

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.*

Court of Appeal No:

Democratic Socialist Republic of Sri Lanka

CA/HCC/0328/2015

COMPLAINANT

CA (Criminal) L.A. No. 7/2015

Vs.

High Court of Trincomalee

Rathnayaka Mudiyansele Susantha

Case No: HCT/459/11

Nimal Gunathilaka

ACCUSED

AND NOW

Lokubaduge Dinesha Sanjeewani

No. 159D, 4th Post,

Kandu Road,

Trincomalee.

AGGRIEVED PARTY-PETITIONER

Rathnayaka Mudiyansele Susantha

Nimal Gunathilaka

ACCUSED-RESPONDENT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Lokubaduge Dinesha Sanjeewani

No. 159D, 4th Post,

Kandu Road,

Trincomalee.

AGGRIEVED PARTY-PETITIONER-

APPELLANT

Rathnayaka Mudiyansele

Susantha Nimal Gunathilaka

ACCUSED-RESPONDENT-RESPONDENT

Vs.

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

COMPLAINANT-RESPONDENT-
RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Anil Silva, P.C. with Amaan Bandara for the Appellant
: Anuja Premaratna, P.C. with Nayana Dissanayake,
Aviska Jayawardana, Natasha de Alwis, Bandula
Dissanayake, Ishan Gampolage and Ramith
Dunusinghe for the Accused-Respondent
: Suharshie Herath Jayaweera, D.S.G. for the
Complainant-Respondent

Argued on : 12-03-2024

Written Submissions : 19-05-2020 (By the Aggrieved Party-Petitioner-
Appellant)
: 20-02-2020 (By the Accused-Respondent)

Decided on : 20-06-2024

Sampath B. Abayakoon, J.

The accused-respondent (hereinafter referred to as the accused) was indicted before the High Court of Trincomalee for committing the following offences.

1. That he committed the offence of sexual harassment to the female mentioned in the count by embracing her and touching her face on or about 15-01-2011 at Trincomalee within the jurisdiction of the High Court of Trincomalee, and thereby committed an offence punishable in terms of section 345 as amended by the Amendment Act No. 22 of 1995 of the Penal Code.
2. That he committed the offence of sexual harassment on the same female mentioned in the count one by embracing her and stroking her head on or about 16-01-2011 at Trincomalee within the jurisdiction of the High Court of Trincomalee, and thereby committed an offence punishable in terms of section 345 as amended by the Amendment Act No. 22 of 1995 of the Penal Code.
3. That he committed the offence of sexual harassment on the same female mentioned in the above two counts by embracing her and kissing her face and lips on or about 30-01-2011 at Trincomalee within the jurisdiction of the High Court of Trincomalee, and thereby committed an offence punishable in terms of section 345 as amended by Amendment Act No. 22 of 1995 of the Penal Code.

After trial, of the judgment dated 16-09-2015, the learned High Court Judge of Trincomalee acquitted the accused on the basis that he is giving the benefit of the doubt in favour of the accused.

Although the Hon. Attorney General has thought it fit not to appeal the acquittal of the accused, the PW-01 of the indictment (the aggrieved party) who faced the incidents of sexual harassment has filed an application in terms of section 16 of the Judicature Act No. 2 of 1978 seeking leave to appeal from the Court of Appeal to file an appeal against the said acquittal.

After having obtained the relevant leave to appeal from the Court of Appeal, the aggrieved party has preferred this appeal.

At the hearing of this appeal, the learned President's Counsel who represented the aggrieved party (the victim mentioned in the indictment and who has given evidence as PW-01 at the trial) expressed the view that this was a judgment pronounced by the learned High Court Judge of Trincomalee by being completely misdirected as to the relevant law and the relevant facts of the matter.

He was of the view that the judgment entered cannot be termed as a proper judgment pronounced in terms of section 283 of the Code of Criminal Procedure Act.

It was pointed out that the indictment relates to three separate instances of sexual harassment of PW-01 by the accused. Bringing to the notice of the Court, the evidence placed before the trial Court by the prosecution in this regard, the learned President's Counsel pointed out that the main reason for the acquittal had been the alleged delay by the aggrieved party to lodge a complaint in this regard to the police. It was also pointed out that the learned High Court Judge's decision has been influenced on the basis that the prosecution has failed to establish any sexual gratification, which was a complete misdirection as to the relevant ingredients that need to be proved in a case of sexual harassment.

The learned President's Counsel was of the view that the acquittal of the accused should be set aside by this Court as it cannot be allowed to stand. The learned President's Counsel also urged the indulgence of this Court to consider the evidence placed before the trial Court and enter a proper judgment, so that justice would be served to the aggrieved party as well as the accused.

The submissions of the learned Deputy Solicitor General (DSG) who represented the Hon. Attorney General, the named complainant-respondent of this matter was that the learned High Court Judge has considered the proof of sexual gratification as a necessary ingredient in this matter whereas, the indictment

against the accused was one based on section 345 of the Penal Code, where proving sexual gratification was not relevant.

She was also of the opinion that the views expressed by the learned High Court Judge that no complaint was made to the police immediately after the incident, creates a doubt was not correct. It was her submission that if there was any delay, it has been well explained by the victim, namely PW-01.

However, having stated so, the learned DSG took up the position that the facts and the circumstances of the case warrant an acquittal of the accused, and therefore, the judgment although wrongly considered as to the facts and the law, should be allowed to stand.

The submissions of the learned President's Counsel who represented the accused was that the three counts mentioned in the indictment refer to three separate incidents, where the accused has denied the charges. He pointed out that when called for a defence, accused has given evidence and it was his defence that his employer, the Prima Ceylon Limited wanted to get rid of him and this complaint was a result of a conspiracy in order to achieve that objective.

He pointed out that the journal entry dated 17-09-2015 of the High Court case record bears testimony that the Human Resource Manager of Prima Ceylon Limited has applied for copies of the proceedings of the case, which shows the interest of the company in the matter. It was his view that this fact should also be considered relevant when deciding the appeal. It was also pointed out that PW-15, one of the police officers who conducted the investigations had recorded a further statement from the prosecutrix, and it shows that the police investigations had been conducted in a bias manner against the accused.

It was his position that the complaint against the accused was a complete fabrication. He pointed out further that the accused was never arrested by the police, but asked to come to the Court, and despite that fact, the police have reported to the Court that he was absconding. He invited this Court to consider

the facts of the matter under the above circumstances, stating that it further strengthens his claim that this was a fabrication against his client.

He questioned the reasons as to why the prosecutrix failed to complain to anybody about the sexual harassment she faced on the first occasion and even on the second occasion, and decided to complain only after the alleged 3rd incident. He also pointed out that what was the reason for her to get into the accused's car even after she faced the alleged last incident. He was of the view, that itself created a doubt as to the genuineness of the complaint of sexual harassment made against the accused.

The learned President's Counsel submitted that the evidence does not suggest that she was sexually harassed in the alleged 1st two incidents and even in the alleged 2nd incident. It was submitted that it cannot be believed that any sexual harassment occurred when one look at the behaviour of the prosecutrix after the incident. It was contended that if she was sexually harassed, she would not have gotten into the car of the accused and get down near the main gate of the factory, and go home in a staff bus where she has not informed anyone whom she met of the alleged harassment she faced.

The learned President's Counsel was of the view that her complaint had been a delayed complaint where she has given various reasons to justify the delay, which in his view had no justification.

He also pointed out the evidence where the security guard of the factory has testified that when the prosecutrix came near the security point in the accused's car and got down, she failed to mention anything to the security guards, which should be considered in favour of the accused at the trial. Another point taken was that there were several contradictions as to her evidence, which should also be considered in favour of the accused.

Citing several judgments pronounced by our Superior Courts, it was the position of the learned President's Counsel on behalf of the accused that the evidence led in the trial was grossly inadequate to prove the charges beyond reasonable doubt. He urged the Court to dismiss the appeal, arguing that though there may be irregularities in the judgment of the learned High Court Judge, the only final conclusion that could be reached was an acquittal of the accused and nothing else.

Before considering the submissions made on behalf of the aggrieved party as well as the accused and that of the learned DSG, I will now proceed to consider the facts as revealed in evidence before the trial Court.

Facts in Brief

It needs to be noted that although the evidence led before the trial Court has been translated into English language for the purposes of this appeal, the entire evidence before the High Court has been in Sinhala language as all the parties had been speakers of Sinhala language as their mother tongue.

PW-01 is the complainant of these incidents of sexual harassment. She has been working as a clerk attached to the human resource section of the Prima Ceylon Limited office situated in Trincomalee. She was a young woman who has gotten married recently and living in her husband's house along with the husband's parents and sister.

The accused was the Human Resource Manager under whom she has worked. It has been her evidence that on some occasions when the office staff could not conclude their work during office hours, it was their practice to work after office hours or even on holidays with the sanction of the Human Resource Manager.

15-01-2011 was the Thaipongal holiday and while she was at home, the Secretary attached to the human resource division has called her in the afternoon and had informed her that the Human Resource Manager wanted her to come to work immediately as there were work to be completed. This has been

her first experience of being summoned her in such a manner. On that directive, she has gone to work at around 2.30 - 3.00 p.m. by the vehicle sent from the office. She has punched her attendance at the security office as usual and when she went to the office, she has been informed to prepare a report as to the no pay leave obtained by the workers. It had been only the accused and herself at the office.

While engaging in this work, the guardroom of the factory has informed her that a call was received from her home. When she took a call to her home, she has come to know that it was her husband and brother who called, and she has been informed to come home. It was around 8:30 in the night at that time.

When she was preparing to leave with the permission of the accused, he has come near her, shook her hands, and had thanked her for helping by placing his cheek on the cheek of PW-01.

It has been her evidence that when this happened, she was shaken by the incident and she left the place in the vehicle provided by the office. However, she has not divulged this incident to anyone else. When she reached home, she has come to know that her brother has got agitated with her husband for allowing her to go to work during holidays and there had been an issue in the house of her husband. Because of this situation, she has left her husband's house and gone to her mother's house.

The following day had also been a holiday. Around 2.30 in the afternoon, she has received a call from the accused asking her to come to work on that day too. She has informed that she is not in a position to come, because of the issue she had to face at her husband's house. However, the accused had insisted her to come informing that there is an urgent matter that needs to be attended to.

Agreeing to his request, when she went to the office, yet again, the accused had been alone in the office. When she informed him that she came, the accused had told her that he wanted her to come, not for any work, but because he wanted to know what was the issue she was facing. Although she resisted his request,

upon his insistence, she has divulged the issue she had to face on the earlier day.

After having the said discussion with the accused and listening to his advice, when she was about to leave, the accused had come near her, stroked her head and hugged her. When she resisted his advances, the accused had informed her to treat him as a brother. After facing this situation, she has gone home and had taken a leave on the following day. However, she has gone back to work the following day and had worked as usual.

When she went to work on 29-01-2011, the accused had informed her to come to work on 30-01-2011 as well, which was again a holiday as there was work to be completed. Agreeing to his request, she has come to the factory along with her husband who dropped her off at the office since official transport was not available on that day. She has come to the office around 2.00 p.m. and she has been asked to arrange some files in the office. On this day too, the accused had been alone in the office. As she could not complete the task on that day, the accused had told her to complete that on the following day.

When she was about to leave the office, the accused has asked her to sit on the chair in front of her. Afterwards, he has played a song using the machine in front of him and has made her to listen to the song. The machine referred to by her appears to be a computer. After the first song, he has played another song, and thereafter, he has turned the screen towards her and had wanted her to look at it. She has seen that the pictures on the screen contained porn material. She has not looked at them. After that, the accused had gone and sat on a sofa placed in his office and had wanted her to come and sit near him. Although she resisted, she has been forced to come and sit. After she sat on the sofa, the accused had come near her, hugged her tight and kissed her on her cheek and the lips. Despite her resistance, he had continued to do so. She has managed to release herself from his grip by resisting his action, and the accused had told her that he wanted to make her happy.

When she was attempting to leave the office, the accused had come near her again and had stroked her head. When she was about to leave the office, the accused has come behind her and opened the locked door, at which point she has realized that the door of the office had been locked.

It had been raining and dark at the same time. There had been some distance to walk from the office to the security guard point for her to get transport. When she was about to walk through the rain, the accused had come by the car and offered to give her a lift which she has accepted because it was raining and as she felt scared to walk in the darkness.

Thereafter, she has gotten down from his car near the security point and had gotten on to the office transport bus, which was available near the office. She has also given a call to her husband and had informed him that she is on her way home, and will not go to work hereinafter. After going home, she has informed of the incidents to her husband.

Subsequently, she has informed the incidents of sexual harassments faced by her to the management of the company, and upon advice, she has gone and met the General Manager of the company in Colombo and informed him of her situation.

After listening to her, the General Manager has instructed her to make a complaint to the police, as this was a serious matter, which has resulted her lodging a complaint to Chinabay police station on 07-02-2011.

About a month after the last incident, she has been told by the General Manager to come back to work, and when she reported back to work, the accused had not been there, and a new Human Resource Manager was in place. She has been working in the institution since then.

She has given evidence stating that she went with her husband and lodged a complaint at Chinabay Police. Explaining the reasons for her to wait until the 07th of February to lodge the complaint, she has stated that she first complained

to her office and two days thereafter, she went to the General Manager's office in Colombo. Although she was instructed to lodge a complaint by the General Manager, she had not been able to do so immediately because she had to go along with her husband to attend work relating to his office and they could not get back to Trincomalee as no transport was possible for some days due to inclement weather. She has insisted that none of these incidents of sexual harassment occurred with her consent.

Under cross-examination, she has clearly stated that there was no matrimonial dispute in her marriage and it was on the insistence of the accused that she came to work as stated by her in her evidence. She has further stated that apart from the three instances where she was summoned to work in the office alone, she had not worked in such a manner previously.

Justifying her not making a police complaint soon after the incident, she has clearly stated that she initially wanted to inform her higher officials about these incidents and she had no particular knowledge about how to deal with such a situation. She has stated that only when she was informed by her General Manager who was stationed in Colombo, she decided to lodge a complaint to the police.

Explaining her reasons to go to work despite knowing the advances made towards her by the accused, she has stated that because she resisted his advances and informed him that she does not like such advances, she thought that it would not occur again.

To the suggestion that she is lying about these incidents, she has stated the following at page 309 of the original case record.

ප්‍ර: තමුන් කියන්නේ අමුලික බොරුවක්

පි: ස්වාමිනි මම සාමාන්‍ය පවුලක ගැහැනු ළමයෙක්. මට අවශ්‍ය නෑ මගේ චරිතයට කැළලක් ඇති කරගන්න. ස්ථිර වෝදනා කරන්න කිසිම අවශ්‍යතාවයක් නෑ. මට කිසිම කෙනෙක්ට කරදර කරන්න අවශ්‍ය නෑ. මට වෙච්ච ඇත්ත සිද්දිය තමයි මම මේ ප්‍රකාශ කරන්නේ.

Replying further to the cross-examination, she has stated that somewhere in December previous to these incidents, the accused conducted a program to the clerical staff, and in that, he showed them how to hug, how to kiss and things like that, and in that program also it was she who was selected by the accused to practically demonstrate the things he talked about in that program.

PW-02 has been a security officer attached to Prima Ceylon Limited and had provided security for the staff transport bus on 30-01-2011. He has given evidence that PW-01 got into the bus where he provided security and got down from it around 7.00 p.m. near the fourth milepost ice factory.

PW-03 has been another security officer who has performed his duties at the main gate of the Prima Ceylon Limited on 15-01-2011, and he has given evidence to confirm that on 15-01-2011, the vehicle bearing number 32-8878 belonging to the company left the main gate at 20.25, and apart from the driver and another security officer, he saw the PW-01 as one of the passengers of the vehicle. He has known her as a clerk of the company. He also knew the accused as the Human Resource Manager.

PW-04 had been the security officer who was on duty at the main gate on 16-01-2011. According to his evidence, PW-01 has come inside the premises at 15.45 in the same vehicle as mentioned earlier, and has left at 17.45 in a van provided by the company. He has stated that he cannot recollect seeing the accused on that day.

PW-10 who has given evidence at the trial is the husband of PW-01. When he gave evidence in March 2015, he had been functioning as a Sales Manager of Ceylinco Life Insurance company and had been serving the company for 12 years by that time. He has married the PW-01 in 2009. As he could recollect, his wife had been working in the human resource division of Prima Ceylon Limited for about 3 years by 30-01-2011. He knew that the accused was the Human Resource Manager of the company.

As his wife has been asked to come to work on 30-01-2011, it was he who has dropped off his wife around 2.00 - 2.30 in the afternoon to her office. He has stated in his evidence that his wife gave him a call and informed him that she will be able to come home in the evening. However, after getting into the 6.45 p.m. staff bus, she has given another call to him and informed that she will not be going to the office hereinafter, which alerted him about some issue his wife may be having in the office.

When she reached home, he has observed that his wife looked highly shaken over something, but has not spoken to him once she reached home. Since he knew some incident might have happened, he has inquired her after a little while. She has informed him that she was subjected to sexual harassment by the accused. She has informed him that when she was about to leave, the accused showed her some porn video using his computer and forced her to sit on the sofa and thereafter, forcibly hugged and kissed her. He has also been informed that when this incident occurred, there was no one else in the office and only when she was walking out of the office, she came to know that the office door had also been locked.

After coming to know about this incident, he has advised her to inform this incident to the higher management of the company and not to go to work hereinafter. He and his wife had gone to Chinabay police on 07-02-2011 and had lodged a complaint in this regard.

He has explained why he did not go to the police immediately after coming to know about the incidents stating that he had to attend a compulsory training program at his head office in Colombo and he had to leave for that purpose. However, although the training program was cancelled, he could not get back to Trincomalee because of a damaged tank at Kanthale due to heavy rain, and it was only after reaching Trincomalee, he and his wife lodged a complaint.

Under cross-examination, he has insisted that he trusts his wife fully, and that is why he is leading a successful family life up to date. Answering the question

as to why he did not lodge a complaint immediately after he came to know about these incidents, he has stated that at that time, both of them were young and a newly married couple. Due to the shock and mental agony as a result of this incident, it did not occur to them that they should report this to the police immediately, but thought it should be the company his wife served which should take action in this regard, and that is why he thought that the company must be informed first.

The police officers who conducted investigations and recorded the statements of relevant witnesses as well as the accused have given evidence in this matter. According to evidence of PW-15, after the initial statement was recorded on 07-02-2011, she has recorded a further statement from PW-01 on 24-02-2011. She has explained the reason stating that since some matters came to light as a result of the accused's statement made to the police, the second statement was recorded to clarify matters arising out of the investigations.

At the conclusion of the prosecution case, the learned High Court Judge has decided to call for a defence and the accused has given evidence under oath. He has admitted that he was functioning as the Human Resource Manager of Prima Ceylon Limited at their office situated in Trincomalee. He has also admitted that PW-01 served under him for about 4 years. However, he has denied the allegations made by her against him that he sexually harassed her.

He has stated that on 15-01-2011, he got down the PW-01 to assist him in the work he had to complete. He has further stated that by that time, he did not have a cordial relationship with the company audit management division. Explaining the reasons, he has stated that because he refused their illegal work, the people working in the said division were not on good terms with him. He has also stated that because he objected to unauthorized persons living in official bungalows and their illegal actions, the management of the Prima Ceylon Limited was not on good terms with him.

He has admitted that on two occasions, he got the PW-01 down to his office outside office hours. He has stated that on the 3rd occasion, without being asked to come, she on her own came to his office while he was working alone on a holiday. According to his version of events, when questioned, she has stated that she came to complete the work she could not attend to previously. He has completely denied the allegations of sexual harassments made against him by PW-01. He has stated that the police recorded a statement from him on 21-02-2011 but did not arrest him, and wanted him to come to Court on 03-03-2011. However, on the said date, he was remanded by the Court.

Under cross-examination, he has stated that the PW-01 was a distant relative of him and had spoken about giving her money in order to help her. He has also spoken about things she told him about personal issues she is having in her marriage life and the suicidal tendencies she is experiencing.

Consideration whether the judgment can be allowed to stand, and whether the appeal of the aggrieved party has merit

Having in mind the above factual matters, I will now proceed to consider the judgment pronounced by the learned High Court Judge.

The section 283 of the Code of Criminal Procedure Code which highlights the basic characteristics of a judgment read as follows.

283. The following provisions shall apply to the judgments of Courts other than the Supreme Court or Court of Appeal:-

(1) 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 reason for the decision.

(2) It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.

(3) If it is a judgment of acquittal it shall state the offence of which the accused is acquitted.

(4) When a judgment has been so signed it cannot be altered or reviewed by the Court which gives such judgment:

Provided that a clerical error may be rectified at any time and that any other error may be rectified at any time before the Court rises for the day.

(5) The judgement shall be explained to the accused affected thereby and a copy thereof shall be given to him without delay if he applies for it.

(6) The original shall be filed with the record of proceedings.

In the impugned judgment (pages 247 to 260 of the translated brief), the learned High Court Judge has mentioned the charges as in the indictment, and had identified the witnesses who gave evidence at the trial.

Thereafter, under the heading **“The Summary of the evidence for the Prosecution,”** instead of providing a summary of evidence for the purposes of the judgment, the learned High Court Judge has selected parts of the evidence of the PW-01, which was in question-and-answer form and has highlighted the said parts in its verbatim. Thereafter, parts of the evidence of PW-02 who was the security officer who provided security to the staff bus in which the PW-01 left the premises has been similarly highlighted.

I find it relevant to reproduce the remainder of the judgment as I find it necessary for the better understanding of the judgment of this Court.

“The charges against the accused are a case relating to sex. It has to be proved as to whether he committed this act. With regard to this case the Court examines the following case:

In this case the attention has to be paid that he did with a view of satisfying his sexual gratification. In fact, in order to prove this, the Court can come to the conclusion based on the acts of the accused.

Muthaiyah Yogarajah alias Yoga Accused-Appellant, Hon Attorney General Respondent, CA. Appeal 55/06 decided on 24-02-2009 to establish a charge under section 365B of the Penal Code, the prosecution must establish that the alleged act was done with the intention of having sexual gratification. This aspect must be proved beyond reasonable doubt.

(Spontaneity)

In respect of any incident, unless the complaint is made as quickly as possible and also if there are no apparent reasons of such delay, the credibility of the witness diminishes. Under cross examination, if the complainant does not show cause for the delay, the accused must not raise question about it. It could be pointed out about it during the submission. In this regard the decided case dated 26-03-2008 CA 118/2002 can be cited.

I shall consider whether the evidence of Aranolis would satisfy the test of promptness. Aranolis was present at the time of the inquest. The learned Magistrate who conducted the inquest requested the witness to come forward, but Aranolis did not make the statement to the learned Magistrate, although he was present. Aranolis made a statement to the police only after five days of the incident. Aranolis, at page 304 of the brief, admits the above facts.

Thus, there is a delay on the part of Aranolis to make a statement to the police. When there is a delay in making a statement to law enforcement

agencies, additional material collected by way of hearsay or false material can creep into such statement.

Here, when the accused did the act stated by the prosecutrix, that is by kissing Sanjeewani at her cheek and lips, it was not shown through evidence that it was committed to satisfy his sexual gratification.

Here it is revealed through evidence that the complainant did not reveal the incident promptly to the police or any others. Based on the above stated reasons, there arises suspicion to Court whether the accused committed the said act. Considering the said benefit of the doubt in favour of the accused, I acquit the accused.”

It would not be hard to understand for a legally trained eye, that the judgment of the learned High Court Judge was not in accordance with the law. The learned High Court Judge after reproducing some parts of the evidence given by the PW-01 and PW-02 in its verbatim has straightway proceeded to cite two judgments, which has been termed as relevant to the case.

The learned High Court Judge has failed to consider or analyze any of the other evidence led by the prosecution to prove the case. Apart from PW-02 who was a security officer, several other security officers of Prima Ceylon Limited have given their evidence. I find the husband of PW-01 (PW-10) as one of the crucial witnesses, whose evidence should have been considered by the learned High Court Judge.

In this matter, when the accused was called upon for a defence, he has given evidence under oath. Nothing has been considered in relation to the accused's evidence or the defence put forward by the accused.

It is trite law that when pronouncing a judgment, it is the duty of the trial Judge to consider the evidence as a whole, be it by the prosecution or by the accused, and come to a firm finding whether the prosecution has proved the case beyond reasonable doubt against the accused or whether the evidence led has created a

reasonable doubt as to the guilt of the accused. If a reasonable doubt has been created as to the prosecution case or even if a reasonable explanation has been provided in relation to the incriminating evidence against an accused, that benefit should be considered in favour of the accused, and he should be acquitted of the charge or charges, but not in the manner the learned High Court Judge has looked at the evidence.

At this juncture, I would like to quote the Indian Supreme Court judgment in **State of Uttar Pradesh Vs. M.K Anthoney (1984) S.C.J 236-1985 Cri. L.J. 493 at 498,**

“While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court had not, this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weightily and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witness may differ in some details unrelated to the main

incident because power of observation, retention and reproduction differ with individuals.”

In the impugned judgment, apart from not considering or analyzing evidence of either party in its correct perspective, I find that the learned High Court Judge was totally misdirected as to the ingredients of the offences under which the accused has been indicted.

All three counts preferred against him were in terms of section 345 of the Penal Code based on sexual harassment. The relevant section reads as follows.

345. Whoever, by assault or use of criminal force, sexually harass another person, or by the use of words or actions causes sexual annoyance or harassment to such other person commit the offence of sexual harassment and shall on conviction be punished with imprisonment of either description for a term which may extend to five years or with fine or with both and may also be ordered to pay compensation of an amount determined by Court to the person in respect of whom the offence was committed for the injuries caused to such person.

***Explanation 1* – Unwelcome sexual advances by words or action used by a person in authority, in a working place or any other place, shall constitute the offence of sexual harassment.**

***Explanation 2* – For the purpose of this section an assault may include any act that does not amount to rape under section 363 or grave sexual abuse under section 365B.**

***Explanation 3* – “injuries” includes psychological or mental trauma.**

The learned High Court Judge has gone on the basis that the prosecution must prove sexual gratification in order to establish the offence of sexual harassment, which was a total misdirection in that regard.

It appears that the learned High Court Judge has gotten himself mixed up as to the relevant law by considering what appears to be a decided case in terms of section 365B of the Penal Code in relation to an offence of grave sexual abuse. In a case of grave sexual abuse, proving sexual gratification is an essential component, but not in a case of sexual harassment.

Besides that, the learned High Court Judge was totally misdirected as to the facts when he determined that there was a delay in making the complaint to the police and the complainant has failed to show cause for the delay.

If the learned High Court Judge took care to analyze the evidence in its correct perspective, there can be no basis for him to determine that there was an unexplained delay which has created a reasonable doubt as to the genuineness of the complaint made by PW-01 to the police about the sexual harassment she had to undergo at the hands of the accused.

Out of the three incidents to which the indictment relates, the first incident has occurred on 15-01-2011 and the second incident has occurred on the following day. The PW-01 has well explained as to why she did not inform those incidents to anyone. The next incident of sexual harassment which was much graver than the earlier incidents had occurred on 30-01-2011. Immediately after the incident and while getting back home, she has informed her husband that she will no longer be going to work. After going home, she has told what happened to her husband and had thereafter gone to the higher management of Prima Ceylon Limited, Trincomalee and complained about the incidents of sexual harassment she faced.

In her husband's evidence, he has clearly explained that being a young and recently married couple, they had no clear idea of what to do and they thought it would be best to inform this to the management of the company. The management of Prima Ceylon Limited, Trincomalee has instructed the PW-01 to complain to the General Manager of the company who is functioning in Colombo, which may have taken some time for her to go to Colombo from Trincomalee and

meet the General Manager. It appears that the General Manager of Prima Ceylon Limited being a multinational company has taken a very serious view of this matter and had instructed the PW-01 to lodge a complaint with the police. PW-01 as well as her husband has explained further the reasons for them to wait until 07-02-2011 to make a complaint to Chinabay police.

It clearly appears that the husband of PW-01 although he was a management level officer of Ceylinco Insurance at the time he gave evidence several years after the incident, he would have been a Junior Executive of the said company during the time relevant to these incidents. He has explained that he had to attend a compulsory workshop conducted in Colombo during the intervening period and although the workshop was not held, he could not return to Trincomalee because of the inclement weather and damage caused to Kanthale tank. I see this as a cogent and truthful explanation under the circumstances.

I find that to justify his determination as to the delay, the learned High Court Judge has cited a case dated 25-03-2008 pronounced by the Court of Appeal in CA-118-2002.

Other than giving the reference, the learned High Court Judge has not cited anything from the judgment.

Thereafter, the learned High Court Judge has gone on to consider a person called Aranolis, who did not initially come forward as a witness, which appears to be in a case of murder. He has even referred to page 304 of the brief to justify that the said Aranolis did not come forward to make a statement initially and came forward 5 days after the incident. Accordingly, he has determined that Aranolis's evidence cannot be considered due to the delay.

It may be that the learned High Court Judge have mixed up the facts of another case when he considered the evidence of one Aranolis in a murder case, which has nothing to do with the impugned case. There is also nothing to indicate that by speaking about one Aranolis and a murder case, he was referring to the earlier

case cited by him, as no connection has been provided to the cited case in the judgment.

For the reasons as considered above, I find that this is a judgment that cannot be allowed to stand under any circumstances.

Accordingly, I hereby set aside the judgment dated 16-09-2015 by the learned High Court Judge of Trincomalee as it cannot be allowed to stand.

It is with regret I have to note that I am not in a position to understand the rationale behind the submissions of the learned DSG who represented the Hon. Attorney General during the hearing of this appeal.

After admitting that the learned High Court Judge was totally misdirected as to the relevant points of law and the way the judgment has been written, the learned DSG thought it fit to argue that the judgment should be allowed to stand and the acquittal of the accused was justified.

As I have considered previously, there is no material whatsoever to justify a judgment pronounced after failing to consider the evidence placed before the Court in its correct perspective and being totally misdirected as to the relevant law.

However, to the credit of the learned President's Counsel who represented the accused at the hearing of this appeal, obviously after realizing the serious weaknesses of the judgment, he never defended the judgment. Fulfilling his obligations towards his client and towards the Court, the learned President's Counsel submitted the reasons as he thought that should be held in favour of the accused and the weaknesses of the prosecution case as he termed, which should have been considered in a properly written judgment. He submitted that when considering the evidence led during the trial, any judgment should be in favour of the accused as the prosecution has failed to prove the charges against his client, when the totality of the evidence was considered.

This is an appeal where the Hon. Attorney General being the complainant who filed the relevant indictment before the High Court of Trincomalee did not appeal against the acquittal of the accused. It was the PW-01, as the aggrieved party who faced the alleged incidents of sexual harassments who pursued this appeal after obtaining prior leave to appeal from this Court.

At this juncture, I would like to draw my attention to section 337 of the Code of Criminal Procedure Act, which provides for the functions the Court of Appeal can in cases of appeals from acquittals, as in the appeal under consideration.

The said section reads as follows,

337.(1) In an appeal from an order of acquittal, the Court of Appeal may reverse such order and direct the accused to be re-tried or find him guilty of the same or a different offence of which the accused person could have been found guilty on the indictment and pass sentence on him according to law.

(2) In an appeal from any other order, the Court of Appeal may alter or reverse or set aside such order or make such order in substitution for the order of the High Court as may be warranted by law.

Having considered the facts and the circumstances of this matter, I am of the view that this is a matter where a retrial cannot be considered. If a retrial is ordered, given the fact that this is an incident which occurred in the year 2011, and if the prosecution witnesses as well as the accused is ordered to go through another trial more than 14 years after the incident, it would not serve justice to either party.

Therefore, it is my view that this is a fit case where this Court should consider as to whether the prosecution has proved the case beyond reasonable doubt or in the contrary, whether it has failed to do so, by considering the evidence within the necessary parameters of a case of this nature.

The Consideration and Analysis of the Evidence

In the case of **Vishaka And Others Vs. State Of Rajasthan And Others**, **decided on 13-08-1997**, the Indian Supreme Court set out the guidelines and norms that should be followed by employers in cases of sexual harassment, the preventive steps, criminal proceedings, disciplinary actions, complaint mechanisms, workers' initiatives, awareness etc. of such instances.

Providing a definition for sexual harassment, it was held:

“For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- a) physical contact and advances;*
- b) a demand or request for sexual favours;*
- c) sexually coloured remarks;*
- d) showing pornography;*
- e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.*

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.”

The allegation against the accused was that he committed three incidents of sexual harassment on PW-01 as stated in the indictment. According to the evidence of PW-01, she has been summoned to work by the accused on all three occasions which were holidays, and that was also in the afternoons of all the three days. The evidence given by the security personnel who manned the main gate of the company premises establishes the fact that PW-01 came to work as stated by her on the given dates.

In fact, the accused had admitted that she came to his office as stated by her. However, he has claimed that on the 3rd day, she came on her own without him requiring her to come.

It was also undisputed and unchallenged evidence that on all three days, it was only the accused and PW-01 who were at the office. On the first day, she had been made to work late into the night and only after she received a call from her home, she has been allowed to leave. At that time, the accused has come near her, has embraced her while thanking her for her services placing his cheek on her cheek. On the 2nd day, when she was leaving, he has hugged her and stroked her head. It was on the 3rd day that he has shown porn material to her and kissed her on her cheeks as well as lips, which has resulted in her informing her husband what happened to her.

This behaviour of the PW-01 where she has gone to the office of the accused for the second and the third time after him having made unwanted advances towards her raises the question as to why she went to his office despite her worries.

To understand that, one will have to look at this entire scenario from the perspective of the PW-01. She was a young woman who hails from the same area and had managed to gain employment in a multinational company like Prima Ceylon Limited. This may have been a dream come true for her because of the stable employment she would be able to enjoy. She has been newly married and may have had her and her husband's own dreams of building a life together. The

income earned by her through her employment, would have been vital for her to move on with her life.

When she was summoned to come through the secretary of the accused, she may not have had any hesitation to go, as she has previously worked on holidays as well. However, the difference this time had been that only she and the accused, who was her Head of the Department and the Human Resource Manager of the company, were at the office. The 1st incident has occurred when she was about to leave the office. The evidence clearly shows that although she was surprised and taken aback by the behavior of the accused, she has had no courage to view it as a sexual harassment because of the status of the accused and the situation of her in general.

According to her evidence, it was her brother who had raised an issue with her husband for allowing her to go to work in the afternoons and stay late in this manner. This has resulted in an issue for her on that day and as a result, she has decided to go to her mother's home. However, her evidence clearly shows that she had no matrimonial dispute with her husband and their relationship was intact.

When the accused himself called her on the following day and wanted her to come, she has clearly hesitated and upon being questioned by the accused, she has been forced to explain that she had to face an issue as a result of her being late on the previous night. However, on the insistence of the accused, she has decided to go on the 2nd day as well. The evidence of PW-01 clearly shows that instead of getting her to work, the accused has probed further into her matrimonial life and had started giving advices and had informed that he wanted her to come only to discuss the details of her issues and not to get any work done. When she was leaving on that day, the 2nd incident had occurred. The evidence of the security officer who manned the main gate of the office establishes the fact that PW-01 has left the office early on that day.

It is clear that PW-01 has not gone to work on the following day, but has reported to work as usual on 18-01-2011. She has continued to work thereafter, and she might have thought that her troubles were over, as she previously expressed her displeasure for the behavior of the accused towards her.

However, when she went for work on the 29th, she has been asked to come to work on the 30th as well which was again a holiday. She has gone to the office as directed, and has got herself dropped off by her husband, which clearly shows that there had been no issues between herself and her husband.

The work assigned to her on that day had been to arrange some files. As she could not finish the work on that day, she has been allowed to go and when she was about to leave, the 3rd incident as I have stated before has occurred.

The sequence of events and the behaviour of PW-01 demonstrates that although she hated the advances made towards her by the accused, she had no way of escaping from it either given her situation.

Another question may arise as to why she got into the vehicle of the accused and went with him up to the main gate on the 3rd occasion.

The evidence clearly shows that there is a distance to travel from the office of the company premises up to the main gate where transportation facilities had been provided for the employees. The PW-01 has explained that it was dark and raining at that time, and that she was fearful of going alone towards the main gate. The accused has offered her a lift under those circumstances, which the PW-01 has been forced to accept despite her ordeal. However, her evidence shows that she has gotten down near the main gate and had gotten into the official transport that was available. This clearly shows that the explanation given by the PW-01 was acceptable. Soon after getting into the office transport bus, she has given a call to her husband and informed him that she will not be going to work hereinafter. If she was a willing participant, she could have kept quiet on this day as well, which was not the case.

The evidence of the husband, PW-10 establishes the behaviour of his wife when she came home in a disturbed mood and explained what happened to her.

Another matter that needs to be considered is the absence of corroboration of the actual incidents by way of an eyewitness account. It is my view that in this kind of sexual harassment matters and cases involving matters of similar nature, one cannot expect such corroboration as a person engaging in this kind of behaviour will make sure that his actions have no witnesses.

Section 134 of the evidence Ordinance reads as follows.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

Therefore, what matters is not the number, but the quality of the witness. If the witness is cogent and trustworthy as in the case under appeal, such evidence can be relied upon.

Towards this, I am reminded of the observation made by the Indian Supreme Court in **Boginbhai Hirjibhai Vs. State of Gujarat (1983) AIR S.C. 753**, wherein it was stated thus;

“In the Indian setting refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as whole is adding insult to the injury.”

The evidence of PW-01 clearly shows that the accused had been prowling upon her in search of his prey even before this incident. Her evidences establish that in December, the accused had conducted what appears to be a social etiquette-training program. He has chosen the PW-01 among other members of the staff and had demonstrated how to hug and how to greet by placing the cheeks on each other etc. through her. This behaviour shows that the accused has not acted as a Head of a Department to ensure that the female employees of his department are not felt embarrassed. There were no reasons for him to summon the young vulnerable lady to his office alone on afternoons of holidays in the

pretext of completing the work. That behaviour coupled with the sexual harassment incidents faced by the PW-01 clearly establishes a strong *prima facie* case against the accused that he has committed sexual harassment on PW-01.

As I have considered before, proving sexual gratification is not a requirement to prove a case of sexual harassment. I find no delay in making this complaint as PW-01 and her husband PW-10 has clearly explained the reasons behind them going to the police on the 07-02-2011.

The next matter to be considered is whether the stand taken up by the accused at the trial has created a reasonable doubt on the evidence of PW-01 and whether it has at least, provided a reasonable explanation as to the charges against him.

The position of the accused had been that his employer, the Prima Ceylon Limited wanted to get rid of him, as he was instrumental in exposing the corrupt practices of the higher management of the company.

Having considered the evidence placed before the Court, I am unable to accept that there had been any conspiracy by the company to remove him from his position. The evidence provides that the higher management of the company had no hand at all on this matter until they were made aware of the sexual harassment incidents faced by PW-01 and her decision to quit her job.

As a responsible company, when she informed of her situation to the higher officials of Trincomalee office of the company, they have duly referred her to the General Manager functioning in Colombo. The General Manager has correctly referred her to the police, as he has taken a very serious view of the matter.

PW-01 has been summoned back to work one month thereafter, according to the undisputed evidence. This shows that the company may have conducted their own inquiry and had decided to take action against the accused by removing him from the position he held. PW-01 being a low-level employee of the company, there would have been no need for the higher authorities of the company to use her as a pawn in the manner stated in her evidence, causing grave

embarrassment and unpleasantness towards her. It is my considered view that there cannot be any better example of workplace sexual harassment than in the instant matter.

Hence, I am of the view that the defence taken up by the accused has not caused any doubt on the prosecution evidence.

The learned President's Counsel submitted that the fact of the Human Resource Manager of Prima Ceylon Limited obtaining copies of proceedings as a reason to assume that the company had been after the accused. However, I am in no position to agree. In my view, the company was entitled to know what was happening in relation to an incident that occurred in their company, which has led to a criminal prosecution.

I do not find that as a reason to hold in favour of the accused in the manner contended on his behalf.

I am unable to agree that the police recording a 2nd statement from PW-01 as a reason to believe that the police have gone out of the way in order to file charges. The evidence of the police officers who conducted investigations clearly show that after recording the statement of the accused, they wanted to clarify certain matters. This shows that the police have been careful in their investigations against the accused. This clearly shows that a comprehensive investigation has been conducted and only after that, the charges have been preferred against the accused by the Hon. Attorney General. There is nothing to conclude that the charges against the accused had been a result of the fabrication of evidence or a result of partial investigations done by the police.

One has to be mindful that in these types of cases, a trivial contradiction or omission cannot be considered relevant, unless the said contradictions or omissions go into the core of the matter, which has the effect of shaking the evidence given by the prosecution witnesses.

In the case of **Mahathun and Others Vs. The Attorney General (2015) 1 SLR 74**, it was held:

- (1) When faced with contradictions in a witness testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness.
- (2) Too great a significance cannot be attached to minor discrepancies, or contradictions.
- (3) What is important is whether the witness is telling the truth on the material matters concerned with the event.
- (4) Where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors.

In the Indian Supreme Court Case of **Apparel Export Promotion Council Vs. A.K. Chopra 1999 1 SCC 259 decided on 20-01-1999**, it has been held;

Regarding the nature of approach that Courts should take while dealing with cases of sexual harassment at the place of work of female employees, it is to borne in mind that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. Any action or gesture, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment.

Per Dr. Anand, CJI.,

“In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meanings of the expression molestation. They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as in the position in the instant case, the Courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and merely has no relevance. The High Court overlooked the ground realities and ignored the fact that the conduct of the respondent against his female junior employee, Miss. X was wholly against moral sanctions, decency and was offensive to her modesty.”

The learned President’s Counsel cited the case of **Dharmasiri Vs. Republic of Sri Lanka (2010) 2 SLR 241** to point out the credibility issue of the evidence of PW-01. I find no relevance in the judgment cited by the learned President’s Counsel to the facts and the circumstances of the case under appeal. As I have stated before, there was no credibility issue of the evidence of PW-01 or any of the prosecution witnesses. I am unable to find any relevance of the other two cases cited by the learned President’s Counsel namely; **Kumara de Silva and two others Vs. Attorney General (2010) 2 SLR 169** and **Fradd Vs. Brown and Co. Limited 20 NLR 282**, to the facts and the circumstances of the case.

For the aforementioned reasons, I find that the prosecution has proved beyond reasonable doubt, the three counts preferred against the accused.

Hence, I find the accused guilty to the said counts preferred against him.

As a result of the charges, he now stands convicted, this Court will allow the accused to plead in mitigation before he is sentenced by this Court.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal

Sentencing Order

Sentenced on : 24-06-2024

Upon the application made on behalf of the learned President's Counsel who represented the accused before this Court, the accused was permitted time to plead in mitigation.

Accordingly, this Court heard the submissions made in mitigation of the sentence and also considered the aggravating factors that came to light during the hearing of this appeal.

The learned President's Counsel submitted several decided cases of our Superior Courts where observations have been made as to the appropriateness of a sentence that should be imposed upon an accused person after being found guilty by a competent Court of law. It was also submitted that the accused is a married person of 59 years of age. It was contended that after this incident and after his employment was terminated, he was not in a position to obtain permanent employment. The learned President's Counsel urged for the Court's indulgence to consider imposing a non-custodial sentence upon the accused.

It is to be noted that a person convicted of the offence of sexual harassment punishable in terms of section 345 of the Penal Code can be sentenced for a term of up to 5 years imprisonment of either description or with a fine or with both, and may also be ordered to pay compensation of an amount determined by the Court.

This Court is aware that when sentencing a person, the Court will have to consider not only the mitigatory circumstances, but also the aggravating circumstances so that justice can be metered out in an equal manner.

Having considered the fact that the accused has had no previous convictions, his age, and other relevant factors, the accused is sentenced as follows.

On count 1 – The accused is sentenced for a period of 2 years rigorous imprisonment and he is also ordered to pay a fine of Rs. 25, 000/-. In default of paying the fine, he shall serve 6 months simple imprisonment.

On count 2 - The accused is sentenced for a period of 2 years rigorous imprisonment and he is also ordered to pay a fine of Rs. 25, 000/-. In default of paying the fine, he shall serve 6 months simple imprisonment.

On count 3 - The accused is sentenced for a period of 3 years rigorous imprisonment and he is also ordered to pay a fine of Rs. 25, 000/-. In default of paying the fine, he shall serve 6 months simple imprisonment. (The period of 3 years rigorous imprisonment is imposed upon the accused considering the more serious nature of the sexual harassment committed on this occasion.)

Having considered the fact that the 3 offences mentioned in the indictment had been committed on three separate occasions, the above-mentioned periods of imprisonment shall be served consecutive to each other, which means a total period of 7 years rigorous imprisonment.

In addition to the above, the accused is ordered to pay a sum of Rs. 750,000/- as compensation to the victim of these incidents of sexual harassment, namely PW-01, mentioned in the indictment preferred against him. If the accused fails

to pay the said compensation, that sum should be recovered as a fine, and in default, he shall serve 1-year simple imprisonment.

The learned High Court Judge of Trincomalee is directed to give effect to the sentence imposed upon the accused.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal