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/ 0400/2017
High Court of Gampaha
Case No. HC/22/2004

The Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Vs

1. Mohotti Mudiyanselage Shantha Gunatilaka.
2. Wickrama Arachchilage Dhammika Karunaratne.

ACCUSED

AND BETWEEN

Wickrama Arachchilage Dhammika Karunaratne.

2nd ACCUSED-APPELLANT

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 Madhushani De Soysa, Nirmani Wickramasinghe with Damitha Wickrama Arachchi for the Appellant.**
Janaka Bandara, DSG for the Respondent.

ARGUED ON : **05/06/2023**

DECIDED ON : **08/08/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named 1st Accused was indicted under Section 364(2) (e) of the Penal Code for committing rape on Dissanayake Mudiyanselage Amitha Kumari in the High Court of Gampaha on 25.10.1999 and in the course of the same transaction of third count mentioned below.

In the second count, the 2nd Appellant (hereinafter referred to as the Appellant) was indicted under section 364(2)(e) read with section 102 of the

Penal Code for aiding and abetting the 1st Accused to commit rape on Dissanayake Mudiyanselage Amitha Kumari on 25.10.1999 and in the course of the same transaction mentioned in the 1st count.

In the third count, the Appellant was indicted under section 308 (A) (2) of the Penal Code as amended for committing an offence of Cruelty on Dissanayake Mudiyanselage Amitha Kumari in the High Court of Gampaha between 03.09.1999 to 25.10.1999.

After the trial, the 1st Accused was acquitted from 1st count and the Appellant was acquitted from the 2nd count.

But for the third count, the Appellant was convicted and was sentenced to two 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.50,000/- as compensation to the victim. In default, 03 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. It is further informed that the Appellant is on bail pending appeal.

<u>The Appellant had filed the following grounds of appeal:</u>

1. The Learned High Court Judge has not evaluated the evidence properly.
2. The Learned High Court Judge has failed to follow the maxim *Falsus in uno, falsus in omnibus.*
3. The Learned High Court Judge had expected some proof from the defence.
4. The Learned High Court Judge has failed to consider grave discrepancies of the prosecution case.

The victim was residing at Inginiyagala in Ampara district before she came to the Appellant's house at Ranpukunugama, Nittambuwa. The Appellant's husband who is a relation of the victim had brought her to Ranpokunugama on the promise that she would be sent to school and could enjoy her leisure time by watching television. Her parents had sent her to Ranpokunugama due to poverty. When she came to the Appellant's house, she had completed 15 years of age. She has four siblings.

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

PW2, Dr.Paranamana who had examined the victim stated that he had noted three categories of injuries on the victim's body. According to him, the first category of injuries had been inflicted by blunt weapon. The second category of injuries had been caused by burning and the third category had been caused by a sharp weapon.

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 and called two witnesses on her behalf.

According to the victim, when she was 15 years old the Appellant had started to assault and ill-treat her. The victim's evidence must be considered very carefully as she was a child when she underwent the agony.

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.

As the 1st and 2nd grounds of appeal are interconnected, both grounds will be considered jointly hereinafter.

In the first ground of appeal, the Appellant contends that the Learned High Court Judge had failed to evaluate the evidence properly and in the second ground the Learned High Court Judge has failed to follow the maxim *Falsus in uno, falsus in omnibus.*

The victim in her evidence had stated that due to unstable economic condition of the family she had to discontinue her schooling and went for odd jobs to support her family. During this time, her mother's relation namely Sisira Uncle who is the husband of the Appellant had come there and with the permission of the parents of the victim, he took her to Nitambuwa. Initially the Appellant had treated her properly and the ill-treatment had started only after some time. Gradually, the Appellant had entrusted her with household chores. In the meantime, the Appellant had started to ill-treat her by pricking her body with sharp pins, dropped hot candle wax on her body and beating her with broomstick and sticks. She was ordered to wash dishes and was not given proper place to sleep. Due to assault, she sustained injuries on her body. She was never sent to school. Once, the Appellant had applied chili powder to her eyes. The Appellant used

to beat the victim in the absence of her husband who used to come home once in three months. Due to this cruel treatment, her life had become miserable. According to the victim the ill-treatment had started after about two years of her coming to the Appellant's house. Further she had been threatened not to reveal it to anybody.

As the 1st Accused and the Appellant were acquitted from 1st and 2nd charges respectively in the indictment, the evidence pertains to 1st and 2nd charges will not be considered in this appeal.

PW2, the mother of the victim corroborated the evidence given by the victim how she went to Appellant's house and returned. She further said when the victim was brought back home by the Appellant's husband, she had noticed injuries all over the victim's body. Due to injuries sustained on her face, she could not even identify the victim properly. Further, hearing her cries, her brother, PW3 had come there and after seeing the victim's appearance he had punched the Appellant's husband's face. As the Appellant's husband sustained injuries on his lip, he had run away from the scene after leaving the victim. Due to fear of police, she had first taken the victim to the hospital.

While corroborating the evidence of PW2, PW3 had further said that he had noticed injuries on victim's body when he went to victim's house hearing the cries of PW2.

PW4, the Doctor who had examined the victim had given very comprehensive evidence under three categories of injuries noted on the victim's body. As he had noted number of injuries on her body, he had not counted their numbers. Blunt weapon injuries had been noted all over victim's body. The second category blunt injuries had been noted on front chest and face of the victim. The third category sharp weapon injures had been noted on back of the chest of the victim. He could not express an opinion about the age of injuries, but he was certain that the injuries could have been inflicted at least two weeks before the examination. In the history given to the doctor,

the victim had said that she was beaten and burnt by the occupier of the house where she lived. The Doctor got photographs of the injuries on victim's body using the services of PW08, who is a freelance photographer cum reporter of the area.

After leading the police evidence, the prosecution had closed the case for the prosecution.

Defence was called and the Appellant gave evidence from the witness box. The Appellant admitted that her husband brought the victim to her house. When she was brought, she had noticed number of injuries on victim's body. Further she had admitted that she entrusted several household chores to the victim. But she denied assaulting the victim while she was in her house.

The Appellant's husband also gave evidence on behalf of her. He too had corroborated the evidence of the Appellant. He further admitted that PW3 had assaulted him when he went to hand over the victim to her mother.

Although the Learned President's Counsel contented that the Learned High Court Judge has not properly analysed the evidence of prosecution witnesses, this contention cannot be accepted as the Learned High Court very correctly and comprehensively had analysed the evidence to come to his conclusion on the third count of the indictment. The relevant portions of the judgement are re-produced below:

Page 879-881 of the brief.

43. පැමිණිලිකාර දැරිය පැහැදිළි සහ ඒකාකාරීව සාක්ෂි දෙමින් කියා සිටියේ 2 වන විත්තිකාරිය විසින් ඇයට වැඩ අතපසු වන අවස්ථාවල දී පහර දීම් සිදුකරන ලද බවත් ඇල්පෙනෙතිවලින් ඇනීම සිදුකළ බවත් නිදා ගෙන සිටින අවස්ථාවල දී ඉටිපන්දම් කිරි වත්කොට පිලිස්සීමට ලක් කළ බවත්ය. එවැනි පහර දීම් සහ පිලිස්සීම් තුවාල සිදු වී ඇති බවට පැ. 1 ලෙස ඉදිරිපත් කර ඇති අධිකරණ වෛද්‍ය වාර්තාව සහ පැ. 6 දරණ ඇඳ හිසපත අනුව සාක්ෂි දී ඇති වෛද්‍යවරයාගේ සාක්ෂියෙන් පැහැදිළිව තහවුරු වේ. අධිකරණ වෛද්‍ය වාර්තාව පමණක් නොව ඇඳහිස පත ද නඩත්තු කර ඇත්තේ මෙම වෛද්‍යවරයා විසින්ම ය. කෙටි ඉතිහාසය වශයෙන් ද ඇඳහිස පතේ

දක්වා ඇති පරිදි ඇයට පහර දෙන ලද බවට සහ ඇයව පුළුස්සන ලද බවට පැමිණිලිකාර දැරිය වෛද්‍යවරයාට සඳහන් කොට ඇත. විත්තියෙන් පෙන්වා දීමට උත්සහ කර සිටියේ මෙම තුවාල මෙම දැරිය ඉඟිනියාගල සිටින විට දී කැලේ හරක් බැලීමට ගිය අවස්ථාවල දී ඇති වූ තුවාල බවයි. එසේ වුවද දැරියව ඉටිපන්දම් කිරි වලින් පුළුස්සන ලද බවට දැරිය දී ඇති සාක්ෂිය වෛද්‍ය සාක්ෂි අනුව ද මොනවට තහවුරු වේ.

44. සිද්ධිය වන අවස්ථාව වන විට වයස අවුරුදු 15 ක් පමණ වූ දැරියක් දරුවා සමඟ සිටීමට ගෙන්වා ගත් බවට පෙන්වා දීමට 2 වන විත්තිකාරිය සිය සාක්ෂිය මගින් උත්සහ කර සිටිය ද ඇයට මිදුල අතුගෑම, රෙදි සේදීම වැනි වැඩට ද ඇය යොදා ගෙන ඇති බව ඇයගේම සාක්ෂියෙන්ම තහවුරු වේ. සමහර අවස්ථාවල දී යට ඇඳුම් පවා සේදීමට දී ඇත. කුඩා දරුවා බලා ගැනීමට ඇයට පැවරීම සම්බන්ධයෙන් ද ඇයගේම සාක්ෂිය තුල 2 වන විත්තිකාරිය වරින් වර පරස්පර විරෝධී ලෙස සාක්ෂි දී ඇත. එක් අවස්ථාවක ඇය කියා සිටියේ ඇයට දරුවා බලා ගැනීමට හැකියාවක් නොමැති බැවින් මුලින් දරුවා බලා ගැනීමට ඇයට දින දෙක තුනක් ලබා දුන්න ද පසුව දරුවා ඇයට නොදුන් බවයි. දරුවාව පැමිණිලිකාර දැරිය විසින් කෙනිත්තීමට ලක් කර තිබුණු බවට ද ඇය සාක්ෂි දී ඇත. 2 වන විත්තිකාරියගේම සාක්ෂියට අනුව මෙම දැරියගේ කකුල් ඉදිමී ඇඟිලි තුවාල වී හොරි සෑදී සැරව ගලමින් සිටින අවස්ථාවක දී මෙවැනි දරුවෙකු බලා ගැනීමට සැලැස්සුවේ ද යන්න සම්බන්ධයෙන් ප්‍රශ්න කළ විට ඇය පෙන්වා දීමට උත්සහ කර සිටියේ මුල් අවස්ථාවේ දී දරුවා බැලීමට හෝ ඇයට ලබා නොදුන් බවයි.

45. 2 වන විත්තිකාරිය මෙන්ම 2 වන විත්තිකාරියගේ ස්වාමි පුරුෂයා ද අධිකරණයේ සාක්ෂි දෙමින් මෙම දැරියව නිවසට රැගෙන එන අවස්ථාව වන විට ද ඇයට මෙවැනි තුවාල තිබූ බවට සහ ඒ සම්බන්ධයෙන් වෛද්‍ය ප්‍රතිකාර ලබාදුන් බවට කියා සිටිය ද එවැනි කිසිදු යෝජනාවක් හෝ මෙම දැරිය සාක්ෂි දෙන අවස්ථාවේ දී දැරියට කර නැත. ඒ අනුවම මෙම දැරියගේ ශරීරයේ තිබූ තුවාල දැරියව රැගෙන එන අවස්ථාවේ දී තිබූ බවට මෙම 2 වන විත්තිකාරිය සහ ඇයගේ ස්වාමි පුරුෂයා දෙන ලද සාක්ෂිය මෙම චෝදනාවෙන් මිදීම සඳහා පසුව ගොතන ලද සාක්ෂියක් බව පැහැදිළිව පෙනී යයි. එපමණක් ද නොව මෙවැනි තුවාල පෙර තිබීමක් සම්බන්ධයෙන් පොලීසියට ද 2 වන විත්තිකාරිය සිය ප්‍රකාශයේ සඳහන් කොට නැත. එවැනි කරුණු පොලීසියට කීමට පොලීසියට ඉඩ නොදුන් බවට දී ඇති සාක්ෂිය ද අධිකරණයට පිළිගත නොහැකි බව පෙනී යයි.

46. ඉදිරිපත් වී ඇති පැමිණිලිකාරියගේ සාක්ෂිය අනුව මෙන්ම 2 වන විත්තිකාරියගේ ස්වාමි පුරුෂයාගේ සාක්ෂිය අනුව ද පැහැදිළිව පෙනී යන්නේ 2 වන විත්තිකාරියගේ පුරුෂයා පැමිණිලිකාර දැරිය නැවත නිවසට කැඳවාගෙන ගිය අවස්ථාවේ දී දැරියගේ ස්වරූපය දැක නන්දන යන තැනැත්තා ඒ සම්බන්ධයෙන් ප්‍රශ්න කොට අවසානයේ දී 2 වන විත්තිකාරියගේ ස්වාමි පුරුෂයා එකී නන්දන යන තැනැත්තාට පහර දීමක් ද සිදු වී ඇති බවයි. දැරියට කෘර ලෙස සළකා ඇති ආකාරය දරුවාගේ ස්වරූපයෙන් භෞතික වශයෙන් දැකීමෙන් එම තත්වය ඒ අවස්ථාවේ දී උද්ගත වූ බවට පැමිණිලිකාරියගේ සාක්ෂිය මෙන්ම 2 වන විත්තිකාරියගේ පුරුෂයාගේ සාක්ෂියෙන් ද තවදුරටත් තහවුරු වේ.

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".

In coming to his conclusion that the Appellant is guilty to the third count of the indictment; the Learned High Court Judge had very correctly considered the divisibility of credibility of a witness by citing the Judgement **Samaraweera v Attorney General [1990] 1 SLR 256.** In this case the court held that:

"I find support for this view in Francis Appuhamyv. the Queen (2) where having considered the circumstances in which the Privy Council [in Mohommed Fiaz Baksh v. The Queen (3) 1958 A. C. 157] made the observation that the credibility (of withesses) could not be treated as divisible and accepted against one and rejected against another the Supreme Court, stated thus:

> *"We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly, in this country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses. In that situation, the Judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true." Per T. S. Fernando J.*

The next contention is the Learned High Court Judge has failed to follow the maxim '*Falsus in uno, falsus in omnibus'.*

The maxim '*Falsus in uno, falsus in omnibus'* is a Latin term which means "false in one thing, false in everything". This is a legal principle in common law that a witness who testify falsely about one matter is not all credible to testify about any other matter. At present this doctrine has been rejected by many of the common law jurisdictions.

It is necessary to consider the applicability of this maxim in our jurisdiction. The following mentioned cases are very much important to ascertain the stance taken by our apex courts regarding this maxim.

In **Samaraweera v. The Attorney General (Supra)** the court held that:

> *"The maxim falsus in uno falsus in omnibus could not be applied in such circumstances. Further all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true".*

In **Viraj v The Attorney General [2010] 2 SLR 251** the court held that:

> *"The maxim 'falsus in uno falsus in omnibus' is not applicable in the instant case. The maxim cannot be considered as the absolute rule and that the Judge in deciding whether or not he should apply the maxim must consider the entirety of the evidence of the witness and the entire evidence led at the trial."*

Considering above cited judgements it clearly demonstrates that the maxim maxim *'falsus in uno falsus in omnibus'* is not an absolute rule when

considering the evidence in a criminal trial in our jurisdiction too. It is now applied as rule of permissible inference which is basically depend upon the judge to decide.

In this case, the Learned Trial Judge has very correctly considered the evidence in applying the maxim '*falsus in uno falsus in omnibus*' in its correct perfective as considered by our superior courts. Hence, it is incorrect to say that the Learned High Court Judge has failed to consider this maxim in his judgment.

As such, the first and second grounds of appeal have no merit at all.

In the third ground of appeal, the Learned President's Counsel complains that the Learned High Court Judge has expected some proof from the defence. Upon perusal of the judgment, pertaining to the third charge levelled against the Appellant, the Learned High Court Judge had nowhere expected the proof from the defence or in other words reversed the burden upon the defence. Therefore, this ground also has no merit.

Finally, the Appellant contends that the Learned High Court Judge has failed to consider the grave discrepancies of the prosecution case.

The Learned High Court Judge, in his judgement very correctly considered all marked contradictions of the prosecution witnesses and had given plausible reasons as to why he disregarded those contradictions and believed the prosecution case. The relevant portion is re-produced below:

Page 881-882 of the brief.

47. මෙම දැරිය සාක්ෂි දෙන අවස්ථාවේ ද, දැරියගේ මව සාක්ෂි දෙන අවස්ථාවේ දී ද නන්දන උපුල් කුමාර යන සාක්ෂිකරු ද සාක්ෂි දෙන අවස්ථාවේ දී ඔවුන්ගේ සාක්ෂි සහ පොලිසියට කරන ලද ප්‍රකාශ අතර පරස්පර විරෝධතා ලෙස විශාල ප්‍රමාණයක් එනම් 2.වී.2 සිට 2.වී.38 දක්වා ලකුණු කර තිබුණා ද එම පරස්පර විරෝධතා සහ පොලිසියට කරන ලද ප්‍රකාශවල ඇති ඌණතා ද මෙම දැරියට 2 වන විත්තිකාරිය විසින් පහර දී තුවාල සිදුකරන ලද බවට පැමිණිලිකාර දැරිය

ලබා දී ඇති සාක්ෂි සම්බන්ධයෙන් කිසිදු ආකාරයක සැකයක් මතු කිරීමට එම පරස්පර විරෝධතා ප්‍රමාණවත් වී නොමැති බවට තීරණය කරමි. එසේම එම පරස්පර විරෝධතා නඩුවේ හරයට දිවෙන පරස්පර විරෝධතා නොවන බවට ද තීරණය කරමි.

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.

Hence, this ground also has no merit.

In this case, the victim was under the vicious clutches of the Appellant. She had fallen victim to ill-treatment as she was taken to Appellant's house by her husband. She had suffered both physically and mentally until she was taken back home. She was 15 years old when she started living with the Appellant and her ordeal continued until she was taken back home.

In this case when the victim gave evidence on 04.03.2014, she was 29 years and married to a differently abled person and blessed with two children. Her husband does not have a permanent job nor she employed either. The family is living in a hut. The victim is 38 years old now.

The Appellant was 48 years old when she gave evidence on 28.03.2017 and she is 54 years old now. The date of offence was between 03.09.1999 to 25.10.1999. Nearly 23 years passed after the offence being committed. Hence, sending the Appellant to jail will not serve any purpose considering all the circumstances of the case.

Although minimum mandatory sentence of 2 years has been stipulated for the offence committed under Section 308(A)(2) of the Penal Code as amended, considering the circumstances mentioned above I decided to replace the 2

years rigorous imprisonment with two years rigorous imprisonment and suspend the same for a period of 10 years.

Further, Rs.50,000/- compensation ordered is increased up to Rs.500,000/- with a default sentence of two years.

Subject to above variation, 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