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

In the matter of an Appeal in terms of Section 331(1)of the Code of Criminal Procedure Act No.15/1979.

C.A. Appeal No.133/2017

H.C. Polonnaruwa No. HC 58/2014

Ranaweerage Thusitha Kumara
Ranaweera alias Chuti Mama

Accused-Appellant

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12;

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J. ACTING(P/CA)**

ACHALA WENGAPPULI J.

COUNSEL : Saliya Pieris P.C. with V. de Seram and S. Ranasinghe for the Accused-Appellant.

A.R.H. Bary S.S.C. for the respondent

ARGUED ON : 23-10- 2018 & 26-11-2018

DECIDED ON : 22nd February, 2019

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ACHALA WENGAPPULI J.

This is an appeal by the Accused-Appellant (hereinafter referred to as the "Appellant") against his convictions for offences punishable under Sections 354 and 365B(2)(b) of the Penal Code as amended and the sentences that are imposed upon said convictions. In relation to the 1st count under Section 354, the Appellant was imposed a two-year term of imprisonment with a fine of Rs. 5000.00 and a default term of three months of imprisonment. For the count under Section 365B(2)(b), the Appellant was imposed a ten-year term of imprisonment with a fine of Rs. 5000.00 and a default term of three months of imprisonment. He was also ordered to pay Rs. 50,000.00 as compensation to the victim and in default eight months of imprisonment.

Being aggrieved by the said convictions and sentences, the Appellant sought intervention of this Court to set them aside on the following grounds of appeal:-

a. the trial Court has erroneously found him guilty to the 1st count when the evidence fails to establish the said count,
b. the trial Court has erroneously shifted burden of proof on him in establishing his defence.

The prosecution presented its case on the evidence of the victim, his grandfather *Chandrasiri* and an aunt *Taranganie*, the Police and the medical officer who examined the victim.

According to the victim, he was about 11years of age at the time of the incident and the Appellant was his immediate neighbour. He used to call him as *Chuti Mama.* The Appellant was not married and had served in the Army. The victim had a strong liking to ride on motor cycles. The Appellant had a motor cycle at that time.

On the evening of the day in question, the Appellant came to the victim's house on his motor cycle. The victim was keen to ride on it, but his grandmother was not in favour of his request for permission. The victim, due to his eagerness to have a ride, despite the objection by his elders, went along with the Appellant, who then had taken the victim to his house on his motor cycle.

At his house, the Appellant has taken the victim to his room and undressed him. Thereafter the Appellant having undressed himself, had intercrural intercourse with the victim. At that time, the victim's grandfather *Chandrasiri* came to the Appellants house in search of the

victim. When the Appellant heard *Chandrasiri*'s enquiry about the victim from his own father, he immediately ran out of the room in which the incident took place. *Chandrasiri* has seen his grandson's legs under the door curtain and had thereafter took him home. The victim did not disclose what happened to *Chandrasiri* since he was told not to. But when his aunt *Tharanganie* threatened him to divulge what happened between them, he told her of his experience with the Appellant and also to his grandfather, who had then taken him to the Police on the following morning to make a complaint.

Chandrasiri in his evidence stated that the Appellant is a regular visitor to their home and is a person who maintained a close relationship with them. On the day of the incident, the Appellant sought his permission to take the victim to the nearby grocery shop on his motor cycle. The witness has reluctantly granted permission since the Appellant appeared drunk. During cross examination a contradiction (V1) was marked off his evidence on the basis what he told police. The witness told police that the Appellant sought permission to take the victim to his residence which is inconsistent with his evidence that it was to the grocery.

When *Chandrasiri* later saw the Appellant's motor cycle parked at his house, went in search of the victim and has enquired from the Appellant's father whether the victim was there. His reply was in the negative. Then the witness entered the Appellant's house and saw the victim in the room. He was shivering with fear. The witness then took the victim home and, on their way, has asked him what happened. The victim did not answer and remained silent. Upon questioning by *Taranganie* the

victim narrated the incident to her, who then conveyed it to the witness. The victim thereafter repeated what he told his aunt to the witness.

During his cross examination, *Chandrasiri* said that after the Police complaint, the Appellant came to his house seeking forgiveness.

Taranganie supports her father's evidence and, in addition confirms the Appellant's subsequent attempt to reconcile the incident.

It is in the light of the evidence referred to above, that had been presented before the trial Court by the prosecution, the grounds of appeal of the Appellant should be considered.

His first ground of appeal appears to have some merit since the prosecution evidence falls short of the required level of proof. The evidence is that the victim was eager to take a ride with the Appellant. *Chandrasiri* had some hesitation to approve the Appellant's request to take the victim along with him, due to the latter's alcohol consumption, but nevertheless granted permission. The prosecution made an attempt to interpret this evidence to read that the permission was granted only to take the victim to the grocery but not to the Appellant's house. The contradiction V1 shows that the Appellant's request to *Chandrasiri* was to take the victim to his house. *Taranganie* also states that the Appellant was after liquor and she did not approve the victim tagging along with him. When she heard that the victim took a ride with the Appellant, she prevailed upon *Chandrasiri* to bring the victim home.

However, the evidence is clear that the Appellant sought permission from the guardian of the victim to take him home, which though reluctantly, granted.

Professor *G.L. Peiris* in his book ***"Offences under the Penal Code"*** observed (at p. 187) that *" the severance of the child from its guardian's custody must be an objective fact at the time the accused arrived at the scene. Where the child communicates her independent decision to the accused in these circumstances and calls on him to look after her the accused cannot be considered to have "taken" or "enticed" the child merely because he does not remonstrate with her or try to persuade her to return home. The accused is not required to do this."*

In the instant appeal too, the facts reveal that the victim was eager to ride on the Appellant's motor cycle. Being his immediate neighbour, he sought permission of the guardian of the victim which was duly granted. There is no definitive evidence that *Chandrasiri* specifically told the Appellant not to take him to the adjoining house. In ***Nalliah v Herath*** 54 N.L.R. 473, it has been stated by Gratian J. *" ... where a minor leaves the immediate custody of his lawful guardian for a temporary purpose he must be deemed still in the guardian's keeping and the correct view is that the relationship of guardian and child suffers no break in its continuity as long as there is not interference with the child's opportunity of returning to the guardian."*

In view of the above, it is our considered view that the evidence presented by the prosecution in support of the kidnapping from the lawful guardianship falls far short of the required level of proof, being beyond reasonable doubt. Accordingly, we set aside the conviction and sentence imposed on the first count of the indictment.

Moving on to the second ground of appeal that the trial Court has erroneously shifted burden of proof on him in establishing his defence, learned President's Counsel for the Appellant contended that the trial Court misdirected itself in expecting the Appellant to call evidence that corroborated his claim that he was in the washroom when *Chandrasiri* came looking for the victim. Since this is not a case based on items of circumstantial evidence, it was argued by the learned President's Counsel that the *Ellenborough* dictum has no application in this instance.

The relevant passage in the judgment is reproduced below.

> "චූදිත තම සාක්ෂියේදී ප්‍රකාශ කරන්නේ මෙම දරුවා තම නිවසට එදින යතුරුපැදියෙන් රැගෙන ආ බවයි. එහෙත් එම දරුවා එළියේ ඇති මාලු ටැංකිය අසල තබා තමාට ඇතිවූ බඩේ අමාරුවක් නිසා වැසිකිලියට ගිය බවයි. වැසිකිලියට ගොස් එනවිට දරුවාගේ සීයා පැමිණ මෙම දරුවා නැවත ඔවුන්ගේ නිවසට රැගෙන ගොස් තිබුණු බවයි. මෙය කිසිසේත්ම පිළිගැනීමට හැකියාවක් ඇති සාක්ෂි නොවේ. එවිට ඔහුගේ පියාද දයාරත්න මාමා ලෙස හඳුන්වන තැනැත්තන්ද නිවසේ සිටි බව ඔහු කියයි. එසේ නම් එම තැනැත්තන් චූදිත වෙනුවෙන් ඉදිරිපත් කර එකී ස්ථාවරය පිළිබඳව තහවුරු කිරීමට හොඳම සාක්ෂිය එම බවට අධිකරණය නිගමනය කරයි. චූදිතයෙකුට සාක්ෂි කැඳවීමට වගකීමක් නොමැති නමුත් ඔහුට එරෙහිව බරපතල ලෙස අපරාධමය තත්වය තහවුරු කර ඇති අවස්ථාවක ඒ සම්බන්ධයෙන් පිළිගත හැකි සාධාරණ පැහැදිලි කිරීමක් නීතිය බලාපොරොත්තුවේ. ඒ අනුව එවැනි සාධාරණ වූ පැහැදිලි කිරීමක් චූදිතගේ සාක්ෂියෙන් පමණක් ඉදිරිපත් නොවන බව මෙම අධිකරණයේ පිළිගැනීමයි."

It is seen from the quoted portion of the judgment, the trial Court was of the view, if the Appellant claims that he was in the washroom while the victim remained near the fish tank, that he could have "corroborated" (තහවුරු) this claim by calling the other inmate of his house, *Dayaratne Mama* as a witness on his behalf. This particular passage seemed that the Appellant's evidence on this question of fact needed support from a third party in order to succeed. The trial Court, at the end of its judgment

concluded that the evidence presented by the Appellant was not sufficient to raise a reasonable doubt in the prosecution's case. It is doubtful whether the trial Court was considering the evidence of the Appellant at that stage for its credibility or sufficiency in establishing his claim of being elsewhere. It appears that its more on the question of sufficiency. If that is the case, then there is some merit in the contention of the learned President's Counsel that there was an apparent shift of burden on the Appellant.

The trial Court had sufficient material before it if it was inclined not to accept the Appellant's evidence as credible. During the prosecution's case, the Appellant consistently maintained that due to the animosity that existed between him *Chandrasiri* over the alleged killing of latter's house dog, this false allegation was concocted against him using the victim.

However, the Appellant, during his evidence stated that other than the dispute he had with *Chandrasiri* was over a fence and some incident involving some pet birds, there was no other problems between them. Thus he effectively negates the position he has already put to the prosecution witness. In addition, the prosecution highlighted two inconsistencies in his evidence with what he stated to Police by marking them as X1 and X2.

The contradiction X1 refers to the reason for his physical disability while the contradiction X2 refers to the reason he went to the grocery that evening.

More than any of these inconsistencies, there is one glaring item of evidence that has come up during the cross examination of *Chandrasiri.* This witness claimed that the Appellant made an unsuccessful attempt to

reconcile the incident after the complaint was lodged. There is no challenge on this item of evidence during the remainder of the cross examination. In addition, that fact is supported by *Tarnganie.* The Appellant did not cross examine her either on this claim and failed to challenge it in his evidence under oath.

In this context it is relevant to refer to a principle that had been recognised by this Court in such circumstances. This Court, in its judgment of ***Karunartne v Attorney General*** (2007) 1 Sri L.R. 255, quoted the judgment of ***Thisera v Attorney General*** -CA 87/2005 - decided on 15.05.2007 where it was held that

> *" ... whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."*

This unchallenged item of evidence of the subsequent conduct of the Appellant cuts across the denial he maintained during the trial before the High Court, which made his evidence not worthy of any credit. In fact, one could even argue that there was a tacit admission of guilt by the Appellant upon his silence over this factual situation. In these circumstances, the rejection of the Appellant's evidence as unreliable by the trial Court could well be justified.

Retuning to the 2nd ground of appeal raised by the Appellant, it appears that the trial Court had erroneously shifted an evidentiary burden on him. However, this Court must then consider whether it should act

under the proviso to Section 334(1) of the Code of Criminal Procedure Act No .15 of 1979 or not,since this is an instance where the error was made in relation to burden of proof.

The leading authority on the point is the judgment of the Supreme Court in ***Mannar Mannan v Republic of Sri Lanka***(1990) 1 Sri L.R. 280, where a divisional bench of the Supreme Court has held that;

> *"... there is no hard and fast rule that the "proviso" is inapplicable where there is a nondirection amounting to a misdirection in regard to the burden of proof. What is important is that each case, falls to be decided on a consideration of (a) the nature and extent of the nondirection amounting to a misdirecton on the burden of proof, (b) all facts and circumstances of the case, the quality of the evidence adduced, and the weight to be attached to it.*

We have carefully considered the evidence presented before the trial Court by the prosecution as well as the Appellant. It has already been decided that there were sufficient reasons to reject the evidence adduced by the Appellant. The prosecution evidence has proved its case beyond reasonable doubt that the Appellant did commit the offence of grave sexual abuse on his victim. In view of this finding, we are of the firm view that this is a fit case where this Court should act under the proviso to Section 334(1) of the Code of Criminal Procedure Act No .15 of 1979.

Accordingly, we affirm the conviction and sentence on the Appellant in relation to the 2nd count. We already decided to acquit the Appellant on the 1st count by setting aside his conviction and sentence.

His appeal is therefore partly allowed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J. ACTING(P/CA)

I agree.

ACTING PRESIDENT OF THE COURT OF APPEAL