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.

Court of Appeal Case No.
CA/HCC/0041/2022

Complainant

High Court of Gampaha
Case No. HC/115/2017

Vs.

Dandeniya Arachchige Priyantha.

Accused

AND NOW BETWEEN

Dandeniya Arachchige Priyantha.

Accused-Appellant

Vs.

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

Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Senarath Jayasundera with Chathurangi Wedage and Rehani Chandrasiri for the Accused-Appellant.
Jayalakshi De Silva, SSC for the Respondent.

ARGUED ON : 05.08.2024

DECIDED ON : 12.09.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Gampaha for committing grave sexual abuse of a girl below the age of 16 years on or about 02nd June 2013 by inserting his tongue to the female genitalia of the victim and thereby committing an offence punishable under section 365B(2)(b) of the Penal Code. After trial, the learned High Court Judge convicted the accused by his Judgment dated 30.11.2021 and sentenced him for 10 years rigorous imprisonment and imposed a fine of Rs.25,000/- which carries a default sentence of 06 months simple imprisonment. Further, compensation of Rs.100,000/- which carries a default sentence of 01-year simple imprisonment was also ordered.

This appeal is preferred against the said conviction and sentence. Prior to the hearing, written submissions were filed on behalf of both parties. At the hearing of the appeal, the learned counsel for the appellant and the learned Senior State Counsel for the respondent made oral submissions.

In brief, the facts of the prosecution case are as follows:

At the time of the incident, the victim was a seven-year-old girl who had been living with her parents and three sisters in Ragama. She was

fourteen years old at the time of giving evidence. On the day of the alleged abuse, which was a Sunday, the victim had attended "dhamma school" and came to her home around 11.30 a.m. After having her lunch, she had gone to the well, which was located near her house. According to the victim (PW-1), when she was near the well, the accused-appellant who was living in the adjacent land to the victim's house had come to that place. The victim had just come out of the toilet and came near the well and she had not been wearing any clothes for her lower part of the body at that time. According to PW-1, at this instance, the accused had kissed the genital area of the victim using his mouth.

The learned Counsel for the appellant has raised following three grounds of appeal in his written submissions.

i. The learned Trial Judge had failed to evaluate the evidence properly and failed to apply the legal principles.
ii. The findings of the learned High Court Judge are not supported and contrary to the evidence of PW-1.
iii. Hon. High Court Judge had failed to evaluate the required legal elements of the offence of grave sexual abuse and convicted the appellant for the said offence.

Although the aforesaid grounds of appeal have been raised in the written submissions, at the hearing of the appeal, the learned Counsel for the appellant mainly relied upon a legal issue. He contended that due to the said legal issue, the conviction cannot stand. The legal issue that he raised is that the learned Judge who wrote the Judgment has never heard the evidence of the case and according to Section 283(1) of the Code of Criminal Procedure Act (CCPA), the Judgment shall be written by the Judge who heard the case. Since the learned High Court Judge who wrote the Judgment had never heard the case, the learned Counsel for the appellant contended that the conviction cannot stand.

Further written submissions have been filed on behalf of the respondent in respect of the aforesaid legal issue.

Section 283(1) of the CCPA reads as follows:
"*The judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.*"

In the instant case, the trial had been commenced before the learned High Court Judge, Hon. Nimal Ranaweera. The prosecution evidence was lead before him and the accused-appellant made a statement from the dock before the same Judge. After the case was fixed for closing submissions of both parties, Hon. Navaratne Marasinghe was appointed as the Judge of this High Court. When the matter came before Hon. Navaratne Marasinghe, the learned Counsel for the accused made an application to proceed the case before Hon. Navaratne Marasinghe adopting the evidence led before his predecessor. The learned High Court Judge made his order stating that he decides to proceed with the case, as it was agreed to adopt the evidence so far led and to proceed thereon. The application of the learned defence counsel and the order made by the learned High Court Judge appear as follow:

"මෙම නඩුව පුර්වගාමී විනිසුරුතුමා ඉදිරියේ විභාගයට ගෙන දෙපාර්ශවයේ දේශණ සඳහා නියමිතව ඇත.

<u>විත්තියේ නීතිඥ මහතා ඉල්ලීමක් කරයි.</u>

ගරු මැතිතුමණි, කෙසේ වෙතත් පුර්වගාමී විනිසුරුතුමා ඉදිරියේ මෙතෙක් මෙහෙයවා ඇති සාක්ෂි ගරු ඔබතුමා ඉදිරියේ පිලි ගෙන වැඩිදුර විභාගය ඉදිරියට පවත්වාගෙන යාමට එකඟ වන බව ගෞරවයෙන් සඳහන් කර සිටිනවා.

<u>නියෝගය</u>

මෙම නඩුව දෙපාර්ශවයේ දේශණ සඳහා නියමිත නඩුවකි. කෙසේ වෙතත් පුර්වගාමී විනිසුරුතුමා ඉදිරියේ මෙතෙක් මෙහෙයවා ඇති සාක්ෂි මා ඉදිරියේ පිලි ගෙන වැඩිදුර විභාගය

ඉදිරියට පවත්වාගෙන යාමට එකඟ වන බැවින් නඩුවේ ඉදිරි කටයුතු මා ඉදිරියේ පවත්වාගෙන යාමට තීරණය කරමි.
(page 96 of appeal brief)

The contention of the learned Counsel for the appellant was that even if the Counsel for the accused requested to adopt the evidence and proceed, the learned High Court Judge should have referred the case back to his predecessor to write the Judgment because Section 283(1) states that the Judgment shall be written by the Judge who heard the case. The learned Counsel submitted the case of ***Nimal Pinsiri Godakandeniyage alias Nimal pinsiri V. Hon. Attorney General*** – Court of Appeal No. CA 77/2014, decided on 18th November 2019, in substantiating his argument and pointed out that the said case has been sent back for retrial. In the case of *Nimal Pinsiri V. Attorney General*, the learned Counsel for the appellant raised an argument and stated that the accused-appellant had been seriously prejudiced because the evidence for the prosecution and the defence had been led before one Judge of the Court and the evidence had been considered and the Judgment had been pronounced by a different Judge of the High Court.

It is correct that the aforesaid case submitted by the learned Counsel for the appellant has been sent back for retrial by the Court of Appeal. However, the reason for sending back the case was not that the evidence of the case has not been heard by the Judge who wrote the Judgment. The reason was that the learned Judge has never considered the accused's dock statement. It was observed by the Court of Appeal that in the Judgment, the learned High Court Judge had made no reference at all to the dock statement made by the accused. As the Court of Appeal concluded that the learned High Court Judge has arrived at the finding of guilt only upon considering the evidence led by the prosecution, the Judgment of the High Court had been set aside and the case was sent back for retrial. It must be specifically mentioned that

there is no single word in that Judgment to the effect that a Judgment cannot be entered by the succeeding Judge considering and analyzing the evidence led before his predecessor.

In addition, it is apparent from that Court of Appeal Judgment that the succeeding Judge can write a Judgment considering the evidence taken by his predecessor even if no evidence is led before the succeeding Judge because in the said Court of Appeal Judgment it has been mentioned that the learned High Court Judge should have referred to the nature of the dock statement made by the accused, pronounced his decision to reject the dock statement and given reasons for the rejection of the dock statement. This finding of the Court of Appeal decision clearly implies that a succeeding Judge who did not hear any evidence of the case can enter the Judgment on the evidence led before his predecessor but the entirety of the evidence including the dock statement should be considered and analyzed in writing the Judgment. Therefore, the said judicial authority submitted by the learned Counsel for the appellant is against the argument formulated by the learned Counsel.

Presently, the legal position regarding the adoption of evidence is settled. In the case of ***Somapala V. The Commissioner to Investigate Bribery and Corruption***- (CA (PHC) APN 37/2009, CA Minutes of 03.02.2010), it was observed that the legislature repealed the proviso to Section 48 of the Judicature Act and substituted thereof, of the following proviso by Judicature (Amendment) Act No. 27 of 1999:

"*Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such Judge, the accused may demand that the witnesses be re-summoned and reheard.*"

Citing the aforesaid Court of Appeal Judgment, the Supreme Court observed in the SC Appeal No: SC/APPEAL/139/2019 (***The Hon.***

Attorney General V. Chandana Sri Lal Gurusinghe), SC Appeal No: SC/APPEAL/2/2022 (***Hettiarachchilage Wasantha Rathna V. OIC Yakkala Police Station and The Hon. Attorney General***) and SC SPL LA No: SC/SPL/LA/267/2018 (***Rajapakse Gedara Nandasena alias kirikolla V. The Hon. Attorney General***) – decided on 05.04.2024 as follows:

"*This amendment removed the right of the parties to civil actions to demand the resummoning and rehearing of witnesses. Following the amendment, this right is now confined only to accused persons in criminal cases.*

This amendment also restricted the accused's rights, which he previously enjoyed. After the amendment, there is no compulsion on the part of the Court to resummon and rehear witnesses and commence the trial afresh when an application is made by the accused; the part "in which case the trial shall commence afresh" found in the original proviso was removed.

By removing that portion, the legislature granted the Court the discretion to decide whether to allow the accused's application to resummon and rehear witnesses, based on the facts and circumstances of each individual case."

Accordingly, the Supreme Court decided the following two questions of law in negative:

(a) Does a Court of first instant require the fact of adopting evidence by the succeeding Judge to be recorded in order to comply with Section 48 of the Judicature Act, as amended, when there was no demand by accused person to resummon and rehear the witnesses?

(b) Would the Cout of Appeal be correct in law in holding that the absence of a record of adoption of evidence in the above circumstances vitiates the proceedings, without considering the matter before it?

Accordingly, the Supreme Court held that the succeeding Judge can proceed with the case adopting the evidence taken by his predecessor even without recording the adoption of evidence when there is no demand by an accused person to resummon and rehear the witnesses. However, it is to be noted that it is advisable to record the consent of the parties whenever the evidence is adopted and then proceed before the succeeding Judge.

The issue before us is slightly different. The argument raised by the learned Counsel for the appellant was that the learned Judge who wrote the Judgment has never heard even a part of the evidence of the case, and all the evidence of the case had been led before his predecessor. It is correct that no evidence has been led before the learned Judge who wrote the Judgment. Closing submissions on behalf of the accused has been tendered in writing to the learned Judge who wrote the Judgement. Thereafter some typographical errors have been corrected.

In the aforesaid Supreme Court decision, a portion of the decision of the case, ***Central Finance Company PLC V. Chandrasekera*** – (2020) 1 Sri L.R. 161 is cited as follows:

"*It should be born in mind that in the above case, no evidence was led before the judge who dismiss the action; all the evidence was led before his predecessor. It is in that context Jayawardena, J. stated that where a succeeding judge is called upon to deliver the judgment in a case where no evidence had been led before him, it is obligatory on the succeeding judge to have the case called in open Court and notify the parties that he is required to deliver the judgment since his predecessor is unavailable and decide which of the three lines of action referred to in the principle part of Section 48 should be followed, i.e. (a)* ***to act on the evidence already recorded by his predecessor****, or (b) partly recorded by his predecessor and partly recorded by him or, (c) if he thinks fit, to re-summon the witness and commence the proceedings afresh.*" (Emphasis added)

In the above case also, no evidence has been led before the Judge who wrote the Judgment and dismissed the action. According to the said Supreme Court decision, one of the options available to the succeeding Judge is to act on the evidence already recorded by his predecessor. Therefore, even if no evidence has been led before the Judge who writes the Judgment, the succeeding Judge can act on the evidence already recorded by his predecessor. What the Supreme Court emphasized in the said Judgment is that it is obligatory on the succeeding Judge to have the case called in the open Court and notify the parties that he is required to deliver the Judgment. In the aforesaid case of *Central Finance Company PLC V. Chandrasekera*, the learned Judge who heard the evidence in the Commercial High Court was elevated to the Court of Appeal. However, even if the Judge who heard the evidence is in a High Court, the same principles apply and the succeeding Judge can write the Judgment acting upon the evidence already recorded by his predecessor after notifying and informing the parties of the case.

In the case at hand, it is apparent from the aforesaid proceedings dated 22.04.2021 that even before the learned High Court Judge, Hon. Navaratne Marasinghe inquired whether the accused-appellant is willing to adopt the evidence and proceed before him, the learned Counsel for the accused, on his own, requested to adopt the evidence so far led and to proceed. Then only, the learned High Court Judge decided to proceed with the case, as the accused-appellant agreed to adopt the evidence and proceed. Therefore, the procedure specified in the aforesaid Supreme Court case has been perfectly complied with by the learned High Court Judge who wrote the Judgment. Therefore, I hold that the Judgment of this case is not contrary to Section 283(1) of the CCPA and the learned Judge has written the Judgment in accordance with the law. Therefore, I regret that I am unable to agree with the legal issue raised by the learned Counsel for the appellant.

The next main issue raised by the learned Counsel for the appellant was that the act of grave sexual abuse described in the charge has not been established by the evidence of PW-1. What the learned Counsel pointed out was that according to the charge, the accused-appellant inserted his tongue to the female genitalia of the victim but according to the evidence of the victim, PW-1, the accused-appellant had kissed her genital area using his mouth.

The learned SSC for the respondent contended in reply that the victim was seven years old at the time of the offence and when giving the history to the doctor who examined her, she had told that the accused inserted his tongue to her genitalia, however, when she gave evidence at the age of fifteen, she had omitted to state that the tongue had been inserted to her genitalia but clearly stated that the accused kissed her genitalia using his mouth. The learned SSC contended further that there was no discrepancy between her evidence in Court and the history given to the doctor and this slight omission could be occurred when giving evidence after seven years of the incident.

I agree with the contention of the learned SSC because after seven years of the incident, this kind of omission could have occurred. It is normal that she did not want to repeatedly describe this unpleasant incident in detail. Although, it is not stated in her evidence that she wanted to forget this incident, obviously, any person with common sense could understand that any girl who faces this kind of sexual abuse tries to forget that unpleasant incident as soon as possible.

However, it should be considered whether the ingredients of the charge have been proved on the said evidence of PW-1. Interpretation of the offence of grave sexual abuse in terms of Section 365B(1) is that "*grave sexual abuse is committed by any person who, for sexual gratification, does any act by the use of his genitals or any other part of the human body or any instrument or any orifice or part of the body of any other*

person, being an act which does not amount to rape under Section 363, in circumstances falling under any of the following descriptions, that is to say…"

In the instant action, according to the evidence of PW-1, part of the accused's body, that is his mouth was used on the genitalia of the victim when kissing that area. It is apparent from the evidence that the accused-appellant performed that act for his sexual gratification. Therefore, when kissing the genitalia of the victim using the accused's mouth, whether he inserted his tongue or not, the ingredients of the charge of grave sexual abuse are proved.

According to Section 166 of the CCPA, an error or omission of the charge in stating the particulars of the offence shall not be regarded as material, unless the accused was misled by such error or omission. When considering the evidence of PW-1 as to the way that the accused committed the offence, it is obvious that the accused is not misled by the description of the offence in the charge. Therefore, the said discrepancy pointed out by the learned Counsel for the appellant has no impact in proving the charge against the accused-appellant.

The other matters pointed out by the defence have been considered by the learned High Court Judge and it is my view that the learned Judge has come to the conclusion after correct analysis of the evidence of the case. The findings of the learned Judge are supported by the evidence presented in the case. The learned Counsel for the appellant did not canvas the sentence imposed on the accused-appellant. In the circumstances, I see no reason to interfere with the Judgment and the sentence imposed by the learned High Court Judge.

Accordingly, the conviction dated 30.11.2021 and the sentence imposed on the accused-appellant are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL