

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

Maduwala Gedara Premadasa

ACCUSED-APPELLANT

C.A 261/2009

H.C. Panadura 1847/2004

Vs.

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

RESPONDENT

BEFORE: Anil Gooneratne J. &
P.W.D.C. Jayathilake J.

COUNSEL: Amila Palliyage for the Accused-Appellant
Thusith Mudalige S.S.C. for the Respondent

ARGUED ON: 24.03.2014

DECIDED ON: 26.05.2014

GOONERATNE J.

Accused-Appellant was convicted of grave sexual abuse, and offence punishable under Section 365(2)(b) of the Penal Code and was sentenced to a term of 8 years rigorous imprisonment and a fine of Rs.5000, and in default of payment of fine for simple imprisonment of 6 months. Accused-Appellant was also ordered to pay compensation to the prosecutrix in a sum of Rs. 25,000/- which carries a default sentence of 2 years rigorous imprisonment. In brief the fact of this case may be summarized as follows:

The Accused-Appellant and the prosecutrix and her family were living in the Ceylon Electricity Board Quarters at Horana, and their houses were adjacent to each other. The prosecutrix was only 12 years old at the time she was subject to sexual abuse. She had identified the Accused-Appellant who was called 'Kalu Mama' and at that time he was staying alone in his house. The prosecutrix used to go to the house of the Accused in the evening after she return from school, and the Accused-Appellant had taken her to the toilet and closed the door and had sexually abused the prosecutrix by liking the genitals

of the prosecutrix, when he is in a sitting position. This sort of behavior had continued at least on about 4/5 occasions, and the prosecutrix had not disclosed any such incident to her mother through fear. The accused having done so had given the prosecutrix money and chocolates. She used to share the chocolates with her class mates. One day the brother of the prosecutrix had been searching for her when she had come out of the toilet of the Accused and the brother had grabbed the chocolates from her and hit her and when asked by the brother as to who gave the chocolates she said it was 'Kalu Mama'. Thereafter her mother had questioned the prosecutrix about the alleged incident but she had not told the mother about it and the mother had told her that if there is something which cannot be disclosed advised her to inform the class teacher.

The class teacher being suspicious as to how the prosecutrix had money in her possession had questioned her. Initially she did not admit, subsequently told the teacher that 'Kalu mama' had given her money after such incidents. This had been reported by the teacher to the school Principal who had informed the Probation Officer. Thereafter the police had taken over the investigation, visited the house and the scene of the incident. She also made a statement to the police and was also examined by a Medical Officer.

The learned counsel for the Appellant contended that the indictment does not refer to a particular date and suggested that the charge is vague since it does not refer to a particular date of incident. It was also argued that the learned High Court Judge has erred by considering the evidence of the Accused-Appellant as corroborative evidence to prove the prosecution case. Learned counsel also emphasized that the learned High Court Judge had erred by evaluating the defence case in the light of the evidence of the prosecution witnesses. He also stated that there is a serious misdirection in law as the learned High Court Judge has not applied the same standard when evaluating the evidence of the Accused. Learned counsel specifically argued that the Accused-Appellant's position is a total denial of the incident and submitted to court that it is unsafe to act on the testimony and the unreliable evidence of the prosecutrix in the absence of corroborative evidence. He also mentioned that the medical evidence does not support the case of the prosecutrix. In the course of his submission he also drew the attention of this court to certain omissions and contradictions. Learned counsel also referred to the history given by the patient to the medical officer and stated that another was involved.

The learned Senior State Counsel in his address to this court emphasized that the evidence of the class teacher who was a witness for the prosecution was never challenged by the defence. He referred to the evidence of the class teacher and the observations she made regarding the victim i.e money dealings by the victim in the canteen with the other class mates, constantly found in the canteen with others. This witness questioned the victim about the money in her possession and the victim admitted on questioning her that the uncle gives money. The purpose of giving money to her was also revealed i.e for touching or embracing her body. Thereafter this witness had reported to the sectional head and thereby the principal of the school was also informed and the principal informed the Probation Officer which enabled the police investigations to commence. Learned Senior State Counsel states that the above items of evidence fortify the case of the prosecutrix, and thereby take the case forward to the point of police investigation, from the evidence of the victim. He also argued that the omissions referred to by the learned counsel for the Accused-Appellant are contrary to the provisions of Section 145 of the Evidence Ordinance.

The learned trial Judge has very carefully analysed the evidence of the victim. Very correctly the learned High Court Judge has observed that

there had been no contradictions marked in cross-examination of the victim but refer to the omissions. I find that the trial judge has given her mind to all the omissions, and decided the truthfulness of the version of the victim. I do agree that the evidence should be rejected only if its a material omission which goes to the root of the case. The omission suggested does not appear to be material to the case in hand, and the defence had not succeeded in casting doubts of the incident itself. The several details elicited in evidence-in-chief which are so germane to the incident remain un-contradicted. Further the victim was only about 12 years old at the time of the incident and having considered the tender age there is no basis to reject the evidence based only omission which does not go to the root of the case. In *Best Footwear (Pvt.) Ltd. Vs. Aboosally* 1997 (2) SLR 137 per Jayasooriya J. ...

Learned defence counsel also referred to an alleged misdirection based on burden of proof and presumption of innocence. Learned counsel relied on the case of *James Silva Vs. The Republic of Sri Lanka* 1980 (2) SLR at 176. In the said case it was held that it is a grave error of law for a trial Judge to direct himself that he must examine the tenability and the truthfulness of the evidence of the defence in the light of the evidence led by the prosecution. In the instant case the position seems to be somewhat different to the above.

The position of the Accused-Appellant, was a total denial of the incident. The Accused gave evidence, and denied the incident and in his evidence the Accused stated that he had a suspicion of the victim party falsely implicating a criminal charge, over an alleged cycle theft. The Accused does not distinctly state that he was falsely implicated but goes on to state that he only has a suspicion about a false charge. At pgs. 230-232 of the brief the learned High Court Judge refer to the evidence of the Accused, and rejects the position of the accused mainly on the basis that alleged incident cannot be denied based on evidence, and that the Accused could not produce a charge as regards the theft of a cycle to demonstrate that it was the victim's party who falsely implicated the Accused. In arriving at a conclusion on this aspect of the case the trial Judge considered the victim's age and all other circumstances concerning her tender age and state that a victim of such an age (12 years) would on one hand be reluctant to disclose the incident due to social stigma and the consequences that flow from the society, on such a disclosure. In other words as far as possible she and her parents would be reluctant to disclose such an incident and as such cannot accept the fact that the victim and her parents would go to an extent to falsely implicate the Accused due to a cycle theft. The trial Judge in this regard refer to the case of Hirjrbhai Vs.

State of Gujarat AIR 1983 S.C 753 and Indian case which refer in details to social stigma flowing from incidence of rape etc. When I consider the entirety of the trial court Judge's Judgment I think it is unfair to observe that the trial Judge has decided to examine the truthfulness and the tenability of the defence case In the light of the prosecution case or by a comparison of the prosecution case. In the Judgment the learned High Court Judge no doubt, has given her mind to the rejection of a suggestion of the false implication by the mother of the victim, but goes on to analyse the evidence of the Accused and rejects the Accused' version on such a defence and to arrive at such a decision to reject the Accused' version, had considered a few decide cases as referred to above. Therefore I am reluctant to act on the submissions of learned counsel for the Accused that the trial Judge has been misdirected on the burden of proof and the presumption of innocence. It is necessary to examine the entirety of the Judgment of the High Court on that point alone and not on isolated items of evidence. Nor can such a view prevail to create a doubt about the guilt of the Accused.

On the question of vagueness of the incident regarding the date of incident and the reference made therein to the period, we cannot see any prejudice being caused to the Accused party, on this aspect since it was not a

sole isolated incident but the alleged acts had been committed on several dates, which shows repetition and continuation of Acts.

In the circumstances and in the context of the alleged incident I wish to observe that the victim's version is sufficiently corroborated by the evidence of the other prosecution witness especially by the evidence of the victims school teacher and that of the mother. It is in fact adds to establish the consistency of the victim's story, and satisfy the test of probability. As such we are not inclined to interfere with the Judgment of the learned High Court Judge. Conviction and sentenced affirmed. Appeal dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilake J.

I agree.

JUDGE OF THE COURT OF APPEAL