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. 168/2013 **Vs,**

Herath Mudiyanselage Wimal Jayantha Herath

Accused

And Now Between

Herath Mudiyanselage Wimal Jayantha Herath

Accused-Appellant

High Court of Kurunegala
Case No. 155-2011 **Vs,**

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Thurairaja PC, J &**
A.L. Shiran Gooneratne J

Counsel : Anil Silva PC with Mr. Buddhika Mallawarachchi for the Accused-Appellant
Haripriya Jeyasundara SDSG for the Complainant-Respondent

Written Submissions : Accused Appellant – 22nd March 2018
Respondent – 22nd March 2018

Argument on : 6th July 2018

Judgment on : **20th July 2018**

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Judgment

S. Thurairaja, PC. J

Accused appellant (hereinafter sometimes referred to as the appellant) was indicted before the High Court of Kurunegala for kidnapping a girl child who was under the age of16 years, committing rape of the said child and kidnapping her again on another day punishable under Section 354 and 364 (2)(e) of the Penal Code. After the trial the learned High Court judge has found guilty and imposed the following sentence:

i. first count 3 years rigorous imprisonment and a fine of Rs. 2,000/- in default 6 months imprisonment.
ii. second count 10 years rigorous imprisonment fine of Rs.2,000/- in default 6 months imprisonment.
iii. third count 3 years rigorous imprisonment, fine of Rs. 2,000/- in default 6 months imprisonment.

In addition to above the appellant was ordered to pay Rs.50,000/- compensation to the victim child in default 1-year imprisonment.

Being aggrieved with the said conviction and the sentence the appellant appealed to the Court of Appeal and submitted the following grounds of appeal:

1. Firstly, the incident of sexual intercourse could not have happened in this case.
2. Secondly there is no cogent evidence to prove the second count.
3. Thirdly there is no proper analysis by the High Court judge in his judgment.

It should be mentioned that the counsel for the appellant had not spelled out specific grounds of appeal in his written submissions. The above are gathered from the oral submission made by the counsel.

It will be appropriate to know the facts of the prosecution case before we proceed further. The victim female child was a student of a rural school near Nikaweratiya on the 13th October 2007 the accused appellant, who was her English teacher, had taken

her to a hotel / guest house at Nikaweratiya in a Motorbike. There the police officers attached to the Police Station of Nikaweratiya raided the place and arrested the Appellant and taken the Child into their custody. It is revealed by the victim child that apart from school classes she had followed tuition classes given by the appellant. She claims that the appellant had proposed an affair and which ended up having sexual intercourse twice.

Since the child was less than 18 years at the time of the incident, as per Section 364 of the Penal Code consent of the child is immaterial. For the benefit of the child her name and identity are not revealed in this judgment (hereinafter sometimes the victim will be referred to as "child").

Considering the first ground of appeal, it is the evidence of the child that the appellant had sexual intercourse once about two months before the 13th of October 2007 and the second occasion was on the said date above.

The doctor who examined the child had revealed that the old tear of hymen was seen and it is compatible with the history given by her that she has had sexual intercourse weeks prior to the 13th October 2007.

The defence put forward in this case is contradicting each other. The line of cross examination and the dock statement was not in the same line. It does not mean that the defence has to prove his innocence. The child was born on the 10th of July 1992 and the incident was alleged to have happened two months prior and on the 13th of October 2007. There are certain discrepancies noted by the learned trial judge as well as us from the evidence of victim child. We are mindful that this incident had alleged to have occurred in a rural area and all of us are aware that the relationship of a school teacher and a student as per Sri Lankan customs is unlike other relationships as it is treated with utmost respect and the teacher is regarded as a god by both parents and parents. The court cannot expect the child to be more systematic and clear in her evidence under the circumstances above mention.

It is evidence that the child has been in the custody of the appellant in a hotel when the police entered into the said place. The explanation given by the appellant in his dock statement is that this is a made-up allegation against him by another English tuition teacher to take revenge on him. The line of cross examination and the evidence given by the witnesses does not support the version of the accused appellant.

On a careful scrutinization of the evidence before the trial judge we are convinced that there is sufficient material for the trial judge to come to a conclusion.

G.P.S. de Silva, C.J. in **Alwis vs. Piyasena Fernando [1993 (1) SLR 119]** held that,

> *"it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lighty disturbed on appeal."*

Further we are also mindful that the learned trial judge had a great advantage to see the demeanour and deportment of the witnesses especially the victim child and the appellant. We are of the view that the findings of the trial judge regarding the second count is justified in the light of the cogent evidence before him.

In **Bharwada Bhoginbhai Hrijibhai v. State of Gujarat [AIR 1983 Supreme Court 753 (1883 Cri. L.J. 1096)]**

> *" As a general rule, there is no reason to insist on corroboration except from the medical evidence..."*

Regarding the second and third ground of appeal we find that the learned trial judge was very concise and content in analysing the evidence before him. It is evidence before court that the appellant has taken the child without the consent of the lawful guardian namely the father. Those two counts were not vigorously challenged by the appellant at the trial. It is also to be placed on record that the counsel for the appellant did not challenge the convictions at the Court of Appeal other than a passing remark.

Analysing the evidence before the learned trial judge and the judgment we are convinced that the finding of the learned High Court judge is warranted, therefore, we find that there is no merit on the grounds of appeal forwarded by the appellant.

Considering the evidence before the trial court, judgment and the submissions of counsels we find that the conviction is justifiable and we have no reason to interfere with the same.

Accordingly, we dismiss the appeal and affirm the conviction.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL