

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.No.215/2016

H.C. Kuliyapitiya No 143/2013

Sathana Naidelage Dayaratne alias  
"Mama"

Accused-Appellant

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Respondent

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**BEFORE** : DEEPALI WIJESUNDERA, J.  
ACHALA WENGAPPULI, J.

**COUNSEL** : Dushantha Kularatne for the Accused-  
Appellant.  
Anoop de Silva S.S.C. for the respondent

**ARGUED ON** : 06<sup>th</sup> February, 2019

**DECIDED ON** : 05<sup>th</sup> April, 2019

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**ACHALA WENGAPPULI, J.**

This is an appeal by the Accused-Appellant (hereinafter referred to as the "Appellant") against his conviction for the offence of rape under Section 364(2)(e) of the Penal Code as amended by Act No. 22 of 1995 and imposition of a sentence of imprisonment for a period of eight years. He was also imposed a fine of Rs.25,000.00 with a default term of two years imprisonment. The trial Court ordered the Appellant to compensate his victim with Rs. 150,000.00 and in default another term of imprisonment for two years was imposed.

Being aggrieved by the said conviction and sentence, the Appellant sought intervention of this Court seeking to set them aside on the basis that the trial Court has;

- a. erred in convicting the Appellant without evidence of vaginal penetration,
- b. erred in convicting the Appellant in its failure to consider the credibility of the prosecutrix
- c. erred in convicting the Appellant after arriving at a wrong conclusion on demeanour of a witness.

The case against the Appellant was that he had placed his penis on the vagina of the prosecutrix who came to his house to iron some clothes. They are related to each other and are neighbours. The prosecutrix *Kalani Buddhika*, is a 13-year-old student who had addressed the 57 year old Appellant as "mama". On the day of the incident, the Appellant's family members and *Kalani* have planned a trip to *Panduwasnuwara* where a pandall was erected. Wife and daughter of the Appellant have left early to visit one of their relatives. *Kalani* was told by *Nimesh*, a 10 year old grandson of the Appellant, to do the ironing for their planned visit in the evening. When *Kalani* arrived at the Appellant's house, he gave some cash to *Nimesh* asking to bring some "sookiri" from the nearby grocery. Only the Appellant and *Kalani* were left in the house. Then the Appellant pulled her into a room. Having removed her garments he held her against the wall and pressed his penis on her vagina. She felt his penis on her vagina and pain.

At that point of time, *Nimesh* returned home and called out her name. She could not respond as the Appellant told her not to move. *Kalani's* mother *Chirawathie* came in search of her daughter and had taken



her home. *Kalani* was crying and had told her mother of the incident. Her elders have decided to lodge a police complaint.

The medical evidence reveals that the medical officer who examined *Kalani* within 24 hours of the incident observed reddening in her vaginal lips, which in his opinion, is compatible with intralabial penetration but short of her hymen, as related to by *Kalani* in the short history.

The question of penetration was considered by the trial Court quite extensively in its judgment. It had relied on the judgment of CA 88/2002 where it has been held that "*Penetration can be minimum by placing the penis between the labia majora or labia minora would be sufficient,*" in reaching its conclusion that there was sufficient degree of penetration into vagina to constitute the offence of rape. We are in full agreement with this conclusion since the medical evidence is precise on the point.

In relation to the complaint of the credibility of *Kalani*, the Appellant submitted that she is a very unreliable witness who said more than 25 times during her evidence that she cannot remember. In view of the contradictions and omissions, taken together with her evasive answers, it was contended that the trial Court erred in accepting her evidence as truthful and reliable account.

Perusal of the judgment of the trial Court revealed that it was mindful of the effect of the omissions and inconsistencies that had been highlighted off her evidence. Having considered the infirmities highlighted by the Appellant, the trial Court attributes those to the failing memory of the relatively young victim, who has had no notion of the importance of remembering them. The trial Court found corroboration of

*Kalani's* evidence on the shopkeeper's evidence that a young boy came to his shop to buy sweets twice on a day and on the medical evidence which supported her.

The third ground of appeal relates to the remarks made by the trial Court upon the demeanour of *Kalani's* mother when called by the prosecution in support of its case. The trial Court noted that she was under some apprehension in giving evidence against the Appellant and had no courage to look straight into the Appellant's face when making her dock identification. The trial Court attributes the reluctance on the part of the witness to implicate a close family relative due to pressure from other family members.

We have carefully perused the evidence of *Chiththrawathie* and it appears that she did not volunteer any evidence during her examination in chief. She was apparently more descriptive in her evidence during her cross examination. When questioned by Court only she did say that she was told by her daughter what happened to her inside that house. We have no reason to question the correctness of the assessment of the credibility of this witness by the trial Court utilising the priceless advantage it had in observing the demeanour and deportment of the witness.

The Appellant denied the incident in his short dock statement.

Considering the totality of the evidence presented before the trial Court, we hold that it had reached the correct conclusion on them by convicting the Appellant for the count of rape. We see no merit in the appeal of the Appellant.

Therefore, we affirm the conviction and sentence imposed on the Appellant.

His appeal stands dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL