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.

C.A.No. HCC 56/2018

H.C. Ratnapura No. HCR 284/2013

Ranaweerage Don. Gamini Shelton
Rathnasiri

Accused-Appellant

Vs.

Hon. Attorney General
Attorney General's Department

Colombo 12 .

Complainant- Respondent

****

BEFORE : **HON. JUSTICE ACHALA WENGAPPULI**

HON. JUSTICE DEVIKA ABEYRATNE

COUNSEL : Dharshana Kuruppu with Aruna Gamage for the Accused-Appellant.

R. Barry S.S.C. for the Respondent

ARGUED ON : 13th January 2020 & 22nd January 2020

DECIDED ON : 28th February, 2020

****

HON. JUSTICE ACHALA WENGAPPULI

This is an appeal lodged by the accused-appellant, in challenging his conviction and the imposition of a sentence of seven-year imprisonment, coupled with a fine and compensation payable to one *Mahadurage Ranatunga,* as imposed by the High Court of *Ratnapura* by its judgment dated 09.05.2018, in case No. 284/2013, where he was found guilty of committing the offence of grave sexual abuse on the said *Mahadurage Ranatunga,* a person under 16 years of age.

When this appeal was taken up for hearing on 13.01.2020 and 22.01.2020, learned Counsel for the accused-appellant had relied on several grounds of appeal in its support. Of these multiple grounds of appeal that had been raised before this Court and the submissions in support of them, it is possible to identify and to classify them under two general areas of dispute.

One such area would be the grounds of appeal which dealt with the procedural and other errors made by the trial Court during the trial and in

determining the guilt or innocence of the accused-appellant. These included that the trial Court had failed to explain the rights of the accused- appellant after it had determined that he had a case to answer, the trial Court had compared evidence of the prosecution witnesses with the contents of their statements made to Police when it evaluated them for credibility and its failure to hold that the prosecution had failed to prove that the offence was committed on the date as alleged in the indictment.

The other general area, under the remaining grounds of appeal could be grouped with, is the errors made by the trial Court in determining the testimonial trustworthiness of the prosecution witnesses and the relative probabilities of the version of events as relied upon by the prosecution in order to prove its allegation levelled against the accused-appellant. In relation to this area, the accused- appellant contended that the trial Court had failed to consider the delay of the prosecution witness No. 1 in making the initial complaint, a factor which had adverse effect on his credibility and that the prosecution witness No. 3 is an interested and therefore an unreliable witness.

In support of the complaint that the trial Court had committed a procedural error when it failed to explain the rights of the accused-appellant when the trial Court ruled that he had a case to answer, the learned Counsel relied on the judgments of ***Lionel v Republic of Sri Lanka*** 79 I NLR 553 and ***Attorney General v Aponso*** 2008 [B.L.R] 145.

In view of the submissions made by the learned Counsel for the accused-appellant on the errors of the trial Court on procedure, namely when it failed to inform the accused-appellant's rights in calling for the defence and the erroneous

comparison of evidence of the lay prosecution witnesses with the contents of the statements made by them during investigations, learned Senior State Counsel confined his submission to the issue whether this Court should order a retrial or not in the circumstances. He moved this Court to order a retrial since the prosecution had established a *prima facie* case before the trial Court and the infirmities that had been relied on by the accused-appellant are due to natural limitations of the witness's capacity to narrate their version with clarity owing to their underprivileged status in social and educational spheres.

In his submissions, the accused-appellant relied on the reasoning of the judgments of ***King v Fernando*** 48 NLR 249, ***Peter Singho v Werapitiya*** 55 NLR 155 and ***Queen v Jayasinghe*** 69 NLR 314, where the issue of remitting a case to be retried was considered by the Superior Courts and have decided against it, owing to different reasons. He also submitted that the alleged date of offence is December 2006, and the accused-appellant is now 67 years of age.

Delivering the judgment of the Court of Criminal Appeal in ***King v Fernando*** (ibid), it was decided not to order a re-trial in that particular instance, owing to the unsatisfactory nature of the evidence of the sole witness to the incident, whose *" ...assailability will be increased by the passage of time" and therefore " ... the chances of a conviction in the event of a fresh trial ... is remote."*

In ***Wijepala v Attorney General*** (2001) 1 Sri L.R. 46, *Fernando* J had re-iterated the duty of an appellate Court, whilst adopting the reasoning of the judgment of ***Jagathsena and Others v G.D.D. Perera, Inspector, Criminal Investigations Department and Mrs Bandaranaike*** (1992) 1 Sri L.R. 371, in following terms;

"... in a trial before a judge sitting alone, while his decision on questions of fact based on the demeanour and credibility of witnesses carry great weight, an appellate Court has a duty to test the evidence by a careful and close scrutiny and if it entertains a strong doubt as to the guilt of the accused, the Court must give the benefit of that doubt to him."

Therefore, when this Court ventures to consider the submissions of the learned Senior State Counsel in order to determine the issue whether a retrial should be ordered or not, it must first test the evidence presented before the trial Court by the prosecution by a careful and close scrutiny.

One of the primary concerns relied upon by the accused-appellant in challenging the testimonial trustworthiness of the evidence presented by the prosecution, is the alleged belatedness in making the allegation and the alleged failure of the trial Court to consider that vital issue adequately.

The prosecution mainly relied on the evidence of *Mahadurage Harsha Ranatunga* (PW1) in order to prove the alleged incident and relied also on his mother *Jayakodi Arachchilage Anoma* (PW2) and a senior teacher of the school *Wanigamuni Chandrasena* (PW3), where the accused-appellant served as its principal, in support of the version of events as narrated by the virtual complainant.

At the time the trial was commenced, the virtual complainant *Harsha Ranatunga* was a 26-year-old mature adult with children although in his evidence he related to an incident which took place when he was in grade 8. He studied in the school which had adjoined to his house.

One day, although the school was closed due to a holiday, the accused-appellant wanted *Harsha* to come over to his office to clean up a cupboard that had been attacked by termites. When he entered the office, the accused-appellant, after having locked the door, asked him to remove his clothes. The accused-appellant, having laid *Harsha* on the office floor had thereafter, performed an act of intercrural sex with him. After the act, *Harsha* was allowed to go home.

It is stated by *Harsha Ranatunga* that he did not complain of this incident to his mother immediately, but told his class teacher *Nimal Chandrasena* only on the following day. Thereafter a formal complaint was lodged with the Child and Women Protection Bureau at *Balangoda.* On 11.09.2007, after about 2 or 3 weeks since the incident, a police officer who visited his home had recorded a statement.

During cross examination, it was elicited through *Harsha Ranatunga* that whilst in Court and awaiting to be called into the witness box, *Chandrasena* (PW3) had shown him a statement enabling him to refresh his memory as to the date of the incident. The witness admitted that the formal complaint was lodged with Child Development Officer of the Provincial Secretariat. After questioning, the witness admitted his involvement in an incident where said *Chandrasena's* son's pair of trousers was removed. The witness was suggested by the accused-appellant, in order to drop charges for that incident, *Chandrasena* and another teacher had induced him to make this false complaint. The witness gave an evasive answer to that suggestion stating that he had left village no sooner he stopped schooling in 2009 and never met *Chandrasena* before the case.

An inconsistency (V1) was marked off his evidence as he had stated to Police that he was laid on a polythene sheet with flowery design, although in evidence he stated that he was laid on bare cement floor of the office.

Witness *Nimal Wijesinghe* stated in his evidence that he had a recollection being told of an incident of some sexual activity by the accused-appellant with *Harsha Ranatunga* that had taken place during school vacation but he was told of the incident only after the school was re-opened for the new term. In cross examination he stated that he never functioned as the virtual complainant's class teacher at any point of time.

The witness who was termed as an interested and therefore partisan witness by the accused-appellant was *Wanigamuni Chandrasena*. He was called as the 3rd prosecution witness.

He related an earlier incident as a starting point of the instant accusation. His own child who studied in Grade 2 of the same school had complained to him of removing his pair of trousers by another student. Sometime later, he came to know that a mother had complained to *Grama Niladahri* that her son was sexually abused and, being a humble villager, she is powerless to initiate legal action. The witness then had summoned two students whose names that transpired. *Harsha* was one of the two. He got the children to write down what happened to them and then advised their mothers to lodge a complaint at the Child Protection Unit. He was summoned by the officers of the Unit at a later point of time where he explained his limited role of sending the complainants to the appropriate Government agency for redress.

During cross examination, the witness admitted that he was the teacher with the longest service record of the school where the virtual complainant

studied. He also stated that the accused-appellant was appointed as principal of the school owing to his close relationship with the regional Director of Education, although he expected the authorities to consider his qualifications for that proof. As the appointment was made for different reasons he had to retire from service with a teachers' salary. The witness also admitted that both himself and the accused-appellant had to face an inquiry held over a loss of some lab equipment, but he was later exonerated. The witness was asked to tender a statement made by him ("X1") which he claimed to be a rough sketch of what he narrated to the Police, as he had it with him in the witness box at the time of giving evidence. He had prepared it after returning from the Police. He further stated that his child had typed his statement into a computer but at that time he was studying in Grade 2. The witness was suggested that he had fabricated this allegation owing to his resentment with the accused-appellant over the latter's appointment as a principal, which he denied.

Witness *Anoma* stated that she saw her son going to the office and upon return he complained of harassment "කරදර කළා." She did not complain about this incident to the *Garama Niladhari* of the area. However, she admitted that it was the school teachers who complained about this incident to authorities. She was thereafter summoned by the Child Protection Authority and had her statement recorded, followed by *Balangoda* Police.

In cross examination, the witness admitted that she was described of the incident in detail by " චන්දසේන සර්" and then by another lady officer at the authority.

The accused-appellant, in his statement from the dock denied the allegation and claimed that the allegation is a fabrication of his former colleague.

When the evidence is considered in the perspective of the submissions made by the accused-appellant, it appears that the details as to the initial revelation of the incident is somewhat hazy. The indictment indicates that the offence was committed between 01.12.2006 and 31.12.2006. *Harsha* said he did not recall the exact date. It is his evidence that he did not tell his mother of the incident but waited patiently to complain to his class teacher *Nimal* on the following day. *Nimal* said he learnt the incident only when he returned to work after school vacation indicating that the alleged incident if at all may have taken place during school vacation.

The first official who recorded a statement from *Harsha* was the *Grama Niladhari* and that was on 21.08.2007. He did so upon instructions of Child Rights Development Officer. The Police recorded Harsha's statement on 11.09.2007 and produced before him the District Medical Officer on 12.09.2007. The short history indicated that the victim was used for a sexual act by an elderly male 10 months ago.

In his examination in chief *Harsha* stated that the incident took place in a school holiday and the following day he complained about it to *"Nimal Sir"*. He was emphatic that the Police recorded his statement 2 to 3 weeks after the incident and his statement was recorded on 11.09.2007.

This effectively placed the date of incident in a date within the month of August 2007, but the indictment was not amended.

The other aspect highlighted by the accused-appellant is the partiality of the witness *Chandrasena* which the trial Court had failed to take note in considering his evidence.

It is interesting to note how *Chandrasena* became involved with the case. *Chandrasena* said he got to know from a third party that *Anoma* had expressed her grief before *Grama Niladhari* over her helplessness and sought help to pursue the incident. But *Anoma* said that she never complained about it to *Grama Niladhari* and got to know the details of the incident only through *Chandrasena.* According to *Chandrasena* when he learnt about the desperate plea made by *Anoma* he summoned *Harsha* and made him to write down the details of the incident he complained about. Harsha did not support this claim. The Defence Witness *Pricilla Fernando* said it was *Chandrasena* who initially handed over a letter prepared by "a villager", in addition to handing over of the written account of the incident claimed to have been written by *Harsha.* After the Police recorded a statement from *Chandrasena,* he prepared a rough sketch of his statement, typed into a computer by his Grade two child. Then at the High Court, *Chandrasena* made an attempt to remind *Harsha* of the date of incident.

The accused-appellant's claim of *Chandrasena's* conduct, being partial due to his unusual interest in the whole exercise, seemed justified in these circumstances. The Defence Witness *Pricilla Fernando* also stated the complaint about *Harsha's* incident was conveyed to her office by *Chandrasena* when he delivered a letter seemingly prepared by a "villager", which act indicated that he had assumed a role in excess of being a mere facilitator to a helpless village woman, whose child had been molested by the principal of the school. The letter that had been tendered to *Fernando,* in support of the "villager's" petition, claiming to be written by *Harsha,* was not produced and not verified by the Prosecution during *Harsha's* evidence.

This Court is mindful and concerned of the trend of general reluctance shown by members of our society in reporting crime, unless they themselves

become victims, and the good samaritanism of the citizenry is fast reaching its vanishing point. Therefore, the observations that are made in the particular circumstances of this appeal should not be construed as an indication of insensitivity of the Courts in recognising someone who acted in fulfilment of his social and civic duty.

At the same time, this Court is duty bound to consider the validity of the complaint of the accused-appellant that he was a victim of a fabricated version of events in the hands of an interested party purely due to professional jealousy.

In this particular incident, however, when the conduct of *Chandrasena* is examined against the backdrop of all the circumstances, it must be observed that there are traits of some personal interest piercing the veneer of the claimed fulfilment of one's social responsibility. His role had transformed itself from the initial status of a facilitator to a one of instigator. The obvious challenge to the *bona fides* of this witness emanates from his own conduct of coming out with a version of events that are not supported by either *Harsha* or his mother *Anoma.* They attribute a more active role on the witness than the one he made an attempt to portray. Although, his over enthusiasm shown in bringing the incident to the attention of authorities could be understood, but when viewed in the light of certain inbuilt improbabilities of his version unfortunately leaves a long shadow of doubt as to his *bona fides.*

Returning to the evidence of *Harsha,* this Court already noted that his evidence is not in line with the time period specified in the indictment and either due to long time that had elapsed since the alleged incident or due to his limitations in expressing himself. It is also noted that his evidence lacked detail, in relation to the circumstances surrounding the incident. This Court had

considered the judgments of ***Dayaratne v The Attorney General*** (CA 188/2015) - decided on 22.09.2017 and ***Dharmadasa v The Attorney General*** (CA 201/2011) where this Court had placed emphasis in establishing the date and time specified in the indictment by the prosecution.

It could well be that *Chandrasena's* involvement in the complaint had resulted in the uncertainty of the evidence of the prosecution as a whole, which is in fact based on an actual incident. However, in applying the test, as employed by their Lordships in ***King v Fernando*** (supra), to the evidence available in the instant appeal, this Court is unable to answer the question affirmatively whether it would serve any purpose to the prosecution by remitting this case to be re-tried, in view of the infirmities that already exists in its case.

Therefore, the appeal of the accused-appellant is allowed by setting aside the conviction and sentence imposed by the High Court of *Ratnapura* by its judgment dated 09.05.2018.

JUDGE OF THE COURT OF APPEAL

HON. JUSTICE DEVIKA ABEYRATNE,

I agree.

JUDGE OF THE COURT OF APPEAL