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.

Pelenda Dewage Wijewardhana
alias Charlis Suda alias Sudu aiya,
Prison,
Mahara.

Accused-Appellant

C. A. No. : CA/140/13

H. C. Gampaha Case No. : HC 126/07

V.

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

Respondent

BEFORE	:	**H. N. J. Perera, J. &**
		K. K. Wickramasinghe, J.
COUNSEL	:	Asela Muthumudalige for the Accused-Appellant.
		Anoopa de Silva, SSC for the Attorney General.
ARGUED ON	:	07th of August 2015
WRITTEN SUBMITIONS	:	16th of September 2015
DECIDED ON	:	07th of December 2015

K. K. WICKRAMASINGHE, J.

The accused-appellant (herein after referred to as the 'appellant'), Pelenda Dewage Wijewardhana alias Charlis Suda alias Sudu aiya was indicted in the High Court of Gampaha for;

1. committing rape on Senanayaka Pathirannehelage Sanjeewani Shashikala Senanayake (the victim), who was below 16 years of age, on or about a day within the period of 2004.07.01 to 2004.10.12 and thereby committing an offence punishable under sec. 364 (2) (e) of the Penal Code as amended by Act No. 22 of 1995 and
2. committing rape on the same victim, who was below 16 years of age, in a different occasion which was not described in the first charge of the indictment, on or about a day within the same period of 2004.07.01 to 2004.10.12 and thereby committing an offence punishable under sec. 364 (2) (e) of the Penal Code as amended by Act No. 22 of 1995.

The indictment had been served to the appellant on 2008.02.21. After reading the indictment to the appellant on 2012.07.10, the appellant had opted for a non-jury trial. Therefore, the trial commenced before the learned High Court Judge of Gampaha on the same day.

At the trial the prosecution led evidence of several witnesses (PW 1, PW 2, PW 4, PW 6, PW 8 and PW 9) and the case for the prosecution had been concluded on 2013.01.22.

On 2013.04.29 the appellant had made a dock statement denying all the charges. There he had stated that the mother of the victim was living in his residence with her two children after her husband left her. Then she went abroad leaving the children with them. At that time, one child was one and half years old and the other one was three years old. From that day they were taking care of those two children. The victim's mother had used to send them Rs. 3000/=, Rs. 4000/= or sometimes Rs. 5000/= while in abroad. The appellant was just a labourer at that time and he was taking care of those children with the earnings of that job. While everything was happening in that way, the mother of the victim had arrived from abroad but left his residence and gone to a residence of one of her brothers' as he (the appellant) scolded her for getting unknown males into his residence. Then he had claimed Rs. 15, 000/= for taking care of her children. Thereafter, the victim's mother, after getting advice from another lady called Sujatha (his elder son's mother-in-law), had filed a criminal case against him. Thereafter the police officers from Kirindiwela Police Station had come and arrested him. Later they assaulted him and applied chilly all over his body. Then the police had taken a statement from him. After that he had been taken to the Pugoda Court and then to Mahara.

On 2013.07.31, the learned High Court Judge had acquitted the appellant from the second charge and convicted him for the first charge of the indictment. On the same day, the learned High Court Judge had imposed a sentence of fifteen (15) years rigorous imprisonment with a fine of Rs. 10, 000/=; in default two years rigorous imprisonment for the first offence.

This appeal lies against the aforesaid conviction and the sentence.

According to the learned Counsel for the appellant, the grounds of appeal are as follows;

1) The prosecution has failed to prove the date of offence beyond reasonable doubt.
2) The learned Trial Judge has failed to consider that the prosecution's story is not corroborated.
3) The learned Trial Judge has failed to evaluate the dock statement given by the appellant.

The Victim was 19 years of age when she was giving evidence before the High Court and according to victim, her mother (PW 2), her younger brother and herself were living with her mother's elder sister at her residence at the age of 6 years, as her mother had some problems with her father at that period of time. Later on, her mother had gone abroad leaving her and her younger brother with their aunt (the elder sister of the mother) and their aunt's husband (the appellant). The aunt and the appellant had two of their own children at that time.

When the victim was about 9 years old, the appellant has started to have sexual intercourse with her while she was alone at home. According to her evidence, she had faced this kind of act for the first time when she was 9 years old and for the last time when she was 12 years old. Altogether she had faced these type of acts for about 3 or 4 times. However, she had not informed anyone about this series of incidents throughout for four years as the appellant had threatened her showing a knife and saying that he will kill her if she informs that to anyone. Finally, when her mother came back to Sri Lanka in 2004, she had informed her the whole series of incidents and accordingly she had made a complaint to the police against the appellant.

Under the first ground of appeal, with regard to the date of offence, the learned Counsel for the appellant argued that the prosecution's evidence (specially the evidence given by the victim in the High Court) does not comply with the said period of time in the indictment (within the period of 2004.07.01 to 2004.10.12) and therefore the indictment is bad in law in the first instance. He further argued that therefore the victim is not a credible witness.

The victim has clearly stated in the High Court that this series of incidents had started when she was 9 years of age or in other words, from 2002 and the appellant committed the offence about 3 or 4 times on her until she was 12 years old or in other words, until 2004 (vide pages 44, 45, 46, 47 and 48 of the brief). On the same day she had further stated that the last incident of this series of incidents took place about 6 or 7 months before she

narrated the incidents to her mother and then she had stated that she told her mother about this series of incidents on or about 2004.10.13 (vide page 48 and 49 of the brief). Therefore, the last incident should have taken place in March or April of 2004. Then it is evident that PW 2 (the mother of the victim) also has not stated an exact time period of the incident.

Furthermore, PW 8, the doctor who examined the victim on 2004.10.13, had clearly narrated the brief history given by the victim at the time of the examination. There the victim had clearly stated that the first incident had taken place two or three months before her examination. Accordingly, the first incident should have taken place in July or August of 2004. According to PW 4, the police officer who had taken down the first complaint and the statements given by the victim and her mother on 2004.10.13, the victim had stated to the police that she had faced this incident about 2 or 3 times and the incident took place 02 or 03 months before the day of the complaint. Accordingly, the incident should have taken place in July or August of 2004.

According to all these evidence it is apparent that though she had given the month of March or April of 2004 to the Court as the month in which the incident took place, she had clearly stated to the police and the doctor that the incident had taken place in the month of June or August. She was giving evidence before court after about 7 years from the last incident but when she was giving the statement to the police and the doctor her memory was fresh and that evidence clearly corroborates with the specific period mentioned in the indictment as the period in which the offence took place.

Furthermore, according to the brief history given by the victim to the doctor it is evident that her childhood was not a pleasant one as she had been assaulted by the people with whom her mother left her and also she had been prevented from going to school. Further, as per her evidence, she was threatened by the appellant not to tell this to anyone and he had done it by showing a knife and telling that he will kill her if she does so. Therefore, it is evident that the victim was living with a lot of fear and pressure. Furthermore, with all that, she was also facing a very harsh series of incidents. So we cannot expect a clear memory with regard to the exact dates on which she faced these incidents from a victim like this. Furthermore, in the courts also she had said that she cannot exactly remember the dates on which she faced those incidents (vide page 48 of the brief).

It is important to note that, in the well-known case of **Bharwada Bhoginbhai Hirjibhai vs State Of Gujarat 1983 AIRHC 753** Justice Thakkar has stated that; *"(1) 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.... (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.... (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment."*

Therefore, considering the whole evidence given by the victim in Court and the condition she had to go through in her childhood, it is not correct to hold that she is not a credible witness merely based on the fact that she could not state in the Court the exact time period in which the offence was committed.

With regard to the second ground of appeal, it is not correct to say that the evidence given by the PW 2 does not corroborate with the victims version. That is because, both the witnesses had clearly stated that the victim was facing this series of incidents from 2002 until 2004 and she had faced this about two or more times when she was under the custody of her aunt and the appellant. Both victim and PW 2 have also stated that this was the period during which PW 2 was abroad and that PW 2 came to know about this incident when she came back to Sri Lanka in 2004.

However, the argument for the learned Counsel for the appellant in this regard was that the PW 2 in her evidence has not mentioned anything about the incident that had taken place. According to her, the victim had only told her that the appellant had come close to the victim wearing an underwear (vide page 65 of the brief). Apart from that there was no evidence given by the PW 2 with regard to the incident. According to this evidence it does not reveal the fact that the appellant has committed any offence to the victim.

Even though PW 2 has not given any evidence with regard to the exact offence, the victim had clearly given evidence that, in all there stating three or four instances, the appellant had taken her to the old house next to his house at the occasions on which there were no one else at home, pressed her against the wall of the room in that house, then removed his trouser and put his penis into her vagina. As per her evidence, he had shook his penis.

The evidence given by the doctor corroborated with the victim's version. According to the brief history given by the victim to the doctor, she had clearly stated the whole incident taken place in the same manner. There she had stated that both she and the appellant were standing at the time of the incident. Further she had stated that in all those instances a liquid had come from the penis of the appellant and it was spread all over her thighs and also into her vagina. Then according to the observations done by the doctor, his view was that this victim had gone through penetration for several occasions and her hymen was severely damaged.

The learned counsel for the appellant, by sighting the case **The Queen v. D. G. De S. Kularatne and two others 1968 71 NLR 529** has submitted that the learned High Court Judge had not considered the dock statement of the appellant. Though the learned counsel stated so, it is apparent that the appellant had merely stated his version and how he was treated by the police during the time he was in the custody of police. In this particular case the version of the appellant is not sufficient enough to create a reasonable doubt in the prosecution case. Therefore, the learned High Court Judge cannot be found fault with. I do not think that merely considering the dock statement alone would warrant an acquittal when considering the strong evidence of the prosecution placed against the appellant. Therefore, facts of the above mentioned case by the counsel for the appellant differ from the present case. Even though the appellant was said to have been treated in inhuman way, the Trial Judge had to consider the evidence placed before her.

Considering all above, it is evident that there are no contradictions that goes to the root of the case and there is clear evidence that penetration had taken place.

On the above mentioned careful evaluation, analysis and consideration of the evidence, it is evident the offence of rape has been proved beyond reasonable doubt against the appellant. The learned High Court Judge should have imposed compensation payable to the victim as stipulated in sec. 364 (2) (e) of the Penal Code as amended by Act No. 22 of 1995 which is mandatory. Considering above I affirm the conviction of the appellant for

the first charge. Furthermore, with regard to the sentence, in addition to the fifteen years rigorous imprisonment and the fine imposed by the learned Trial Judge, I order the appellant to pay Rs. 50, 000/= as compensation to the victim, and in default one year rigorous imprisonment.

Subject to the above variation, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1. Bharwada Bhoginbhai Hirjibhai vs State Of Gujarat 1983 AIR HC at page 753
2. The *Queen v. D. G. De S. Kularatne and two others 1968 71 NLR 529*