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

M. P. Kelum Sisira Kumara

ACCUSED-APPELLANT

C.A No. 05/2011

H.C. Anuradhapura 217/2005

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &

Sunil Rajapaksa J.

COUNSEL: A. Meddegoda for the Accused-Appellant

Chethiya Gunasekera D.S.G. for the Complainant-Respondent

ARGUED ON: 17.07.2014

DECIDED ON: 23.09.2014

GOONERATNE J.

The Accused-Appellant was indicted for grave sexual abuse of one H. Shamalee Sandamalee on or about 01.12.2003, an offence punishable under Section 365 (b)(2)(b) of the Penal Code as amended. The evidence reveal that the victim was 13 years old when she gave evidence in the High Court and her date of birth as recorded (folio 36) was 10.12.1994. Therefore she would have been about 8 years old when she was subject to sexual abuse and harassment. The Accused-Appellant was convicted for the above offence and sentenced for 10 years rigorous imprisonment and fined Rs. 5000/- which carries a default sentence of 2 ½ years imprisonment.

The prosecution version as revealed by evidence was that the victim identified the Accused who is called 'Sudumama' who did something to her? The victim at the beginning of her examination-in-chief answered the above question as 'yes'. The victim resided in a house which had collapsed and her father had taken her and the other children to the house of the Accused. Victim's mother was not in the island during the relevant period. The father

had left the children at the house of the Accused during the period/time of offence and had gone for work. Victim had been sleeping inside the house with her brother and the Accused had come to the place they were sleeping and had taken the child out of the house, and removed her underpants. It is described in her own words as ඒ මාමා එලියට එක්ක ගිහින් මගෙ කලිසම ගැලෙව්වා. Sexual act had been performed twice according to evidence. (morning and evening) Although the victim had not replied correctly or with certainty of the alleged sexual act, the several questions put to her by the prosecuting counsel indicates at folios 43/44 of the brief that the incident that happened in the afternoon, when she was on bed. There is evidence (40) that the Accused had given her some toffees and sent the brother out, to bring some fishing-hook. (බිලි කොක්කක්) It is recorded as රෑ, ඊට කලින් මට උදේ ටොෆි අහුරක් ගෙනත් දිලා අයියට බිලි කොක්කක් අරගෙන එන්න කියලා යවලා, මාව තියා ගත්තා (40). The Accused in the way the victim could explain was on top of her, as explained ඇගෙ උඩ. Accused had been in this position as told by her for 20 minutes. At folios 48/49 the victim described the act of sex in the best possible way in which she could explain. It is suggestive of unnatural sex or anal sex and the position she was kept whilst the act of sex had been performed (48/49).

The learned counsel for the Accused-Appellant, inter alia urged the following points.

(a) Uncorroborated medical evidence.

(b) Alleged position of sexual act as described by victim is an impossibility.

(c) Learned High Court Judge failed to consider

(1) Inconsistent position taken by the victim and vague description of alleged sexual act.

(2) Absolute impossibility of sexual act as in (b) above.

(3) Failure to consider the medical report

(4) Alibi not considered and misdirected in law.

(5) Dock statement not analysed correctly.

Learned Deputy Solicitor General submitted to this court that the victim was abused and harassed as above on 2 occasions by the Accused. He also drew the attention of this court, mainly to the fact that the position of the defence had never been suggested or put to the prosecution witnesses (60 & 61). It was also suggested to this court that the evidence of Premawathie (84,

86 & 87) gives the background facts to this court and that the children along with victim's brother and sisters were looked after by her for 13 days and corroborated even by hearsay evidence about the complain made by the victim to her as regards the incident.

The medical report suggest that the hymen was intact and opinion stated therein states no evidence of vaginal penetration. Examination done on 23.03.2004. There is no doubt a delay, in the examination of this child who was subject to abuse. The offence is one of grave sexual abuse, which does not amount to rape. As such penetration has to be ruled out, and the offence is not rape. As long as the ingredients of this offence (section 365(b)2(b)) are established the medical report cannot be of much assistance. Further the delay in examination of the victim may be another fact which matters and medical evidence would diminish in value. Notwithstanding above, I would deal with the evidence of the victim. In all these type of cases the age of the victim matters to a very great extent. This was a very small child who was abused and harassed as above. She could not at times provide direct answers to some direct relevant question as regards the sexual act. However constant

probing of the child victim by the prosecution led her gradually to explain the act of child abuse which amount to grave sexual abuse. The details of the act testified by the child in her own way and language is more than sufficient to secure a conviction, along with other evidence led on behalf of the prosecution. This court need not collect and refer to all other evidence to prove guilt, which the learned High Court Judge has considered in the Judgment of the High Court.

It is essential for a court of law in a case of this nature to be mindful of all the circumstances and other various aspects such as age of child, mental and physical condition, power of explanation etc. Furthermore a child of tender years would be averse to court surroundings and proceedings. He or she may prefer to avoid such surroundings, and wait for the first available opportunity to leave the court room. One must also bear in mind the abuse that the child had to undergo as in the case in hand. This may have a far reaching effect on her mental condition in her future years to follow, at least up to adulthood and may be even thereafter. In all these circumstances I hold that it is very much safe to act upon her evidence and I will not fault the learned High Court Judge to that extent. Before I conclude I would prefer to

draw a favourable view of the prosecution case and I fortify my views from the famous Indian case of *Bhoginbhai Hirjibhai Vs State of Gujarat (1983) AIR. SC 753 at 755.* Indian Supreme Court held thus:

"By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed-up when interrogate later on. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another."

The defence case has been correctly viewed by the trial Judge. The alibi has not been suggested to the prosecution, or elicited, when the prosecution witnesses were giving evidence. I do agree with the defence that Section 126A of the Code would not have an application as regards the case in hand.

The views expressed by the trial Judge regarding the defence case contained in the dock statement, cannot be rejected by this court. There is enough and more evidence placed by the prosecution to prove the prosecution case beyond reasonable doubt. If one collects all the items of evidence led on behalf of the prosecution, the case of the prosecution is well

established. Trial Judge's views that the defence case does not create a reasonable doubt in the prosecution case cannot be faulted. In all the above facts and circumstances we affirm the conviction and sentence and dismiss this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL