

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

In the matter of an appeal against an order of the High Court 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. The Democratic Socialist Republic of Sri Lanka.

CA No: CA/HCC/ 0071/17
HC: Kurunegala: HC57/2009

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Giriwala Gamage Nawarathne Manike
2. Periyathambi Annamuththu Mery Airin Petricia
3. Jayakodi Arachchilage Upul Priyadarshana
4. Appuhamy Arachchilage Sarath Chandra Siriwardhane
5. Widulath Arachchilage Sarath Podi Bandare

Accused

And now between

Widulath Arachchilage Sarath Podi Bandare

5th Accused- Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J. (P/CA)**

&

R. Gurusinghe J.

Counsel: A.M.E.B. Atapattu, AAL for the accused-appellant.

Sudharshana De Silva, DSG for the Complainant-Respondent.

Written Submissions: By the accused-appellant on 04.12.2017.

By the Complainant-Respondent 05.12.2017.

Argued on : 14.10.2022

Decided on : 15.11.2023

N. Bandula Karunarathna J. (P/CA)

The 5th accused-appellant (here in after called as the appellant), along with four others, stood indicted in the High Court of Kurunegala for having committed the offences punishable under section 360 (B) (1) (b) of the Penal Code. The appellant was found guilty of the above offence as charged under count 1 of the indictment. The appellant was sentenced to a term of 5-year imprisonment and to a fine of Rs. 500,000 with a default term of two years.

As the indictment was read over, the 1st to 5th accused pleaded 'not guilty' to the indictment. Accordingly, the trial commenced before the learned High Court Judge against all five accused. While the trial was in progress, the 2nd and 4th accused pleaded guilty to the respective charge, whereupon the two accused were convicted on their own plea. Those two accused were sentenced accordingly, the trial against the 1st, the 3rd and the 5th accused proceeded and concluded. The learned trial judge found the 1st and the 3rd accused not guilty of the offences they were charged with and found the 5th accused-appellant guilty.

The prosecution led the evidence of the following witnesses:

- a. Witness No 3 - Basnayake Mudiyanseelage Susantha Kumari Basnayake (victim of the crime or 3rd witness)
- b. Witness No 02 - Weerabahu Mudiyanseelage Sudharma Kumudini Jayarathne (relation of 3rd witness or victim)
- c. Witness No 01 - Maligarnuwe Gedara Leelawathi (Mother of 2nd witness)
- d. Witness No 10 - Kotuwegedara Subarathna Manike (Mother of 3rd witness)

- e. Witness No 05 - Pahala Gedaralage Nawarathnasiri (Person who worked in the Melsiripura Sajan Restaurant, where 2nd and 3rd witnesses were kept)

The prosecution marked the birth certificate, the medical report and identification parade notes in support of its case against the appellant. According to the identification Parade notes the 5th accused-appellant was identified. According to the evidence revealed against the appellant, the victim was taken to a hotel where the offence was perpetrated. According to the evidence, the victim was kept in the hotel for nearly seven days and introduced her to different men for sexual gratification. After the victim escaped from the appellant, they produced themselves at the police station and lodged complaints.

At the conclusion of the prosecution case, the appellant made a dock statement and denied his involvement in the offence. In preferring an appeal, the appellant urged the following grounds in the petition of appeal dated 02.06.2017 and prayed that the said conviction and the punishment be set aside;

- (i) Conviction and the punishment imposed are contrary to the law;
- (ii) Prosecution has failed to establish the charges against the appellant beyond reasonable doubt;
- (iii) The 1st charge of the indictment has been framed incorrectly against the appellant;
- (iv) Punishment imposed on the appellant is excessive and not reasonable;
- (v) The conviction and the punishment on the appellant is contrary to the evidence produced before the court.

The learned High Court Judge came to the conclusion after analysing the facts and law fairly and reasonably so that no prejudice was caused to the appellant. The evidence had before the learned trial judge was sufficient to convict the appellant and there was no material to interfere with the finding of guilt. The 5th accused-appellant in this appeal was indicted in the High Court of Kurunegala under the count for procuration of Basnayake Mudiyansele Susantha Kumari Basnayake with a view to illicit sexual intercourse, to leave her usual place of abode in Sri Lanka, at Yangalmodera situated within the jurisdiction of the High Court of Kurunegala, during the period between 01.05.2003 to May 2003, an offence punishable under section 360 (b) (1) (b) of the Penal Code Amendment Act No.22 of 1995 read with section 360 (a) (5) of the Penal Code Amendment Act No.22 of 1995 and No.29 of 1998.

The prosecution called their Witness No. 1 the mother of the prosecutrix named Maningamuwe Gedara Leelawathi, Witness No.2 named Weerabahu Mudiyansele Sudarma Kumudini who was kept with the prosecutrix, Witness No. 3, prosecutrix named Susantha Kumari Basnayaka, Witness No.4, an employee of the hotel named Pahalagedaralage Nawarathnasiri and Witness No.19, Police Constable No.18205 named Somarathna to establish the charge against the 5th accused-appellant. The 5th accused-appellant made a dock statement.

It was argued by the learned counsel for the appellant that the prosecution has not established the case beyond reasonable doubt, against the 5th accused -appellant. If carefully evaluated the prosecution evidence, it can be found that, in the absence of any explanation to the contrary from the defense, the prosecution evidence does not establish ingredients of the offence of the 1st charge. On the question of the 5th accused-appellant's participation, in the absence of any evidence to the contrary, the evidence of Witness No. 1, the mother of the prosecutrix named Maningamuwe Gedara Leelawathi, Witness No.2, named Weerabahu Mudiyanseelage Sudarma Kumudini who was kept with prosecutrix, Witness No. 3, prosecutrix Named Susantha Kumari Basnayaka, do not establish participation of the 5th accused-appellant.

This was held in the cases of Martin Sinho Vs. Queen (69 CLW 29) and King Vs. Podi Sinho (52 NLR 49).

Learned counsel argued on behalf of the appellant that the prosecution has not established this case beyond reasonable doubt as per the contents of the counts. The offence has been committed at Yangalmodara. Yangalmodara is situated within the police area of Polgahawella. The appellant states that he has not entered the Polgahawella police area. The prosecutrix named Susantha Kumari Basnayaka (witness No. 3) also admitted this. As per the evidence led in the trial, the commission of an offence was within the Polpithigama police area. Also the Yangalmodara mentioned in the first charge is situated beyond the 3 police areas from Melsiripura. Therefore, the 1st charge is levelled against the 5th accused-appellant is totally contrary to section 165 of the Criminal Procedure Code. According to the provisions of section 165 of the Criminal Procedure Code, the place of the commitment of the offence must be included for the charge invariably. Hence, it is my view that the conviction for the defect charge is totally against the law.

The prosecution has not established the *mens rea* or the knowledge of the 5th accused-appellant. This was clearly established evidence given by witness No.3 the prosecutrix named Susantha Kumari Basnayaka.

Proceedings dated 12.10.2015 Page No.50, 51 of the appeal brief is as follows;

- ප්‍ර : ඔබව මැල්සිරිපුර ගෙදරින් එක්කරගෙන ආපු සරත් යන අය මැල්සිරිපුර නැවතුනා නේද?
- උ : සරත් පොඩ්බණ්ඩාර යන අයද?
- ප්‍ර : සරත් පොඩ්බණ්ඩාර යන අය මැල්සිරිපුර ඉඳන් මෙහාට ආවද තමන් සමඟ?
- උ : මැල්සිරිපුරට එනකම්ම ආවා.
- ප්‍ර : එම අය පොල්ගහවෙල,අලව්ව දිහා, ගිරිඋල්ල දිහා සිටියේ නැහැ නේද තමන් සමඟ ?
- උ : නැහැ.

Proceedings dated 12.10.2010 Page No.39 of the appeal brief is as follows;

- ප්‍ර : තමන් කියලා තියෙන විදිහට කුමාරි කියලා, සරත් කියලා කෙනෙක් තමන්ගේ ගෙදරට ඇවිල්ලා මොනවද යෝජනා කලේ ?

- උ : බබා ඔයාව එක්ක යන්න ආවේ, ලැස්තිවෙන්න කියලා කිව්වා. ගාමන්ට එකට එක්ක යන්න.
- ප්‍ර : කවද කිව්වේ?
- උ : පැට්‍රිෂියා කුමාරි කිව්වේ.
- ප්‍ර : පැට්‍රිෂියා කුමාරිද එහෙම නැත්නම් ඒ ආව අනෙක් පුද්ගලයාද?
- උ : පැට්‍රිෂියා කුමාරි.

Proceedings dated 12.10.2010 Page No. 43, 44 of the appeal brief is as follows;

- ප්‍ර : එක්කන් ගිහින් මොකද කලේ ?
- උ : බයික් එකෙන් බහින්න කියලා කිව්වා. මේ වැනි එකට නගින්න කියලා කිව්වා. ඊට පසුව මම වැනි එකට නැග්ගා.
- ප්‍ර : වැනි එක තිබුනේ කොහෙද?
- උ : වැනි එක තිබුනේ ඒ ගේ ගාව.
- ප්‍ර : වැනි එකට නගින්න කිව්වේ කවුද ?
- උ : පැට්‍රිෂියා කුමාරි.
- ප්‍ර : තමන් පොලිසියට ප්‍රකාශයක් දුන්නානේ. කලින් මම කියපු ප්‍රකාශය ඒ ප්‍රකාශයේ කොහෙවත් සඳහන් වෙලා නෑ පැට්‍රිෂියා වැනි එකට නගින්න කිව්වා කියලා.
- උ : පැට්‍රිෂියා තමයි කිව්වේ.

Proceedings dated 12.10.2010 Page No.50, 51 of the appeal brief is as follows;

- ප්‍ර : ඔබ මැල්සිරිපුර ගෙදරින් එක්කරගෙන ආපු සරත් යන අය මැල්සිරිපුර නැවතුනා නේද?
- උ : සරත් පොඩ්බණ්ඩාර යන අයද?
- ප්‍ර : සරත් පොඩ්බණ්ඩාර යන අය මැල්සිරිපුර ඉඳන් මෙහාට ආවද තමන් සමග ?
- උ : මැල්සිරිපුරට එනකම්ම ආවා.
- ප්‍ර : එම අය පොල්ගහවෙල, අලව්ව දිහා, ගිරිඋල්ල දිහා සිටියේ නැහැ නේද තමන් සමග ?
- උ : නැහැ.

Proceedings dated 12.10.2010 Page No.54,55 of the appeal brief is as follows;

- ප්‍ර : සරත් පොඩ්බණ්ඩාර එයිට කලින් දැකලාම නැහැ?
- උ : නැහැ.
- ප්‍ර : මේ විත්තිකරු තමාව එදින ගෙනියන්න ආපු දවසේ තමාගේ ගෙදර ඉඳලා මැල්සිරිපුර හෝටලයට යනකල් තමයි දැක්කේ ?

- උ : ඔව්.
- ප්‍ර : සාමාන්‍යයෙන් කොච්චර වේලාවක් ඔහුව දැක්කද ?
- උ : පැයක්, හරියටම මතක නැහැ වෙලාව.
- ප්‍ර : හරියටම මතක කරලා කියන්න.
- උ : අපේ ගෙදර ඇවිත් පැය භාගයක් පැයක් විතර ඉන්න ඇති ඊට පස්සේ ලැස්ති වෙලා ගියා.
- ප්‍ර : පැයක් විතර තමයි ඔබ පොඩ්බණ්ඩාරව දැකලා තිබුනේ.
- උ : එහෙමයි.

According to the prosecutrix, Susantha Kumari Basnayaka, she had seen the 5th accused-appellant for nearly one hour and no more. During the said time of one hour there was no conservation between the prosecutrix and the 5th accused-appellant.

The 5th accused-appellant draws the attention of this Court to the evidence of Witness No.1 the mother of the prosecutrix as follows;

Proceedings dated 18.01.2017 Page No.06 of the appeal brief is as follows;

- ප්‍ර : මහත්මිය සුසන්තාව එක්කගෙන යන්න ආවේ කවුද?
- උ : සරත් බංඩාර.
- ප්‍ර : ඊට අමතරව තව කවුද ආවේ ?
- උ : පැට්‍රියා කුමාරි.
- ප්‍ර : පැට්‍රියා කුමාරි කියන්නේ මහත්මිය 02 වන වුදින ලෙස හඳුනාගත්ත කෙනාද ?
- උ : ඔව්.
- ප්‍ර : සරත් පොඩ් බංඩාර කියන පුද්ගලයා මෙම සුසන්තා කුමාරිව රැගෙන ගියා මහත්මිය දැක්කද ?
- උ : ඔව් අපේ ගෙදර ඇවිත් ගියේ.
- ප්‍ර : එම පුද්ගලයාව නැවත දැක්කොත් අඳුනගන්න පුළුවන්ද ?
- උ : මට දැන් නම් අඳුනගන්න බෑ . අසනීප වෙලා හිටියා අවුරුද්දක් විතර, දැන් මට මොනවත් මතක නෑ.

According to the evidence of Witness No. 1, the mother of the prosecutrix, although she identified the 2nd accused named Patricia Kumari, she cannot identify the 5th accused-appellant giving reason for her inability, she has stated that she had been ill for one year and therefore could not remember anything. It is unbelievable as that her identification of the 2nd accused named Patricia Kumari and her inability to identify the 5th accused-appellant. A considerable doubt has arisen as to whether Witness No. 1 has actually seen the 5th accused-

appellant. Accordingly, the stance of the 5th accused-appellant of not entering to the home of the prosecutrix and waiting the road nearby is strongly confirmed.

Proceedings dated 23.01.2017 Page No. 04 of the appeal brief is as follows;

- ප්‍ර : තානායමක රැකියාවක් කළාද?
- උ : ඔව්.
- ප්‍ර : මොකක්ද ඒකෙ නම ?
- උ : අපි කියන්නේ හෝටලය කියලා.
- ප්‍ර : ඒ හෝටලය තියෙන්නේ කොහෙද?
- උ : මැල්සිරිපුර, මහවැව.
- ප්‍ර : ඒකෙ අයිතිකරු කවුද ?
- උ : සරත් මහත්තයා.
- ප්‍ර : මහත්තයා ඒකෙ මොකද කලේ ?
- උ : අතුගැවා, ගේට්ටු ඇරියා, වැහුවා, ෂීට් හේදුවා.
- ප්‍ර : මහත්මයාට කවුද මේ රැකියාව ලබා දුන්නේ ?
- උ : කුමාරි මිස්.
- ප්‍ර : කුමාරි මිස්ගේ සම්පූර්ණ නම දන්නවාද ?
- උ : දන්නේ නෑ.
- ප්‍ර : මේ හෝටලයෙ වෙන කවුද හිටියේ ?
- උ : අනෝමා කියලා ලමයා හිටියා. කුමාරි මිස් හිටියා එව්වරයි.

As per the evidence of Witness No. 5, the employee of the hotel, the only persons in the hotel were "Anoma" and "Kumari Miss"- the 2nd and 4th witnesses. He has stated that the 4th accused named Sarath Chandrasiriwardena is the owner of the hotel. As per the evidence of witness No. 5 the 5th accused-appellant was not in the hotel; also, he was not an employee of the hotel.

The 5th accused-appellant made a dock statement. The trial Judge is under a duty to critically evaluate the version of the accused when he made a dock statement. But in the instant case, the learned trial judge disregarded that responsibility. In his dock statement, the 5th accused-appellant clearly stated that he had no knowledge about the commitment of the offence. His position was confirmed by the evidence of witnesses No. 3 and No. 5. Therefore, the trial Judge has not fairly considered the dock statement with the evidence of witnesses No. 3 and No. 5.

Therefore, it is not safe to allow the conviction of the 5th accused-appellant for the 1st count. In the circumstances this court is inclined to set aside the conviction and the punishments imposed on the 5th accused-appellant for the 1st count.

The infirmities in the judgment support the contention that the finding of the learned trial Judge's judgment is unsound in law. For the reasons set out above, I conclude that the learned trial Judge had misdirected himself by failing to evaluate the said material in favour of the accused-appellant.

I, therefore, decide to set aside the conviction and sentence dated 22.03.2017.

The appeal of the accused-appellant is allowed.

Accused-appellant is acquitted and discharged from all counts in the indictment.

President of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal