

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

In the matter of an appeal under Section 331 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.

CA/HCC/104/2023

HC Puttalam Case No: 186/2019

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Mallawathanthrige Samantha Mallawa

Accused

And Now between

Mallawathanthrige Samantha Mallawa

Accused-appellant

Vs.

The Attorney General

Attorney General's Department

Colombo 12.

Complainant -Respondent

Before : **B. Sasi Mahendran, J.**
 Amal Ranaraja, J

Counsel: Rashmini Indatissa for the Accused- Appellant
 Disna Warnakula, DSG for the Respondent

Written

Submission: 30.05.2024 (by the Accused Appellant)

On 19.07.2024 (by the Respondent)

Argued On : 06.08.2025

Judgment On: 18.09.2025

JUDGMENT

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as "the Accused"), a relative of the victim, Malwathanthrige Samantha Mallawa, was indicted before the High Court of Puttalam on two initial charges. Subsequently, following the testimony of Prosecution Witness No. 01 (PW 01), an additional charge was incorporated into the indictment.

1. Count No. 1: That on or about 6th June 2009, the Appellant raped Waduge Ayesha Maduwanthi Livera, who was under 16 years of age, thereby committing an offence punishable under section 364(2)(e) of the Penal Code.
2. Count No. 2: That on or about 6th June 2009, the Appellant, with the intention of scaring, threatened the physical well-being of Waduge Ayesha Maduwanthi Livera, thereby committing the offence of criminal intimidation punishable under section 486 of the Penal Code.

Additional Count -

3. Count No. 3: That between 6th June 2009 and 9th June 2009, apart from the incident mentioned in Count No. 1, the Appellant raped Waduge Ayesha Maduwanthi Livera, who was under 16 years of age, thereby committing an offence punishable under section 364(2)(e) of the Penal Code.

At the trial prosecution led the evidence through 14 witnesses and marking productions P1-P3, and thereafter closed its case. The Accused, in his defence, made a dock statement and called one witness.

At the conclusion of the trial, the Learned High Court Judge found the Accused guilty on the first and third counts of rapping. Accordingly, for the first count, the Learned High Court judge imposed 18 years of rigorous imprisonment with a fine of Rs. 10,000/- with a default sentence of 6 months simple imprisonment and for the 3rd count, 18 years of rigorous imprisonment along with a fine of Rs. 10000 with a default sentence of 6 months simple imprisonment. Furthermore, compensation in the sum of Rs. 30,000 carries in default term of 01-year simple imprisonment.

Being aggrieved by the afore-mentioned conviction and the sentence, the Accused has preferred this appeal to this Court.

The following grounds for appeal were set out in the written submission.

1. That the learned Trial Judge misdirected herself when he concluded that there were no contradictions or omissions in PW 1's evidence,
2. That the learned Trial Judge has failed to evaluate the credibility of PW 1's evidence properly,
3. That the learned Trial Judge failed to appreciate that the Prosecution had failed to discharge its burden of proving its case beyond a reasonable doubt.

The facts pertaining to this case and the background to the incident may be set out briefly as follows;

PW 01, Waduge Ayesha Maduwanthie Livera, testified that she was in Grade 5 at the time of the alleged offence on 06.06.2009 and was 21 years old when giving evidence. She stated that her parents were separated, and following her mother's second marriage (PW 02), she resided at her grandmother's (Kiri Amma's) house (Maha Gedara) in Mudalakkuliye, along with her maternal aunt (Punchi).

The Accused, known to the witness as “Goppi Mama,” is the son of her maternal grandmother’s sister (referred to as “Loku Amma”) and was a frequent visitor to the household. On Poson Poya Day, 06.06.2009, the witness was left alone at Loku Amma’s house while she was away preparing food for a dansala. During this time, the witness, who had been sleeping unclothed, awoke to find the Accused beside her, touching her inappropriately. PW 01 testified that the Accused then raped her and threatened to kill her if she disclosed the incident.

PW 01 stated that following her grandmother’s illness, and she was in Colombo, her grandmother’s house was closed, and she remained at the residence of her maternal grandmother’s sister (“Loku Amma”). Despite no one being present at Maha Gedara, the witness continued her routine of lighting the oil lamp there. On one such occasion, while she was standing on a chair to light the lamp, the Accused approached her, held her by the waist, instructed her not to shout, and placed her on the bed located in the same room. At the time, the witness was dressed in a nightdress and pants, which the Accused removed before raping her. The incident lasted approximately 10 to 15 minutes. The witness experienced physical pain, pleaded with the Accused to stop, and attempted to escape, but was unable to do so due to the Accused’s physical strength. The witness further testified that the Accused threatened to kill her during the incident if she disclosed this to anyone.

Following the incident near the oil lamp, PW 01 returned to her Loku Amma’s residence, where her Punchi (aunt), her father’s elder brother’s daughter, and that relative’s husband were present. On the same day, the Accused arrived at the house and asked the witness to wash his shirt. Upon her refusal, the Accused slapped her. PW 01 disclosed this incident to those present, her Punchi and her father’s elder brother’s daughter. Subsequently, her Punchi contacted PW 01’s mother. The following day, on 10.06.2009, PW 01’s mother arrived, inquired about the events, and took her to the Anamaduwa Police Station to formally report the matter.

During cross-examination, learned counsel for the Accused asserted that the house where PW 01 went to light the oil lamp was, in fact, her maternal uncle’s residence. The witness agreed but clarified that the house was commonly referred to as her Kiri Amma’s house or “Maha Gedara.” The Learned Counsel further suggested that the witness had gone to Maha Gedara on the instruction of her Kiri Amma, which PW 01 denied. However, when

confronted with her police statement indicating otherwise, she acknowledged that such a statement had been recorded. Regarding the point of entry, counsel stated that the witness had entered through the back door. PW 01 responded that she could not recall precisely, noting that the door's presence varied over time and that it was structurally weak. The Learned Counsel also referred to a prior statement allegedly made by the witness, suggesting that a similar incident had occurred three days earlier with the accused. Which she has told the JMO. PW 01 stated she could not remember such a statement. Finally, the defence proposed that PW 01 had not been disturbed by the alleged incident until the Accused slapped her, and that her accusation was fabricated in retaliation. PW 01 firmly rejected this suggestion.

According to the testimony of PW 11, JMO, Dr Deepthi Kumara Wijewardana, he has examined the victim, PW 01, on 12. 06.2009, who was 13 years old and given a small history regarding the incident, and according to the witness, a relative of the PW 01 has raped her three times on 06.06.2009, 07.06.2009, and 08.06.2009. The witness claimed that there is no mention of the accused's threat to the victim, PW 01. During the examination, he observed that a bruise on the outside of PW 01's hymen, the area outside the vaginal opening, the base of the hymen was torn and was recovering, and her hymen was partially dilated. The history given reconciles with the injuries, and the psychological report states that she has an acute stress reaction following the abuse.

The learned High Court Judge, having considered the testimony of the aforementioned witness, the dock statement of the Accused, and the evidence led by the defence, has observed that PW-01's testimony is spontaneous, consistent, reliable, and credible.

We are mindful of the observation made by Justice Takar J in **Bhoginbhai Hirjibhai V. State of Gujarat**, AIR 1983 SC 753, which held that;

“By and large a witness cannot be expected to possess a photo graphic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time plan. A witness is liable to get or mixed up when interrogated later on”.

According to the observation made by W.L. Ranjith Silva, J, in the case of **D.Tikiribanda v. Attorney General**, 2010 BLR 92, held that;

“It is not surprising that there is an omission as distinct from a contradiction (omissions on material points may amount to contradictions) in the evidence of the victim as to the description/narration as to the offence and as to how the preparation of the offence took place. A victim of sexual harassment is more often than not compelled to make statements and give evidence in court. We must realize that she’s not doing so for the pleasure of it but because she is compelled to do so. Even though such complaints may appear to be voluntary yet they may not be voluntary in the true sense. This is what is called secondary victimization. This is somewhat like adding insult to injury. Any victim of rape or sexual harassment would like to avoid the embarrassment of talking about, let alone repeating the narration of such a shameful incident, if she could, Naturally it is reasonable and realistic to believe that a victim of sexual harassment would be in a trauma before, soon after the incident and sometimes even thereafter. In most of the Child abuse and child rape cases the complainants are belated due to a sense of shame, fear, embarrassment or ignorance. These incidents are brought to light invariably after much questioning and persuasion. Mostly the victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible (withdrawal symptom). The offenders should not be allowed to capitalize or take mean advantage of these natural and inherent weaknesses of small children. Under such circumstances it is only a counsel who appears for an accused who could even suggest that such trivial contradictions should be considered as decisive.”

Following observation made by Justice S. Thuraiaraja PC, J in the case **AG v. Daradadagamage Chandraratne**, CA/85/2013, decided on 25.05.2018, His Lordship held that;

“The last ground of appeal is that the evidence of the prosecutrix is unreliable.

As we discussed above the child was 11 years 10 months and 11 days at the time of the incident, she gave evidence after 8 years and subjected to cross examination for a period more than 3 year.

Time and again Courts have discussed the acceptance of evidence of children of tender ages. Our Judges are not there to test the memory of the witness, they are

expected to find the actual fact and the truth. Witnesses are human being, they are not memory machines nor robots to repeat the incident as it was. Further the natural behaviour of human beings is to forget incidents, especially sad memories. No one wants to re- visit painful moments and keep detailed memories with them. We are also mindful most of our courts with due respect, are not child friendly. In this case a child giving evidence after 8 years and subjected to cross examination more than 3 years is sufficient to create certain contradictions in her testimony. It is human nature. We carefully perused the evidence of the Prosecutrix and others and found some contradictions inter-se and per-se. The learned trial Judge had considered most of those and made his decision.”

Upon consideration of the testimony of PW 01, it is evident that the incident occurred when she was approximately 10 years of age, and her evidence was recorded after a lapse of 11 years at the trial. Notwithstanding the passage of time, her testimony remained consistent and credible throughout. Minor contradictions were noted; however, they do not materially affect the substance of the case or undermine the reliability of her account.

On the other hand, upon analysing the evidence of the Accused, it is noted that while he denied the charges, he admitted to having struck the victim, attributing his actions to her alleged stubborn behaviour. However, it is pertinent to consider the testimony of PW-5, who stated that, while she was present, the Accused struck the victim and made certain utterances.

උ: එයා අපේ ගෙදරට ඇවිල්ලා හිටියා උදේ. එතකොට මේ සමන්ත මල්ලවන් හිටියා. ඒ සමන්ත මල්ලව කියන කෙනා පාරක් ගැහුවා මෙයාට. එතකොට ඒ ළමයා කිව්වා. උබ ගැහුවානේ මන් කියන්නම් මට කරපු දේ කියලා එව්වරයි දන්නේ. එව්වර තමා එයා කිව්වේ.

It is evident that this aspect of the testimony was not challenged by the Accused during cross-examination. A careful assessment of PW-01's evidence reveals no material inconsistencies or grounds to question her credibility.

PW 11, JMO confirmed that, upon examination, injuries to the hymen were observed, and it aligns with both legal standards and a compassionate understanding of the witness's circumstances.

When we peruse this evidence, we are of the view that the prosecution has proved the case beyond a reasonable doubt; therefore, I do not intend to divert from the findings of the Learned Trial Judge and thereby affirm the conviction and sentence.

This appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL