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.

Court of Appeal No:
CA/HCC/0234/2023

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Puttalam

Case No: HC/225/2019

Ambagahage Nihal Ranjith Emmanuwel

ACCUSED

AND NOW BETWEEN

Ambagahage Nihal Ranjith Emmanuwel

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Asanka Mendis with Shehan Rajapakse for the Accused-Appellant
	: Anoopa de Silva, D.S.G. for the Respondent
Argued on	: 08-07-2024
Written Submissions	: 19-03-2024 (By the Accused-Appellant)
Decided on	: 25-09-2024

Sampath B. Abayakoon, J.

This is an appeal by the accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Puttalam.

The appellant was indicted before the High Court of Puttalam for committing the offence of rape on his own daughter between the periods of 01-01-2014 and 22-05-2014, at Madurankuliya within the jurisdiction of the High Court of Puttalam, and thereby committing an offence punishable in terms of section 364(3) of the Penal Code as amended by Penal Code Amendment Act No. 22 of 1995.

After trial, the learned High Court Judge of Puttalam found the appellant guilty as charged, of the judgment dated 18-10-2023, and after having considered the aggravating as well as the mitigatory circumstances, and also the minimum period of imprisonment that has been prescribed for a person found guilty of an offence of this nature, has sentenced the appellant for a period of 19 years rigorous imprisonment. In addition, he has been fined Rs. 25,000/- with a default sentence of one year simple imprisonment.

The Facts in Brief

The victim child of this incident (PW-01) is the youngest daughter of the appellant. Although she was 15 years of age when she gave evidence for the 1st time before the High Court on 08-07-2021, she was an eight-year-old child at the time relevant to this incident. During that time, she has been living with her father, an elder sister and a brother in their house situated in Sembatta. Her mother had left for overseas employment and it had been her father who looked after them.

In her evidence, she has stated that her father committed grave sexual abuse on her several occasions, and on the day relevant to this incident, he inserted his penis into her vagina. These incidents had occurred when the other siblings were not at home or during the night when others were asleep.

She has given specific evidence stating that the incident relevant to this charge of rape occurred in 2014, several days prior to the day she made the complaint to the police. Being unable to bear these abuses anymore, she has informed her suffering to a person called Baba Akka and later to one Priyanthi aunt who had taken her to the police, which led to the complaint against the father.

When she was giving evidence, although an admission has been recorded to the effect that she was born in 1999, and therefore, was under the age of 16 years during the period relevant to this charge, it appears to be that the said admission was wrongly recorded. There are two birth certificates in the original case record. The birth certificate relating to the victim child marked P-03 shows that she was born on 27-06-2006. It appears that the prosecuting State Counsel has wrongly recorded the admission based on the victim child's elder sister's birth certificate available in the case record.

It has been revealed that after the complaint was made she and her sister have lived with the earlier mentioned Priyanthi aunt for several years, and at the time when she gave evidence, she was living at a children's home. She has also given evidence to the effect that when her mother left for foreign employment, they

were living in a house built out of thatched coconut leaves, and these incidents occurred before their house was burnt down in a fire. The evidence reveals the fact that after the house was burnt down in May 2014, all the family members have been given shelter in a neighbouring house for a day, and later, the victim child and her sister have gone to live with the earlier mentioned with Priyanthi aunt.

It has also been revealed that her mother used to send money to Priyanthi aunt for their upkeep, and the children attended school while living with the earlier mentioned Priyanthi.

Under cross-examination, several omissions in relation to the statement she made to the police has been highlighted by the defence Counsel, which relates to the incidents of sexual abuse allegedly committed by the appellant. The victim child has also admitted that while she was living with Priyanthi aunt, her husband too subjected her to rape and there is another case pending in relation to the said incidents.

The person mentioned as Priyanthi has given evidence in this matter as PW-02. She has been running a small boutique near her house in Madurankuliya and the mother of the victim child has been closely associated with her as she used to work in her boutique. The mother of the child has left somewhere in 2013 for foreign employment. Being a person known to the family of the victim child, she has maintaned a close relationship with them and used to look after their welfare as a neighbour. About 4 to 5 months after the victim child's mother had left for foreign employment, their house has been burnt down and the child and her family, including the appellant have been given shelter in the neighbouring house belonging one Mary. After few days, at the request of the appellant, she has agreed to provide shelter for the victim child and her elder sister. About 2 weeks after the burning down of the house, the Church members of the area have reconstructed the house of the victim child and they had returned to the house to live with their father.

About two days after they returned, she has come to know from a neighbour about the sexual harassments faced by the victim child and her elder sister, and when she went and inquired from them, she has come to know about the incidents faced by the both of them. Thereafter, she has taken the two girls under her care and had taken steps to lodge a police complaint in this regard.

According to her evidence, when these matters were taken up in the Court, and the two children were to be taken under probation care, out of compassion, she has undertaken to take care of the children and they had been living with her for about 5 to 6 years. Their mother has provided financial support to care for them. Subsequently, because of the complaint that her husband too committed sexual abuse on the child, the child has been handed over to the probation care, but has insisted that she still visits the child and care for her despite the complaint against the husband.

When she was subjected to cross-examination, several alleged omissions in her statement to the police had been brought to the notice of the Court, and it has been alleged that because she was benefiting out of the money sent by the children's mother for their upkeep, and in order to stop the children going back to their father, it was she who instigated a false complaint against the appellant. It has also been suggested that it was only her husband who committed sexual abuse to the child. She has denied the allegations against her.

According to the evidence of the Judicial Medical Officer (JMO) who marked the Medico-Legal Report in relation to his examination of the child as P-02, the child has given the history of the incident as her father sexually abusing her during night time about three times by using his penis over her vagina. However, the JMO has observed signs of repeated penile penetration of the child's vagina when he examined her. He has opined that such sexual penetration may have occurred somewhere between two weeks or earlier than the date of examination. He has well explained the medical reasons for his observations and the opinion.

According to the evidence of the police officers who conducted investigations into the incident, the police have received the complaint in this regard on 23-05-2014. According to the evidence of PW-04, the police officer who conducted the main investigation, the child has shown the house of one Miyurin Janaki as the place where she was subjected to sexual intercourse and has observed that the house of the victim child has got burnt down.

At the conclusion of the prosecution evidence, the learned High Court Judge has decided to call for a defence from the appellant, where he has made a dock statement.

In his dock statement, he has stated that he came to Sembatta area from Madurankuliya and built a small hut on the land he purchased. Subsequently, his wife has gone for overseas employment leaving the three children with him. He has stated that due to a domestic accident, the hut was completely burnt down and as a result, the two children went and slept at Miyurin's house. As his wife wanted the two girls to be handed over to Priyanthi, the two girls had been given to Priyanthi for care. It had been his position that Priyanthi refused to hand over the children when he wanted the children back, and subsequently, the police came and arrested him. He has alleged that it was the husband of Priyanthi who committed the sexual abuse on the children and he was falsely implicated.

On behalf of the appellant, his other two children, the male child and the elder daughter has been called to give evidence. It appears that although they have stated that they were unaware of sexual abuse or rape incidents faced by their sister, they have given evidence to show that the earlier mentioned Priyanthi, who was instrumental in taking the children to the police, was a person who used the money sent by their mother for their upkeep for her own benefit.

The appellant has also called Miyurin Janaki, the mentioned neighbour of the appellant with whom the children and the appellant sought shelter after their house was burnt down. She has stated that they stayed in her house for one day

and thereafter, they left to live with Priyanthi. Later, she has come to know about the sexual abuse incidents alleged to have been faced by the children. The Grama Sewaka of the area during the time relevant to this incident has also been called on behalf of the appellant.

It needs to be noted that when the elder daughter was called to give evidence on behalf of the appellant, she was a 24-year-old married woman with children. She has given evidence, which clearly appears to be evidence intended to favour her father.

The Grounds of Appeal

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

1. The prosecution has failed to prove the place of the incident.
2. The learned High Court Judge has considered bad character evidence of the accused.
3. Failure to annex the written sanction of the Attorney General as required in a case of incest in terms of section 364A vitiates the conviction.
4. The learned High Court Judge has considered the ingredients of section 364A(3) of the Penal Code when convicting the accused, but when sentencing the learned High Court Judge has considered section 364(3) of the Penal Code.
5. Prosecution has been conducted on a defective charge.
6. The prosecution has failed to satisfy Court that the evidence of prosecution witnesses passed the tests of consistency, probability, and the *inter se* and *per se* contradictions.
7. The learned High Court Judge has not considered the defence evidence in its correct perspective.

The Consideration of the Grounds of Appeal

The 1st Ground of Appeal :-

In the indictment, the place of the incident has been mentioned as Madurankuliya. The evidence led at the trial shows that in fact, the victim child and the appellant were living at a place called Sembatta in Madurankuliya area during the time relevant to this incident. PW-03 Priyanthi, and the son of the appellant, who gave evidence as defence witness no. 03 has given their addresses as Sembatta, Madurankuliya. The evidence shows that both these places are situated very close to each other where the appellant's family and the other relevant witnesses lived.

It is the considered view of this Court that for such an alleged discrepancy in the indictment to be considered as a material defect in the indictment, there must be a basis to show that it has led to the appellant being misguided or misdirected as to the charge against him.

It is amply clear that there was no such misdirection, and therefore, any prejudice caused to the appellant. The consistent evidence led at this trial had been to the effect that the incident of rape and the other sexual abuse incidents faced by the victim child occurred in their own house. Therefore, I find that the important factor is not the name of the area that the incident occurred, but whether it had occurred. Since the evidence has been clear that the allegation against the appellant has been to the effect that he committed rape on his own child in their own house, there cannot be any basis for the appellant to be misled or misdirected as to the charge against him.

The dock statement of the appellant, the line of cross-examination, and also the evidence of his other two children called to give evidence on his behalf shows that there was no misdirection in that regard. Hence, I find no merit in the 1st ground of appeal.

The 3rd, 4th, and 5th Grounds of Appeal :-

As the said grounds of appeal are interrelated, I will now proceed to consider the said grounds of appeal together.

Section 364A of the Penal Code under which the appellant has been indicted before the High Court relates to the offence of incest. Section 364A(4) state that no prosecution shall be commenced for an offence under this section except with the written sanction of the Attorney General.

However, in this instance, it is the Attorney General who has filed an indictment before the High Court. It is my considered view that, when the Attorney General himself files an indictment, which clearly implies the sanction of the Attorney General, a separate sanction would not be necessary. When a matter is referred to the Attorney General's Department, the Attorney General will only file an indictment after studying all the materials placed before him and having considered whether there are sufficient grounds to file an indictment against an accused person. In such a situation, expecting the Attorney General to file a separate sanction letter should not be expected, as if not for the sanction of the Attorney General, there would be no indictment.

I am of the view that a separate written sanction would be necessary only in situations where any other prosecuting authority files a charge, if it is permissible, and not in situations where the Attorney General himself files the indictment.

It was contended that the learned High Court Judge considered the ingredients of the offence under which the appellant was indicted in terms of section 364A(3) when considering the evidence, but sentenced the appellant in terms of section 364(3) of the Penal Code, and therefore, the appellant has been sentenced on a defective indictment.

However, I find no basis to agree with such a contention. The learned High Court Judge has well considered the connection between the victim child and the

appellant being her own father, to determine that the crime committed falls within the interpretation of section 364A(1) of the Penal Code.

It needs to be noted that although section 364A(3) provides for the punishment of incest in the section itself, section 364(3) of the Penal Code also provides for the punishment for the offence of incest as enumerated in section 364A. I find nothing wrong in the Hon. Attorney General indicting the appellant for committing the offence of incest describing the punishable section, as section 364(3) of the Penal Code. The learned High Court Judge in her sentencing order has well considered the mandatory minimum sentence that needs to be imposed in terms of the relevant section and the maximum sentence that can be imposed, for which I find no reason to find fault with.

For the reasons as considered as above, I find no merit in the above-considered grounds of appeal as well.

The 2nd Ground of Appeal :-

In his submissions before this Court, the learned Counsel for the appellant submitted that the Court has allowed bad character evidence to be led at the trial. It was his position that when PW-02 was giving evidence (at page 108 and 109 of the appeal brief), bad character evidence has been led, and the learned High Court Judge has considered the said evidence at page 5 of the judgment (page 265 of the appeal brief) and again at page 13 and 14 of the judgment (pages 273 and 274 of the appeal brief), which has caused prejudice towards the appellant.

It is well-settled law that bad character evidence becomes relevant only when the good character evidence of the accused is led.

Section 53 of the Evidence Ordinance provides that in criminal proceedings, the fact that the person accused is of a good character is relevant.

(The good character of the accused is always relevant - **King vs. Marshall Appuhamy (1949) 51 N.L.R. page 140, 45 C.L.W. pages 49**)

Section 54 of the Evidence Ordinance provides that in criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

The exception to this rule (section 54) is where evidence has been given that the accused has a good character i.e., where he puts his character into issue in which case the prosecution is entitled to rebut the evidence of good character. However, the character must by clearly put in issue. This may be at the stage of cross-examination of prosecution witnesses.

> Explanation 1—this section does not apply to cases in which the bad character of any person is itself a fact in issue.
>
> Explanation 2—a previous conviction is relevant as evidence of bad character in such case.

In criminal cases, the prosecution cannot prove the bad moral character of an accused not only because of the presumption of innocence, but also because he must be judged on what he did, and not on what other people think he did or say about his character.

However, in the appeal under consideration, I am unable to see that bad character evidence has been led against the appellant. What the PW-02 has stated in her evidence-in-chief had been what she came to know from a third party, which amounts to hearsay evidence. It is clear that what she heard had been the reason that prompted her to take the two children, including the victim child, and to make a complaint in that regard to the police.

I am unable to find any fault with PW-02 narrating that fact, which relates to the reasons as to why she made a complaint to the police. If not for her complaint, this incident would not have come to light as the victim of the incident was a very young child at that time, who had no way of informing what was happening to her to the police or any other authority who can investigate into such allegations.

I am unable to find that the learned High Court Judge has, in anywhere in the judgment, has referred to character evidence against the appellant. Nowhere in the consideration of evidence, the learned High Court Judge had referred to the character, but only what PW-02 has come to know from the two children including the victim child. At page 13 of the judgment (page 273 of the appeal brief), the learned High Court Judge has commented on the alleged omission which the defence Counsel has brought to the notice of the Court in relation to the statement made by PW-02 to the police. She has considered that omission in order to consider whether the evidence of PW-02 passes the test of credibility and nothing else.

Accordingly, I find no merit in the second ground of appeal.

6th and the 7th Grounds of Appeal :-

It was contended that the prosecution has failed to satisfy the Court as to the tests of consistency, probability and *inter se* and *per se* contradictions, and also the learned High Court Judge has not considered the defence evidence in the corrects perspective.

This is a case where the appellant is the own father of the victim child, who was under the age of 9 years during the time she had to face these incidents of grave sexual abuse and rape. Although the indictment relates to one count of rape allegedly committed by the appellant on his own daughter, the evidence led at the trial clearly indicates that it was not an isolated incident, but the victim child had been subjected to repeated grave sexual abuse as well as rape.

It is my considered view that any evidence in that regard needs to be considered in that context, and in view of the painful task any victim has to undergo when narrating such incidents in open Court against her own father. The learned High Court Judge in her judgment has well considered of the manner such evidence should be considered and has come to correct findings in that regard.

It was held in the Court of Appeal Case of **D. Tikiribanda Vs. The Attorney General-decided on 06-10-2009** reported in **Bar Association Law Reports 2010 (B.L.R.) 92** that;

> *"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."*

At this stage, I find it appropriate to refer to the Indian case of **Bhoginbhai Hirjibhai Vs. State of Gujarat (AIR 1983-SC 753 at pp 756-758)** very often cited in our Courts. It was held:

1) *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.*

2) *Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

3) *Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

4) *A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witnesses is giving truthful and honest account of the occurrence witnessed by him – perhaps*

it is a sort of a psychological defense mechanism activated on the spur of the moment.

When considering the evidence of the victim child and the witnesses who gave evidence before the Court, I am unable to find any inconsistency or improbability in the version of events narrated by the witnesses. I find that the learned High Court Judge has well considered all the relevant aspects of the evidence in coming to her determinations, for which, I find no basis to disagree. The alleged contradiction or omissions do not go into the root of the matter as correctly considered by the learned High Court Judge in the judgment.

Although it was contended that the defence was not considered in the correct perspective by the learned High Court Judge, I have no reason to agree with such a contention. At the trial, the appellant has only made a dock statement. The dock statement has been considered by the learned High Court Judge having in her mind, the weight that should be given to a dock statement, which is not evidence given under oath by an accused person, although such dock statement can attract some evidential value.

The learned High Court Judge has separately considered the witnesses called on behalf of the appellant and whether the defence taken up by the appellant and evidence called on behalf of him has created a reasonable doubt as to the prosecution evidence. I am of the view that the learned High Court Judge has reached her conclusions after well considering the evidence placed before the Court by both parties and considering the evidence in its totality where the appellant was found guilty to the charge preferred against him. Hence, I find no basis for the grounds of appeal urged by the appellant.

It needs to be specially noted that the learned High Court Judge in her sentencing order had considered the aggravating circumstances, as well as the mitigatory circumstances available to the appellant when sentencing him. It is only after well considering such circumstances and having given credit to the mitigatory circumstances, the learned High Court Judge has imposed the

sentence pronounced upon the appellant. I am of the view that the sentence imposed upon him was a fair and a just sentence, given the facts and the circumstances under which the appellant was found guilty to the charge.

For the reasons as considered above, the appeal is dismissed for want of merit. The conviction and the sentence dated 18-10-2023 by the learned High Court Judge of Puttalam affirmed.

However, having considered the fact that that the appellant had been under incarceration from his date of conviction, it is ordered that his sentenced deemed to have commenced from is date of sentence, namely from 18-10-2023.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal