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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Case No. HCC- 205/2017
High Court of Gampaha
Case No. 132/06

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs

Munasinghe Arachchige Muditha Dinesh Gunarathne

Accused

AND NOW BETWEEN

Munasinghe Arachchige Muditha Dinesh Gunarathne

Accused-Appellant

Vs

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Amila Palliyage with Sandeepani Wijesooriya, Savani Udugampola, Lakitha Wakishta Arachchi and Subaj De Silva for the Accused-Appellant.
Disna Warnakula, DSG for the State.

ARGUED ON : 11.01.2024 and 17.01.2024

DECIDED ON : 29.02.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Gampaha on four counts for committing the Murder of four persons on or about 01.02.2002, by setting fire to the victim's home, which in turn caused their deaths an offence punishable under Section 296 of the Penal Code. As the accused-appellant was absconding, evidence was led under Section 241 of the Code of Criminal Procedure Act and the trial proceeded. However, throughout the trial, the accused-appellant was represented by an Attorney-at-Law, and all the prosecution witnesses were cross-examined. After the prosecution case, the learned judge called for a defence but no witnesses were called on behalf of the accused-appellant. After the trial, the learned high court judge convicted the appellant on all four counts and sentenced him to death. This appeal is preferred against the said conviction and sentence.

Prior to the hearing, written submissions had been filed on behalf of both parties. At the hearing of the appeal, the learned Counsel for the appellant and the learned Deputy Solicitor General for the respondent

made oral submissions. On the request of the learned Counsel for the appellant, further written submissions were filed after the hearing.

In brief, the prosecution case is as follows:

PW-1, an 11-year-old boy at the time of the incident, was living in Enderamulla with his parents and two younger siblings. He was 19 years old at the time he testified. The accused-appellant, according to PW-1, was a neighbour of PW-1 who was about 25 years old at the time of the incident. The accused-appellant used to play with PW-1, and it transpires from the evidence of PW-1 that he had been sexually abusing PW-1 for some time prior to the incident. The accused-appellant had invited PW-1 to live with him in his house, but he declined. Upon denial by PW-1, he set fire to the house where the family of PW-1 resided. As a result, the mother, father, younger brother, and younger sister of PW-1, who were sleeping on the same bed, died.

Before the day of the incident, the accused-appellant had suggested several times to PW-1 to set fire to the house of PW-1 and kill PW-1's family members, enabling PW-1 to live with the accused-appellant in his house. On the day before the incident, the accused-appellant had gone to visit a doctor together with PW-1, obtained a prescription, and thereafter purchased sleeping tablets in the presence of PW-1. On that day, the accused-appellant had also purchased petrol, informing his intention to set fire to the house. According to PW-1, the night before the incident, the accused-appellant had added sleeping pills to the food prepared for PW-1's family for dinner. On the following day, around 3.00 a.m., the accused-appellant entered PW-1's house, asked PW-1 to leave, and entered the house holding a bucket. Shortly after, PW-1 has seen fire inside his house, and the accused-appellant came back from the house, running towards PW-1.

The learned counsel for the appellant advanced his arguments on the following grounds:

i. The learned high court judge erred in law by applying Section 76 of the Penal Code when arriving at a decision with regard to the culpability of PW-1 which is not permissible in law.
ii. The learned high court judge erred in law by arriving at a finding that PW-1 is not an accomplice and his evidence need not be corroborated.
iii. The evidence of PW-1 is not credible in light of the contradictory nature of his evidence.
iv. The learned high court judge has failed to consider that there is no conditional pardon given to PW-1 in terms of Section 256 of the Code of Criminal Procedure Act.
v. The learned trial judge has failed to consider the integrity and credibility of investigations.

The key point raised by the learned counsel for the appellant was that the learned high court judge had wrongly applied Section 76 of the Penal Code to the prosecution witness number one, who was the only witness who spoke about the incident and then the learned judge acted upon his evidence. The learned counsel contended that the finding of the learned judge that PW-1 is not an accomplice is wrong, PW-1 is an accomplice and to accept his evidence, the honourable Attorney General should tender a pardon to him in terms of Section 256 of the Code of Criminal Procedure Act. The learned counsel contended further that without corroborative evidence, the learned judge could not act upon PW-1's evidence as he was an accomplice. The learned Counsel submitted the judgments *Dissanayake Mudiyanselage Jayasiri V. The Hon. Attorney General* – S.C. Appeal 73/2015, decided on 18.09.2018; *Panangalage Don Nilanka and another V. The Hon. Attorney General* – S.C. Appeal No. 139/2014, decided on 21.11.2018 and *Ajith Fernando alias Konda Ajith*

and others V. The Attorney General– (2004) 1 Sri. L.R. 288 in substantiating his arguments.

The learned Deputy Solicitor General for the respondent stated that PW-1 was a 11-year-old boy at the time of the incident and he is not an accomplice. Thus, she contended that the question of tendering a pardon by the Attorney General does not arise. Further, she contended that the learned high court judge is correct in acting upon PW-1's evidence, as he is a credible witness. The learned DSG stated that PW-1 gave evidence regarding the main incident, but medical evidence and the evidence of other witnesses corroborates PW-1's evidence regarding the other matters relating to the main incident.

The learned DSG pointed out that PW-1 had been sexually abused by the accused-appellant continuously. She explained that PW-1 was compelled to do all the acts that he did with the accused-appellant because the appellant had taken control of this 11-year-old boy. Because of PW-1's fear of the appellant, the learned DSG stated that PW-1 had to obey everything that the appellant said. Therefore, she contended that PW-1 is a victim and a witness but certainly not an accomplice. In addition, the learned DSG pointed out that the contradictions marked on behalf of the appellant were minor contradictions and they do not affect the credibility of PW-1. She contended that the learned high court judge has correctly evaluated the evidence of the case and has come to a correct conclusion.

The aforesaid 1st, 2nd, 3rd and 4th grounds of appeal are interconnected. I wish to consider first, the aforesaid 5th ground of failing to consider the credibility and integrity of the investigations. The learned counsel for the appellant pointed out that a flambeau was found at the scene of the crime and the investigators wanted to bring the said flambeau within Section 27(1) as that was recovered according to the statement made by

the accused-appellant. Accordingly, the learned trial judge gave a date to consider it. The learned counsel submitted that on the next date, the investigator said that he had collected the said torch at the crime scene around 4.20 a.m. when he had visited the place. The learned counsel for the appellant contended that this evidence clearly stipulates the fact that the police were trying to implicate the accused-appellant with some fabricated evidence.

The impact of error, illegality or defect in the investigation has been considered in the following judgments.

In ***Union of India vs. Prakash P. Hinduja*** - ***AIR 2003 SC 2612*** the Supreme Court of India observed; "in *H.N. Rishbud v. The State of Delhi* 1955 SCR 1150, Court held that if cognizance is in fact taken on a police report initiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial, which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice and that an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial." Hence, it is apparent that even an illegal investigation does not affect the competence and the jurisdiction of the Court if a miscarriage of justice has not been occurred due to the said illegality.

In ***Amar Singh vs. Balwinder Singh*** - **AIR 2003 SC 1164,** it was held that "…where the prosecution case is fully established by the direct testimony of the eye-witnesses, which is corroborated by the medical evidence, any failure or omission of the investigating officer cannot render the prosecution case doubtful or unworthy of belief." In the instant action also, the prosecution case is mainly relied on the testimony of PW-1 who was at the scene when setting fire to the house.

In the case at hand, the learned counsel for the appellant contended that the investigator attempted to implicate the accused-appellant by stating in his evidence that the flambeau was recovered based on the statement made by the accused-appellant. However, the learned high court judge, in his judgment, had never considered any connection between the flambeau and the accused-appellant. The learned judge made all of his observations on the basis that the investigator had collected the said flambeau at the crime scene. Hence, no prejudice has been caused to the appellant as a result of the alleged bias of the investigator demonstrated by the learned counsel for the appellant. Therefore, I hold that the issue pointed out by the learned counsel for the appellant in respect of the integrity and credibility of investigations has no effect in determining this action.

Now, I proceed to consider the main issue raised by the learned counsel for the appellant. The main issue is outlined in the aforementioned grounds of appeal 1, 2, 3, and 4. The learned counsel who appeared for the accused in the high court trial had made submissions at the conclusion of the trial that only the evidence of an accomplice is before the Court and that his evidence cannot be acted upon without corroboration.

The learned high court judge has dealt with that issue in paragraphs 41, 42, 43 and 44 of his judgment. The learned trial judge found with reasons that the 11-year-old PW-1 had not attained sufficient maturity to understand the nature and consequence of his conduct when doing certain things with the accused-appellant in relation to the offence described in the indictment when the appellant told him to do those things. Accordingly, the learned judge applied Section 76 of the Penal Code and stated in his judgment that PW-1 could not commit an offence

according to Section 76 of the Penal Code and thus he does not fall into the category of an accomplice. It was the view of the learned trial judge that corroboration is not required to act upon PW-1's evidence if the said evidence is found to be credible.

One of the arguments of the learned counsel for the appellant was that it has not been proved by presenting the birth certificate or any other acceptable evidence that PW-1 was under twelve years at the time of the incident. The learned counsel pointed out that as appears on Page 95 of the appeal brief, PW-1 has stated that his age is about eleven years. However, in the examination in chief, when PW-1 was questioned about his age in the year 2002 (at Page 82 of the Appeal Brief), he clearly stated that his age was eleven years. In addition, when PW-1 was giving a statement to the Police on 02nd February 2002, he stated that his age is eleven years. The age of PW-1 was never in dispute. Therefore, it is apparent that PW-1 was under the age of twelve years at the time of the incident and further proof of his age is not warranted.

Apart from that, the learned counsel for the appellant stressed the point that Section 76 of the Penal Code does not apply to a prosecution witness and it applies only to an accused in formulating his defence. The learned DSG contended that PW-1 is not an accomplice because he was not directly or indirectly involved in committing the offence.

According to my view, Section 76 of the Penal Code applies to PW-1 in the following way. In that respect, it is necessary to consider what this section means. Section 76 of the Penal Code reads as follows:

"*Nothing is an offence which is done by a child above eight years of age and under twelve, who has not attained sufficient maturity of*

understanding to judge of the nature and consequence of his conduct on that occasion."

According to Section 76, anything done by a child above eight years and under 12 years of age who is unable to understand the nature and consequence of his conduct at the time he or she is doing that act, is not an offence. As stated previously, the learned trial judge has found that PW-1 had not attained sufficient maturity to understand the nature and consequences of his acts when doing certain things with the accused-appellant on his demand.

When considering whether PW-1 had attained sufficient maturity to understand the nature and consequence of his conduct, it must be noted that the minor age of the child could be the only reason for a child to not to have attained sufficient maturity. However, the minor age is not the only reason for PW-1 to not understand the nature and consequences of the acts that he did with the appellant. PW-1 is not only under twelve years of age but also a victim of continuing grave sexual abuse. The evidence confirms that he was a child who had to obey the abuser (the accused-appellant) and do things as the accused-appellant said mainly because of the fear. PW-1 has stated in his evidence that the accused-appellant threatened him that he would be killed if he says something about setting fire to the house to anybody (page 93 of the Appeal Brief). Because of the fear, PW-1 stated that he had to obey the accused-appellant. In view of the aforesaid factors, it is evident that PW-1 had not acted with the intention to commit a crime. It is apparent from the evidence adduced in the high court that PW-1 was compelled to do what the accused-appellant told him to do. The eleven-year-old boy was not in a position to refuse to do what the appellant directed him to do. Under these circumstances, I agree with the finding of the learned high court judge that PW-1 was not mature enough to understand the nature and

consequences of his conduct when he did certain things directed by the appellant.

Now, it is important to consider who is an accomplice. In the case of ***King V. Pieris Appuhamy*** – 43 NLR 412, the interpretation given to "Accomplice" in the Indian case of *Rekumal V. Emperor* – 1934 AIR 183 is cited as follows: "An accomplice is a person directly or indirectly involved in the commission of a criminal offence."

As PW-1 was not mature enough to understand the nature and consequence of his conduct, anything done by PW-1 is not an offence according to Section 76 of the Penal Code. Therefore, directly or indirectly PW-1 could not be involved in commission of a criminal offence and thus, he is not an accomplice. Accordingly, the decision of the learned judge that PW-1 is not an accomplice is correct. In the circumstances, the issue of tendering a pardon by the Attorney General would not arise. PW-1 is also an ordinary witness and the learned high court judge has correctly decided that PW-1's evidence need not be corroborated to be acted upon his evidence.

At this stage, it is also vital to consider the Amendment No.10 of 2018 brought to the Penal Code, although the said amendment is not applicable to the instant case. By the said amendment, Section 75 of the Penal Code has been amended as follows:

Section 75 of the Penal Code (Chapter 19) (hereinafter referred to as the "principal enactment") is hereby amended by the substitution -

(1) for the words "eight years" of the words "twelve years"; and

(2) in the marginal note thereof, for the words "eight years", of the words "twelve years".

Section 76 has been amended as follows:

Section 76 of the principal enactment is hereby amended by the substitution –

(1) for the words "above eight years of age and under twelve," of the words "above twelve years of age and under fourteen"; and

(2) in the marginal note thereof, for the words "above eight and under twelve" of the words "above twelve and under fourteen".

When making submissions, the learned counsel for the appellant pointed out citing the judgment of *Panangalage Don Nilanka and another V. The Hon. Attorney General* – S.C. Appeal No. 139/2014, decided on 21.11.2018 that under Section 75 of the Penal Code, a child under the age of 8 years has absolute protection from culpable liability and under Section 76, a child between 8 and 12 years of age has qualified protection from criminal liability. According to the amendment No. 10 of 2018 brought to the Penal Code, a child under 12 years has absolute protection from culpable liability. Although this amendment could not be applied to the case at hand, the intention of the legislature is clear. The amendment was introduced in 2018, as the legislature deemed it prudent to legislate that anything done by a child below the age of 12 years should not be considered an offence. Although the amendment could not be applied to the instant case, the intention behind this amendment can be taken into consideration. This helps to substantiate the finding of the learned high court judge that PW-1, who was at the age of 11 years had not attain sufficient maturity to understand the nature and consequences of his conduct on the incidents relating to this case.

The learned Deputy Solicitor General argued, even if the age of the child is disregarded, PW-1 is not an accomplice and he is a victim and a witness. At this stage, it is pertinent to consider more elaborately who can be considered as an accomplice. In ***Peiris V. Dole*** – 49 NLR 142 at

page 143, Basnayake, CJ. made the following observations: “An accomplice is one who is a guilty associate in crime or who sustains such relation to the criminal act that he could be charged jointly with the accused. It is admittedly, not every participation in a crime which makes a party an accomplice in it so as to require his testimony to be confirmed.” Basanayke, CJ. in this judgment considered the following passage of the Judgment in the case of *Emperor Vs. Burn* – 11 Bombay Law Reports that reads as follows: “No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admission of the facts showing that he had such a hand. If the evidence of a witness falls short of these tests, he is not an accomplice; and his testimony must be judged on principles applicable to ordinary witnesses.”

The evidence of this case clearly demonstrates that PW-1 is not a guilty associate in the crime. He did certain acts relating to the crime because he was afraid of the accused-appellant, and he could not refuse to do things when the appellant directed him to. It is evident that PW-1 did not have a conscious hand in the crime. Hence, PW-1 could not be considered as an accomplice.

In addition, in the case of ***Galagamage Indrawansa Kumarasiri and three others V. W.M.M. Kumarihamy and Hon. Attorney General*** – S.C. TAB Appeal No. 02/2012, decided on 02.04.2014, it was held that “The definition of an accomplice in Sri Lankan Law, as accepted by the Courts, clearly indicates that an accomplice must demonstrate common intent and knowingly unite with the principal offender to commit the crime but excludes the mere presence of witnesses in the vicinity of the scene from coming within this definition.”

In the case at hand, PW-1 was accompanied by the appellant in certain instances, but at any instance, PW-1 did not have common intent with the accused-appellant to kill his parents and siblings. As stated previously, because of the fear and inability to refuse what the appellant told him to do, PW-1 did certain things he explained in his evidence. Hence, it is precisely clear that PW-1 did not knowingly unite with the accused-appellant with the common intent to kill his parents and siblings. Therefore, according to the legal positions stated in the aforesaid judicial authorities, there is a merit in the argument of the learned DSG that even if the age of the child is disregarded, PW-1 is not an accomplice.

Another argument advanced by the learned counsel for the appellant was that the evidence of PW-1 is not credible in light of the contradictory nature of his evidence. The learned DSG pointed out that although some minor discrepancies were marked as contradictions, the main matters pertaining to the crime that were described by PW-1 have never been challenged in cross-examination. In perusing the impugned judgment of the learned high court judge, it is apparent that he has considered the contradictions marked and omissions brought to the attention of the court by the defence in evaluating evidence. The learned judge has stated reasons why those contradictions and omissions do not affect the credibility of PW-1. The learned high court judge has looked into every aspect of the case and evaluated entirety of the evidence of the case carefully. It is my view that the learned high court judge has correctly found that PW-1 is a credible witness and the court can act upon his evidence. As previously stated, PW-1 can be considered as an ordinary witness as well as a credible witness; therefore, his evidence can be relied on without corroboration. I hold that the learned trial judge has come to the correct conclusion after correctly analyzing the evidence of the case.

For the foregoing reasons, I find no reason to interfere with the Judgment of the learned High Court Judge dated 11.07.2017.

Accordingly, the Judgment dated 11.07.2017 is affirmed and the Appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J
I agree.

JUDGE OF THE COURT OF APPEAL