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

In the matter of an application under and in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No:

HCC/0202/2019

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT

Vs.

High Court of Chilaw

Case No: HC/46/2016

Randeni Aarachchige Dona Indunil Samantha

ACCUSED

AND NOW BETWEEN

Randeni Aarachchige Dona Indunil Samantha

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Nalin Ladduwahetty, P.C. with Kavithri Ubeysekera for the Accused-Appellant
	: Lakmini Girihagama, D.S.G. for the Respondent
Argued on	: 11-03-2024
Written Submissions	: 27-07-2020 (By the Complainant-Respondent)
	: 30-06-2020 (By the Accused-Appellant)
Decided on	: 14-06-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Chilaw for committing the offence of rape of a minor between the periods of 07-10-2007 and 06-10-2008 at Marawila, within the jurisdiction of the High Court of Chilaw, and thereby violating section 364(2)(e) of the Penal Code punishable in terms of section 364(2) as amended by the Penal Code Amendment Act No. 22 of 1995.

After trial, the learned High Court Judge of Chilaw found the appellant guilty as charged of the judgment dated 26-06-2019.

Accordingly, after having considered the mitigatory as well as the aggravating circumstances, the learned High Court Judge sentenced the appellant for a period of 15 years rigorous imprisonment. In addition, the appellant has been ordered to pay a fine of Rs. 25,000/- and in default, to serve 12 months rigorous imprisonment.

The appellant has also been ordered to pay Rs. 250,000/- as compensation and it has been ordered that it should be recovered as a fine.

It is noteworthy to mention that although compensation has been ordered, the learned High Court Judge has failed to mention to whom it should be paid, although obviously it should be paid to the victim of the crime, namely PW-02 mentioned in the indictment. The learned High Court Judge has also failed to impose a default sentence, in the event the appellant fails to pay the compensation amount, which has been ordered to be recovered as a fine.

Being aggrieved of his conviction and the sentences, the appellant preferred this appeal.

Facts in Brief

The victim of this crime has been listed to give evidence as PW-02 in the indictment. She has commenced her evidence at the trial on 11-09-2017, some 9 years after the alleged incident. By that time, she was a 21-year-old married person. She has been born on 13-02-1996.

According to her evidence, during the time relevant to this incident, which happened in October 2008, she and her mother were living in an accommodation provided at a tile factory in Marawila. Although she had an elder sister and a brother, they have been married and was living separately at that time. Her father has also been separated from the family. Her mother was employed at the said tile factory.

The appellant was their neighbor who lived with his family in his own house. On the day of the incident, the victim has gone to the house of the appellant in order to make a call to her married elder sister to inform her about the demise of a mother of one of the teachers in their dhamma school. She has gone to the house of the appellant since her house had no telephone facilities. She has been to the appellant's house before, and knew the appellant and his family very well.

When she went to his house around mid-day, only the appellant had been in the house. When she informed of her need to him, the appellant had allowed her to make a call using their phone. After the call the appellant had led the victim child to a nearby sofa and had shown a compact disc (CD) played in the TV to her. In the process, the appellant had removed the clothes of the child and wanted her to perform the acts shown in the TV screen. The victim has refused, but the appellant after removing the sarong he was wearing, has forcibly entered his penis into the victim child's vagina. The incident has occurred on the sofa. The appellant has closed the front door after he played the CD, which was shown to the victim child.

After the incident, the victim has returned to her home but has not divulged the incident to anyone. However, when her elder sister visited her place of residence some 2-3 days after the incident, she has informed the incident of rape, and made a complaint in this regard.

In her evidence, she has stated that apart from this incident, she was also raped several times by a person called Sanath, who apparently had been the paramour of her mother.

Under cross-examination, she has admitted that the mentioned Sanath was the paramour of her mother. The learned Counsel who represented the appellant at the trial has questioned the victim child in detail about the sexual harassment and rape incident committed by the mentioned Sanath to the child. She has admitted that what she initially informed to her sister was that the said Sanath had committed sexual acts on her. However, she has maintained the position

that after informing about Sanath, she informed what happened to her at the hands of the appellant as well. It has been suggested to her that her mother instigated her to not implicate Sanath to the crime and to implicate the appellant, which the victim has denied.

The mother of the victim child has given evidence as PW-03. It had been her position that when the victim child was hospitalized on the allegation of being raped by the person with whom she was living with at that time, namely one Sanath Ananda, she informed her that she was raped by the appellant as well. She has maintained the position that she had no issues with the appellant and his family until then.

It needs to be noted that the elder sister of the victim child to whom the child has narrated what happened to her before she informed anyone else, has not been called as a witness for the prosecution although she has been so listed.

The Judicial Medical Officer (JMO) who examined the child has observed that the child had been subjected to repeated sexual intercourse, which has resulted in her hymen being attenuated at 3 and 9 o'clock positions. He has observed post-traumatic stress on the child. Giving the history to the JMO, the child has stated that the person called 'Indunil aiya' committed rape on her when she visited his house. After observing multiple incidents of sexual intercourse, the doctor has questioned her further as to the history where she has indicated that a person called 'Sanath maama' used to commit rape on her regularly for a period of one year. At the time the doctor examined her, she had been a 12 years and 7 months old child.

According to the evidence of the police officers who have conducted investigations into the incident, after recording the victim child's mother's statement at the hospital on 07-10-2008, the female police officer who recorded the victim's statement has taken the child to a separate place and had recorded her statement. The child has revealed that she was repeatedly raped by the mother's paramour and she was also raped by the appellant.

After the prosecution case was closed, the learned High Court Judge of Chilaw has decided to call for a defence from the appellant based on the evidence placed before the Court.

The appellant as well as his wife has given evidence in this matter. The appellant has also called the elder sister of the victim child who was listed as a prosecution witness (but not called by the prosecution) as a defence witness.

The appellant giving evidence has admitted that the victim child came to his house to make a call, but has maintained the position that at that time, both he and his wife were at home, and it was to his wife the victim child informed her need to make a call. It was his position that because of her need, he gave his mobile phone to her, but it was given outside of his house, in front of his wife. After making the call, the child had left. He has denied that he committed rape on the child.

The wife of the appellant in her evidence has maintained the same position and had stated that it was to her, the child spoke and requested for a call, which resulted in her telling her husband to allow the child to use his mobile phone. She has maintained the position that the child left after making the call and nothing else happened between them. However, under cross-examination, she has admitted that their house had a land phone as well. When questioned about as to when this incident occurred as claimed by them, she has stated that she can remember that it happened in 2008 some 2-3 months after the Sinhala New Year.

The sister of the victim child in her evidence has stated that when she visited the house, her sister informed her that her mother's paramour Sanath Ananda committed sexual intercourse on her, which resulted her admitting her sister to the hospital and lodging a complaint with the police in that regard. According to her, although her sister informed only about Sanath Ananda, when she was hospitalized, she has informed about the rape incident committed by the appellant to her mother. She has stated in her evidence that when she was

informed about what her mother's paramour did to her, she in fact went to the appellant's house and informed his wife about the incident and inquired about the appellant with the intention of getting his three-wheeler to take her sister to the hospital. She has also stated that after getting to know the incident involving the appellant, she questioned her sister, and she confirmed that she was also sexually harassed by the appellant.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel formulated the following grounds of appeal for the consideration of the Court.

1. Did the learned High Court Judge err in not considering the infirmities in the prosecution evidence.
2. Did the learned High Court Judge fail to consider the importance of section 114 of the Evidence Ordinance as relevant when the prosecution failed to call the evidence of the sister of the victim as a witness for the prosecution.
3. Was the accused's entitlement for a fair trial impaired by the indefinite date of offence stated in the indictment.
4. Did the learned High Court Judge err by wrongly rejecting the defence evidence.
5. Did the learned High Court Judge's failure to act according to the required procedural steps cause a disadvantage to the accused.

Consideration of the Grounds of Appeal

At this juncture, I find it relevant to consider the 2nd, 3rd, and 5th grounds of appeal before considering the rest, as I find the said grounds of appeal revolving around questions of law as well as questions of fact.

In relation to the 2nd ground of appeal, it was the position of the learned President's Counsel that the best evidence, as to what happened to the victim child would have been that of her sister to whom she has informed about the

sexual harassment faced by her. It was his contention that the sister of the victim, namely PW-01 listed in the indictment was not called by the prosecution, in fact she had been released from the case even before the trial commenced, but had been called as a defence witness. It was argued that the provisions of section 114 illustration (f) of the Evidence Ordinance should have been considered in full force in favuor of the appellant based on the facts and the circumstances of the case.

It is well-settled law that it is the totality of the evidence that should be considered, be it the evidence by the prosecution or by the defence, in order to come to a finding whether the prosecution has proved the case beyond reasonable doubt or else, the evidence has created a reasonable doubt or has given a reasonable explanation as to the evidence against an accused person.

It was held in the case of **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167** that,

> *"A satisfactory way of arriving at a verdict of guilt or innocence is to consider all the matters adduced before the Court, whether by the prosecution or by the defence in its totality without compartmentalizing it, ask himself whether as a prudent man, in the circumstances of the particular case, whether he believed the accused guilty of the charge or not."*

The argument advanced by the learned President's Counsel is that the presumption of the existence of certain facts in terms of section 114 illustration (f) of the Evidence Ordinance should have been considered by the learned Trial Judge in favor of the appellant.

For matters of clarity, I will now reproduce the relevant section, which reads thus;

> **114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of**

natural events, human conduct, and public and private business in their relation to the facts of the particular case.

Illustration

The Court may presume-

(f) that evidence which could be and is not produced would if produced, be unfavourable to the persons who withholds it;

It is my considered view that, accused person can claim the advantage of the above section if the evidence which could have been led at the trial was not led as part of the evidence in the case.

However, the situation in this case is very much different. Although the prosecution has not led the evidence of the sister to whom the victim child has narrated her sufferings due to sexual abuse faced by her, the appellant, when called for his defence, has called her as a defence witness. This means whatever the evidence she was expected to give at the trial has been led in the case, enabling the Court to consider the said evidence as a part of the case.

As I have considered above, since the evidence placed before a Court in a criminal trial has to be considered in its totality rather than compartmentalizing it, the learned trial Judge has had the advantage of considering the evidence of the victim's sister when coming to a conclusion whether the prosecution has proved the case beyond reasonable doubt against the appellant.

This goes on to show that since the relevant evidence was before the Court, the fact of not calling such evidence by the prosecution has not caused any prejudice towards the appellant. It is my view that illustration (f) of section 114 of the Evidence Ordinance has no application under the circumstances.

In the 3rd ground of appeal, it was urged that the appellant's entitlement to a fair trial was impaired because of the indefinite date of offence in the indictment.

It was pointed out that the evidence indicates that the incident where the appellant has alleged to have raped the child occurred 3 days before she informed it to her sister. It was questioned as to why the prosecution needed to mention a period of one year without mentioning a definite date, which has occasioned an unfair trial towards the appellant.

The relevant section 165 of the Code of Criminal Procedure Act, which refers to the particulars as to the time, the place and the person that should be stated in a charge reads as follows.

> **165(1). The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that, the offence is not prescribed.**

The section itself is clear enough that the purpose of giving the date and the place of the incident is to give sufficient notice to the accused as to the charge against him.

Hence, only if it can be shown that the appellant was misled as to the charge against him or could not put forward his defence as a result of the witness who spoke about the date of the incident and by not giving a definite date in the indictment, he could not establish his defence as a result of that, the appellant can succeed in such a position.

It is clear from the evidence placed before the trial Court that the appellant has admitted that the victim child came to his house and wanted to make a telephone call. It has been his contention that it happened when his wife was present and it was his handphone he allowed the child to use, and no sexual harassment or an incident of rape took place. However, I find that what is material here is the fact that the admission of the appellant that the child came to his house to make a phone call.

It shows that the appellant was not denied of an opportunity of taking up an alibi due to the admission, which has caused no prejudice towards the appellant as to a fair trial.

This aspect was sufficiently discussed in the case **Rex Vs. Dossi 13 Cr. App. R. 158** where it was held that the date specified in an indictment is not material unless it is an essential part of the alleged offence; the defendant may be convicted although the Jury finds that the offence was committed on a date other than that specified in the indictment, amendment of the indictment is unnecessary although it may be a good practice to do so (provided that there is no prejudice to the accused) where it is clear on the evidence that the offence was committed and it was committed on a day other than that specified.

In the case of **D.R.M Pandithakoralage (Excise Inspector) Vs. V.K Selvanayagam 56 NLR 143**, it was held that a mistaken date in the indictment is not a material error, unless the date is of the essence of the offence or the accused is prejudiced.

The evidence led in this matter had clearly established that the offence has occurred during the period mentioned in the indictment. For the reasons as considered above, I find that the date not being specific, has not caused any prejudice towards the appellant.

The 5th ground of appeal urged by the learned President's Counsel was on the basis that the learned High Court Judge has proceeded to read over the indictment to the appellant, even before the indictment was served on him, and has failed to comply with the requirements of section 195 of the Code of Criminal Procedure Act.

As per the proceedings dated 26-10-2016, it is clear that the indictment has been served on the appellant only after the indictment was read over to him and he pleaded not guilty to the charge. This was contrary to the procedure laid down in terms of section 195 and 196 of the Code of Criminal Procedure Act.

In terms of section 196 of the Code of Criminal Procedure Act, once the indictment is received by the High Court, it is the duty of the presiding Judge to notice the accused mentioned in the indictment and order him to appear or to be brought before him and cause a copy of the indictment with its annextures to be served on the accused.

(Since this was a case taken up before the Code of Criminal Procedure (Amendment) Act No. 2 of 2022, setting the matter for pretrial conference was not a requirement.)

At the same time, the accused can be released on suitable bail if the offence is an offence where the accused can be released as such, cause the accused to be fingerprinted and if the offence is an offence that can be triable by a Jury, inquire from the accused whether he elects or not to be tried by a Jury.

If the accused informs the Court that he wishes to have his case tried before a Jury, the necessary steps of the procedure have to be adhered to in that regard.

If the accused is unrepresented and wants the services of an assigned counsel, the Court should facilitate such a request as well.

The matter shall be fixed for trial thereafter.

In terms of section 196 of the Code of Criminal Procedure Act, it is only after the fulfillment of the above-mentioned criterion and after the matter is fixed for trial, the indictment shall be read over and explained to the accused once the Court is ready to commence the trial.

The relevant section 196 of the Code of Criminal Procedure Act reads as follows;

> **196. When the Court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty to the offence charged.**

I am of the view that although the learned High Court Judge has failed to follow the due procedure before the charge was read over to the appellant, that in itself would not nullify the proceedings unless if it can be established that it has caused a material prejudice to the appellant or has occasioned a failure of justice.

The Article 138 of The Constitution is the provision which confers jurisdiction to the Court of Appeal to hear and determine appeals of this nature.

The proviso of Article 138 reads as follows:

> **Provided that no judgment, decree or order of any Court shall be reversed or varied on a count of any error, defect or irregularity, which has not prejudiced the substantial rights to the parties or occasioned a failure of justice.**

The similar statutory provision in section 436 of the Code of Criminal Procedure Act reads as follows:

> **436. Subject to the provisions hereinbefore contained any judgment asked by a Court of competent jurisdiction shall not be reversed or altered in an appeal or revision on account-**
>
> > **(a) of any error, omission, irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this code; or**
> >
> > **(b) of the want of any sanction required by section 135, unless such error, omission, irregularity, or want has occasioned a failure of justice.**

The above-mentioned statutory provisions clearly provide that the test should be whether such an irregularity, as claimed in this appeal, has occasioned a failure of justice, or has caused a prejudice to the substantial rights of the appellant.

I find that the appellant has been represented by a Counsel when the indictment was read over to him and right throughout the trial. It is amply clear that although the indictment was read over to the appellant on 26-10-2016 and thereafter only it has been served on him along with the annexures, the trial has commenced only on 11-09-2017, which has provided enough space for the appellant to study and get ready to face the charge against him. I am of the view that no prejudice or failure of substantial rights has occasioned to him in that regard.

For the reasons as considered above, I am of the view that the 2nd, 3rd, and the 5th grounds of appeal urged on behalf of the appellant are devoid of merit.

Having determined the said grounds of appeal, I will now proceed to consider the 1st and the 4th grounds of appeal together as they are interrelated.

It was contended that the learned High Court Judge erred in not considering the infirmities in the prosecution evidence and also erred by wrongly rejecting the defence evidence.

It was submitted that admittedly, the mother of the victim child had a paramour and it was against the paramour, the victim child informed her sister that she is being abused. It was contended that the name of the appellant was something that was introduced and that was an infirmity that could have been considered in favour of the appellant. It was also contended that the period of the offence mentioned in the indictment was actually related to the offence alleged to have committed by the paramour of the victim's mother, and when the victim as well as her mother gave evidence in Court, they were very hesitant to mention the paramour or whether the victim's mother had an illegitimate relationship with paramour. It was also submitted that the evidence also shows the fact that the mother knew very well about the sexual abuse committed on her daughter by her paramour and she has failed to divulge that fact to the sister of the victim when these matters came to light, and she clearly has turned a blind eye which should have been considered in favour of the appellant.

In fact, it was submitted that even the learned High Court Judge has found that the mother was evasive in her evidence, which again should have been considered in favour of the defence version of events.

Referring to the defence case put forward at the trial, it was the position of the learned President's Counsel that the learned High Court Judge has failed to consider the evidence of the appellant, his wife, as well as the evidence given by the sister of the victim when called on behalf of the appellant in its correct perspective by failing to consider whether their evidence can be believed, or whether it has created a reasonable doubt or explanation about the prosecution case. It was pointed out that the learned High Court Judge, at several places in the judgment has determined that the appellant has failed to contest or challenge the evidence (හඹ කර නැත), to consider it against the appellant. It was submitted that it was a wrong assumption made in order to reject the evidence of the appellant and his witnesses, as it was the duty of the prosecution to prove the charge beyond reasonable doubt.

The evidence of the victim child and that of the JMO makes it clear that the child had been subjected to grave sexual abuse and sexual intercourse over a period of time. The evidence establishes the fact that she had been abused by her own mother's paramour. It also shows that the mother had been aware of at least some of the incidents, but has turned a blind eye towards them.

I find the fact that the victim being a 12-year-old who is dependent on her mother, well explained the girl's behaviour when she failed to inform of the incidents to anyone else until she had the opportunity to tell what was happening to her elder sister. It is true that initially she has told the sister only about the abuses towards her by the paramour of her mother. The child has come out about the incident where she was raped by the appellant, only after she was admitted to the hospital. The mother's evidence was that while the child was hospitalized, she revealed to her that apart from her paramour, the appellant also had sexual intercourse with her.

Although the appellant has suggested that when cross-examining the mother of the victim, it was she who instigated the child to make a false allegation against him, the evidence clearly shows that the mother had not attempted to protect the paramour when the incidents were revealed to her.

The child had been admitted to the hospital on the basis that she was raped by the paramour, which shows that the mother was not attempting to protect him at that time.

The police officer who had recorded the statement of the child had separated the child from the mother and recorded the statement, where the child has revealed the incident of rape, which led to the indictment against the appellant.

When the child was examined by the doctor, she has first revealed the incident of rape alleged to have been committed by the appellant. Subsequently, she has informed the doctor that she was continuously raped over a period of time by the paramour of her mother. This provides consistency as to the evidence of the child in relation to the allegation against the appellant.

It is clear from the evidence of the victim child that although she was not certain about the date of the incident, she was certain that it happened on the day where she went to make a telephone call to her elder sister. It is quite possible that the child being a 12-year-old and having being subjected to sexual abuse continuously may have forgotten the timeline as to what happened first or when.

In the case of **D. Tikiribanda Vs. Attorney General, CA 64/2003 decided on 6-10-2009 reported in Bar Association Law Journal (2010) (B.L.R.) 92**, it was held;

> *"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 inherent weaknesses of small children."*

In the case of **Mahathun and Others Vs. Attorney General (2015) 1 SLR 74,** it was held;

1. *When faced with contradictions in a witness's testimonial, the Court must bear in mind the nature and significance of the contradictions viewed in light of the whole of the evidence given by the witness.*
2. *Two greater significances cannot be attached to minor discrepancies or contradictions.*
3. *What is important is whether the witness is telling the truth on the material matters concerned with the event.*
4. *Where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors.*
5. *The Court of Appeal will not lightly disturb the finding of a trial Judge with regard to the acceptance or rejection of a witness unless it is manifestly wrong.*

The fact that the victim child was not forthcoming with the allegation against the appellant initially has to be considered having in mind the overall picture of the situation faced by the victim child, to consider whether the delay in her making the allegation against the appellant can be considered as an infirmity in relation to the prosecution case.

In the case of **D. Tikirbanda Vs. AG (supra),** it was determined that:

> *"If delay of making a statement is explainable the evidence of a witness should not be rejected on that ground alone."*

In the case of **Gamage Prabath Janaka Nayana Priyantha Perera Vs. Attorney General CA 107/2012 decided on 27-05-2016, Nawaz, J.** observed that,

> *"Why the witness did not reveal the drastical act or otherwise is a fact for him or her to explain and in fact if the explanation is plausible and credible the Court must act on the testimony albeit belated. If the explanation for the delayed statement is plausible and acceptable and the Court accepts the*

same as plausible, there is no reason to interfere with the conclusion made by the trial Court for accepting the belated statement."

The learned High Court Judge in her judgment has considered whether the delay in coming out with the allegation against the appellant has caused a doubt as to the evidence and has come to a finding that it was not so, for which I have no reason to disagree.

I am not in a position to consider the victim not informing that the appellant was also responsible for her plight to the sister at the first instance as an infirmity in her evidence. The facts and the circumstances clearly show that she has been suffering silently because of the sexual abuse faced by her and she has come out with it to her sister out of sheer desperation. Since it was the paramour of the mother who had been committing sexual abuses on her regularly by that time, it appears that she has initially informed about him to her sister which has led to her being hospitalized.

Her evidence clearly shows that she has gathered enough courage to inform her suffering because she was made aware of such abuses during a program held in her school. It is clear that when she gained confidence that she is under the protection of the authorities, she has come out with the incident of rape committed by the appellant. I find that her evidence in that regard was cogent and trustworthy which can be relied upon.

Although the learned High Court Judge has stated at several places in the judgment that the appellant has failed to challenge the evidence of the victim child and other witnesses, I am of the view, that in itself does not mean that the learned High Court Judge has moved away from the duty of the prosecution to prove the charge beyond reasonable doubt or had relied on the weaknesses of the defence put forward by the appellant to convict him.

As correctly viewed by the learned High Court Judge, when the victim child was giving evidence and being cross-examined, the questions posed to her had been mostly in relation to the mother's paramour and as to the incident where she

was allegedly raped by the appellant. Other than suggesting that she is lying under the influence of her mother in order to save the mother's paramour, no other suggestion has been made to her.

Similarly, when the mother of the child gave evidence, it is clear that what the mother has stated was what she was told by her daughter. She has been very clear that initially what was said to her was that the child was raped by her paramour, and only when she was at the hospital she informed about the rape incident committed by the appellant. She has been questioned at length about her paramour and his involvement. Nothing has been suggested to challenge her evidence in relation to what she came to know about the appellant. If the allegation was that the victim child gave evidence against the appellant after having being instigated by her mother, that suggestion should have been put to the mother when she was giving evidence and should have cross-examined her based on that fact. The appellant has not made any allegation as such when the mother was giving evidence at the trial.

I am of the view that what the learned High Court Judge has stated needs to be considered in that context, which does not show that the learned High Court Judge was misdirected as to the burden of proof in a criminal case.

It is well settled law that when an accused person takes up a particular line of defence, such a line has to be put to the relevant witnesses when they give evidence for the prosecution. If the accused fails to confront the relevant witnesses with his stand so that they can answer, but comes out with a story, which should have been put to the witnesses when he was called upon for a defence, such a defence in my view has little value unless it creates a reasonable doubt against the evidence of the prosecution.

In the case Indian Supreme Court case of **Sarwan Singh Vs. State of Punjab (2002) AIR S.C. iii 3652** it was observed;

"It is rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put this case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted."

His Lordship Sisira de Arbrew, J. stated in **Pilippu Mandige Nalaka Krishantha Kumara Thisera Vs. AG, CA 87/2005 decided on 17-05-2007** that;

"..I hold that whenever evidence given by a witness on a material fact is not challenged in cross-examination it has to be concluded that such evidence is not disputed. And is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."

When the accused was called upon for his defence, his position had been to the effect that although the child came to his house to make a telephone call, it happened on a day where his wife was also present and it was from his wife, the child came and asked permission to take a telephone call. It has also been stated that she came near the boundary fence of their house and used his mobile phone to take the call and left. The position of the wife of the appellant had also been the same.

However, when the child was cross-examined, none of these positions had been put to her. Since the child was the best person to provide answers to such a stand, without confronting the child of that position, coming up with such a stand has no value or reason to be considered in favour of the appellant's version of events.

If the allegation was that the mother of the victim child instigated her to make a false complaint against the appellant, the mother of the child would have been confronted in that regard. As I have stated before, no questions had been put to her to suggest any instigation by the mother.

I find that the learned High Court Judge has devoted a part of her judgment, as she should have, to consider the defence case put forward in order to find

whether it has created a doubt as to the prosecution case or a reasonable explanation has been provided. She has well considered the relevant positions in order to justify the conclusions reached in that regard in rejecting the stand of the appellant. I find that the learned High Court Judge has come to correct findings in that regard, which gives no reason for me to interfere on the basis that the learned High Court Judge has failed to consider the defence put forward by the appellant.

For the reasons as considered above, I find no merit in the 1st and the 4th grounds of appeal either.

Accordingly, the appeal is dismissed for want of merit.

Having considered the learned High Court Judge's failure to pronounce a default sentence if the appellant fails to pay the compensation ordered and to whom it should be paid, I direct that the sentencing order should stand varied to read that the compensation should be paid to PW-02, the victim of the incident, and in default of paying the sum mentioned, the default sentence should be 18 months simple imprisonment.

However, having considered the fact that the appellant had been in incarceration from his date of conviction and the sentence, it is ordered that his sentence shall be deemed to have commenced from his date of sentence, namely 26-06-2019.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal