

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

In the matter of an appeal under and in terms of the Article 138(1) of the Constitution read with the Section 11(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

**Complainant**

**CA Case No: CA/HCC 63/19**

HC of Rathnapura Case No:

HCR 113/2015

**Vs.**

Sandaradurayalage Siripala

**Accused**

**AND NOW BETWEEN**

Sandaradurayalage Siripala

**Accused-Appellant**

v.

Hon. Attorney General,  
Attorney Generals Department  
Colombo 12

**Complainant-Respondent.**

**Before:** Menaka Wijesundera, J.  
B. Sasi Mahendran, J.

**Counsel:** I.B.S. Harshana for the Accused-Appellant  
Riyaz Bary, DSG for the Respondent

**Written** 23.10.2019 (by the Accused-Appellant)

**Submissions:** 27.10.2021.(by the Respondent)

**On**

**Argued On:** 14.06.2023

**Decided On:** 09.08.2023

**Sasi Mahendran, J.**

The Accused Appellant (hereinafter referred to as the Accused) was indicted in the High Court of Ratnapura for having committed the offence of Grave Sexual Abuse on *Thusecoorey Mohotti Gunnaanselage Anusha Lakmali* who was under sixteen years of age, at three different times on or between 4<sup>th</sup> of July 2006 to 3<sup>rd</sup> of July 2007, punishable under Section 365 B (2) of the Penal Code as amended by Act, No. 22 of 1995, and as further amended by No. 29 of 1998 and No. 16 of 2006.

The Prosecution led evidence through eight witnesses, marking productions P1 and P2, and thereafter closed its case. The Accused, in his defense, made a dock statement. At the conclusion of the trial, the Learned High Court Judge found the Accused guilty. He was consequently convicted and sentenced to 12 years of rigorous imprisonment, along with a fine of Rs. 25,000/-, with a default sentence of six months of simple imprisonment. Furthermore, the Accused was ordered to pay compensation worth Rs. 100,000/-, with a default sentence of two years of rigorous imprisonment in case of failure to pay.

Being aggrieved by the aforementioned conviction and sentence, the Accused preferred this appeal to this Court

The following grounds for appeal were set out in the written submission.

1. The Learned Trial Judge had failed to consider that the date of the alleged offence had not been proved by the Prosecution and
2. The Learned Trial Judge had failed to consider that the prosecution failed to exclude the possibility of the instant offence being committed by someone else when the evidence of the prosecution itself leads to a reasonable inference that either someone else could have done the same.

The facts and circumstances are that:

According to the testimony of PW1, *Thusecoorey Mohotti Gunnaanselage Anusha Lakmali*, who was in grade 6 at school when she was victimized, she lived at the Accused's house with her sister (PW2), her father, and the Accused's family. During that time the Accused had engaged in sexually harassing and molesting PW1 by removing her clothes and subsequently placing his male organ on top of her genitalia. This act would transpire when no one is at home.

**On page 70 of the brief:**

ප්‍ර: ඒ වෙලාවේ තමා ඇඳගෙන හිටිය ඇඳුම්වලට මොනවාද වුනේ?

උ : ඒ ඇඳුම් ගලවනවා .

ප්‍ර: ඔහුගේ ඇඳුම් ?

උ : ඒවත් ගලවනවා.

She states that these events happened in the Accused's house on the bed where he would lie on top of her and place his genitalia on top of her own. She states that there had been no penetration and that she did not bleed during the process. This had happened multiple times, exceedingly more than five times.

**On page 71 of the brief:**

ප්‍ර : කොහේ ඉඳලාද ඒ ක්‍රියාව කරන්නේ?

උ : ගෙදර ඉඳන්

.....

ප්‍ර : සිරිපාල මාමගේ මුහුණ තියෙන්නේ කොහෙටද?

උ : යටිපැත්තට.

ප්‍ර : සිරිපාල මාම ඔය ක්‍රියාව කරනකොට කොහේ ද හිටියේ?

උ : මගේ ඇඟ උඩ .

ප්‍ර : ඒ වෙලාවේ ඇගේ ඇඳුම් තිබ්බාද ?

උ : නැහැ.

**and on Page 72 of the brief:**

ප්‍ර : සිරිපාල මාමා ඔය ක්‍රියාව කලේ තමාගේ වූ කරන එක ඇතුලට දාලාද පිටින් තියලද?

උ : පිටින් තියලා.

ප්‍ර : කොයි වෙලාවක හරි තමාගෙන් ලේ හෙම පිට වුනාද?

උ : නැහැ.

ප්‍ර : මේක ඔබ කියන විදියට ගොඩක් සැරයක් සිද්ධ වුනාද?

"She was threatened with her life by the Accused if she were to confess to anyone about this. Ultimately, she reported this to her English teacher at her school. After two weeks, the Police visited her school and took her to a doctor to conduct a medical examination and inquired about the incident. However, even

during that time, she was being abused by the Accused. Subsequently, she was handed over to an Orphanage.

In her cross examination, she stated that she was sexually abused by the Accused when they had moved from the house in Rajaweka to live at the Accused's house.

**On Page 78 of the brief;**

උ: මම පොඩි කාලේ සිට හිටියේ එහෙ නමයි. මම රජවක ගෙදර ඉඳලා ආවට පසුව තමයි සිරිපාල මාමා කරදර කරන්න පටන්ගත්තේ.

The defence put forward a contradiction regarding the number of days PW1 was living at the Accused's house; this particular portion of the statement was marked as V1 She indicated that she told her English teacher that this had happened to her when she was in grade six. It is very strange to note that there was a suggestion made by the defence whether the Accused had harassed her after the father had harassed her.

**On Page 80 of the brief;**

පු : සිරිපාල මාමා තමාට කරදර කලේ තාත්තා තමාට කරදර කලාට පසුව කියලා මම තමාට යෝජනා කරනවා.?

උ : කලින්.

She further described how these events transpired.

පු: තමාගේ ලිංගය තුලට ප්‍රවේශයක් කලාද, නැතිනම් පිටතින් කලාද?

උ : පිටතින් කලේ.

Again, she reiterated that when this happened to her, she was in grade six.

**On Page 81 of the brief;**

පු: තමා 06 වසරේ ඉන්නකොට තමාට ලිංගික අතවරය කලාද?

උ: ඔව්.

It is pertinent to note that PW1 was consistent throughout, and there were no discrepancies marked in her cross-examination.

In her re-examination, when the question was posed by the prosecution as to whether she was sexually abused by her father, she stated that she was sexually abused by the Accused prior to being abused by her father when they were living near the *Grama Niladari* office.

When we analyze the evidence in its entirety, it becomes apparent that she was consistent regarding the atrocious events at that time and when they happened. We are mindful of the fact that when the incident occurred, the prosecutrix was of the tender age of 11 years. The evidence of the prosecutrix was recorded on 3rd August 2007 by PW8, Lady Constable *Nadika*, which was 10 years prior to her being questioned again about these unfortunate events. It is clear that she harbored no knowledge in comprehending the fundamentals of sex, let alone rape. We are mindful that she could not answer some questions raised by the defense and prosecution regarding the time and other information.

We are mindful of the observation made by **W.L. Ranjith Silva, J** in the case of **D.Tikiribanda v. Attorney General, 2010 BLR 92**, held that:

“It is not surprising that there is an omission as distinct from a contradiction (omissions on material points may amount to contradictions) in the evidence of the victim as to the description/narration as to the offence and as to how the preparation of the offence took place. A victim of sexual harassment is more often than not compelled to make statements and give evidence in court. We must realize that she’s not doing so for the pleasure of it but because she is compelled to do so. Even though such complaints may appear to be voluntary yet they may not be voluntary in the true sense. This is what is called secondary victimization. This is somewhat like adding insult to injury. Any victim of rape or sexual harassment would like to avoid the embarrassment of talking about, let alone repeating the narration of such a shameful incident, if she could, Naturally it is reasonable and realistic to believe that a victim of sexual harassment would be in a trauma before, soon after the incident and sometimes even thereafter. In

most of the Child abuse and child rape cases the complainants are belated due to a sense of shame, fear, embarrassment or ignorance. These incidents are brought to light invariably after much questioning and persuasion. Mostly the victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible (withdrawal symptom). The offenders should not be allowed to capitalize or take mean advantage of these natural and inherent weaknesses of small children. Under such circumstances it is only a counsel who appears for an accused who could even suggest that such trivial contradictions should be considered as decisive.”

Therefore, it cannot be reasonably expected from a person in the prosecutrix's circumstances to recall the horrendous turn of events she experienced as a child with absolute precision. Furthermore, it is not uncommon for a victim of an unfortunate event to feel diminished and remain silent rather than be vocal about it.

The counsel for the Accused submits that the prosecutrix had made some contradictory statements regarding the duration when she lived with the Accused, which was marked as V1. The question is whether this goes to the root of the case.

It is worth reiterating the words of His Lordship **Thakkar J.** in **Bhoginbhai Hirjibhai V. State of Gujarat AIR 1983 SC 753**;

*“By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.”*

The above observation was followed by His Lordship **W.L Ranjith Silva J.**, in the Case of **Don Kuruppu Arachchige Indika Gayan v The Republic of Sri Lanka, CA 205/2007, decided on 16<sup>th</sup> December 2010.**

With the above dictums in mind, when we consider the prosecution evidence, especially that of PW1, we find that the defense does not create any doubt regarding the grave sexual abuse committed by the Accused. The learned High Court Judge has

correctly considered the evidence of PW1 and has reached the conclusion that the said witness is a truthful witness.

According to PW6, *Upul Ajith Kumara Thennakoon*, the Judicial Medical Officer, it is pertinent to note that, following his forensic report, PW1 was neither comfortable nor did she trust anyone to disclose any information, as she was suffering from depression and mental discomfort following the horrific events. She later stated that she had resisted her father's and the Accused's advances toward her and depicted how they conducted it. Upon thoroughly examining PW1, he states that there had been no penetration identified. In his expert opinion, sexual assault cannot be ruled out, as he did not expect any injuries inflicted on her during the acts, and he cannot factor out any signs of hymen penetration. According to him, injuries are not inevitable in such a case.

### **The Accused Version**

When we consider the Accused's dock statement, he has stated as follows: The Prosecutrix and her family lived at his house for 10 days before they moved out. He indicated that his house consisted of a room and a kitchen, and that there was no space to conduct such an act in his small house. He also stated that he had learned about PW1's father sexually abusing her, and upon further inquiry, her father had tried to assault him. Thereafter, he had reported this to a teacher at the school. He denies this allegation and claims that he is innocent. It is pertinent to note that it was never proposed to the Prosecutrix by the counsel of the Accused regarding the size of the room of the Accused's house, and further that the Accused had reported this incident to a teacher at the school, during her cross-examination.

I am of the view that the evidence of the Accused is not capable of throwing any doubt whatsoever, let alone a reasonable doubt, in the prosecution's case. We hold that the Learned High Court Judge had correctly rejected the Accused's dock statement.

During the argument, the counsel for the Accused brought to our notice that the prosecution has failed to prove the date of this incident, which violates the requirement stated in Section 165 of the Code of Criminal Procedure.



They had heavily relied on the case of **Warnakulasuriya Lakshman Thisera alias Jayakody Don Lakshman Appuhamy v. Attorney General, CA 13/2015, Decided on 21.02.2018, S.Thurairaja Pc, J**, held that:

“The prosecutrix submits that this incident happened at her home, on a morning hour of the day. Unfortunately, she gives different dates/periods. One occasion she said in the examination in Chief that this incident happened in October 2002, after while she said that this happened three months after her mother's demise. (That will take us to a date three month from 29th September, i.e. December 2002), In the Cross examination she claims she cannot remember the date, after a while she said it was 1 ½ months after her mother's funeral. (that will be Mid November 2002), After that she said it was after alms giving, she gave two dates of alms giving one is 15th Day and the other one was after three months. Subsequently said 25 days after her mother's death. When reading the evidence of the Prosecutrix it reveals she is not certain of the date of the incident (offence). She is certain about the date of her mother's demise, but unable to give the date of this incident. Will this violate the requirements stated in section 165 of the CCPA.”

But in the instant case, the prosecutrix was certain that when this incident occurred, she was in grade six, and she remained consistent even during her cross-examination. Therefore, we overrule the objection taken by the Accused with regard to the date of the incident

After carefully considering all submissions, evidence, and materials we are of the view that the prosecution has proved the case beyond reasonable doubt. Therefore, we affirm the conviction and sentence. This appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

**Menaka Wijesundera, J.**

**I AGREE**

**JUDGE OF THE COURT OF APPEAL**