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

In the matter of an Appeal against an order of the High Court under Sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Amarasinghe Arachchilage Chandrasomasiri,
Kurudugahahena Janapadaya,
455/A, Kandewatta,
Amithiriwela.

Accused-Appellant

C. A. No : 191/2013

H. C. Kegalle No : 2573/06

V.

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

Respondent

BEFORE : **H. N. J. Perera, J. &**

K. K. Wickramasinghe, J

COUNSEL : Harendra Perera for the Accused-Appellant.
Dileepa Peris SSC. for the Attorney General.

0ARGUED ON : 03th March 2015

DECIDED ON : 30th April 2015

K. K. WICKRAMASINGHE, J.

This is an appeal from a conviction for 'Grave Sexual Abuse' under sec. 365 B (2) (b) as amended by Act Nos. 22 of 1995 and 29 of 1998, at a trial held at the High Court of Kegalle.

The accused-appellant had made a dock statement denying the act of grave sexual abuse.

The learned High Court Judge, after considering the submissions made by both counsel for the prosecution and the defense, convicted the accused-appellant and imposed 15 years rigorous imprisonment with a fine of Rs. 10,000 and a default sentence of 2 years simple imprisonment.

The evidence relied on by the prosecution were; that the victim (first witness), Subasinghe Aarachchilage Pradeep Indika Subasinghe (then 12 years of age) and his brother (second witness) visited the accused's residence (a hut) to collect some books as informed by the accused with the consent of their father (third witness). The accused gave some money to the brother, who was then 9 years of age, to buy some goods and sent him to the shop. According to the evidence of the victim, after the brother left, the accused closed the door of the hut and has placed him on the bed. Thereafter the accused placed his male organ in between the legs of the victim, moved it up and down and he stopped the act after the sperms

shredded all over the thighs of the victim. When the brother was coming back the victim was outside the hut with eyes filled with tears. Thereafter the accused had given some books, pencils, etc... to both of them and then the victim had come home with his brother. In the evening he had narrated the incident to his father and the aunt (Ilangakoon Aarachchilage Indrani). After two days from the incident the aunt went with the victim and lodged a complaint about an 'attempt of a sexual attack'. No statement from the victim was recorded at that time. Hence the complaint was only in regard to an "attempt of a sexual attack" the matter was investigated by the minor crimes unit. The victim's statement was recorded after one month from the incident. Thereafter the police started the investigations. The victim was examined by the doctor after a month. The doctor was unable to observe any injuries on the victim.

However, in this case the accused neither gave nor called any evidence at the trial other than to prove certain contradictions in the evidence of the witnesses for the prosecution. In his dock statement he merely denied the allegation.

The accused appellant made the appeal on the basis that the prosecution had not proved its case 'beyond reasonable doubt' and the grounds for the appeal as mentioned in the petition of appeal are as follows;

a) The victim (first witness for the prosecution) has admitted a suggestion made by the defence counsel by saying that 'he does not remember the incident happened on that particular day completely'.

   Thus, the evidence given by the first witness cannot be regarded as a credible evidence to convict the accused appellant. Therefore this creates a reasonable doubt where the privilege of the doubt should be given to the accused.

b) The second witness, the brother of the victim, has stated at the stage of preliminary examination that 'he was not aware of the incident that his brother had faced when he was going to the police station'. Therefore, the evidence of the second witness cannot be used to corroborate the evidence given by the victim.

c) Evidence of the third witness (the father of the victim) contradicts with the evidence given by the victim.

d) Even though the ninth witness, the then O. I.C. of the Ruwanwella Police Station stated that the 1st complaint on his behalf had been made by one Ilangakoon Aarachchilage Indrani on 26.01.2002 and even though she was listed as a witness of the prosecution, she had never been testified before the court.

e) Until the inquires started on 28.02.2002 regarding the complaint made on 26.01.2002, no statement from the victim had been recorded and even though such a statement was recorded after a month from the first complaint, that statement contradicts with his oral evidence in court.

f) The tenth witness, the medico legal officer, by giving evidence, accepted that she examined the victim after 1 and ½ months from the incident and further the medical legal report is also silent as to a sexual attack that had taken place or at least to any injuries which show any such attempts.

When we analyze the evidence given by the victim in court, as pointed out by the learned counsel for the accused-appellant, it is clear that the victim has stated that 'he does not remember the incident that happened on the particular day completely' as an answer to a suggestion made by the defense counsel. The answers he had given to the questions put to him at the stage of examination, cross-examination and re-examination also proves that he has given evidence without a clear memory of the incident.

At page 49 of the brief shows that the learned State Counsel has questioned the victim as to the date he made the complaint to the police. Thereby, accepting the suggested date by the learned State Counsel, he had stated in the court that he did make the complaint on 2002.02.28 which was two days after the incident. But according to the police report, as pointed out by the learned defense counsel at the stage of cross-examination (at pages 64 and 65), the complaint was made on 2002.01.26. and not in fact on 2002.02.28. On 2002.02.28 the victim has only given a statement to the police officer who was conducting the inquiries regarding the complaint made on 2002.01.26 by the victim's aunt. Furthermore the victim answering to a question raised by the learned defense counsel (at pages 65 and 66) has stated that in his statement to the police on 2002.02.28 he stated to the police that the incident happened two days before the date of the statement. But as the learned defense counsel had brought to the notice of the victim (at page 66) he in fact, in his statement to the police, has stated that the incident happened about a month before the date of the statement. Then in the court the victim had mentioned that he could not remember what he actually said to the police in this regard.

The victim answering a question at the examination in chief has stated that 'the accused removed his (the accused's) sarong completely and the accused was fully naked at that time' (at pages 56 and 57). This contradicts with his statement to the police. In his statement to the police he has stated that 'the accused raised his sarong up to his chest'.

It is important that the victim giving evidence in court has stated (at page 58) that while the accused was committing intercrural sexual intercourse with him, he was lying on the bed upwards and the accused's face was facing down towards his face. This contradicts with his statement to the police on 2002.02.28. According to the statement, the victim has specifically stated that at the time of committing the offence, the victim was lying on the bed face down.

Furthermore, the victim has given evidence to the fact that when they were coming back home from the accused's hut, he told to his brother about the incident happened to him up to some extent (at page 61). But this contradicts with the evidence given by the brother (at pages 77 and 78). The brother in his evidence has stated that 'until he came home from the accused's hut he was unaware that such an incident had happened to the victim'.

There is another very strong point which shows that this incident in issue was totally not in the memory of the victim at the time of giving evidence. There is evidence to prove that the victim was admitted to the Base Hospital Avissawella on 2002.03.01 and examined by Dr. W. M. D. T. P. Wijemanna on 2002.03.02. The victim has stated that he was not examined by a doctor at any time after going to the Ruwanwella police station and he did not go to any hospital (at page 63).

It is very important that the brother's evidence before court contradicts with his own statement to the police on 2002.03.01 regarding how he came to know about the incident that happened to the victim.

When the learned State Counsel asked what happened at the victim's home after they came from the accused's hut, the witness (brother of the victim) answering that particular question has stated that "aunt was at home and asked me to get ready to go to Ruwanwella at night". Then he has stated that after they came to the police only he asked what happened. However, that answer was not clear at all (at page 77). It is very important that in court, he has said that he was unaware of the incident happened to the victim until he went to the police station. This contradicts with his statement to the police on 2002.03.01. There he has stated that 'after they came home from the accused's home the victim divulged the thing done by the accused to him to the father and the aunt and then both father and the aunt went to meet the accused'.

The victim while examining has stated that his father went to meet the accused after he divulged the incident that happened to him after coming back home from the accused's hut. But the father or the brother has not supported this evidence in court. None of them has given evidence stating that the third witness met the accused just after the victim informed him (the father of the victim) about the incident.

It is noted that according to the evidence given by the victim's brother, he has mentioned that they went to the police in the night (at page 77). However, it was proved that none of the members of the victim's family went to the police on the same day that the incident happened. So this cannot be the night of the day the victim and the brother came

home from the accused's hut. On the other hand, if this witness was referring to the night of the day on which their aunt made the complaint (2002.01.26), it creates a doubt by his statement that he was unaware of the incident taken place inside the accused's hut to the victim as it was after two days from the incident. However, it is clear that he was not referring to the date that he made the statement to the police as that statement was given at 10.50 in the morning.

The second witness has also stated in court that 'when he was coming back to the accused's hut from the shop, the victim was walking down from the accused's hut with eyes filled with tears and then went to one 'Kandy aunt's' house which was about 100m from the accused's hut (at page no. 77). However, neither the 1st witness (victim) nor the second witness, in their statements said to the police, that the victim went to the house of 'Kandy aunt' just after the incident and also that this 'Kandy aunt' was not called as a witness at the trial.

When we consider the judgment delivered by the learned High Court judge it seems that she was misdirected by considering that the victim correctly admitted the suggestion made by the learned counsel for the prosecution regarding the date of first complaint and the date on which the incident happened. She has held that the evidence given by the second witness at the stage of cross-examination did not create any reasonable doubt on proving the evidence given by the victim. However, considering the evidence given by the second witness regarding how he came to know the incident the victim faced, and with regard to the things happened after both of them came home from the accused's hut, a doubt creates as to the delay of making the first complaint and the things happened after they came home.

It is important to note that the learned High Court Judge has failed to consider the fact that even though the first and the third witnesses has stated that they informed the incident to the 'grama niladhari' first and then upon his directions the complaint was made after two days from the incident this was not stated by any person to the police at any stage or the delay for the first complaint was not stated to the police at any stage. The fact of meeting the 'grama niladhari' has been told only to the court after 11 years from the incident. And it is doubtful because;

a) the victim, who didn't have any memory of going to a hospital or the fact that a doctor examined him remembered the fact of informing the incident to the 'grama niladhari' with all necessary information (the 'grama niladhari' was not present on the day after the incident, therefore they met him on the next day. Then he directed them to go to the police and that was the reason for making the first complaint two days after the incident) (at pages 62,69 and 70),
b) the third witness has never gone to the police station with regard to this matter even though the victim had complained to him about this incident on the same day

evening and no statement was recorded from him by the police. As the learned defence counsel has argued, this behaviour of the third witness is doubtful as the father of the victim.

c) that particular 'grama niladhari' was not called as a witness by the prosecution.

Furthermore, the learned High Court Judge has applied the 'Ellenboro dictum' by sighting a list of cases to deny the dock statement made by the accused upon the ground that the prosecution had made a strong case before the court. When we consider all of the above mentioned contradictions and omissions, question arises as to whether the prosecution had made a strong case before the court.

In a criminal matter, the burden of proving lies for the prosecution to prove his case beyond reasonable doubt. In the case of ***Perera Vs. Naganathan (1964) 66 NLR 438*** it was held that, an expression of preference of the prosecution story is not enough to fulfil the requirement of proof 'beyond a reasonable doubt'. The great scholar Glanville Williwms in Mathematics of proof (1979) Crim. L. Rev. 297, 340, has explained the term "beyond reasonable doubt" as it must be "satisfied that you can feel sure".

The learned State Counsel sighting the case ***K. W.Rupasinghe alias Wilson Vs. The Republic of Sri Lanka CA 179/2005*** has stated in the written submissions that it was decided; *"when evidence of a victim of sexual abuse satisfies the test of probability and promptness it can be acted upon"*. The facts of that case and the base upon which the judgment was given in that case are much different from the present case. There the accused appellant had pleaded the defence of "alibi" and the main question in issue before the court was whether the accused appellant had entered the victim's room within that particular time period or not. In that case there were no questions as to any delay of making the first complaint or the absence of medical evidence. Furthermore, in that case the accused's evidence also supported the view that there was a possibility of him to commit that alleged offence within the alleged time period. On this behalf only the court had held that *"when evidence of a victim of sexual abuse satisfies the test of probability and promptness it can be acted upon"*. Therefore, that cannot be applied to the present case.

The learned State Counsel has also pointed out in the written submissions that the accused in his dock statement has merely denied the allegation and he has given no explanation for the allegation levelled against him by the minor victim. As we have mentioned above, in Criminal matters the 'burden of proof' lies on the prosecution. The defence has no burden to prove that he is innocent and the innocence of the defendant is presumed until proven guilty. However, according to the well established 'Ellenboro dictum', as pointed out by the learned High Court Judge, when the prosecution has established a strong case against the

defence, the defence must produce an acceptable explanation to the court. If he failed to give such an explanation, that can be taken as a negative point against him. For example, in the case of ***Seetin Vs The Queen (1965) 68 NLR 316***, the Court of Criminal Appeal accepted the directions given to the jury by the learned Trial Judge which stated that, "*The burden of proving the case against the accused is on the Crown. There is no burden cast on the accused to prove their innocence. The accused are presumed to be innocent, and that is a presumption that continues right up to the end of the case. If, after a consideration of all the evidence, you come to the conclusion that the Crown has not proved its case beyond reasonable doubt, then the accused are entitled to be acquitted.... If you are satisfied that the Crown has proved beyond reasonable doubt that five accused entered the hut, and if you are satisfied that a prima facie case has been made out by the prosecution, then, you will ask yourselves the question: "Has the Crown proved its case beyond reasonable doubt?" And if the Crown has proved its case beyond reasonable doubt, you might be justified in asking the question: "Is there not an explanation which we would have liked to hear from the accused?" "Would we not like to have known what the accused were doing that night?"*."

When we apply this to the present case, it is clear that the fact of the mere denial of the allegation by the accused in his dock statement can only be considered when we are satisfied that the prosecution has proved its case beyond reasonable doubt.

In the present case there are some major contradictions, omissions and also loopholes on the part of the case for the prosecution as we have mentioned above. Mainly, according to the police evidence (fourth witness) the first complaint was made on 2002.01.26 by one Illangakoon Arachchilage Indrani who was listed in the list of witnesses of the prosecution (at page 87) about an attempt of a sexual attack. However, this virtual complainant was not called up for the prosecution and has never testified before the court in order to obtain a clear clarification about the complaint made by her to the police.

The reasons given by the first witness and the third witness for the delay of the first complaint was doubtful and if the virtual complainant was called as a witness she would have given an explanation as to why she didn't make the complaint soon after the incident.

Furthermore, no reasons were given for the belated statement of the victim and for the delay of producing him to a doctor for the examination. According to the evidence given by the doctor, as a result of the delay there were no evidence of any injuries and therefore even the medico legal report (P1) was silent as to a "Grave Sexual Attack". This P1 would have been the best evidence to corroborate the evidence of the victim if the victim was produced before the doctor without any delay.

Accordingly, except the evidence of the victim which was with a lot of infirmities, there was no other evidence to prove the commission of the alleged offence beyond a reasonable doubt.

Therefore, it is unsafe to convict the accused appellant with the available evidence.

We acquit the accused appellant.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFFERED TO:

1) ***Perera Vs Naganathan*** **(1964) 66** ***NLR 438***
2) ***K. W.Rupasinghe alias Wilson Vs. The Republic of Sri Lanka*** **CA 179/2005**
3) ***Seetin Vs The Queen*** **(1965) 68 NLR 316**