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

In the matter of an Appeal under Section 331 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.

The Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No. CA/HCC/0108-0109/2019

Complainant

High Court of Matara Case No. HC/52/2017

V.

1. Gamlathge Nishantha
2. Rajapakse Arachchige Chamara

Accused

AND NOW BETWEEN

1. Gamlathge Nishantha
2. Rajapakse Arachchige Chamara

Accused–Appellants

V.

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

Respondent

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

COUNSEL : Anuja Premaratna, PC with Nayana Dissanayake, Imasha Senadeera, Ishan Madawa, Senal Matugama, Shonal de Silva, Ramith Dunusinghe and Vivendra Ratnayake for the Accused – Appellants.

Riyaz Bary, Deputy Solicitor General for the Respondent.

ARGUED ON : 21.11.2022

WRITTEN SUBMISSIONS
FILED ON : 16.02.2021 by the 1st and the 2nd Accused–Appellants.
21.01.2020 by the 1st Accused–Appellant.

07.05.2021 by the Respondent.

JUDGMENT ON : 12.01.2023

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K. PRIYANTHA FERNANDO, J.(P/CA)

1. The first and the second accused appellants were indicted in the High Court of *Matara* on the following counts.
   I. On count No. 1, the 1st accused appellant (hereinafter referred to as the 1st appellant) was charged with the offence of kidnapping from lawful guardianship, punishable in terms of section 354 of the Penal Code.
   II. On count No. 2, the 2nd accused appellant (hereinafter referred to as the 2nd appellant) was charged with the offence of aiding and abetting the 1st appellant in committing the offence mentioned in count No. 1, an offence punishable in terms of

section 354 to be read with section 102 of the Penal Code.

III. On count No. 3, the 1st appellant was charged with the offence of grave sexual abuse, punishable in terms of section 365 B(2)(b) of the Penal Code.

IV. On count No. 4, the 2nd appellant was charged with the offence of aiding and abetting the 1st appellant in committing the offence mentioned in count No. 3, an offence punishable in terms of section 365 B(2)(b) to be read with section 102 of the Penal Code.

V. On count No. 5, the 1st appellant was charged with the offence of rape punishable in terms of section 364(2)(e) of the Penal Code.

VI. On count No. 6, the 2nd appellant was charged with the offence of aiding and abetting the 1st appellant in committing the offence mentioned in count No. 5, an offence punishable in terms of section 364(2) to be read with section 102 of the Penal Code.

2. After trial, the learned High Court Judge convicted the 1st appellant for counts 1, 3 and 5 and convicted the 2nd appellant for counts 2, 4 and 6 as charged.

3. Both the 1st and the 2nd appellants were sentenced as follows,

The 1st appellant;

Count No. 1 - rigorous imprisonment for a period of 2 years with a fine of Rs. 2,500/-

Count No. 3 - rigorous imprisonment for a period of 12 years with a fine of Rs. 5,000/-

Count No. 5 - rigorous imprisonment for a period of 12 years with a fine of Rs. 5,000/-

The 2nd appellant;

Count No. 2 - rigorous imprisonment for a period of 2 years with a fine of Rs. 2,500/-

Count No. 4 - rigorous imprisonment for a period of 12 years with a fine of Rs. 5,000/-

Count No. 6 - rigorous imprisonment for a period of 12 years with a fine of Rs. 5,000/-

In addition to the above, both the 1st and the 2nd appellants were ordered to pay Rs. 100,000/- each, as compensation to the victim. The sentences of imprisonment imposed on both appellants were ordered to run concurrently.

4. This appeal has been preferred by the appellants against the above convictions and the sentences. The learned President's Counsel appearing for the appellants urged the following grounds of appeal.
    I. The learned High Court Judge has failed to consider the unexplained belatedness of the complaint.
    II. The learned High Court Judge has failed to consider the credibility of evidence of the prosecutrix.
    III. The learned High Court Judge has failed to consider the fact that the medical evidence does not corroborate any sexual act.

5. The brief facts as per the evidence of the prosecution are as follows,
   The child victim (PW1) has been 12 years of age when the alleged sexual offences were committed on her by the appellants. The 1st appellant is the son of the PW1's grandfather's sister. According to the mother of the PW1, the victim's relationship towards the 2nd appellant is that, he is an uncle to the victim. On the day of the incident, the PW1 was coming back after dropping her nephew at the nursery, the 1st appellant has asked her to get into the three-wheeler. The 2nd appellant has also been in the three-wheeler. According to the PW1, she was having a love affair with the 1st appellant. Both the 1st and the 2nd appellants have taken her to a house, and the 1st appellant has committed the sexual acts on her. When the 1st appellant took the PW1 to a room which had no

furniture in it, the 2nd appellant has given a mat for the 1st appellant to use.

6. When the PW1's mother (PW2) got to know about the incident that transpired between the PW1 and the 1st appellant, she has inquired the PW1 regarding this. Thereafter, the PW2 has gone and inquired about the incident from the 1st appellant's family, upon which the family members of the 1st appellant have tried to assault the PW2. Then the PW2 has taken her daughter to the police station and has lodged a complaint.

7. The grounds of appeal No. 1 and 2 will be discussed together. The learned President's Counsel for the appellants submitted that, the complaint to the police was lodged 13 days after the alleged sexual offences were committed on her. The prosecutrix has failed to even inform her mother until the mother heard certain rumours regarding the incident. It is the submission of the learned President's Counsel that, the dispute which arose when the PW1's mother went to inquire from the 1st appellant's family, has led to the complaint to the police being lodged. The learned President's Counsel further submitted that, the evidence of the PW1 is contradictory to the evidence of the police officer with regard to the house to which the PW1 was taken by the appellants. The evidence of the PW1 revealed that, her mother has added certain facts to her statement to the police and therefore, the evidence of the PW1 is not credible.

8. The learned Deputy Solicitor General for the respondent submitted that, a 13 days delay in making the complaint to the police is justified in the given circumstances. It was further submitted that, there is no discrepancy between the evidence of the PW1 and the police officer with regard to the house to which the PW1 was taken into by the appellants.

9. In cross-examination, the PW1 was questioned as to why she did not tell her mother or at least to her aunt about

the incident. She said that she was too scared to tell them. The PW1 was 12 years of age at the time when the sexual acts were committed on her. It is obvious that, she would have been scared to tell her parents that she was having a love affair with the 1st appellant who is her uncle.

10. How children would react when they become victims of sexual offences was discussed in case of ***Sirirathana Thero v. Hon. Attorney General*** *CA 194/2015 (07.05.2019).*

> *"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."*

11. In the instant case, the PW1 clearly stated that she did not tell her parents about the incident initially as she was scared. She may have also felt guilty as she was having a love affair with a much older relative of hers when she was only 12 years of age. Hence, her delay in coming out with the story to her mother will not affect her credibility.

12. One cannot expect a twelve-year-old girl child to go to the police station on her own to lodge a complaint regarding a sexual assault. The PW1's mother upon having heard about the sexual assault, has inquired from the PW1 and has then gone to the 1st appellant's house. Being a close relative of the 1st appellant and being an ordinary village woman, there is no improbability regarding her actions. The learned President's Counsel stressed upon the fact that, the PW2 being the mother of the PW1, has added certain facts to the PW1's statement to the police. Upon carefully scrutinising the PW1's evidence, it is clear that the only thing that PW1 told the police in making her statement after hearing from her mother is the address of the 1st appellant.

13. There is neither any inconsistency nor any contradiction between the evidence of the PW1 and the police officer who visited the crime scene on the layout of the house, as submitted by the learned President's Counsel. The evidence of the PW1 was that, it was the front room where you can see the sitting room when you enter. The evidence of the police officer (PW8) was that, she was shown the front room by the PW1 as the place in which she was sexually abused. One can enter that room through the veranda. Hence, I find that the grounds of appeal No. 1 and 2 are devoid of merit.

14. The Learned President's Counsel for the appellants submitted that, counts No. 5 and 6 should fail because the offence of rape was not proved, as penile penetration into the vagina was not proved. The Learned President's Counsel further submitted that, the medical evidence does not corroborate vaginal penetration.

15. To complete the element of penile penetration, the penis need not be inserted deeply into the vaginal passage. It is sufficient that the penis enters beyond the labia majora to the vulva. In cross examination, the PW1 in her evidence said (at page 114 of the brief);

"ප්‍ර: සාක්ෂිකාරිය ඊටපස්සේ මොකක්ද කළේ මේ විත්තිකාරයා ඔබට?
උ: මගේ චූදාන තැනට තිව්වා.
ප්‍ර: තියලා මොකක්ද කළේ?
උ: තද කළා.
ප්‍ර: චූදාන එක ඇතුළටම දැම්මද?
උ: ටිකක් විතර.
ප්‍ර: ඔබ කියන්නේ මේ විත්තිකාරයා ඔබගේ චූකරන තැන ඇතුළටම දැම්මද මොකක්ද කළේ කියලා හරියට නිශ්චිත පිළිතුරක් දෙන්න ගරු අධිකරණයට?
උ: දැම්මා.
ප්‍ර: ඇතුළටම දැම්මද?
උ: නැහැ.
ප්‍ර: කොහාටද දැම්මේ?
උ: චුට්ටක් ගියාට පස්සේ ආයි මම එපයි කිව්වට පස්සේ ගත්තා එළියට."

16. As I have stated before in this judgment, the PW1 was about 12 years of age at the time of the incident. One cannot expect a twelve-year-old girl child to explain the female anatomy. However, she has sufficiently explained the penetration of the penis.

17. The medical officer (PW11) has examined the PW1 on 27th December 2007, that is 14 days after the incident. The PW1 has been consistent when she narrated the short history to the medical officer. The PW11 has not observed any injury on the PW1's thighs, or labia. The medical officer in his evidence has said that, there has been no penetration inside the vaginal passage. However, he has said that he cannot exclude any penetration between vaginal lips (page 199 of the brief).

> "ප්‍ර: කෙටියෙන් කියනවා නම්, ඇයගේ කලවා අතර හෝ ඇයගේ යෝනි මාර්ගය තුළට යම් ප්‍රවිශ්ටයක් වුනාද කියලා මහත්මයාට මතයක් ඉදිරිපත් කරන්න හැකියාවක් නැහැ?
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> උ: යෝනි මාර්ගය තුළට යම් ප්‍රවේශයක් සිදුවෙලා නැහැ. තොල් පෙති අතර ප්‍රවිශ්ටයක් වුනාද නැත්ද කියන එක ස්ථීර වශයෙන්ම කියන්න බැහැ."

18. Therefore, it is clear that, although the medical evidence does not assist to corroborate the PW1's evidence on penetration, it is not inconsistent with the evidence of PW1 that the 1st appellant penetrated his penis into her vulva. As the evidence of the PW1 is found to be cogent and credible, the appellants can be safely convicted even in the absence of any corroborative evidence.

19. In case of ***Thambirasa Sabaratnam v. A.G,*** *CA 127/2012*, after discussing a series of case authorities said;

> *"Therefore, it is clear that an accused person facing a charge of sexual offence can be convicted on the uncorroborated evidence of the victim when her evidence is of such character as to convince the Court that she is speaking the truth."*

20. Indian Supreme Court in case of ***Bhoginbhai Hirjibhai v. State of Gujarat [1983]*** *AIR SC 753* said;

"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."

21. Upon carefully scrutinizing the evidence of the PW1, I am of the view that the learned High Court Judge was entitled to act upon her evidence without any further corroboration. Hence, the ground of appeal No. 3 should necessarily fail.

22. Although no specific ground of appeal was raised, the learned President's Counsel submitted that, the prosecution has failed to prove counts 1 and 2 beyond reasonable doubt, as they failed to prove that the PW1 was kidnapped from lawful guardianship. It is the contention of the learned President's Counsel that, the prosecution failed to call the father of the PW1, although he was listed as a witness in the indictment.

23. It is the contention of the learned Deputy Solicitor General for the respondent that, the prosecution has called the mother of the PW1 to prove the element of lack of consent by the guardian.

24. According to the particulars of the offences in counts No.1 and 2 of the indictment, it is alleged that the PW1 was kidnapped from the lawful guardianship of *Rajapaksa Arachchige Gunasiri*. He is the father of the PW1, whose name appears in the list of witnesses as witness No. 4. Section 352 of the Penal Code that defines kidnapping from lawful guardianship provides that, whoever takes or entices any minor under sixteen years of age if a female without the consent of such guardian is said to have kidnapped such minor from lawful guardianship.

25. The particulars of the offences in counts No. 1 and 2 clearly mention that, the said *R. A. Gunasiri* was the lawful guardian of the PW1. Thus, it is incumbent upon the prosecution to prove that, the PW1 was taken away without the consent of the father *Gunasiri*. The mother of

the PW1, who is the PW2, has not consented for the appellants to take the child away. However, that does not mean that the Court can imply that the father who was the guardian has also not given consent. The evidence of the PW2 did not reveal that the father of the PW1 has not given consent. One might argue that, no father would ever consent for a 12-year-old daughter to be taken away. However, it is for the prosecution to prove beyond reasonable doubt that, there was a lack of consent from the guardian. In this instance, according to the particulars of the offence in counts No. 1 and 2, the father, although listed in the indictment as a witness, has not been called by the prosecution to prove lack of consent. Hence, I find that the prosecution has failed to prove the charges in counts No. 1 and 2 against the 1st appellant and the 2nd appellant respectively.

26. For the aforesaid reasons, I affirm the convictions and subsequent sentences imposed on the 1st appellant by the learned High Court Judge in counts 3 and 5. I also affirm the convictions and sentences imposed by the learned High Court Judge on the 2nd appellant in counts 4 and 6. I acquit the first appellant on count No. 1 and the 2nd appellant on count No. 2.

27. Hence, the appeals preferred by the appellants are partly allowed.

PRESIDENT OF THE COURT OF APPEAL

WICKUM A. KALUARACHCHI, J.

I agree.

JUDGE OF THE COURT OF APPEAL