IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal under Section 331 of the Criminal Procedure Act No. 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No. HCC/0289/2019

V.

High Court of Chilaw Case No. HC/30/2018

Withanapathiranalage Dickshon Nihal Appuhamy

Accused

AND NOW BETWEEN

Withanapathiranalage Dickshon Nihal Appuhamy

Accused – Appellant

V.

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

Complainant - Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J. (P/CA)**

SAMPATH B. ABAYAKOON, J.

COUNSEL	:	Duminda De Alwis and Charuni De Alwis for the Accused – Appellant. Janaka Bandara, Senior State Counsel for the Respondent.
ARGUED ON	:	13.08.2021
WRITTEN SUBMISSIONS FILED ON	:	23.07.2020 and 04.10.2021 by the Accused Appellant. 27.08.2020 and 23.11.2021 by the Respondent.
JUDGMENT ON	:	17.12.2021

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K. PRIYANTHA FERNANDO, J.(P/CA)

1. The accused appellant (hereinafter referred to as appellant) was indicted in the High Court of *Chilaw* for one count of Rape punishable in terms of Section 364(1) of the Penal Code. Upon conviction after trial, the appellant was sentenced to fifteen years' rigorous imprisonment. In addition, the appellant was ordered to pay a fine of Rupees Twenty Thousand and in default of payment of such fine, to serve six months' imprisonment. Further, the appellant was ordered to pay Rupees Two Hundred Thousand to the victim (PW1) and in default of payment of such compensation the appellant was ordered to serve one years' imprisonment.

2. Being aggrieved by the above conviction and the sentence, the instant appeal was preferred by the appellant. The learned Counsel for the appellant urged the following grounds of appeal:

    I. The learned trial Judge had failed to consider the belatedness of PW1's complaint to the police against the appellant.

    II. The learned trial Judge failed to assess the credibility and trustworthiness of PW1's evidence.

III. The learned trial Judge failed to consider the material contradictions in the prosecution evidence.

IV. The prosecution failed to prove the case beyond reasonable doubt.

3. Brief facts of the case:
As per the testimony of the victim PW1, she had been living with her mother, step-father and five year old sister. At the time of the incident she had been twenty years old. The incident had taken place on a Sunday (31.07.2011). The mother had gone to buy the groceries to the Sunday fair. She had been at home with the step-father (the appellant) and the sister. The appellant had been consuming alcohol in the sitting room. After having a bath, she had come to her room wearing a towel, to change. Then the appellant had come and held her by the hand and covered her mouth. Within the scuffle, her head struck on the wall or the cupboard where she fell unconscious. When she regained consciousness she has felt dizzy and also pain in the genital area. When she came out of the house after dressing herself, she has seen the appellant sleeping on the floor near the cot where the sister was. The appellant had on and off harassed the PW1 threatening not to tell the mother about the incident. Due to the fear of the appellant she had not told the incident to the mother. However, after she went for work she had told her friend about the incident and gone to see a doctor with the friend's mother. She has got to know from the lady doctor that she is no more a virgin. Thereafter, as her friend could not keep her at their place she had gone and boarded herself at a boarding place. She had told about the incident to her mother. The appellant had come in search of her with the mother to the workplace where she had told her workmates not to tell her whereabouts.

She had got to know that the appellant is assaulting the mother and she had gone and made a complaint to the police. Upon making the complaint and coming out of the police station, one lady named *Thusitha* from the "*World Vision*" Organisation had inquired from her as to what happened. *Thusitha* had been helping their family on and off before. *Thusitha* had contacted a lawyer and on the lawyer's advice she had gone and made a statement about the sexual assault incident by the appellant to the police.

4. The learned Counsel for the appellant submitted that the PW1 has complained to the police three weeks after the incident and that affects her credibility. It was further submitted that she went to the police station to complain about the appellant assaulting the mother, but not on rape.

5. In case of ***Sumanasena v. Attorney General [1999] 3 Sri LR 137***, Their Lordships referred to what was said by Justice T.S. Fernando in ***Queen v. Pauline De Croos [1968] 71 NLR 169*** at p. 180

> *"...Just because the witness is a belated witness the Court ought not to reject his testimony on that score alone and that a Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness. ..."*

6. A similar view was expressed in ***Samarakooon v. The Republic [2004] 2 Sri LR 209*** Court held:

> *"...Just because a statement of the witness is belated the Court is not entitled to reject such testimony. In applying the Test of Spontaneity, the Test of Contemporaenity and the Test of Promptness the Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced by the witness are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement. ..."*

7. In the instant case, the Court has to be mindful of the fact that the father of the victim was dead and the appellant was her step-father. Therefore, the PW1 had been in a vulnerable state although she was a working girl of twenty years of age. Her evidence was that she was threatened by the appellant not to divulge anything that happened, to her mother. In fact, the appellant had come along with the mother looking for her to the workplace where she has avoided them. It is understood and probable that the PW1 was reluctant to rush to the police station in the circumstances especially when the appellant is her step-father and also the father of her step-sister. If not for the encouragement given by the lady named *Thusitha* from the "*World Vision*" Organisation she may not have made the complaint even on that day. She had not even told about the incident to her mother immediately, which also can be accepted in the circumstances. It is well understood that she may not have rushed to make a complaint due to the social stigma that may be attributed to her as a result. Her delay in making the complaint has to be considered in that context. Therefore, the delay in making the complaint will not affect the testimonial trustworthiness of the victim PW1.

8. The learned Counsel for the appellant submitted that the lady by the name of *Thusitha* from the "*World Vision*" Organisation as well as the lady doctor who examined the PW1 initially were not called by the prosecution to testify although they would have been the best witnesses. Even the friend of the PW1 to whom she told first about the incident was not called by the prosecution.

9. The prosecution is not bound to call all the witnesses in the back of the indictment. The presumption under Section 114 illustration (f) of the Evidence Ordinance may be drawn only if a material witness essential to the unfolding of the narrative is not called. In the instant case, the said witnesses are not even listed in the indictment, and the police may not have recorded their statements. In terms of Section 134 of the Evidence Ordinance, no particular number of witnesses shall in any case be required for the proof of any fact. Hence, the prosecution cannot be found fault with for not calling the said witnesses to testify.

10. The learned Counsel for the appellant submitted that some material contradictions were highlighted during the testimony of the PW1 that affects her credibility. In that, he submitted that the PW1 said that she was not wearing any clothes when she regained consciousness but when cross-examined she admitted that she had a cloth on her body. The PW1 initially has said when she regained consciousness she was not wearing clothes. In cross-examination she admitted that she had told the police that she was covered with a piece of cloth. Not wearing clothes and covered with a piece of cloth should not be taken as a contradiction that affects the credibility of PW1.

11. The PW1 never said that the appellant inserted the penis into her vagina. All what she said was she fell unconscious and when she regained consciousness her vaginal area was painful. She has told the same thing to the Medical Officer PW4 who testified in Court. Her evidence has been consistent and she can be considered a credible witness.

12. The main argument of the Counsel for the appellant was that the prosecution has failed to prove all the elements of the offence of Rape beyond reasonable doubt. In that, the prosecution has failed to prove that the appellant inserted his penis into her vagina (penile penetration). The learned Senior State Counsel for the respondent conceded that there is no direct evidence that there had been penile penetration. According to the evidence of the victim PW1, when she regained consciousness she had felt pain in her vaginal area. The Medical Officer PW4 has opined that there had been vaginal penetration. However,

there is no evidence, direct or circumstantial, to prove that the penetration that had occurred into the vagina of the victim had been penile. There is no other evidence, for example semen, to show that there had been penile penetration. Hence, the Senior State Counsel conceded that the prosecution has failed to prove the offence of Rape. In the above premise I find, for want of evidence on the main element of penile penetration, the prosecution has failed to prove the charge of Rape and that the learned High Court Judge has erred when she convicted the accused for rape. Hence, the conviction of the appellant for rape is set aside.

13. However, the learned Senior State Counsel submitted that there is evidence that there had been penetration into the vagina and that it was caused by the appellant. In her evidence, the PW1 had denied having any sexual penetration by anyone else other than the instant incident that happened with the appellant. Therefore, it is the contention of the learned Senior State Counsel that the learned High Court Judge should have convicted the appellant for a lesser offence of Grave Sexual Abuse.

14. The learned Counsel for the appellant contended that the offence of Grave Sexual Abuse is not a cognate offence to the offence of rape and therefore the appellant cannot be convicted for Grave Sexual Abuse as he was not charged for the same. It is the contention of the learned Counsel for the appellant that if the Court finds that there is evidence to prove the offence of Grave Sexual Abuse, the only option is for the Court to send the case back to the High Court for retrial so that the Attorney General can indict him for Grave Sexual Abuse if he so wishes.

15. The learned Counsel for the appellant relied upon the cases of ***CA appeal no. 88/2002 argued and decided on 19.06.2007*** and ***Mohamed Aboobakar Ibrahim v. Hon. Attorney General CA 191/2002 decided on 12.08.2016***.

16. In this context, it is imperative to carefully consider and analyse Section 177 to be read with Section 176, and Section 178 of the Code of Criminal Procedure Act where the latter speaks about minor offence and the former does not.

> *"176. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial before the High Court may be included in one and*

the same indictment; or may be charged with having committed one of the said offences without specifying which one.

177. If in the case mentioned in section 176 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

178.
(1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved he may be convicted of the minor offence though he was not charged with such offence.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence he may be convicted of the minor offence although he was not charged with it and although jurisdiction to try such minor offence is exclusively vested in some other court.

(3) Anything in this section shall not be deemed to authorize a conviction for any offence referred to in section 135 when a complaint has not been made as required by that section."

17. It is the contention of the learned Counsel for the appellant that the ingredients of the offences of Grave Sexual Abuse and Rape are distinguished from each other and are different and do not contain similar ingredients and therefore Grave Sexual Abuse cannot be considered as a lesser offence of Rape. However, he submits that those two offences are cognate offences in different classes and categories in the Penal Code. The learned Counsel for the appellant further submitted that this is not a case even to send for a retrial.

18. It is the contention of the learned Senior State Counsel that it is practically impossible to commit Rape without committing Grave Sexual Abuse. It is his contention that the moment the penis (in case of Rape) or any other instrument, genitals or any other part of the human body is placed on the vagina without the consent of the victim, the offence of Grave Sexual Abuse is completed and the moment the penis penetrates the vagina the offence of Rape is completed. In discussing Section 177 to be read with Section 176 of the Code of Criminal

Procedure Act, it is important to consider what *Soertsz J.* observed in the case of ***King v. Piyasena [1942] 44 NLR 58***:

> *"...The answer to the question raised seems to me to depend on the interpretation of sections 181 and 182 of the Criminal Procedure Code. Section 182 is the only relevant section, in the circumstances of this case, that can be advanced, as enabling a Court, when an accused is charged with one offence, to convict him of another offence, although he was not specifically charged with it, if it appears from the evidence that he might have been charged with it. But the scope of this section is expressly limited to "the case mentioned in the preceding section". ...*
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> *...The illustration appended to this section shows that the different offences contemplated are cognate offences, and it is doubtful which of these acts or series of acts may, ultimately, be found to constitute. This section, however, postulates a case in which a doubt arises from the nature of the fact or series of facts and not from a failure to appreciate the value of unambiguous facts or from an inaccurate view of the position in law arising from those facts. ..."*

19. In the instant case, the prosecution has proved beyond reasonable doubt that there had been penetration into the vagina. Medical evidence has confirmed the penetration. As mentioned before in paragraph 12 of this judgment, the prosecution however, has failed to establish that it was the appellant's penis that was used in penetration. The charge of Rape failed due to that reason. However, insertion of any other part of the human body or an instrument to the vagina will constitute the offence of Grave Sexual Abuse as defined in Section 365B of the Penal Code. Hence, when the charges were framed there had been a clear doubt as to which offence was committed, Rape or Grave Sexual Abuse, as the PW1 was unconscious when the penetration happened. Thus in terms of Section 176 of the Code of Criminal Procedure Act the prosecution was entitled to indict him either for Rape and alternatively Grave Sexual Abuse or for one of the offences. As it was doubtful as to which of those offences the facts which can be proved will constitute, the succeeding Section 177 provides for convicting for the offence which the appellant is shown to have committed although he was not charged with it. It is also pertinent to note that Rape and Grave Sexual Abuse come under the same class of sexual offences and also defined in the same chapter of offences affecting the human body, Chapter XVI of the Penal Code. As there was a doubt as to which of the offences was

committed due to the nature of the act, the Honourable Attorney General could have indicted the appellant with a charge of Grave Sexual Abuse as well, at least alternatively. As the prosecution has proved all the elements to constitute Grave Sexual Abuse as provided in Section 365B (1)(a) of the Penal Code beyond reasonable doubt, the appellant can be found guilty and convicted for the same in terms of Section 177 of the Code of Criminal Procedure Act, although he was not charged with Grave Sexual Abuse.

20. However, it is also incumbent upon the Court to conclude that there was no prejudice caused to the appellant in convicting him for Grave Sexual Abuse when he was not charged with the same. The Court will have to consider whether he would have been taken by surprise or whether he did not have the opportunity to defend himself for Grave Sexual Abuse. The accused was right throughout represented by Counsel at the trial. As I have mentioned before, the moment the penis, genitals or any other part of the human body or instrument touches the vagina without consent of the victim, the offence of Grave Sexual Abuse is completed. Hence, one cannot argue that the elements that constitute Grave Sexual Abuse would have taken the appellant by surprise and the appellant should have expected the same. Also, as mentioned before, Section 177 of the Code of Criminal procedure Act provides for conviction of such offence although not charged with it.

21. In the above premise, we find the appellant guilty of the offence of Grave Sexual Abuse on the PW1, punishable in terms of Section 365B (2)(a) of the Penal Code.

22. When imposing the sentence we take into consideration all the mitigatory circumstances submitted by the Counsel for the appellant in the High Court. It was submitted by the Counsel that the appellant was a first offender and was fifty seven years old, married with a school-going child. It was also mentioned that he was a disabled person but the sole breadwinner of the family by selling betel. The Court will also take into consideration that the Legislature has considered Grave Sexual Abuse a very serious offence. The prescribed punishment of a minimum of five years which may extend to twenty years reflects the intention of the Legislature. The Court will also take into consideration the fact that the appellant has taken advantage of the vulnerability of his step-daughter who was living in the same house with him. Taking those factors into consideration, the following sentence is imposed on the appellant – Ten years' rigorous imprisonment, in addition a fine of Rupees five Thousand to be paid, in default of payment of such fine three months'

simple imprisonment. In addition, the appellant is also ordered to pay Rupees One Hundred Thousand as compensation to the victim and in default of such payment of compensation, another one years' simple imprisonment. As the accused had been in incarceration since the date of sentence by the High Court, the sentence of imprisonment is ordered to run from the date of sentence namely 14.11.2019.

Appeal is allowed to the above extent.

PRESIDENT OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL