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/0061/2022 **Complainant**

High Court of Ratnapura
Case No. HC/195/17 **Vs.**

Sarath Menikpura.

Accused

AND NOW BETWEEN

Sarath Menikpura.

Accused-Appellant

Vs.

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

Respondent

BEFORE : MENAKA WIJESUNDERA, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Indica Mallawaratchy for the Accused-Appellant.

Sudharshana De Silva, SDSG for the Respondent**.**

ARGUED ON : 21.05.2024

DECIDED ON : 27.06.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Rathnapura on two counts for,

1. committing an act of rape on his daughter during the period of 01.01.2012 to 31.12.2012, an offence punishable under Section 364(3) of the Penal Code.
2. committing another act of rape other than on the occasion mentioned in the first count, on his daughter during the aforementioned period of time, an offence punishable under Section 364(3) of the Penal Code.

After trial, the learned High Court Judge convicted the accused-appellant for both counts and imposed 17 years of rigorous imprisonment on each count. A fine of Rs. 25,000/- carrying default sentences of simple imprisonment of 6 months were also imposed on each count. Additionally, compensation in a sum of Rs. 200,000/- carrying default sentences of one year simple imprisonment were imposed on each count. Sentences were ordered to run concurrently. This appeal is preferred against the said convictions and sentences.

Written submissions on behalf of both parties were filed prior to the hearing. At the hearing, the learned Counsel for the appellant and the

learned Senior Deputy Solicitor General (SDSG) for the respondent made oral submissions.

The prosecution case may be briefly summarized as follows:

The victim, PW-1 who was studying in Grade 09 at the time of the incident was the daughter of the accused-appellant. In February 2012, on the day of the first incident, victim had gone to her aunt's house with her family to attend a pirith ceremony and had returned home around 7.30 p.m. with her father, the accused-appellant to collect some cloths. The accused and the victim were alone at home. According to PW-1, the accused-appellant had pulled the victim to the bed at that moment and raped her. She had managed to escape in a while and went back to the aunt's house. The victim had not disclosed the incident to anyone as the appellant had threatened to kill her and her mother if she did so.

About three months later, the victim had returned home from school and was changing her cloths around 2.15 p.m. At that moment, the Accused- appellant had put the victim on the bed and raped her for the second time.

In 2015, the victim had sent a text message to her boyfriend, Saman Kumara using her grandfather's mobile phone (although the victim, PW-1 refers to it as mother's phone, the mother, PW-2 stated that it is her father's phone) mentioning that her father harasses her. PW-2, the mother of the victim had seen the message. On the next day, 12.06.2015, the accused had a quarrel with PW-2, the mother of the victim and had beaten PW-2. According to PW-1, the accused-appellant had constant fights with her mother. On this particular day, when the accused was beating her mother with an iron rod, PW-1 had revealed her mother about the incidents of rape committed by the father in the presence of the accused-appellant. The mother had then gone to the police station to make a complaint and the victim had tried to commit

suicide by consuming poison while her mother was at the police station making a complaint.

The learned Counsel for the accused-appellant advanced her arguments on the following grounds of appeal:

1. Inconsistent and erratic versions in the testimony of the prosecutrix renders her evidence unworthy of credence.
2. Testimony of the prosecutrix is peppered with vital omissions and material contradictions which consequently taints her credibility and testimonial trustworthiness.
3. 3 ½ year undue belatedness of the police complaint renders the conviction wholly unsafe.
4. Reasons adduced by the prosecutrix to justify the said belatedness are wholly unjustifiable and/or appear to be palpably false in view of the vital omissions coupled with her subsequent conduct following the alleged 1st incident.
5. Learned Trial Judge's (LTJ) conclusive finding that the evidence of the prosecutrix is wholly consistent with the history recorded by the 2 medical officers is factually and legally flawed.
6. Evidence of the prosecutrix does not favour the test of probability in view of the suspicious subsequent conduct of the prosecutrix following the alleged 1st incident of rape.
7. Rejection of the dock statement is legally flawed as the LTJ has shifted the burden of proof to the accused-appellant thereby reversing the presumption of innocence and occasioning in a deprivation of a fair trial.
8. Sec. 114(f) of the E.O. operates against the prosecution for its failure to list and lead the evidence of Saman Kumara who was a vital witness to the prosecution and who would have provided the missing link in the prosecution case.
9. Judgment of the Trial Court is legally and factually flawed thereby rendering the Judgment factually and legally untenable.

Although, nine grounds of appeal have been submitted by the learned Counsel, some of them are repetitions. Therefore, firstly, I summarize the grounds of appeal urged by the learned Counsel for the appellant as follows:

i. Belatedness of making a complaint to the police has not been justified.
ii. Prosecutrix's testimony is not reliable.
iii. Rejection of the dock statement is legally flawed.
iv. Section 114(f) of the Evidence Ordinance operates against the prosecution for its failure to lead the evidence of Saman Kumara.
v. The Judgment of the learned High Court Judge is legally and factually flawed.

The learned SDSG contended that the victim was 13 years old at the time of the incident. He contended that the appellant, the father of the victim was in the Army one time and the victim has explained that because of fear, she did not disclose to anyone that the father had raped her. He contended further that when the incident occurred in 2011, she had only two younger sisters and she could not tell about father's sexual harassments to them because the two sisters were very small at that time. After she started a love affair with Saman Kumara in 2015, she said that she revealed the sexual harassment done by the farther through an SMS. Therefore, the learned SDSG submitted that the delay in informing the police has been justified. The learned SDSG contended further that the doctor who examined the victim has given evidence and his evidence is consistent with the history given by the victim. Also, she had been referred to a psychiatrist and the SDSG contended that as an independent witness, his evidence demonstrates the victim's plight due to the incident. Therefore, he contended that the evidence of the doctor and psychiatrist corroborates the victim's evidence and the learned Trial Judge has come to the correct conclusion.

Now, I proceed to consider the grounds of appeal.

Belatedness of making a complaint to the police has not been justified.

The first complaint was made by the mother of the victim (PW-2) on 12th of June 2015. The learned Counsel for the appellant contended that after three and a half years, the first complaint had been made. The learned Counsel stated that the reason explained for the long delay was fear, because of fear a complaint was not made and it is not a justifiable reason. Therefore, she contended that making a belated complaint casts a reasonable doubt on the prosecution case. The learned SDSG pointed out the items of evidence relating to the reason why the victim daughter was so scared to complain agaist the father and contended that those reasons justify the delay of making a complaint to the police.

Undisputedly, the victim was 13 years old when the incidents relating to the two charges occurred. Generally, making a prompt complaint to the police regarding the incident is one of the reasons to believe that the prosecution story is true. However, the test of promptness should be applied carefully because delay is not always a reason to disbelieve a witness. As it was held in ***Sumanasena V. Attorney General*** – (1999) 3 Sri L.R. 137, "just because the witness is a belated witness Court ought not to reject his testimony on that score alone, Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable, the Court could act on the evidence of a belated witness". Accordingly, even when considering an offence committed against an adult, a delay in making a statement to the police about the incident alone is not a reason to disbelieve the testimony of the victim, if an acceptable reason is given for the delay.

Delay in making a complaint about an offence committed against a child is different. In the case at hand, the victim girl kept silent without informing anybody about the rape or sexual harassment committed by her farther for three and a half years. A child's reason for silence has

been explained in ***The Crown Court Compendium Part I*** (published in May 2016 - page 10-22), as follows:

"Experience has shown that children may not speak out about something that has happened to them for a number of reasons. A child may

- *be confused about what has happened or about whether or not to speak out;*
- *blame him/herself for what has happened or be afraid that he/she will be blamed for it and punished;*
- *be afraid of the consequences of speaking about it, either for him/herself and/or for another member of the family;*
- *may feel that s/he may not be believed;*
- *may have been told to say nothing and threatened with the consequences of doing so;*
- *may be embarrassed because s/he did not appreciate at the time that what was happening was wrong, or because s/he enjoyed some of the aspects of the attention they were getting;*
- *simply blank what happened out and get on with their lives until the point comes when they feel ready or the need to speak out {e.g. for the sake of a younger child who s/he feels may be at risk};*
- *may feel conflicted: loving the abuser but hating the abuse."*

In addition, in, ***The Crown Court Bench Book*** (published in March 2010 - at page 367) it is stated as follows:

"Children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realise that what they are describing is, by adult standards, bad or, in their perception, naughty."

Apart from that in ***Daradagamage Chandraratne Jayawardane alias Shantha v. The Attorney General*** - Court of Appeal case No. CA/85/2013, decided on 25.05.2018, it was observed as follows:

"*Time and again courts have discussed the acceptance of evidence of children of tender ages. Our judges are not there to test the memory of the witness, they are expected to find actual fact and the truth. Witnesses are human beings, they are not memory machines nor robots to repeat the incident as it was. Further, the natural behaviour of human beings is to forget incidents, especially sad memories. No one wants to re-visit painful moments and keep detailed memories with them. We are also mindful most of our courts with due respect, are not child friendly*."

In the case at hand, the victim's own father raped her twice according to the victim. The reason given by her for not telling anybody about this and not complaining to the police is that she was afraid of the consequences of speaking about it as specified above. The victim stated in her evidence that the appellant father told her that if she spoke about this, her mother and she would be killed. Not only that, the victim stated that the father tried to throw acid once (pages 96 and 113 of the appeal brief). In addition, as the learned SDSG contended, the victim daughter had no reason to falsely accuse her father of raping her. Whatever disputes the father had with her mother, a daughter would never falsely accuse her father of raping her. In the circumstances, I hold that an acceptable reason has been given for the delay of making a statement to the police and therefore, the belatedness of making a complaint has no impact on the prosecution case.

<u>Prosecutrix's testimony is not reliable.</u>

In the written grounds of appeal tendered by the learned Counsel for the appellant, the basis of grounds 1, 2, 5 and 6 is that the prosecutrix testimony is not reliable. The learned Counsel has pointed out some infirmities and an inconsistency *per se* in the evidence of the

prosecutrix. The inconsistency that the learned Counsel pointed out was that in explaining the first incident, although she stated that her father's penis was inserted into her vagina in her evidence in chief, when she was cross-examined, she stated that she did not allow her father to do anything and father only attempted to harass her. Therefore, the learned Counsel contended that there was not only a vital inconsistency but also, there was no rape in the first incident, according to PW-1.

Explaining the second incident, PW-1 had clearly stated how her father raped her. When questioned about the first incident, she has given an explanation that since the first incident was not as serious as the second incident, she said that she did not allow her father to do anything. Her explanation can be accepted as an explanation of a child because it transpires from the evidence that bleeding took place in the second incident but not in the first incident.

Apart from that, some inconsistencies and omissions were pointed out by the learned Counsel for the appellant. All these omissions and contradictions have been considered by the learned Trial Judge and he explained in his Judgment, the effect of those inconsistencies and omissions and correctly concluded that those inconsistencies and omissions do not affect the credibility of the victim, PW-1. The only omission that can be considered as an omission with some effect is not stating about the SMS in her police statement by PW-1. However, the mother has clearly explained in her evidence how she saw the SMS and the subsequent events that led to make the first complaint. The mother of the victim has stated about the SMS in her police statement. Therefore, the said omission is not material because there was no dispute at all about the mother seeing the SMS and the subsequent events that took place after seeing the SMS. Also, it is apparent that Saman Kumara sent a reply SMS because PW-1 informed him about the father's harassment through an SMS.

The prosecutrix was a 13 years old child when she faced this unfortunate incidents. She gave evidence after 8 years of the incidents. Under these circumstances, the HCJ is correct in deciding that she is a reliable witness.

The next matter to be considered is whether PW-1's testimony could be acted upon without corroboration. The learned Counsel for the appellant contended that it is essential to corroborate the evidence of the prosecutrix in a rape case. The learned SDSG contended that the prosecutrix evidence has been corroborated by the evidence of the doctor who examined her and the consultant psychiatrist who examined her. He pointed out that according to the psychiatrist, the victim had an adjustment disorder type of depression, and this is consistent with the history given by the victim. Also, the Judicial Medical Officer's evidence that there was an old tear of hymen at 6 O' clock position and the answer given by the JMO in cross-examination that her observations are consistent with penetration to vagina more than once, corroborate the evidence of the prosecutrix, the learned SDSG submitted.

Now, I proceed to consider the legal issue whether the corroboration is essential to act upon the evidence of the prosecutrix in a rape case. There are Judgments to the effect that victim's evidence need corroboration to prove sexual offences. In the Indian Supreme Court case of ***Gurcharan Singh v. State of Haryane*** -AIR (1972) SC 2661, the necessity of corroborating evidence is explained as follows: "As a rule of prudence, however, court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated." However, it is apparent from perusing the relevant judgments that corroboration is not essential always. It was held in ***Sunil and Another v. The Attorney General*** - (1986) 1 Sri L.R 230 that it is very dangerous to act on the uncorroborated testimony of a

women victim of a sex offence but if her evidence is convincing, such evidence could be acted on, even in the absence of corroboration.

In the cases of ***The King v. Themis Singho*** - 45 N.L.R 378 and ***Premasiri and Another v. The Queen*** - 77 NLR 85 it was held that in a charge of rape, it is proper for a jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the jury that she is speaking the truth.

Also, it was decided in ***Regina v. W.D Dharmasena*** - 58 N.L.R 15 that in a charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated.

In the case at hand, although there are some shortcomings in the evidence of the prosecutrix, when analyzing her evidence keeping in mind the mental condition of a daughter who was raped by her father with the other circumstances relevant to the incident, and the fact that she gave evidence after eight years of the incident, there is no reason to conclude that she is not telling the truth. It must not be forgotten that the natural behaviour of human beings is to forget incidents, especially sad memories. No one wants to re-visit painful moments and keep detailed memories with them as decided in the aforesaid Judgment of *Daradagamage Chandraratne Jayawardane alias Shantha v. The Attorney General*.

It is vital to note that the Indian Supreme Court in ***Bhoginbhai Hirjibhai v. state of Gujarat*** - (1983) AIR S.C 753 went onto the extent of stating that "In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to the injury."

In the case at hand, the prosecutrix's evidence has been corroborated by the evidence of the Judicial Medical Officer and the Psychatrist as pointed out by the learned SDSG. For the reasons stated above, the

prosecutrix's testimony is reliable and the learned High Court Judge is correct in acting upon her testimony.

Rejection of the dock statement is legally flawed.

The learned Counsel for the appellant contended that the learned Trial Judge had shifted the burden to the accused-appellant to prove his version and since the accused had not proved his version, the learned Judge wrongly rejected the dock statement. I regret that I am unable to agree with that contention because the learned Judge has extensively analyzed the dock statement from page 80 to page 83 of his Judgment and found that the dock statement is improbable and unbelievable. The learned Judge has not shifted any burden to prove anything to the accused-appellant. Since the dock statement is improbable and unbelievable, he rejected it. It is obvious that the improbable and unbelievable dock statement of the appellant does not raise any reasonable doubt on the prosecution case. A reasonable doubt arises only if there is some probability in the defence version. In addition, it must be noted that the learned Trial Judge has considered the suggestions made on behalf of the accused-appellant to the prosecution witnesses and found with reasons as to why those suggestions do not raise a reasonable doubt on the evidence of the prosecution witnesses. Therefore, the argument that the rejection of the dock statement is legally flawed has no merit.

Section 114(f) of the Evidence Ordinance operates against the prosecution for its failure to lead the evidence of Saman Kumara.

Section 114 Illustration (f) reads as follows: "Evidence which could be and is not produced would if produced, be unfavourable to the persons who withholds it." This is a presumption. The contention of the learned counsel for the appellant was that this presumption must be applied for the failure of the prosecution to call Saman Kumara in evidence. The learned counsel contended that the entire incident was disclosed after

three and half years because of Saman Kumara and that is why it is important to call Saman Kumara to give evidence.

It is correct that according to the mother, she inquired PW-1 regarding the father's harassments after seeing the reply SMS sent by Saman Kumara in response to the SMS sent by PW-1. The next day, PW-1 revealed her mother about the incidents of rape. The defence has not challenged the aforesaid way of disclosing the incidents. So, what else can be elicited by calling Saman Kumara in evidence? If he was called to give evidence, he would have stated that when he received an SMS from PW-1, he sent an SMS asking whether there were harassments from her father. It is clear that apart from that, Saman Kumara could not say anything about the incidents relating to the charges because even about the fact that the father had harassed PW-1, he came to know after receiving an SMS from PW-1. As the witnesses need not be called to prove undisputed facts, there was no necessity to call Saman Kumara in evidence. Hence, this ground of appeal also fails.

At this point, I wish to highlight a very important point which both the learned Counsel did not bring to the attention of the Court. The fact that PW-1 informed Saman Kumara through an SMS that her father harassed her has not been disputed by the defence. It is clear that what she meant by harassing was sexual harassment. It is evident that she informed him about her father's harassment and that is why her mother found a reply SMS sent by Saman Kumara asking whether there was harassment from the father. All the arguments on behalf of the appellant were based on the premise that she might have had sexual intercourse with Saman Kumara and falsely implicated her father in raping her. There is a clear reason why this cannot happen. If she had sexual intercourse with Saman Kumara, she would never have informed Saman Kumara through an SMS that her father sexually harassed her for the obvious reason that they knew that she had sex with no one else but with him. Therefore, no reasonable doubt arises as to whether

PW-1 had sex with Saman Kumara and then falsely implied her father for raping her.

The Judgment of the learned High Court Judge is legally and factually flawed.

For the reasons stated above, the Judgment of the learned High Court Judge is factually and legally correct. Therefore, there is no merit in this ground of appeal.

For the foregoing reasons, I find no reason to interfere with the Judgement of the learned High Court Judge. The Judgment dated 17.12.2021, the convictions and the sentences passed 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