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

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

Court of Appeal No:
CA/HCC/103/22

Warusappulige Wasantha Sarath Kumara

Accused – Appellant

High Court of Ratnapura
Case No: HC/14/2015

Vs.

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

Respondent

Before : Menaka Wijesundera J.
K.M.G.H Kulatunga J.

Counsel : Shavindra Fernando PC with
R. Fernando for the Accused-Appellant
Dishna Warnakula, D.S.G for the Respondent.

Argued on : 29.10.2024
Decided on : 03.12.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgement dated 25th of February 2022.

The accused appellant (hereinafter referred to as the appellant) has been indicted under sections 354 and 364(3) of the Penal Code committed during the period of 01/01/2011–31/12/2011

The appellant has pleaded not guilty and the prosecution has led the evidence of the victim, the mother of the victim, the police officers and the doctor. The accused when called upon to place his defense has made a statement from the dock. Upon the conclusion of the defence and the prosecution cases, the learned trial judge has convicted and sentenced the accused for both the charges in the indictment. Being aggrieved by the said conviction and sentence the instant appeal has been lodged.

The grounds of appeal raised by the counsel for the appellant are as follows

1. The prosecution has not proved beyond reasonable doubt the period of the offence referred to in the indictment from the evidence of the victim
2. The doctor's evidence is contradictory to the evidence of the victim

The victim has given evidence in court in 2018 and she had been 19 years of age. Her birth certificate had been marked by the prosecution and the date of birth in the said document had been recorded as 24th October 1998. The doctor in the Medico Legal Report had said that on the 14th of August 2013 her age had been recorded as 14 years therefore on the details in the medico legal report and the birth certificate during of the period stated in the indictment the victim has to be 12 years of age and not 13.

The evidence of the victim says that the appellant is an uncle and when she was 12 or 13 years of age, she had been raped by him but she had not told anyone because he had threatened her (pages 77, 86 of the brief) and the victim is unable to speak of a date, year or month. Moreover, she states that she was bleeding after the incident with the appellant (page 83), and that when she showed her mother the mother had not responded. She had complained to the police on the 11th of August 2013. Essentially, the victim had been cross examined extensively and in her cross examination she says that apart from the instance when she had been raped by the uncle, she has had sexual intercourse with a person called Arosh in 2013 and that this incident led her to go the police on 11th of August 2013 to lodge a complaint.

She has said that she consented to have sexual intercourse with Arosh because she wanted money to buy the season ticket to go in the bus to go to school,

further providing that when she had gone to pluck tea leaves, that Arosh had been driving the lorry which has been collecting the tea leaves daily.

On her return from her interlude with Arosh she had been reprimanded by her brother and had been forced to divulge the incident.

The learned President's Counsel for the appellant submitted that her evidence is not corroborated by the mother, the doctor or the brother. The brother had not been called as a witness. Furthermore, it is submitted that the doctor is contradicting her because the doctor had stated upon examining her virginal area; that she shows signs of a person who has had repeated instances of sexual intercourse.

It has been held in the case of ***Thimbirigolle Sirirathana Thero v OIC Police Station, Rasanayakepura, bearing No. 194/2015***,

"When a child is sexually assaulted by an adult, it is also natural for the victim's family to think twice before making a complaint to the police. There can be adverse effects on the child when this kind of offence is exposed."

As such in the instant case also the victim is living in a rural poverty stricken society where it is looked down upon on cases of sexual offences, which imposes a constraint on the victim of such matters to be silent of such abuse.

Therefore, the doctor's statement with regard to the victim's possible sexual experiences cannot be considered as a contradiction.

As such, I am unable to conclude that the doctor contradicted the victim on his medical observations.

The next witness had been the mother of the victim who had said that she had got to know about the uncle's incident at the police station.

The doctor, who has examined her, also had given evidence and he had said that the victim had been 14 years and 9 months on the date of examination which had been the 14th of August 2013.

The case history given by the victim to the doctor had been that she has had sexual intercourse in 2013 with Arosh and when she had been in the age of 12/13 the appellant had raped her.

The doctor had in addition said on examination of the victim, that he had found her to be a person who has had repeated instances of sexual intercourse. This observation of the doctor; the learned President's Counsel for the appellant had challenged and had submitted to court that it contradicts with

the victim's position in evidence but this I have explained above and have rejected the same.

The police had received the first information on 11th of August 2013 when the victim had gone to complain about her relationship with Arosh, which means that it is two years after the period mentioned in the indictment. Therefore, it can be concluded that it is a belated complaint. It has been held many times in our legal literature that a belated complaint can be accepted if the delay has been adequately explained. This has been discussed in the case of the famous ***Kobeygane murder case 2004 1 SLR 209*** by his Lordship Justice Jayasuriya Where it is said that;

> *"Just because the statement of a witness is belated the court is not entitled to reject the same… if the reasons for the delay adduced by the witnesses are justifiable and probable the trial judge is entitled to act on that evidence."*

His lordship justice Jayasuriya has considered the words of His Lordship Justice TS Fernando in the case of ***Paulin De Crooze vs Queen 71 NLR 169,*** which also has held the same sentiments as quoted above.

In the instant matter, the explanation given by the witness for the delay is the threat she had been subjected to by the appellant (at page 83 of the brief) which I think is quite acceptable.

Thereafter, the prosecution case has been closed and the defence has been called and he has made a dock statement denying the entire incident.

The main disputed fact in the instant matter is that the prosecution has not established beyond a reasonable doubt the period of offence referred to in the indictment.

This I have explained above by referring to the birth certificate, the medico legal reports which justifies the evidence of the victim that the incident took place when the victim was at the age of 12/13 during the period referred to in the indictment.

But it has to be stated that the victim has not specifically stated numerically the date, month or the year during which the incident had occurred.

At this point I wish to quote **The Law of Evidence Volume 2 Book 2 Page 488 by ERSR Coomaraswamy** where it has been said

> *" Young children are dangerous witnesses. Any mistakes or discrepancies in their statements are ascribed to innocence or failure to understand, and*

undue weight is often given to what is merely a well taught lesson. Children have good memories but no conscience… The real tests of their evidence are how consistent their story is with itself, how it stands the test of cross examination and how far it fits with the rest of the evidence and the circumstances of the case."

Therefore, in the said chapter the local, the Indian and the English law has been considered pertaining to the evidence of a child and it has been decided that it is better for a child's evidence to be corroborated but as stated above, the real test of their evidence is how consistent they had been in their story, how they face the cross examination and how far it fits with the rest of the evidence and the circumstances of the case.

In the instant matter the victim not being able to state a date, month or the year of the incident, has not caused any prejudice to the accused because even to the doctor in the history she had said she had sexual intercourse with Arosh in 2013 and her act of rape by the uncle had been when she was at the age of 12. She has made this statement in 2013 and the doctor had concluded her to be 14 years of age during this time.

Therefore, the victim although does not refer to the period referred to in the indictment, she has explained the incident right throughout trial very consistently and the probable time period that the incident had taken place.

At this stage I wish to quote the case of ***R v Dossi, 13 Cr. App. R. 158***

"In Dossi (Supra) it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment."

The above mentioned principle has been considered in the case of ***Court of Appeal Case No. CA/HCC/0431/2019*** decided on 02.12.2022 by his Lordship justice Priyantha Fernando where it has been held that

"Child victims in sexual crimes of this nature are often reluctant to inform their parents or guardians about the abuse immediately unless they are compelled to do so. Most importantly one can expect a child of tender age to keep a record of the exact date on which he/she was abused or raped, unless there is some special significance on the date in which the abuse took place."

Therefore, I conclude that the first ground of appeal does not carry any merit.

The second ground of appeal is that the doctor had contradicted the victim which I have dealt above and this too I do not see any merit which warrants a variation of the final conclusion of the trial judge.

The other disputed points of the counsel for the accused appellant had been that the statement being belated and the mother not corroborating the victim. These two disputed points also I have dealt above and have concluded that it has no merit.

The learned trial judge in his judgement has referred to the grounds of appeal and he has also considered the contradictions marked by the defence from V1 to V17 and has rejected the dock statement of the appellant on the basis that it has not created a reasonable doubt in the evidence of the victim.

As such, considering the above mentioned material it is the opinion of this court that the grounds of appeal raised by the appellant has not created circumstances to set aside the conviction and the sentence imposed by the trial judge.

Hence, the instant appeal is dismissed and the sentence and the conviction of the appellant are hereby affirmed.

Judge of the Court of Appeal

Hon. K.M.G.H Kulatunga

I agree.

Judge of the Court of Appeal