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

In the matter of an Appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No. 15 of 1979 as amended.

Court of Appeal No:

CA/HCC/0010/2024

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT

Vs.

High Court of Kalutara

Case No: HC/764/2019

Samarasinghe Liyanage Priyantha Kumara

ACCUSED

AND NOW BETWEEN

Samarasinghe Liyanage Priyantha Kumara

(In Remand Prison - Dumbara)

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Nuwan De Alwis instructed by Mirthula Skandarajah for the Accused-Appellant

: Anoopa de Silva, D.S.G. for the Complainant-Respondent

Argued on : 24-09-2024

Decided on : 19-12-2024

Sampath B. Abayakoon, J.

This is an appeal preferred by the accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Kalutara.

The appellant has been indicted before the High Court of Kalutara for committing the following offences;

1. That he committed the offence of kidnapping of the minor girl mentioned in the indictment from her lawful guardian, on or about 10-12-2007 at a place called Ihaladeniya within the jurisdiction of the High Court of Kalutara, and thereby, committed an offence punishable in terms of section 354 of the Penal Code.

(2) At the same and at the same transaction, the appellant committed grave sexual abuse on the above-mentioned minor by using his penis on the vagina of the minor girl, and thereby, committed an offence punishable in terms of section 365B(2)(b) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995, 29 of 1999 and 16 of 2006.

After trial, the learned High Court Judge of Kalutara, of the judgment dated 05-10-2023 has found the appellant guilty as charged.

After having considered the mitigatory as well as aggravating circumstances, the learned High Court Judge has sentenced the appellant for a period of 5 years rigorous imprisonment in relation to count 01. He has been ordered to pay a fine of Rs. 10,000/- with a default sentence of 6 months simple imprisonment.

In relation to count 02, the appellant has been sentenced for a period of 10 years rigorous imprisonment, and in addition, he has been ordered to pay a fine of Rs. 15,000/- with a default sentence of 6 months simple imprisonment.

In addition to the above sentences, the appellant has been ordered to pay Rs. 100,000/- as compensation to the victim, namely PW-01. In default, he has been sentenced for a period of 1-year rigorous imprisonment.

The two rigorous imprisonment periods imposed has been ordered to be served concurrently to each other, which means a total period of 10 years rigorous imprisonment. However, the learned High Court Judge has ordered that the imprisonment period ordered for default of paying the fine and compensation shall be served consecutive to each other.

Facts in Brief

The victim of this incident, namely PW-01, has been a 14-year-old girl when this incident occurred, and was a 29-year-old married mother of two young children when she gave evidence for the first time before the trial Court on 10-01-2023.

By that time, she has been employed at a garment factory. She is a person who has studied up to grade 11.

She has testified that although she cannot remember the date of the offence, she can remember that it happened in the month of December in the year 2007. She has stated that she went to the police station to complain on the day of the incident itself. According to her statement to the police, it is clear that she has made her statement to the police on 14-12-2007.

It appears from the indictment that the date mentioned in the indictment as to the date of offence has been 10-12-2007.

Her evidence reveals that she had a younger sister, and her mother who was employed in a factory would typically return home late in the afternoon. It was the PW-01, who had been managing household responsibilities, while attending school.

Her father was an unemployed person who used to consume liquor every afternoon, and was the person who looked after PW-01 and her sister, while their mother was away for employment. It has been the habit of PW-01 and her sister to fetch water for their daily usage from a well situated in a rubber plantation, a little distance away from their home. Her grandmother's house has been situated about 10-15 minutes walking distance away from their house. The appellant has been a person well known to her and an acquittance of their father, who used to have liquor together.

According to the evidence of PW-01, after returning home from school, she and her sister have gone near the well to fetch some water. She has met the appellant when they were drawing water from the well, and the appellant has dragged the PW-01 towards the jungle area near the rubber plantation and has forced her on to the ground. Thereafter, he has lowered his trouser, has removed the undergarment worn by the victim, and has forcibly placed his penis between her

legs and has had intercrural sex with her. When she started shouting, the appellant has bolted from the scene.

After the incident, both of them have returned home, and when the father returned in the evening, she has narrated what happened to her. This has led the father to scold the appellant using filth. After her mother returned, the incident has been told to her, and both she and her sister have been taken to the police station, and subsequently, to the hospital, where a doctor has examined her.

It has been her evidence that when inquired by the doctor, she told him the incident faced by her.

According to the Medico Legal Report (MLR) marked X-01, she has been admitted to the hospital on 14-12-2007, and the Judicial Medical Officer (JMO) has examined her on the following day.

Under cross-examination, she has maintained the position that they went to the police station on the day of the incident, and the incident occurred after she and her sister returned home from school. She has stated that she went to school on that day and did not attend classes in Mathugama. She has insisted that since they had no money, she only attended school, and the incident happened after their return from school.

The defence has marked two contradictions in that regard as V-01 and V-02, where the victim has stated to the police that she went to Mathugama to attend classes and returned home at around 1.30 p.m. Another contradiction has been marked as V-03 where she has stated to the police that she informed the incident to her mother after she returned home from work, which was contrary to her stand when giving evidence that she informed it to her father first.

It has been pointed out that she has not stated in her police statement that she went near the well with her sister, which has been brought to the notice of the Court as an omission.

In her police statement, she has stated that she shouted calling for her grandmother when this incident happened, which she has denied while giving evidence stating that she did not call her grandmother (contradiction marked V-04). In her police statement, she has stated that her grandmother came to the place of the incident after hearing her cries, which the witness has denied, and the said contradiction has been marked as V-05. In her evidence, she has stated that she was wearing a light green coloured undergarment when this incident occurred and the undergarment produced in the Court has been the same colour, but in her statement to the police, she has stated that she was wearing a blue-coloured undergarment on that day, and the said discrepancy has been marked as V-06.

The stand taken up by the appellant had been that due to the animosity her mother and the family members had with the appellant because of her father's habit of consuming liquor with him, a concocted story of sexual abuse was made against the appellant. The PW-01 has denied that she had any animosity towards the appellant or she made up a story of this nature against him.

It needs to be noted that throughout her examination-in-chief and cross-examination, she has referred to the appellant as "ප්‍රියන්ත මාමා," which shows the close connection the victim and the appellant had during the time relevant to the incident.

The prosecution has called the sister of the victim to give evidence. However, she has been unable to shed much light to the evidence of PW-01 other than saying that she can remember was her sister had to face an incident like this, but cannot remember any details of the incident. She has admitted that she was 13 years of age at the time of the incident. She has testified that it was their father who looked after them when their mother was away for employment, and the appellant was a friend of their father who was well known to her and her elder sister. She has admitted that she made a statement to the police in relation to

the incident, but denied that the statement was made due to an animosity their mother had with the appellant.

The prosecution has also called the mother of PW-01 to give evidence where she has stated that when she returned home from her work at the garment factory after 7.30 on the night of the incident, she found her husband shouting and quarreling with the appellant. She has come to know that her mother had informed her husband about an incident, but she was unaware as to what really happened as she was away from home at that time. It has been her evidence that her daughter did not specifically say what happened to her.

She has also stated that she is unable to remember much of the details, which may be a reference to the passage of time from the date of the incident and the date she was called upon to give evidence before the trial Court.

The evidence of the JMO who examined the victim at the hospital had been to the effect that he did not observe any injuries or marks suggestive of grave sexual abuse on the child. However, he has expressed the opinion that such an abuse as narrated by the victim to him can occur without any obvious marks or injuries being present.

PW-01 has narrated the history of the incident in the same way she told the Court in giving evidence, and has informed the doctor that the incident occurred on the 10-12-2007.

The prosecution has not called police witnesses as the defence has admitted several matters relating to police investigations and had recorded them as admissions in terms of section 420 of the Code of Criminal Procedure Code.

At the conclusion of the prosecution case, the learned High Court Judge has decided to call for a defence after determining that the prosecution has established a strong *prima facie* case against him.

The appellant has only made a short statement from the dock stating that "රණ්ඩුවක් උනා. පොලිසියට කියල දූෂන නඩුවක් දැම්මා. මම දූෂනය ගැන දන්නේ නැහැ. රණ්ඩුවක් වෙච්ච එක ගැන නම් දන්නවා. එච්චරයි මට කියන්න තියෙන්නේ."

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel formulated the following grounds of appeal for the consideration of the Court.

1. The discrepancy with regard to the date of the incident has not been properly considered by the learned High Court Judge.
2. Veracity of the corroborative evidence given by the witnesses had not been properly analyzed.
3. The learned High Court Judge has failed to evaluate in the correct perspective, the omissions, the contradictions in prosecution witnesses and also the dock statement of the appellant.
4. The prosecution has failed to prove the case beyond reasonable doubt.

Consideration of the Grounds of Appeal

It was submitted by the learned Counsel that PW-01 has stated in her evidence that she and her parents went to the police station on the day of the incident. It was his submission that if that was so, since the police statement has been recorded on 14-12-2007, the date of offence should be the same, but according to the indictment, the date of offence is 10-12-2007, and hence, the prosecution has failed to prove the date of offence beyond reasonable doubt.

He submitted several discrepancies of the evidence of PW-01 as to the incident and also alleged *inter se* discrepancies in the evidence of the sister of PW-01 who is said to have been present when this incident occurred.

The learned Counsel contended that although PW-01 has stated that it was the grandmother who came to the place of the incident in her statement to the police, not calling the grandmother as a witness is a matter that should have been considered in favour of the appellant.

It was his position that there was a high possibility that due to various animosities, the mother of PW-01 had with the appellant, she may have instigated a false complaint against him in this manner. He was of the view that the evasive nature of the mother's evidence (PW-03) supports such a contention. It was his position that it was only the PW-01 who has spoken about the incident faced by her, and since her evidence was not cogent enough to be believed, it was not safe to act on her evidence alone.

It was the submission of the learned Deputy Solicitor General (DSG) that although it was only the PW-01, namely the victim of the crime, who speaks about the incidents faced by her, her evidence was cogent enough to act on that alone.

The learned DSG pointing out to the day of the incident and the time it took for the victim to come and give evidence before the High Court contended that discrepancies might occur when a witness gives evidence on an incident of this nature. It was her position that when it comes to the facts and the circumstances of the case under appeal, it is very much clear that discrepancies have occurred not due to the fact that PW-01 was not telling the truth, but due to the passage of time and also the present circumstances of PW-01.

With the submissions made by the learned Counsel as well as the learned DSG in mind, I will now proceed to consider the grounds of appeal urged together, as they are interrelated.

As I have stated before, this is an incident that occurred when the victim was a 14-year-old girl, where she has given evidence 16 years after the event. By that time, she had been a married mother of two children and expecting her 3rd child. She has also been employed in a garment factory.

It is the view of this Court that her evidence needs to be considered in that context to find out whether the PW-01 is speaking about something that did not occur due to being instigated by her mother as claimed by the appellant. I am of the view that the marked contradictions of the evidence of PW-01 also needs to

be considered in the same context. I find that none of the contradictions marked as V-01 to V-06 are contradictions in relation to what happened to her at the hands of the appellant on the day of the incident.

The contradictions marked V-01 and 02 relates to the fact whether she attended classes or went to school and returned on the day of the incident. Her position had been that she never attended private classes as her parents could not afford it and she returned home after attending school.

However, her evidence has been clear that after coming home from school, she went with her sister to the well to fetch water and this incident occurred near the well, which is a fact that has not been discredited in the evidence. Her position had been that she informed the incident to her father first, and later, the mother came to know about it after she returned home from work. The contradiction marked V-03 has been to that effect.

When taking the evidence as a whole, it is clear that the mother has been informed of the incident later as the mother has given evidence to the effect that when she came home in the night, there had been a quarrel over this at her home. This shows that it was the father who had come to know about the incident before the mother.

The contradictions marked relating to the fact whether she called for her grandmother when she was dragged by the appellant, and whether she came in response to her cry, are matters that can be attributed to the passage of time where the victim may not have exactly remembered the minute details of the incident and not because she was lying about it.

It is trite law that a witness, especially a witness of this nature, may forget the exact details of an incident because of her attempts to move away from the incident and go on with her life.

Under the context of the case under appeal, it becomes very much clear that the victim, who was a 14-year-old girl when this incident occurred, and when she

gave evidence after 16 years, was married and having children, she would have definitely forgotten most of the minute details of the incidents due to her circumstances.

It was held in the Court of Appeal Case of **D. Tikiribanda Vs. The Attorney General - decided on 06-10-2009** reported in **Bar Association Law Reports 2010 (B.L.R.) 92** that;

> *"Mostly the victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible (withdrawal symptom). The offenders should not be allowed to capitalize or take mean advantage of these natural inherent weaknesses of small children."*

At this stage, I find it appropriate to refer to the Indian case of **Bhoginbhai Hirjibhai Vs. State of Gujarat (AIR 1983-SC 753 at pp 756-758)** very often cited in our Courts. It was held:

1) *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

2) *Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

3) *Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

4) *A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-*

conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witnesses is giving truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.

When it comes to the evidence of the sister and the mother, I find the same situation. The sister, being the younger sibling, has been unable to say much detail about the incident other than saying that her sister faced an incident of this nature.

Although the victim's mother does not say that the victim told her the incident, it is very much clear from her evidence that when she came home, there had been an issue in relation to her daughter, which has resulted in making a complaint against the appellant.

The evidence of the JMO clearly shows that when giving the history, the victim has stated that the incident occurred on 10th December. The fact of informing the date offence to the doctor 5 days after the incident shows that the date of the incident has been fresh on the victim child's mind by that time.

The exact date of the offence becomes relevant only in a situation where not proving the same as stated in the indictment has caused any prejudice towards the accused person.

The importance of proving a date mentioned in a charge was sufficiently discussed in the case of **R. Vs. Dossi (1918) 13 Cr.App.R. at 158**;

> The indictment charged the accused with indecently assaulting an 11-year-old girl on 19th March 1918. The child gave sworn testimony at the trial and the trial Judge invoked the rule of practice that it would be dangerous to convict absent corroboration. The accused provided alibi evidence for 19th March 1918, but could not do so for any other day in March. The child gave no evidence of a specific date but referred to

constant acts of indecency over a considerable period of time ending at some date in March 1918.

The jury found the accused not guilty of the offence on the date alleged. The Crown then amended the indictment to read "on some day in March", whereupon, the jury found the accused guilty. The conviction was upheld on appeal,

Per Atkin, J. at page 159;

> *"From time in memorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence."*
>
> He continued at page 160;
>
> "*Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment.*"

It is clear from the above authority, as well as several other authorities that followed, that the date of the offence need not be strictly proven in order for a conviction to result, unless time is an essential element of the offence.

The mother of PW-01 has failed to explain the reasons as to the delay in making a statement to the police. However, I do not find that it in itself as a reason to doubt the evidence of PW-01, since it was cogent enough to be believed.

It is trite law that what is relevant would be not the quantity, but the quality of evidence.

Section 134 of the Evidence Ordinance which speaks about the number of witnesses in a case reads as follows,

> **134. No particular number of witnesses shall in any case be required for the proof of any fact.**

It is quite apparent from the judgment of the learned High Court Judge that she has been very much mindful of the legal principles that she should apply when evaluating the evidence placed before the Court. The learned High Court Judge has well considered the value that can be attached to the alleged contradictions and also the question of delay in making the complaint, and has correctly determined that in fact, the incident has occurred on 10-12-2007.

It was contended that the learned High Court Judge has failed to consider the dock statement in its correct perspective. However, I find that the dock statement too has been considered, given the fact that although it has some evidential value, it is subject to the fact that it was a statement made without taking an oath or having to face the test of cross-examination.

I find that as rightly determined by the learned High Court Judge, the dock statement has not created any reasonable doubt or has provided a sufficient explanation as to the evidence led in this action, which creates a reasonable doubt on the evidence.

At this juncture, I would like to take note that the entire trial has been conducted before the learned High Court Judge who finally pronounced the judgment. Therefore, it is abundantly clear that the learned High Court Judge had the benefit of listening to all the witnesses and observing the demeanor and deportment of the witnesses. It is quite apparent from the judgment that the learned High Court Judge has used that knowledge as well in her determinations.

It is well-settled law that under such circumstances, the appellate Courts will be reluctant to interfere with the determinations of facts and the circumstances made by a trial Judge, unless they are manifestly wrong.

It was held in the case of **Chaminda Vs. The Republic (2009) 1 SLR 144**, that;

> *"An Appellate Court will not lightly disturb the findings of a trial Judge who has come to a favourable finding with regard to the testimonial trustworthiness of a witness whose demeanor and deportment had been observed by a trial Judge. Findings of primary facts by a trial Judge who hears the see witnesses are not to be lightly disturbed on appeal."*

The only misdirection I can find in the judgment is the determination by the learned High Court Judge that the history given by the victim child to the JMO can be considered as corroboration of her evidence.

It is well-settled law that history given by a patient to a JMO as to an incident would not be corroboration of the incident in its strict sense, but a fact that shows that the victim has been consistent in her version of events.

In the case of **Sena Vs. The Republic of Sri Lanka (2009) 1 SLR 48**, it was held:

> *"…the evidence of a victim of a case of sexual assault cannot be corroborated by a subsequent statement made by her. The learned trial Judge was wrong when he concluded that the evidence of the victim had been corroborated by her short history given to the doctor."*

It was held in the case of **Ariyadasa Vs. The Queen (1967) 70 NLR 03 at 04,**

> **Per T.S. Fernando, J.,**
>
> > *"The corroboration that section 157 contemplates is not corroboration in the conventional sense in which the term is used in Courts of law but in a sense of consistency in conduct of a witness tending to render his testimony more acceptable."*

I am of the view that the said misdirection has not caused any prejudice towards the appellant or occasioned a failure of justice, since the consistency of the evidence of the PW-01 has been established.

The Article 138 of The Constitution is the provision under which the Court of Appeal has been granted jurisdiction to hear and determine appeals from the Courts of First Instance. The proviso of Article 138 reads as follows,

> **Provided that no judgment, decree or order of any Court shall be reversed or varied on account any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.**

I am of the view that this is a clear situation where the proviso of Article 138 of The Constitution becomes applicable, which requires no interference from this Court into the judgment of the learned High Court Judge.

For the reasons as considered above, the appeal is dismissed as I find no merit in it. The conviction and the sentence dated 05-10-2023 affirmed.

However, having considered the fact that the appellant has been in incarceration form his date of the conviction and the sentence, it is ordered that the sentence shall be deemed to have been commenced from the date of sentence, namely from 05-10-2023.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal