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.

C.A. Case No: **CA-HCC-0070/2015**

H.C. Kuliyapitiya Case No:
HC 149/2012

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.
Rathnayake Mudiyanselage
Gnanasena Rathnayake,
"Shan Piyasa",
Methsiri Uyana,
Halmillawewa.

Accused

AND NOW BETWEEN

Rathnayake Mudiyanselage
Gnanasena Rathnayake,
'Shan Piyasa',
Methsiri Uyana,
Halmillawewa.

Accused-Appellant

Vs.
The Attorney General
Attorney General's Department
Colombo 12

Complainant- Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	Anil Silva, PC with AAL Isuru Jayawardhena for the Accused-Appellant Rohantha Abeysuriya, ASG for the Complainant-Respondent
ARGUED ON	:	06.08.2019
WRITTEN SUBMISSIONS	:	The Accused-Appellant – On 16.01.2018 The Complainant-Respondent– On 17.08.2018
DECIDED ON	:	03.12.2019

K.K.WICKREMASINGHE, J.

The Accused-Appellant has filed this appeal seeking to set aside the judgment of the Learned High Court Judge of Kuliyapitiya dated 29.04.2015 in case No. HC 149/2012.

Facts of the case:

The accused-appellant (hereinafter referred to as the 'appellant') was indicted in the High Court of Kurunegala for committing grave sexual abuse on or about 09.01.2008, on one W.M.P. Shevon alias Suveni, an offence punishable under Section 365B(2)(b) of the Penal Code as amended. The appellant pleaded not guilty to the charge and stood for trial. Later, the case was transferred to the High Court of Kuliyapitiya.

For the prosecution, evidence of four witnesses were led namely, Pravini Shevon alias Suveni (PW 01 - victim), grandmother of the Victim, Mary Theresa (PW 02), Police Inspector Senaratne (PW 04) and Dr. Ilangaratna Banda (PW 06). Productions from "P 01 to P 04" were marked. For defence, the appellant and his wife, Pathiraja Mudiyanselage Suneetha Irangani, testified and closed the defence case.

The Learned High Court Judge convicted the appellant for the charge and imposed four years rigorous imprisonment and a fine of Rs. 25,000/- with a default sentence of four months imprisonment.

Being aggrieved by the said conviction and the sentence the appellant preferred this appeal.

The Learned President's Counsel for the appellant submitted following grounds of appeal, in the written submissions;

1. The Belated Complaint
2. The Learned High Court Judge has not considered whether there was a reason for Mary Theresa to fabricate a case against the accused
3. Misdirection as regards to the burden of proof

The incident in question can be summarized as follows;

As per evidence of Pravini Shevon (hereinafter referred to as the 'prosecutrix' and/or 'PW 01'), she lived with her parents and her grandfather. On the alleged date of the incident i.e. 09.01.2008, the prosecutrix went to school and came back around 1.00pm. The prosecutrix changed her clothes and had gone to her grandmother's (PW 02) house which was situated about 25-30 feet away from the

prosecutrix's house. The prosecutrix stayed there till about 5.00pm and left for her house to bring a book and the accused invited her to his house, promising to give biscuits. The appellant was wearing a towel and carrying his small child at that time. The appellant had taken the prosecutrix into a room of his house and thereafter, had taken her to the kitchen, where the appellant sat down on a chair put the small child on the floor. Thereafter, he took the prosecutrix on to his lap and removed her skirt and the underpants, and placed his penis between her thighs and sexually abused her.

Subsequently, the prosecutrix had run back to her grandmother's house and informed the incident to grandmother. The appellant had followed the prosecutrix and PW 02 had shouted at the appellant for abusing her grandchild. Thereafter, PW 02 had washed a liquid that looked like foam, off the prosecutrix's legs.

On 12.01.2008, a complaint was lodged at the Dingiriya Police Station and the prosecutrix was examined by Dr. Ilangaratna Banda (PW 06), on 14.01.2008.

The defence version was that his family had a domestic servant in the relevant period to look after his small child who was 10 months old. The servant comes every day before his wife goes to work and waits till she returns from her work. The appellant took up a defence of an alibi and denied the incident stating that on the date of the incident, the appellant was at home till about 9.00am and thereafter, attended a Directors meeting of the Bingiriya Cooperative Society. When he came home his wife and two children were at home. The wife of the appellant, Irangani, testified for the defence.

The Learned President's Counsel for the appellant raised the first ground of appeal in which it was contended that there was a belated complaint in the instant case. The incident had occurred on 09.01.2008 and Mary Theresa (PW 02), the

grandmother of the prosecutrix, lodged a çomplaint at the Police Station on 12.01.2008. PW 02 testified that she informed this alleged incident of grave sexual abuse to the parents of the prosecutrix and the complained was made after three days. PW 04 – IP Senaratne stated that the complaint to the Police was made on 12.01.2008 (Page 109 of the brief). The Learned President's Counsel for the appellant further argued that not only this is a belated complaint but also it had not been made by the parents of Shevon. The complaint was made by the grandmother of the prosecutrix.

The Learned ASG for the respondent replied to the above contention that neither the prosecutrix nor PW 02 was cross examined regarding the delay, by the defence Counsel at the trial.

The Learned High Court Judge did not address about the said delay in his judgment.

In the case of **Karnel Singh V. The State of M.P [1995 AIR 2472, 1995 SCC (5) 518]**, it was held that,

> *"...It was said that there was considerable delay and sufficient time for tutoring and therefore her evidence could not be belivered. There is no merit in this contention. The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband.* ***Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathize with her.*** *Therefore, delay in lodging complaints in such cases does not necessarily*

indicate that her version is false. The possibility of tutoring is ruled out because the evidence does not show that her husband knew the appellant and his companion before the incident..." (Emphasis added)

In the case of **Bandara V. State (2001) 2 SLR 63,** it was held that,

"if there is valid reason or explanation for the delay and if the trial judge is satisfied with the reasons and explanations given, no trial judge would apply the test of spontaneity and contemporaneity and reject the testimony of a witness in such circumstances".

It is settled law that, where a complaint is lodged belatedly, a Court can act on evidence of the prosecutrix, if the complainant gives a plausible explanation about such delay. In the instant case, there is no such reasonable explanation given by the prosecution as to why PW 02 waited three days to make the complaint to the Police. I observe that this was a serious incident involving a little child and yet her parents did not take the child to the Police and lodge a complaint instantly. I am unable to agree with the argument of the Learned ASG for the respondent that the defence did not question about the delay in cross-examination. I am of the view that it was a duty cast on the prosecution to explain the delay on their part. Since the burden is on the prosecution to prove their case beyond reasonable doubt, the prosecution had an inevitable duty to explain such delay. The defence had clearly questioned the genuineness of the complaint of the Grandmother. In such a backdrop, I am of the view that there were suspicious circumstances as to why PW 02 lodged a belated complaint and therefore, I answer the contention of the Learned President's Counsel for the appellant in affirmative.

I wish to consider the 2nd and 3rd grounds of appeal together.

In the second ground of appeal, it was contended that the Learned High Court Judge failed to consider whether there was a reason for Mary Theresa to fabricate a case against the appellant.

The appellant and his wife gave evidence for defence case. Both the appellant and his wife were employed at that time and there was a domestic servant to look after their small child who was about 10 months old at that time. On 11.01.2008, the domestic servant had informed the wife of the appellant that she did not want to come to work hereinafter, since the prosecutrix kept coming to the house to play with the small child and as a result the child cannot be put to sleep. The wife of the appellant informed about this issue to the appellant when he came home and the appellant went to the house of the prosecutrix on the same day and had an exchange of words with them for sending the child. Thereafter, the belated statement was made on the next day, i.e. 12.01.2008. It is noteworthy that this is not a new position taken up freshly at the defence, but taken up even during the case for the prosecution.

PW 02 was questioned about this incident during the cross-examination and she admitted that the appellant came on a day in the month of January and quarreled with them;

> "ප්‍ර: ඔය සුවේනි ඥානසේනලාගේ ගෙදරට 2008 ජනවාරි මාසයේ දවසක ගියා කියලා ඥානසේන හවස් වරුවේ තමාලට බැන්නා නේද?
>
> උ: එයා අපිත් එක්ක රණ්ඩු කලා." (page 104 of the Brief)

Further, I observe that this was suggested to the prosecutrix as well (Page 81 of the brief) and the PW 02 and the prosecutrix contradicted each other on their answers to this suggestion.

I observe that the Learned Trial Judge has completely eliminated the possibility to make a false accusation against the appellant, without giving a reasonable explanation for such rejection. I am of the view that the genuineness of the complaint was at stake and the Learned High Court Judge should have considered the position taken up by the defence more carefully.

In the final ground of appeal, it was contended that the Learned High Court Judge had misdirected himself as regards to the burden of proof. It was submitted that defence had been rejected without any legal basis and it has occasioned a miscarriage of justice. It was further argued by the Learned President's Counsel for the appellant that the prosecutrix has taken diametrically opposing positions in respect of the vital circumstances pertaining to the act of sexual abuse and the Learned High Court Judge has failed to evaluate the same.

The Learned ASG for the respondent replied to the above contention that the contradictions and omissions pointed out by the defence were taken into consideration by the Learned High Court Judge and it was concluded that the contradictions and omissions did not fatally affect the instant case.

However, I observe that the prosecutrix in her statement to the Police had stated that the sexual act was done to her in a room of the appellant's house and in Court, she testified that the appellant abused her in the kitchen of his house. This was marked as 'V 01 and V 02' as contradictions by the defence Counsel. Further, an omission was brought to the notice of the Court during her cross examination that even though she categorically stated in her evidence that her clothes were removed by the appellant, she did not state that in her statement made to the police.

The Learned President's Counsel for the appellant further submitted that although the prosecutrix, in Court, specifically took up the position that all her clothes were removed by the appellant, she had given completely different version of history to the Doctor who examined her;

> "ප්‍ර: ඇය කෙටි ඉතිහාසය පවසා තිබෙනවාද?
>
> උ: එහෙමයි.
>
> ඇය මොනවද පවසා තිබෙන්නේ?
>
> ස්වාමීනී, ඇය ඇයගේ වචනයෙන්ම මම සමග ප්‍රකාශ කලා 2008 ජනවාරි 09 වන දින ඥානසේන මාමා මට එයාලාගේ ගෙදර එන්නට කියලා කීවා. බිස්කට් එකක් දෙන්නට. ඊට පස්සෙ මම ගියා. එහෙ කුස්සියට අඩගහගෙන ගියා. ඊට පස්සේ ඥානසේන මාමා මම ඔඩොක්කුවේ තබා ගත්තා. ඇදුම් ගැලෙව්වේ නැහැ. ඉම්බෙත් නැහැ. අත ගෑවෙත් නැහැ. එක පාරටම ඥානසේන මාමාගේ වූ එක මගේ පස්ස පැත්තට තියලා තද කරා..." (Page 129 of the Brief)

I am well aware that our law, as it stands today, does not require corroboration from a prosecutrix in a sexual offence. However, it is settled law that the Trial Judge will act on a sole testimony of a prosecutrix only if her evidence is cogent, credible and consistent.

In the case of **B. Bhoghinbhai Hirjibhai V. State of Gujarat (AIR) 1983 SC 753,** it was held that,

> *"...in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to the injury."*

In the case of **Sunil and another V. The Attorney General (1986) 1 Sri L.R 230**, it was held that,

> *"It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration..."*

In **Premasiri and another V. The Queen [77 N.L.R 86]** it was held that,

> *"In a charge of rape it is proper for a Jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such character as to convince the Jury that she is speaking the truth..."*

Therefore, it is understood that Court should not act on the sole testimony of a prosecutrix if it appears to be unreliable and inconsistent.

I observe that the prosecutrix was only 09 years old at the time of the incident and therefore, it is natural that there could be mistakes made by her in evidence. However, I am unable to reject the contradictions pointed out by the defence as mistakes that she committed due to poor memory.

Another important aspect which needed attention of this Court is the manner in which the defence was analyzed by the Learned High Court Judge.

The Learned High Court Judge, in the beginning of the judgement, has mentioned that only the appellant gave evidence for defence case. Even when evaluating the evidence of the defence, the Learned Judge has evaluated only the evidence of the appellant. However, the wife of the appellant too had testified for defence, and the Learned High Court Judge has not at least mentioned about her evidence.

In this regard, the Learned ASG submitted that the evidence of wife was a description of her marriage to the appellant and this was not considered to be

material to the instant case by the learned High Court Judge. The Learned High Court Judge had opted not to mention the evidence of the appellant's wife owing to the above reason and it cannot be considered a fatal error as it did not affect the root of the case.

I am unable to agree with the said submission. We are not to make assumptions about a conclusion arrived by the Learned High Court Judge with regard to any witness, in the absence of any such conclusion written down by the Judge in his judgment. The mentioning that **"only"** the appellant testified for the defence, clearly manifest that the sufficient attention of the Learned High Court Judge was not paid to the evidence of the wife of appellant.

Further, I observe that the Learned High Court Judge first evaluated the evidence of the prosecution and came to the conclusion that the prosecution has proved its case. Thereafter, the Learned High Court Judge proceeded to consider the defence. This is a total misdirection and it is apparent that the Judge had prejudged the case even before considering the evidence as a whole.

Therefore, it is my view that it certainly has caused prejudice to the appellant since the defence version was not properly evaluated. For these reasons, the 2nd and 3rd grounds of appeal should succeed.

In the case of **Radhu V. State of Madya Pradesh [Case No: Appeal (crl.) 624 of 2005**, Indian Supreme Court observed that,

> *"The court should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case".*

In light of above, it is to be understood that the Court should be cautious in convicting an accused for a sexual offence since there is a strong chance of an accused being falsely implicated. Such conviction should be made only after being satisfied that the prosecution has built a strong, unchallenged case with credible evidence.

After perusing the proceedings, it is my considered view that the evidence of the prosecution lacks consistency and there are fatal errors in the Judgment as well. Therefore, I am of the view that it is unsafe to convict the appellant in the instant case. I set aside the conviction and the sentence imposed on the appellant by the Learned High Court Judge and acquit the appellant.

The appeal is hereby allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Karnel Singh V. The State of M.P [1995 AIR 2472, 1995 SCC (5) 518]
2. Bandara V. State (2001) 2 SLR 63
3. B. Bhoghinbhai Hirjibhai V. State of Gujarat (AIR) 1983 SC 753
4. Sunil and another V. The Attorney General (1986) 1 Sri L.R 230
5. Premasiri and another V. The Queen [77 N.L.R 86]
6. Radhu V. State of Madya Pradesh [Case No: Appeal (crl.) 624 of 2005,