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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal Case No.
CA/HCC/ 0198/2016
High Court of Matara
Case No. HC/38/2013

Bopehetti Arachchige Rathnasiri

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Hafeel Fariz for the Appellant.** **Suharshie Herath Jayaweera, SSC for the Respondent.**
ARGUED ON	:	**23/02/2022**
DECIDED ON	:	**06/04/2022**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Matara for committing three counts of incest on his daughter namely Bopehetti Arachchige Nadeeka between 10/03/2000 to 10/05/2000 an offence punishable under Section 364(3) of the Penal Code as amended.

After the trial, the Appellant was convicted only for the first count and was sentenced to 18 years RI and a fine of Rs.10000/-, in default for which 06 months simple imprisonment had been imposed.

The Appellant was acquitted from the 2nd and 3rd charges of the indictment.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has provided his consent for this matter to be argued in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom from prison.

The Counsel for the Appellant advanced the following grounds of appeal:

1. Patent lack of jurisdiction of the court.
2. That the whole case for the prosecution is based on DNA evidence which is at best can only be considered as mere expert evidence and cannot be considered as conclusive evidence especially in the absence of other probative evidence.
3. That the victim was not 16 years old at the time and the date of birth was not proved by the prosecution.

In the first ground of appeal the Appellant contends that the charges had been filed without the sanction of the Hon. Attorney General. Hence it is lacking the jurisdiction of the court.

In the third ground of Appeal the Appellant contends that the victim was not 16 years old at the time and the date of birth was not proved by the prosecution.

As these two grounds are interrelated, these grounds will be considered jointly in this appeal.

In this case the Appellant was indicted on 03 counts for having committed an offence on three occasions between 10th March, 2000, to 10th May 2000 under section 364(3) of the Penal Code as amended that is, committing rape on the victim Bopehetti Archchige Nadeeka who was under 16 years of age when she stood in a relationship towards him as enumerated in Section 364(A) (1) of the Penal Code as amended.

Section 364(3) of the Penal Code states:

> "Whoever commits rape on a woman under sixteen years of age and the woman stands towards the man in any of the degrees of relationships enumerated in Section 364A shall on conviction be punished with rigorous imprisonment, for a term not less than fifteen years and not exceeding twenty years and with fine.

Section 364A (1) of Penal Code states:

> "Whoever has sexual intercourse with another, who stands towards him in any of the following enumerated degrees of relationship, that is to say —

a) either party is directly descended from the other or is the adoptive parent, adoptive grandparent, adopted child or adopted grandchild of the other; or

b) the female, is the sister of the male, either by the full or the half-blood or by adoption, or is the daughter of his brother or of his sister, by the full or the half blood or by adoption, or is a descendant from either of them, or is the daughter of his wife by another father, or is his son's or grandson's or father's or grandfather's widow; or

c) the male, is the brother of the female either by the full or the half blood or by adoption, or is the son of her brother or sister by the full or the half blood or by adoption or is a descendant from either of them, or is the son of her husband by another mother, or is her diseased daughter's or granddaughter's or mother's or grandmother's husband, commits the offence of 'incest'."

364A (4) states:

> "No prosecution shall be commenced for an offence under this section except with the written sanction of the Attorney General."

In this case the Appellant was not charged under 364A of the Penal Code as amended. He was charged under Section 364(3) of the Penal Code as amended. The sole reason for mentioning 364A of the Penal Code as amended in the body of the charge framed under 364(3) is to establish the prohibited sexual intercourse the Appellant had with his biological daughter. Hence, it is crystal clear that the Attorney General's sanction is required only if the Appellant is indicted under Section 364A of the Penal Code as amended. In this case as the Appellant had been indicted under section 364(3) of the Penal Code as amended, the Attorney General's sanction is not necessary.

The Appellant further argue that the victim was not 16 years old at the time and the date of birth was not proved by the prosecution.

In this case when the prosecution led evidence of the victim, she had deviated her stance taken in the complaint lodged against the Appellant. After leading some evidence, as she did not come out with the prosecution's version, on an application by the prosecution the victim was remanded. When her evidence resumed after the remand, she again adopted the same evasive attitude towards the prosecution case. Hence, an application was made by the prosecuting counsel under Section 154 of the Evidence Ordinance to question PW1.

The High Court Judge in his judgment correctly analysed the probative value of the victim's evidence. Once the application made under Section 154 of the Evidence Ordinance to question the own witness, the evidence given by the said witness has only little value, like in this case. Hence, it is very important to consider the other available evidence to come to a conclusion in a case.

PW09, the doctor who examined the victim and issued the Medico Legal Report has stated that when he examined the victim, she was 57 days after child birth. According to this witness the victim had given birth to a child on 15th of January, 2001. According to the calculation of the doctor the victim could have conceived in the month of April, 2000.

According to P3, the birth certificate of the victim states that she was born on 11/04/1984. Considering the time period mentioned in the indictment, the victim was under 16 years of age when she was raped.

In this case the defence had not challenged the medical evidence during the trial. Hence evidence pertaining to the age of the victim cannot be taken as an appeal ground before this court.

The Court of Appeal in **Bandara v. The State** C.A. 27/99 held that:

> *"…when there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross-examination that is a special fact and feature in the case, it is a matter falling within the definition of the word "proof" in section 3 of the Evidence Ordinance and a trial judge or court must necessarily take the fact in to consideration in adjudicating the issue before it."*

In **Ukkuwa v. The Attorney General** *[2002] 3 SLR 279*, is a case where Justice S. Tilakawardene held that matters of fact that could have been challenged and clarified at the Trial Court are precluded from being challenged at the Appellate Court in the following manner at page 282;

> *"… court is mindful of the fact that having had the opportunity to cross-examine the witness before the original court and having failed or neglected to avail himself of the opportunity of such examination on these matters which could have been clarified, had such objections or cross-examination being raised in the original court, the counsel is precluded from challenging so the veracity of such matters of fact before this court."*

In **Gunasiri and Two Others v. Republic of Sri Lanka** C.A. 116/13, the Court of Appeal held that:

> *"…it is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted."*

Considering the above-mentioned judgments, the appeal grounds advanced by the Appellant under number one and three have no merit.
In the second ground of appeal the Appellant contends that the whole case for the prosecution based on DNA evidence which is at best can only be considered as mere expert evidence and cannot be considered as conclusive evidence especially in the absence of other probative evidence.

In this case the Appellant, the victim and the child born out of this sexual intercourse were subjected to a DNA test to ascertain the biological father of the child. Upon a Court Order being issued the Genetech Institution had conducted the DNA test and submitted their findings to the court. According to the report dated 25/07/2012 under reference No. 28908/PTT/2012/03/23 the results of the DNA test established that the Appellant is the biological father of the child born to the victim in this case.

PW11 who prepared the DNA report under the court order had given comprehensive evidence as to the applicability and accuracy of a DNA report in a criminal case. According to this witness the accuracy of a DNA report to establish the paternity is 99.999%. The said DNA report was marked as P2 by the prosecution.

This witness was cross examined regarding the correct identity of the persons who were subjected to DNA test and accuracy of taking blood samples for the test. The witness endorsed that he was personally present when the blood samples were taken from the Appellant, the victim and the child. Thereby, he vouched for the 100% accuracy of the report.

The use of DNA evidence in the criminal justice system has been regarded by scholars as "probably the greatest forensic advancement since the advent of fingerprinting".

In **The Attorney General v. M. N. Naufer alias Potta Naufer and Others** [2007] 2 SLR 144 the court held that:

> *"An individual's genetic constitution is unique in so much as there are no two individuals who have the same DNA. By analysing DNA of an*

individual, it is possible to say that the chances of finding another person with matching DNA is less than one in a trillion. This is analogous to hand finger printing techniques and that is why DNA finger printing has received the degree of acceptability which is similar to hand fingerprinting in courts the world over".

Counsel for the Appellant advanced the argument that the DNA is not a conclusive proof against an accused as it has inherent weaknesses and therefore, solely relying on DNA evidence only creates serious doubt in the prosecution case. To support his claim the counsel has submitted several foreign judgments for the consideration of the court.

In **C. Premjibhai Bachubhai Khasiya v. State of Gujarat and another** [2009] CRI.L.J. 2888 the court held that:

"The science of DNA is at a developing stage and when the Random Occurrence Ratio is not available for Indian Society, it would be risky to act solely on a positive DNA report, because only if the DNA profile of the accused matches with the foetus, it cannot be considered as conclusive proof of paternity. Contrarily, if it is solitary piece of evidence with negative result, it would conclusively exclude the possibility of involvement of the accused in the offence."

Hence the Indian Courts look for other supporting evidence along with the positive D.N.A. report.

In this case the Learned High Court Judge considering the demeanour of the prosecutrix, has taken into consideration the fact that the prosecutrix was a young girl who had to give evidence against her own father. Further, the learned trial judge has analysed the prosecutrix's evidence and has acted upon certain portions of her evidence, which are supported by expert evidence given by the PW11 and PW9 who prepared the D.N.A. and Medico Legal reports respectively.

The Learned High Court Judge has acted upon the evidence of the prosecutrix based on the concept of divisibility of evidence and cited the relevant judgement mentioned below in support of his conclusion.

In **Samaraweera v. AG** [1990] 1 SLR 256 the court held that:

> *"The* maxim falsus in uno falsus in omnibus *(could not be applied in such circumstances) … the credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."*

DNA evidence has now been accepted by our courts as a science upon which expert evidence could be led in terms of Section 45 of the Evidence Ordinance.

Section 45 of the Evidence Ordinance states:

"When the Court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinions upon that point of persons specially skilled in such foreign law, science, or art, or in questions as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, are relevant facts."

How that expert evidence should be considered by a trial judge is discussed in several decided cases in our criminal justice system.

In **Mark Antony Fernando v. AG** CA/84/97 decided on 08/10/1998 the court held that:

"…the judge has to decide (…) whether there was a very great antecedent probability of the injury resulting in death as opposed to a mere likelihood.

That function cannot be delegated to the expert. The judge is expected to decide this issue assisted by the evidence of the expert but independently of the opinion expressed by the expert."

Dr. Ruwan J. Illeperuma, an expert in DNA Technology elaborates in his article titled "**DNA, THE BIOLOGICAL TOOL FOR CRIME INVESTIGATION IN SRI LANKA**" as follows:

> "Because each person's DNA is different from that of every other individual (except for identical twins) examining variations in genetic material among human individuals, by DNA technology is the most powerful method for accurate human identification. DNA can be isolated from a number of biological samples, such as hair, saliva, blood, bone, teeth etc. The technology currently being applied is so sensitive that even a miniscule amount of bodily fluid or tissue can yield accurate DNA information. Therefore, this technology has a wide application in identifying perpetrators of crime and in confirming familial relationships of humans. (.....). The level of accuracy achievable guarantees absolutely no risk of convicting the wrong person and thereby establishing the innocence of those wrongly convicted."

Therefore, an expert in DNA analysis plays a vital role in sexual abuse cases relating to children. Their opinion could assist prosecuting authorities in identifying the person against whom criminal charges should be framed, as in this case. Their opinion also provides great assistance to the court in the proper adjudication of the matter.

As the Learned High Court Judge had meticulously considered the acceptable evidence along with the DNA evidence properly, I conclude that the second ground of appeal also does not have any merit.

When analysing entirety of the evidence presented, I am of the view that the prosecution had proved the case against the Appellant beyond reasonable

doubt. Hence, I affirm the conviction and sentence imposed on him by the Learned High Court Judge of Matara.

I further order that the sentence imposed on the Appellant to be operative from the date of conviction namely 17/10/2016, given the fact that the Appellant has been in incarceration since the conviction.

The Registrar is directed to send a copy of this judgment to High Court of Matara along with the original case record.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL