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./ HCC/ 278/2018

High Court of Gampaha Case No: 107/2013

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

-Vs-

Bamunu Arachchi Vidanalage Wimalasena alias Baby Mahattaya

ACCUSED

AND NOW

Bamunu Arachchi Vidanalage Wimalasena alias Baby Mahattaya

ACCUSED-APPELLANT

-Vs-

The Hon. Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

BEFORE : A.H.M.D. Nawaz, J. (P/CA) &

Sobhitha Rajakaruna, J.

COUNSEL : Kapila Waidyaratne, PC. with Nipuna Jagodaarachchi for the Accused-Appellant.

Nayomi Wickramasekara, SSC for the Attorney General.

Argued on : 17.07.2020

Decided on : 25.11.2020

A.H.M.D. Nawaz, J. (P/CA)

An indictment was served on the accused-appellant charging him with three counts of grave sexual abuse under section 365 B 2 (b) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998, committed against a victim, a 15 year old boy, in the year 2009. Upon the conclusion of the trial, on 31.10.2018 the learned High Court Judge convicted the accused-appellant on counts No. 1 and No. 3 and acquitted the accused-appellant of count No. 2 of the indictment. Consequent to the conviction, the accused-appellant was sentenced to 10 years' rigorous imprisonment for each count to operate concurrently. A fine of Rs. 1000/- for each count was also imposed with a default term of two weeks' simple imprisonment. Furthermore, the learned High Court Judge ordered Rs. 75,000/- to be paid to the victim as compensation with a default sentence of one year simple imprisonment.

Aggrieved by the aforementioned conviction and sentence, the accused-appellant preferred an appeal to this court on two grounds namely, whether the conviction with regard to count No. 1 is proper and legal in view of the available evidence and whether the sentence imposed is excessive and or appropriate considering the mitigatory circumstances of the case.

The pith and substance of the argument of the learned President's Counsel Mr. Kapila Waidyaratne upon the first ground of appeal is the fact that the time period within which the alleged offence of grave sexual abuse in count No. 1 was committed as narrated to court by the victim, is inconsistent with the time period mentioned under count No. 1 of the indictment. It has thus been argued on behalf of the accused-appellant that the failure of the prosecution to establish the exact time period within which the offence was committed renders count No. 1 legally untenable and

that the learned High Court Judge erred in law in having convicted the accused-appellant on the said count. This raises the fundamental issue of whether the requirement of stating the exact time period within which the offence was committed is indispensable to prove that the offence was in fact committed.

Having concluded that the evidence given by the victim is credible and irrefutable in terms of establishing the charge contained in count No. 1, the learned High Court Judge moved on to consider whether the discrepancy as regards the date contained in count No. 1 of the indictment has in fact caused any prejudice to the accused-appellant and he proceeded to answer the question in the negative. The learned High Court Judge cited the cases of ***R v. Dossi*** 13 Cr App R 158 and ***Panditha Koralage v. Selvanayagam*** 56 NLR 143 in support of this contention.

I would consider it opportune at this juncture to discuss the factual matrix upon which the learned President's Counsel for the accused-appellant contended that the conviction on count No. 1 is not proper having regard to the evidence led in the case. Count No. 1 of the indictment charged the accused-appellant with having performed oral sex or fellatio on the victim-one Kulatunga Mudiyanselage Prabath Madhusanka Bandara at Imbulgoda between the dates 12th April 2009 and 8th May 2009. The second count was a continuation of the period beginning from 9th May 2009 and ending on 11th September 2009 during which the accused-appellant was accused of having subjected the victim to intercrural sex or *coitus interfemoris* at the same village. The third count in the indictment arraigned the accused on one specific incident of intercrural sex or *coitus interfemoris* that allegedly took place on 12th September 2009.

It is on count No. 1 (the accusation of fellatio) and count No. 3 (the allegation of intercrural sex) that the accused-appellant was convicted by the learned High Court Judge of Gampaha in a judgment dated 31st October 2018. Having acquitted the accused-appellant of count No. 2, the learned High Court Judge went on to impose the sentences I have referred to above for count No. 1 and count No. 3.

As regards the conviction on count No. 3, namely intercrural sex on 12th September 2009, the learned President's Counsel Mr. Kapila Waidyaratne submitted that he would not press any argument on the evaluation of evidence or the conviction but would rest his case solely or substantially on a plea to mercy which he said should gravitate to clemency towards the accused-appellant given the mitigatory circumstances. In other words he sought a reduction of 10 years' rigorous imprisonment to a lesser period of incarceration.

Even so he argued that the evidence adduced by the prosecution to establish count No. 1 (the accusation of fellatio) did not show that the grave sexual abuse did take place between the dates recited in the indictment namely the period between 12th April 2009 and 8th May 2009.

One would now in the backdrop of the facts and circumstances of the case have to assay the evidence and ascertain whether there lies any justification for the learned High Court judge to have held against the accused-appellant on the first count.

In respect of the incident pertaining to count No. 1, the victim stated that he was unable to recall the exact date on which it occurred. The victim only spoke in the course of his evidence of an incident that had taken place at the boutique of the accused-appellant, about two months prior to 12.09.2009 (the date on which the incident relating to the third count took place). In other words according to the recollection of the victim, the incident should have taken place in June 2009. But the indictment alluded to a period between April and May 2009.

It was the contention of the Senior State Counsel that even though the victim failed to recall the exact date on which the incident at the boutique took place, the fact that the victim was very specific and consistent in terms of describing the acts that were committed on him at the accused-appellant's boutique sufficiently establishes the commission of the offence.

The fact that the victim specified in his evidence that only two incidents took place, namely, the one similar to what was described in count No.1 and the other incident recited in count No. 3 led to a predictable result. This was the basis upon which the learned High Court Judge acquitted the accused-appellant of count No. 2 but there is a salient factor that strikes this court as pertinent. Upon a careful perusal of the evidence led in the case it is crystal clear that during the trial it was neither suggested that the incident at the boutique never took place nor was it ever challenged during cross-examination. This silence in the face of stark accusations made against the accused-appellant is a relevant fact that renders the assertion of the victim more probable.

As **Peter Murphy** comments in his **Evidence, 8th Ed., p. 597-598,** there are two direct consequences of a failure to cross-examine a witness. One is purely evidential in that;

> *"failure to cross-examine a witness who has given relevant evidence for the other side is held technically to an acceptance of the witness's evidence in chief."*

The other is a tactical one but no less important for that;

> *"Where a party's case has not been put to witnesses called for the other side, who might reasonably have been expected to be able to deal with it, that party himself will probably be asked in cross-examination why he is giving evidence about matters which were never put in cross examination on his behalf."*

Even in his other work , viz. "**A Practical Approach to Evidence**" at page 444, Peter Murphy, Professor of Law of the South Texas College of Law, having considered the effect of omission to cross-examine a witness on a material point states the same as above. It is, therefore, not open to a party to impugn in a closing speech or otherwise, the unchallenged evidence of a witness called by his opponent or even to seek to explain to the tribunal of fact the reason for the failure to cross-examine.

Accordingly it is a counsel's duty, in every case:

> *"(a) to challenge every part of a witness's evidence which runs contrary to his own instructions; (b) to put to the witness, in terms, any allegation against him which must be made in the proper conduct of the defence; (c) to put to the witness counsel's own case, in so far the witness is apparently able to assist with relevant matters or would be so able, given the truth of the counsel's case."*

Thus the evidence of the victim who was quite forceful in his assertions on the sexual abuse that took place at the boutique remains unimpugned notwithstanding the fact that the memory of the victim slipped on the date.

There is also evidence to the effect that the victim opened the door for the accused-appellant to enter the victim's house on 12.09.2009. This evidence which was led to establish the offence that took place at the house of the victim constituted relevant facts recited in count No 3. There is also evidence that the victim directed the accused to his room when asked to do so. All these items of evidence lead this court to the irresistible inference that the victim clearly knew the malefic intentions of the accused at all times. The learned Senior State Counsel emphasized that for the victim to so have knowledge of accused-appellant's intention, a similar interaction as alleged in the first count ought to have taken place previously between the victim and the accused-appellant and it was what the victim consistently asserted in the witness box though he failed to recall the relevant dates pertaining to the first count in the indictment.

Consequently I take the view that the failure of the victim to remember the precise date on which the incident pertaining to the first count took place has not prejudiced the accused-appellant in any way.

There is another aspect of the defence case proffered by the accused-appellant that strengthens my reasoning. In his dock statement the accused-appellant claimed that false accusations had been made against him and he specifically denied having any knowledge of the alleged incidents that were testified to by the victim. There was a complete denial of the *actus reus* on the part of the accused-appellant in his dock statement. It would appear that the accused-appellant was quite certain that he was innocent. In such circumstances, why would the precise date on which the incident pertaining to count No. 1 be so material to establish the position of the accused-appellant? In other words if the accused-appellant asserts that the incidents never took place as alleged by the victim, the failure on the part of the victim to refer to the exact dates of the commission of the offense in count No. 1 could not have misled the accused-appellant. As the dock statement stood, the date of commission of the offence in the 1st count was not material to the defence of the accused as he asserted that he was nowhere there near the victim on any date.

At this juncture a reference must also be made to section 166 of the Code of Criminal Procedure Act, No. 15 of 1979 which is as follows:

> *"Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or these particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omission."*

It is clear that the principle underlying section 166 is that erroneous indictments ought to be amended only where failure to do so would mislead the accused, thereby denying him a fair trial.

The evidence of the victim is so consistent in terms of specifying the nature of the offence and the place where it was committed and the failure to remember the exact date on which the incident took place never resulted in a miscarriage of justice.

In the case of ***William Edward James*** 17 Criminal Appeal Reports 116, it was held that a mistaken date in an indictment, unless the date is of the essence of the offence

or the accused is prejudiced, need not be formally amended. It was in the course of dismissing the appeal in this case that the Lord Chief Justice referred to the judgment of Atkin J. in the case of ***R V. Dossi*** (supra) where it was held that from time immemorial a date specified in an indictment has never been considered a material matter unless time was of the essence of the offence. As far as the accused-appellant was concerned the offence never took place on any date and therefore time could not have constituted the essence of his defence. I therefore take the view that the conviction of the accused-appellant on count No. 1 of the indictment must be upheld.

Having thus disposed of the crux of the argument pertaining to count No. 1 what remains to be considered is the quantum of sentence imposed by the learned High Court Judge. The accused-appellant has not challenged the conviction under count No. 3 of the indictment and has been sentenced to 10 years' rigorous imprisonment for both counts No. 1 and No. 3, to run concurrently. The learned President's Counsel for the accused-appellant urged this court to take into account mitigatory circumstances and thereby made a passionate plea for a reduction of the sentence imposed by the learned High Court Judge.

Statutory and judicial guidelines as well as a plethora of case law have set out the principles regarding sentencing and the considerations that ought to be taken into account when suspending or reducing a sentence that has already been imposed. – *see* ***R v. James Henry Sargeant*** (1974) 60 Cr. App. R. 74.

In ***Bandage Sumindra Jayanthi v. Attorney General*** CA 251/12 – CA 267/12 (CA minutes of 03.07.2015) I provided a comprehensive account of the manner in which a sentence could be aggravated or mitigated.

> *"Where there is a legislative guideline such as in Section 303 (1) (a) to (l) of the Code which is, as I have commented above, a mirror image to some extent of long established judicial guidelines, the sentencer will begin the process of sliding up and down the scale of aggravation and mitigation by reference to the non-exhaustive list of factors given in both the legislative*

and judicial guidelines. Secondly the sentencers can also engage in a consideration of any factors deemed relevant by them but not listed in the guidelines. Other statutory provisions such as sections 16 and 300 of the Code as commented upon below can also be taken into account."

It has been brought to the notice of this court that the accused-appellant is now 80 years of age and that his health has been seriously deteriorating. From 2009 to 2018 the accused-appellant faced the trial while being released under strict bail conditions. During this period the accused-appellant has not been accused of committing any other offences. It has further been asserted that due to the stigma surrounding the situation his two daughters and son have been unable to enter into marriage. Undoubtedly the sins of the father shall not be visited upon his issues.

In ***Bandage Sumindra Jayanthi v. Attorney General*** (supra) I accentuated the factors against which the aims of sentencing must be balanced.

"Furthermore it has to be emphasized that the legitimate aims of sentencing which have to be balanced against the effect of a sentence on personal mitigation such as family life includes the need of society to punish serious crime, the interests of victims that punishments should constitute just deserts and the need of society for appropriate deterrence."

Therefore taking into account the present circumstances of the accused-appellant, on a balance of considerations this court takes the view that the imposition of the sentence of 10 years' rigorous imprisonment for each count has to be commuted.

Therefore this court orders that the sentence be reduced to 7 years' rigorous imprisonment for each count to operate concurrently from the date of conviction.

This reduction of sentence to 7 years' rigorous imprisonment for each count will operate concurrently from the date of conviction namely 31.10.2018. This court deems it condign to order this reduction having regard to the strong misericordia grounds that have been urged on behalf of the accused-appellant.

Subject to the variation and reduction of the sentence the conviction of the accused-appellant for count No. 1 and No. 3 is affirmed and the appeal is dismissed.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna J.

I agree.

JUDGE OF THE COURT OF APPEAL