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

In the matter of an Application under and in terms of Section 358 of the Code of Criminal Procedure Act read with Article 145 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Ranthilake Mudiyanselage Jayaratne

Bandara

Deceased Accused-Appellant

Court of Appeal No:

CA/HCC/295/19

High Court of Anuradhapura

HC/129/12

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12

Respondent

AND NOW BETWEEN

Kapuwatte Dissanayake Mudiyansalage

Chandra Kumari

No. 65C, Sorabora, Wamura,

Mahiyanganaya

Petitioner – Appellant

On behalf of

Ranthilake Mudiyanselage Jayaratne

Bandara

Deceased Accused-Appellant

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent

Before : Menaka Wijesundera J.

K.M.G.H Kulatunga J.

Counsel : Hafeel Farisz with Sanjeewa Kodithuwakku and

Shannon Tillekaratne for the Appellant.

Anoopa De Silva, DSG for the State.

Argued on : 09.10.2024

Decided on : 25.11.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgement dated 09.10.2019 of the High Court of Anuradhapura.

The deceased accused-appellant had been indicted under section 354 and two counts under section 365 of the Penal Code.

Upon the conclusion of the case, the learned High Court judge had found the appellant guilty of all three charges. At the very outset, the learned counsel appearing for the respondents stated that she is conceding the fact that the sentence and the conviction on the first count cannot be sustained and should be set aside.

Hence, both parties made submissions with regard to the conviction and the sentence on the counts of grave sexual abuse.

Before venturing into the merits of the appeal, I intend to deal with the legal provisions which had been used in filing the amended petition of appeal by the wife of the appellant after his demise, as his next of kin.

The accused-appellant had died after obtaining bail pending appeal and section 358 (1) of the Code of Criminal Procedure Act No. 15 of 1979 (CCP) reads as follows,

> "Every appeal and application for leave to appeal to the Court of Appeal under this Code shall abate on the death of the accused:
>
> Provided that where the appeal or application is against a conviction, a person aggrieved with the leave of the court hearing the appeal intervene and prosecute the appeal or application only in so far as the finding of guilt is concerned. "

Hence, as per the above section, when the appellant passes away, proceedings of the appeal filed by him abate but a person aggrieved "can continue with the proceedings with leave of court".

According to section 358 (2) of the CCP;

> "The expression 'person aggrieved' shall have the same meaning as the same section of the Judicature Act."

Section 16 of The Judicature Act Number 1978 as amended reads as follows;

" (1) A person aggrieved by a judgement, order or sentence of the High Court in criminal cases may appeal to the Court of Appeal with the leave of such court obtained in all cases in which the Attorney- General has a right of appeal under this chapter.

(2) In this section 'a person aggrieved' shall mean any person whose person or property has been the subject of the alleged offence in respect of which the Attorney-General might have appealed under this chapter and shall, **if such person be dead, include his next of kin namely his surviving spouse, children, parents or further descendants or brothers or sisters**.

(3) Nothing in this section shall in any way affect the power of the Court of Appeal to act by way of revision in an appropriate case. "

Hence, the legislature has clearly set out that the next of kin of a deceased person, such as the surviving spouse children, parents or further descendants or brothers or sisters would qualify as an aggrieved party in the event of abatement.

The counsel for the diseased appellant has relied on the case of ***OIC Gampala Police vs Sitti Nazeema*** **(1988) 2 CALR 138** in which the above mentioned principle has been upheld.

The counsel of the petitioner has further prayed that this court may exercise the powers vested under Article 145 of the Constitution, following the dicta in the above mentioned case. The same principles laid down in the case cited by the counsel for the deceased appellant, this court also has discussed the same principles in ***CA/PHC/147/17*** decided on 30th August 2022 by Justice Iddhawella.

As such, the merits in the instant application are hereby considered under article 145 of the constitution, which will only decide on the conviction and not the sentence.

The grounds of review raised by the Counsel for the petitioner were as below,

1) The prosecution story being improbable and the learned High Court Judge being naïve to the said situation,
2) Section 114 (f) of the evidence ordinance being misapplied,

3) Ingredients of charges relating to grave sexual abuse not being proved adequately by the prosecution.

The victim, who had been 21 years of age at the time of giving evidence, had said that on the day of the incident he had gone to a nearby house to learn how to ride a motor-cycle. This house had belonged to a police officer. Two other persons also had come and the three of them had started to have alcohol inside the house (page 80 of the brief). Out of the three persons, the accused had come out and had asked the victim whether he could ride bicycles. Thereafter, the accused had taken the victim on a motorcycle with the victim seated in the front. Both of them had been holding the handle of the motorcycle when the accused is supposed to have rolled up the shorts worn by the victim and had started to touch his genital area (pages 83 and 84 of the brief). The victim says that he had protested but still the accused had continued to do so (page 151 of the brief).

The main contention of the counsel for the petitioner was that the improbability of the instant incident had not crossed the mind of the learned High Court judge.

Thereafter, the victim had been taken to a lonely house near the house of "Kiri amma" and the accused is alleged to have committed anal intercourse on the victim (pages 145, 147 and165 of the brief). While the act was going on "kiri-amma", who is related to the victim, had barged into the house (page 152 of the brief) at which point the accused is supposed to have taken the child on the motorcycle and dropped him off near a boutique in the vicinity of the victim's house (page 171 of the brief).

Once again, the Counsel for the petitioner reiterated that this is highly improbable because for one reason "Kiri amma" had not been called as a witness because she had died and the fact that children in narrating instances of this nature could be surmising and conjecture and at this point, he quoted

Sakar - Law of Evidence – 20th Edition – Volume 02 – page 2808 where it has been said that

> "When a minor child witness is giving evidence… the court has to examine evidence of such child with utmost caution… . In the case of such evidence court has to search for reliable corroborative evidence either orally or documentary as a matter of prudence after being satisfied that evidence of such child witness is itself free from infirmity and is sterling sound, in rape cases it is utmost necessary. [***Gujraasing v State of MP, 2001 (1) MP LJ 202 (MP)***] In [***State of Gujarat v Bachmiya Musamiya, 1993 (3) Guj LR 2456 (Guj)***, observed:
>
> There is no rule of law that the uncorroborated testimony of a child witness and/ or a victim of sexual offence cannot be relied on without corroboration. It may be true that the evidence of a child of tender age may be examined, with more and extra-caution or full circumspection. If the evidence of the victim of the sexual offence who is of tender age, if found creditworthy and reliable, can be accepted without any corroboration… it is extremely difficult to formulate the kind of evidence which should or would be regarded as corroboration because its nature and extent may necessarily vary with the circumstances of the given case and also according to the particular circumstances of the culpability charged. (Principles stated)
>
> The corroboration for the evidence of a child witness must come from an independent source and it may be direct or circumstantial [***Mobeni Mingim v Union Territory of Arunachal Pradesh, 1982 Cr LJ NOC 39 (Gau)***]. There is no bar accepting the uncorroborated testimony of a child witness, yet prudence requires that courts should not act on the uncorroborated testimony of a child witness [***Munna State, 1985 Cr LJ 1925, 1925: (1985) 2 Crimes 107 (All)***]."

Being mindful of the above mentioned legal principles, on considering the cross-examination of the witness, the victim had answered quite satisfactorily and had in fact given very practical answers, for example at page 150 he had been asked as to why he did not attempt to run when he was being taken into the lonely house. He had answered that he did not anticipate what was to follow. It had been suggested to him that he was lying but having gone through the evidence of the victim there is no reason to believe that the victim was lying having considered the descriptive way in which he had given evidence (pages 85-89, 91-95, 125, 126 and 139of the brief).

The counsel for the petitioner submitted to court that the testimony of the child witness had not been corroborated by any other witness. This was made especially in view of "Kiri amma" not being called as a witness because she had already passed away.

But the counsel for the petitioner failed to refer to the evidence of PW-02 to whose house the victim had gone on the fateful day and had been playing when the accused had taken him on the bicycle (pages 176, 178 and 182 of the brief). Hence, the victim being taken away by the accused had been corroborated by this witness (pages 182-184 and 188 of the brief). He says very clearly that the victim was away with the accused for about half an hour (page 182 of the brief).

Thereafter, the prosecution had led the evidence of investigating officers, who had stated to court that the lonely house referred to by the victim had been a mud thatched house in an isolated place (pages 202 and 203 of the brief).

According to the evidence of the doctor, the victim had been 12 years of age at the time of examination and he had been admitted on the very next day of the offence and examined on the 24th. The child had given a short history to the doctor in which he had alleged anal intercourse but

not what had happened while riding the bicycle. At page 215 of the brief, the doctor had observed an abrasion on the chest of the victim and upon questioning, the victim had said that the accused had caused it (saliently at pages 225-228 of the brief).

The doctor had further said that there were no injuries around the anus and he says even after anal penetration if there had been slight injuries it could cure within a day (page 217 and 218 of the brief). Therefore, he said that he cannot rule out the history given by the victim.

It had to be noted at this stage that the victim also had spoken of an injury during examination-in-chief. The doctor had been very lengthily cross-examined and it had been suggested to him that he had written down the history he wanted to write, which he had denied completely (pages 222-229 of the brief).

The doctor in cross-examination had stated further, that the abrasion (page 215 of the brief) on the chest had been caused by finger nails, which the child had explained to the doctor as which had occurred when the anal intercourse was taking place ("finger abrasion" at pages 216 and 224 of the brief).

Therefore, the evidence of the doctor also had corroborated the child victim. Hence, the submission of the counsel for the petitioner stating that the evidence of the child victim is uncorroborated cannot be accepted.

The accused had been taken into custody on 31st of December, 2006 by the Kappethigollawa police station.

Thereafter, the prosecution had closed its case and the defence had been called.

The accused had made a statement from the dock according to which he had admitted of going to the house of PW2 and the whole sequence of events where he had taken the victim to buy cigars and thereafter, he had said that he dropped off the child and went back to duty.

But the next day he had been contacted by PW2, who had told him of the alleged incident and said that if Rs. 100,000 was given they can settle the matter and because he refused to do so the instant allegation has been made.

But it has to be noted that the prosecution witnesses, the victim and PW2 when giving evidence in the trial court they had not been cross-examined with this position of the accused. The line of cross-examination had been to the effect that the witnesses were lying.

Hence the position taken up by the accused in the dock statement had not been put to the witnesses in the prosecution, thereby making it a defence based on an afterthought.

The counsel for the petitioner alleged that the trial judge had failed to consider the improbable story of the prosecution, which this court has already held that there is no reason to believe that the victim was lying.

Thereafter, the counsel for the petitioner alleged that it is not safe to act on the uncorroborated testimony of a child witness.

But this too we have found to be without merit because the victim had been corroborated by PW2 and the doctor. Hence, that ground raised by the counsel also fails.

The next ground of appeal raised by the counsel is that the learned trial judge had failed to observe that the prosecution had not proved the ingredients of the offence based on the medical and police evidence (further at pages 197, 198 and 202 of the brief).

At this point it has to be noted that the doctor had recorded a history given by the victim to the doctor in which he had alleged the anal intercourse and had spoken of an injury and the doctor had observed one on the chest which he had said had been due to some finger mark, which the victim had explained to be of the accused, when he had been holding him tight.

The police could not have observed any sign of a struggle because the floor of the house had been mud thatched. Therefore, that ground also fails.

As such, it is the opinion of this Court that the grounds of review raised by the counsel for the petitioner is devoid of any merit and the trial judge had considered and had been mindful of the all the legal principles raised by the Counsel for the petitioner and the facts pertaining to the case. As such, it is opinion of this court that there is no exceptional ground or other lawful basis to act in review as urged by the counsel for the petitioner.

As such, the conviction and sentence with regard to charges number two and three of the accused is hereby affirmed and the conviction and sentence with regard to charge number one is hereby set aside.

Judge of the Court of Appeal

Hon. K.M.G.H Kulatunga

I agree.

Judge of the Court of Appeal