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

In the matter of an Appeal in terms of Article 138(1) of the Constitution read with Section 331 of the Criminal Procedure Code and Section 19(B) of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990.

C.A. No. 261/2016

H.C. Ampara No. HC/AMP/1664/2015

Ranhoti Bandaralage Jayawardena
alias Ukku Mama alias Jaye Bappa

Accused-Appellant

Vs.

1. The Democratic Socialist Republic of Sri Lanka.
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12

Respondents

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI, J.

COUNSEL : Dharshan Weerasekera (Assigned Counsel) for the Accused-Appellant.

Sudarshana de Silva D.S.G. for the respondent

ARGUED ON : 20th February, 2019

DECIDED ON : 17th May, 2019

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ACHALA WENGAPPULI, J.

The appellant, who was indicted by the Hon. Attorney General alleging that he committed grave sexual abuse on *Yapa Bandaralage Chandana Upul Kumara,* a person below the age of 18 years, on or about 23.10.2011 at Arantalawa, an offence punishable under Section 365 B (2)(b) of the Penal Code as amended.

At the conclusion of the trial, the appellant was convicted by the trial Court. He was sentenced to 10 years of R. I. and fined Rs.12,000.00 with a default term of imprisonment of 6 months.

Being aggrieved by the said conviction and sentence, the appellant sought to set them aside on the basis that;

a. the trial Court failed to consider that there was no corroboration of *Upul Kumara's* evidence either by medical or by any other lay witness's evidence
b. the prosecution has failed to call "Akka" who is a witness to the incident,
c. the trial Court erroneously acted on uncorroborated and unreliable evidence of the said *Upul Kumara* in convicting the appellant.

The prosecution case presented on the evidence of *Upul Kumara,* a ten year old child, who lived with his father and his grandmother since the death of his mother. In the afternoon of the day in question, he had a bath from the well located near his house, after washing his clothes. After finishing his bath, *Kumara* wiped himself dry with a towel. The appellant, who is related to *Kumara,* came there. He held *kumara* from his waist and having put *Kumara* on the cement floor after removing his trouser, inserted his penis into the anus. *Kumara* raised cries but after about 10 minutes only, an "Akka", who lived close to the well, arrived there with her laundry. *Kumara* told "Akka" of the incident and was advised to complain to his family.

Later *Kumara* has disclosed this incident to his close relations and also to his grandmother *Loku Menika.* She was called by the prosecution as

a witness in support of its case. She, however, showed some reluctance to identify the appellant at the dock, perhaps due to the blood relationship that she had with the appellant, but came out with an important item of evidence in relation to the subsequent conduct of the appellant. She clearly said in her evidence that the appellant had expressed his regret over this incident and sought forgiveness. The exact words used by the witness, attributed to the appellant are " මගෙන් වරදක් වුනා." The appellant did not challenge this assertion by the witness during her cross examination and only denied it in his evidence.

A police complaint was lodged by the child after few days since the incident as his father, who was employed as a day labourer, showed some reluctance to come forward and only when his uncle took the initiative to take him to the police to lodge a complaint. There was also hesitation by the witness "Akka", with whom the child had made the initial disclosure of the incident, to make a statement.

The medical evidence indicates that the child had no external injuries at the time of his medical examination. However, a dilated anal orifice was noted by the medical officer, which is indicative of long term abuse. During the medical officer's questioning, the child had admitted of sexual abuse which commenced two years prior to the date of medical examination but he did complain of this incident as well, being the latest.

Police investigations revealed that the well is located about 450 meters away from the child's house and another house was seen located about 100 meters away from the said well.

Learned Counsel for the appellant, in support of his first ground of appeal submitted that the medical evidence does not support the allegation and no other evidence available in corroboration of the child's evidence before the trial Court. He relied on the principles laid down on the requirement of corroboration in the judgments of ***Premasiri v Attorney General*** (2006) 3 Sri L.R. 106, ***Sana v Republic of Sri Lanka*** (2009) 1 Sri L.R. 48 and ***Ajit v Attorney General*** (2009) 1 Sri L.R. 23.

He relied particularly on the item of evidence where the child victim stated that he was sexually abused few days prior to his physical examination, but the medical evidence does not support such a claim instead it rather supports a situation of continued abuse. There were no lay witnesses who claimed to have seen the incident, except "Akka", but she was not called by the prosecution. It was further submitted that the failure to call "Akka" deprived the evidence of the victim of any corroboration and the said failure of the prosecution gives rise to the presumption under Section 114 (f) of the Evidence Ordinance.

The appellant's challenge mounted against his conviction is based primarily on the ground that there was no corroboration. It also founded

on the ground that "Akka" who may have been an eye witness was not called by the prosecution as a witness and thereby starving its case of corroborative material, in addition to give rise to the presumption under Section 114(f).

Evidence of the child victim reveals that "Akka" resides in the house that was located closer to the well. He raised cries and then "Akka" arrived ten minutes after with her laundry. The witness was emphatic at that time only he was there near the well. Thus, it is clear that "Akka's" arrival at the well was not due to the call of distress by the child but because she had some clothes to wash. It is also clear that she was totally unaware as to what is said to have happened near the well before she reached there, until the boy disclosed it to her. Clearly she is not a witness to the incident, but at most a witness to his consistency. Therefore, it appears that the appellant's contention that she is a witness to the incident is based on a misconceived notion on evidence. Her evidence would not have added anything to the prosecution's case in respect of its narration except for the general behaviour of the child victim at that point of time and the consistency of his version of events. In such a situation, the presumption under Section 144(f) does not arise for consideration.

The question of corroboration in an allegation of sexual offences was considered in the judgments of ***Premasiri v Attorney General, Sana v Republic of Sri Lanka*** and ***Ajit v Attorney General*** (supra) all of which in relation to sexual offences committed on women. The collective

jurisprudence that could be gathered from these judgments seemed to be that the *"... Courts in some cases of rape especially when the accused claims the allegation to be a false one or when the accused claims that sexual intercourse was performed with the consent of the woman, insist on corroboration of the testimony of the prosecutrix."*

In the judgment of the Supreme Court in ***Gallage v Addaraarachchi and another*** (2002) 1 Sri L.R. 307, Silva CJ held that:-

> *"... if the evidence of the victim does not suffer from basic infirmity and the probability factor does not render it unworthy of credence, as a general rule there is no reason to insist on corroboration."*

Almost identical words are found in ***Mahalakotuwa v The Attorney General*** - CA Appeal No. 176/2007 - decided on 22.06.2010. A similar approach was adopted by this Court in ***Tikiribanda v Hon. Attorney General*** *2010 [B.L.R.] 92* when it held that:-

> *" ... there is no impediment on the part of the Court in acting solely on the evidence of the victim and it is only when the evidence of the victim suffers from some infirmity or where the Courts believe that it would not be prudent to base a conviction, solely on that evidence, the Court should look for corroboration."*

Returning to the instant appeal, we note that the evidence of *Kumara* does not suffer from any of such infirmity which made the trial Court to rule that "... *it would not be prudent to base a conviction, solely on that evidence*". Therefore, mere absence of any corroboration does not render his evidence untruthful and unreliable. The trial Court was mindful of the contradictions and omissions that had been marked off his statement and it has correctly ruled that those infirmities had no adverse effect on his credibility as a witness, owing to triviality of the issues on which they were marked. When the evidence of *Kumara* is considered in its totality we are satisfied that his narration of the sequence of events in relation to the incident is clearly a probable one. The evidence of the prosecution, viewed against the admission made by the appellant to the witness *Loku Menika* on his own volition after the incident and thereby seeking her forgiveness after stating that he did some wrong, supports the conclusion reached by the trial Court to accept of *Kumara's* evidence as a truthful and reliable account of what took place that evening.

The trial Court after a careful evaluation of the evidence given by the appellant under oath decided to reject his evidence, We agree with the reasoning of the trial Court in rejecting his evidence.

We are of the opinion that there was credible and reliable evidence that had been placed before the trial Court by the prosecution and it had correctly found the appellant guilty to the charge of grave sexual abuse.

Therefore, we hold that the several grounds of appeal that has been urged before us by the learned Counsel are without merit.

The conviction and sentence imposed on the appellant by the High Court of Ampara is hereby affirmed and we accordingly make order to dismiss his appeal.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL