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

Court of Appeal Case
No: CA 194/2015

High Court (Kurunegala)
No: HC 81/2010

The Republic of Sri Lanka

Complainant

V.

Thimbirigolle Sirirathana Thero

Accused

AND BETWEEN

Thimbirigolle Sirirathana Thero

Accused Appellant

V.

(1) Officer-in-Charge,
Police Station,
Rasnayakepura.

(2) Hon. Attorney-General,
Attorney-General's
Department,
Colombo 12.

Respondents

BEFORE	:	**A.L. SHIRAN GOONERATNE, J** **K. PRIYANTHA FERNANDO, J**
COUNSEL	:	Shyamal A. Collure with Prabhath S. Amarasinghe for the Accused-Appellant Azad Navavi D.S.G. for the Attorney General
ARGUED ON	:	2019.03.12
WRITTEN SUBMISSIONS FILED ON	:	2018.02.28 (by the Accused - Appellant) 2018.08.06 (by the Respondent)
JUDGMENT ON	:	2019.05.07

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted in the High Court of Kurunegala with one count of Grave Sexual Abuse on Walisundera Mudiyanselage Kasun Prabhath (Victim), punishable in terms of section 365 b(2)b of the Penal Code. Upon conviction after trial, Appellant was sentenced to imprisonment for 8 years with a fine of Rs. 25,000/-, in default imprisonment for 6 months.

02. Being aggrieved by the said conviction and sentence, the Appellant appealed against the same on the following grounds. (Grounds as mentioned in written submissions filed on behalf of the Appellant dated 28th February 2018).

1. The learned High Court Judge has failed to consider the intrinsic infirmities of the prosecution case and the said failure vitiates the said judgment, conviction and sentence.

2. The learned High Court Judge has failed to consider that a complaint had been lodged in this regard at the police station of Rasnayakepura three months after the alleged incident and there was absolutely no medical evidence to establish the charge.

3. The said judgment and conviction are contrary to law and the weight of evidence and hence, are completely unreasonable and unjustified as the learned High Court Judge has failed to conclude that there was no evidence warranting the conviction of the Appellant for the prosecution has failed to establish its case beyond reasonable doubt.

4. In the circumstances, the said judgment, conviction, and sentence have occasioned a grave miscarriage of justice.

03. Case for the prosecution is mainly dependent on the evidence of the victim Kasun Prabhath. According to the victim's evidence he had been living with his grandmother and aunt. Appellant had been the priest of the temple that his family had a close relationship with. At the time relevant to the incident Kasun had been 13 years of age. He had gone to the temple on his way to school to offer breakfast 'Dane' to the priest who was the Appellant. They used to give 'Dane' to the temple on the 22nd day of every month.

04. When he was serving 'Dane' from the basket, the Appellant had closed the door behind. He had tried to scream when Appellant had tried to remove his clothes. Appellant had threatened him not to shout pointing a knife at him. After removing his clothes, Appellant had put a cloth on the bed, spat on his thighs and had got on to him. Appellant had put his penis between his thighs and had moved up and down. Then he has wiped what he ejaculated and had told him not to tell anyone. Victim had then gone to school.

05. Grounds 1, 3 and 4 will be dealt together as they are based on the same footing. Counsel for the Appellant submitted that the victim had made the complaint to the police 3 months after the alleged incident. According to Nadeesha (Victim's aunt) she had come home after August 2005 from Trincomalee. Counsel submitted that Nadeesha's claim that the complaint was made within few days after she became aware of the incident is untenable.

06. Counsel further submitted that as the Vesak lantern competition had taken place few days after the alleged sexual abuse according to the victim, and as Vesak falls in the month of May, the alleged offence could not have taken place on 22nd June 2005 as claimed by the prosecution.

07. The victim had been 13 years of age at the time of the alleged incident. By the time he testified in Court he was 23 years old. Court will have to consider his evidence in that context. It is evident that the turn to offer 'Dane' to the temple comes on the 22nd day of every month. Clearly, the counsel for the defence has put confusing questions to the victim in cross examination as to the time of the alleged sexual assault. Counsel had tried to show that the lantern competition was held for Vesak in May. However, the victim in re-examination has clarified that displaying lanterns and making

horror houses were to collect money to the temple and not necessarily in May during Vesak.

08. Counsel for the Appellant submitted that although a knife was listed in the indictment, it was not produced in court. It was submitted further, that the medical report does not support the case for the prosecution. The sexual act the Appellant had performed on the victim would not necessarily cause physical injuries to the victim. However, the short history given by the victim to the doctor shows the consistency of the evidence of the victim.

09. It is the Trial Judge who has the opportunity to observe the demeanour and deportment of the witness who testifies before him. The learned Trial Judge has properly analyzed all the evidence placed before him by the prosecution and the defence. He has given good and sufficient reasons for accepting the evidence of the victim. He has taken all the infirmities into consideration when he found the victim a witness trustworthy of credit. The learned Trial Judge also has rightly disregarded the contradictions marked as V1 and V2 as they do not go to the root of the matter and would not have any adverse effect on the testimonial trustworthiness of the victim.

10. In the circumstances, the grounds of appeal no. 1, 3 and 4 should fail.

Ground 2.

11. Counsel for the Appellant submitted that the learned Trial Judge failed to consider that the complaint by the victim to the police was made after a delay of about 3 months. Victim in evidence said that he told his uncle about the incident after about 15 days. Then the uncle had told that to her aunt. After the incident he had not taken 'Dane' to the temple.

12. Delay in making a complaint may affect the credibility of a witness.

However, if the witness explains the delay to the satisfaction of the court, his evidence can be relied upon. The explanation has to be plausible. (*Perera V. Attorney General CA 107/2011, Sumanasena V. Attorney General [1999] 3 S.L.R. 137*,)

13. In the instant case it is evident that the 13-year-old victim's mother and father were away from home. Victim had been living with his mother and aunt. It is also evident that the matter was referred to *Dayaka Sabhawa*. Even the defence witness Gnanathilake gave evidence to that effect. Dayaka Sabhawa also may have taken some time to sort the dispute out. The uncle to whom the victim had told the incident first also had been around 16 years old at that time. In a village set up it is quite normal for victims' family or villagers to try to settle this kind of an issue amicably especially when the priest of the temple is involved.

14. When a child is sexually assaulted by an adult it is also natural for the Victim's family to think twice before making a complaint to the police. There can be adverse effects on the child when this kind of offence is exposed. Victim in this case had given clear evidence as to how this affected him. Children in school had started teasing and mocking at him referring to the priest. So much so, he said that he had to leave the school. In such times mostly the victim would suffer mental trauma due to the social stigma.

15. In cases of sexual offences, Courts have found that victims of sexual offences can react in different ways. Some may complain immediately. Others may feel, for example, afraid, shocked, ashamed confused or even

guilty and may not speak out until some time has passed. There is no typical reaction. (*Crown Court Compendium Part 1. May 2016*)

16. When it comes to a child victim, he or she may even find it difficult to explain to court the delay in making the complaint. The Trial Judge, before whom the witnesses testified, is the best person to decide on the credibility of the victim and the other witnesses as he observed the demeanour and deportment of the witnesses. In this case the learned trial judge in his judgment has given careful consideration to the above aspects and also to all the evidence adduced by the prosecution and defence at the trial.

17. Counsel for the Appellant also submitted that there was no medical evidence to prove the charge. As I mentioned before in paragraph 08 of this judgment, the sexual act alleged could be committed without having visible physical injuries. Medical officer who examined the victim opined that there is a possibility to commit the alleged sexual act without having visible injuries. He also said that it is possible to have red patches, and if so, could have noticed if the victim was examined immediately after the act. Therefore, the absence of scars of physical injuries visible will not affect the credibility of the victim. In the circumstances we find that ground of appeal No. 2 has no merit.

18. Counsel for the Appellant submitted that the evidence did not reveal that the alleged offence was committed on the day mentioned in the indictment. We bear in mind that the victim was 13 years old when the alleged offence was committed. The evidence was taken in court after about 9 years. Accused is entitled to know the time of the alleged offence was committed as per the prosecution, for him to prepare for his defence. Otherwise he would be deprived of a fair trial.

19. According to the victim, the incident occurred on a day he went to offer 'Dane' to the Appellant. It is not in dispute that the 'Dane' was due on the 22nd of every month. Victim, when he was examined by the doctor, had said that he was abused on 22nd June 2005 morning around 6.30 am when he went to offer 'Dane'. Victim had also explained the events that took place thereafter.

20. In cases of sexual offences against children, victims very often find it difficult to remember the exact date of the offence by the time they testify in court after a long lapse. However, the Accused should not be deprived of a fair trial. This aspect was sufficiently discussed in case of *R.V. Dossi, 13 Cr.App.R. 158.*

> "In Dossi (supra), it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided that there is no prejudice, below) where it is clear on the evidence that if the offence was committed at all it was committed on the day other than that specified.
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> In case of *Wright V. Nicholson 54 Cr.App.R.38,* it was held that the prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in Dossi if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having

to answer a less specific allegation, as to the importance of the provision of such particulars in the context of the right to fair trial under art.6 of the ECHR." (*Archbold Criminal Pleading Evidence and Practice 2019 1-225 at page 83*).

This position was accepted and followed in *Pandithakoralage V. Selvanayagam 56 N.L.R. 143.*

21. It is pertinent to note that the Appellant said in evidence that he knew that this complaint was made to the Temple Development society. He admitted that he was residing in the temple during that period. While denying the allegation, he also said that the 'Dane' was due on 22nd of every month from the house of Simonahamy. While denying talking to the victim he said that the victim had come to the temple. Appellant had never taken a position that he was away from the area or from the temple during the period this alleged offence was committed. It was not a defence of *alibi* he was taking or suggesting, but total denial of committing the offence. The learned Trial Judge has correctly found that the Appellant committed the offence alleged. In the above premise we are of the view that there was no prejudice caused to the Appellant in preparing for his defence and therefore he was not deprived of a fair trial.

For the reasons stated above we find that there is no merit in this appeal and is dismissed.

22. By the indictment dated 06.06.2010 the Appellant was charged for the offence that he committed on 22.06 2005. In terms of section 365 b (2) b of the Penal Code as amended by Act No. 22 0f 1995, the prescribed punishment for the offence shall be rigorous imprisonment for a term less

than 10 years and not exceeding 20 years and with a fine and shall also be ordered to pay compensation of an amount determined by Court to the person in respect of whom the offence was committed.

By the amendment to the Penal Code by Act No. 16 0f 2006, the mandatory minimum sentence of imprisonment was amended to 7 years instead of 10 years. Certified date of the Act No. 16 of 2006 is 24.04.2006.

23. However, the offence in this case was committed on 22.06 2005, before the 2006 amendment came into operation. Hence the applicable sentence of imprisonment to this charge is between 10 years and 20 years. Applicable minimum sentence of imprisonment is 10 years, not 7 years. It is the date of the offence that applies to the sentence, not the date of the indictment. The contention of the counsel for the Appellant that the relevant punishment is decided on the date of indictment and not on the date of offence is untenable.

24. Counsel for the Appellant, in his submission, has invited the court to take the Circumstances in to consideration and also the principles set out in SC Ref. No. 03/2008. As stated in Paragraph 22 and 23 of this judgment, Legislature has clearly prescribed the minimum mandatory imprisonment sentence of 10 years. The Learned High Court Judge in his sentencing order dated 25.06.2015 has not stated any reasons why he should have deviated from the prescribed sentence, nor we find that the court should have deviated from the prescribed sentence in the circumstances. It is the bounded duty of the court to give effect to the intention of the Legislature.

25. Therefore, the Learned Trial Judge has erred when he imposed an imprisonment sentence of 8 years, when in fact the prescribed minimum mandatory sentence of imprisonment was 10 years. We find that it has also escaped the mind of the learned State Counsel when she made sentencing submissions in the High Court. It is also mandatory for the Trial Judge to order compensation to be paid to the victim which was not done. Hence, as the punishment imposed is not in conformity with the punishment prescribed by law, we set aside the sentence imposed by the learned High Court Judge.

26. When deciding on the sentence, we are mindful of the sentence prescribed by law. We take all the mitigatory factors submitted by the counsel for the Appellant in the High Court. Although the victim impact statement was not submitted, we take into account the unchallenged evidence adduced by the victim as to how this affected him in his personal life and education. It is a clear breach of trust as this offence was committed on the child when he went to offer 'Dane' to the Appellant who was the priest of the temple, on his way to school, which is a serious aggravating factor.

27. Taking all these into account we sentence the Appellant as follows;

- Rigorous Imprisonment for 12 years.
- A fine of Rs. 5,000/-, in default of payment 3 months simple imprisonment,
- Rs. 100,000/- to be paid to the victim as compensation, in default simple imprisonment for 6 months.

Appeal is dismissed. Sentence varied as above.

JUDGE OF THE COURT OF APPEAL

A.L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL