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

In the matter of an appeal to the Supreme Court in terms of section 09 of the High Court of the Provinces (Special Provisions) Act No. 90 of 1990 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Office-in-Charge, Police Station, Kollupitiya.

Complainant

SC Appeal 76/2018

SC/SPL/LA 55/2016 HC/MCA 140 /2013 MC Case No. 89640/11 Vs,

Thusith Thilina Malagoda, No. 35, Ransive Lane, Colombo 06.

Accused

And

Paleketiyage Samanthi Manohari Paleketiya, No. 49, Mahawa Road, Nikawaratiya.

Appellant

Vs,

Office-in-Charge, Police Station, Kollupitiya.

Complainant -Respondent

Thusith Thilina Malagoda, No. 35, Ransive Lane, Colombo 06.

Accused-Respondent

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

Respondent

And now between

Thusith Thilina Malagoda, No. 35, Ransive Lane, Colombo 06.

Accused-Respondent-Appellant

Vs,

Paleketiyage Samanthi Manohari Paleketiya, No. 49, Mahawa Road, Nikawaratiya.

Appellant-Respondent

Office-in-Charge, Police Station, Kollupitiya.

<u>Complainant –Respondent-Respondent</u>

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

Respondent-Respondent

Before: Hon. Justice Buwaneka Aluwihare PC

Hon. Justice Vijith K. Malalgoda PC Hon. Justice Murdu N.B. Fernando PC

Counsel: Anil Silva PC with Nandana Perera for the Accused-Respondent-Appellant

Migara Doss with Ms. Lakmali Hemachandra for the Appellant- Respondent

Malik Aziz, SC for the Hon. Attorney General

Argued on:

12.12.2018

Decided on:

12.02.2019

Vijith K. Malalgoda PC J

The Accused-Respondent-Appellant (herein after referred to as the Appellant) namely Thusith Thilina

Malagoda was charged before the Magistrate Fort on a charge under Section 345 of the Panel Code

which reads as follows;

"On or about 28.03.2011 at Mahanama Vidyalaya, R.A. de. Mel Mawatha, Colombo 03 within

the jurisdiction of this court did entre the workplace of Samanthi Manohari Palaketiya of

Mahawa Road, Nikaweratiya and kissed her face without her consent and with the intention

of outraging the modesty, and thereby committed an offence punishable under section 345 of

Penal Code as amended by Penal Code (amendment) Act No 22 of 1995."

When the above charges were readout to the Appellant above named before the Learned

Magistrate, the Appellant pleaded not guilty to the said charge and the trial against him proceeded

before the said Magistrate's Court. During the trial, the prosecution relied on the evidence of;

i) Palaketiyage Samanthi Manohari Palaketiya

ii) Sadarathdura Cyril Silva

iii) Chathura Ranjith Nissanka and

iv) Yakupitiyage Nandapala

When the learned Magistrate called for the defence, the Appellant gave evidence on oath and the

learned Magistrate on 27.06.2013 delivered the judgment acquitting the Appellant.

Being aggrieved by the said acquittal, the Complainant-Appellant-Respondent (hereinafter referred to as the Respondent) or the victim before the Magistrate's Court namely Palaketiyage Samantha Manohari Palaketiya preferred an appeal to the High Court of the Western Province, holden in Colombo with the sanction obtained from the Hon. Attorney General under the provisions of the Code of Criminal Procedure Act No. 15 of 1979.

The leaned High Court Judge, by his judgment dated 18.03.2016 allowed the appeal preferred by the Respondent and convicted the Appellant (accused before the Magistrate's Court) of the above charge and referred the case back to the Magistrate's Court for identification and sentence.

Being aggrieved by the said judgment of the learned High Court Judge, the Appellant had preferred a Special Leave to Appeal application before the Supreme Court and when this matter was supported before this court on 21.05.2018 for Special Leave, Court granted Special Leave on the following questions of Law.

- a) Is the judgment contrary to Law and against the weight of evidence led at the trial?
- c) Did the learned High Court Judge fail to consider the propensity of the Complainant to make allegations of improper sexual conduct and that therefore it was likely that the Complainant may have falsely fabricated a case against the Petitioner?
- d) Did the Learned High Court Judge fail to consider that the belatedness of making a complaint considering the circumstances of this case which matter was rightly considered by the learned Magistrate when acquitted the Petitioner?

As observed by me, the Appellant whilst challenging the judgment of the learned High Court Judge had raised several grounds and some of those grounds can be summarized as follows;

i. Belated statement made to police

- ii. Failure to complain the incident to the Principle of Mahanama College
- iii. Complainant's propensity to make false allegations of sexual harassment to absolve herself from her own wrongdoings
- iv. The complainant never wanted an inquiry into the incident
- v. Can the Appellant be convicted based on sole unreliable testimony of the Complainant

When considering the appeal before this court, it is important to note that the present appeal is lodged against the reversal of the findings of the trial Judge by the learned High Court Judge, and it is an accepted legal principle that the Appellate Courts are reluctant to interfere with the findings of the trial court unless the said decision is against the weight of the evidence led before the trial judge.

This position was considered by G.P.S. de. Silva (J) in the case of *Alwis Vs. Piyasena Fernando (1993)*1 Sri LR 120 at 122 as follows;

"It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal"

The main reason as to why the Appellate Courts are reluctant to interfere with the findings of the trial court, is the advantage of the Trial Judge of seeing the lay witnesses who testify before the trial court and the fact that the trial judge is possessed with the demeanor and deportment of the witness in deciding the trial before him. However as revealed before us, the learned Magistrate before whom the evidence for the prosecution case was led had been transferred and the case for the defence was taken up before the new Magistrate after adopting the evidence for the prosecution case.

In the said circumstances, the learned State Counsel who represented the Hon. Attorney General submitted that the learned Magistrate who delivered the judgment in the trial court was deprived

with the demeanor and deportment of the prosecution witnesses including the main witness for the prosecution, the Respondent before this court, Palaketiyage Samanthi Manohari Palaketiya.

As observed by me, the learned High Court Judge was mindful of the above legal requirement and had referred to the role of an Appellate Judge in an appeal as follows;

"අල්විස් එදිරිව පියසේන පුනාන්දු (1993 (1) ශ්‍රී ලංකා නීති වාර්ථා 119) හා පුකාශයට පත් නඩු තීන්දු ගනනාවක් මගින් තහවුරු වූ නෛතික තත්වය නම් සිද්ධිමය කරුණු සම්බන්ධයෙන් තීරණය කරනු වස් අභියාචනාධිකරණයකට වඩා මුල් අවස්ථා අධිකරණය වඩාත් යෝගා තත්වයක සිටින බවත්, මුල් අවස්ථා අධිකරණ තීන්දුවක සිද්ධිමය කරුණු සම්බන්ධයෙන් එළඹෙන ලද තීරණ අභියාචනයේදී වෙනස් කරනු ලබන්නේ නම් එය ඉතා සැලකිල්ලෙන් හා පුවේශමෙන් කළයුතු බවත්ය. එසේ වුවද මෙම අභියාචනයට අදාල කොටුව මහේස්තුාත් අධිකරණයේ 89640/11 දරන නඩුව සලකා බැලීමේදී, එම නඩුවේ පැමිණිල්ලේ සියඑම සාකෂි එක් මහේස්තුාත්වරයෙක් ඉදිරියේ ද, ඉන් අනතුරුව විත්තියේ නඩුව පමණක්, තීන්දුව පුකාශයට පත් කිරීමට යෙදුන මහේස්තුාත්වරයා ඉදිරියේ දී මෙහෙයවා ඇති බැව් පෙනී යයි. ඒ අනුව තීන්දුව පුකාශයට පත් කිරීමට යෙදුන මහේස්තුාත්වරයා ඉදහස් නොවරයා හට පැමිණිල්ලේ සාකෂි දුන් ස්වභාවය සහ විලාශය නිරීකෂණය කිරීමේ අවකාශයක් ලැබී නොමැති අතර, හුදෙක් වර්තා ගත සටහන් අනුව පමණක් එම නිගමනයට එළඹී ඇත. ඒ අනුව සලකා බලන කල මෙම අධිකරණයට වඩා සිද්ධිමය කරුණු සම්බන්ධයෙන් වඩාත් හොදින් තීරණය කිරීමේ තත්වයක් මෙම නඩුවේ මහේස්තුාත්වරයා වෙත තිබී නොමැති බව පෙනී යයි. ඊට යටත්ව මෙම නඩුවේ කරුණ මම සලකා බලම් "

In the above circumstances, I can't find fault with the decision of the learned High Court Judge to interfere with the findings of the learned Magistrate if he had observed that the impugned decision before the High Court was against the evidence led before the trial court.

In the said circumstance this court too has a duty to analyze the evidence and consider whether the learned High Court Judge is correct in reversing the findings of the learned Magistrate.

As observed earlier in this judgment, the main grounds on which the Appellant challenged the High Court findings, also needs this court to analyze the evidence led before the trial court.

Therefore it is important to consider the evidence given by the Complainant before the Magistrate's Court proceedings, namely Palaketiyage Samanthi Manohari Palaketiya, before considering the specific issues raised by the Appellant.

The Complainant who was a music teacher at Mahanama College, Colombo 03 had complained of an incident that took place during the school hours between 8.45-9.30 a.m. The Appellant too was a teacher at the same school. According to the Complainant, the Appellant had walked in to her class room when nobody was in and had made certain indecent proposals to which she did not agree and requested him to leave. The Appellant who left the class room on her request had come back to the class room again and had kissed her face. He once again left the class room when the Respondent shouted at him. The Respondent immediately complained the said incident to one Cyril Silva who was the Master-in-Charge of discipline at Mahanama College, over the phone. Said Cyril Silva had requested the Respondent, not to complain the incident to anybody and to leave the school obtaining half days leave. He further undertook to look into the matter internally to avoid any adverse publicity to the school.

According to the Respondent, she had remained silent until 25th of April. The school holidays too had intervened during this period. Around the 25th an officer from the Kollupitiya Police Station visited the school on an anonymous complaint, questioned the Respondent about the incident that took place on 28th March. The Respondent did not make a complaint to the police even on that day but, finally decided to lodge a complaint with police on 11th May 2011 when pressure was brought on her by several parties including the Old Boys Association and the Appellant himself, to settle the matter. By this time an inquiry conducted by the Education Ministry, was also proceeding against the Appellant.

The above position taken up by the Respondent was confirmed by witness Cyril Silva who received the complaint on 28th Morning.

As revealed before us, the learned Magistrate who considered the above evidence had given his mind to the delay in making the statement with the police and the failure by the Respondent to complain the above incident to the Principle in the following manner.

"තවද පැමිණිල්ලේ සාක්ෂි අනුව මෙම සිදුවීම සිදුවී ඇත්තේ 2011.03.28 වන දිනයේදීය. එහෙත් පැ.සා 01 සහ පැ.සා 04 සාක්ෂිකරුවන්ගේ සාක්ෂිවලින් අනාවරණය වූයේ මීට අදාල පැමිණිල්ල පොලිස් ස්ථානය වෙත කර ඇත්තේ 2011.05.11 වන දිනයේදීය. එනම් මාස 02කට ආසන්න කාලයක් ගත වීමෙන් පසුවය. මෙවැනි සිද්ධියක් සිදුවූයේ නම් ඒ පිළිබඳව අපුමාදව පොලීසියට පැමිණිල්ලක් කිරීමට අසමත් වූයේ ඇයිද යන සැකය මතුවේ. පැ.සා 01 සාක්ෂිකාරිය පුකාශ කර සිටියේ එම සිද්ධිය තමන් විසින් පැ.සා 03 සාක්ෂිකරුට එම දිනයේම දන්වා සිටි බවයි. පැ.සා 03 සාක්ෂිකරු ද සාක්ෂි දෙමින් එම කරුණු තහවුරු කරන ලදී. එහෙත් නඩු විභාගයේදී අනාවරණය වූයේ පැ.සා 03 සාක්ෂිකරු එදින නිවාඩු දමා නිවසේ සිටි තැනැත්තකු බවයි. පැ.සා 01 සාක්ෂිකාරිය මෙම අතවර සිද්ධිය, නිවාඩු ලබා නිවසේ සිටි පැ.සා 03 සාක්ෂිකරුට සිදුවු දිනයේම දැනුම් දීමට කියා කල ද එම අවස්ථාව වන විට පාසලේ රැදී සිටි විදුහල්පතිවරයාට හෝ වෙනත් බලධාරියකු හට මේ පිළිබඳව පැමිණිල්ලක් සිදු කර නොමැත. එම අවස්ථාවේදී පාසලේ නොසිටි පුද්ගලයකුට එම දිනයේම දැනුම් දීම සිදු කරනවාට වඩා පාසලේ සිටි විදුහල්පතිවරයාට මේ සම්බන්ධයෙන් දැනුම් දීමක් කළ හැකිව තිබුණි. එසේ නොකිරීම තුලින් ද පැමිණිල්ලේ නඩුව කෙරෙහි යම් සැකයක් ඇතිවේ. "

However the above issues were put before the Respondent when she was giving evidence before the Magistrate and she had explained them in her evidence as follows;

"මෙම සිද්ධියෙන් පස්සේ මම පාසලෙන් වරුවක් නිවාඩු දාලා ගියා. මේ සම්බන්ධයෙන් පොලිසියට පැමිණීල්ලක් කලේ නැහැ. සිරිල් සර් මට කිව්වා නිවාඩු දාලා යන්න වෙන කිසි දෙයක් කරන්න එපා කියලා. සිරිල් සර් පොලිසියට යන්න එපා කියපු නිසා පැමිණීල්ලක් කලේ නැහැ................. මෙම සිද්ධිය එලියට යන්න දෙන්න එපා මහානාම විදහාලයට කැලලක් කියලා. එහෙත් දෙපාර්ශවය අතර විමර්ශනයක් සිදුකලේ නැහැ. ඊට

Cross Examination (Page 48)

- පු: එම පැමිණිල්ල ඉදිපත් කිරීමට පළමුව තමුන්ට රාජකාරී කටයුතු අතරෙ සිදු වුනාය කියන මෙම සිද්ධිය සම්බන්ධයෙන් තමන් විදුහල්පතිතුමාට පැමිණිල්ලක් ඉදිපත් කලාද නැද්ද?
- උ: විදුහල්පතිතුමාට කිවුව් නැහැ

(Page 59)

- පු: ඒ අවස්ථාව වන විට තමන් ඒ හාෆ් ඩේ ගත්තේ තමන් පුද්ගලික වශයෙන් ගන්න තියෙන නිසාද? හේතුවක් නිසාද?
- උ: විනයභාර ගුරුවරයා සිරිල් සිල්වා කියපු නිසා
- පු: සිරිල් සිල්වා කියපු නිසා ගියා කියලා තමයි කියන්නේ. සාක්ෂිකාරිය මේ සිදුවීම සම්බන්ධයෙන් විදුහල්පතිට දැනුම්දීමක් කලේ නැහැ
- උ: ඔව්
- පු: විදුහල්පති සමඟ තමන් යම්කිසි අමනාපයක් තිබුණද?
- උ: මගේ තිබුනේ නැහැ විදුහල්පතිගේ තිබුණා
- පු: විදුහල්පතිගේ අමනාපයක් තිබුණ නිසා තමන් කියන්න ඉදිරිපත් වුනේ නැහැ

උ: ඔව්

Re Examination (Page 65)

"විත්තියේ නීතීඥ මහත්මයා හරස් පුශ්න අසනවිට මගෙන් ඇහුවා එම සිද්ධිය සිදුවන අවස්ථාවේ පැමිණීල්ල කලේ විනයභාර ගුරුවරයාට කියා. විදුහල්පතිතුමාට පැමිණීල්ලක් කලේ නැද්ද කියා. විදුහල්පතිතුමාත් එවැනි යෝජනාවක් ගෙනාවා. මේ වගේ පුශ්න වෙලාවට විදුහල්පතිතුමාත් ගන්නේ මාලගොඩ සර්ගේ පැත්ත නිසා විදුහල්පතිතුමාට කියා කිසිම අවශා (වැඩක්) නැහැ"

Even though the learned Magistrate had failed to consider the above evidence, the learned High Court Judge had correctly considered the above evidence in his judgment.

In addition to the two main points referred to above, several other issues raised on behalf of the Appellant including the Respondent's propensity to make a false allegation against the Appellant was well considered by the learned High Court Judge in his judgment. As further observed by the learned High Court Judge the Respondent was subject to severe cross examination on behalf of the Appellant but the Appellant had failed to establish any contradictions or omissions in her evidence.

Even though the learned President's Counsel who represented the Appellant had taken up the position that the Respondent is not a credible witness mainly due to the delay in making the statement to police, coloured with the other deficiencies and therefore it is unsafe to act on her evidence, I see no merit in the above argument and do agree with the findings of the learned High Court Judge that, it is safe to act on the testimony of the Respondent.

When considering the matters referred to above, I observe that the decision of the learned High Court Judge to interfere with the findings of the Magistrate by quashing the acquittal and convicting the Appellant was a well-considered decision since the evidence led before the learned Magistrate

was contrary to the findings of the learned Magistrate. In the said circumstance I answer the questions of law raised in the present appeal in negative and dismiss the appeal with costs.

Judge of the Supreme Court

Justice Buwaneka Aluwihare PC

I agree,

Judge of the Supreme Court

Justice Murdu N.B. Fernando PC

I agree,

Judge of the Supreme Court