

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application under
in terms of section 83(2) of the Case
of Criminal Procedure Act No. 15 of
1979.

Democratic Socialist Republic of Sri
Lanka.

Complainant

Vs

1. Gamhewage Nihal Silva

Court of Appeal Case No:

CA/HCC/0135/23

High Court of Homagama Case No:

HC-187/2018

Accused

And now between

Gamhewage Nihal Silva

Accused-Appellant

Vs

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

Respondent

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

Counsel : Anil Silva P.C. with Anjana Abeyrathne for the Accused - Appellant
Hiranjan Peris A.S.G. for the Respondent

Argued on : 10.10.2025

Decided on : 23.01.2026

Pradeep Hettiarachchi, J

Judgement

1. In this matter, the accused-appellant (hereinafter referred to as “the appellant”) was indicted before the High Court of Homagama on a charge of grave sexual abuse, an offence punishable under section 365B(1)(b) of the Penal Code. Upon the conclusion of the trial, the learned High Court Judge found the appellant guilty of the said charge and convicted him accordingly.
2. The appellant was sentenced to seven years’ rigorous imprisonment and was further ordered to pay a fine of Rs. 100,000.00, with a default sentence of three months’ simple imprisonment. The Court also directed the appellant to pay a sum of Rs. 100,000.00 as compensation, with a default sentence of one year’s simple imprisonment. Being aggrieved by the said conviction and sentence, the appellant has preferred the present appeal.
3. During the period relevant to the alleged offence, the victim was an Advanced Level student at Mahinda Rajapaksha College, Homagama. He was keen on practising music and, with a view to improving the quality of his voice, was directed by one of his music teachers to a person by the name of Lakmal Kasthurirathna. Upon contacting the said Lakmal over the telephone, Lakmal provided the victim with the telephone number of the appellant.

4. Subsequently, the victim made an appointment with the appellant and, on 19.12.2013, visited the appellant's residence.
5. At the trial before the High Court, six witnesses testified for the prosecution, and the appellant made a dock statement. PW1 was the victim. According to his evidence, when he arrived at the appellant's house, the appellant's wife was present and requested him to wait outside, as the appellant was conducting a music class at the time. After the class had concluded, the appellant came downstairs and handed the victim an application form. Upon completing the form, the victim returned it to the appellant together with a sum of Rs. 1,500.00.
6. Thereafter, the appellant asked the victim to sit on the floor and suggested that he shave his armpits and groin area, which suggestion was objected to by the victim. At that point, the appellant is alleged to have suddenly taken out a canister and sprayed a substance onto the victim's nose, causing him to feel faint. The appellant then led the victim to a nearby room, opened the zipper of the victim's trousers, lowered his underwear, and performed oral sex on him.
7. The victim further stated that the alleged act continued for approximately two to three minutes, after which he managed to push the appellant aside and escape. He also testified that the appellant ejaculated during the said act and thereafter wiped the victim's genital area with a piece of cloth.
8. Thereafter, the victim boarded a bus bound for Awissawella and, while on his way, contacted his mother by telephone, informing her that he was facing a problem, though he did not disclose the full details of the incident. He further requested his mother to inform his father. Upon reaching Awissawella, his parents and brother were present, and he then narrated the entire incident to them.
9. Subsequently, they proceeded to the Awissawella Police Station and were directed to the Nawagamuwa Police Station, where a complaint was lodged. The police thereafter referred the victim for a medical examination. At a later stage, the police visited the appellant's residence with the victim, inspected the premises, and arrested the appellant.

Following are the grounds of appeal urged by the appellant.

1. Has the prosecution proved the case against the appellant beyond a reasonable doubt?
 2. Does the prosecution case fail on the test of probability?
 3. Has the learned High Court Judge not considered the matters favorable to the appellant and thereby was the appellant deprived of the fair trial?
 4. Has the learned trial Judge misdirected himself when analyzing the evidence?
 5. Has the learned trial Judge misdirected himself as regards to the evaluation of the dock statement?
10. Additionally, it was submitted that, in the absence of a proper investigation conducted by the police, the prosecution could not have given rise to a valid charge. The first four grounds of appeal are interrelated and, accordingly, I shall consider them together.
11. It is evident that the alleged offence is said to have been committed by the appellant on the very first day he met the victim. At the time of the alleged incident, the victim was a 17-year-old male student. The evidence further discloses that there were other students present upstairs during the relevant time. According to the testimony of the victim, he was seated on the floor when the appellant allegedly sprayed a substance onto his face.
12. In his evidence, the victim stated that the appellant used a canister to spray a substance onto his face, which allegedly caused him to feel weak. However, although the victim was examined by a doctor on the very same day, no traces or effects of any such substance were detected. Furthermore, there is no evidence that the police questioned the appellant in this regard, nor was any such canister or substance recovered from the appellant's residence, despite a search having been conducted. The only item produced by the police was a broom, which had no evidentiary value or corroborative effect in relation to the prosecution case.

13. The evidence of the Judicial Medical Officer, Dr. Prabhath Abeysingha, does not indicate the detection of any substance, or even traces thereof, on the victim that could have caused the alleged weakening effect when sprayed on his face. Dr. Abeysingha further confirmed that, had the victim informed the doctor who attended to him at the time of admission that a substance had been sprayed on his face resulting in weakness, such information ought to have been recorded contemporaneously in the admission notes. He also stated that, in the ordinary course, hospitals forward relevant specimens to the Government Analyst; however, in view of the history presented in this case, no such step had been taken.
14. More importantly, it was the evidence of the victim that the appellant used a broom to wipe semen that had fallen on the floor after the alleged incident, and when the broom was shown to him at the trial, he identified it as the very broom allegedly used by the appellant. If that were so, the police could have easily forwarded the said broom to the Government Analyst for examination. However, no such step was taken.
15. This omission casts serious doubt on the prosecution narrative and further demonstrates the failure of the police to conduct a proper and effective investigation. While a defective investigation per se does not automatically vitiate a prosecution, where such defects relate to material aspects of the case and give rise to reasonable doubt, the Court is duty bound to extend the benefit of doubt to the accused.
16. In the present case, the omission to subject the broom alleged to be directly connected with the commission of the offence to forensic examination not only weakens the corroborative value of the prosecution evidence but also seriously undermines the credibility of the prosecution narrative. This lapse clearly demonstrates the failure of the police to conduct a proper and effective investigation and renders the conviction unsafe.
17. In the present case, the victim was 17 years of age at the time of the alleged incident. According to the evidence of PW1, when the appellant suggested that he remove hair from his armpits and groin area, he objected and informed the appellant that it was inappropriate to make such a suggestion to a student. PW1 further stated that the alleged incident occurred on the very first day he met the appellant.

18. At that stage, the appellant had no knowledge of the victim's family background, personal conduct, or disposition. In these circumstances, it appears highly improbable that the appellant would have made such an inappropriate suggestion to the victim on their very first meeting. It is also significant to note that, having regard to the victim's age and physical capacity, he could have easily left the premises had he in fact been subjected to any improper approach by the appellant.

19. It is noteworthy that, during cross-examination, when the victim was questioned as to why he did not resist or raise an alarm at the time the alleged offence was being committed, he stated that he feared for his life. However, the conduct of the victim following the alleged incident, as revealed in his examination-in-chief, does not support the existence of such fear when he left the appellant's premises. The victim testified as follows:

ප්‍ර : ඔය වෙලාවේ තමුන් කිව්වා තමුන් යනකොට සර් අතු ගානවා දැක්කා කියලා නේද?

උ : මම අර සල්ලි ටික අර ගන්නට පස්සේ සර්පිනාව උඩ තිබ්බ ඒ සල්ලි ටික අරගෙන මම කිව්වා මම තමුසෙට හොඳ වැඩක් කරනවා මේ කරපු දේට කියලා, එතකොට මම දැක්කා ඒ වෙලාවේ මේ පුද්ගලයා කොස්සක් අරන් අතු ගානවා ඒ ප්‍රදේශය, ඒ කියන්නේ සිද්ධිය වෙච්ච ස්ථානය. මම ඒක තමයි කිව්වේ.

ප්‍ර : මොන වගේ කොස්සක්ද?

උ : කොහු වලින් හඳලා තිබ්ව්ව කොස්සක්.

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20. This inconsistency once again casts serious doubt on the credibility of the victim's testimony. The disparity between the explanation offered for his inaction during the alleged incident and his calm and composed conduct thereafter materially undermines the reliability of this aspect of the prosecution case.

21. According to the testimony of the victim, he first contacted the husband of a music teacher who had taught him while he was schooling in Dehiwala, and it was this person

who provided him with the telephone number of Lakmal. Upon contacting Lakmal, the latter instructed the victim to contact the appellant and provided him with the appellant's telephone number. It is noteworthy that, subsequent to the alleged incident, neither the victim nor his father informed Lakmal of the alleged occurrence. This omission is a relevant circumstance which the Court is entitled to take into account in assessing the credibility of the prosecution case, particularly where the testimony of the victim is otherwise marked by material inconsistencies and improbabilities.

22. Moreover, the victim's assertion that he felt weak after the appellant allegedly sprayed a substance onto his face remains wholly unsubstantiated by medical evidence, thereby further undermining the credibility of this aspect of the prosecution case.
23. Where the evidence of the victim is riddled with improbabilities and material inconsistencies, it is unsafe to found a conviction thereon. The learned trial Judge has manifestly failed to give due consideration to the aforesaid improbabilities apparent in the testimony of the victim, which, in my view, amounts to a serious misdirection directly affecting the findings of the learned Judge.
24. According to the victim, he was introduced to the appellant by one Lakmal Kasthurirathne. In his dock statement, the appellant stated that the said Lakmal was not on good terms with him due to a dispute relating to the copyright of a song. If that were so, it raises a legitimate question as to what prompted Lakmal to introduce the victim to the appellant. It also gives rise to the possibility that Lakmal may have had a motive to place the appellant in difficulty.
25. Having regard to the sequence of events in the present case, the dock statement of the appellant cannot be disregarded in its entirety, particularly in a situation where the prosecution version itself is marred by material improbabilities.
26. Although the learned trial Judge has referred to the dock statement of the appellant, it has not been considered in its proper perspective. In my view, the dock statement ought to have been evaluated in the context of the material improbabilities apparent in the prosecution case, and the failure to do so has resulted in a misdirection affecting the findings of the learned trial Judge.

27. It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt.

Kathubdeen v. Republic of Sri Lanka [1998] 3 Sri L.R.107

28. If the Accused's evidence creates a reasonable doubt in the prosecution case, the Accused is entitled to be acquitted. In ***Queen Vs. Kularatne 71 NLR 529***, the Supreme Court observed the following rules with regard to a dock statement of an Accused:

1. If the dock statement of the Accused is believed it must be acted upon.

2. If the dock statement creates a reasonable doubt about the case for the prosecution, the defence must succeed.

29. Similar view was expressed in ***Gunasiri and two others vs. Republic of Sri Lanka [2009] 1 SRI. L.R.39*** as follows:

(1) If the dock statement is believed it must be acted upon.

(2) If the dock statement creates a reasonable doubt in the prosecution case the defence must succeed.

30. When the material improbabilities apparent in the testimony of the victim are considered in conjunction with the dock statement of the appellant, it cannot reasonably be held that the prosecution has established its case beyond reasonable doubt. For the aforesaid reasons, it is unsafe to allow the conviction to stand.

31. Had the learned trial Judge properly taken into account the aforesaid infirmities apparent in the testimony of the victim, particularly the material improbabilities in the prosecution version, it would not have been possible to arrive at a conclusion of guilt against the appellant.

32. Accordingly, the conviction and sentence imposed on the appellant by the judgment dated 28.04.2023 are hereby set aside. The appeal is allowed, and the appellant is acquitted of the charge.

Judge of the Court of Appeal

P.Kumararatnam, J.

I agree.

Judge of the Court of Appeal