

271/2013

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

In the matter of an appeal from the  
High Court in terms of section 331 of  
Code of Criminal Procedure Act  
No. 15 of 1979 as amended.

Kalubowilage Upali Kusumsiri Peiris

**Accused-Appellant**

**C.A.Case No:-271/2013**

**H.C.Negombo Case No:-324/2009**

**V.**

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

**Respondent**

**Before:- H.N.J.Perera, J &**

**K.K..Wickremasinghe, J.**

**Counsel:-Shanaka Ranasinghe P.C with N. Mihindukulasuriya for the  
Accused-Appellant**

**Shanaka Wijesinghe D.S.G for the Respondent**

**Argued On:-23.03.2015/28.04.2015**

**Written Submissions:-27.05.2015**

**Decided On:-05.06.2015**

**H.N.J.Perera,J.**

The accused-appellant was indicted in the High Court of Negombo for committing the offence of grave sexual abuse on Harini Lasanga Baddegama between 18<sup>th</sup> September 2006 to 4<sup>th</sup> November 2006an offence punishable under section 365 (b) 2(b) of the Penal Code as amended by Act No. 29 of 1998.

After trial the accused-appellant was found guilty as charged and was sentenced to a term of 7 years rigorous imprisonment and imposed a fine of Rs.5000/- with a default term of one month simple imprisonment. In addition the accused-appellant was ordered to pay Rs.50,000/- as compensation to the victim and ordered a default term of one year simple imprisonment.

Being aggrieved of the aforesaid conviction and sentence the accused-appellant had preferred this appeal to this court.

The main contention of the learned P.C. who appeared for the accused appellant was that the prosecution story does not satisfy the test of probability. Further it was submitted on behalf of the accused-appellant that the learned trial judge has also failed to consider contradictions between the evidence given by the victim and her mother in this case.

The case for the prosecution was that the victim Harini Lasanga Baddegama was six years old at the time of the incident. The younger brother of her was kept at a Day Care Centre. It is alleged that on the day of the alleged incident the victim and her mother went to pick up the brother from the said Day Care Centre. The accused-appellant's wife who was a teacher at the said Day care Centre had brought the brother to her house. When the mother along with the victim went to pick the brother

who was at the house of the accused-appellant he was asleep and the mother had gone into the room where the brother was sleeping to wake him up. It is alleged that while the mother went into the room to wake up the brother, the accused-appellant had called her and she stopped and the accused-appellant took her by the hand and then sat on a chair and kept her on his lap, raised her dress and touched her vagina.

It is very clear from the evidence of the victim that she has not made a prompt complaint to the mother immediately after the incident. As per the evidence of the victim, she informed the mother that she is having difficulty in urinating and the mother had observed blood stains in the victims under garments. When inquired, the victim informs the mother that the umbrella had knocked her vagina which led to the bleeding. After wards the victim was shown to a doctor and had thereafter attended school only on one day. Thereafter when requested to go to the Day Care Centre she has refused and had informed the mother about the incident. A complaint has been made to the police and the victim hospitalized thereafter.

The accused-appellant had been indicted on the footing that the offence of grave sexual abuse on Harini Lasanga was committed by the accused-appellant between 18.09,2006 and 4<sup>th</sup> November 2006. In this case no evidence had been led by the prosecution to prove the alleged offence was committed by the accused-appellant during the period stated in the indictment. Even to the leading question put to her by the state Counsel she has stated that it was in the year 2006 and that she cannot remember the date. Even the mother of the victim has failed to mention any date.

The main ground adverted to by the learned Counsel for the accused-appellant in the course of his submissions is that the learned trial Judge has failed to consider and evaluate the discrepancy inter se arising from the evidence of Harini and her mother's evidence. According to the

victim her mother was going to wake up the brother the accused-appellant called her, took her by the hand and then sat on a chair and kept her on his lap, raised the dress she was wearing and touched her vagina. When this happened her mother was inside the room. Contrary to the evidence of the victim the mother of the victim denies ever going inside the room and waking the brother. According to her as usual the boy had been brought and given to her. If the mother's evidence is to be believed then the said incident could not have happened the way alleged by the victim of this case. This certainly creates a grave doubt in the prosecution case as to whether the accused-appellant had an opportunity to commit the alleged offence as stated by the victim. It is very unlikely that a person would engage in such a sexual act under the given circumstances. The victim has further stated that the son of the accused-appellant too was inside the room at the time. I therefore hold that the story of the victim that grave sexual abuse was committed by the accused-appellant does not satisfy the test of probability.

The crucial issue that arose for determination by the learned trial Judge in the instant case was whether this girl had been in fact subjected to sexual abuse between said period by the accused-appellant as alleged by the victim. Medical expert Dr. Indira Kitulwatta has testified to court what she observed when he examined Harini on 07.11.2006. The doctor has observed that there is evidence of repeated vaginal penetration over a period of time. The evidence of the doctor reveals that the victim has been abused over a period of few months. The doctor has observed that there is a wasting of the hyman due to repeated vaginal penetration over a period of time. This conclusion has been arrived at by examining the victim and by the abrasions and the wasted nature of the hyman. The evidence indicates abuse over a period of 1 ½ months. The expert evidence of the doctor who examined the said victim do not support the evidence of the victim as the victim alleged that the accused-appellant

committed the act of grave sexual abuse only on a single occasion. Considering all these matters I hold that the medical evidence does not support the evidence of the victim that she was subjected to grave sexual abuse by the accused-appellant.

In Premasiri V. The Queen 77 N.L.R 86, Court of Criminal Appeal held:-

"on the uncorroborated evidence of the complainant only when such evidence is of such character as to convince the jury that she is speaking the truth."

In Sunil and another V. The Attorney General 1986 (1) SLR 230, it was held that:-

"Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused-appellant acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.

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 this case there is a serious doubt as to whether the incident has taken place in the way as described by the victim in court. The medical evidence too was not supportive of the sexual act having taken place in the manner testified by the victim.

The function of an appellate court in dealing with a judgment mainly on the facts from court which saw and heard witnesses has been specified as follows by Macdonnell C.J in the King V. Guneratne 14 Ceylon Law Recorder 174:-

"I have to apply these tests as they seem to be, which a court of appeal must apply to an appeal coming to it on questions of fact:

- (1) Was the verdict of the judge unreasonably against the weight of the evidence.
- (2) Was there misdirection either on the law or the evidence,
- (3) Has the court of trial drawn the wrong inferences from the matters in evidence.

Similarly Wijewardene, court is not absolved J. stated in Martin Fernando V. Inspector of police, Minuwangoda, 46 N.L.R 210 that:-

"An appellate court is not absolved from duty of testing the evidence extrinsically as well as intrinsically "although "the decision of a magistrate on questions of fact based on demeanour and credibility of witnesses carries great weight "where a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt."

For the aforesaid reasons I find that it is unsafe to allow the conviction to stand. Accordingly I set aside the conviction and the sentence dated 01.03.2013.

Appeal allowed.

**JUDGE OF THE COURT OF APPEAL**

**K.K..WICKREMASINGHE, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**