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

In the matter of an Appeal in terms of Section 331(1) 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.

Court of Appeal

Case No: CA 96/2015

Democratic Socialist Republic of Sri Lanka

Complainant

-Vs-

High Court of Gampaha

Case No: HC 95/2013

Kalu Dewa Susantha Jayalal Silva

Accused

AND NOW BETWEEN

Kalu Dewa Susantha Jayalal Silva

Accused-Appellant

-Vs-

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	Amila Palliyage AAL with Duminda De Alwis AAL for the Accused-Appellant Lakmali Karunanayake DSG for the Complainant-Respondent
ARGUED ON	:	07.11.2019
WRITTEN SUBMISSIONS	:	The Accused-Appellant submitted on 19.09.2017 The Complainant-Respondent submitted on 28.11.2017
DECIDED ON	:	17.01.2020

K.K. WICKREMASIGHE, J.

The Accused-Appellant (hereinafter referred to as the 'Appellant') was indicted in the High Court of Gampaha dated 17.03.2015 in case No. HC 95/2013 under Section 365(B) (2) (b) of the Penal Code as amended by Act No.16 of 2006. The Appellant was convicted for having committed two acts of grave sexual abuse during the time period commencing from 01.12.2012 to 31.01.2013 on Kaikawala Liyanage Senushi Kaawya Sathsarani, who was a minor.

The Appellant pleaded not guilty to the Indictment, the prosecution and the defence led evidence. At the end of the trial the learned High Court Judge convicted the Appellant for the first charge in the Indictment and sentenced him for 07 years rigorous imprisonment and a fine of Rs.7,500/= with a default sentence of

06 months simple imprisonment, while acquitting the Appellant from the second charge.

Being aggrieved by the aforementioned conviction and sentence, the Appellant preferred this appeal to this Court.

In the written submission filled by the Appellant dated 19-09-2017 following Grounds of Appeal were urged;

1. Prosecution has failed to prove that the offence was committed during the time period stipulated in the indictment beyond reasonable doubt and therefore there was no charge to answer by the accused.
2. The learned Trial Judge has rejected the evidence of the defence in the wrong premise.

However at the stage of the argument Counsel for the Appellant informed Court that he was relying only on the second Ground of Appeal.

At the trial the prosecution led the evidence of the prosecutrix (hereinafter referred to as 'PW 01') who was a minor (06 years old) at the time of the incident, the mother of the prosecutrix (hereinafter referred to as 'PW 02'), the Judicial Medical Officer, a relative (Wasana) of the prosecutrix and two Police Officers.

Upon closure of the prosecution case the Accused-Appellant and his wife both testified on behalf of the Appellant.

Facts of the case:

The narrative as unfolded by the prosecutrix (Prosecution Witness No.01) is set forth as follows;

She was a frequent visitor to the Appellant's house. The Appellant was living together with a relative of hers (Shama nanda). On the day of the alleged incident, the prosecutrix was at Shama Nanda's (Accused-Appellant's) residence, Shama nanda had asked her husband (Accused-Appellant) to put the prosecutrix to sleep. Accordingly the Appellant had carried the prosecutrix to the bedroom and placed her on the bed. Thereafter the Appellant had tickled her and abused her. The

prosecutrix has not immediately informed about the incident to anyone as she was intimidated by the Appellant.

The prosecutrix had disclosed the incident to her mother after some days when she overheard a conversation between her mother and a relative called Wasana where Wasana was divulging about a similar act committed to her by the Appellant. (vide pages 71-72 of the appeal brief)

Mother of the prosecutrix (PW 02) has then gone to the Appellant's house with PW 04(Wasana) and her husband to inquire about the said incident. On 04.03.2013 PW 02 has lodged a complaint against the Appellant in the Meerigama Police Station and thereafter the police commenced the investigations. The version of the prosecutrix is corroborated by the evidence of the mother.

Learned Counsel for the Appellant submitted that the Learned Trial Judge has rejected the evidence of the defence in the wrong premise. It was further submitted that the rejection of the defence evidence by the Learned Trial Judge is purely based on untenable grounds and surmises. Moreover, the Learned Counsel for the Appellant specifically pointing out the fact that the Appellant has opted the most difficult task in a criminal trial to give evidence under oath explaining the incriminating evidence adduced against him and the wife (concubine) of the Appellant was called to give evidence on his behalf.

In addition, the Learned Counsel for the Appellant submitted on the test of reasonable doubt and described the duty of a Trial Judge regarding the evaluation of the defence evidence. It was further contended that the evidence of the Accused may be not so convincing but even then it was sufficient to create a reasonable doubt on the prosecution's case.

The Learned Counsel for the Appellant carried his argument further by strongly urging that the contradictions, of the defence evidence considered by the Trial Judge were not on material points and therefore the defence evidence should not have been rejected by the Learned Trial Judge.

The Accused-Appellant and his wife took up the position that they were assaulted in the police station by the mother of the victim and stated that police did not take any attempt to stop the assault.

They entirely denied the incident narrated by the prosecution (vide pages 274-275 and 321-326 in the appeal brief) and stated that the Accused-Appellant was wrongfully arrested and detained in the police station. Further stated that his statement was taken forcibly by the Police and he was unaware about the content of the statement though he signed (vide pages 251-253 of the appeal brief).

The above mentioned position was never put forward to the prosecution witness to confront them. Further, the defence has not established the reason why the prosecutrix or her mother would falsely implicate Appellant on such a serious allegation, when they had no enmity between them.

According to the well-known maxim "Equity aids the vigilant not the indolent" (*Vigilantibus non dormientibus aequitas subvenit)*[1] a person who has been wronged must act relatively swiftly to preserve their rights.

Therefore it is apparent that neither the accused nor his wife (concubine) took any meaningful action against the alleged wrongful incidents said to have been taken place. On that viewpoint I do agree with the Learned Trial Judge's finding with regard to the complaint of the Accused-Appellant about unfair treatment to him (vide pages 631-632 of the appeal brief)

I further observe that the contradictions marked as X1-X4 affects the credibility of the accused and his witness.

"එදින මමයි වාමලියි කාමරේ ඇදේ හාන්සි වෙලා සිටින විට මේ කාව්යා දුවත් ඇදට ඇවිල්ලා අපිත් එක්ක හිටියා"
"මමයි කාව්යා දුවයි හිටියා. මා එක්ක සෙල්ලම් කරමින් හිටියේ"
"දුව මට කිව් කැවුවා. මමත් දුවට කිව් කැවුවා"
"මම කිවුවා වාසනා නංගිගේ තේ එක රහයි කියලා"
(Contradictions marked as X1-X4 in vide pages 15-16 of the appeal brief)

The Learned High Court Judge has amply demonstrated the reason and rejected the defence evidence on the contradictions marked as X1 – X4.

Learned Counsel for the Accused-Appellant submitted the following Judgement of ***Federal Court, Kuala Lumpur in Gunalan Ramachandran & ORS V. PP [Criminal Appeal No. 05-19,20,21-2004(W)]*** regarding the test of reasonable doubt;

> *"To earn an acquittal, the Court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused wife will suffice. It is not, however, wrong for the Court to be convinced that the defence version is true, in which case the Court must order an acquittal. In appropriate cases it is also not wrong for the Court to conclude that the defence story is false or not convincing, but in that instance, the Court must not convict until it ask a further question, that even with the Court does not accept or believe the defense explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of Judges rightly prefer to adopt straightway the legally established reasonable doubt test, rather than to delve in the believable and convincing test before applying the reasonable doubt test?"*

However, I find that in the instant case, since the evidence of both defence witnesses are far from truth and not credible. The available defence evidence is not amount to create a reasonable doubt in the prosecution case.

I observe that, at the beginning of the Judgment (vide pages 604-606 of the appeal brief) the Learned Trial Judge has discussed how to conduct a fair trial. Therefore it is evident that the Learned High Court Judge was very well conversant with the applicable provisions of the Law.

In the case of ***Dharmasiri* V. *Republic of Sri Lanka*[2010] 2 Sri L.R. 241**[2] it was held;

> *"Credibility of a witness is mainly a matter for the Trial Judge. Court of Appeal will not lightly disturb the findings of Trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the Trial Judge has the advantage of seeing the demeanor and deportment of the witness..."*

As well as in the case of ***Chaminda V. Republic of Sri Lanka*[3],** it was held that,

> *"Court of Appeal will not lightly disturb the findings of a judge who had come to a favorable finding with regard to the testimonial trustworthiness of a witness whose demeanor and deportment had been observed by the trial judge.*

This view is supported by the judicial decision in ***Alwis* V. *Piyasena Fernando*[4]** *wherein* **G.P.S. De Silva CJ** remarked thus:

> *"It is well established that findings of primary facts by a Trial Judge who hears and sees witness are not to be lightly disturbed on appeal.."*

Therefore when considering the evidence of the prosecution case it is evident that there is cogent evidence against the Accused-Appellant. When ring of truth of the prosecution witnesses is available it is difficult to challenge the same by unreliable and fallacious defence taking up on to create a reasonable doubt in the prosecution case.

I observe that the Learned High Court Judge has fairly and squarely analysed the evidence adduced before him and delivered a well-reasoned judgment. I find no merit in the ground of appeal urged by the Appellant and therefore the ground of appeal should necessarily fail. Accordingly I have no reason to interfere with the findings of the Learned Trial Judge.

Accordingly the conviction and the sentence imposed on the Appellant by the Learned High Court Judge dated 17.03.2015 is affirmed.

The appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL

References;

1. Equity and the Law of Trusts (Twelfth Edition) by Philip H Pettit - Page No.26
2. *Dharmasiri V. Republic of Sri Lanka*[2010] 2 Sri L.R. 241
3. *Chaminda V. Republic of Sri Lanka* [2009] 1 Sri L.R. 144
4. *Alwis V. Piyasena Fernando* [1993] 1 Sri L.R. 119