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

In the matter of an Appeal made in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:

CA/HCC/0152/2023

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Matara

Case No: 90/2017A

Hettiarachchi Kankanamge Dhanasiri

ACCUSED

AND NOW BETWEEN

Hettiarachchi Kankanamge Dhanasiri

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Nalinda Indatissa, P.C. with Kasun Sarathchandra, Lakshman Premasiri and Yureshika Udari Perera for the Accused-Appellant.
	: Disna Warnakula, D.S.G. for the Complainant-Respondent.
Argued on	: 03-09-2024
Written Submissions	: 16-01-2024 (By the Accused-Appellant)
Decided on	: 09-12-2024

Sampath B. Abayakoon, J.

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

The appellant was indicted before the High Court of Matara for committing the offence of kidnapping of an underage boy from his legal guardian, on or about 05-03-2008 at a place called Dampahala, within the jurisdiction of the High Court of Matara, and thereby committing an offence punishable in terms of section 354 of the Penal Code.

He was also indicted for committing the offence of grave sexual abuse on the same underage boy at the same time and at the same transaction, and thereby committing 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 1998 and 16 of 2006.

After trial, the learned High Court Judge of Matara found the appellant guilty as charged of his judgment dated 02-03-2023.

Having considered the mitigatory as well as the aggravating circumstances, has sentenced the appellant in the following manner.

> **On count 01 -** 2 years rigorous imprisonment and in addition, Rs.50,000/- fine. In default of paying the fine, 6-month imprisonment.
>
> **On count 02 -** 10 years rigorous imprisonment and in addition, Rs.100,000/- fine. In default of paying the fine, 6-month imprisonment.

In addition to the above, the appellant had been ordered to pay Rs.500,000/- as compensation to the victim, namely PW-01, and in default, it has been ordered that the said compensation should be recovered as a fine, and in default, he shall serve a sentence of 1 year imprisonment.

After the filing of the indictment before the High Court of Matara on 03-04-2017, and despite the notice being issued, the appellant has never appeared before the High Court. The sureties who stood surety for him when he was released on bail by the learned Magistrate of Matara has informed the Court that the appellant has left the country and they are unable to produce him before the Court.

This has resulted the learned High Court Judge of Matara taking steps in terms of section 241 of the Code of Criminal Procedure Act. Having satisfied that the appellant is absconding the Court, and has left the island, and therefore not possible to serve the indictment on him, the trial has commenced in his absence.

After the pronouncement of the judgment and the sentence at the conclusion of the trial, the appellant has preferred this appeal within the stipulated time provided in the Code of Criminal Procedure Act for an accused person to appeal, if dissatisfied of his conviction and the sentence.

At the hearing of this appeal, the learned President's Counsel who represented the appellant formulated the following grounds of appeal for the consideration of the Court.

The Grounds of Appeal

1. The evidence with regard to the identification of the accused had not been properly evaluated by the learned High Court Judge.
2. The contradictions *per se* in the evidence of the victim child has not been properly evaluated by the learned High Court Judge.
3. *Inter se* contradiction between the evidence of PW-01, namely, the victim child and his mother (PW-02) has not been considered.
4. *Inter se* contradictions between PW-02 and the investigating officer (PW-06) had not been considered.
5. The inadmissibility of the short history given to the doctor in the absence of PW-01 confirming that he gave a short history of the incident to the doctor had not been considered.
6. Failure to call the evidence of the father of PW-01 has not been considered by the learned High Court Judge.

Before considering the grounds of appeal urged, I find it appropriate to place on record the evidence led at the trial in brief.

The Evidence in Brief

The victim (PW-01), was an eight-year-old school-going child when he had to face this incident of grave sexual abuse. He was an 18-year-old youth when he gave evidence for the first time before the High Court of Matara, some 11 years after the incident. By that time, he had been in employment at a manufacturing factory located in Colombo.

When he gave evidence before the High Court on the 1st day of the trial, it appears that he had been reluctant to come out as to what happened to him on the date of the incident, other than saying that he gave a statement to Urubokka Police

in relation to the thing that happened to him at the hands of the person living near his house. He has also stated that he left his house to go to his grandmother's house, situated about 300 meters away, to bring some rice as directed by his mother. It had been his position that on his return, he had to face this harassment, and had stated that he met the person called Damith. He has also identified the appellant as Dhanasiri, who also lives near his house, and has stated that although he faced an incident, he cannot remember much detail about it.

This has resulted in the postponement of the case for another date. On the next date, the witness has come out describing the incident faced by him in much detail. He has stated that he and his mother went to the police on the day of the incident itself, and if the police record says that his statements were to the effect that the incident happened on 05-03-2008, he admits it.

He has stated that when he was returning home from his grandmother's house, he met the person to whom he referred to as Damith on the road, and he escorted him to an abandoned house nearby, where he saw Dhanasiri inside the house. After he was taken inside the house, the person called Damith has laid him down on a mat, which was on the ground, and had engaged in intercrural sex with him.

After this act, the appellant had also engaged in intercrural sex in the similar manner with the victim child. After they committed the act on him, they have let him go, and the person called Damith had informed him not to mention this to anyone. However, after reaching his home, he has informed the incident faced by him to his mother, and the mother has taken immediate steps to take him to the police station to lodge a complaint in this regard. He has stated that he did not know the appellant or had no any special relationship with him until he met him at the abandoned house, and therefore, had no animosity or ill will towards him.

Explaining the reasons as to why he did not or could not describe the incident faced by him when he gave evidence on the previous day, he has stated the following.

> ප්‍ර: නෙලුම් ඔබ ගිය පාර ගරු අධිකරණයේ සාක්ෂි ලබා දෙන විට අවසාන කොටසේදී සාක්ෂි ලබා දීමක් කලේ නැහැ..
>
> උ: ඔව්.
>
> ප්‍ර: එයට හේතුව මොකක්ද?
>
> උ: ඇත්තටම මම එදා සුදනම් වෙලා සිටියේ නැහැ සාක්ෂි ලබාදෙන්න. එදා ඇත්තටම මට අමතක වෙලා හිටියේ. ඊටපස්සේ මම යද්දී අම්මත් එක්ක කතා කලා. ඊටපසු කිව්වා මේ විස්තරය කිව්වා. මේක ජීවිතයට අමිහිරි මතකයක්. ඒ නිසා මම මේක කා එක්කවත් කතා කරන්න කැමති නැහැ ස්වාමීනි. අමතක කරලා තියෙන්නේ ස්වාමීනි.
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> ප්‍ර: නෙලුම් ඔබ ගරු අධිකරණයට සාක්ෂි ලබා දීම සිදු කලේ ඔබට සිදු වෙච්ච ඇත්ත සිදුවීම ද එහෙම නැත්තනම් ඔබට මව හරි වෙන කව්රු හරි කිව්ව කතාවක් ද?
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> උ: සත්‍ය සිදුවීම ස්වාමීනි.

The cross-examination of the victim reveals the fact that when this incident occurred, the victim was unaware of the name of the appellant as Dhanasiri, but knew him as the person who was driving a van and lived in a neighbouring house known as Kongala Gedara. It is clear that the victim has described the appellant in that manner when informing the incident to his mother. It was his mother who had informed him that the said person's name was Dhanasiri.

It needs to be mentioned that while under cross-examination, the victim had fainted in the witness box, which has resulted in the adjournment of the trial for several minutes.

It has been suggested to him that his evidence, where he says that he and his mother went to the police station on the same day was false and the complaint was in fact made on the following day morning, namely 06-03-2008. He has also stated that he cannot remember whether he has stated in the police statement

that the person mentioned Damith has done the same thing to him previously, whereas his evidence to the Court had been to the effect that this was the first incident faced by him.

According to the evidence of the mother (PW-06) of the victim child, her son has gotten late to come home on 05-03-2008 after going to his grandmother's house to get some rice as directed by her.

This has resulted her telling her daughter to go and look for the younger brother. Her daughter has returned home saying that the younger brother has left the grandmother's house and that he was not there. About 10 minutes thereafter, the victim child has returned home, and when questioned, he has revealed to her that two persons held him, identifying them as "ඉස්කෝලෙට පහල කෝන්ගල ගෙදර වැන් එක තියෙන අය්යා" and "අත්ත්ලයි ගෙදරට පහල ගෙදර අය්යයි," which has resulted her in identifying them as Dhanasiri meaning the appellant, and Damith respectively. Both of them had been well known to her over a period of time. Her evidence shows that she has not gone into probing the matter further, but has taken the child to the police station to lodge a complaint. It appears that the mother has realized what may have happened to her son when the incident was mentioned to her by him.

When she went to lodge a complaint, it has been informed to her that the officers attached to the Children's and Women's Bureau are not at the station and to come back on the next day, which explains the reason as to why the complaint has been recorded in the following day morning. It has been her evidence that she came to know of the details of what happened to her son only after listening to what he told the police officers when the police recorded his statement in that regard. She has given further evidence stating that although she came to know about the incident, she cannot come out with intricate details of it due to her shyness to explain it in open Court. She has stated further that when they went to the police station on 5th March, it was around 6.30 in the evening.

Although the witness has spoken about making the complaint to Morawaka Police, in fact, it is clear that the complaint had been to the Urubokka Police.

At the trial, PW-04, the sister of the victim has given evidence confirming that she went looking for her brother, as he was late to come home.

PW-05, the Medical Officer who examined the victim child after his admission to the Urubokka Government Hospital has given evidence confirming that he examined the child on 06-03-2008. He has recorded the history given by the child as to the incident and has not found any visible injuries on the child. However, he has expressed the opinion that an incident of sexual abuse as stated by the victim may occur without any obvious marks of sexual abuse being present.

The fact that PW-07 was the police officer who recorded the statements of PW-01 and 02 and the contradictions and omissions contained therein has been an admitted fact in terms of section 420 of the Code of Criminal Procedure Act.

The police officer who investigated the incident has stated in his evidence that after receiving the complaint in this regard on 06-03-2008, he went and inspected the place of the incident and found that it was an abandoned house. He has found a mat inside a room. Later, he has taken steps to arrest the appellant as well as the other person as suspects of the incident. He has also taken steps to admit the child to the hospital and has also given instructions to his subordinate officers to record the statement of the appellant.

At the conclusion of the prosecution case, the learned High Court Judge has decided that there is *prima facie* evidence to call a defence from the appellant. Since the appellant was absconding, the case has been closed without any defence evidence being called.

Consideration of the Grounds of Appeal

At the hearing of the appeal, the learned President's Counsel strenuously contended that the evidence given by the victim child was to the effect that he did not know the appellant and he was a stranger to him when this incident occurred.

It was his position that the victim child has come to know about the names and the identity of the appellant as well the other person because of his mother revealing their names to him, and also after they were arrested on suspicion.

It was his position that such evidence does not establish the identity of the appellant beyond reasonable doubt before the Court.

It was the contention of the learned President's Counsel that the evidence of PW-01 was not credible and *per se* contradictory. It was pointed out that the evidence of the victim child when he gave evidence before the trial Court had been to the effect that he met the other person called Damith near the road, and the appellant when he entered the abandoned house. However, his statement to the police had been that he met both of them on the road.

It was his position that the victim child has given evidence as to the alleged perpetrators only at the instigation or under the influence of his mother, and not by clearly identifying who committed the crime on him. The learned President's Counsel submitted that what he termed as an *inter se* contradiction between the evidence of the mother of the victim and that of the police officer who conducted investigations as to how the arrests were made are very much contradictory to each other.

It was his position that the mother being an interested witness and her evidence being not rational, such evidence should not have been relied on by the learned trial Judge. It was contended further that relying on the history given by the victim in the judgment was also wrong since it was not consistent with the version of events as narrated by PW-01.

It was the submission of the learned Deputy Solicitor General (DSG) that the evidence of the prosecution witnesses when taken cumulatively, clearly establishes the fact that although the victim may not have known the names of the assailants, he knew them previously.

It was pointed out that it was the very reason why he has described the two persons who caused grave sexual abuse on him in the manner described by the mother of the victim in her evidence. It was the contention of the learned DSG that the mother has not coached the PW-01 at any stage of the trial in a manner which creates any doubt as to the genuineness of the PW-01's evidence. It was submitted that due to his age and his eagerness to forget the incident, he might have been a reluctant witness, but not a witness who was uttering an untruth.

It was also stated that the mother's version of events and that of the police as to the manner in which the suspects were arrested, has not created any material doubt.

The learned DSG urged the Court to dismiss the appeal on the basis that the grounds of appeal urged lacks any merit. It was further submitted that the learned High Court Judge has considered the evidence in the correct perspective in reaching his judgment, which needs no interference from this Court.

Since all the grounds of appeal urged are interrelated, I will now proceed to consider the said grounds of appeal together.

The main argument taken in this appeal was to the effect that the prosecution has failed to establish the identity of the appellant.

It appears that this argument has been formulated based on what PW-01 said in his evidence as to the manner he came to know the names of the appellant as well as the other person who committed grave sexual abuse on him. In his evidence in chief, he has stated that he met the person named Damith first, and when he was escorted to the house where this incident took place, he met the appellant Dhanasiri.

However, it is clear from his evidence when taken as a whole, at the time of this incident, he has not known the names of the appellant and the other person. However, it is also clear that the victim knew the appellant and the other person well since they were persons who lived in the neighbourhood.

The subsequent evidence of PW-01, where he says that he did not know the appellant, has to be considered in that context and not in a manner to argue that the evidence of PW-01 had been to the effect that the appellant and the other person were strangers to him. His evidence and that of his mother clearly shows that he has known the appellant as a person living in the neighbouring house known as the Kongala Gedara and who is driving a van. When the victim has described the person who committed the crime to him in such a manner, being a person who lived in the village throughout her life, she has had no difficulty in identifying the person as Dhanasiri, who is the appellant.

In the similar manner, when the victim child said to the mother that the other person who took him away was the "Ayya" who lives in the house situated below his grandfather's, the mother has identified the other person as Damith. It is that knowledge gained by the victim through his mother, which has led him to identify the appellant and other person by their names as the ones who committed the crime on him.

I am of the view that this has not created any doubt as to the identity of the appellant as portrayed by the learned President's Counsel in his submissions before this Court.

I am in no position to agree that the learned High Court Judge has failed to consider the question of identity in the correct perspective in his judgment.

I find that the learned High Court Judge has well analyzed the evidence with regard to the fact whether the PW-01 knew the appellant before the incident and whether he has told the truth about it to the Court. Only after coming to a firm finding as to the identity of the appellant, the learned High Court Judge has proceeded to consider the evidence as to the offence of grave sexual abuse, which

I find to be the proper approach that should be adopted by a trial Judge when the question of identity becomes relevant.

It is quite obvious that the victim, who was 8 years of age at the time of the incident and had given evidence 11 years thereafter as an 18-year-old youth, has forgotten most of the minor details of the incident. It is also clear that he has been attempting to forget the unpleasant incident faced by him for obvious reasons and was reluctant to come out with it in open Court, which amounts to revisiting an incident of such a nature.

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.*

I am of the view that whatever the contradictions or omissions *inter se* or *per se* have to be considered in the above context, and the said contradictions or omissions should go into the core of the matter where it creates a reasonable doubt as to the trustworthiness of evidence.

When it comes to the alleged *inter se* contradictions of the evidence of PW-01 and his statement to the police, the witness stating that he met Damith near the road and the appellant was inside the house in giving evidence whereas he has told the police that he met both of them near the abandoned house, are not things that go into the root of the matter. Similarly, where the appellant was when the other person committed the grave sexual act on the victim child is also not a thing that dent the credibility of the victim's evidence. In his police statement, the victim child has told the police that on a previous occasion too, the person called Damith committed the same sexual abuse on him, and in giving evidence, he has stated that he cannot exactly remember that fact.

As I have considered before, it is abundantly clear that the victim child being a youth of 18 years of age when he gave evidence has forgotten most of the minute details of the incident as a result of him attempting to forget the bad experience

he faced. That is the very reason why he has given answers stating that he cannot remember certain things, and if he has stated things in the police statement, what he said was correct. That does not mean that he was lying before the Court or attempting to narrate a previously concocted story before the Court.

I do not find a basis to believe that it was the mother of PW-01 who instigated this type of an allegation against the appellant and PW-01 has given evidence at the insistence of his mother.

There is nothing in the evidence before the trial Court that PW-01's family or his mother in particular had any animosity towards the appellant. They had been neighbours in their village and had no reason to make a false allegation against him. The mother's evidence clearly shows that when she was told that the appellant and another person held her son and took him to an abandoned house, the mother being an adult had the ability to suspect what may have happened. Her evidence shows that she had been overwhelmed by emotions and had promptly taken the child to the police station to lodge a complaint. Although the complaint has been recorded on the following day, the evidence establishes that they have gone to the police on the evening of 05-03-2008, soon after the mother was informed of the incident, but it was the police who had failed to take steps to record a statement promptly. This cannot be attributed as a delay in lodging a complaint under any circumstance.

Although the mother's version as to the manner in which the appellant was arrested and the police investigator's evidence in that regard differs somewhat, I find that it is not a matter that creates a doubt as to the incident *per se*, and a matter which should not be held against the evidence of the victim child and his mother in that regard.

I find no basis in the contention that the victim child not telling in his evidence before the Court that he told the doctor who examined him the history regarding the incident as a reason to disregard the evidence as to the history given by the doctor who examined the child when he was admitted to the hospital.

It is clear that a child of this age would not understand the procedures adopted by a Judicial Medical Officer when examining a child. Even if asked whether he gave the history of the incident to the doctor, he may not remember it some 11 years after the incident. In my view, what is relevant would be the evidence of the doctor who examined the child. The doctor marking the Medico-Legal Report (MLR) as X-01 has stated very clearly that he recorded the history as stated to him by the victim child.

A history of an incident narrated to a doctor does not provide corroboration in its strict sense as to the evidence of a victim, but it provides for the consistency as to the evidence in relation to an incident.

In the case of **Ariyadasa Vs. The Queen (1967) 70 NLR 03 at 04,** it was observed by **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."*

It is very much clear that the child has been examined by the doctor a day following the incident without any delay. This shows that the incident was very much fresh in the mind of the victim child. I am of the view that the consistency in the statement to the doctor in relation to the evidence placed before the Court is a matter that should be held in favors of the prosecution when determining a case of this nature.

The learned President's Counsel formulated a ground of appeal on the basis that the prosecution has failed to call the father of the victim child and it has created a doubt in relation to the prosecution evidence. The evidence led before the trial Court does not provide a basis to conclude that the father of the victim child as a material witness for the prosecution.

It is well settled law that what is material is not the number of the witnesses called, but the quality of the witnesses, which proves a case beyond a reasonable doubt.

Section 134 of the Evidence Ordinance, which refers to number of witnesses, reads as follows,

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

For the above reasons as considered, I am of the view that the prosecution has proved its case beyond reasonable doubt against the appellant. Hence, I find no reason to interfere with the conviction and the sentence of the appellant by the learned High Court Judge of Matara.

Accordingly, the appeal is dismissed for want of merit. The conviction and the sentence dated 02-03-2023 affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal