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 CPC read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Hon. Attorney General

Complainant

C.A Appeal No: CA 203/2016

Vs.

Jayasekera Liyanaarachchige Uditha Malith Anuruddha alias Chooti Ayya

High Court Tangalle

Accused

Case No: HC **41/2014**

AND NOW BETWEEN

Jayasekera Liyanaarachchige Uditha Malith Anuruddha alias Chooti Ayya

Accused-Appellant

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

BEFORE : Deepali Wijesundera J.

L.U Jayasuriya J.

COUNSEL : Neranjan Jayasinghe for the Accused-Appellant

Haripriya Jayasundera D.S.G for the A.G

ARGUED ON : 14th November, 2017

DECIDED ON : 29th November, 2017

L.U Jayasuriya J.

The accused appellant (hereinafter sometimes referred to as the appellant) was indicted in the High Court of Tangalle under following the counts.

1. That between the period 03.08.2007 and 02.08.2008 in Beliatta, the appellant committed the offence of grave sexual abuse on Udugamage Bavindu Kavishan by inserting his penis into the anus of said Udugamage Bavindu Kavishan who was below the age of 16 which is an offence punishable under Section 365 (B) (2) of the Penal Code as amended.

2. That between the period of 03.08.2007 and 02.08.2008 in Beliatta, other than the instance referred to in count no. 1, the appellant committed the offence of grave sexual abuse on Udugamage Bavindu Kavishan by inserting his penis into the anus of said Udugamage Bavindu Kavishan who was below the age of 16 which is an offence punishable under Section 365 (B) (2) of the Penal Code as amended.

After trial, the Learned High Court Judge convicted the appellant on both counts and imposed 7 years RI with a fine of Rs. *2,000/-* carrying a default term of three months each. This appeal is from the said conviction and the sentence.

The story of the prosecution is that on the day in question the victim (who was 11 years at the time of the incident) has played cricket with the appellant, and as the ball went missing the victim has gone with appellant to bring another ball. When the victim was sitting in the verandah of the appellant's house, the appellant has taken the victim to a room gagged him and tied his hands to a bed post. Thereafter the appellant had inserted his penis into the anus of the victim after removing cloths of both parties. The victim testifies that he was threatened by the appellant not to disclose this incident to anyone.

The victim says that the appellant committed the same act a few days after the first incident at the appellant's house. The learned counsel for the appellant argued that the date of offence is not specified and therefore it is difficult for the appellant to answer the first charge.

The learned counsel further argued that it is difficult to answer the second charge as well and more difficult to form a defence.

To strengthen the appellant's argument he cited the judgment in case No. CA 01/2013 decided on 31.01.2014. The appellant's argument was that the date of offence had not been established by the prosecution.

It was revealed in evidence that the victim was threatened by the appellant not to tell anyone and further the appellant has not divulged the incident to his parents fearing that they will punish him. Moreover the victim's mother

has come to know of the incident from a third party and the first complaint was made on the 02.08.2008.

The Learned Deputy Solicitor General argued that the charges were framed in terms of Section 174 (1) of the Code of Criminal Procedure Act and are not defective. The said Section provides thus,

"When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences he may be charged with and tried at one trial for any number of them not exceeding three, and in trials before the High Court such charges may be included in one and the same indictment."

The victim testifies in his evidence on a leading question posed by the state counsel that the incident took place in August 2007. It appears the Learned High Court Judge has allowed the above question under Section 142 of the Evidence Ordinance.

Section 142 of the Evidence Ordinance provides thus;

"Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination, except with permission of the court".

Since the prosecution has established that the offence was committed during the period referred to in the indictment and the victim whilst giving evidence, states that these incidents happened during the month of August 2007, the above argument has no merit.

The JMO has observed a healed tear in the anus at 6 o'clock position which has been caused due to penetration.

The learned DSG submitted that the medical evidence corroborates with the victim's evidence and therefore there is no reason to disbelieve the version of the prosecution.

We find that his evidence meets the test of probability. The victim has explained the delay in making the complaint, and the explanation given is plausible.

For the aforestated reasons we see no basis to set-aside the judgment dated 15.12.2016 and accordingly we affirm the impugned judgment and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.:

I Agree.

JUDGE OF THE COURT OF APPEAL