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

In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal
Case No. CA/85/2013

Vs,

Daradadagamage Chandraratne Jayawardane alias Shantha

Accused

And Now Between

Daradadagamage Chandraratne Jayawardane alias Shantha

Accused-Appellant

High Court of Monaragala
Case No. 88/2008

Vs,

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : S. Thurairaja PC, J &
A.L. Shiran Gooneratne J

Counsel : Dulindra Weerasuriya PC, with Kanishka Goonawardane for the Accused-Appellant
Haripriya Jayasundara, DSG for the Complainant-Respondent

Written Submissions: Appellant – 3rd October 2017
Respondent – 4th October 2017
Argument : 14th May 2018
Judgment on : 25th May 2018

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Judgment

S. Thurairaja PC, J

This case was mentioned on 15th May 2008 and 27th November 2008, when Justice A.L. Shiran Gooneratne presided at the High Court of Badulla. The Learned President's Counsel (PC) for the Appellant brought this to the notice of this Court and submitted that they have no objections for him to hear this appeal because it was, just mentioned before him at the High Court and no material steps were taken on those two days. Learned Deputy Solicitor General (DSG) also supports the same view. After due consideration of the submissions and the case record Justice Gooneratne decided to hear this appeal.

The Accused Appellant (hereinafter sometimes called and referred as the Appellant), was indicted under section 364 (2)(e) of the Penal Code for committing an offence of Rape on a Child who is less than 16 years old. After the trial the High Court had found the Appellant guilty and sentenced him for 12 years Rigorous Imprisonment and imposed a fine of Rupees 25000/- in default 4 years Rigorous Imprisonment, in addition to the above the High Court had directed to pay a compensation of Rupees 200,000/- to the victim, in default 2 years Rigorous Imprisonment.

Being aggrieved with the said conviction and sentence the appellant preferred an appeal to the Court of Appeal and framed following grounds of appeal:

1. The learned Judge had acted in contravention of the 'rule against bias' when he delivered the Judgement

2.No proper adoption of Proceedings: made under Section 48 of the Judicature Act.

3. Identity of the Accused.

4. No corroboration.

5. Date of offence was not proved

6. Burden of Proof casted upon the Accused.

7. Evidence of the Prosecutrix is unreliable.

Both, Counsel for the Appellant and the Respondent filed written submissions and made oral submissions and submitted their case, we carefully considered the materials before us.

It will be appropriate to consider the timeline of this case, before we proceed to the substantive issues. Incident alleged to have happened on the 21st June 1998, it was reported to the Police Station of Medagama on the 25th, the Child was produced to the District Medical Officer and subjected to a medical examination on the same day. Subsequently a non-summery inquiry was held at the Magistrate Court of Bibile (circuit) and referred to the Attorney General and the AG preferred an Indictment dated 6th August 2001 to the High Court of Badulla. Indictment was served on the Appellant on the 13th December 2001. Trial commenced on the 6th March 2006 at the High Court of Badulla. Trial proceeded at Badulla High Court till 27th November 2008 and after the creation of a High Court at Monaragala, case was transferred and called at the new Court on the 19th December 2008, thereafter this case was heard and concluded on the 9th May 2013.

The first ground of appeal submitted is that the Learned Trial Judge who delivered the Judgment had participated in this case as a Prosecutor, hence there is bias against the Appellant.

Rule against bias was discussed from time immemorial by Jurists and Judicial authorities. Natural Justice has two major ingredients. One is rule against bias (nemo judex in causa sua) and the right to a fair hearing (audi alteram partem).

> In **Dr. Karunaratne vs Attorney General and others** 1995 (2) Sri L.R 298. The Court held, *in several authorities which have been considered in the case of Perera v. Hasheed (supra) two tests for disqualifying bias have been formulated:*
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> *(a) The test of real likelihood of bias, and*
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> *(b) The test of reasonable suspicion of bias.*

In the case of **R v. Rand** 1866- L.R. 1 QB, P. 230, Blackburn, J. said "wherever there is a real likelihood that the Judge would, from hindered or any other cause have a bias in favour of the parties it would be very wrong in him to act... ".

In this present case, the Indictment was served on the Accused Appellant on the 13th December 2001, he was represented by Mr. Kahandawaarchchi AAL. Thereafter the

matter was fixed for more than 7 dates and it was finally taken up on the 06/03/2006. One of those occasions, on the 12th May 2003, Mr. Gihan Kulatunga had appeared on behalf of the Prosecution as a regular Prosecuting Counsel of that Court.

Hon. K.M.G.H. Kulatunga, was appointed as Judge of High Court and served many jurisdictions including Monaragala. After about 9 years on the 12/07/2012, this matter came before him and the Appellant was represented by the original Counsel Mr. Kahandawaarchchi. Case for the Prosecution was concluded and the defence case to be taken up, the Appellant made a Dock Statement and concluded his case. Case was postponed to 27/09/2012,19/11/2012,28/01/2013and 05/03/2013 for the submissions of Counsels and this couldn't be reached and finally postponed to 06/03/2013 on that day the Prosecuting State Counsel brought to the notice of the learned Judge that he appeared as a State Counsel for the Prosecution. Judge inquired from the Accused Appellant and his Counsel of their stance, The Counsel who appeared from the inception to the Appellant informed court that he has no objection for the Judge to Judge this case. The learned trial Judge made a considered order on that day and proceeded to hear the submissions of the Counsel of the Appellant on the next date namely 21/03/2013.The defence Counsel also filed written submissions before the High Court. The Appellant or his Counsel never raised any objection at any time. Judgment was delivered on the 9th May 2013.

This is the first time the Appellant raising an issue of bias. Carefully perusing the proceedings, it reveals that the prosecution was represented by several State Counsels on several dates, but the Accused Appellant was represented by the same senior Counsel from the beginning till the conclusion. As I stated previously in this judgment, this case originally taken up before the High Court of Badulla and transferred to the High Court of Monaragala, after it was created. It is common knowledge of the workload of Attorneys at Law and State Counsels. They handle hundreds of cases if not thousands. Considering facts of this case this is one of their routine case. Mr. Kulatunga or the defence Counsel Mr. Kahandawaarchchi, didn't remember the participation of Mr. Kulatunga in this case. It is the State Counsel who brought this issue to the notice of the Court. The Appellant nor his Counsel had not raised any objection, till the matter came to the Court of Appeal.

Perusing the entire record, it is observed that the Judge had appeared once for the prosecution and was not involved in the case substantially. Further this is not a personal matter of the judge and no material was submitted in that regard. It appears a routine official case for the prosecutor as well as the Judge.

> *In **Perera v. Hasheed** Vol. I Srikantha Law Reports page 133 at 145. G. P. S. De Silva, J. (as he then was) made the observation that it must be remembered that a judicial officer is one with a trained legal mind and that it is a serious matter to*

allege bias against a Judicial Officer and that this court would not lightly entertain such an allegation.

Considering all we find that the complaint of bias cannot be substantiated by any means. We are satisfied that there is no bias, hence we find no merit in this ground of appeal.

The next ground of appeal is that the proceedings were not properly adopted. We carefully perused the proceedings and found that there are several Judges heard this case and every time when a new Judge took over proceedings were adopted.

The Counsel submits that when the proceedings are adopted the Trial Judge should make a detailed judicial order.

Now we refer section 48 of the Judicature which govern the adoption of proceedings.

> *In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh :*
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> *Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be re-summoned and reheard.*

As per the above section the law requires the adoption of proceedings by the Judge who is succeeding the previous. When the Judge takes the decision to adopt the proceedings, that decision need not be explained in detail. We cannot expect the trial Judges to give lengthy reasons and explanations on each and every decision taken in a trial proceeding. practically it is impossible. When he writes a judgment, he is expected to give reasons

It is our considered view that formal adoption is sufficient and Judge is not expected to give reasons. Accordingly, this ground of appeal also fails in its own merit.

It will be prudent to know the facts of the case before we proceed further. This is a case of Rape alleged to have happened on the 21st June 1998. The victim was 11 years 10 months and 11 days old (as per her birth certificate, was born on 10/08/1986). She is the only girl child among 6 boys in her family. Her father was light worker due to injuries, mother was a fire wood cutter. The Accused Appellant was the Grama Seva

Niladhari of that area. He had some dealings regarding buying of trees, with the parents of the victim child. According to the victim on the day of the incident parents were away from home, Appellant had come there and assigned work to her brothers who were toddlers. He then entered the house and ask for a glass of water from the victim. When she brought the glass he embraced her, she had dropped the glass. He then carried her to the hall and had sexual intercourse with her. She found bleeding on her vagina and got scared. The Appellant had then threatened her that if she tell this to anyone he will kill her when she is returning from school and hide her. She revealed the fact that her neighbour Jayawardane had seen the Appellant nude and confronted him. The Prosecutrix did not tell this incident to her parents or anyone due to the fear of death. Mother had learnt this incident from the neighbour and inquired from her and took her to hospital and the Police. She was subjected to medical examinations and the District Medical Officer (DMO) had observed rupture of hymen and blood clot at labia minora. Further he had observed swelling of vagina.

Prosecutrix, mother, DMO, and police officers who conducted investigation gave evidence in the prolonged trial. When the defence called after the Prosecution case the Appellant opted to make a statement from the dock and closed the case. Both Counsels made submissions and the appellant filed written submission also.

There are two factors uncontested, those are that the child is less than 12 years old and the appellant is the Grama Seva Niladhari of that area.

The third ground of appeal of the appellant is that the identity of the appellant was not established.

It should be noted that the incident alleged to have happened on 21/06/1998, when she was less than 12 years old. She commenced giving her evidence at the High Court on the 6th June 2006 almost 8 years after the incident. She was subjected to cross examination from 19/06/2006 to 03/08/2009, for more than 3 years. The child was cross examined extensively on every aspect of the incident and life. At the cross examination she revealed that she was subject to a non-penetrative sexual abuse a week prior to this incident. We are mindful of sections 53 and 54 of the Evidence Ordinance. The learned Trial Judge who delivered the Judgment comprehensively analysed and dismissed this issue. The 2nd incident of Rape was the subject matter before the High Court. The learned Judge had given reasons in his judgment and explained that he only considered the facts of the second incident and elements of section 364 (2) (e) of the Penal Code. We carefully perused the Judgment and find that the learned Judge has painstakingly considered the identification of the Appellant by the Prosecutrix. The Counsel for the Appellant highlights that the victim child has told the court that she didn't know the appellant and certain time she said that she knows the appellant, this creates a doubt and results in favour of the appellant.

On perusing the proceedings, we find that the victim child had said that she know the appellant as the Grama Seva Niladhari of that area, all of us know the value and recognition of a Grama Sevaka especially in rural area. Further she knew the appellant as the father of a child who is her class. In addition to above she said that she knows the appellant who had timber dealings with her parents. Considering all, we are of the view that her evidence should be considered fully and not few sentences in isolation. Therefore, we find that the finding of the learned trial judge of positive identification is reasonable and well founded. Accordingly, we find this ground of appeal also fails on its own merits.

The next ground of appeal is that the Prosecutrix evidence was not corroborated.

As per the evidence of the prosecutrix this incident had happened on 21/06/1998, at that time she was less than 12 years old child. She told the court that her neighbour Jayawardane had seen the appellant nude and confronted him. Mother of the victim says she learnt about this incident from her neighbour Jayawardane. Mother had questioned her daughter and assaulted her when she was reluctant of revealing the entire incident.

When the child was taken to the DMO and the Police Station, she had made a detail statement. The DMO had recorded the history of the patient verbatim and submitted to court, there the child had given clear account of the incident. It is important to observe that the Medico Legal Report (MLR) indicates that this child was subject to penetrative sexual intercourse and there are injuries found of rupture of hymen and contusion/ blood clot on labia minora.

According to the amendment to the Penal Code (22 of 1995 and thereafter) provisions, Corroboration is not necessary. Judicial decisions made prior to these amendments requiring corroboration are not applicable to this case.

In **Bharwada Bhoginbhai Hirjibhai vs State of Gujarat** 1983 AIR 753, 1983 SCR (3) 280 it was held,

> *'..... And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the*

rules devised by the courts in the Western World.Obeisance to which has perhaps become a habit presumably on account of the colonial hangover. We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the probabilities-factors does not render it unworthy of credence, ***as a general rule, there is no reason to insist on corroboration except from the medical evidence****, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: (emphasis added)*

Considering the available evidence before the High Court, the testimony of the child is sufficient, anyhow the mother's and medical evidence amply corroborate the evidence of the prosecutrix. Therefore, this ground of appeal also fails on its own merits.

The next ground of appeal is that the learned trial judge had shifted the burden of proof on the appellant.

Counsel refers certain sentences in the judgment and says that the Judge had shifted the burden on the accused appellant. The judgment consists of 49 pages, the Judge had explained the principles and guidelines he followed in his judgment. He categorically says that the burden of proving the case always rests with the prosecution and it never shifts on the accused. Considering the entire judgment, we find that the Judge had not shifted the burden on the Appellant. It is important to read the judgment fully and understand it as a complete document. It will be inappropriate to isolate certain words or sentence and give different meaning and interpretation. Accordingly, we find there is no merit in this ground.

The last ground of appeal is that the evidence of the prosecutrix is unreliable.

As we discussed above the child was 11 years 10 months and 11 days at the time of the incident, she gave evidence after 8 years and subjected to cross examination for a period more than 3 year.

Time and again Courts have discussed the acceptance of evidence of children of tender ages. Our Judges are not there to test the memory of the witness, they are expected to find the actual fact and the truth. Witnesses are human being, they are not memory machines nor robots to repeat the incident as it was. Further the natural behaviour of human beings is to forget incidents, especially sad memories. No one wants to re- visit painful moments and keep detailed memories with them. We are also mindful most of our courts with due respect, are not child friendly. In this case a child giving evidence after 8 years and subjected to cross examination more than 3 years is sufficient to create certain contradictions in her testimony. It is human nature. We carefully perused the evidence of the Prosecutrix and others and found some contradictions *inter-se* and *per-se*. The learned trial Judge had considered most of those and made his decision.

In **Bharwada Bhoginbhai Hirjibhai vs State of Gujarat** (ibid) THAKKAR, J observed:

(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.

(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(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 1.1 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.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.

(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 defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

We are of the view that none of these contradiction goes to the root of the case and create a doubt in favour of the appellant. Therefore, we conclude that there is no merit in this ground of appeal.

We carefully considered the Judgment in the light of available materials before the Court, we find that decision of the learned Trial Judge is well founded. Therefore, we have no reason to interfere with the findings of the Learned High Court Judge.

Considering the sentence imposed by the learned trial judge, we find in the given facts of this case, is very reasonable and appropriate. Therefore, we are not inclined to interfere with the said sentence.

Considering all for the reasons stated above we dismiss the appeal and affirm the conviction and sentence.

APPEAL DISMISSED

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL