

68/2012

**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 Criminal Procedure Code
Act NO. 5 of 1979 as amended.

Wathukarage Nanda Premasiri

Accused-Appellant

C.A.Case No:-68/2012

H.C.Monaragala Case No:-375/2015

V.

The Attorney General.

Attorney General's Department,

Colombo 12.

Respondent

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

K.K.Wickremasinghe, J.

Counsel:-Amila Palliyage with Charith Galhena for the Accused-

Appellant

Shanil Kularatne S.S.C for the Respondent

Argued On:-02.10.2015

Written Submissions:-05.11. 2015

Decided On:-07.12.2015

H.N.J.Perera,J.

The accused was indicted in the High Court of Monaragala for committing grave sexual abuse on one Wathukarage Swarna Priyadharshanie on 13th January 2001 an offence punishable under section 365 B (2) B of the Penal Code amended by ACT No 22 of 1995 and 29 of 1998. After trial the accused-appellant who was the father of the victim was convicted and sentenced by the learned trial Judge to 10 years R.I and imposed a fine of Rs.5000/-and a default sentence of three month's imprisonment. The accused-appellant was also ordered to pay Rs.75,000/- as compensation to the victim with a default term of nine months R.I 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 was only 11 years of age at the time of the incident and is the daughter of the accused-appellant. According to the evidence of Priyadharshanie on the day of the incident after watching T.V she went to sleep in her room. The other occupants had been sleeping in the adjoining drawing room area. According to the victim she has suddenly woke up and realised that her under garment half removed and her father the accused-appellant lying on top of her body. She had felt pain on top of her genital area and also felt the penis of the accused-appellant on her body. The victim has further stated that when she tried to cry for help the accused-appellant closed her mouth and asked her not to shout and said that he is her father and threatened her with death. The victim

has said that she clearly identified the person who was on top of her body to be her father from his voice. Further she has said that the accused-appellant on the following morning before leaving to chena the accused-appellant has given her some money and has told her not to inform about this incident to the mother or the grand-mother.

The accused-appellant in his dock statement had claimed that the victim has uttered falsehood on the instigation of his wife Chandrathilaka.

In the appeal the Counsel for the accused-appellant relied mainly on two grounds of appeal. (1)The indictment does not specify the act done by the accused-appellant and the evidence not compatible with the act described in the indictment.

(2)The evidence of the victim is not corroborated and it is unsafe to act on the evidence of the prosecutrix in the absence of corroborative material.

In the said indictment it is stated that the accused-appellant had committed an offence of sexual abuse on the victim by keeping his penis in between the thighs of the prosecutrix.

In her evidence the prosecutrix has clearly stated that she got up when she felt that the under garment being pulled down and that she felt the pain in the region on top of her genital area. She has clearly stated that the accused-appellant did not press his penis on her genital area after she woke up, but she felt the pain on top of her genital area and she also felt the accused-appellants penis on her body. In her evidence she has categorically stated that she found the accused-appellant lying on top of her body when she woke up. This clearly indicates that she felt the pain top of the genital area and that she also felt the penis of the accused-appellant touching her body in the said area. Therefore there is no doubt that the evidence given by the prosecutrix in this case very

clearly establish the fact that the accused-appellant was lying on top of her and had his penis touching the genital area of the victim. This piece of evidence clearly indicates that the accused-appellant had his penis in between the thighs of the victim and that it was pressing the top of her genital area. In our opinion the evidence given by the prosecutrix sufficiently demonstrate how the accused-appellant was lying on top of the body of the victim placing his penis in between the thighs of the victim pressing the top area of her genital. We are of the view that the evidence of the victim Priyadharshanie is sufficient to convict the accused-appellant on the charge described in the indictment if believed.

The accused 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 *Bhoginbhai Hirjibhai V. State of Gujarat* (1983) AIR S.C 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 look 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 85 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 as to convince the jury that she is speaking the truth.”

Therefore it is very clear that an 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.

The prosecutrix had clearly testified that she found the accused-appellant on top of her body when she suddenly woke up that night. She has also stated that she felt pain on the top area of her genital and that she felt the penis of the accused-appellant touching her body in the said area. She has stated that she was able to identify the person who was lying on top of her body as her father, and that she was able to identify him by his voice when he closed her mouth and told her not to shout. It is clearly seen that the accused-appellant too has in order to make her quiet informed her that it is her father. The victim has on the following day morning itself had inform her mother about this incident. The prosecutrix has questioned the mother as to why she did not hear her calling her that night. She testified that the victim told her that her nicker was removed and that she found her father on top of her body that night. The mother of the victim had questioned the accused-appellant about the incident. The accused-appellant had denied the incident and has stated that the victim must have dreamt something in her sleep. She has even asked the accused-appellant to apologize to her daughter. Mother of the victim witness Chandrathilaka has further stated that she sent a message to the mother of the accused-appellant to come but she too did not come. Thereafter she has stated that there was a delay in making the complaint to the police was that she waited for the parents of the accused-appellant to arrive. Thereafter she has made a complaint to the police on 18.01.2001.

In *Sumanasena V. Attorney General* [1993] 3 Sri.L.R 137 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 mother of the victim witness Chandrathilaka has given a plausible reason for the delay in making a complaint to the police.

Dr. Wijaya Lellwela had testified to the fact that the said prosecutrix was examined by him at the Badulla Hospital on 21.01.2001 at 10 a.m. She has been admitted to hospital 19.01.2001 at 6.35 p.m. On examination he found no injuries on the body of the prosecutrix. He has stated that she was only 11 years old at the time and he could not get a detail account of the incident from her due to her age but she stated that her father who was drunk lied on top of her body. He has said that he examined the prosecutrix after eight days from the incident. According to him if the prosecutrix had any injuries the said injuries could have been cured by then.

Even though the defence has extensively cross examined the prosecutrix and the other witnesses in this case, no significant omission or contradiction had been brought to the notice of court to cast a doubt in the prosecution story.

In *Mohamed Niyas Naufer & others V. Attorney General S.C. Appeal 01/2006* decided on 08.12,2006 Shirani Thilakawardene, J held that:-

“When faced with contradictions in a witness 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 in that case that too greater 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. In the instant case the victim was only 11 years of age at the time of the incident and 19 years at the time she gave evidence in court. She was married at the time she testified in High Court.

I cannot agree with the submission made by the Counsel for the accused-appellant that the learned trial Judge had rejected the defence version without a proper analysis of the same. 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 entire case revolves around and rests on the testimony of the victim of this case witness Priyadharshanie. It is well established that conviction can be based on the testimony of a single witness provided the court finds from scrutiny of her evidence that she is wholly reliable witness. The trial Judge has come to such favourable finding in favour of the witness Priyadharshanie as regards her testimonial trustworthiness and credibility.

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.

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.”

On perusal and consideration of the learned trial Judge’s judgment and the totality of the evidence led in this 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