

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

*In the matter of an Appeal in terms of
section 331 (1) of the Code of Criminal
Procedure Act No- 15 of 1979, read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

Court of Appeal No:

Democratic Socialist Republic of Sri Lanka

CA/HCC/0392/19

COMPLAINANT

Vs.

High Court of Colombo

1. Dilan Dewinda Kolambage

Case No: HC/8090/2015

2. Mapitigamage Don Hasitha Sidantha

Mapitigama

ACCUSED

AND NOW BETWEEN

1. Dilan Dewinda Kolambage

2. Mapitigamage Don Hasitha Sidantha

Mapitigama

ACCUSED-APPELLANTS

Vs.

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

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Saliya Pieris, P.C. with Geeth Karunaratne for the 1st
Accused Appellant
: Upul Kumarapperuma with Shalini Weeraratne and
Radha Kuruwitabandara for the 2nd Accused
Appellant
: Dilan Ratnayaka, SDSG for the Respondent

Argued on : 09-09-2022

Written Submissions : 02-10-2020 (By the 1st Accused-Appellant)
: 23-09-2020 (By the 2nd Accused-Appellant)
: 12-02-2021 (By the Respondent)

Decided on : 31-10-2022

Sampath B Abayakoon, J.

This is an appeal preferred by the 1st and the 2nd accused appellants (hereinafter sometimes referred to as the appellants) on being aggrieved of conviction and the sentence imposed by the learned High Court Judge of Colombo.

The accused appellants were incited before the High Court of Colombo on following counts.

1. That between the period of 1st January 2014 and 13th November 2014, the appellants conspired to commit grave sexual abuse on a minor and as a result, the first accused appellant committed the grave sexual abuse and the second accused appellant aided and abetted in the crime, and thereby, committed an offence punishable in terms of section 365 B 2 (b) of the Penal Code read with section 113 (b) and 102 of the Code.
2. At the same time and at the same transaction, the 1st accused appellant committed grave sexual abuse on a minor and thereby committed an offence punishable in terms of section 365 B 2 (b).
3. At the same time and at the same transaction, the 2nd accused appellant aided and abetted the 1st accused appellant in committing the above-mentioned offence and thereby committed an offence punishable in terms of section 365 B 2 (b) read with section 102 of the Penal Code.
4. That on or about 13th November 2014, the 1st and 2nd accused appellants conspired to commit the offence of grave sexual abuse and the 1st accused appellant committed the said offence while the 2nd accused appellant aided and abetted the 1st accused in the said process, and thereby, committed the offence of grave sexual abuse punishable in terms of section 365 B 2 (b) read with section 113 (b) and 102 of the Penal Code.
5. That the 1st accused appellant committed the offence of grave sexual abuse on a minor in the process of the 4th count mentioned above and thereby committed an offence punishable in terms of section 365 B 2 (b).
6. At the same time and at the same transaction mentioned in count 5, the 2nd accused appellant aided and abetted the 1st accused appellant

in committing the offence of grave sexual abuse and thereby committed an offence punishable in terms of section 365 B 2 (b) read with section 102 of the Penal Code.

After trial, learned High Court Judge of Colombo by his judgement dated 19-09-2019, found the appellants not guilty on the 1st, 2nd and 3rd counts preferred against them and accordingly, they were acquitted of the said charges. However, the 1st appellant was convicted for the 4th and the 5th counts preferred against him, while the 2nd appellant was convicted for the 4th and the 6th counts preferred against him.

Upon the conviction, the 1st accused was sentenced to 10 years each rigorous imprisonment on the 4th and the 5th counts while he was also fined Rs.25,000/- each on the said counts. In default of paying the fine, he was sentenced to a further period of 15 months each simple imprisonment.

The 2nd appellant was sentenced to 9 years each rigorous imprisonment on the 4th and the 6th counts while he was ordered to pay a fine of Rs.25,000/- each on the said counts. In default, he was sentenced to 15 months simple imprisonment on each of the two counts.

In addition to the above sentence, the two appellants were ordered to pay Rs.100,000/- each as compensation to the victim child and in default, they were sentenced to 28 months each of simple imprisonment.

It is clear from the evidence led before the High Court, and the stand taken by the appellants, the main challenge to the evidence was on the basis of identification of the appellants as the perpetrators of the crime by the victim child.

At the hearing of this appeal, the learned President's Counsel representing the 1st appellant formulated the following grounds of appeal for the consideration of the Court.

1. There is a grave doubt as to the identification of the first accused and matters favourable to the first accused available in the evidence in that regard was not adequately considered by the learned High Court Judge in his judgement.
2. The learned High Court Judge has failed to adequately consider the material contradictions and omissions in the evidence.
3. The learned High Court Judge failed to consider the evidence given by the 1st appellant and the witnesses called on behalf of him in its correct perspective.

On behalf of the 2nd appellant, the learned Counsel raised the following grounds of appeal.

1. The learned High Court Judge failed to give due consideration to the fact that the identification of the 2nd appellant by the victim child was tainted with irregularities which has not been adequately considered in the judgement.
2. The learned High Court Judge has failed to consider matters favourable to the 2nd appellant.

Facts in brief: -

The victim child was a 6-and-a-half-year-old, grade 02 student in a leading school in a Colombo when he was subjected to the alleged grave sexual abuse by two members of the school's rugging team. It was in evidence that on the mentioned day, the child has attended gymnastic practice and he was forcibly taken by two members of the rugging team to the rugging room and one person abused him sexually, while the other person aided and abetted him.

After this incident came to light, the parents of the child have complained to the principal of the school and also to the National Child Protection Authority. Before the official complaint was made, the father of the child has shown a photograph downloaded from the internet to the child, where the child has pinpointed two rugging team members who was on the photograph as the persons who committed

the crime on him. It appears from the evidence that the parents have complained to the principal as well as the National Child Protection Authority based on the said identification by the victim child. It has also transpired during the evidence that the principal of the school has determined that one of the students pinpointed by the victim in the picture cannot be one of the perpetrators as the said student has given up rugging practices some time ago. It is also in evidence that the principal has also used number of other photographs obtained from various sources to narrow down the possible perpetrators before the victim child could identify them.

Later, an informal identification parade has been held at the school where six members of the school rugging team was shown to the victim child and the child has identified the 1st and the 2nd accused appellants as the persons who committed the crime on him. The victim child has identified the 1st appellant as ‘සුදු අයිසා’ who committed the grave sexual abuse on him, and the 2nd accused appellant as ‘කලු අයිසා’ who assisted the 1st accused appellant in committing the crime.

Consideration of The Grounds of Appeal

In his submission before this Court, the learned President’s Counsel on behalf of the 1st accused appellant submitted that there exists no doubt that a grave sexual abuse has been committed on the victim child which is a crime that cannot be condoned under any circumstances. He agreed that as a result, the victim child has undergone tremendous amount of physical and mental trauma. He agreed that as a result of this incident, the parents of the victim child have also undergone untold mental trauma in relation to what their only child had to face. It was his contention, despite that, the case presented against the appellants should be fairly considered in order to find whether there was evidence beyond reasonable doubt against the appellants. It was his view that the possibility of an innocent being convicted for a crime of this nature should be eliminated in order to serve justice. It was his position that in the instant

case, that has not happened. Making his submissions mainly on the procedure followed by the relevant authorities in identifying the two appellants as the members of the rucker team who committed this crime, it was his position that it was faulty, which has resulted in a grave prejudice towards the appellants. He went on to pinpoint the alleged irregularities before the Court.

It has transpired in evidence that when this matter came to light, the father of the child with all the good intentions has attempted to identify the students concerned by showing a photograph downloaded from the internet to the victim child. He has identified two boys in the picture as the perpetrators. At the National Child Protection Authority, the same picture has been used in order to identify the offenders. the two students pointed out by the victim child has been highlighted as 'A' and 'B'. when this picture was shown to the principal, he has ruled out the boy in picture 'A' on the basis that the said boy was no longer a member of the rucker team who has given up rucker some time ago. The principal has identified the said boy before he ruled out his culpability for the offence. Thereafter, principal has shown several photographs of the members of the school rucker team available in his personal computer to the child in order to narrow down the search.

Although the principal has stated in his evidence that he did not show the pictures to the victim child, the evidence led in this action shows that the said pictures have been repeatedly shown to the child before a selected number of six students have been called for an informal identification parade, where the victim child has identified the 1st and the 2nd appellants.

It was the contention of the learned President's Counsel that the principal's action of excluding one of the boys identified by the victim child in the picture shown to him without calling that boy for an identification by the victim child was highly irregular, which has caused prejudice to the appellants. He pointed out that when this process of identification took place, the officers of the National Child Protection Authority and several police officers were also present, yet they

have not taken any positive steps to ensure, although it was not an official identification parade, it was in compliance with the basic standards of a parade of this nature.

The learned President's Counsel pointed out that the learned High Court Judge has failed to consider identification of a student who was not produced even for an informal identification parade in his judgement. It was his view that non-consideration of this factor which was a matter in favour of the 1st accused appellant has caused prejudice to his client. It was his position that under the circumstances, the contradiction in the evidence of the victim child where he has stated when he made his statement to the National Child Protection Authority that it was 'සුදු අයියා', meaning the 1st accused appellant that held him, and the one who sexually abused him was 'කලු අයියා', meaning the 2nd accused appellant, as a matter very much relevant in this action. It was his position that such a vital contradiction is a contradiction that cannot be attributed as a mere contradiction that has not dented the credibility of the evidence as considered by the learned High Court Judge.

Citing the judgement pronounced in **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167**, it was the argument of the learned President's Counsel that the learned High Court Judge was wrong in considering the evidence adduced on behalf of the appellants in the light of the prosecution evidence. It was his position that the learned High Court Judge has failed to properly evaluate the evidence led in this action and failed to consider the matters favourable to the appellants in the judgement. He was also of the view that the evidence whether a conspiracy charged can be maintained has also not been considered in the judgement.

The learned Counsel for the 2nd accused appellant agreeing with the submissions made by the learned President's Counsel contended that the identification of both the accused appellants were not proper and convicting the appellants based on such identification has caused prejudice to the appellants.

Accordingly, both the Counsel moved that their respective appeals be allowed as it was not safe to allow the conviction to stand due to the matters urged by them.

After having considered the submissions made by the learned Counsel on behalf of the appellants, the learned Senior Deputy Solicitor General (SDSG) submitted that he is no longer in a position to argue against the contention that the procedure adopted by relevant authorities in order to identify the perpetrators of the crime, was not proper. He submitted further that because of the showing of several photographs over and over to the victim child, identification based on such action cannot be considered as acceptable, given the fact that no proper identification parade has been held. Accordingly, he informed Court that he is conceding that the appeal of the appellants should be allowed.

After having considered the submissions of the learned Counsel for the appellant as well as the submissions of the learned SDSG, this Court would like to express our appreciation to the learned SDSG for his views expressed in this matter.

As agreed by the Counsel on behalf of both the parties, there is no doubt that the victim child has been subjected to an inhumane sexual abuse while attending his school, which is a matter that cannot be condoned under any circumstances. However, it is necessary that a conviction based on evidence presented before a trial Court in that regard to be convincing enough to establish a charge beyond reasonable doubt against an accused. As agreed by the learned SDSG, although, the evidence of the victim was that he was able to identify the two members of the rucker team of the school who sexually abused him, the procedure that has been adopted by the relevant authorities in order to identify the two students concerned are not at all satisfactory.

The action of the father who showed a photograph of the school rucker team downloaded from the internet can be termed a justifiable action under the circumstances faced by the parents. However, this Court cannot justify the actions of the school principal where he has attempted to exclude a suspect and to determine whom should be produced for an informal identification parade.

The actions of the officers of the National Child Protection Authority are also not satisfactory for allowing such a procedure to be followed. It appears that the school principal has acted with the best interest of the school in mind in order to minimize the damage that may be caused to the reputation of the school while attempting to identify the wrongdoers.

However, the procedure adopted in that regard has resulted in a situation where the identification of the appellants was tainted and not proper, as argued correctly and agreed by the Counsel.

At this juncture, I would like to cite the judgement of **Regina Vs. Turnbull and Another (1997) QB 224**, where it was held:

“Where the case against an accused depends wholly on the correctness of the identity of the accused, the judge should warn the jury of the special need to for caution before relying on the correctness of the identification by the witness.”

The Judge should tell the jury that;

- Caution is required to avoid the risk of injustice.
- A witness who is honest may be wrong even if they are convinced, they are right.
- A witness who is convincing may still be wrong.
- More than one witness may be wrong.
- A witness who recognizes the defendant, even when the witness knows the defendant well, may be wrong.

Some of the circumstances a judge should direct the jury to examine in order to find out whether a correct identification has been made include;

- The length of time the accused was observed by the witness;
- The distance the witness was from the accused;
- The state of the light;

- The length of time elapsed between the original observation and the subsequent identification to the police.

E.R.S.R. Coomaraswamy in his book **‘The Law of Evidence’ Volume 1 at page 663** discusses the question of identity in the following manner.

“A fundamental requisite in a criminal case is to establish the identity of the accused as the guilty party. The text-books abound with instances of what were supposed to be clear identifications which proved to be fallacious and defective. These include the case where an honest witness was deceived by the broad glare of sunlight, (R Vs. Wood and Brown [Ann-Reg. 1784])...

...Much of the value of direct evidence of identification will depend on the personal appearance of the subject of identification. Many persons cannot be easily distinguished from others. The liability mistake is greater where the questionable identity is a matter of deduction and inference and the expression of an opinion than where it is the subject of direct evidence. (Wills, op. cit., 7th edition., pp 197-200)”

For the reasons set out as above, this Court has no option but to allow the appeal by the appellants as it is the view of this Court that allowing the conviction and the sentence to stand is not safe.

Accordingly, I allow the appeal, and acquit the appellants from the charges for which they were found guilty.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal