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

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act no 15 of 1979 as amended.

Kahadawela Arachchilage Wijeratne

**Accused-Appellant**

**C.A.Case No:- 63/2014**

**H.C.Ratnapura Case No:-182/2007**

**V.**

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**Respondent**

**Before:- H.N.J.Perera, J &**

**K.K.Wickremasinghe, J.**

**Counsel**:-Anil Silva P.C with C.Peiris for the Accused-Appellant

H.Jayanetti S.C. for the Respondent

**Argued On**:-13.08.2015

**Written Submissions**:-18.09.2015

**Decided On**:-16.11.2015

**H.N.J.Perera, J.**

The accused-appellant was indicted in the High Court of Ratnapura for committing grave sexual abuse on one Puwakdandawe Manikku Arachchilage Prasad Madushanka Priyadarshana between the period of 1st March 2004 and 31st March 2004 an offence punishable under section 365 B(2)B of the Penal Code amended by Act No 22 of 1995 and No 29 of 1998. After trial the accused-appellant was convicted and sentenced by the learned trial Judge to 8 years R.I and imposed a fine of Rs.2500/- with a default term of one month of simple imprisonment. The accused-appellant was also ordered to pay Rs 20,000/- as compensation to the victim with a default term of six months simple imprisonment. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

The facts pertaining to this case and the background to the incident may be set out as follows.

The victim Madushanka was only 15 years of age at the time of the incident and was studying in grade 10. The accused too had been a teacher at the same school. According to the evidence of Madushanka on the day of the incident he and the witness Ajith Kumara had visited the residence of the accused-appellant on the request of the accused-appellant to have additional lessons in the subject of Sinhala and Social Studies. The accused-appellant too had accompanied them to his residence and on their way to his house the accused-appellant had gone to a boutique and bought provisions to cook for the night.

The accused-appellant after coming home had thereafter asked the witness Ajith Kumara to go to the boutique again to bring rice to be cooked as breakfast for the following day morning. At that time only the

victim and the accused-appellant had been at home and the accused-appellant had called him to a room and when the victim had gone to the room the accused-appellant had embraced the victim and had started to kiss him .However the victim had managed to escape. Later the accused-appellant had called the victim once again to a different room on the pretext of offering some clothes to the victim and when the victim had gone to the said room, the accused-appellant had once again embraced the victim and had in the process touched the private parts of the victim. The victim had very clearly stated that the accused-appellant touched the penis of the victim.

The learned Counsel for the accused-appellant urged four grounds of appeal as militating against the maintenance of the conviction.

1. That conviction of grave sexual abuse is unsafe in view of the inconsistence evidence of the victim

2. The story of the victim is not corroborated.

3. The learned trial Judge had proceeded to compare the evidence of the prosecution witnesses with the dock statement of the accused-appellant prior to rejection of the evidence placed by the defence.

4. That the victim had uttered falsehood on the instigation of a 3rd party.

With regard to the way the accused-appellant had touched the victim's private parts the victim in examination in chief had said that at the time of the incident he was wearing a pair of shorts and that the accused-appellant embraced him and touched his private parts. He has clearly stated that the accused-appellant touched his private parts when he was wearing a pair of short .In cross examination a question has been put to him on the basis that the accused-appellant had touched his private parts over the trouser he was wearing to which the witness had responded by saying yes.To a question posed to him by court he has said

that he was only wearing a trouser at that time. Thereafter when he was asked by the defence Counsel whether the accused-appellant touched his private parts from the top of the trouser he was wearing at that time the witness has clearly stated that the accused-appellant inserted his hand inside between his body and the trouser from front and touched his penis. He has further said that he was wearing a loose trouser at that time and the trouser would have come down a bit. It was pointed out by the defence that the victim in his statement to the police has stated that the accused-appellant had pulled down the trouser worn by the victim. It is to be noted that the witness had been consistent with regard to the main incident that the accused-appellant touched his penis. The victim had been consistent with regard to the act that was committed by the accused-appellant even though he had been a little inconsistent as to the manner how the hand of the accused-appellant was kept on his private parts. When one consider the evidence given by the victim in totality there is no material contradiction or an omission with regard to the manner in which the accused-appellant touched the victim's private parts. Therefore in my view the omission and the contradiction pointed out by the Counsel for the accused-appellant does not cast a doubt with regard to the incident. The victim had given evidence in the High Court after a lapse of 10 years from the date of the incident. The victim had narrated the story according to the way he remembers the incident at the time of giving evidence before the High Court.

In Mohamed Niyas Naufer & Others V. Attorney General SC Appeal 01/2006 decided on 08.12.2006 Shirani Thilakawardena, J observed that:-

"When faced with contradictions in a witness's testimonial, the court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness."

It was further held that too great a significance cannot be attached to minor discrepancies, or contradictions as by and large a witness cannot be expected to possess a photographic memory and to recall the exact details of an incident. It was further held in that case that:-

"Therefore court should disregard discrepancies and contradictions, which do not go to the root of the matter and shake the credibility and coherence of the testimonial as a whole. The mere presence of such contradictions therefore, does not have the effect of militating against the overall testimonial creditworthiness of the witness, particularly if the said contradictions are explicable by the witness. What is important is whether the witness is telling the truth on the material matters concerned with the event."

Our law does not require the prosecution to call a number of witnesses to prove a case against an accused. Evidence given by one witness is sufficient. It is the quality of the evidence given by the said witness that matters.

In Sumanasena V.Attorney General [1999] 3 Sri.L.R 137 it was held that:-

"Evidence must not be counted but weighed and the evidence of a single witness if cogent and impressive could be acted upon by a court of law."

Thus the court could have acted on the evidence of the victim provided the trial Judge was convinced that he or she was giving cogent, inspiring and truthful testimony in court.

In Bhoginbhai Hirjibhai V. State of Gujarat (1983) AIR 753 Indian Supreme Court stated thus:-

"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury."

However in Gurcharan Singh V. State of Haryana AIR 1972 S.C 2661, the Indian Supreme Court held:-

"As a rule of prudence, however, court normally looks for some corroboration on her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated."

In Premasiri V.The Queen 77 N.L.R 86 Court of Criminal Appeal held:-

"In a charge of rape it is proper for a Jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such character to convince the Jury that she is speaking the truth."

Therefore it is very clear that as accused person facing a charge of sexual offence can be convicted on the uncorroborated evidence of the victim when her evidence is of such character as to convince the court that she is speaking the truth.

In the instant case the victim had visited the house of the accused-appellant with witness Ajith Kumarasiri . Since this witness was asked to visit the boutique to buy rice, he had not been at home at the time of the incident. But the evidence of this witness supports the story of the victim up to that point of time. The evidence of witness Ajith Kumarasiri had not been challenged by the defence at the time of the trial.

It is clear that the victim had not wanted to divulge the said incident that took place at the house of the accused-appellant to anyone due to embarrassment. The victim has clearly stated that he felt shy to disclose this even to his friend Ajith. The victim has clearly said that he decided not to divulge this to anyone but one day when he was studying together with Kamal he questioned him about it and he thought that Kamal knew something about the incident and thereafter he told everything to him. It is very clear from the testimony given by the victim that he did not

intend to inform about this incident to anyone else. But later he has disclosed about it to witness Kamal. The conduct of the victim clearly shows that he had not taken an undue interest with regard to the matter and that when the police questioned him with regard to the incident he had disclosed the said incident to the police. There is no evidence to show that there was animosity between this victim and the accused-appellant. It is also clear that he has not implicated the accused-appellant falsely due to an instigation by a third party.

In Sumanasena V. Attorney General [1999] 3 Sri.L.R138 it was held that:-

"Just because the witness is belated witness, court ought not to reject his testimony on that score alone, court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the court could act on the evidence of a belated witness."

In this case the victim has given a plausible reason for the delay in making a complaint to the police. In fact the evidence of the victim shows that he never intended to make a complaint about this incident to anyone. But after some time due to circumstances beyond his control he was compelled to divulge the said incident to the police. One cannot say that the victim wanted to falsely implicate the accused-appellant due to a third party's intervention.

The entire case revolves around and rests on the testimony of victim of this case witness Madushanka. It is well established that conviction can be based on the testimony of a single witness provided the court finds from scrutiny of his evidence that he is wholly a reliable witness. The trial Judge has come to such a favourable finding in favour of the witness Madushanka as regards his testimonial trustworthiness and credibility.

On perusal of the judgment of the learned trial Judge it is very clear that the trial judge had considered and evaluated all the material evidence that had been led before him at the trial by both parties.

It is settled law that an unsworn statement must be treated as evidence. Queen V. Kularatne 71 N.L.R 529. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt. The evidence given by the accused-appellant too had been considered by the learned trial Judge in detail. It is my view that the learned trial Judge has correctly rejected the dock statement of the accused-appellant. The dock statement is not credible nor does it create any reasonable doubt on the prosecution case.

The learned President's Counsel had raised an issue on the footing that the learned trial Judge has compared the evidence of the prosecution with the version of the defence. Although the learned trial Judge stated so in his judgment, when one consider the entire judgment of the learned trial Judge it is clearly seen that the learned trial Judge had considered all the evidence that had been placed before court by both parties and also had very clearly analyzed the evidence of the accused-appellant's dock statement and had clearly come to the conclusion that the said charge against the accused-appellant had been proved beyond reasonable doubt by the prosecution. In my opinion what the learned trial Judge has in fact stated is that he had considered the evidence led by both parties and the evidence given by the accused-appellant does not create any reasonable doubt on the prosecution case.

In King V. Musthapha Lebbe 44 N.L.R 505 the Court held thus:- "The Court of Criminal Appeal will not interfere with the verdict of a Jury unless it has a real doubt as to the guilt of the accused or is of the opinion

that on the whole it is safer that the conviction should not be allowed to stand."

A Court of Appeal will not lightly disturb the findings of a trial Judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong. The Privy Council V. Fradd V Brown & Company Ltd. 20 N.L.R 282.

On perusal and consideration of the learned trial Judge's judgment and the totality of the evidence led in the case we are of the considered view that he had come to a right decision in finding the accused-appellant guilty of the charge.

In my opinion the prosecution has proved the case beyond reasonable doubt. For the above reasons, I refuse to interfere with the judgment of the learned trial Judge and affirm the conviction and sentence. I dismiss the appeal.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**K.k.Wickremasinghe, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**