

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

In the matter of an Appeal made under
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/0404/2019**

Galegedera Manannalage Sumanadasa

**High Court of Ratnapura
Case No: HCR/125/2018**

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **Sampath Abayakoon, J.
P.Kumararatnam,J.**

COUNSEL : **Amila Nawalage for the Appellant.
Jayalukshi De Silva, SSC for the
Respondent.**

ARGUED ON : **06/05/2024**

DECIDED ON : **06/08/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Ratnapura for committing three counts of incest on his step daughter namely Thavalangodage Nimeshi Saumya between 01/01/2007 to 31/12/2007 an offence punishable under Section 364(3) of the Penal Code as amended.

After the trial the Appellant was convicted as charged on all three counts and he was sentenced to 20 years rigorous imprisonment on each count with a fine of Rs.30000/-. In default of which 01-year rigorous imprisonment was imposed on each count. In addition, the Learned High Court Judge had specified a sum of Rs.300000/- to be paid as compensation to the victim on each count and in default of which a sentence of 01 years rigorous imprisonment was imposed on each count.

Further, the Learned Trial Judge had ordered the sentence imposed on 1st, 2nd and 3rd counts to run concurrently.

Being aggrieved by the aforesaid conviction and the sentence the Appellant preferred this appeal to this court.

The Counsel for the Appellant placed following grounds of appeal for adjudication:

1. The Learned High Court Judge had failed to evaluate that the prosecution failed to prove the alleged offence was committed during the period stipulated in the indictment.
2. The Appellant was deprived a fair trial.

PW1, the prosecutrix who encountered this unpleasant incident was in grade six. The Appellant was her step father who lived with her mother in the same house.

On the day of the first incident, when she was at home with her elder sister, the Appellant had first sent her sister out of the house to look whether any one coming. After that he had taken the victim inside the house, put her on a mat and committed rape on her. Although she divulged this incident to her sister, but not told her mother who came home after work. This is due to the threat extended on her by the Appellant. In two weeks gap the Appellant had continued to rape her thrice in similar fashion. As it was unbearable pain not only to her but also to her elder sister, both had gone to the police and lodged a complaint against the Appellant. Although both had gone to Pothupitiya Police Station first to lodge a complaint, but the proper investigation was done by Rakwana Police station. The victim admitted that she lodged her complaint on 05.06.2011. Due to fear of the Appellant, she had waited 3 and half years to lodge her complaint.

PW4, Dr.Inoka Ratnayake had examined the victim and submitted the Medico-Legal Report. In her report injuries were found on the victim's hymen in six o'clock and seven o'clock positions. The observations in the medical report had revealed that the victim was subjected to repeated vaginal intercourse.

After the conclusion of the prosecution case, the Learned High Court Judge had called for the defence. The Appellant had made a dock statement and closed the case for the defence.

Although the Appellant advanced three grounds of appeal, he did not proceed to canvass the third ground of appeal at the hearing. Hence, this Appeal commences with the consideration of the 1st and 2nd second grounds of appeal.

In the first ground of appeal the Appellant contended that the Learned High Court Judge had failed to evaluate that the prosecution failed to prove the alleged offence was committed during the period stipulated in the indictment.

According to the victim she was born on 09.10.1998 and the incident happened according to her recollection, when she was in grade six. This is only her recollection and not conclusion. Therefore, it cannot argue that the allege offence cannot be taken place in 2007.

During the trial, this position was never put to the witness by the defence. Further, the defence had admitted that the victim was under 16 years of age at the time of committing the offence on her. This had been marked as an admission under Section 420 of the Code of Criminal Procedure Act No.15 of 1979.

In this case, the Appellant was represented by a Counsel at the trial. Through his Counsel the Appellant had admitted that the victim was under 16 years of age at the time of committing the offence. Therefore, he is estopped from contesting the age of the victim during the period stipulated in the indictment. Hence, this ground has no merit.

In the second ground of appeal, the Counsel for the Appellant contends that the Appellant was deprived of a fair trial.

The Counsel for the Appellant citing Section 165(1) of the Code of Criminal Procedure Act, contends that time is most important factor for an Accused to build up his defence and when prosecution stipulates period of 01 year that amounts to 365 days which is impossible for an Accused to come out with the proper defence like *alibi*.

As correctly pointed out by Learned Deputy Solicitor General, three offences which are of the same kind committed within the span of 12 months can be included in the same indictment under Section 174(1) of the CPC, the prosecution had framed three charges under Section 364(3) of the Penal Code as amended in indictment. This has not caused any prejudice to the Appellant, as prosecution had complied statutory provision of the CPC. Therefore, he cannot argue that he was not awarded a fair trial. Hence, this ground also sans any merit.

In this case the prosecutrix was consistent in her evidence about the happenings of the incident. She had vividly explained how she was raped by the Appellant on three occasions. She had given evidence before the High Court for more than 12 years after the incident.

The learned High Court Judge in the judgment had considered all the evidence adduced by the prosecution and the defence and had given reasons as to why he acted on the evidence adduced by the prosecution. He has accurately analysed all the evidence presented by both parties with correct perspective and arrived at the correct finding.

In this case the Appellant is the step father of the victim. He is married to the victim's mother and has two daughters aged 15 and 10 years. The defence had made mitigating submission highlighting the family situation of the Appellant.

Under Section 364(3) of the Penal Code, the minimum sentence is 15 years and the maximum sentence is 20 years. The minimum sentence is

mandatory. As such, the sentence should start from 15 years and goes up to 20 years.

In this case the Learned High Court Judge had imposed maximum sentence of 20 years on each count to be run concurrent to each other. I think imposing maximum sentence is not warranting in this case. As such, I set aside the 20 years rigorous imprisonment imposed on each count and replace with 15 years rigorous imprisonment on each count to be run concurrent to each other.

Secondly, I set aside the Rs.300,000/-compensation imposed on each count and replace with Rs.100,000/- compensation on each count subject to 06 months default sentence on each count.

The fine and default sentence imposed on each count will remain same.

I further order the sentence imposed to be operative from the date of conviction namely 20/11/2019.

The appeal is, therefore, dismissed subject to above variation of the sentence.

The Registrar of this Court is directed to send this judgment to the High Court of Ratnapura along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL