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

In the matter of an appeal under and in terms of the Article 138(1) of the Constitution read with the Section 11(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

**Complainant**

CA. No. 303/2018 **Vs.**

High Court of Dasanayaka Pathirennahalage Punchi Banda

Kuliyapitiya **Accused**

Case No.44/2017 **And Now Between**

Dasanayaka Pathirennahalage Punchi Banda

**Accused-Appellant**

**Vs.**

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

**Complainant-Respondent**

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Kasun Liyanage Assigned Counsel for the Accused-Appellant.

Sudharshana De Silva DSG., for the Respondent.

ARGUED ON : 07.03.2021

DECIDED ON : 29.07.2021

.

R. Gurusinghe, J

The accused-appellant was indicted in the High Court of Kuliyapitya on two counts, namely,

1. On or about 9th March 2009, at Dambadeniya within the jurisdiction of that Court, the accused committed the offence of kidnapping a girl under age of 16 from legal guardianship punishable under Section 354 of the Penal Code and,
2. The offence of grave sexual abuse punishable under Section 365 (b) (2) (b) of the Penal Code as amended by Act Nos. 22 of 1995 and 29 of 1998.

After the trial, he was convicted of both charges and sentenced to five years rigorous imprisonment for the first count with a fine of Rs.10,000/- and for the second count 15 years of rigorous imprisonment with a fine of Rs. 10,000/- and in default a term of six months and in addition, compensation of Rs. 500,000/- to the victim with a default term of two years simple imprisonment.

Being aggrieved by the conviction and the sentence, the appellant preferred this appeal to this Court. When this appeal was taken up for hearing, the

learned assigned counsel for the appellant submitted that he would confine his argument to the first ground of appeal.

The first ground of appeal is whether the learned Trial Judge had failed to take into consideration that it was not safe to act upon the evidence of PW1 regarding the identification of the accused-appellant.

The argument for the appellant is that as per the evidence, PW1 did not sufficiently acquaint with the accused-appellant, and therefore, identification of the appellant in the Court is not safe to act upon.

This was taken up for trial about seven years after the incident, by which time the appearance of the appellant had changed. At the time of trial, the appellant had long hair and a beard. However, the PW1 and PW2 had identified him as the person who committed the sexual abuse. The argument was that in addition to the appellant, there were about 2-3 people who had worked at the carpentry workshop. PW2, the mother of PW1 in the first complaint to the police of Giriulla, had categorically stated that she knew the appellant very well.

The PW1 and PW2 had shown the place where the alleged incident had taken place. In the statement to the police, PW1 had referred to the appellant as "පහල ගෙදර ඉන්න මාමා" and not as "පහල ගෙදර ඉන්න මාමා කෙනෙක්".

One of the complaints of the appellant is that after the first date of trial, the learned High Court Judge had kept PW1 in the custody of a home that night and thereby unduly influenced PW1 to give evidence against the appellant. This Court does not approve such a course adopted by the learned Trial Judge. However, for that reason alone, an offender cannot be freed.

As the learned Deputy Solicitor General for the Respondent has pointed out, prior to placing PW 1 in custody at home on the first date of trial took place

where PW1 had stated that the person who had worked at Sanjeewa Mama's carpentry workshop was the appellant.

On the first date of trial, PW1 stated as follows:

“ප්‍ර: දැන් ඔයාට ඒ මාමා අඳගැහුවද?

උ: එක්කන් ගියා.

ප්‍ර: මොනවහරි දෙනව කිවුවද?

උ: සෙල්ලම් බඩු දෙනව කිවුව.

ප්‍ර: සෙල්ලම් බඩු දෙන්ව කියල කතා කරපු අය කලින් දැකල අඳුනන කෙනෙක්ද?

උ: දැකල තියෙනව.

ප්‍ර: කොහොමද දැකල තියෙන්නෙ?

උ: වඩු මඩුවෙදි.

At page 67

ප්‍ර: ඒ හසිනිගෙ ඇඟ උඩ නැගල එහෙම කරපු මාමා අද අධිකරනයේ ඉන්නවද?

උ: ඔව්.

ප්‍ර: කොහේද ඉන්නෙ?

උ: විත්ති කූඩුවේ සිටින චූදිත පෙන්වා සිටී (සාක්ෂිකාරිය විත්ති කූඩුවේ සිටින චූදිත පෙන්වා සිටී)

Even though she had not known the name of the appellant, she had given the description of the appellant.

At page 101

ප්‍ර: පොලිසියට එදා කිවුවේ ඇත්තටම උන සිද්ධියක්ද? නැත්නම් අම්ම කියන්න කීව දෙයක්ද?

උ: නැහැ ,මට වෙච්ච සිද්ධියක්.

ප්‍ර: හසිනි,එදා පොලිසියට ගිහිල්ල තිබුනේ පුතාගෙ අම්ම පොලිසියට මෙහෙම කියන්න කියල කිවුව දේ කියල කිවුවොත් පිලිගන්න පුලුවන්ද?

උ: බැහැ.

At page 103

ප්‍ර: මේ කූඩුවේ ඉන්න මාමාගෙන් ඔයාට කරදරක් උනේ නැහැ කියා කිවුවොත් ඔයා පිලිගන්නවද?

උ: කරදරයක් උනා.

PW2, the mother of the victim, had stated that she went to fetch water with her younger child. She had seen her elder son and daughter PW1 going to the carpentry workshop. When she came back within five to ten minutes, only her son was at home. He had told her that the appellant had asked for a box of matches. Then she had called out to her daughter three, four times and had gone near the road. It was a small road, and the carpentry shop was on the other side of the road**.** Then the victim had come running, and after going home, the victim was crying. The victim told her that the appellant had put her on the ground and touched her genital area.

When considering the evidence of PW1 and PW2 together, I get the impression that they are truthful witnesses. We find no reason to disbelieve their evidence. There

were no contradictions; only two omissions were marked. However, those omissions are not vital omissions. A complaint was lodged promptly. The history was given to the doctor also tallies with the evidence in Court.

The alleged incident happened at about 5.00 p.m., in the evening of 9th March 2009. The following day morning, a complaint was lodged with the Giriulla police. The appellant was not a complete stranger to PW1 or PW2. Both of them had seen the appellant before the incident. As per PW2's complaint, the appellant had been working at the carpentry workshop about three, four months prior to the incident. She had seen him often. Even though she had not known the name of the appellant, she had given the descriptions of the appellant. She had explicitly stated that she knew the appellant very well.

According to the investigation officer's evidence, both PW1 and PW2 had shown the place where the incident had taken place, and that was a ten-by-ten feet room, where the appellant used to sleep. A camp bed which used by the appellant was also present in the room.

In view of the aforementioned evidence, identification of the appellant cannot be considered as mere dock identification. The appellant was a known person to PW1 and PW2 for about three, four months prior to the incident. Therefore, there is no mistake in the identity. There was no suggestion by the appellant at the trial that it could have been someone else who had worked at the carpentry workshop. The learned High Court Judge has considered the issue of the identification of the accused-appellant, and after considering the evidence, he had come to a decision.

All the arguments about the identification of the appellant could have been correct if the appellant was a complete stranger to the witnesses prior to the incident. There was no allegation that PW1 or PW2 had given false evidence. The argument was that PW1 and PW2 could have made a mistake in identifying the appellant. This argument cannot be sustained in view of the above evidence.

There are no discrepancies that affect the credibility and trustworthiness of the witnesses.

The order of the learned Trial Judge to keep PW1 in the custody of a home was inappropriate. However, as I mentioned above, PW1 had identified the appellant and described the incident before she was sent to a home to be present in the Court on the following day.

The proviso to section 334(1} of the Code of Criminal Procedure Act states: -

'Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

In the case of Mannar Mannan V. The Republic of Sri Lanka 1987 (2) S.L.R94 it was held that the purpose of the proviso is to prevent appeals being allowed on the basis of technicality, regardless of whether prejudice has been caused or not to an accused person.

Although the learned trial Judge had made this inappropriate order, the evidence establishes the charge against the accused-appellant. The Court of appeal, in terms of proviso to section 334 of the Code of Criminal Procedure Act has the power to affirm a conviction.

Therefore, I hold that there was no miscarriage of justice. The prosecution has proved the case beyond a reasonable doubt.

For the above reasons, I refuse to interfere with the judgment of the learned trial Judge and affirm the conviction.

The appellant has no previous convictions. He is now over 60 years old. As he was unable to supply bail money and find a surety, he had been languishing in remand custody for a long period. Considering the above facts, the punishment imposed for the second count is reduced to ten years. The rest of the punishment is not changed.

However, we direct all the sentences to run concurrently and are deemed to have been served from the date of the conviction, namely 26/11/2018.

Subject to the variation of the sentence, the appeal of the appellant is dismissed.

Judge of the Court of Appeal

**N. Bandula Karunarathna, J.**

I agree.

Judge of the Court of Appeal