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**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/ 0404/2017  
High Court of Gampaha  
Case No. HC/171/2004**

Dadayakkarage Rupawathi

**ACCUSED-APPELLANT**

**vs.**

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

**COMPLAINANT-RESPONDENT**

**BEFORE** : **Sampath B. Abayakoon, J.  
P. Kumararatnam, J.**

**COUNSEL** : **Sumith Senanayake, P.C. with Damitha  
Wickrama Arachchi for the Appellant.  
Dileepa Peiris, SDSG for the Respondent.**

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**ARGUED ON** : **11/03/2022**

**DECIDED ON** : **08/04/2022**

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**JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted under Section 308 (A) (2) of the Penal Code as amended for committing an offence of Cruelty on Dona Jayana Udayangani Vithana in the High Court of Gampaha between 2001/08/01 to 2002/07/31.

After the trial, the Appellant was convicted as charged and was sentenced to three years rigorous imprisonment with a fine of Rs.1000/-. In default 02 weeks simple imprisonment was imposed. In addition, the Appellant was ordered to pay Rs.100000/- as compensation to the victim. In default, 08 months simple imprisonment was imposed.

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

The Learned President's Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in her absence due to the Covid 19 pandemic. It is further informed that the Appellant is on bail and she is waiting outside the court due to Covid 19 pandemic restrictions.

The Appellant had filed the following grounds of appeal:

1. Adoption of evidence was not done properly under Section 48 of the Judicature Act.

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2. The Learned High Court Judge had failed to evaluate all the witnesses properly.
  3. The Learned High Court Judge had failed to consider the defence version properly.

In this case the Appellant is the step mother of the victim. As the mother of the victim suffered from a mental disorder, her father had contracted his second marriage with the Appellant. The victim was about 7 years old at that time. Due to her father's second marriage she had to change her school. Initially the Appellant had treated the victim in a good manner. Upon lapse of time, the Appellant had started to ill-treat her by assaulting her with sticks and broom sticks. Due to this her schooling had come to a standstill.

Although her father and her neighbours reported this to the police, the police after inquiry, handed the victim back to the Appellant. The Appellant used to beat the victim in the absence of her father. Due to this cruel treatment, the victim had lost her education and her life had become miserable. As such her father had lodged a complaint in the Peliyagoda Police.

W/IP Seelawathie had conducted the inquiry, arrested the Appellant and produced her before the court.

PW2, Dr.Ratnayake who had examined the victim stated that 36 external injuries had been noted on the victim's body.

After the closure of the prosecution case, the defence was called and the Appellant had elected to give evidence from the witness box and proceeded to deny the charge.

According to the victim when she was 09 -10 years old the Appellant had started to assault and ill-treat her. As she was a child when she underwent the agony, her evidence needs to be considered very carefully.

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In **Panchhi and Others v. The State of U.P and Others** [1998] 7 SCC 177 it was held that:

*“Evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring.”*

In **Kumara De Silva and 2 Others v. Attorney General** [2010] 2 SLR 169 the court held that:

*“Credibility is a question of fact, not of law.... The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial judge.”*

Guided by above mentioned judgments, I will now proceed to consider the appeal grounds advanced by the Appellant.

In the first ground of appeal the Appellant contends that the adoption of evidence was not done properly under Section 48 of the Judicature Act.

Section 48 states:

“In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh :

Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued

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before the successor of any such judge, the accused may demand that the witnesses be resummoned and reheard.”

When the victim was under cross examination, the Learned High Court Judge who heard the case up to that point was transferred. Hence a new High Court Judge had resumed the trial on 15/05/2012 and continued the trial after adopting the proceedings led up to that point.

When the case was proceeding, the second High Court Judge also got transferred. Hence the trial was continued before a third judge on 10/05/2016 after adopting the proceedings led up to that point.

Finally, the case was concluded before the judge who wrote the judgment. He too had properly adopted the proceedings on 21/07/2017 and continued the trial.

Although it has been the practice of the judges of our courts to formally adopt the proceedings of their predecessor, I find no such specific requirement in Section 48 of the Judicature Act amended by the Amendment Act No. 27 of 1990. What is necessary in a criminal prosecution is to continue with the case and it was up to the accused to demand that the witnesses be re-summoned and reheard which has not happened in this case. Hence, I find no merit in this ground of appeal.

In the second ground of appeal the Appellant contends that the Learned High Court Judge had failed to evaluate all the witnesses properly.

The victim in her evidence stated that after the second marriage to the Appellant by her father, she resided with them along with her elder sister. As her sister could not get on well with the Appellant her sister had gone to her aunt's house. As she was 08 years and was schooling, she remained with her father and the Appellant. Initially the Appellant had treated her properly and the ill-treatment had started only after some time. At the age of 09 her schooling also came to a standstill as the Appellant had entrusted her with household chores. In the meantime, she was admitted to Gothatuwa Maha

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Vidyalaya by the Appellant. Her ordeal has continued even after the change of the school. When she complained to her father, very often, verbal exchanges had been taken place between her father and the Appellant. After such arguments, the Appellant had used to beat the victim using sticks and broomsticks.

Several complaints had been lodged with the Wellampitiya and Peliyagoda Police Stations. After inquiry, the police had handed her back to the Appellant after issuing a warning. Despite that her ill-treatment had continued to leave 36 scars on her body. She had been prevented from going to her relations house and/or informing them about her predicament. Further, she had been threatened that her house would be bombed if she divulges the Appellant's cruel treatment to her father.

When she was about 12 years old, her schooling had come to a permanent standstill and she was used to do get the domestic work done by the Appellant. Due to assault on her head and body with various objects, she had received residential treatment at the General Hospital in Colombo and at the Colombo Eye Hospital. Most of the time she was locked inside the house when the Appellant leaves the house. She was not allowed to play with the children in her neighbourhood.

When she was 14 years old, she was produced before the Juvenile Court, in Bambalapitiya and was then sent to Ranmuthugala Children's Home. Due to fear, she did not tell the doctor as to how she sustained the scars that were observed on her body. Until she was sent to the children's home, the victim's father, the Appellant and the victim had lived together in the same house.

In the cross examination, she reiterated that she did not divulge anything against the Appellant due to fear psychosis created by the Appellant. As such, she had not given true evidence before the Magistrate Court of Bambalapitiya.

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When the victim attained puberty, her father had gifted some jewellery and those jewellery had been taken in to the custody of the Appellant. A chain which she was wearing when she attended the court was also removed by the Appellant at the court's premises itself.

PW3 IP/Seelawathi had given evidence and corroborated the evidence of the victim at all material points. The ill-treatment of the victim had been revealed when she gave her statement on 04/11/2002 when she was in Gangodawila Children's Home. The two statements given earlier did not contain any information about the ill-treatment caused by the Appellant. The reason for that is on both occasions she had given her statements while she was living under the custody of the Appellant. This had been mentioned in the B/ Report filed in the Juvenile Court, Bambalapitiya.

PW4, the father of the victim too had corroborated the evidence of the victim. After observing the plight of the victim under the custody of the Appellant, he had made several attempts to take her under his custody, but all such attempts had proved to be futile as the Appellant had instigated the victim to state that she was willing to be with the Appellant. Further, he had vehemently denied fabricating evidence against the Appellant.

PW3 the doctor who had examined the victim had noted about 36 wounds all over the victim's body. The Appellant had admitted a description of those injuries under Section 420 of the Code of Criminal Procedure Act No.15 of 1979. According to the opinion of the doctor all such injuries are compatible with blunt force trauma. Although the defence had asked several questions based on the history given to the doctor, the victim in her evidence stated that she gave history in such a manner due to fear of the Appellant.

Further the defence had suggested to the victim that the scars visible on her body was due to Chickenpox. But the defence did not put any question regarding this position either to the doctor or to her father. Although her

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cross examination continued from 21/09/2010 to year 2012, she had not changed her stance taken in this case.

The Learned High Court Judge had very correctly analysed the evidence presented by the prosecution to come to his conclusions. Hence it is incorrect to say that the Learned High Court Judge had not properly evaluated the evidence in this case to consider whether the Appellant is guilty under Section 308(A)(2) of the Penal Code as amended.

The Section 308(A) states:

“Whoever, having the custody, charge or care of any person under eighteen years of age, wilfully assaults, ill-treats, neglects, or abandons such person or causes or procures such person to be assaulted, ill-treated, neglected, or abandoned in a manner likely to cause him suffering or injury to health (including injury to, or loss of, sight or hearing, or limb or organ of the body or any mental derangement) commits the offence of cruelty to children”.

Hence, the second ground of appeal also has no merit.

Finally, the Appellant contends that the Learned High Court Judge had failed to consider the defence version properly.

Learned High Court Judge had very extensively considered the evidence adduced by the defence. The Appellant had given evidence from the witness box and was subjected to cross examination. She had vehemently denied the charge in her evidence. Further, the defence had called two witnesses but that evidence too failed to create a doubt on the prosecution case.

In this case the victim was under the vicious clutches of the Appellant. She had fallen victim to ill-treatment as her father contracted his second marriage with the Appellant. She was suffering both physically and mentally until she was able to come out with her story to the relevant authorities. She was 07 years old when she started living with the Appellant and her ordeal



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continued until she was 14 years old. Her schooling was stopped and her childhood become miserable.

Considering the evidence presented by both parties, I conclude this is not a fit and proper case to interfere with the judgment of the Learned High Court of Gampaha. Hence, the appeal is dismissed.

The Learned High Court Judge of Gampaha is hereby directed to issue notice on the Appellant to appear before the High Court, as she is on bail pending appeal, and to comply with this judgement.

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**