

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

In the matter of an appeal in terms of section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Case NO: HCC-132-23

HC Embilipitiya HCC/53/2021

Democratic Socialist Republic of Sri Lanka
Complainant

VS

Mudugamuwa Hewage Kelum Dinesh *alias*
Duminda Mama,
5478/1, No 20 Junction, Yaya 03, Viharagala,
Suriyawewa.

Accused

And now

Mudugamuwa Hewage Kelum Dinesh *alias*
Duminda Mama,
5478/1, No 20 Junction, Yaya 03, Viharagala,
Suriyawewa.
(Presently at Agunukolapelessa Prison)

Accused –Appellant

Vs

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

Complainant -Respondent

Before: B. Sasi Mahendran, J.

Amal Ranaraja, J

Counsel : Amila Palliyage with Sandeepani Wijesuriya, Savani Udugampola,
Lakitha Wakishta Arachchi and Subaj De Silva for the Accused-
Appellant
Anoop De Silva, DSG for the State

Argued On : 07.10.2025

Judgment On: 11.11.2025

JUDGEMENT

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as "the Accused") was indicted before the High Court of Embilipitiya on one count of criminal trespass and two counts of Grave Sexual Abuse committed against a minor, Patabandi Gallage Sanduni Nisansala, during the period from 13th November 2016 to 11th December 2016 which is punishable under Section 436 of the Penal Code and Section 365B(2)(b) of the Penal Code, as amended by Act No. 22 of 1995, Act No. 29 of 1998, and Act No. 16 of 2006.

At the trial, the prosecution led the evidence through 5 witnesses and marked the production from P1-P2 and thereafter closed its case. Upon the conclusion of the prosecution's case, the Accused made a dock statement in his defence.

At the conclusion of the trial, the Learned High Court Judge, by a judgment dated 15.02.2023, found the Accused guilty on all three counts. Consequently, for the 1st count, 7 years of rigorous imprisonment with a fine of Rs 10000 and in default of the fine, 12 months of simple imprisonment. For the second and third counts, 15 years of rigorous imprisonment with a fine of Rs 10000 and in default of the fine, 12 months of simple imprisonment were imposed to run concurrently. Additionally, an amount of Rs 100,000

in compensation to the victim in a default of 12 months of rigorous imprisonment was ordered.

Aggrieved by the aforementioned conviction and sentence, the Accused preferred this appeal before this Court. The grounds of appeal advanced by the Accused are as follows:

1. The criteria adopted by the Learned Trial Judge in evaluating the evidence purely based on surmises and conjectures is completely contrary to the evidence led at the Trial.
2. The Learned Trial Judge erred in law by failing to consider the inconsistent evidence of Prosecution Witnesses and the evidence of PW1 which fails the text of spontaneity.
3. The Learned Trial Judge has failed to consider the medical evidence which contradicts the evidence of the Prosecutrix.

Facts and circumstances of the case are as follows,

According to PW 1, Sanduni Nisansala, the victim in this case, was fourteen years old at the time the alleged incident occurred. On the evening of the first occasion, she was alone at home, and the Accused, who was her neighbour, entered the room in her house and, while conversing with her, all of sudden caressed the body of the prosecutrix. In the chest area, to be specific. Following this, the witness exited the house and informed her mother upon her arrival. According to the witness, the Accused remained there for approximately four to five minutes in her house and returned to his residence. After the incident, the witness's mother informed the accused's wife of the events.

The witness further stated that she is often alone at home when her mother takes her sister to classes, and that she occasionally visits the accused's residence to converse with his wife. On a later occasion, the witness went to the accused's house while his wife was not present. During this visit, the accused allegedly caused the witness to lie down, lifted her clothing, and touched her breast area. He then removed her skirt and positioned himself on top of her. According to the testimony of PW 1, the accused placed his male organ on top of her vagina. The witness resisted pushing the accused away and returned to the house. Further, she has noticed discharge in her skirt. PW1 disclosed the incident to her mother upon her arrival.

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ප්‍ර : ඒ දුමින්ද මාමා වූ කරන තැන සන්දුනිගේ කොතනටද ඒ කරදරයක් කරන්න ගියේ?

උ ; මම වූ කරන තැනට.

ප්‍ර : සදුනි වූ කරන තැනට දුමින්ද මාමගේ වූ කරන එකෙන් මොන විදියේ දෙයක්ද ඒ වෙලාවේ කලේ?

උ ; ඒ මගේ ඇග උඩට වෙලා වූ කරන එක නියාගෙන හිටිය විතරයි.

ප්‍ර ; දුමින්ද මාමගේ වූ කරන තැන සදුනිගේ කොතනටද නියාගෙන හිටියේ?

උ : මම වූ කරන තැනට.

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ප්‍ර : ඊට පස්සේ කිව්වා දුමින්ද මාමා වූ කරන එක තමුන්ගේ වූ කරන එක ලග නියලා ටිකක් වෙලා හිටියා එව්වරයි කලේ වෙන කිසිම දෙයක් කලේ නැහැ නියලා කිව්වනේ?

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The PW 1 states that the complaint was initiated through a telephone call to the police, following which officers visited her residence. After being transported to the police station by jeep, a medical examination was conducted. We note that she was not sure about which incident took place at first.

The witness denied the statement recorded in the police report that the accused had hugged her from behind. She also refuted the allegation that, on the first day, the accused attempted to take her to bed and made physical advances toward her, as documented in the same report. The defense counsel highlighted a contradiction concerning a second alleged incident that reportedly occurred one week after the first, involving inappropriate physical contact. Additionally, the counsel pointed out inconsistencies in the witness's statement to the Police regarding her decision to disclose the incident to her mother while failing to inform the accused's wife. She also claimed that the accused had attempted to initiate a relationship with her. Finally, the witness denied the defense counsel's

suggestion that she had associated with another boy six months after filing the police complaint.

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උ : ඔව්.

ප්‍ර : ඊට අමතරව වෙන කිසිම දෙයක් කලේ නැහැනේ?

උ : නැහැ ස්වාමිනි.

ප්‍ර : සාක්ෂිකාරිය මෙහෙම කිව්වද මගේ කකුල් දෙක ඇත් කරලා මගේ වු කරන එකට දිව දැමීමා කියලා තියෙනවානම් වැරදියි නේද ?

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During the testimony of PW 02, Anushika Gunasiri, the mother of the victim it was revealed that the accused had purchased a portion of their land. Approximately six months later, she observed a suspicious relationship between the accused and PW 01. After PW 01 denied the existence of such a relationship, PW 02 used a phone recorder to gather evidence and confirmed her suspicions. She then informed the accused's wife and played the recording for her. Subsequently, PW 02 reported the matter to the police via the emergency call center. The witness confirmed that the incident occurred on or before 10.12.2016, and PW 02 provided a formal statement to the police two days later, on 12.12.2016.

Upon analyzing the evidence of PW1 and PW2, a contradiction emerges between the two witnesses.

According to PW 03, Dr. Sisira Seneviratne, has examined the prosecutrix. According to the history provided by PW-01, the accused became acquainted with the prosecutrix within a month and attempted to initiate a relationship with her. On the first day of their interaction, the accused allegedly touched the breast area of the prosecutrix. During the medical examination, on 14.12.2016 Dr. Seneviratne observed signs consistent with frequent sexual activity. Additionally, upon examining the victim's genital area, he noted old tears in her hymen.

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ප්‍ර : දැරියගේ ලිංගේන්ද්‍රිය පරීක්ෂාවට ලක් කිරීමේදී නිරීක්ෂණය කරපු ලක්ෂණ මොනවද?

උ : ඇය වැඩිවියට පත් වූන ලිංගික ලක්ෂණ පෙන්නුම් කළා. යෝනි තොල් අතරේ තිබෙන ඇලෙන සුළු ගතිය ගන්දනා ගත්තේ නැහැ. යෝනි විවර තත්වය විස්තාරණය වී ඇති බව හඳුනා ගෙන තියෙනවා. ඇයගේ කවාකාර හැඩයේ කනා පටලය තුළ ගුද මාර්ග පැත්තට වෙන ප්‍රදේශයේ තැඹිඹි දාරක තුවාල හඳුනා ගෙන තියෙනවා. ඇය උඩබැලී අතට තබා පරික්ෂා කිරීමේදී ඔරලෝසු මුහුණතේ 5,6 අංක ඇති ස්ථානයේ තමයි හඳුනා ගෙන තියෙන්නේ. ඇයගේ ගුද මාර්ගයේ හෝ කලවා පරික්ෂා කිරීමේදී අසාමාන්‍යතාවයක් තත්ත්වයක් හඳුනා ගෙන නැහැ. ඇයගේ ලිංගේන්ද්‍රයන් හෝ ගුදය තුළින් බෝවෙන රෝගයක ලක්ෂණ හඳුනාගෙන නැහැ.

The witness stated that such injuries could result from vaginal penetration or the insertion of a finger. It is also noted that, according to the history provided by the prosecutrix, she has not engaged in any sexual activity with any other individual.

Upon analyzing the testimony of PW1, it is evident that she did not mention any act of penetration. In contrast, the medical evidence presented by the examining doctor indicates old tears in the hymen, which suggests prior penetration. Notably, the doctor's findings do not align with the brief history provided to him by the prosecutrix. Furthermore, she failed to disclose or explain the injuries to her hymen, and her testimony does not offer any account of how these vaginal injuries may have occurred. This inconsistency raises a serious question regarding the credibility and truthfulness of her statement before the court.

Furthermore, PW2—the mother of the prosecutrix—stated that she became suspicious of the prosecutrix's behavior towards the accused and subsequently lodged a complaint with the police. In contrast, the prosecutrix testified that she herself disclosed the incident directly to her mother. These inconsistencies highlight a clear discrepancy between the accounts of PW1 and PW2.

According to the testimony of Prosecution Witness 4 (PW4), WPC Sunethra Nishanthi, she recorded the statements of PW1 on 12th December 2016 and 14th January 2017. During cross-examination, the witness acknowledged that the second alleged incident occurred approximately one week after the first.

PW 8, On 12.12.2016 Police Inspector Dinesh Kumara Herath received a call from PW 2 concerning the incident. PW 4 had recorded statements from PW 01 and proceeded to the prosecutrix's residence. The accused was subsequently arrested on 13.12.2016. Investigations later revealed that the incident had taken place roughly three weeks prior to the arrest. During cross-examination, the witness testified that, according to the police

statement, PW2 had expressed suspicion that the accused had approached PW1 while she was alone.

The accused, in the dock statement, stated that he had purchased the land from PW1's family in 2016. He further alleged that the family had subsequently demanded him to vacate the property, and that the complaint was lodged after he moved to the new residence. The accused denied all allegations of sexual assault levelled against him.

In light of the observations made by PW3 during the examination of PW1, particularly concerning the nature of the alleged frequent sexual activities, the Learned High Court Judge concluded that such findings may be attributed to acts involving the insertion of the accused's finger or tongue. The Court found this inference relevant in assessing the medical and testimonial evidence. Accordingly, it is pertinent to reproduce the relevant portion of the judgment delivered by the Learned High Court Judge for clarity and context.

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‘පැ.සා. 03 ගේ සාක්ෂිය මගින් පැ.සා. 01 ගේ ලිංගික අපයෝජනයක් හේතුවෙන් කල පරීක්ෂාවේදී ඇය නිතර නිතර ලිංගික ක්‍රියාවල යෙදීමේ ප්‍රතිපලයක් ලෙස ඇයගේ ලිංගේන්ද්‍රයේ ඔහු විසින් නිරීක්ෂණය කරන ලද ලක්ෂණ තිබේ ඇති බවට තහවුරු වී තිබේ. එසේම එකී ලක්ෂණ වූදින කලා යැයි කියන ස්ත්‍රී ලිංගයට ඇඟිල්ල දැමීම හා දිව දැමීමෙන්ද සිදු විය හැකි ඒවා බවට තහවුරුව තිබේ. මෙම අයගේ සාක්ෂිය කිසිදු ආකාරයකින් අභියෝගයට ලක් වීමක් සිදුව නැත. ඒ අනුව පැ.සා. 01 පරීක්ෂාවේදී ඇයගේ ලිංගේන්ද්‍රයේ ඉහත ලක්ෂණ නිරීක්ෂණය වී ඇත්තේ වූදින සමග පවත්වන ලද ලිංගික සබඳතායේ ප්‍රතිපල හේතුවෙන් බව පැහැදිලි වේ.’

When we analyse the evidence of the prosecutrix, she has stated that the Accused touched her breast area on the first day and on the second day kept his penis on her genital area. She never uttered a word about the penetration, and when the doctor examined the prosecutrix, he observed that there were injuries in her vagina and there was a partially healed tear over the hymen. Also, the doctor has stated there is evidence which was completable with manipulation of the vagina with penetration.

When we compare the doctor's evidence and the prosecutrix evidence doctor's evidence does not corroborate with the evidence of the prosecutrix. It is well established that in sexual abuse cases, the courts expect the prosecutrix's evidence to be sufficiently convincing. When the testimony of the prosecutrix is not convincing, then courts expect the corroboration of evidence.

When we analyse the evidence of PW1, she is not sure about which incident took place first. I am mindful that our courts place great emphasis on the consistency of witness testimony. In the present case, the evidence provided by the prosecutrix lacks consistency. The evidence given by the doctor does not corroborate the testimony of the victim about the sexual act, which gives a different picture of the prosecutrix's version. We note that it is very dangerous to act on the uncorroborated testimony of the victim of a sex offence if the evidence is not convincing.

In Premasiri V. The Queen 77 N.L.R 86 it was held: -

"In a charge of rape, it is proper for a Jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the Jury that she is speaking the truth."

In Sunil and another V. The Attorney General 1986 1 S.L.R 230 it was held that:-

"Corroboration is only required if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible."

"It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."

In Gurcharan Singh v. State of Haryana, AIR 1972 SC 2661, the Court observed that in cases of this nature, it generally seeks some form of corroboration. The ruling stated as follows:

"As a rule of prudence, however, court normally looks for some corroboration of her testimony so as to testify its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated."

Above three judgements were considered by H.N.J. Perera, J. (as he was then) in Wjethunga Mudiyanselage Heen Banda v Attorney General, CA 129-2013, decided on 07.10.2015 held that,

"The short history given to Doctor does not appear to be compatible with her testimony in the High Court."

.....

I hold that the medical evidence does not support the evidence of the prosecutrix that she has been raped. Thus the case depends only on the evidence of the prosecutrix.

.....

I hold that the evidence of the prosecutrix is not credible'

Considering above facts and the judgements cited above my considered view is that the evidence of the prosecutrix is not credible, and it is not safe to act on her evidence. Since the evidence of the prosecutrix is not reliable and cannot be believed, it is unsafe to allow the conviction to stand.

I therefore set aside the conviction and the sentence and acquit the Accused.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL