## 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 Case No.

CA/HCC/ 0184/2017

High Court of Kalutara Case No. HC/108/2009 Harold Rex Jansen

### **ACCUSED-APPELLANT**

vs.

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

#### COMPLAINANT-RESPONDENT

BEFORE : Sampath B. Abayakoon, J.

P. Kumararatnam, J.

COUNSEL: Shanaka Ranasinghe, PC with Niroshana

Mihindukulasuriya for the Appellant.

Sudharshana De Silva, DSG for the

Respondent.

<u>ARGUED ON</u> : 12/07/2023, 13/07/2023, 25/07/2023,

02/08/2023 and 21/09/2023.

**DECIDED ON** : 31/01/2024

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#### **JUDGMENT**

#### P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General at the High Court of Kalutara as follows:

- 1. On or before 23/06/2008 for kidnapping Angampodi Yuvana Yvonne de Silva, an under-aged girl from the legal custody of Walimuni Shiroma Abeysekera and thereby committing an offence punishable under Section 357 of the Penal Code.
- 2. In the course of the same transaction, committing grave sexual abuse by use of some part of the body of aforesaid Angampodi Yuvana Yvonne de Silva by placing his penis on her chest and ejaculating semen an offence punishable under Section 365B (2) (b) of the Penal Code as amended Act No.22 of 0995.

The prosecution had called 31 witnesses in support of the case. The Appellant had made a dock statement when the defence was called by the Learned High Court Judge.

After the trial, the Appellant was convicted as charged and was sentenced to 07 years of rigorous imprisonment for the 1<sup>st</sup> Count and 12 years rigorous imprisonment for the 2<sup>nd</sup> Cout with a fine of Rs.20000/-, in default of which 01-year rigorous imprisonment was imposed. In addition, Rs.100,000.00/-

was imposed as compensation payable to the victim with a default sentence of 02 years rigorous imprisonment.

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

The Appellant was on bail pending appeal and was present in Court during all dates of the argument.

## On behalf of the Appellant the following Grounds of Appeal are raised.

- 1. Did the Learned High Court Judge fail to consider that the prosecution had failed to prove the ingredients of the charges beyond reasonable doubt.
- 2. Did the Learned High Court Judge fail to consider that the evidence of the victim was inconsistent and contradictory therefore, it is unsafe to act upon such evidence.
- 3. The Learned Trial Judge has failed to consider the fact that the video recording of the victim was not corroborated in material particulars by evidence from an independent source as required by Section 163A (5) of the Evidence (Special Provisions) Act No. 32 of 1999.
- 4. The Learned Trial Judge erred in law by concluding upon considering the evidence -in-chief of the victim, that it is proved beyond reasonable doubt that the Accused committed a sexual act.
- 5. Did the Learned High Court Judge erred in law by concluding that the evidence given by the victim at the video conference proved that the Accused committed a sexual act before analysing of the case.
- 6. The Learned High Court Judge erred by concluding that the evidence of the probation officer had corroborated the evidence of the victim.

#### The Facts of this case albeit briefly are as follows.

In this case, the prosecution had led the video evidence of a preliminary interview of the prosecutrix conducted and video recorded by the Child Protection Authority at the time of the investigation was played before the Learned Trial Judge in terms of Section 163 (A) of the Evidence (Special Provisions) Act No 32 of 1999. Prior to leading video evidence of the prosecution, the prosecution had led evidence of official witnesses who had taken part in the process of recording of video evidence to establish that the recording had been done after following due process.

In the video evidence, the prosecutrix had said that she had been receiving education at the Holy Family Convent, Kalutara in grade 9 when she encountered the incident pertaining to this case. She has a sibling and she was living with her mother and her aunt at Nagashandiya. While she was studying at the Holy Family Convent, a love letter written to her boyfriend was caught by her class teacher and she was taken to the school principal, PW3 for an inquiry. When she was interrogated by PW3, after corporeal punishment, she had revealed an incident which had been allegedly committed by the Appellant.

The Appellant is well known to the victim's family as his daughters were also studying in the same school. The Appellant used to take her and her brother to school with his children. The mother of the victim, PW2 had no objection to this help extended by the Appellant. It has been alleged that on one day the Appellant had taken her to school with her brother and after dropping her brother, had taken the victim near a mosque, and had unbuttoned her school uniform. When she said that she wants go home, the Appellant dropped her to the school and went away.

On the day of the incident, the Appellant had only taken the victim in his jeep and stopped near the Basket Hall and removed her uniform tuck buttons, and had kept his penis on her breast and ejaculated. She had

further said, that her boyfriend also did the same to her prior to this incident, which she had told to the Appellant expecting redress.

The prosecution has placed the video evidence as evidence-in-chief of the prosecutrix and the defence was allowed to cross-examine the witness. In the cross examination, the prosecutrix had claimed that no such incident happened to her from the Appellant and she implicated the Appellant due to instigation of PW3.

As all grounds of appeal are interconnected, all grounds will be considered together hereinafter. The Learned President's Counsel appearing for the Appellant contended that the Learned Trial Judge has failed to consider that the video recording of the statement of the complainant has not been corroborated in material particulars by evidence from an independent source as required by Section 163A (5) of the Evidence ordinance.

## Section 163 A (5) of the Evidence (Special Provisions) Act No.32 of 1999 states:

"(5) Where the child witness, in the course of his direct oral testimony before court, contradicts, either expressly or by necessary implication, any statement previously made by him and disclosed by the video recording, it shall be lawful for the presiding judge, if he considers it safe and just in all the circumstances of the case, to act upon such previous statement as disclosed by video recording, if such previous statement is corroborated in material particulars by evidence from an independent source."

The Learned President's Counsel argued, highlighting the above-mentioned section, that the prosecution had failed to adduce corroborative evidence as required by law as the prosecutrix had gone back on her statement, which had been recorded on the video. Hence the learned President's Counsel strenuously argued that the prosecution had not proven the case against the Appellant beyond reasonable doubt.

The victim in her evidence denies that it was the Appellant that committed the alleged sexual acts and that it was in fact her boyfriend "Romesh" who committed the alleged acts. Further, the victim had categorically stated that the Appellant had not committed any sexual act on her, but due to the insistence of PW3 she had implicated the Appellant to this case. The relevant portions of the evidence are re-produced below:

## Vol-I pages 155-156 of the brief.

- පු : සාක්ෂිකාරීය තමුන්ට කිසි දෙයක් කරලා තිබනා ද ඕ.අයි.සී. අන්කල් ඒ වෙන කොට ?
- උ : නැහැ.
- පු : තමුන්ට විදුහල්පති තුමිය පහර දෙනකන්ම කිසිම දෙයක් කරලා තිබනා ද ඕ.අයි.සී. අන්කල්?
- උ : නැහැ.
- පු : එහෙම කරලා තිබුනේ නැත්නම් තමුන් මේ විදුහල් පති තුමියට ඕ.අයි.සී. අන්කල් යම් දෙයක් කරා කියලා ලියලා දුන්නාද ?
- උ : ඔව්.
- පු : ලියා දුන්නේ ඇත්තක් ද ?
- උ : නැහැ.
- පු : විදුහල්පති තුමියට ලියා දුන්නේ ඇත්තක් නොවේ ?
- උ : නැහැ.
- පු : බොරුවක් විදුහල්පති තුමියට ලියා දුන්නේ?
- උ : විදුහල්පති තුමිය ගහ ගහා ඇහුවාම ඕ.අයි.සී. අන්කල් මොනවාද කලේ කියලා ඇහුවාම රොමේෂ් කරපු දේ තමයි මම ඕ.අයි.සී. අන්කල් පිටින් දාලා කිව්වා.
- පු : ඇයි ඕ.අයි.සී. අන්කල් නොකරපු දෙයක් එලෙස කරා කියන පදනමින් ඇතුවේ ?
- උ : සිස්ටර් මගෙන් ඇතුවා ඕ.අයි.සී. අන්කල් කරපු දෙය.
- පු : මම අහන්නේ, ඕ.අයි.සී. අන්කල් කිසිම දෙයක් කලේ නැහැ කියලා කිව්වා ?

උ : ඔව්.

## Vol-I pages 156-157 of the brief.

පු : එවැනි තත්ත්වයක් තුල ඕ.අයි.සී. අන්කල් ගැන කිව්වා. සිස්ටර් ගහන කොට?

උ : ඕ.අයි.සී. අන්කල් ගැන කිව්වා.

පු : එහෙම කියන්න හේතුව ?

උ : ඕ.අයි.සී. අන්කල් මොනවද කලේ කියලා ඇනුවා.

පු : තමුන් මොකද්ද කිව්වේ ?

උ : මුකුත් කලේ නැහැ කිව්වා.

පු : ඊට පස්සේ මොකද්ද කලේ සිස්ටර් ?

උ : ඊට පස්සේ මට තව ගැනුවා.

පු : එතකොට ?

උ : ඊට පස්සේ නිකන්ම කියවුනා රොමේෂ් කරපු දේ ඕ.අයි.සී. අන්කල් කලා කියලා.

පු : ඒක සම්පූර්ණ අසතෳයක් ?

උ : ඕ.අයි.සී. අන්කල් කරපු එක අසතෳයි.

පු : තමුන්ට අතට පහර දුන්නා කියලා කිව්වා ?

උ : ඔව්.

## Vol-I pages 164-165 of the brief.

## (අධිකරණයෙන් :

පු : ඒ සම්මුඛ සාකච්ඡාවෙදි තමුන් කිව්වේ බොරුද ?

උ : සමහරක් ඒවා මම පිළිගන්නේ නැහැ.

පු : ඇයි එහෙම නම් තමුන් පිළිගන්නේ නැති ඒවා සාකච්ඡාවෙදි කිව්වේ ?

උ : මම ඇත්ත කිව්වේ. ඒ ඇත්ත කියලා සමහරක් අය පිළිගත්තේ නැහැ. මම අම්මත් එක්ක යන්න ඕන නිසා. ඇවිල්ලා මාව රන්මුතුගල දායි කියලා මම බය වුනා. ඊට පස්සේ මාව නැවත කළුතර හොලි ෆැමලි එකට දැම්මා. මම සිස්ටර් පිුන්සිපල්ගේ කොන්වන්ට් එකට දැම්මා. මම තවත් බය වුනා. මම එවෙලේ කියපු බොරු ඒවා දිගටම කියන්න කියලා. මම ඇත්ත කිව්වට පිළිගත්තේ නැහැ.

පු : තමුන්ට ඕ.අයි.සී. අන්කල්ගෙන් ලිංගික වරදක් වුනා කියලා වීඩියෝ සම්මුඛ සාකච්ඡාවෙදි ජාතික ළමාරක්ෂණ අධිකාරීය ඉදිරිපිට පුකාශ කලේ එතකොට බොරුද ?

උ : ඒක බොරු.

පු : තමුන්ට ඕ.අයි.සී. අන්කල් බොරු කියන්න කියලා තියෙනවද ?

උ : නැහැ.

පු : වෙන කවුරුහරී තමුන්ට බොරු කියන්න කියලා කියලා තියෙනවද ?

උ : නැහැ.

පු : තමුන් මොනවද ඇත්ත කිව්වේ වීඩියෝ සම්මුඛ සාකච්ඡාවෙදි ?

උ : රුමේෂ් අයියගෙන් වෙච්ච හැම දෙයක්ම ඇත්ත කියලා පිළිගන්නවා.

ප : ඕ.අයි.සී. අන්කල් තමුන්ට කරපු කුියාව ගැන තමුන් වීඩියෝ සම්මුබ සාකච්ඡාවෙදි කිව්වේ බොරුද ?

උ : ඔව්.

පු : ඇයි එහෙම වීඩියෝ සම්මුබ සාකච්ඡාවෙදි බොරු කිව්වේ ?

උ : මගේ කටඋත්තරය ලියන්න ආවේ මාලනී කියලා ඇන්ටි කෙනෙක්. කළුතර හොලි ෆැමලි එකේ සිස්ටර් පින්සිපල් තමයි කටඋත්තරය ගනිද්දි කොලේ ලියපු ඒවම කියන්න කියලා කිව්වේ. ඊට පස්සේ මම කොලේ ලියපු එක කියලා වීඩියෝ රෙකෝඩින් එක ගන්න ගිනිල්ලා කියපු කටඋත්තර ඒවා පුශ්න කලා. මට එකම ඒවා වීඩියෝ රෙකෝඩින් එකේදි කියන්න සිද්ධ වුනා.

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පු : තමාගේ මේ සංවාදය, වීඩියෝ දර්ශනයේ පුකාශ කලා ශුකුානු කියලා දෙයක් ගැන ?

උ : ඔව්.

පු : එවැනි දෙයක් තමන් යම්කිසි පුද්ගලයෙකුගේ දැක තියෙනවද ඒ කාලයේ ?

උ : රොමේෂ්ගේ.

පු : රොමේෂ් කියන්නේ අවකට හිටිය පෙම්වතා ?

උ : ඔව්.

පු : රොමේෂ් කියන පුද්ගලයා තමාට කොහේදීද මුලින්ම හමු වුනේ ?

උ : කම්පියුටර් කඩේකදී.

පු : ඒ පුද්ගලයා තමාට යම්කිසි ලිංගික කුියාවක් කරලා තියෙනවද ?

උ : ඔව්.

පු : මොකක්ද කරලා තියෙන ලිංගික කිුයාව ?

උ : මාව පාලු පාරකට එක්ක ගෙන ගිනිල්ලා, එතන දෙබොක්කාවක් වගේ තැනක්. බෝක්කුවක් තියෙනවා. ටීෂර්ට් එක ගලවලා, වෙස්ට් එක ගලවලා බෝක්කුව උඩ වාඩි කරලා එයාගේ ශුකුාණු මගේ පපුවේ ගෑවා.

පු : ඒ කාලය වෙනකොට වීඩියෝ දර්ශනය පවත්වන කොට ශුකුානු දැකලා තියෙනවා. ඒවා දැකලා තිබුනේ තමාගේ පෙම්වතාගේ එනම්, රොමේෂ් කියන අයගේ කියලා තමා කියන්නේ?

උ : ඔව්.

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ප : තමා පුකාශ කලා හරස් පුශ්ණ වලදී කිසිම අවස්ථාවක, කිසි දිනක, කිසි ස්ථානයකදී තමාට එවැනි ශුකානු සම්බන්ධ කිසිවක්, පපුවේ ශුකාණු තැවරීමත්, වෙන යම් ආකාරයක ලිංගික කිුයාවක් මේ ඕ.අයි.සී. අන්කල් නොකරපු බව ?

උ : ඔව්.

පු : එවැනි දෙයක් කරලා නැත්නම් සාක්ෂිකාරීය මේ වීඩියෝ දර්ශනය ටේප් කරද්දි වරින් වර ඇයි නොකරපු දෙයක් තමාගේ වචන වලින් කියනවා නම් ඕ.අයි.සී. අන්කල් පිට දාලා ඕ.අයි.සී. අන්කල්ට ඒක ආදේශ කරලා මොකද ?

උ : මම කොන්වන්ට් එකේ නවත්තලා ඉද්දී, සිස්ටර් දීපා ගාව නවත්තලා ඉද්දී ළමා රක්ෂණ අධිකාරියේ මාලනී ඇන්ට් ලිච්ච ඒව. ඊට පස්සේ කටඋත්තරය ලියන්න කලින් සිස්ටර් දීප කථා කරලා, ව්යානා කටඋත්තරය වෙනස් කරන්න එපා. ඒ විදිහට දෙන්න කියලා. මම ඒ

විදියට කරලා තියෙන්නේ වීඩියෝ පටිගත කරද්දී මාලනී ඇන්ට් නිටිය. මට ඒ වෙලාවේ ඒ දෙයක් කියන්න සිද්ධ වුනා.

#### අධිකරණයෙන් :

පු : සිස්ටර් දීපා තමාට අසතෳ කියන්න කියලා තමාට කිව්ව ද ?

උ : ඔව්.

Corroborating evidence is the proof which strengthens or confirms the evidence which already exists. Such independent evidence backs up the testimony of a witness.

In **Director of Public Prosecutions v. Hester** [1972] 3 A.E.R 1056 the House of Lords held that:

"The essence of corroboration evidence is that one creditworthy witness conforms what another creditworthy witness had said. Any risk of the conviction of an innocent person is lessened if conviction is based upon the testimony of more than one acceptable witness... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence with only fill its role if it in itself is completely credible evidence".

In **Fernando v. The Republic** [1978] 79 (II) NLR 313 Vythialingam, J. held that:

"In our law of evidence corroboration is a term which has a special significance. In the conventional sense as used in our courts it means other independent evidence which confirms or supports or strengthens the evidence which is required to be corroborated. In the case of certain

categories of witnesses, statues or judges, as a matter of prudence and caution require that their evidence should be corroborated before it is accepted and acted upon...

The term, however, may also be used in a more popular sense to denote evidence which renders other evidence more probable. For example, it is in this latter sense that the term is used in Section 157 of the Evidence Ordinance which makes admissible any former statement by a witness relating to the same fact at or about the time when the fact took place or before any authority competent to investigate the fact, in order to corroborate him".

### In **Ariyadasa v. Queen** 70 NLR 3 the court held that:

"The corroboration that Section 157 contemplates is not corroboration in the conventional sense in which the term is used in courts of law but in a sense of consistency in the conduct of a witness tending his testimony more acceptable".

The Learned President's Counsel submitted to this Court that the Learned High Court Judge had wrongly concluded that the prosecution had corroborated the evidence of PW1 through the evidence given by PW3 and PW5. The relevant portions of the judgment are re-produced below:

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එසේම මෙකී සිද්ධිය ඉතාමත් කැමැත්තෙන්ම විදුහල්පතිනියට පුකාශ කොට තිබීම තුළින්ද, දැරියගේ වීඩියෝගත සාක්ෂිය ස්වධීන මූලාශයක් වන පූජනීය කනහ සොයුරියක් වන දීපා පුනාන්දු කනහ සොයුරියගේ සාක්ෂිය මගින් මෙම අධිකරණයට තහවුරු වී ඇති හෙයින්ද, අධිකරණය ඉදිරියේ දෙන ලද සාක්ෂියක් ලෙස මෙම දැරිය එකී වීඩියෝ සම්මුබ සාකච්ඡාවේදී කරන ලද පුකාශය මෙම අධිකරණය ඉදිරියේ ආවේශ්ය (admissible) වේ. ඒ අනුව එකී වීඩියෝගත සාක්ෂිය ස්වාධීන මූලාශුයන් මගින් නඩුවේ සමස්ථයක් ලෙස කරුණු සලකා බලන විට තහවුරු වන හෙයින්ද, එසේම ඇගේ වීඩියෝගත සාක්ෂිය සතෳ සාක්ෂිය බවට ස්වාධීන මූලාශු මගින් ඉදිරිපත් වන සාක්ෂි මගින්ද, මෙම විදුහල්පතිවරියගේ සාක්ෂියෙන්ද, තහවුරු වන හෙයින් දැරියගේ සාක්ෂිය සාක්ෂි ආඥා පනතේ 163(A)(5) යටතේ අනුකූල වන බව තීරණය කරමි.

## Vol-IV pages 548-549 of the brief.

තමාව ඕ.අයි.සී. අන්කල් වාහනයට දමාගෙන කීප දවසක් රැගෙන ගිය බවත්, කළුතර බාලිකාව අසල බාස්කට් හෝල් එක ළඟ පාළු ස්ථානයකට ගොස් වාහනය නතර කොට ඇයට, ඇගේ වචනවලින් කියනවා නම්, ඇයට සක්කරන්න දීපු අවස්ථාවක් කිවූ බවත්, එලෙස අවස්ථා කීපයක් සිදුවුනු බව කිවූ බවත්, එසේම ඊට අමතරව ඇයව කළුතර කැලිඩෝ වෙරළ ආසන්නයට ගොස් තමාව අපයෝජනය කළ බවත් තමාට කියා ඇති බව ඔහුගේ සාක්ෂිය විය.

2012.06.20 සාක්ෂි සටහන් 4 වන පිටුව 2.30 සිට

පු : කුමක්ද ඇය ඔබට පුකාශ කලේ ?

උ : අය පෙම්වතාට ලියූ ලියුමක් පන්ති භාර ගුරුතුමියට හමුවන බවත්, එහි ඕ.අයි.සී. අන්කල් ගැන සඳහන් වී තිබුණ නිසා ඕ.අයි.සී. අන්කල් ගැන ඇනුවා. එහිදී තමුන් දවස් කීපයක් මේ විදිහට වාහනයේ දමා රැගෙන ගියා. කළුතර බාලිකාව අසල තිබෙන බාස්කල් හෝල්ට් එක ළඟට පාළු නිවසක් ළඟට ගිහිල්ලා වාහනය නතර කරලා ඇයට ඇයගේ වචනයෙන් කියනවා නම්, සක් කරන්න දීපු අවස්ථාවක් කිව්වා. අවස්ථා කීපයක් වුනා කිව්වා. ඊට අමතරව කළුතර කැලිඩෝ වෙරළ ආසන්නයට ගොස් ඇයව අපයෝජනය කළ අවස්ථාවක් කිව්වා.

එදිනම සාක්ෂි සටහන් 5 වන පිටුව,

Although the Learned High Court Judge had concluded that the evidence given by PW5 had corroborated the evidence given by the victim, but it failed to support the 2<sup>nd</sup> charge in the indictment. PW5 only spoke about oral sex and sexual abuse without distinguishing the sexual act committed on the victim by the Appellant. But in the Judgment Learned High Court Judge had come to the conclusion that the evidence given by PW5 had corroborated video recording evidence of the victim. The relevant portion is re-produced below:

## Vol-IV page 685 of the brief.

දැරිය මූලික වීඩියෝ සම්මුඛ සාකච්ඡාවේ දී පුකාශ කරන ලද ආකාරයටම ඇයව ලිංගික අපචාරයන්ට චූදිත ලක් කොට ඇති බවත්, එකි වීඩියෝ සම්මුඛ සාකච්ඡාව මෙම නඩුවේ ඉදිරිපත් වී ඇති ස්වාධීන පුතවයන් වන ඉතාමත්ම පූජනීය තැනැත්තියක් වූ විදුහල්පතිනි දීපා පුනාන්දු කනහ සොයුරියගේ සාක්ෂියෙන් ද, ස්වාධීන සාක්ෂිකරුවකු වූ පරිවාස නිලධාරී තිසේරා ගේ සාක්ෂියෙන්ද, එසේම ඉතාමත් ස්වාධීන සාක්ෂිකාරීයක් වු විශේෂඥ අධිකරණ වෛදූ නිලධාරීනියගේ සාක්ෂියෙන්ද, දැරියගේ මූලික වීඩියෝ සම්මුඛ සාකච්ඡාවේ දී පටිගත කළ පුකාශය ඇති සාක්ෂිය ස්වාධීන පුතවයන් මඟින් තනවුරු වන හෙයින් 1999 අංක 32 දරණ සංශෝධිත සාක්ෂි ආඥා පනතේ 163 ඒ වගන්තිය යටතේ මෙම අධිකරණය ඉදිරියේ අවේශන කරගනිමි.

The Learned President's Counsel submitting several judgments argued that the considering the above-mentioned witnesses as corroborative witnesses by the Learned High Court Judge has caused great injustice to the Appellant. He argued that the leading evidence of PW3 and PW5 in this case only shows the consistency of the prosecutrix's evidence. Even though evidence of PW5 shows consistency of the victim's evidence, it fails to prove the 2<sup>nd</sup> charge.

## In Sana v. Republic of Sri Lanka [2009] 1 SLR 48 the court held that:

"(1) The corroborative facts and evidence must proceed from someone other than the witness to be corroborated. This means that his previous statements, even when admissible cannot be used to corroborate him, such as proof of a complaint in a sexual case or a previous act of identification is not corroborative of the evidence of die witness, even though by showing consistency, it can to some extent strengthen his credibility.

Where an accused is charged with rape corroboration of the story of the prosecutrix must come from some independent quarter and not from the prosecutrix herself. A complaint made by the prosecutrix to the police in which she implicated the accused cannot be regarded as corroboration of her evidence.

Evidence of a victim in a case of sexual assault cannot be corroborated by a subsequent statement made by her. The Learned Trial judge was wrong when he concluded that the evidence of the victim had been corroborated by her short history given to the doctor".

### In **King v. Atukorale** 50 N.L.R. 256 Gratiaen, J. held that:

"The corroboration which should be looked for in cases of this kind is some independent testimony which affects the accused by connecting or tending to connect him with the crime, and it is settle law that although the particulars of a complaint made by a prosecutrix shortly after the alleged offence may be given in evidence against the prisoner "as evidence of the consistency of her conduct with her evidence given at the trial", "such complaint" cannot be regarded as corroboration in the proper sense in which that word is understood in cases of this kind".

# In **S. Rajaratnam v. The Republic of Sri Lanka** 79(1) N.L.R. 73 Thamotheram, J. held that:

"(1) That the corroborating required where the charge is one of rape is some independent testimony which affects the accused by connecting or tending to connect him with the crime. A statement made by the prosecutrix to her grandmother, after the event cannot constitute the kind of corroboration required".

Considering the above cited judgments pertaining to "Corroboration" in this case, the Learned Deputy Solicitor General's position that the evidence given by PW3 and PW5 corroborates the testimony of the prosecutrix cannot be accepted as the evidence given by PW3 and PW5 is not corroborative evidence. Although the Learned High Court Judge had correctly observed

that the prosecutrix had gone against her video evidence, he had misdirected himself by holding that her evidence had been corroborated by the evidence of PW3 and PW5. In fact, their evidence only shows the "consistency" of the prosecutrix's evidence which certainly strengthens her credibility.

The Learned Deputy Solicitor General in his additional written submission stated that evidence given by PW14, PW6 and PW13 corroborates the fact that the victim was going with the Appellant in his vehicle. This position was not only accepted by the victim, the Appellant also admitted in his evidence. Hence, this evidence cannot be considered as material corroboration as required under Section 163 A (5) of the Evidence (Special Provisions) Act No.32 of 1999.

The Learned High Court Judge had heavily relied on the fact that a lady named Mangala had influenced PW2, mother of the victim to give evidence in favour of the Appellant. To corroborate this hearsay evidence, the prosecution had not called Mangala or PW2 to give evidence during the trial. As correctly argued by Learned President's Counsel who represented the Appellant, hearsay evidence had creep into the proceeding which undoubtedly affects the fair trial which had been mandated in the Constitution.

The right to a fair trial lead to determine whether an accused is innocent or guilty. This is a universally recognised human right. Fair trials help to establish the truth and are vital for everyone involved in a case. They are a cornerstone of democracy, helping to ensure fair and just societies, and limiting abuse by governments and state authorities.

## In **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".

The Learned High Court Judge in his judgment had come to the conclusion that the offence allegedly to have committed under Section 365 (2)(b) of the Penal Code also falls under Section 363(A) (5) of the Penal Code. This is clear misdirection as the 2<sup>nd</sup> charge levelled against the Appellant is contemplated for committing grave sexual abuse on the victim while Section 363 of the Penal Code refers to the offence of rape.

The relevant portion is re-produced below:

## Vol-IV page 487 of the brief.

එසේම මෙම නඩුවේ 365(2)(ආ) වගන්තියද, 363(A)(5) වගන්තිය යටතට ඇතුළත් වන වරදක් හෙයින්ද වින්දිත තැනැත්තිය වයස අවුරුදු 16 ට අඩු දැරියක් වන හෙයින්ද, එසේම දැරියගේ මූලික වීඩියෝ සම්මුඛ සාකච්ඡාවේදී කර ඇති පුකාශය වීඩියෝගත කරන ලද සාක්ෂියක් හෙයින්ද, මෙම නඩුවේදී එකී වීඩියෝ පටිගත කිරීමේ දී කර ඇති පුකාශය සෙසු ස්වාධීන සාක්ෂිවලින්, නඩුව සමස්ථයක් වශයෙන් ගත් කළ තහවුරු වන හෙයින්, එය මෙම නඩුවේදී දෙන ලද සාක්ෂියක් ලෙස අදාල කරගත හැක.

The grounds of appeal considered above have merits that certainly disturb the judgment of the Learned High Court Judge. Among them, the prosecution has failed to adduce corroborative evidence in material particulars by evidence from an independent source which is, of course, a statutory requirement under Section 163 A (5) of the Evidence (Special Provisions) Act No.32 of 1999. Further, Learned High Court Judge has misdirected on issues pertaining to law of evidence which has led to denial of a fair trial.

Considering all the circumstances discussed above, this Court could only come to the conclusion that the prosecution has not proven the case beyond reasonable doubt. Therefore, the Appellant is acquitted from the charges.

The appeal is allowed and the conviction is set aside.

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

#### JUDGE OF THE COURT OF APPEAL

## SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL