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.

Keerawella Palliyaguruge Dinesh Indika,

34, Singha Road, Keragapokuna

Wattala

Accused-Appellant

C. A. No. : CA 88/2013

H. C. Negombo Case No. : HC 228/2009

V.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

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

K. K. Wickramasinghe, J.

COUNSEL	:	Neranjan Jayasinghe for the Accused-Appellant. Sudharshana De Silva, SSC for the Attorney General.
ARGUED ON	:	30th of September 2015
WRITTEN SUBMITIONS	:	26th of October 2015/ 03rd of November 2015
DECIDED ON	:	15th of December 2015

K. K. WICKRAMASINGHE, J.

The accused-appellant (herein after referred to as the 'appellant'), Keerawella Palliyaguruge Dinesh Indika, in this case was indicted by the Hon. Attorney General in the High Court of Negombo for having committed Grave Sexual Abuse on Palliyaguruge Mona Priyangani at Keragapokuna, on a day in between 05.09.2003 to 05.10.2003, an offence punishable under sec. 365 B (2) (a) of the Penal Code as amended by the Act No. 22 of 1995.

Upon the appellant pleading not guilty to the indictment, the trial commenced before the learned High Court Judge. After trial he was convicted for the charge and sentenced to seven (7) years rigorous imprisonment and a fine of Rs. 5000 in default one (1) month simple imprisonment and ordered to pay Rs. 50, 000 as compensation to the victim in default twelve (12) months simple imprisonment.

Being aggrieved by the said conviction and the sentence this appeal has been made by the appellant against the aforesaid conviction and the sentence.

Facts of this case may be briefly summarised as follows;

Palliyaguruge Mona Priyangani who was the alleged victim in this case was twenty seven (27) years old at the time of the incident and was a mentally retarded person. On the day of the incident the victim was washing clothes inside the bathroom of her residence and her mother was not at home in that morning. While washing clothes the victim had felt a pain on her chest and therefore she had gone to the bed to rest. When she was lying on bed appellant had entered the house. Then the appellant had entered the victim's bedroom and climbed on to the victim's body by pushing her on to the bed. Then the appellant had removed his short and asked the victim to bite his male organ. At that time, the victim had screamed asking for help and then the appellant had tied the hands and legs of the victim. Thereafter the appellant had raised the nighty of the victim and bit her chest and her back. At that time the victim was nearly fainted. Then the appellant had removed the underwear of the victim and pressed his male organ against her female organ. While the appellant was committing that act, the victim had screamed saying that "These acts are bad. These acts have to be done after marriage." However, the appellant had put a piece of cloth into her mouth and squeezed her throat in order to prevent her shouting. Thereafter, the appellant had stated that the work is done and left the place as the mother of the victim was coming back home. Before the appellant leave, he had warned the victim that he would kill her if she told this to anyone.

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

1) The evidence of the victim is not credible and therefore she cannot be considered as a competent witness.
2) If she is a competent witness then her evidence fails the test of consistency and the test of credibility.
3) There is no corroboration of the victim's evidence.
4) Prosecution had failed to prove the date of the offence.
5) This is a framed charge by the members of the victim's family due to previous animosity of the parties.

The case for the prosecution was based on the evidence of the victim who was a mentally retarded person. The learned High Court Judge had questioned the victim at the commencement itself of her evidence and he was satisfied the way that she was giving evidence, clearly describing the incident taken place against the appellant. Through that

questionnaire the Learned High Court Judge was satisfied that the victim is capable of understanding the questions put to her and she is competent enough to give rational answers. She was subjected to cross examination in length and in the course of her cross examination she had clearly answered all the questions asked by the learned defence counsel. The two omissions brought to the attention of court were not proved by the defence. However, the conviction is solely based on the evidence given by the victim.

The mother of the victim, the Judicial Medical Officer who examined the victim and the police officer who visited the scene had given evidence. The doctor had not seen any injuries on the victim. However, the victim had been referred to a psychiatrist.

At the end of the prosecution case, the appellant had chosen to give evidence he was subjected to cross examination. The appellant took up the position that this was a false complaint due to animosity between his family and the victim's family who are close relatives and neighbours.

When considering the competency of the victim, as a witness, sec. 118 of the Evidence Ordinance states that;

"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation—A person of unsound mind is not incompetent to testify unless he is prevented by his unsoundness of mind from understanding the questions put to him and giving rational answers to them."

Accordingly it is the duty of the learned High Court Judge to ascertain whether victim is a competent witness. In the present case, it is evident that the learned High Court Judge was satisfied with the competency of the victim. Furthermore, careful perusal of the evidence of the victim reveals that the victim was a person who could understand the questions put to her and could give rational answers.

In **Fradd v. Brown and Company 20 NLR 282 at 283**, it was held that *"It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance"*. Also in the case of **Oliver Dayananda Kalansuriya alias Raja v. Republic of Sri Lanka CA 28/2009 (13.02.2013)**, citing the case of **State of Uttar Pradesh v. M. K. Anthony (1984) SCJ 236/ (1985) CRI. L. J. 493 at 498/499**, Justice Sisira de Abrew held that "*While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as whole appears to have ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals.*"

Therefore it is evident that the learned High Court Judge had observed the demeanour of the witness, (since she had given evidence before him) and had come to a conclusion that the victim was a credible and trustworthy witness.

The next two grounds of appeal are that the evidence of the victim fails the test of consistency and the test of credibility and there is no corroboration of the victim's evidence. The learned counsel for the appellant argued that although corroboration is not sine qua non the evidence of the witness should be highly convincing in order to convict the appellant only on the testimony of the victim. In this regard, the learned counsel for the appellant cited the case of **Sunil and another v. A. G. 1986 1 SLR 230** where Justice

Dheerarathne held that "*Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness' evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.* ***It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration***". He also cited the case of W. A. Wijerathna v. Republic of Sri Lanka CA 108/2006 and the case of Galuge Ruwan Weeraratne v. A. G. CA 100/2002.

The above mentioned ground of appeal can also be discussed with the next ground of appeal which was also the position taken up by the appellant at the High Court; 'This is a framed charge by the members of the victim's family due to previous animosity of the parties'.

The evidence reveal that although the victim's family and the appellant's family (who were neighbours and very close relations) had previous disputes, the appellant used to come to the victim's house and had contacts with the victim's family members (specially with the children in her family). This had been stated by the victim over and over while giving evidence but the appellant, in his evidence, had denied going inside the house of the victim. However, under cross examination by the prosecution a contradiction was marked. Accordingly, the appellant had stated to the police that he went inside the house of the victim asking for a screw driver (vide page 133 of the brief). At the Court also appellant had admitted the fact that he went up to the victim's house asking for a screw driver. Furthermore, he had admitted that he had a close relationship with the children of the victim's family in order to ask for a screw driver (vide page 138 of the brief). It is also evident that the mother of the victim had also given evidence to the fact that usually the appellant used to come to the victim's house (vide page 60 of the brief).

It is important to note that the false implication by the victim was not mentioned in the police station by the appellant (this had been brought to the notice of the Court by the learned State Council as an omission- vide page 140 of the brief). According to the appellant's version the main reason behind this implication was the dispute in between the two families (victim's and the appellant's). However, when the 'Grama Sevaka' of the area was called by the defence to establish that there was a land dispute referred to him by the mediation board which was between the appellant's father and the victim's father,

in cross examination the witness had admitted that there was no such complaint made to him after 19.08.2000 of any dispute between the same parties. Also the officer from the Land Registry who had been called by the prosecution to give evidence had submitted a partition deed dated 08.10.2003 showing that the dispute in between the parties had been solved by that date. According to the mother of the victim the dispute had been concluded on 18.12.2002 as both the parties agreed to settle before the Mediation board. Furthermore, the appellant himself had stated that he was in good terms with the children of the victim's family (even with the victim) by the time of the incident (vide page 138 of the brief). Moreover, the brother of the appellant also admitted in cross examination that by 2003 the land dispute was settled (vide page 187 of the brief). Therefore, the position of the appellant in regard to the 'false implication' is baseless.

Further the learned Counsel for the appellant had marked the following contradictions and omissions in the victim's evidence to show that she is not a credible witness.

I. In the High Court the victim had stated that she was washing clothes. She felt pain in her chest then she came and slept. Then after the appellant came and tied her legs and hands, put a piece of cloth in her mouth and committed the sexual act.
To the doctor she had not stated that the sexual act was performed after her hands and legs were tied.
She had not stated to the police that her hands and legs were tied at that time (she had admitted this fact in the High Court).

II. In the High Court she had stated that the appellant came from the front door.
To the doctor she had stated that the appellant rang the front door bell and then she opened the door. Then the appellant came inside and closed the door.

III. In the High Court once she had stated that she was on the bed (vid page 20 of the brief) and later she had stated that she was dragged and put on the bed (vide page 23 of the brief).

IV. In the High Court once she had stated that the appellant pressed the penis near her vagina and then she screamed. She was unconscious and after that she did not see the appellant (vide page 23 of the brief).
Later she had stated that after the penis was pressed the appellant slapped her three times, hit her hand and then went away since the mother came (vide page 28 of the brief).

V. In the High Court the victim admitted that she told to police that when the appellant came she was in the bathroom and the appellant asked her to wash her private parts and come.
However she had not stated in the Court that the appellant asked her to wash her private parts and come before committing the act.

It should be noted that all the above mentioned contradictions and omissions marked by the defence were not proved and of which the contradiction (no. V) was marked.

When a reasonable man goes through the evidence given by the victim at the Court it is evident that the victim was not questioned in great detail in regard to the procedure of the acts taken up on the day of the incident. Actually it is obvious that this kind of a mentally retarded person cannot be questioned in that way. The victim had just narrated the incident here and there without a proper flow. Also it is evident that her memory was mixed up with the similar incidents that she had to face because of this appellant. Furthermore, according to the evidence of the victim she was having a chest pain at the time of the incident and she was also nearly fainted. In **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.".* There, Justice Thakkar has stated all above with regard to a normal human being. Accordingly, there can be much greater deficiencies with regard to a mentally retarded person.

Considering all these facts we cannot expect a clear cut description of the incidents occurred at the time of the incident and the exact procedure of those incidents from the

victim in this case. However, she had clearly explained the acts committed by the appellant at the time of the incident according to her knowledge. Accordingly, as Justice Dheerarathne held in the case of **Sunil and another v. A. G. 1986 1 SLR 230**, as the evidence of the victim is convincing such evidence can be acted on even in the absence of corroboration.

The final ground of appeal was that the prosecution had failed to prove the date of the offence. According to the indictment it is stated that the incident had taken place during the period of 05th September 2003 to 05th October 2003. According to the evidence given by the doctor, he had examined the victim on 06.10.2003 and the victim had stated to him that the incident took place 03 weeks prior but within two months. Accordingly the incident had taken place in between 06.08.2003 to 06.10.2003. According to the evidence given by the mother of the victim, the victim had told the incident to her on the 02nd 03rd of October 2003. As per the victim, the incident had taken place a week prior to the date on which she informed the incident to her mother. According to that, the incident had taken place on a day in between 05th September 2003 to 05th October 2003.

In **CA 1/2013 dated 31.01.2014**, Justice Sisira de Abrew held that *"As I pointed out earlier, the incident, according to the evidence led at the trial, is alleged to have taken place on 16.7.2007. Was the accused appellant charged that he committed the alleged offence on 16.7.2007? The answer is no. the indictment alleges that the accused appellant had committed this offence during the period commencing from 1.1.2007 to 7.7.2007. According to the evidence he has not committed the alleged offence during this period."* Furthermore he held that *"According to section 165 of the Criminal Procedure Code, the charge must, inter alia, specify the time and place of the offence with which the accused is charged. The idea behind this principal is to* ***give sufficient opportunity to the accused to answer the charge and to ensure a fair trial.*** *Answering the charge includes among other things preparing for his defence, presenting his defence and cross-examining the witness called by the prosecution etc. Then* ***when a charge specifies that the accused committed the offence during a period and the evidence shows that the offence was not committed during the said period the accused cannot be convicted.*** *In such a situation it cannot be contended that the accused was not prejudiced because* ***the idea behind specifying the time and place of offence, as I pointed earlier, is to give sufficient opportunity to the accused to answer the charge and to ensure a fair trial."*** In that case the evidence had showed that the offence was not committed during the period which was in the indictment and furthermore the evidence specifically had showed that the offence had been committed on a specific day

which does not come within the period mentioned in the indictment. However, in the present case, no such evidence is present. Furthermore, in the present case the appellant had taken up the defence that he never went inside the house of the victim during the period specified in the indictment. Therefore it shows that the period mentioned in the indictment was reasonably sufficient to give the accused notice of the matter with which he is charged and the appellant was given sufficient opportunity to answer the charge.

In the case of **King v. Musthapha Lebbe 44 N.L.R. 505** the Court of Appeal held that "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". Considering all above I do not see any reason to interfere with the findings of the learned High Court Judge.

In my opinion the prosecution has proved the case beyond reasonable doubt. Therefore, I affirm the conviction and the sentence.

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. Fradd v. Brown and Company 20 NLR 282 at 283
2. Oliver Dayananda Kalansuriya alias Raja v. Republic of Sri Lanka CA 28/2009 (13.02.2013)
3. State of Uttar Pradesh v. M. K. Anthony (1984) SCJ 236/ (1985) CRI. L. J. 493 at 498/499
4. Sunil and another v. A. G. 1986 1 SLR 230
5. W. A. Wijerathna v. Republic of Sri Lanka CA 108/2006
6. Galuge Ruwan Weeraratne v. A. G. CA 100/2002
7. Bharwada Bhoginbhai Hirjibhai vs State Of Gujarat 1983 AIRHC 753
8. CA 1/2013 dated 31.01.2014
9. King v. Musthapha Lebbe 44 N.L.R. 505