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

In the matter of an Appeal made under 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 Case No.
CA/HCC/ 0054/2020

Herath Mudiyanselage Somawardhana alias Anura

High Court of Ratnapura
Case No. HC/189/2017

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **A.S.M.Perera , P.C. with Uvindu Jayasiri and Chathunika Vitharana for the Appellant.**
Shanil Kularatna, SDSG for the Respondent.

ARGUED ON : **07/10/2022**

DECIDED ON : **15/11/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General for committing an offence under section 364(2) read with Section 364 (2) (e) of the Penal Code for committing statutory rape on Kukule Viyannalage Nayanasiri Priyangika Madhuwanthi between 01/08/2006 to 15/09/2006.

The trial commenced on 11/10/2018. After leading all necessary witnesses and marking Production P1-P2, the prosecution had closed the case on 22/10/2019. The Learned High Court Judge had called for the defence on the same day and the counsel for the Appellant had moved for a day to call witnesses on his behalf. The Appellant had given evidence from witness box, called several witnesses and marked documents X1, X2, X3 and X3 (a) and closed his case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant as charged and sentenced him to 18 years rigorous imprisonment and imposed a fine of Rs.25,000/- subject to a default sentence of 06 months simple imprisonment. In addition, a compensation of Rs.500000/- was ordered with a default sentence of 02 years rigorous imprisonment.

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 his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom from prison.

The Learned President's Counsel contends that based on the evidence offered, it is impossible to conclude that the prosecution has proven its case against the Appellant beyond reasonable doubt.

According to PW1, the incident pertaining to this case had occurred when she was attending year five class at Opanayaka Vidyalankara Maha Vidyalaya. She was 10 years old and the Appellant was her class teacher at that time. Her class was functioned in a hall with a stage. The alleged incident had happened inside the changing room which is situated beside the stage.

On the date of the incident, the Appellant had entrusted the task to clean the changing room to the victim. When she was cleaning the room, the Appellant had come behind, held her and put her on a desk. After removing her under garment the Appellant had inserted his penis in to her vagina and had raped her. As it was painful, she had shouted but none had come for her help. After the act, the Appellant had asked her to go home but reminded her not to divulge this incident to anybody. Although she encountered an unpleasant incident, she did not divulge it anybody including her parents. She attained puberty before this incident.

After about 16 months from the 1st incident, on 26/11/2007 she had lodged a complaint against a person called Sagara for raping her. This incident had come to light when her mother confronted her with regard to arriving late home after school. When her mother assaulted and questioned her, she had divulged the incident of rape by Sagara. But she did not divulge anything

about 1st incident which had happened to her in the school. At the police station when she was questioned whether she had encountered any incident similar to the second one, the victim had come forward for the first time about the alleged raping incident by the Appellant. Even her mother had got to know the 1st incident at the police station.

The Appellant giving evidence from witness box denied the incident.

The prosecutrix came out about the first incident pertains to this case first time when she promptly lodged her complaint against Sagara who had raped her on 26/11/2007.

In the cross examination, the prosecutrix admitted that on the day of the first incident, her friends Keshani, Sivahari and Ranjula were present. The prosecutrix had made two statements to the police. In her first statement she asserted that the Appellant had asked her to stay behind when other children were not present there. In her second statement she had mentioned about other student's presence. The prosecution, although had named the other children of the prosecutrix's class as witnesses in the indictment, had not called them to give evidence during the trial.

PW3, DMO Balangoda submitted the Medico Legal Report of the prosecutrix which had been marked as P1. In the short history the doctor had noted that a similar incident which had been occurred from another person in the year 2006. The doctor even though admitted that he obtained the short history from BHT of the prosecutrix, the prosecution had not taken any measures to produce the same during the trial. According to the doctor who had examined the prosecutrix, there were no external injuries present and the hymen was not to be seen. The doctor had examined the witness on 27/11/2007 after Sagara raped her.

The admissibility of the recorded history in the Medico-Legal Report as evidence in criminal trials has been discussed in several decided cases.

In **Gamini Dolawatte V. Attorney General** [1988] 1 Sri. L. R 221 held that:

> "*While a Medico-Legal Report is admissible in evidence under Section 414(1) of the Code of Criminal Procedure Act, hearsay evidence by way of the case history embodied in such a report is not admissible as such history is information is not ascertained by the Doctor from his own examination of the injured".*

Under this backdrop, now I consider whether the evidence given by the prosecutrix could be accepted without any corroboration to prove the charge of rape against the Appellant.

In **Sunil and Another v. The Attorney General** [1986] 1 Sri.L.R. 230 the court held that:

> *"It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration".*

In **State of Andra Pradesh v. Garigula Satya Vani Murty** AIR 1997 SC 1588, it was held that:

> *" …the courts are expected to show great responsibility while tying an accused on a charge of rape. They must deal with such cases with utmost sensitivity".*

As stated earlier, the incident pertains to this case had been only revealed on 27/11/2007 about 16 months after the incident. Hence no medical evidence available to substantiate the claim of the prosecutrix. Further the prosecution has failed to call the fellow students who were present at that time. She already attained puberty when the alleged incident said to have happened.

According to PW3, mother of the prosecutrix, during her examination in chief, she told the court that her daughter revealed sexual harassment perpetrated by the Appellant while making a testimony regarding a rape event allegedly committed by one Sagara. The relevant portions of her evidence are re-produced below:

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ප්‍ර : මොන වගේ දෙයක් ද මේ විත්තිකාරයා දුවට කරලා තියෙන්නේ ?

උ : අතවර කරලා තියෙන්නේ.

ප්‍ර : අතවරයක් කියන්නේ ලිංගික අතවර. ඩෙස් පුටු බංකු උඩ දාගෙන කරලා තියෙන්නේ. පොලිසියේ මහත්වරුත් එක්ක ළමයා කිව්වා. තව මොනවාද කලේ කියලා ඇහුවම කලිසම ගලවලා ඇඟේ අතුල්ලනවා කියලා කිව්වා.

ප්‍ර : පොඩි නෝනා කිව්වානේ ලිංගික අතවර කියලා ඒ කියන්නේ මොන වගේ ලිංගික අතවරයක් ද කරලා තියෙන්නේ ?

උ : ලිංගික අතවර කියලා කිව්වාම මහත්තයාට තේරෙන්නේ නැද්ද ? ළමයිත් එක්ක ඒ මහත්තයා ලිංගික අතවර කරලා තියෙනවා. නැත්නම් අපි ඒවා දන්නේ කොහොමද ළමයා කිව්වේ නැත්නම්.

(Page 117 of the brief)

ප්‍ර : ඒ වේලාවේ දුවගෙන් දැන ගත්තාද මොන වගේ කරදරයක් ද මේ විත්තිකාරයාගෙන් වුණේ කියලා ?

උ : ඒ වේලාවේ පොලිසියේ මහත්තයාට ළමයා කීවට පස්සේ තමයි දැන ගත්තේ.

ප්‍ර : මොන වගේ දෙයක්ද මේ විත්තිකාරයා කරලා තිබුණේ ?

උ : ඩෙස් උඩ බුදියන්න කියලා කලිසම් ගලවන්න කියලා තිබුණා. ගවුම් ගලවන්න කියලා තිබුණා. ඩෙස් උඩ බුදියන්න කියලා තමයි ළමයාට කරදර කරලා තියෙන්නේ.

In **Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 His Lordship held that;

> *"In considering the question as to whether evidence given by the witness should be accepted or not, the court has, no doubt, to examine whether the witness is an interested witness and to enquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is - whether there is a ring of truth surrounding his testimony."*

Under these circumstances, accepting prosecutrix's evidence without corroboration for the charge of rape will cause great prejudice to the Appellant's right to have a fair trial. Hence, I conclude that finding the Appellant guilty to the charge of rape is untenable considering the circumstances of this case. Therefore, his conviction entered by the Learned High Court Judge Ratnapura hereby is set aside.

Therefore, now I consider whether the Appellant could be found guilty to a lesser offence considering the available evidence.

According to the facts of this case, the Appellant being the class teacher of the prosecutrix, using his authority and breaching the trust as a teacher intentionally used force on the prosecutrix and touched her body and removed her under garment and thereby has caused sexual harassment.

Section 345 of Penal Code as amended states:

"Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment and shall on conviction be punished with imprisonment of either description for a term which may extend to five years or with fine or with both and may also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person."

EXPLANATION

1. Unwelcome sexual advances by words or action used by a person in authority, to a working place or any other place, shall constitute the offence of sexual harassment.

2.For the purposes of this section an assault may include any act that does not amount to rape under section 363 or grave sexual abuse under section 365B.

3. "injuries" includes psychological or mental trauma.

Hence, acting under Section 335(2) (b) of the Code of Criminal Procedure Act No. 15 of 1979 I substitute a conviction under Section 345 of the Penal Code as amended and impose the Appellant a period of five years rigorous imprisonment and a fine of Rs.10000/- with a default sentence of 01-year rigorous imprisonment. Further, the Appellant is ordered to pay a sum of

Rs.300000/- to the PW1 as compensation and in default serve 2 years of rigorous imprisonment.

Considering all the circumstances of this case I order the sentence to take effect from the date of conviction i.e., from the 25/06/2020.

Subject to the above variations, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL