

**AMARASINGHE AND ANOTHER**  
**v**  
**REV. SUMATHIRATNE AND ANOTHER**

COURT OF APPEAL  
NANAYAKKARA, J.  
BALAPATABENDI, J.  
CA 21/2000  
H.C.GAMPAHA 55/98  
SEPTEMBER 22, 2003

*Penal Code – Amendment Act, No. 22 of 1991, Act, No. 29 of 1998 – S. 363 B (2) 365 B(1)(a) – Sexual abuse – Burden of Proof – Non appreciation and misconception of the legal position in regard to burden of proof.*

The accused – respondent was charged with having committed grave sexual abuse on two girls. After trial, the accused – respondent was acquitted.

The petitioners who were the victims of the crime moved in Revision to have the verdict of acquittal set aside.

**HELD:**

- (i) It appears that the High Court Judge has made a serious error in regard to the burden of proof and the legal principles applicable to it in evaluating the evidence before him
- (ii) He has placed a burden higher than that of proof beyond reasonable doubt.
- (iii) Non appreciation and misconception of the legal position in regard to burden of proof has resulted in a grave miscarriage of justice.

*K. Thiranyagama with M.J.A. Hassan and Ms.Hasanthi Ratnayake for petitioners.*

*Dr. Ranjith Fernando with Ms. Harshani Gunawardena for accused respondent.*

*Ms. Ayesha Jinasena, S.C. for Attorney-General.*

*Cur. adv. vult*

November 27, 2003

**NANAYAKKARA, J.**

In this case the accused-respondent was charged in the High Court of Gampaha, with having committed grave sexual abuse on two girls, an offence punishable under section 365 B (2) read with section 365 B (1) (a) of the Penal Code as amended by the Penal Code Amendment Act, No.22 of 1995 and No.29 of 1998.

At the end of the trial at which the victims (two girls) and several other witnesses testified, the learned trial judge acquitted the accused-respondent of the charges levelled against him.

The petitioners who were the victims of the crime have now invoked the revisionary jurisdiction of this court to have the verdict of acquittal entered in favour of the accused-respondent set aside. 10

At the hearing of this application many matters which have a direct bearing on the facts as well as on law were urged by the petitioners.

Going through the judgment it appears the learned High Court Judge has made a serious error in regard to the burden of proof and the legal principles applicable to it in evaluating the evidence led before him.

It appears that he has placed a burden higher than that of proof beyond reasonable doubt as the offence with which the accused-respondent was charged carries a minimum mandatory jail sentence on conviction. 20

This is evident from the following excerpt taken from the Judgment:

මෙම චෝදනා ඉතාම බරපතල චෝදනා ලෙස ගැනේ මේවා අනිවාර්ය පිර දඬුවම් නියම කර තිබෙන චෝදනා වේ. එම නිසා රට පරිලන ආකාරය ඔප්පු කිරීමේ භාරයද ඉතා ඉහළ මට්ටමක තිබිය යුතුව ඇත. ඒ අනුව අපරාධ චෝදනාවක මෙම චෝදනා සාධාරණ සැකයෙන් තොරව ඔප්පු කිරීමේදී පැමිණිලි සතු කාර්ය භාරය ප්‍රවීණව පවතී. ඉතාම ඉහළ මට්ටමකින් සාධාරණ සැකයකින් තොරව මෙම චෝදනා විත්තිකරුවා ඊර්ෂ්‍යාව ඔප්පු කිරීමේ වගකීම සම්පූර්ණයෙන්ම පැමිණිලි සතු වේ.

It appears that the learned trial Judge has failed to appreciate the legal principles governing the burden of proof in offences of this nature. 30

Non appreciation and misconception of the legal position in regard to burden of proof in my view has resulted in a grave mis-carriage of justice.

Therefore quite apart from other matters urged, at the hearing of this application, this ground alone would in my view be sufficient to set aside the order of acquittal entered in the case.

Accordingly a re-trial is ordered and the case is remitted to the High Court of Gampaha for re-trial.

**BALAPATABENDI, J.** I agree.

*Appeal allowed. Re-trial ordered.*