

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

In the matter of an appeal in terms of Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 331 of the Criminal Procedure Code and Section 19 (B) of the High Courts of the Provinces (Special Provisions) Act No 19 of 1990.

Court of Appeal Case No:
CA/HCC/0209/2023

The Democratic Socialist Republic of Sri Lanka
Complainant

Vs

High Court Chilaw Case No:
HC/121/2019

Warnakulasuriya Ivan Christy Fernando *alias* Bappa
Accused

AND NOW BETWEEN

Warnakulasuriya Ivan Christy Fernando *alias* Bappa

Accused – Appellant

Vs

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

Complainant – Respondent

Before : **P Kumararathnam, J.**
Pradeep Hettiarachchi, J.

Counsel : Accused – Appellant is produced in court via zoom platform by the Prison Authorities. Isuru Somadasa for the Accused – Appellant.
Hiragana Peries SDSG for Respondent

Argued on : 03.06.2025

Decided on : 07.08.2025

Pradeep Hettiarachchi, J

JUDGEMENT

1. In this case, the appellant-accused (hereinafter referred to as the appellant) was indicted before the High Court of Chilaw for committing rape on a girl under 16 years of age, an offence falling under Section 364(2)(e) of the Penal Code as amended by Act No 22 of 1995, and punishable under section 364(2) of the Penal Code.
2. The trial was conducted before the High Court Judge of Chilaw without a jury. At the conclusion of the trial, the learned High Court Judge found the appellant guilty of the charges and convicted him accordingly. The appellant was sentenced to 12 years of rigorous imprisonment and fined Rs. 20,000/-, with a default sentence of two months of simple imprisonment. Furthermore, the appellant was ordered to pay the prosecutrix a sum of Rs. 500,000/- as compensation, failing which he will serve an additional eight months of simple imprisonment.
3. Being aggrieved by the said conviction and sentence, the appellant has preferred the present appeal. Although several grounds of appeal were advanced by the appellant, during the argument, counsel for the appellant informed the Court that he would rely on the grounds mentioned in his written submissions filed in support of the appeal.
4. In the written submissions, the appellant primarily relied on three grounds of appeal namely:
 - a. The story of the prosecutrix is highly improbable, suspicious and contradictory and it was not corroborated by other witnesses, and therefore the learned High Court Judge should not have acted on the evidence of the prosecutrix;
 - b. The prosecution has failed to place before the court a vital witness Senanayake Arachchige Mily Charlet PW2 and thereby should have held in favor of the appellant as per the presumption under section 114 (f) of the Evidence Ordinance; and,
 - c. The learned High Court Judge has failed to properly evaluate the contradictions and omissions marked on behalf of the appellant at the trial and/or duly consider the same.

5. First, I shall consider the credibility of the prosecutrix's evidence and in particular, whether there are any glaring contradictions which would render her testimony untrustworthy.
6. It was the argument of the appellant that the trial judge has failed to apply the test of probability and improbability in its proper perspective to the evidence of PW-01 the prosecutrix. In other words, that the trial judge failed to appreciate the improbability of the victim's story.
7. The credibility of a witness may be questioned by applying the test of probability and improbability, consistency and inconsistency, interestedness and disinterestedness and spontaneity and belatedness (***Wickramasuriya vs. Dedoleena and others-(1996) 2 Sri LR 954***).
8. In ***Veerasamy Sivathanan v Hon Attorney General, SC Appeal 208/2012***, Justice Yasantha Kodagoda has stated the following:

“In a criminal trial conducted before a judge sitting without a jury, testimony and evidence related functions to be performed by the presiding judge, which I wish to refer to as the primary functions of the trial judge to be performed after the recording of evidence, are the following:

- 1. Assessment and determination of 'credibility' of witnesses.*
- 2. Determination of 'testimonial trustworthiness' of the testimonies given by witnesses.*
- 3. Analysis of the evidence.*
- 4. Determination of the 'probative value' (weight) to be attached to evidence and the 'sufficiency' of evidence to prove the charges.*
- 5. Determination of whether the prosecution has 'proven the ingredients of the offence(s)' the accused stands charged.*
- 6. If the defence has relied on a 'general or special exception to criminal liability', whether the defence has proven such exception.*
- 7. Determination of whether the prosecution has proven its case 'beyond reasonable doubt', and contra wise, whether the defence has raised a 'reasonable doubt' regarding the case for the prosecution.*

9. In the case of *James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167 at 176* following the Privy Council case of *Jayasena Vs. The Queen 72 NLR 313 (PC)* it was observed;

"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality, without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."

10. With these legal principles in mind, I shall now consider the present appeal. According to the prosecutrix's evidence, she was living with her maternal grandmother when she was allegedly raped by the Appellant, who was her grandmother's second husband.
11. The house evidently had only one room. The prosecutrix, her younger brother, grandmother, and the Appellant were the other occupants, all sleeping on a mat placed on the floor. In her evidence-in-chief, the prosecutrix stated that the Appellant had raped her on three occasions, with the last incident occurring three days before the complaint was made to the police.
12. According to the prosecutrix's testimony, the alleged rape occurred while she was sleeping alongside her grandmother and younger brother on a single mat on the floor. In her evidence-in-chief, the prosecutrix explicitly stated that the Appellant turned on the light and approached her as they slept; upon her cries, he extinguished the light and departed.
13. She testified as follows; (page No. 72)

ප්‍ර : දැන් ඈ නිදාගෙන ඉන්නකොට තේද කිසි සිද්ධියක් වුනේ ?

උ : එහෙමයි.

ප්‍ර : ඈ නිදාගෙන ඉන්නකොට මොකද වුනේ කියන්න ?

උ : ස්වාමීණි අපි නිදාගෙන ඉද්දි ලයිට් දානවා. ළහට එනවා ඊට පස්සේ මම කැගහනකම් ආයි ලයිට් නිමලා යනවා.

අධිකරණයෙන් ප්‍රශ්න

ප්‍ර : ඔයා මොනවා කියලද කැගහන්නේ ලයිට් දානකොට ?

උ : මාමේ මේන් කරදර කරනවා කියලා තමයි ස්වාමීණි කැ ගහන්නේ.

ප්‍ර : දැන් එයා ලයිට් දාලා මොකද කරන්නේ ?

- උ : ලයිට් දාලා එයා වතුර බොන්න යනවා.
- ප්‍ර : ගිහිල්ලා මොකද කරන්නේ ?
- උ : ගිහිල්ලා අපි නිදාගත්තට පස්සේ ආයි ලයිට් නිමනවා. ආයේ එයා ආවට පස්සේ මම කැගහුවා. ඊට පස්සේ ආයි එයා ගියා.
- ප්‍ර : ඔයා කැගහන්නේ ඇයි කියලා අහන්නේ එයා ලයිට් දානකොට ?
- උ : එයා කරදර කරන්න එන නිසා ස්වාමිණි.
- ප්‍ර : මොනවද කරන්න එන කරදර ?
- උ : අතපත ගානවා.
- ප්‍ර : කොහෙද අතපත ගාන්නේ ?
- උ : ඇහ.

Page 73

අධිකරණයෙන් ප්‍රශ්න

- ප්‍ර : දැන් ලොකුඅම්මා ඉන්නකොට කොහොමද එහෙම කරන්නේ ?
- උ : මම ලොකුඅම්මට කතා කලා. එයාට නින්ද ගිහින් හිටියේ.
- ප්‍ර : විත්තාකාරයා ලයිට් දානකොට ලොකුඅම්මට ඇහැරෙන්නේ නැද්ද ?
- උ : ලයිට් නිමලානේ එයා එන්නේ ස්වාමිණි. ඊට පස්සේ මම කැගහනකොට එයා ලයිට් එක දානවා. ඇහැරිලාද කියලා බලන්න.

14. What's discernible from the prosecutrix's evidence is that whenever the Appellant approached her, she cried out, and her grandmother, whom she called 'Loku Amma,' would awaken. However, the grandmother was not informed of the Appellant's alleged attempts to rape the prosecutrix. The evidence also shows that after the prosecutrix's cries awakened her grandmother; the Appellant later approached and raped her. Furthermore, she testified as follows (page No. 75):

- උ : එයා ඇහට ආවා. පපුව අතගැවා. කකුල් අතගැවා. ඊට පස්සේ මම කැගහුවා බයටත් එක්ක. ඊට පස්සේ එයා නැගිටලා ගියා. ගිහින් ලයිට් දාලා බැලුවා. ඊට පස්සේ ආයි ලයිට් එක නිව්වා.
- ප්‍ර : ඊට පස්සේ?
- උ : ඊට පස්සේ ආයි ආවා.
- ප්‍ර : එතකොට ලොකුඅම්මා නැගිට්ටේ නැද්ද ඔයා කතා කරන සද්දෙට ?
- උ : ලොකුඅම්මට නින්ද ගිහින් හිටියේ ඊට පස්සේ ආයි ආවට පස්සේ කැගහලා කතා

කලාට පස්සේ ලොකු අම්මා නැගිට්ටා.

ප්‍ර : දැන් ඔයා ගාවට දෙවෙනි පාරටත් ලයිට් නිමලා ආවනේ ?

උ : එහෙමයි.

ප්‍ර : ඒ ඇවිල්ලා මොකුත් කලාද ඔයාට ?

උ : එහෙමයි.

15. More importantly, the prosecutrix admitted to assaulting the Appellant, demanding him to stop harassing her, after which he departed. Additionally, evidence shows the Appellant raped the prosecutrix on three or four occasions; however, she did not report these incidents to anyone, fearing he would assault or harm them.

16. However, in her testimony, she admitted that she raised an alarm and also assaulted the Appellant on one or two occasions, which caused the Appellant to leave the room. If that were the case, it is difficult, if not impossible, to accept the prosecutrix's claim that she did not inform anyone about the incident due to fear of the Appellant.

17. Therefore, it is not reasonable to believe that the Appellant would have committed rape on the prosecutrix while the lights were on and in a room where her grandmother and younger brother were sleeping on the same mat. At page 94, she testified as follows;

Page 94

ප්‍ර : ඔය සිද්ධිය මතකයි ?

උ : එහෙමයි.

ප්‍ර : රන්සලනි ඒ ලයිට් දාන සිද්ධිය වුනේ ඔයා ඔය කියන විදියට දූෂණය කලා කියන දවසේද ?

උ : එහෙමයි.

ප්‍ර : එතකොට රන්සලනි එතකොට ඔයා දැන් දරුවෙක් ඉන්න අම්මා කෙනෙක් යමක් කමක් හොඳට තේරෙනවා නේද?

උ : එහෙමයි.

ප්‍ර : දැන් ඔයාට දූෂණය කලා කියන සිද්ධිය ඉතාම වැදගත් නේද ?

උ : එහෙමයි.

Page 95

ප්‍ර : එතකොට ඒ දූෂණය කරන්න කලින් මේ ලයිට් දාලා නිවලා යම් කිසි පෙළඹවීමක් කලා කියන එක වැදගත් කාරණක් නේද?

උ : එහෙමයි.

ප්‍ර : ඒක ඔයා දූෂණය කරන්න කලින් ලයිට් දාලා බලලා ඔයා ගැන හොයලා බැලුවා වගේනේ කියන්නේ ?

උ : එහෙමයි.

ප්‍ර : ඒක ඔයා පොලීසියට කිව්වාද?

උ : එහෙමයි.

ප්‍ර : මම ඔයාට යෝජනා කරනවා ඔයා ඒ ගැන එක වචනයක්වත් පොලීසියට කියලා නැහැ කියලා?

උ : නැහැ

18. It is also important to examine the testimony of Dr. Y.M. Ilangarathna Banda, the Judicial Medical Officer before whom the prosecutrix was produced and medically examined. The Medico-Legal Report relating to the examination, bearing No. 51/13 and dated 15.09.2013, was marked as P2. While referring to the report, the JMO expressed his observations and stated the conclusions he had reached based on those observations.

19. A careful examination of the Medico-Legal Report reveals that the JMO observed old, healed hymenal tears at the 6 o'clock position, along with a dilated hymenal orifice that could admit three fingers in an un-dilated state. Based on these findings, the JMO concluded that there was medical evidence of repeated vaginal penetration over a period of time. More importantly, the JMO observed old, healed tears on the hymen, which appeared to be significantly worn out due to repeated vaginal penetration.

20. It is also significant to note that, while giving evidence, the prosecutrix clearly stated that the alleged incident occurred three days before she went to the police, and that nothing of that nature had happened to her prior to that. She further testified as follows;

(page No. 83/84)

Page 82

ප්‍ර : පොලීසියට යන්න කලින් දවස් තුනකට කලින් එහෙම දෙයක් වුනා කියලා කිව්වානේ ?

උ : එහෙමයි.

ප්‍ර : ඒ විදියටම ඊය කලින් වෙලා තිබෙනවද ?

උ : ඊට කලින්නම් වෙලා නැහැ ස්වාමීණි.

අධිකරණයෙන් ප්‍රශ්න

ප්‍ර : දැන් ඔයා විස්තර කලේ පළවෙනි සිදුවීම නේද ?

Page 83

උ : එහෙමයි.

ප්‍ර : පොලීසියට යන්න කලින් සිද්ධයෙන් විස්තර කලේ ?

උ : එහෙමයි.

ප්‍ර : ඊට කලින් ඔය වගේ සිද්ධීන් සිද්ධ වුනාද ?

උ : නැහැ ස්වාමීණි.

21. This evidence clearly contradicts the JMO's opinion, as the JMO concluded that there had been repeated vaginal penetration occurring over a considerable period of time.

Page 156

ප්‍ර : දැරියගේ කෙටි ඉතිහාසයක් අධිකරණ වෛද්‍ය පරීක්ෂණයේදී අනාවරණය වූ කරුණුත් මත එළඹිය හැකි නිගමනයන් කවරේ ද ?

උ : කන්‍යා පටලයේ පහළ කොටස විශාල ගෙවීමක් ඇතිවී ඇති නිසා හා ඔරලෝසු මුහුණතේ හයවන ස්ථානයේ පැරණි සුවවූ තුවාල ඇති නිසා එමගින් දක්වා තිබෙන්නේ අවස්ථා ගණනාවකදීම යෝනි මාර්ග ප්‍රවේශයක් කාලයක් තිස්සේ සිදුවූ ඇති බවයි.

22. Therefore, the credibility of the prosecutrix's evidence in this regard is seriously undermined by the medical opinion expressed by the JMO. Furthermore, her claim that

she was raped by the appellant while lying on the same mat where her grandmother and younger brother were also sleeping, with the lights on, is difficult to accept. According to her own testimony, she cried out and even assaulted the appellant on one occasion. If, as she stated, the appellant turned on the lights before approaching her and switched them off when she resisted and raised cries, can it be reasonably believed that the others sleeping on the same mat would not have awakened or been alarmed? The answer, quite clearly, is no.

23. It is important to emphasize that, in a case of this nature, the testimonial trustworthiness and credibility of the prosecutrix—particularly the probability of her version of events—must be assessed by the trial judge with the utmost care and caution.

24. In ***Ranjeet Kumar Ram vs State of Bihar [2015] SCC 500***, it was held that:

Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one.

25. In ***State of Andhra Pradesh vs Garigula Satya Vani Murty AIR 1997 SC 1588***, it was held that:

‘..the courts are expected to show great responsibility while trying an accused on a charge of rape. They must deal with such cases with utmost sensitivity.

26. The aforementioned discrepancies and contradictions in the testimony of the prosecutrix create a reasonable doubt regarding her version of events—particularly concerning the manner in which she was allegedly raped by the appellant. Her evidence lacks consistency; on one occasion, she stated that the appellant had raped her three times prior to the last incident, while at another point, she claimed that the only instance of rape occurred three days before she made the statement to the police. It will be relevant to discuss, at this juncture, what is meant by “reasonable doubt”

27. In ***Goverdhan & Anr. Vs State of Chhattisgarh Criminal Appeal No. 116 OF 2011*** decided on January 09, 2025, Indian Supreme Court elaborately discussed the concept of “reasonable doubt” and stated as follows. “It means that such doubt must be free from suppositional speculation. It must not be the result of minute emotional detailing, and the

doubt must be actual and substantial and not merely vague apprehension. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense as observed in *Ramakant Rai v. Madan Rai*, (2003) 12 SCC 395 wherein it was observed as under : “ *Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than the truth. To constitute reasonable doubt, it must be free from an overly emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.*”

28. While applying this principle of proof beyond reasonable doubt the Court has to undertake a candid consideration of all the evidence in a fair and reasonable manner as observed by the Supreme Court of India in *State of Haryana v. Bhagirath* (1999) 5 SCC 96 as follows:

“It is nearly impossible in any criminal trial to prove all the elements with a scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the expression ‘reasonable doubt’ is incapable of definition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge.

29. At this point, it may be also relevant to mention an observation made by Lord Denning, J. in ***Miller v. Miller of Pensions* (1947) 2 All ER 372, 373 H:**

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the court of justice....”

30. In the present case, there are notable inconsistencies and improbabilities, particularly concerning the manner and place in which the appellant allegedly committed the offence. Moreover, the prosecutrix’s testimony was inconsistent regarding the number of times she was allegedly raped, creating further uncertainty. These defects go to the very root of the prosecution's case and seriously undermine the credibility of the prosecutrix’s evidence. Given the gravity of the charges levelled against the appellant, such inconsistencies cannot be lightly disregarded.

31. The prosecutrix was a 14-year-old child at the time of the alleged offence, and therefore, it would be unreasonable to expect her to make a statement to the police entirely free of shortcomings. Accordingly, I am not inclined to place significant weight on the contradictions and omissions highlighted by the defence during cross-examination with reference to her initial statement made to the police.
32. However, the improbabilities and inconsistencies evident in her testimony at the trial cannot be lightly disregarded, particularly as she was a 21-year-old married woman with a child when she gave evidence before the Court. Therefore, in assessing the credibility of her testimony—especially with regard to issues of improbability—the Court cannot apply the same standard as it would for a child witness. The learned High Court Judge has taken into account the age of the victim at the time of the alleged offence and has given reasons for rejecting the defence's contention that the prosecutrix's credibility was impaired by the contradictions in her evidence.
33. As stated earlier, the central issue in this case is not merely the contradictions highlighted by the defence, but rather the inherent improbability of the prosecutrix's account of how the alleged rape occurred, along with the inconsistencies evident in her testimony. Furthermore, the evidence of the Judicial Medical Officer casts serious doubt on the truthfulness of the prosecutrix's version. The learned trial judge failed to adequately analyze and evaluate these critical aspects before arriving at the conclusion to convict the appellant.
34. Another vital ground of appeal advanced by the appellant is the failure of the prosecution to summon PW2, Mili Charlet the grandmother of the prosecutrix, to give evidence. It was therefore submitted that the presumption under Section 114(f) of the Evidence Ordinance should be drawn in favour of the appellant.
35. According to the prosecutrix, her grandmother was sleeping in the same room, on the same mat, at the time the alleged rape was committed by the appellant. She further stated in her evidence that, on one occasion, her grandmother was awakened when she cried out as the appellant attempted to rape her. If that were the case, PW2 would be an essential witness in the present trial, particularly in light of the inconsistencies and improbabilities apparent in the prosecutrix's testimony.
36. In *King vs Senevirathne* 38 NLR 208, it was held:

“Witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution”

37. In the present case, PW2 could have been a vital witness capable of corroborating the testimony of the prosecutrix, had she been called to give evidence. However, the prosecution, without offering any apparent reason, failed to summon PW2 to testify.
38. In view of the prosecutrix’s evidence being unclear and inconsistent on material points—and also contradicting the opinion of the Judicial Medical Officer as stated in the Medico-Legal Report—it would not be safe to rely solely on her testimony in the absence of corroboration.
39. For the reasons set out above, I allow the Appeal and proceed to quash the convictions and sentences imposed on the Appellant by the learned High Court Judge of Chilaw. Accordingly, the Appellant is acquitted from all the charges leveled against him.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal