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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Court of Appeal Case No.
CA/HCC/0061/2023
High Court of Gampaha
Case No. HC/99/2017

Complainant

Vs.

Weweldeniya Kushan Hasantha.

Accused

AND NOW BETWEEN

Weweldeniya Kushan Hasantha.

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J

K.M.G.H. KULATUNGA, J

COUNSEL : Kamal Suneth Perera with Nadeeka K. Arachchi for the Accused-Appellant.

Jayalakshi De Silva, SSC for the Respondent.

ARGUED ON : 22.10.2024

DECIDED ON : 17.12.2024

K.M.G.H. KULATUNGA, J.

Introduction

1. The accused-appellant was convicted by the High Court Judge of Gampaha for committing grave sexual abuse of a 15-year-old girl on or about 17th of November, 2010, punishable under Section 365B (2)(b) of the Penal Code, as amended by Act No. 22 of 1995. Then the accused-appellant (who hereinafter is also referred to as the appellant) was sentenced to nine years' rigorous imprisonment with a fine of Rs. 25,000/- and a six-months default sentence, and also ordered to pay Rs. 100,000/- as compensation to the victim, with one year's default sentence. Aggrieved with the conviction and dissatisfied with the sentence the appellant has now preferred this appeal.

Facts

2. The appellant was a known neighbour of around 19 years of age and the prosecutrix was around 15 years at the time of the incident. The appellant happened to visit the victim's house, around 2:00 PM, whilst her parents were in the paddy field and her grandfather was napping. The victim and her younger sister

were in the front porch, where the appellant joined them for a chat.

3. Hearing the telephone ring inside the house, the victim had gone to answer it. The appellant has followed her in, grabbed her and forced her into a bedroom, thrown her onto a bed and closed the door. Then the appellant has covered her mouth while touching her breasts and genital area. The victim's muffled screams have alerted her grandfather who then knocked on the door, prompting the appellant to flee by jumping over the room wall (the gap between the roof and the top end of the wall – no ceiling). The victim disclosed the incident to her parents upon their return. They first visited the appellant's parents before reporting the matter to the police on the same day.

4. The Police *inter alia* recorded a statement from the victim's 70-year-old grandfather, but he passed away before the trial commenced. The evidence presented included testimony of PW-01 the victim, PW-02 her mother, PW-05 the investigating officer and PW-06 the Judicial Medical Officer, the pathologist.

5. Upon the defence being called, the appellant made a dock statement and called his mother to testify on his behalf. The appellant in his dock statement denied the allegations but admitted visiting the victim's house and chatting with her and said that the contradictions in the prosecution's evidence undermined the case against him.

Grounds of Appeal

6. The grounds of appeal pleaded are;
    1. that the learned trial judge has failed to properly evaluate the probability of the prosecution' case;
    2. that the learned trial judge has failed to evaluate the inter se and per se contradictions in the prosecution's case;

3. that the learned trial judge failed to properly evaluate the evidence;
4. that the learned trial judge erroneously believed the evidence of the investigation officer (PW-05); and
5. that the learned trial judge misdirected himself as regards to the evaluation of the defence case.

Consideration of the grounds of appeal

7. The 1st - 4th grounds of appeal relate to credibility and the evaluation of the evidence and will be considered together. At this juncture, it is relevant to note that the trial judge who finally determined this matter succeeded to his predecessor after the close of the prosecution's case. Except for the defence evidence and the cross-examination of the investigating officer PW-05, the trial judge did not have the opportunity to see the demeanour and deportment of the prosecution witnesses. Therefore, the trial judge himself was limited to the other tests, namely, probability and improbability, and consistency and inconsistency, in determining the veracity and the credibility. The trial judge has quite rightly made no reference to the demeanour and deportment but applied the other tests.

Improbability

8. It was the argument of the appellant that the trial judge has failed to apply the test of probability and improbability in its proper perspective to the evidence of PW-01 the prosecutrix. The sum total of this argument is that the trial judge failed to appreciate the improbability of the victim's story. The credibility of a witness may be impugned by employing the test of probability and improbability, consistency and inconsistency, interestedness and disinterestedness and spontaneity and belatedness (**Wickramasuriya vs. Dedoleena** and others-(1996) 2 Sri LR 954). Improbability directly affects the credibility.

9. That being so, the argument advanced is that PW-01's version of how the appellant escaped is improbable. PW-01 states that the appellant stepped on to the ironing board, scaled the wall, jumped to the sitting area, and escaped. It is submitted that the Police witness said that the height of the wall was approximately 14 ½ feet, and the Police Officer also had not observed any footprints on the wall. It is thus submitted that even if the ironing board is 3 feet tall, it is not possible for a person to scale a wall of 14 ½ feet. Even if he had done so, one would expect some injury to have been caused to the appellant if he leaped 14 ½ feet. Thus, it is the submission that the version of PW-01 is improbable and that this had escaped the attention of the trial judge.

10. The evidence of PW-05, IP Kanchana, the Police witness as to the height is as follows:

ප්‍ර : අපරාධයක් සිදුවූ වා යයි කියන කාමරයේ බිත්ති හතර පැත්තේම එක උසද තියෙන්නේ?

උ : ඔව්. අඩි 10ක් විතර උසයි බිත්ති.

ප්‍ර : ඔබ බිත්තියේ උස දල වශයෙන් ඔබ කියන්නේ?

උ : ඔව්.

ප්‍ර : ඔබ උස මනින්න ගියේ නැහැ නේද?

උ : ඔව්.

ප්‍ර : ඒ උස අඩි 12ක් හෝ 15ක් විතර වෙන්නත් පුළුවන්?

උ : 15ක් වෙන්න හැකියාවක් නැහැ. සාමාන්‍යයෙන් මම උස අඩි 05ක් විතර. මගේ උස ප්‍රමාණයට අඩි 10ක් විතර මැනිය හැකියි.

ප්‍ර : අඩි 15ක් වෙන්න බැහැ. නමුත් 14 ½ ක්, 13 ½ක්, 13ක් වෙන්න පුළුවන්?

උ : සමහර විට වෙන්න හැකියාව තිබෙනවා.

11. In her estimation, it was 10 feet. Then, the defence questions, if it could be 15 feet, which the witness clearly denies and says it could not be. Then, it is followed by the suggestive question if the height could be 13, 13 ½ or 14 ½ feet. Her answer was that *it*

sometimes may probably be. It is from this evidence that the appellant's counsel advanced the above argument of improbability based on the premise that the evidence has proved that the height is 14 ½ feet and thus it is not possible to scale that wall. In PW-05's emphatic position is that the height is 10 feet. The appellant in his dock statement does not refer to this in any form. Thus, on a consideration of the totality of the evidence there is no improbability.

12. At pages 28 and 29 of the judgement, this aspect has been considered by the trial judge. The trial judge has clearly come to a correct conclusion, considering the evidence. Therefore, this ground of improbability of PW-01's evidence is misconceived and is devoid of any merit.

Contradictions and omissions

13. It is submitted that the trial judge failed to evaluate vital contradictions in the evidence of PW-01. The argument is that the charge is about the touching the vagina of PW-01. However, in her evidence she had admitted that her vagina was touched over the clothing (panty) (Page 69 of the appeal brief). The failure to mention in the statement that the touching was **over the clothing/undergarment** was raised as an omission.

14. Then not stating in the police statement, the touching of the breasts and the failure to mention the touching of the genitalia was over the clothing, appear to be omissions in that it is not stated directly in that form in the statement. At the point of making the statement, these are additional and consequential factors as far as the main complaint of touching the genitalia is concerned. Therefore, the failure to mention the abovesaid is quite probable for the simple reason that when a young girl of 15 years is required to narrate an incident of a very personal nature, which necessarily involves reference to genitalia, unpleasant and

embarrassing descriptions of events and acts one cannot expect in the backdrop of our culture, society and social norms, to narrate every incidental act and detail freely. A victim of sexual violence will be naturally inclined to say what is necessary and only the bare minimum. This is especially so when a victim had been traumatized by such event.

15. The act of touching the female genitalia of a child aged 15 years is the offending act, as to whether the clothing was removed or not touching the female genitalia, would not make any difference to the act of 'sexual abuse' as alleged in the charge. It would certainly fall within the definition of the offence under Section 365B of the Penal Code.

16. Considering a similar issue in **Regina vs. H** (2005) 1 WLR 2005, the Court of Appeal whilst interpreting the word "touching" contained in Section 3 of the Sexual Offences Act, 2003 as in force in U.K, observed that the touching of clothing would constitute "touching" for the purpose of said Section 3. Thus, a lack of skin-to-skin contact alone does not as a matter in proving this offence.

17. If at all, the relevance is in respect of the credibility and consistency. This was a momentary act which the child was resisting. If the hand was put in or if it was over the garments is a matter of detail which in such circumstances may be difficult to recall after several years.

18. The next is the contradiction where in cross-examination, she had admitted that the incident took place in her room. However, in her statement she had stated it to be the room she, her mother, and her sister usually sleep. I see absolutely no contradiction here for the simple reason that this happens to be the room where she sleeps may be with others. However, for all purposes that room being referred to as her room is another way of describing the

same thing as said to the Police. I see no appreciable contradiction here.

19. Then it was submitted that though the victim alleges there was a scuffle, the absence of any injuries throws a doubt as to the truthfulness. Then, it was submitted that whilst PW-01 said there was no door in the front except the door frame, the Police Officer had said that the front door was open. Then, it was submitted whilst PW-01 said that the room door was locked, and the Police Officer had not noticed such a lock on the door. The learned trial judge was considered these contradictions and omissions and concluded that they were not significant and relevant as they do not go to the root of the evidence or the core of the prosecution's case. These are not significant and are of trivial nature. As regard the existence or the non-existence of the door lock, it is just that the Police Officer had not made a positive observation as to the presence of the door lock. This does not mean that there was no lock, it only means that the Police Officer had not made a conscious observation as to the existence or otherwise of the lock. Therefore, I see no merit in the above ground of appeal.

20. The 03rd ground of appeal is that the acceptance of the evidence of the PW-05, the Police Officer is erroneous, as regards the arrest of the accused. PW-05 claims that she arrested the accused at a junction along a road. However, the fact that she had not carried hand-cuffs or a weapon, bringing him back to the Police Station by bus without buying a ticket and the absence of an out entry makes her evidence suspicious and not credible. It is also submitted that there is a contradiction as to the mode of transport employed to take victim to the hospital. Considering this submission, it is apparent that there are some contradictions which does not impact upon the totality of the prosecution case. The fact that the investigation was conducted by this witness, the

victim was taken to a doctor and the arrest of the accused are common ground. This evidence does not impact upon the credibility to any appreciable degree. Finally, it was argued that the MLR tendered to Court contains a wrong date on which the doctor has admitted, and also the absence of the opinion of the doctor. These are trivial mistakes which have been explained and is of such a nature that can create no impact to the credibility or the admissibility of the medical evidence.

21. F. N. D. Jayasuriya, J., in **Wickremasuriya v. Dedoleena and Others** (1996) 2 Sri L.R. considered and evaluated the nature, effect and import of contractions and held that,

    i. *"After a considerable lapse of time, as has resulted on this application, it is customary to come across contradictions in the testimony of witnesses. This is a characteristic feature of human testimony which is full of infirmities and weaknesses especially when proceedings are held long after the events spoken to by witnesses; a judge must expect such contradictions to exist in the testimony. The issue is whether the contradiction or inconsistency goes to the root of the case or relates to the core of a party's case. If the contradiction is not of that character, the court ought to accept the evidence of witnesses whose evidence is otherwise cogent, having regard to the Test of Probability and Improbability and having regard to the demeanour and deportment manifested by witnesses.*

    ii. *The corte issue is whether the contradiction or inconsistency goes to the root of the case or relates to the core of a party's case. If the contradiction is not of that character, the court ought to accept the evidence of witnesses whose evidence is otherwise cogent, having regard to the Test of Probability and*

Improbability and having regard to the demeanour and deportment manifested by witnesses. Trivial contradictions which do not touch the core of a party's case should not be given much significance, specially when the 'probabilities factor' echoes in favour of the version narrated by an applicant. Justice Thaaker in his judgment in ***Barwada Boginbhai Hirjibhai v. the State of Gujerat****, (1983 A1R 753 at 755.) remarks: "Discrepancies which do not go to the root of the matter or to the core of a party's case and shake the basic version of the witness cannot be given too much importance. More so, when the all important probabilities factor echoes in favour of the version narrated by the witness."*

22. I regret to note that the appellant has resorted to raising extremely trivial differences and omissions to assail and challenge the evidence of PW-01. As held time and again, evidence of witnesses is susceptible to variations due to natural human frailties of loss of memory and lapse of time. In such circumstances, when such differences and omissions are insignificant and especially when the 'probabilities factor' echoes in favour of the version narrated by the witnesses as in this case the court can act on such evidence. As to the contradictions and omissions, which I have already considered, they are broadly two omissions and one contradiction. At pages 16 and 23 of the judgement, these contradictions and omissions have been sufficiently considered. To that extent, the learned trial judge has adverted his mind to the same. Accordingly, as for this ground of appeal, I see no merit and the same is thus rejected.

Failure to evaluate the defence case.

23. As for the failure to evaluate the defence case, the main argument is that the dock statement had not been properly analysed and evaluated in the proper perspective. As for the dock statement it is now settled law that a judge should in evaluating a dock consider the following principles:

    i. If the dock statement is believed it must be acted upon;
    ii. If the dock statement creates a reasonable doubt in the prosecution case the defence must succeed;
    iii. If the dock statement cannot be accepted or rejected the defence must succeed [**Queen vs. Kularatne** (71 NLR page 529)].

24. The trial judge in this case, at pages 32 – 35 of the judgement has extensively considered and evaluated the dock statement and the defence evidence. The dock statement is rejected on the basis that it is not truthful, as it is not probable and is inconsistent with previous positions suggested to the witnesses. Then the trial judge also has observed that the said dock statement and the evidence of the defence do not create any dent or doubt in the prosecution case and evidence. The finding of untruthfulness is based on the inconsistency and contradictions arising out of the dock statement and the improbability of the defence version. The improbability is that, in one breath, the appellant claims that there was a love affair between them. In the same breath it is alleged for the prosecutrix to have made a false allegation of sexual abuse by touching her genitalia. In the normal course of human conduct, if a girl was merely seen in a room with a boy and was called upon to explain her conduct, would she fabricate a narrative alleging the touching of her genitalia? I think not, and in all probability, she would deny any conduct of a sexual nature even if it had so happened. The appellant's version is that when

the grandfather came, the appellant claims to have merely walked out, and no physical contact took place between him and PW-01. If that be so, the victim had no reason to fabricate a physical act of a sexual nature to explain her conduct of being alone in the room when no one has seen anything happen.

25. It is unimaginable that a young girl in our society would concoct an untruthful story and level charges of sexual assault for the purposes of animosity or revenge, or to that matter as an excuse for being seen in solitude with her lover. The stigma that attaches to the victim of sexual offence in our society ordinarily rules out the levelling of false accusations of a sexual nature. Ours is a conservative society, and therefore, a girl, and more so a young girl, will not put her reputation at peril by alleging falsely of an act of a sexual nature. Moreover, no parent would normally take the risk of tarnishing the image of their daughter by making a false allegation of sexual nature against a person. This is the reality, and victims are more prone to conceal and suffer in silence rather than to complain and risk undue publicity and social stigma.

26. Therefore, the version of the appellant is inherently improbable. To cap it all, the existence of a love affair had not been suggested to the prosecutrix either. Therefore, the so-called love affair is more of an afterthought and a false position which the appellant has taken up at the end of the trial. In these circumstances, the trial judge's finding that the dock statement is untruthful and the decision to reject the dock statement, is, in accordance with the evidence, reasonable and correct.

The sentence

27. Now to consider if the sentence is excessive as alleged by the appellant. Sentence imposed is 9 years' rigorous imprisonment, a fine of Rs. 25,000/- and compensation in a sum of Rs. 100,000/- with default terms of six months and one year respectively. The

sentence prescribed by section 365B (2)(b) is rigorous imprisonment for a term not less than seven years and not exceeding twenty years and a fine and also compensation. The maximum penalty of twenty years that the legislature has set for this offence is a reflection of the community's abhorrence of and concern towards sexual abuse of children. Certainly, general deterrence is of great importance in offences involving acts of significant sexual abuse and exploitation against children. Moreover, the legislature has provided for increased penalties in respect of many such offences; it is to protect children from abuse and exploitation and to deter others from acting in a similar manner.

28. The appellant submits that in considering the sentence, the trial judge has presumed a probability of an act of rape taking place, which has caused some prejudice to the appellant in determining the sentence. It is correct that, at page 03 of the sentencing order, the trial judge has in fact opined that the possibility of a more serious offence being committed was averted by the arrival of the grandfather. The learned judge states that if not for the timely arrival of the grandfather, the victim may have even been raped. The trial judge had, in fact, specifically stated that he would take this matter into consideration in determining the sentence. Then, he had also referred to several judgements pertaining to sentencing in rape cases. Accordingly, it is apparent that the trial judge has been of the mindset that the appellant has attempted to rape the victim, and the determination of the sentence has to some extent been coloured and affected. In these circumstances, I am satisfied that prejudice has been caused to the appellant in determining and quantifying the substantial jail term of the sentence. Accordingly, the jail term imposed is varied to five years' rigorous imprisonment.

Conclusion.

29. For the aforementioned reasons, I hold that there is no merit in this appeal against the conviction. Accordingly affirm the conviction. However, as the sentence is excessive, the sentence of the accused-appellant is varied. The 9-year term of rigorous imprisonment imposed is altered and varied to 5 years' rigorous imprisonment. Subject to this variation made to the substantive term of imprisonment, the fine and the compensation ordered, and the default terms are affirmed.

30. Accordingly, the appeal against the conviction is dismissed, however the appeal against the sentence is partially allowed.

    The appeal is partially allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL