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

In the matter of an Appeal under Section 154(p) of the Constitution read with Section 331 of the Criminal Procedure Act No. 15 1979.

Watapathane Gedara Punchi Banda

Accussed-Appellant

CA Appeal No. CA 237/2017

Vs.

High Court of Polonnaruwa

Case No: HC 120/2014

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

Before : Menaka Wijesundera J.

Wickum A. Kaluarachchi J.

Counsel : U.R. de Silva, PC with Hiruni Rubereu and M. Hannadige for the Accused-Appellant.

Madhawa Thennakoon, DSG for the Respondent.

Argued on : 16.01.2024

Decided on : 15.02.2024

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 28.09.2017 of the High Court of Polonnaruwa.

The accused appellant (hereinafter referred to as the appellant) has been indicted under two counts of grave sexual abuse under the provisions of the Penal Code.

Upon conclusion of the trial, the learned trial judge had found the appellant guilty for the first charge and had acquitted of the second charge.

The story of the prosecution is that the victim who had been five years of age at the time of the offence had been living with her brother who had been aged eight at the time of the offence and the farther while the mother had been abroad.

The appellant is the paternal grand farther of the victim and he had been living next door to the victim.

The grounds of appeal raised by the learned Counsel for the appellant were that,

1) **The prosecution had not proved its case beyond a reasonable doubt,**
2) **The learned trial judge had not considered the omissions and the contradictions in the story of the prosecution satisfactorily,**
3) **The story of the prosecution being highly improbable.**

The main witness of the prosecution had been the victim and at the time of the offence she had been five years of age and when she had given evidence in Court, she had been ten years of age. She had said that on the day of the incident she and her brother had been playing hide and seek and she had run in to the house of the appellant who had been living next door, in order to hide from the brother.

The appellant had called her and had got her to be in a position so that her genitals would rub on his penis. She had varied her stance from stating to Court that she has been seated and standing during the incident, and she had said further that the appellant removed her undergarment and was holding her very close and that although she did not like it that she could not get away.

She had only stated in Court that her genitals rubbed on his penis as he was holding her very tight. But to the doctor she had said that the appellant had got her to touch his penis.

At that point according to her testimony, the brother had walked in and the appellant had let her go and she had run out pulling her undergarment up. She further says that the brother on seeing her had called her out and when she went out, the brother had taken her to the farther who had been at home and had got her to divulge the incident.

The learned President's Counsel for the appellant submitted to Court that the narration of the victim was not accurate and is inconsistent.

The learned President's Counsel for the appellant also drew the attention of Court to the contradictions marked in her evidence and submitted that the learned trial judge had not considered the evidence of the victim in the correct perspective.

It is a well founded principle in criminal law that contradictions and omissions brought to the notice of Court by the defense should be disregarded if it does not go to the root of the case. It has been so decided in the case of **Wickremasinghe vs Dedolina and others 1996 (2) SLR by Jayasuriya J.**

In the instant matter this Court has observed that the victim had varied in her position in describing the incident ,for example in her description as to how she had been positioned at the time of the incident and also in her saying that the appellant being alone at his place.

At this point we also draw our minds to the judgment of Priyantha Fernando J in which it **is quoted in the case of The Republic of Sri Lanka vs. Thimbirigolle Sirirathana Thero CA 194-2015 delivered on 07.05.2019 by his Lordship Priyantha J in which he had held very rightly and prudently that "*It is the trial judge who has the opportunity to observe the demeanor and the deportment of the witness who testifies before him*".**

Hence in the instant case in considering the evidence led at the trial and the way it has been applied to arrive at the final conclusion we observe that the trial judge has not rightly appreciated the opportunity he has been afforded with of having to observe the demeanor and the deportment of the prosecution witnesses.

The next point raised by the learned Counsel for the appellant was that the testimony of the brother of the victim is highly improbable.

The evidence of the brother of the victim had been that on the day of the incident he had been playing with the victim and the victim had suddenly run in to the house of the appellant and when he had also gone, he had seen the

victim on the lap of the appellant seated in a way which he had not liked, and then he had called her and taken her to the father of theirs and the victim had narrated the incident to the father.

Upon analyzing the evidence of the brother, we find that his evidence seems to be too mature for a child of 9 years of age because he takes the step of taking the victim to the father to divulge the incident and refrains from narrating the incident himself to the father which would have been the most the probable thing for a child of that age.

Thirdly the prosecution has led the evidence of the victims farther who had tried to corroborate the evidence of the victim but he had contradicted himself in trying to describe what the victim is supposed to have told him.

But it has to be noted that he has been cross-examined by the defense whether he had any land dispute with the appellant to which he had said no.

The instant matter had been brought to the notice of the authorities by a school teacher of the victim who had questioned the victim upon hearing rumors and the victim is supposed to have divulged in the teacher as well, hence the lodging of the complaint had been delayed.

The doctor who has examined has stated to Court that the victim in the case history had said that the appellant had got her to touch his penis but where as in Court, she had said that the appellant embraced her in a way that her genitals rubbed on his penis. But at this point we observe that the trial judge had acquitted the appellant for the charge which describes what has been stated to the doctor. Hence the finding of the trial judge is not corroborated by the medical evidence.

At the conclusion of the case for the prosecution, the appellant has given evidence on oath and had said that the father of the victim had a dispute with him with regard to the way he has distributed his paddy lands among the five children and as such the father of the victim had falsely implicated him.

He also speaks to a dispute with regard to the distribution of some fertilizer, and the evidence of the appellant has been corroborated by the wife and the prosecution witnesses also had been cross-examined on the dispute between the parties by the defense, and the prosecution had not been able to challenge the credibility of the appellant and his wife in the witness box.

But the trial judge had analyzed the evidence of the victim and had concluded that the prosecution had established its case beyond a reasonable doubt with regard to the first charge against the appellant and not the second.

But after arriving at that conclusion only that the trial judge had considered and analyzed the evidence led on behalf of the appellant. As such, the learned Counsel for the appellant stated that it had caused a great injustice to the appellant.

It is a well-founded principle of criminal law that when a party prefers a criminal charge against an accused, it is the party making the same must prove its case beyond a reasonable doubt, and the accused can even remain silent.

It has been held in the case of James Silva vs The Republic of Sri Lanka 1980 (2) SLR page 167 that " It is a grave error of law for a trial judge to direct himself that he must examine the tenability and truthfulness of the evidence of the defense in the light of the prosecution case. Our criminal law postulates a fundamental presumption of legal innocence of every accused till the contrary is proved. This is rooted in the principle of legal inviolability of every individual in our society, and now in our Constitution....Therefore to examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence.

As such, in the instant matter we find that the trial judge in considering the evidence of the defense after deciding that the prosecution has proved its case beyond a reasonable has violated a basic principle of criminal law.

Furthermore, the defense put forward by the appellant at the time of the trial has been put to all the prosecution witnesses in cross examination and the prosecution had not been able to challenge the said evidence.

As such, we find that the defense of the appellant at the trial had been consistent and cogent and it has created a reasonable doubt in the case for the prosecution which has already been contradicted on vital matters as discussed above.

Hence, we find that the trial judge had not considered the merits of the case in the manner prescribed by law.

Hence, we find merit in the submissions made by the learned President's Counsel for the appellant, we allow the instant appellant and we set aside the

conviction and the sentence imposed by the trial judge. The Accused-Appellant is acquitted.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

Honorable Justice Menaka Wijesundera was pleased to make available to me her draft judgment. Following a consideration of it, I found myself in agreement with all the reasons given in her judgment as well as her conclusion.

In this case, there were two counts against the accused-appellant. The appellant was acquitted from the 2nd count and convicted of the 1st count. One of the main arguments advanced by the learned President's Counsel for the appellant was that, before evaluating the defence evidence, the learned high court judge had arrived at the conclusion that the prosecution had proved its case beyond a reasonable doubt (page 217 of the Appeal Brief), which is an erroneous finding. In reply, the learned Deputy Solicitor General appearing for the respondent stated that although the learned High Court Judge stated so, the learned Judge has thereafter analyzed the defence evidence.

A similar issue arose in the case of ***Anthony Michael Morril V. Attorney General*** – Court of Appeal Case No. CA 26/06, which was decided on: 25.05.2010. Likewise in the case at hand, in this case also, the learned trial judge had proceeded to evaluate the defence evidence after finding that the prosecution had proved the case beyond a reasonable doubt. However, it was

observed by the Court of Appeal that "The learned trial judge has come to the conclusion that the prosecution has proved the case beyond reasonable doubt before considering the defence evidence which rendered subsequent consideration of the defence evidence. It is cardinal rule in our criminal law that every person charged with an offence is entitled to a fair trial and shall be presumed innocent until he is proved guilty. (Article 13(3) and 13(5) of the constitution) This presumption of innocence should be operative until the learned trial judge perused and analyzed the entirety of the evidence led in the case, that of the prosecution as well as that of the defence".

Therefore, I agree with the contention of the learned president's counsel that the trial judge should have concluded that the prosecution has proved the case beyond a reasonable doubt only after evaluating the prosecution evidence as well as the defence evidence.

However, if the learned trial judge had properly evaluated the defence evidence and correctly considered whether the defence evidence creates a reasonable doubt on the prosecution case, mentioning that the prosecution has proved the case beyond a reasonable doubt only after considering the prosecution evidence could be disregarded.

In the instant case, it is apparent that the learned High Court Judge has not properly evaluated the defence evidence, especially, the inconsistencies *inter se.* Justice Menaka Wijesundera has explained very clearly that the credibility of the accused-appellant's evidence as well as the evidence of the other defence witnesses has not been challenged in cross-examination, and the defence evidence is consistent and cogent. Hence, the learned High Court Judge's finding that the defence evidence did not cast a reasonable doubt on the prosecution case is wrong, according to my view.

In addition, it must be noted that the prosecution called the father, brother of PW-1, and the Judicial Medical Officer who examined PW-1 in order to corroborate PW-1's evidence. Hence, it is important to consider whether PW-1's evidence has been corroborated by the evidence of these three witnesses.

It is needless to state repeatedly that it is the duty of the prosecution to prove the charges against the accused beyond a reasonable doubt. As explained by Justice Wijesundera in her reasoning, PW-1's evidence and her father's evidence are contradictory. PW-3, her brother stated in his evidence that he saw his sister (PW-1) sitting on the lap of the grandfather (the accused-appellant) when he went to that house (page 78 of the Appeal Brief). However, PW-1 has stated very clearly that the sexual act that she described occurred when she was standing in front of her grandfather while he was seated (page 37 of the Appeal Brief). Therefore, PW-1's evidence and her brother's evidence as to how the sexual act was performed are also contradictory. The other witness who was called to corroborate PW-1's evidence is the Judicial Medical Officer (PW-9). In the Medico-Legal Report he submitted, the short history given by PW-1 is mentioned. PW-1 had stated to the JMO that the appellant had got her to touch his penis. However, she has never stated to the JMO anything about the sexual act described in count one of the indictment for which he was convicted. Furthermore, the JMO stated in his evidence, that PW-1 said in giving the short history that she was asked to touch her "Loku Aththa's" genital area, and she touched that area over the sarong that he was wearing (page 131 of the Appeal Brief). That was the only incident that took place, according to the history given by PW-1 to the doctor who examined her after the incident. Therefore, the aforesaid all three witnesses who were called by the prosecution to corroborate PW-1's evidence have not corroborated her evidence but contradicted her evidence with regard to the sexual act described in the count one for which the accused-appellant was convicted.

It is correct that a child witness's evidence should be evaluated with extra caution. Minor discrepancies and contradictions that are not directly relevant to the main incident could be disregarded. However, the aforesaid vital contradictions between the evidence of PW-1 and the other three witnesses who testified about certain instances relating to the offence described in count one has arisen in respect of the sexual act described in the count one for which the appellant was convicted. Hence, undoubtedly, a reasonable doubt casts on the story narrated by PW-1, when her father, brother, and the doctor contradict her evidence. However, the learned trial judge has failed to take into consideration the aforesaid vital inconsistencies *inter se.*

In the face of the unchallenged evidence of the defence, as described by Justice Wijesundera, when considering the prosecution evidence, which consists of contradictions that go to the very root of the case, it cannot be concluded that the first count has been proved beyond a reasonable doubt.

In the circumstances, it is my considered view that, the conclusion of the learned High Court Judge that the first count against the accused-appellant has been proved beyond a reasonable doubt is incorrect. While agreeing with Justice Menaka Wijesundera, I hold that count one of the indictments has not been proved beyond a reasonable doubt, and accordingly, the accused-appellant should be acquitted of count one of the indictment as well.

The appeal is allowed.

Justice Wickum A. Kaluarachchi

Judge of the Court of Appeal