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

In the matter of an Appeal in terms of Section 331(1) of the of the Code of Criminal Procedure Act No. 15 of 1979 read together with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

CA 145/2014

HC Tangalle Case No. 56/2007

Hewageganage Nihal Shantha

ACCUSED

AND NOW BETWEEN

Hewageganage Nihal Shantha

ACCUSED – APPELLANT

Vs.

The Hon. Attorney General
Attorney Generals Department
Colombo 12.

COMPLAINANT- RESPONDENT

BEFORE: **S. DEVIKA DE LIVERA TENNEKOON, J.**

L. U. JAYASURIYA, J.

COUNSEL: **Seevali Amithirigala with Pathum Wijepala for the Accused – Appellant on the instructions of Mrs. Wijesuriya**

Lakmali Karunanayake SSC for the Complainant – Respondent

ARGUED ON: **21.09.2016**

WRITTEN SUBMISSIONS: **Accused – Appellant – 21.10.2016**

Complainant – Respondent – 06.02.2017

DECIDED ON: **05.04.2017**

S. DEVIKA DE LIVERA TENNEKOON J

The Accused – Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Hambanthota in case No. HC 278/2007 by indictment dated 06.06.2007 on the following counts;

01) That on or about 10th of November 1998 the Appellant committed the offence of kidnapping Supun Shanaka Guruge who was less than 16 years of age at the time from the lawful guardianship of Naotunna Palliyaguruge Upali in Thaligala located within the jurisdiction of this Court, an offence punishable under Section 354 of the Penal Code.

02) That on the same day, at the same place and in the same transaction the Appellant committed the offence of Grave Sexual abuse on Supun Shanaka Guruge by sexually gratifying himself by placing his genitals

close to the genitals of the said victim and thereby committing an offence punishable under Section 365 (b) (2) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998.

The indictment was read over to the Appellant on 27.04.2011 and the Appellant pleaded not guilty to the aforementioned chargers and the trial commenced against him.

After the establishment of the High Court of Tangalle the High Court of Hambanthota case bearing No. HC 278/2007 was transferred to the High Court of Tangalle as case bearing No. T.H.C. 56/2007.

The victim Supun Shanaka Guruge (PW1), his mother K.K. Kanthi (PW2), Police Constable Premadasa (PW 4), Sub-Inspector Sarathchandra (PW5) and Dr. R.K. Somasiri (PW 6) gave evidence on behalf of the prosecution and the Appellant gave evidence on his behalf by a dock statement on 02.04.2013 denying the charges levelled against him in his Defence.

The learned High Court Judge of Tangalle pronounced judgment on 23.06.2014 and convicted the Appellant on both chargers aforementioned and sentenced the Appellant as follows;

1st Count – 4 years rigorous imprisonment with a fine of Rs. 10,000/- and a default term of 6 months simple imprisonment,

2nd Count – 10 years rigorous imprisonment with a fine of Rs. 10,000/- and a default term of 6 months simple imprisonment.

The case for the prosecution in brief was that the victim was around the age of 8 years when the alleged incident occurred and on the day in question he was sent by his mother to the nearby boutique which was located about 100 meters from his house to buy Panadol. On his way back from the boutique the Appellant, who was known to the victim, had taken him near a tamarind tree and forced the victim to lie down on the ground and had allegedly pulled down the victims shorts and the Appellant had come on top of him and thereafter had placed his genitals on the thighs of the victim and performed a sexual act. After the said incident the victim has run home and told his mother (PW2) about this incident.

The learned Counsel for the Appellant contends that the victim does not remember what actually happened to him and that the victim takes up contrasting positions when giving evidence before and after Court was adjourned for lunch.

I shall now consider the strength of the evidence of PW1, the victim of the alleged grave sexual abuse. Throughout the witness testimony of the victim it is clear that the victim states that he was young when the alleged incident took place and that he cannot remember specific details surrounding the said incident. When the victim was cross examined the Defence marked as **V1** a contradiction of evidence relating to identifying the Appellant by his name soon after the incident to his mother (PW2) whereas the victim has stated in cross examination that he merely described the alleged perpetrator to his mother.

It is submitted on behalf of the State that the victim had difficulty in narrating the incident in question and such should be excused since the victim was of a tender age (8 years) at the time of the alleged incident and that his testimony was led only 13 years later (when the victim was 21 years old).

The learned Counsel for the Appellant contends that when the complainant has presented two versions in evidence such evidence needs to be corroborated with other evidence. Considering that soon after the alleged incident the victim informed his mother (PW2), she would then be the best person to corroborate the evidence of the victim.

Before considering the evidence of the victim's mother (PW2) I shall first consider if it is necessary to corroborate the evidence of the victim in light of the relevant precedent.

In the case of R Vs. Dharmasena 58 NLR 15 held that that;

> 'In a charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated'

Basnayake, C.J. was of the view that;

> 'The principal submission made on behalf of the first appellant was that the learned trial Judge failed to direct the jury that as against him there was in law no corroboration of the evidence of the prosecutrix. We are unable to uphold this submission as in our view the story of the prosecutrix was corroborated in several respects. Our Penal Code does not require that the evidence of the prosecutrix in a charge of rape should be corroborated although it does provide that in the case of charges of procuration under section 360A no person shall be convicted upon the evidence of one witness, unless such evidence be corroborated in some material particular by evidence implicating the accused. Another such provision is to be found in the Maintenance Ordinance. There is no presumption, as in the case of an accomplice, that a prosecutrix in a case of rape is unworthy of credit unless she is corroborated in material particulars. Except where corroboration is expressly required by statute,

> our rule of evidence [Evidence Ordinance, Section 134. illiam Crocker, 17 Cr. App. R. 45.] is that no particular number of witnesses shall in any case be required for the proof of any fact.'

A different approach was adopted in the case of Premasiri Vs. The Queen 77 NLR 86in which it was held that;

> '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 a character as to convince the jury that she is speaking the truth.'

In the case of Karunasena Vs. The Republic 78 NLR 63 it was held that;

> 'in a charge of this nature(rape), a proper direction would have been to tell the jury that it is not safe to convict a person on the uncorroborated testimony of the prosecutrix but that the jury, if they are satisfied with the truth of Her evidence, may, after paying attention to that warning, nevertheless convict.'

Similarly in the case of Sunil & another Vs. The Attorney General 1986 (1) SLR 230 it was held that;

> '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.'

In the recent case of Ajith Vs. The Attorney General 2009 (1) SLR 23 Sisira de Abrew J quotes a passage from Dr. Glanville Williams book: Proof of Guilt, 3rd Edition pages 158 and 159 states that;

> 'On a charge of rape and similar offences it is practice to instruct the jury that it is unsafe to convict on the uncorroborated evidence of the alleged victim. The rule applies to a charge of indecent assault, or any sexual

> offence, including an unnatural offence between males. There is a sound reason for it, because these cases are particularly subject to the danger of deliberately false chargers, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girls refusal to admit that she consented to an act of which she is now ashamed.'

His Lordship further states that;

> 'I hold that it is very dangerous to act on the uncorroborated testimony of a victim of a sexual offence. However, if the Court can without any hesitation, accept and believe that the story narrated by her is true then the Court can act on such evidence even without corroboration. I would like to state here that Court, in cases of rape, as a rule of prudence normally looks for corroboration of her testimony in order to satisfy its conscience that she is telling the truth.'

E. R. S. R. Coomaraswamy, in his treatise, The Law of Evidence, Volume II, Book 2, p 625 argues that corroboration is needed 'where a witness is neither wholly reliable nor wholly unreliable' and is required in three sets of circumstances: (i) Where it is expressly required by statue, (ii) By rule of practice (developed by the Courts), and (iii) Sometimes on the facts and circumstances of the particular case.

Therefore, in cases where the evidence of a victim of grave sexual abuse is neither wholly reliable nor wholly unreliable such evidence should be corroborated.

In light of the above this Court is of the view that the evidence of the victim's mother (PW2) is material and essential to the instant case.

Having considered the concise evidence of PW2 (vide pages 77 - 84) it is clear that the victim has only informed her that the Appellant had grabbed the victim

and that the Appellant had held the victim and embraced him after which the victim had freed himself and run away. It is prudent to note that nowhere in her evidence does she state that the victim had informed her of the alleged act of grave sexual abuse. In cross examination she confirms the fact that the victim only informed her that the Appellant had attempted to embrace the victim and thereafter the victim had freed himself and run away (vide page 83 of the Appeal Brief).

In relation to the above the learned Senior State Counsel submits that "human witnesses cannot be expected to testify like tape recorders and are likely to omit or forget details when testifying after a considerable passage of time". This Court cannot agree with this view in the instant case since PW2, a material witness, has omitted the very act complained of in her evidence.

Therefore this Court is of the view that the learned High Court Judge has misdirected himself in fact when he found that the victim (PW1) had given clear evidence about the act of grave sexual abuse allegedly perpetrated by the Appellant and that the same was corroborated by the testimony of PW2, the victim's mother.

Further, it is prudent to note that PW2's evidence reveals an inconsistency relating to when the alleged incident was complained to the Police. The alleged incident occurred on 10.11.1998. In evidence PW2 states that the victim informed her of the alleged incident on the same day and that she delayed going to the Police directly since her Husband (PW3 whose evidence was not led) was not at home and that after her husband returned she informed him of the alleged incident and that she complained to the Police on the next day i.e. 11.11.1998 (vide page 82 of the Appeal brief). However the evidence of PW4 and PW5 (the Police Officers) reveal that the complaint was only made on 12.11.1998 two days after the alleged incident. PW2 does not provide any explanation as to why

the alleged incident was not reported to the Police after her Husband was informed. It seems that the victim's parents complained of the said incident only after the attack on their house on 11.11.1998 when they lodged a complaint relating to the said attack.

In fact PW5 confirms in evidence that the statement given by the victim's father, one Upali, on 12.11.1998 does not contain any mention of the alleged act of grave sexual abuse perpetrated on his son by the Appellant but only contains a description of the attack on his house on 11.11.1998 (vide page 112 of the Appeal brief). Since there was no mention of the alleged act of grave sexual abuse in his statement the said Upali was not called to give evidence in the instant case although he was named as PW3 (vide page 137 of the Appeal brief). This Court finds that an omission of this nature by the victim's father is a serious lapse on his part which exposes inconsistencies in the case for the prosecution.

I shall now consider the evidence of PW6, the Judicial Medical Officer Dr. R.K. Somasiri, who marked the Medico – Legal Report as P1 also dated 12.11.1998. PW6 admits in evidence that owing to a lapse on his part the 'short history given by the patient' does not reveal any particulars about the alleged incident but only that the victim was subject to sexual abuse (vide page 93 of the Appeal brief). He further admits that the said 'short history given by the patient' section is incomplete (vide page 95 of the Appeal brief).

Therefore this Court finds that the evidence of PW6 does not sufficiently corroborate the narration of the prosecution with cogent evidence and that the learned High Court Judge has erred in concluding to the contrary.

For the aforesaid reasons this appeal is allowed. I set aside the conviction and sentence of the learned High Court Judge dated 23.06.2014 and acquit the Accused – Appellant.

Appeal Allowed.

Judge of the Court of Appeal

L. U. JAYASURIYA, J.

I Agree.

Judge of the Court of Appeal