of Sri Lanka 78 BLR 49 Sirimanna J. stated as follows:- When an accused is facing a capital charge it is essential that every point in favour of the accused though it may

seem trivial should be placed before the jury. It may well be that all such matters if so placed before the jury may create a reasonable doubt the benefit of which the accused is entitled to. When however the circumstances against the accused are emphasized and the trial judge expresses his opinion as to the adverse inferences and fails to place the circumstances and inferences in favour of the accused before the jury the accused is deprived of a substance of a fair trial.

It is not necessary to consider many other grounds urged by the learned counsel for the defence as for the reasons mentioned above the conviction cannot be allowed to stand. We therefore, set aside the conviction and acquitted the accused"

When considering evidence it is evident that this is not a falsely implicated case. This is a very rear case where there are eye witnesses to the incident. The victim's mother and sister were eye witnesses to the incident It is apparent that the sister of the victim was in overseas at the time when the case was taken up for trial. Therefore only mother of the victim had testified.

In the circumstances the best interest of both parties would be to send this case for retrial. Therefore we direct the Registrar, Court of Appeal to send this case back to the High Court of Embilipitya for retrial.

Judge of the Court of Appeal

M.M.A. Gaffoor J

I agree

Judge of the Court of Appeal