

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

In the matter of an Appeal in terms of
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.

The Democratic Socialist Republic of Sri
Lanka

Complainant

Court of Appeal Case No.
CA HCC 50/2023

Vs.

High Court of Matara
Case No.
HC 419/2019

Jayalathge Vijitha *alias* Vijitha Mama

Accused

AND NOW BETWEEN

Jayalathge Vijitha *alias* Vijitha Mama

Accused-Appellant

Vs.

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

Respondent-Respondent

Before: **B. Sasi Mahendran, J.**
 Amal Ranaraja, J.

Counsel: Asanka Mendis with Sandeepani Wijesooriya for the Accused-Appellant.

Azard Navavi, S.D.S.G for the Respondent.

Argued on: 04.06.2025

Decided on: 03.07.2025

JUDGMENT

AMAL RANARAJA, J.

1. The Accused-Appellant (hereinafter referred to as the “Appellant”) has been indicted in the *High Court of Matara* in High Court case no. 419/2019.
2. The charges in the indictment are as follows;

Charge 01

That on or about September 27,2016, within the jurisdiction of this Court, the accused-appellant did kidnap a minor under the age of fourteen years from his lawful guardianship, and that he has thereby committed an offence punishable under section 354 of the Penal Code.

Charge 02

That on the same day, at the same place and in the course of the same transaction, the accused committed the offence of grave sexual abuse on the said minor, who was less than sixteen years of age, by sexually gratifying himself by placing

his genitals inside the mouth of the said victim and thereby committing an offence punishable under section 365 B (2)(b) of the Penal Code (as amended by Act No.22 of 1995 and Act No.29 of 1988 and Act No.16 of 2006).

Charge 03

That on the same day, at the same place and in the course of the same transaction, the accused committed the offence of grave sexual abuse on the said minor, who was less than sixteen years of age, by sexually gratifying himself by placing his mouth on the genitals of the said minor and thereby committing an offence punishable under section 365 B (2)(b) of the Penal Code (as amended by Act No.22 of 1995 and Act No.29 of 1988 and Act No.16 of 2006).

Charge 04

That at the same time and during the course of the same transaction, the appellant attempted to insert his penis into the anus of the said minor for the purpose of sexual gratification, and thereby, committed the offence of grave sexual abuse punishable in terms of section 365B(2)(b) of the Penal Code (as amended by Act No.22 of 1995, Act No.29 of 1998 and Act No. 16 of 2006).

3. At the conclusion of the trial, the Learned High Court Judge has convicted the appellant of the second and third charges and proceeded to acquit the appellant in respect of the first and fourth charges. Thereafter, the Learned High Court Judge has sentenced the appellant as follows;

Charge 02

A term of 10 years rigorous imprisonment and also imposed a fine of Rs. 25,000 with a term of one-year imprisonment in default.

Charge 03

A term of 10 years rigorous imprisonment and also imposed a fine of Rs.25,000 with a term of one-year imprisonment in default.

4. Further, the Learned High Court Judge has also ordered the appellant to pay as compensation to PW01, a total sum of Rs. 300,000.00, (i.e. a sum of Rs. 150,000.00 each in respect of charges 02 and 03) with a term of six month's imprisonment each, in default of the payment of compensation.

Case of the prosecution

5. The appellant has been an immediate neighbour of PW01 in this case. Both households, have shared access to water from a stream that flows adjacent to their properties. To facilitate the collection of water, a pipe has been installed along the path of the stream allowing both households to use the water sourced from this natural stream.
6. It has become a typical practice for the members of the households to clear any blockages that may occur within the pipeline from time to time. This routine maintenance has been necessary to ensure a continuous flow of water for daily use.
7. On the date of the alleged offences specified in the charges, the appellant has got PW01 to accompany him under the pretence of assisting him in removing a blockage from the pipeline. When they arrived at the location where the pipeline was connected to the stream, the situation has taken a horrifying turn. The appellant armed with a knife, has forcibly dragged PW01 further away from the area, subsequently subjecting PW01 to sexual abuse as detailed in charges 02 and 03 against the appellant.

Case of the appellant

8. The appellant while admitting that he and PW01 went to the location where the pipe was fixed to the stream, has denied committing sexual abuse against PW01. He has maintained that there was animosity among the households regarding the usage of the water sourced from the natural supply and as a result he believed that he has been falsely implicated in this allegation.

Grounds of appeal

9. When the matter was taken up for argument, the Learned Counsel for the appellant urged the following grounds of appeal;
 - i. The prosecution has failed to satisfy the Court as to the test of consistency, spontaneity, probability, *inter se* and *per se* contradictions in the evidence of the prosecution witnesses.
 - ii. The Learned High Court Judge has not considered the delay in making the complaint from the correct perspective.
 - iii. The Learned High Court Judge has considered in his judgment material which had not been elicited in the evidence.
 - iv. Contradictions and omissions marked by the prosecution when the accused was giving evidence had not been proved.
 - v. The prosecution has failed to call a material witness.
 - vi. The prosecution has failed to prove the ingredients of the offence
 - vii. The Learned High Court Judge has shifted the burden of proving his innocence to the accused.

10. The Counsel for the appellant has contended the following;

- i. Inconsistency regarding the duration of acquaintance;
It is asserted that PW01 has provided contradictory statements concerning the duration of his acquaintance with the appellant. That this inconsistency raises questions about the credibility of PW01's testimony.
- ii. Inconsistency in regard to the description of events;
The Counsel further argues that PW01 has contradicted himself regarding the manner in which he was allegedly dragged away from the site where the pipeline was affixed to the stream.
- iii. Failure to disclose assault to the medical professional;
It is also noted that PW01 has not informed the doctor who examined him about experiencing physical assault following the incidents detailed in the charges.
- iv. Contradictory statements from PW01's mother;
The Counsel for the appellant, highlights that the mother of PW01 has contradicted PW01 when the form varied her account of whether the appellant pushed PW01 after allegedly sexually assaulting PW01.

11. It is undisputed that the appellant and PW01 as neighbours have known each other for an extended period of time, in fact PW01 has testified that he has known the appellant from a young age, which indicates a level of familiarity that is not only relevant but also important for understanding their relationship. Accordingly, the timeline mentioned by PW01 stating that he has known the appellant for approximately two to three years, should not be considered a material discrepancy in the context of this case.

12. During the proceedings, PW01 has recounted the incident in which the appellant allegedly grabbed him by the collar of his T-shirt, and dragged him to the location where the alleged events occurred.

However, during the cross-examination, the Learned Counsel for the appellant has posed a question regarding the specific nature of how the appellant allegedly dragged PW01, i.e. specifically, whether PW01 was indeed dragged by his clothing.

13.

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ඇදුමකින් අදින්න උත්සාහ කලාද ?

උ : එහෙම මතක නෑ.

[*vide* page 91 of the Brief]

This question has introduced a potential source of confusion for PW01. It is important to note that while he was wearing a T-shirt he may have been inclined to clarify the nature of the clothing that he was physically grabbed from. However, the manner in which the questions were directed at PW01 in cross-examination could have influenced his ability to recall details accurately. As a result, he may have felt overwhelmed and stated that he could not remember certain facts relating to the manner he was dragged by the appellant.

14. Furthermore, given the serious nature of the allegations of sexual assault, it is conceivable that the psychological impact of such claims may over shadow other elements of the incident, such as physical assault itself. When recounting the series of events to the doctor who examined him, PW01 could have inadvertently overlooked detail in the specifics of physical assault, focusing instead on the more significant emotional and psychological implications of the alleged sexual abuse. The same applies to PW01's narrative, to his mother about the alleged incident.

15. The Learned Counsel for the appellant has also argued that the narrative of PW01 is not probable. It is argued that PW01 could not have continued attending the same school after the alleged incidents involving the appellant primarily due to the intense humiliation and

social stigma that he would have had to inevitably face from fellow students. That, such an environment would have made it exceedingly difficult for PW01 to maintain normal school life, suggesting that the account given by PW01 may not be accurate. Furthermore, the Learned Counsel posits that PW01 would have had an opportunity to cause physical harm to the appellant at the time of the alleged incident.

16. Additionally, the argument is made that the appellant's visit to PW01's house consequent to the alleged incidents, is contradictory with the narrative of PW01 of sexual abuse. If the claims made by PW01 were true, it would seem implausible for the appellant to willingly enter an environment where he would be in a close proximity to someone he allegedly victimised.
17. In regard to PW01's desire to continue his education at the same school following the alleged incidents, it is essential to consider the psychological and emotional impact those events may have had on him. While PW01 may have been resilient and capable of handling insults and bullying, the reality of experiencing such deplorable incidents is different. Not every child possesses the same emotional resources to cope with trauma and the responses from the school community could vary significantly.
18. The complexity underscores the need to approach PW01's experience with feelings and understanding. The reactions of PW01 and other children cannot be generalised as each individual's response to trauma is influenced by various factors, including personal temperament and prior experiences. Therefore, it is crucial to acknowledge that the consequences of the situation that PW01 endured are unique to his experiences and feelings and they should not be dismissed or minimised.
19. At the time of the alleged incident, PW01 has been only fifteen years old, in contrast the appellant as an adult, which inherently creates a power imbalance in their interactions.

20. The added factor of the appellant wielding a sharp-edged weapon, a knife, would understandably instil a deep sense of fear and vulnerability in PW01. In such circumstances, the instinct for self-preservation might have overwhelmed any thoughts of resisting or escaping the situation. Fear of harm can paralyze an individual, making it less likely for PW01 to act defensively as the Learned Counsel for the appellant has suggested.
21. Further, it cannot be concluded that the arrival of the appellant at the residence of PW01 following the alleged incident serves to demonstrate that the appellant was not connected to those events. The timing of the appellant's presence at PW01's home may indeed raise questions about his intentions. For instance, he could have arrived to seek clarification about the allegations or to engage in an alibi building exercise. Therefore, the mere fact that the appellant showed up at PW01's house after the alleged incident does not inherently absolve him of potential culpability.
22. A fifteen-year old might hesitate to make a complaint for the fear of retaliation or negative consequences. Young people may worry about how their complaint will affect their relationship with peers with authoritative figures such as teachers or elderly relatives. They might fear being bullied ostracized or not being taken seriously. Another factor contributing to the delay in making a complaint is the lack of confidence. Most teenagers doubt the validity of their feelings or concerns. This uncertainty can prevent them from taking steps to speak up about the issues that mattered to them. Young people may also delay in making a complaint simply because they do not know the proper channels or the procedures to follow. There might be confusion about whom to approach, what to say or how to articulate their concerns effectively. Sometimes, teens might also downplay the seriousness of their concerns. They may convince themselves that their problem is not significant enough to warrant a complaint or that it will resolve on its own. This tendency to minimise their feelings can lead to a delay in taking action.

23. It is evident from the testimony of PW01's mother that, when recounting what her son communicated to her, she has not mentioned that PW01 revealed any details about the appellant engaging in sexual activity involving PW01's penis. However, upon reviewing her testimony as a whole, it becomes clear that she has become emotional upon learning about PW01's sexual abuse by the appellant. As a result, she may have forgotten key aspects of her son's narrative due to the distressing circumstances she faced.

24. The prosecution has identified three contradictions during the cross-examination of the appellant. However, despite these contradictions being marked, the prosecution has failed to substantiate them. The Learned High Court Judge rendering the judgment has carefully considered the appellant's narrative in conjunction with the totality of the evidence presented during the trial.

25. After thorough examination, the Learned High Court Judge has concluded that the appellant's account was improbable when evaluated against the surrounding evidence. It is important to note that the Learned High court Judge has not dismissed the appellant's narrative solely based on the aforementioned contradictions. Rather the judgment reflects a holistic assessment of all relevant circumstances and testimonies. Therefore, the argument advanced by the Learned Counsel for the appellant concerning the substantiation of the contradictions marked lack merit and must be dismissed.

26. Although the mother of PW01 has indicated that some neighbours were present when she was calling out to PW01, she has not provided specific details regarding the identities of those individuals. Furthermore, the appellant has not made an effort to uncover the names of those potential witnesses. In the light of this lack of clarity, it becomes difficult for a Court to ascertain who those purported witnesses may be.

27. The Learned High Court Judge in the disputed judgment has made the following observations;

“ඒ අනුව විත්තිවාදක මත වූදින තම නිර්දෝශිතභාවය පැහැදිලි කර ඇත්ද යන්න පිළිබඳව සලකා බැලිය යුතුය”

[*vide* page 30 of the disputed judgment]

28. In light of the observation made by the High Court Judge referred to above, the Learned Counsel for the appellant has raised a contention that the Learned High Court Judge has improperly shifted the burden of proving innocence onto the appellant. This alleged misdirection, he argues, fundamentally undermines the integrity of the disputed judgement rendering it unsustainable and warranting its reversal.

29. Upon thorough examination of the disputed judgment it is evident that the Learned High Court Judge has meticulously assessed the narratives presented by both parties.

30. The Learned High Court Judge has engaged deeply with the evidence and the arguments put forth. Moreover, the Learned High Court Judge has applied the required legal principles concerning the evaluation of evidence in a very careful and thorough way, decisively choosing to act upon the evidence submitted by the respondent while giving less weight to that provided by the appellant.

31. The Learned High Court Judge’s review of the evidence have been comprehensive. It has been considered in its totality rather than in isolated segments. This approach demonstrates a conscientious effort to ensure a fair evaluation, rather than any inclination to place an undue burden on the appellant.

32. Furthermore, the above contention cited by the Learned Counsel appears to have been taken out of context. It lacks foundation as it mischaracterizes the Learned High Court Judge's evaluation processes and the basis of the judgment rendered.

33. Due to the aforesaid reasons, I am not inclined to interfere with the conviction and the disputed judgment together with the sentence imposed on the appellant.

34. I accordingly *dismiss the appeal* and make no order regarding cost.

35. The Registrar of this Court is directed to communicate this judgment to the *High Court of Matara* for compliance.

Judge of the Court of Appeal

B. SASI MAHENDRAN,

I agree,

Judge of the Court of Appeal