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

In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal
Case No. CA 66/2012 **Vs,**

Thelge Pradeep Kumara

Accused

And Now Between

Thelge Pradeep Kumara

Accused-Appellant

High Court of Nuwara Eliya
Case No. HC/NE/47/2009 **Vs,**

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Devika de L. Tennekoon, J &**
S. Thurairaja PC, J

Counsel :Priyantha Deniyaya for the Accused-Appellant
Dilan Ratnayke DSG for the Complainant-Respondent

Judgment on : 22nd November 2017

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Judgment

S.Thurairaja PC J

The Attorney General had preferred an indictment against Thelge Pradeep Kumara accused appellant (hereinafter sometimes mentioned as appellant) as follows:

(1) On 14th May or on a near date in 2004, within the jurisdiction of Nuwara-Eliya town you have for the purpose of obtaining sexual gratification used a part of your body on a part of the body of Warnasooriya Mendis Erandi Lakmali, viz; by inserting your finger into the vagina of Waranasooriya Mendis Erandi Lakmali, you have committed a punishable offence under Section 365B (2)(b) of Act No. 22 of 1995 (Penal Code Amendment) as further Amended by Act No. 29 of 1998 of the Penal Code.

(2) On any other occasion except in the incident and the same transaction, more fully described in the (1) count above, you have for the purpose of obtaining sexual gratification used a part of your body on a part of the body of Waranasooriya Mendis Erandi Lakmali, you have committed a punishable offence under Section 365B (2)(b) of Act No. 22 of 1995 (Penal Code Amendment) as further Amended by Act No. 29 of 1998 of the Penal Code.

As per the evidence available before the High Court of Nuwara-Eliya the appellant was a school van assistant.On the 14/05/2004 he had collected children from the school and travelled to hand over to another van. While they were travelling the appellant had inserted his fingers under the school uniform of the virtual complainant Waranasooriya Mendis Erandi Lakmali who was 7 years old at that time. She cried and complained to her mother, subsequently the mother lodged a complaint to the police station of Nuwara-Eliya. She was admitted to the hospital, subjected to a medical examination and doctor found that thehymen was intact swelling and abrasion was found on the walls of Labia Minora.

On receiving the indictment trial was held at the High Court. The prosecution led the evidence of PW1 Waranasooriya Mendis Erandi Lakmali, PW2 Kalyani Jayasekara, PW3 Gajanayake Mudiyanselage Chaminda Ruwan Kumara, PW7 Dr. K.K.D.J.S.K. Perera and PW5 S.I Jeyaweera. When the defence was called the accused appellant, he made a dock statement and called Sub Inspector Iddamalgoda Jagath Kumara Weerawardana from the Police Station of Nuwara-Eliya to give evidenceand closed the case for defence.

Both counsels for the prosecution and the defence made their submissions and the learned Trial Judge after considering all delivered the judgements and found the accused appellant guilty for the charges levelled against him.

Counsel for the accused appellant and the state made submissions before the sentence is passed. The trial judge had imposed the following sentence:

For the 1st charge: - 3 years of imprisonment and a fine of Rs. 5000/=, 06 months' imprisonment if defaulted.

For the 2nd Charge: - 3 years of imprisonment and a fine of Rs. 5000/=, 06 months imprisonment if defaulted.

Being aggrieved with the conviction and sentence the appellant preferred an appeal to the Court of Appeal. In the meantime, Hon. Attorney General being dissatisfied with the sentence filed a revision application in the Court of Appeal under case no. CA (PHC) APN 103/2012. Whereby the Attorney General supports the conviction and complains the sentence is illegal and inappropriate.

Both counsels agreed to take up the appeal and revision together and invited the court to hand down one judgment / order.

The accused appellant in his petition of appeal and the oral submissions made in the court submit the following grounds of appeal:

(a) The order of the High Court Judge in contrary to law and is against the weight of the evidence led in this case.

(b) The contradiction marked V1 was not considered by the trial judge.

(c) The learned High Court Judge has misdirected himself by not giving proper weightage to the suspicious elements involving the unaccounted belatedness of the victim involved. (sic)

(d) The learned trial judge had failed to consider the dock statement.

Considering the grounds of appeal, it warrants us to peruse the evidence led before the trial judge.

Virtual complainant W.M.E. Lakmali gave evidence. Firstly, she revealed that in 2004 when she was studying in grade 2, she was 7 years old she used to travel in Sugath Aiya's van to and from school. Most of the days they were taken from the van which came to her school and changes to her normal van (couple of school van drivers goes to schools and collect the children and share them at the junction which is known as pooling).

On the day of the indictment Sugath had entrusted collecting the children to Ruwan, who was the driver and the accused appellant Pradeep was the van assistant. The van was packed with school children some students including virtual complainant were standing in the van. The appellant was seated when the van was on the move the accused appellant had inserted his hand into the frock and his fingers reached the vagina under the panties. She tried to avoid but couldn't and then she started to cry. She was dropped at the place to interchange van and got into her usual van driven by Sugath. The driver had noticed she was crying when asked she did not say anything. When she reached home, she was crying and complained to her mother of the incident.When the mother inspected, she had noticed a swelling on the vagina. Then her mother called her father and they went to the Kandapola Government Dispensary on advice the victim was taken to the police station of Nuwara Eliya. She

was taken to the General Hospital of Nuwara Eliya and hospitalised for medical examination.

The virtual complainant was a 7 years old child at the time of the incident. She says that she didn't make a complaint to the police and it was done by her parents subsequently after about 2 ½ years the police recorded a statement from her.

She was subject to an intensive cross examination by counsel and he had marked contradiction V1. She admitted that she had told in her statement that at the time of the incident "I told about this to Sugath Aiya in the van, then only Pradeep Aiya took his hands off".

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The defence counsel at the trial and the counsel who is before the appellate court insisting that this is the serious contradiction and which goes to the root of the case and;if this is considered properly the conviction will not stand.

Next witness, Dr. C.K.D Jude Sriyanjana Perera, said he examined the child on the 14/06/2004 at around 5.25pm. The child had told him that she had been sexually abused by a school van driver that day at around 1.30pm. the driver had inserted his finger through her under wear and touched her genital area. On examination he had observed that the hymen was intact and small abrasion at the right side of Labia Minora, and the wound is partially healed. He confirmed that his findings were consistent to the history given by the patient.

The next witness was Gajanayake Mudiyanselage Chaminda Ruwan Kumara. He gave evidence and said that he was requested by Sugath to collect this child, the victim and the others from the school. He confirms that the appellant was the van assistant at the time of the incident. The incident had happened in the van bearing registration number 51-4173. In the evening around about 3.30pm the mother of the

victim had come there and informed him of the incident. Thereafter, he was also involved in taking the child to dispensary and hospital.

The next witness was Kalyani Jayasekara, who is the mother of the victim child. She confirms the date of birth and corroborates the evidence of the virtual complainant. The most important observation made by this witness was that the child was disturbed and crying. On getting the information about the incident she had checked her daughter, and had found some swelling on the vagina. She narrates the steps that she had taken in detail. On hearing about the disturbance from the daughter, she had called her husband and told him about the incident. Thereafter she had gone to a government dispensary at Kandapola, there they were advised to go to the police. Since there is only a police post at Kandapola they proceeded to Nuwara Eliya town and lodged a complaint in the Police Station. Subsequently they were referred to the General Hospital of Nuwara Eliya. She had given consent to the doctor to examine the child. It's also observed that she had carried her daughter at certain times on that day. She submits that she made the first complaint to the police station.

Inspector of Police Kankanamage Jayaweera attached to Nuwara Eliya Police Station as OIC Crimes had conducted the investigation. He said that he received a complaint from the mother of the victim Kalyani Jayasekara on 14/06/2004 at about 1700hrs, the police searched and arrested the accused.

Considering all available evidence, it is clear that the incident had happened on 14/06/2004. There is no eye witness other than the virtual complainant, but the related factors reveal that the complaint was prompt and the identification of the accused was with certainty by the victim, van driver, mother and Sugath her original van driver.

When the defence was called the accused appellant made a dock statement. He had taken up a defence of alibi and motive for a false complaint.

One of the grounds of appeal was that the dock statement was not considered. When analysing the dock statement carefully he had said that he didn't travel in that van on the day of the incident. This is proven to be incorrect by the virtual complainant, driver of the van Ruwan and Sugath. He had never suggested this stance to any of the prosecution witness. It appears it is the 1st time he had taken the defence of alibi after almost 8 years of the incident namely 25/01/2012.

The appellant, in his dock statement stated that this is a false complaint with a motive. He submits that his grandmother's house was adjoining to the house of the victim and there was a dispute about cutting a branch. That had happened 2 years ago. He further submitted that there is no one living in at his grandmother's house.

Learned Trial Judge had given due consideration to dock statement. When we analyse carefully we find that the accused had never taken up the defence of alibi as well as enmity with the prosecution witnesses when they gave evidence.

The defence called Sub Inspector Weerawardana, OICin charge of administration of Police Station Nuwara-Eliya. He was not involved in any of the investigation in this case. He only spoke to the fact that the victim child made a statement to police on 25/12/2006, almost 2 ½ years after the incident. The Counsel also moved to mark the statement made by the witness as V2.

Considering the ground of appeal that the complaint was belated, the prosecution evidence before the court reveals that the mother of the victim had lodged the 1st complaint on the 14/06/2004. The other witnesses also confirm the said date. It was revealed that the police had recorded the statement from the victim on the instruction of the Attorney General. This shows the Attorney General had followed the correct procedure to satisfy himself and to make all materials available to accused to have fair trial. I observed that the learned trial judge had not given much weight to document marked V2.

Statement of the victim was recorded under Section 109 of the Code of Criminal Procedure Act No. 15 of 1979 (as amended) [CCPA]. The same law provides circumstances on which it can be used, definitely it cannot be used to corroborate. If the statement been used to corroborate the evidence of the virtual complainant, it could have violated the provision of the law. This clearly shows that the learned trial judge with a judicially trained mind had not considered the said V2 document, to provide a fair trial for the accused appellant.

In **BANDARA V THE STATE 2001 (2) SLR 63**, it was held:

> "If there is a valid reason or explanation for the delay and if the trial Judge is satisfied with the reasons and explanations given, no trial Judge would apply the test of spontaneity and contemporaneity and reject the testimony of a witness in such circumstances. 'delayed witnesses evidence could be acted upon if there were reasons to explain the delay."
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> This principle was recognised in the case of SUMANASENA VS AG 3 SLLR 137 and by Justice F.N.D. Jayasuriya in AJITH SAMARAKOON VS. REPUBLIC 2004 SLLR 209. (Kobeigane Murder case)

In the light as the above cases delay in making a first complaint is accepted if it is properly justified. In this present case it is our considered opinion that there is no delay in making a complaint. The child victim who was 7 years old at the time and the mother lodged a complaint immediately and a prompt investigation was conducted and the child was medically examined by the doctor. Virtual complainant's statement recorded after 2 ½ years,in fact, it gives more fairness to the accused. Therefore, this court is of the view that there is no delay in making the complaint. The ground of appeal of delay in making the complaint fails on its own merits.

The counsel submitted that the learnedtrial judge had not favourably considered the contradiction marked V1. This factor is already discussed above but for completeness we observe as follows. This incident had occurred on the 14/06/2004 at that time the child was 7 years old, she usually goes in the school van driven by "Sugath aiya". On

the day of the incident she had gone to school in Sugath Aiya's van but when she was returning from her school, she had come in the van driven byGajanayake Mudiyanselage Chaminda Ruwan Kumara. He also gave evidence and confirms that he drove the vehicle, the appellant was the van assistant and the child was the passenger in that van. She continued her travel to her home in her usual van driven by Sugath. In her statement she had said, that "I told this to Sugath Aiya, only thereafter, Pradeep Aiya took his hands off."

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The grounds of appeal under paragraph 8(ii) speak about "Sarath Aiya". There is no evidence revealed involvement of a "Sarath Aiya" in this entire episode, it appears that the counsel of the accused appellant had misconceived or confused with the names.

Incident had happened on 14/06/2006. The virtual complainant made a statement on 25/12/2006 and gave evidence on 28/06/2011. This court is mindful of the age of the child and period of delay between the date of the incident and giving evidence. Considering the all, we agree with the learned trial judge and the reasons stated above, we conclude that this ground of appeal fails on its own merits.

The accused took up a defence of alibi and false complaint for the 1st timein his dock statement.

Considering the non-contradicted evidence before the court reveals that the accused was present on the date, time and the place of incident. Therefore, this defence of alibi also fails.

For the 1st time the accused takes up a defence of false complaint. If we consider the reason put forward by him, he speaks of a dispute between his grandmother and the virtual complainant's family 2 years ago and there is no evidence to the fact that the accused was living in that premises and the dispute was currently alive. Further this

defence of dispute was never put to any of the prosecution witnesses, therefore we find that this defence is untenable.

In **Gunasiri and Others V Republic of Sri Lanka 2009 1 SLLR 39**, it was held that:

> *It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted. The failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused, indicates that it-was a false one.*

Considering all available materials as discussed, we find that the grounds of appeal fails on its own merits. Therefore, we dismiss this appeal against conviction.

The learned DSG submits that the sentence imposed by the trial judge is illegal and inappropriate. The sentence imposed was 3 years rigorous imprisonment and Rs. 5000 fine, in default 6 months for the 1st count and a similar sentence was imposed for the 2nd count.

Section 365B (2)(b) reads as follows: **(as at the time of the offence in 2004)**

> *Commits grave sexual abuse on any person under eighteen years of age, shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;*
>
> *In 2006 this law is amended by 16 of 2006 as follows;*
>
> *Commits grave sexual abuse on any person under eighteen years of age, shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;*

In AG V Ranasinghe 1993 2 SLR 81, the Court of Appeal observed that:

An offence of rape calls for an immediate custodial sentence. Reasons are -

(1) to mark the gravity of the offence

(2) to emphasize public disapproval

(3) to serve as a warning to others

(4) to punish the offender

(5) to protect women.

Aggravating factors would be

(a) use of violence over and above force necessary to commit rape

(b) use of weapon to frighten or wound victim

(c) repeating acts of rape

(d) careful planning of rape

(e) previous convictions for rape or other offences of a sexual kind

(f) extreme youth or old age of victim

(g) effect upon victim, physical or mental

(h) subjection of victim to further sexual indignities or perversions

The accused appellant is entitled by law against the conviction and sentence together or separately. A person can concede to a conviction and challenge a sentence. Therefore, it is preferable for the trial judge to give reasons for his sentiency.

In **Senadheera Appuhamilage Chandra Rathnapali Gunasekara V Attorney General SC APN 114A/2011**, S. Tilakawardana. J quoted Article 14(5) of International Covenant on Civil and Political Rights (ICCPR) and commented as follows:

"*Article 14(5)*

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

"However, in terms of the international law there is a right to appeal both conviction as well as after sentence and where such cases comes as two separate appeals, should be consolidated and heard and determined as one case."

It will be appropriate for the judge to consider the aggravating circumstances and mitigating factors and state some in his reasoning for sentence. In this case the trial judge had not given any reason. Therefore, we vacate the sentence and impose the following sentence.

We consider the following factors as aggravating circumstances:

i. The victim was 7 years old school going child.

ii. At the time of the incident the accused being a school van helper had a control over the child which can be presumed as temporary custodial. In reality the children must be protected by all people at all time. This incident had not happened at meetup of chance. The innocent child was abused when she was unprotected and helpless.

iii. The accused was an adult.

iv. The accused had caused severe pain of mind to the victim.

v. The victim was subject to bodily harm.

vi. There is no regret or repentance by the accused appellant.

vii. The subsequent conduct of accused appellant.

We consider the following factor as mitigatory circumstances:

(1) The appellant was 18 years old at the time of the incident.

(2) The incident had happened in 2004.

After carefully considering all aggravating and mitigatory circumstances we impose 10 years rigorous imprisonment for the 1st count and fine of Rs. 5000/- in default 3 months simple imprisonment.

Further, we order to pay compensation of Rs. 50,000/- to victim Warnasooriya Mendis Erandi Lakmali in default one-year rigorous imprisonment.

For 2nd count we impose 10 years rigorous imprisonment, same to be applied concurrently with the 1st count. We impose Rs. 5000/- fine in default 6 months simple imprisonment. Since there is compensation ordered in the 1st count we do not order compensation to this count. If the fine and the compensation is not paid in default sentences will be implemented consequently.

Subject to variation in the sentence the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J
I agree,

JUDGE OF THE COURT OF APPEAL