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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act.

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

C.A. Case No. HCC/187/19 **Complainant**

High Court of Kegalle

Case No. 3804/17 **Vs.**

Wewathenne Siriniwasa

Accused

AND NOW BETWEEN

Wewathenne Siriniwasa

Accused –Appellant

Vs.

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

Complainant-Respondent

BEFORE : K. PRIYANTHA FERNANDO, J (P/CA)
WICKUM A. KALUARACHCHI, J

COUNSEL : Niroshan Mihindukulasuriya for the Accused-Appellant

Chathurangi Mahawaduge, SC for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 07.10.2020 (On behalf of the Accused-Appellant)

04.05.2021 (On behalf of the Respondent)

ARGUED ON : 09.08.2022

DECIDED ON : 13.09.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Kegalle and convicted for the charges of;

1. on or about 24th August 2010 kidnapping Jayalath Pedige Dilini Prasangika Gunarathne who is under the age of 16 years from the legal custody of Horathal Pedige Priyanka Rathnakanthi, and thereby committing an offence punishable under section 354 of the Penal Code.
2. During the course of the same transaction, committing grave sexual abuse to Jayalath Pedige Dilini Prasangika Gunarathne who is below the age of 16 years, an offence punishable under section 365B(2)(b) of the Penal Code.

This appeal is preferred against the said convictions and sentences. Prior to the hearing, written submissions were filed on behalf of both parties. At the hearing of the appeal, the learned counsel for the appellant and the learned State Counsel for the respondent made oral submissions.

In brief, the facts of the prosecution case.

At the time of the incident, the victim was 13 years and 11 months old. She was living with her parents and three brothers. The appellant was a Buddhist monk and a teacher of the Sunday school at "Atugoda Temple," and the victim was a student there. Evidence reveals that the appellant had an inappropriate relationship with the victim. The victim's house was only 100-150 meters away from this temple.

On the day of the incident, according to the prosecution, the appellant had met the victim when she was coming from her aunt's house and had told her that he would be coming in the night of the same day to meet her. Accordingly, the appellant had come to the house of the victim around 10 p.m. where she was sleeping with her parents and three brothers. The appellant had talked to the victim through a window and had asked her to come outside of the house to meet him. Thereafter, he had taken her to the "*Dharma Shalawa*" at the temple. The appellant then asked her to lie down on a mat, which the victim refused to do but the appellant insisted on. Then, the appellant lifted the skirt worn by the victim and put his male organ between the victim's thighs and moved up and down.

When the victim's mother (PW2) awoke in the night, she noticed that her daughter was missing. Then she informed the victim's father, and the father and victim's elder brother went to the temple, where they found the victim and brought her back to her home. Soon after, the victim lodged a complaint at the Kegalle police station against the appellant.

Following grounds of appeal have been urged by the appellant in his written submission:

1. The prosecution has failed to prove the ingredients of the first charge.
2. The learned trial Judge has failed to evaluate the credibility of the victim.
3. The prosecution failed to lead evidence in corroboration of the evidence of PW1.

Based on the aforesaid grounds, the learned counsel for the appellant made submissions regarding the probability of the prosecution story, not considering the appellant's more probable version, the uncertainty in describing the sexual offence by PW1, and the absence of corroborative evidence also.

Probability of the prosecution story

The main argument of the learned counsel for the appellant was that the evidence of the victim was not credible. His position was that this is a fabricated story. The learned counsel contended that when the victim was sleeping with her parents and her brothers, the appellant coming to her house and talking through a window is improbable. The learned counsel for the appellant contended that the defence version is more probable.

The learned State Counsel contended in reply that the victim's evidence which has no contradictions or omissions is reliable and probable. Therefore, she stated that the argument that the defence version is more probable has no basis.

The position taken up by the appellant in his evidence was that the victim came to his temple on her own and he never asked her to come. According to the said position, even the appellant admits that the victim was with him in the temple at night. The issue whether she

went to the temple on her own or whether she went with the appellant at his request would be dealt with later. However, I cannot see any improbability of the appellant going to the victim's house at night and asking her to come to the temple if the appellant wanted to have sex with her. At the same time, I should say that there is no improbability in the appellant's version as well. However, there is no basis to accept the argument that the defence version is more probable than the prosecution version. Hence, there is no issue as to the probability of the prosecution story.

Whether there is a discrepancy or uncertainty in describing the sexual offence?

During the cross-examination of the PW1, no contradiction has been marked, no omission has been brought to the notice of the court. However, the learned counsel for the appellant pointed out the different words used by PW1 to describe the sexual act on two different occasions. His contention was that PW1, the victim stated in her evidence that the appellant put his male organ on her thighs and moved up and down between the thighs but in the short history given to the doctor, she stated that the accused had rubbed his male organ on her legs. Therefore, the learned counsel contended that the said inconsistency runs to the root of the case which in no uncertain terms blemishes the credibility of the victim.

When questioned about that, PW1 stated, "I stated as I could understand what had been done to me.". Her explanation appears as follows:

"ඒ දවස් වල මට කරපු දේ තමයි ස්වාමීනි මට තේරෙන විධියට කිව්වේ, දැන් මම ඇත්ත දන්නවා ස්වාමිනි."

(page 52 of the appeal brief)

Without any hesitation, her explanation could be accepted as a very clear explanation. At the time of the incident, she was 14 years old. Furthermore, no one can be expected to use the same words in 2018 when giving evidence that were used in 2010 when explaining the incident to the doctor.

In addition, any reasonable man could understand the statement "moving male organ up and down through the thighs" has no difference from the statement "rubbing male organ on her legs" because the thighs are at the upper part of the legs. In fact, PW1 has also stated this in the following way:

ප්‍ර: තමුන් විවෘත අධිකරණයේ කියපු කතාව වෛද්‍යවරයාට තමුන් ඒ විධියටම කියලා නැහැ කියලා පිළිගන්නවාද?

උ: ඒ අතර ගැලපීමක් තියෙනවා ස්වාමීනි.

ප්‍ර: ගැලපීමක් තිබුනට වෙනසක් තියෙනවා කියලා පිළිගන්නවාද?

උ: වෙනසක් නැහැ. ස්වාමීනි ඒ ක්‍රියා දෙකේම සම්බන්දය එකයි.

(Page 53 of the appeal brief)

So, there is absolutely no discrepancy or uncertainty in describing the sexual offence. Therefore, I regret that I am unable to accept under any circumstances the argument that the said inconsistency runs to the root of the case and blemishes the credibility of the victim.

Whether PW1's evidence requires corroboration?

Another argument advanced by the learned counsel for the appellant was that the victim's evidence has not been corroborated by other evidence. The learned counsel contended that at the time of the alleged incident, the victim's father and elder brother had come to the

"*Dharma Shalawa*" and had shouted at the accused and dragged the victim to the house and that it is clear that both the father and brother are the best eye-witnesses to corroborate the evidence of PW1.

The learned State Counsel submitted in reply that PW1's evidence has been corroborated by the evidence of PW2, PW5, PW7 and PW11. Further, it was contended that although the victim's father and brother were not called in evidence, the prosecution has made a strong case against the appellant. The learned State Counsel also pointed out that no particular number of witnesses are required for the proof of any fact according to section 134 of the Evidence Ordinance.

In an offence of this nature, there could be no medical evidence to corroborate the victim's evidence. In her testimony, the Judicial Medical Officer stated that no injuries could be found in this kind of sexual abuse. If the father or the brother of the victim or both of them were called in evidence what they could say is that the victim was in the temple and they brought her back to the home. The fact that the victim came to the temple and met the appellant was admitted by the appellant in his evidence. While denying the allegation against him, the appellant said that he spoke to her for 3-4 minutes. In addition, the appellant himself admitted that the victim's brother and father came to the temple, scolded and threatened him and had taken back the victim. Therefore, there was nothing to corroborate by calling the father and brother of the victim in evidence.

It is correct that on certain occasions, our courts have held that it is unsafe to admit victim's evidence in respect of sexual offences without corroboration. However, it was held in the Indian case of Bhoginbhai Hirjibhai V. State of Gujarat – AIR S.C. 753 that "In the Indian setting,

refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to the injury".

It is needless to state that sexual offences are not committed in public. Therefore, it is natural that there would be hardly any eye-witnesses to testify about the sexual abuse. In the case of Gurcharan Singh V. State of Haryane – AIR (1972) SC 2661 also, it was observed that in this type of cases court normally looks for some corroboration. It was held thus:

"As a rule of prudence, however, court normally looks for some corroboration of her testimony so as to testify its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated."

The substance of the said decision was that corroboration is needed to prevent false implications. In the case at hand, the fact that the victim came to him is admitted by the appellant. The appellant also stated that he spoke to her for 3-4 minutes. Hence, the identity of the appellant is not an issue in this case. The only issue is whether he sexually abused her or he only spoke to her for 3-4 minutes.

In the case of Sunil and another V. The Attorney General – (1986) 1 Sri L.R. 230, it went on to state that "It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence", but it was held further that "but if her evidence is convincing, such evidence could be acted on even in the absence of corroboration".

The following judicial authorities clearly held that a conviction for sexual offences could be arrived on the uncorroborative evidence of the victim.

It was held in the cases of The King V. Themis Singho – 45 NLR 378, and Premasiri and another V. The Queen – 77 NLR 85 that "In a charge of rape, it is proper for a Jury to convict on the uncorroborated

evidence of the complainant only when such evidence is of such a character as to convince the Jury that she is speaking the truth".

In Regina V. W.G. Dharamasena – 58 NLR 15, it was held that "In a charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated".

Accordingly, the law permits either to act on corroborated or uncorroborated evidence in determining sexual offences. What expects from a trial Judge is to carefully analyze whether corroboration is needed or not. In the case before us, the appellant's identity was not an issue, and it was established even by the appellant's evidence because the appellant had admitted that he talked with PW1 when she came to the temple at night on the day in question. The complaint regarding the offence was made promptly. Only the sexual abuse committed by the appellant must then be proved in order to establish the second charge. As previously stated, there would be no evidence to corroborate the act of sexual abuse as nobody witnessed it. That has to be proved only on PW1's evidence. Other incidental matters need no corroboration for the reasons stated previously. Hence, I hold that there is no issue regarding the corroboration.

Would the appellant's evidence cast reasonable doubt on the prosecution case?

The substance of the appellant's evidence is very simple. He says that PW1 came to the temple on her own, that he only spoke with her for 3-4 minutes, and that he did nothing to her. However, the central issue here is that this position has never been suggested to the victim when she was cross-examined. It was not suggested to PW1 that when she was coming from her aunt's house, the appellant did not tell her that he would come at night. It was not suggested to PW1 that the appellant did not come to her house at night and ask her to come to the temple. PW1 was not suggested that she did not go to the temple

with the appellant when the appellant asked her to go. At least, she was not suggested that she came to the temple on her own.

An observation of the Indian judgment of Sarvan Singh v. State of Punjab - (2002 AIR SC (iii) 3652) at pages 3655 and 3656, has been cited in the case of Ratnayake Mudiyanselage Premachandra v. The Hon. Attorney General - C.A. Case No. 79/2011, decided on 04.04.2017 as follows: "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."

In the case of Himachal Pradesh v. Thakur Dass - (1983) 2 Cri. L. J. 1694 at 1701 V. D. Misra CJ held that "whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed". Similarly, in Motilal v. State of Madhya Pradesh - (1990) Criminal Law Journal NOC 125 MP, it was held that "absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact".

During the cross-examination, it was only suggested to the PW1 that the appellant had not sexually abused her and the evidence regarding sexual abuse is false. The victim's evidence, how the appellant asked her to come to the temple and how she went with him to the temple at night has never been challenged in cross-examination. In consequence, the aforesaid unchallenged prosecution evidence must be accepted because in absence of the appellant's position being even suggested to the PW1 in cross-examiation, it amounts to an admission of the prosecution version according to the decisions of the aforesaid judicial authorities. So, it is obvious that the appellant's version,

which was taken only at the tail end of the case, cannot be accepted and thus the said version casts no doubt on the prosecution case.

Evidence given by children

The appellant's counsel also contended that after the incident, when the mother, PW2, asked what had happened, the daughter, PW1, said nothing. The learned counsel attempted to show that PW1 remained silent because nothing happened. However, according to the mother's evidence, only at that moment, her daughter did not say anything. In a short while, the mother, father and daughter went to the police station and lodge a complaint about the sexual abuse.

At the time of the incident, PW1 was a 14-year-old child. In the case of Thimbirigolle Sirirathana v. OIC, Police Station, Rasnayakepura - CA No. 194/2015, decided on 07.05.2019, it was discussed the behavior of a child who had experienced sexual abuse. It was held in this case that "when a child is sexually assaulted by an adult, it is also natural for the victim's family to think twice before making a complaint to the police". But in the instant action, there was no delay in making a complaint. Also, it was held that "in cases of sexual offences, Courts have found that victims of sexual offences can react in different ways. Some may complain immediately. Others may feel for example afraid, shocked, ashamed, confused, or even guilty and may not speak out until some time has passed. There is no typical reaction. *(Crown Court compendium part 1, May 2016)".* So, this is a natural response of a child who faced such a situation. Therefore, the mother's evidence that the daughter said nothing soon after she came from the temple with her father and brother cast no doubt on her evidence.

The trial Judge's findings should not be lightly disturbed

In the aforementioned Court of Appeal judgment, it was also held that "The trial Judge before whom the witnesses testified is the best person

to decide on the credibility of the victim and the other witnesses, as he observed the demeanor and deportment of the witnesses".

It is vital to note at this stage that this is a rare occasion in which the learned Judge who wrote the judgment has heard the case from beginning to end. It has been held in several cases such as King Vs. Gunaratne 14 Ceylon Law Recorder 174, Fradd Vs. Brown & Company 20 NLR 282 at 283, State of Uttar Pradesh Vs. M. K. Anthony (1984) SCJ 236/(1985) CRI L.J. 493 at 498/499, Oliver Dayananda Kalansuriya alias Raja Vs. Republic of Sri Lanka CA 28/2009 (13.02.2013), Wickramasuriya V. Dedolina (1996) 2 Sri L.R. 95, and Alwis V. Piyasena Fernando (1993) 1 Sri L.R. 119 at 122, that the testimonial trustworthiness of witnesses is a matter for trial Judge and a considered finding of a trial Judge will not be disturbed by an Appellate Court lightly.

In addition, it should be noted that in a country with a cultural and social background like ours, being a victim of sexual abuse leaves a scar on a 14-year-old girl's entire future. So, under any circumstances, no girl would be tempted to fabricate a story for this kind of offence, implicating a monk by making her own future dark.

The other argument advanced by the learned counsel for the appellant that the defence evidence has not been considered has no merit because when perusing the impugned judgment, it is apparent that the learned High Court Judge has considered the the appellant's evidence, defence position taken up during the prosecution case, and after evaluating the evidence, the learned Judge has set out his findings with reasons. As the learned Judge carefully analyzed the appellant's evidence, he observed contradictions P2, P3, and P4 that cast strong doubts on the appellant's testimony.

For the reasons stated above, I hold that the learned High Court Judge has rightly convicted the appellant for the grave sexual abuse charge.

Whether the ingredients of the first charge have been proved?

The next matter to be decided is the first charge of kidnapping. The learned counsel for the appellant contended that the prosecution has failed to prove the ingredients of the first charge. The learned counsel contended that because the victim and the appellant had a close relationship, there was no kidnapping and the victim and the accused-appellant planned to meet during the night. He argued that the charge of kidnapping is not fulfilled in the absence of "take or entice."

Submitting the case of P. Sirisena and 2 others V. Sub Inspector of Police – 75 NLR 322, the learned State Counsel for the respondent contended that although the victim had willingly gone outside of the house as a response to the appellant summoning her through the window, her consent is immaterial, as the victim was a minor.

Firstly, the appellant's version that the victim went to the temple on her own without the knowledge of the appellant could not be accepted, as there was no suggestion even to the victim on behalf of the defence that she came to the temple on her own.

Secondly, if she went willingly when the appellant asked her to come to the temple, the offence of kidnapping is committed by the appellant because according to the decision of the said case, *P. Sirisena and 2 others V. Sub Inspector of Police*, "The taking of a minor for the purpose of contracting a marriage, upon a false pretense that she was a major, without the knowledge of her parents, was taking her away for an improper purpose. It was immaterial that the minor consented or went willingly, for a minor cannot validly consent to the

substitution of some other person's control for the control which is exercised over her by her lawful guardian." Accordingly, it was held in the said case that the appellants were liable to be convicted of kidnapping the minor from the lawful guardianship of her mother.

In the case at hand also, the appellant had taken the PW1 for an improper purpose of sexually abusing her. Hence, as a minor, PW1's consent is immaterial.

Committing the offence of Kidnapping in respect of a minor has been extensively discussed in the Indian case of S. Varadarajan V. State of Madras – 1965 AIR 942 (Also 1965 SCR (1) 243), Decided on 09 September 1964. The headnote of the said case reads as follows:

"Where a minor girl, alleged to be taken away by the accused person, had left father's protection knowing and having capacity to know the full import of what she was doing and voluntarily joined the accused, it could not be said that the accused had taken her away from the keeping of her lawful guardian within the meaning of section 361 of the Indian Penal Code. **Something more had to be done in a case of that kind such as an inducement held out by the accused person or an active participation by him in the formation of the intention, ……."** (emphasis added)

In the case before us, the appellant had taken away the girl from the lawful guardianship of her mother in order to form his immoral intention. Thus, the offence of kidnapping is committed.

At this stage, it is pertinent to compare section 361 of the Indian Penal Code and section 352 of the Sri Lankan Penal Code. Except for the age limits of male and female minors, Section 361 of the Indian Penal Code is identical to Section 352 of the Sri Lankan Penal Code. For convenience, the two sections are reproduced below.

Section 361 of the Indian Penal Code

Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age it a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship .

Section 352 of the Sri Lankan Penal Code

Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age it a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to " kidnap such minor or person from lawful guardianship ".

The observations of the case Rex V. James Jarvis reported in XX Cox's Criminal Cases, 249 in respect of the offence of kidnapping have been cited in the said Indian Judgement as follows:

"Jelf J., has stated the law thus to the jury:

Although there must be a taking, yet it is quite clear that an actual physical taking away of the girl is not necessary to render the prisoner liable to conviction; it is sufficient if he persuaded her to leave her home or go away with him by persuasion or blandishments."

In view of the aforesaid decisions, it is evident that in the instant action, the offence of kidnapping is committed when the appellant willingly or unwillingly takes the PW1 to the temple. Hence, the learned High Court Judge has correctly convicted the appellant for the first count as well.

Sentencing

The only other matter that remains to be considered is the sentence imposed on the appellant. The learned High Court Judge sentenced the appellant to 4 years' simple imprisonment for the first count and suspended the same for 15 years, and imposed 11 years' simple imprisonment for the second count. The Honourable Attorney General has not appealed against the sentence.

However, this court could consider whether its intervention is required to vary the sentence because the appellant preferred the appeal against the conviction as well as the sentence. In addition, it was pleaded in the petition of appeal that the sentence imposed on the second count is excessive. This court feels that an intervention on the sentence is needed for three reasons. Firstly, the sentence imposed on the second count is illegal, as rigorous imprisonment is mandatory for the offence under section 365B(2)(b) of the Penal Code. Secondly, I am of the view that the sentence imposed on the second count is inadequate in light of the nature and circumstances on which the grave sexual abuse was committed. Thirdly, the sentence passed on the first count is also illegal because according to section 303(2)(d) of the Code of Criminal Procedure Act, the term of imprisonment should not exceed two years in order to suspend the sentence. In this case, the learned Judge imposed 4 years simple imprisonment for the first count and suspended for 15 years.

Accordingly, this court informed the learned counsel for the appellant that further time could be granted to forward reasons why the sentence on the second count should not be enhanced, if the convictions are affirmed. However, the learned counsel for the appellant informed this court that he does not want further time and

submitted the reasons on the same day, why the sentence should not be enhanced, if the convictions are affirmed.

Now, I consider the submissions made by both counsel regarding the sentence. The minimum sentence for the second count is seven years imprisonment and the maximum is twenty years. The learned counsel for the appellant submitted that the learned trial Judge has considered the midpoint, 12 years, of the period of imprisonment and deducted one year, as the appellant had no previous convictions. The learned counsel also submitted that the appellant was a priest and a teacher. He also stated that no damage has been caused to the victim as a result of this offence.

The learned State Counsel for the respondent contended that committing this kind of offence as a priest and a teacher is a highly aggravating factor and the learned High Court Judge has not considered the same. Advancing on her argument, the learned State Counsel stated that this is a fit case to enhance the sentence.

The learned High Court Judge has made an observation before passing the sentence that although the breach of discipline is a relevant issue in monastic life, breach of discipline by the accused is not considered at all in passing the sentence. It should be noted that a child who goes to a monk, not like going to an ordinary person, expects guardianship and has more confidence that the monk will do no harm to her. Furthermore, the accused-appellant was a teacher in the Sunday school and PW1 was a student there. Hence, it is my considered view that sexually abusing the girl who came to the monk who was also her teacher is more serious than abusing the girl by an ordinary person. So, this is an aggravating factor the learned Judge should have considered.

The learned Judge has considered not having previous convictions and repentance for committing the offence as mitigatory factors. In this case, the accused-appellant pleaded not guilty to the charges and after the trial, the learned High Court Judge found him guilty. I do not find here any evidence of repentance on the part of the appellant.

In addition, although the learned counsel submitted that no damage has been caused to the PW1, there is a strong possibility to cause psycalogical damage to a child who was sexually abused like this. The psycological damage is not visible. Therefore, psycological damage to a sexually abused child is difficult to detect and cannot be estimated. It is a known factor that some psycological damages could last for her life time. In this case, there is no evidence whether such psycological damage was caused to the PW1. However, the fact that no physical damage had been caused to her cannot in anyway be used as a mitigatory factor for the reasons stated above.

Undoubtedly, the aforesaid circumstances compel this court to enhance the sentence for the second count. Considering the mitigating and aggravating factors, I hold that 15 years' of rigorous imprisonment is an appropriate, lawful sentence which is correct in principle as well.

Therefore, the convictions on both counts are affirmed. The sentences imposed by the learned High Court Judge are varied as follows: The sentence imposed on the second count is enhanced to 15 years' Rigorous Imprisonment. The rest of the sentence; the fine, compensation, default sentences and the amount ordered to be paid to the Victims of Crime and Witnesses Assistance and Protection Fund under the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 04 of 2015 as well as the default sentence remain

unchanged. The sentence, fine and the default sentence imposed on the first count is affirmed. However, the learned Judge has suspended the said sentence. The suspension of the said sentence is removed. Instead, the said sentence is ordered to run concurrently with the sentence for the second count imposed by this court.

The appeal is dismissed. The sentences on counts one and two are varied to the above extent.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL