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

C.A. (HCC) Case No. 208/2017

H.C. Avissawella Case No. 127/2006

Democratic Socialist Republic of Sri Lanka,

Complainant

V.

Matarage Sunil Premawasantha

Accused

AND NOW BETWEEN

Matarage Sunil Premawasantha

Accused Appellant

V.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

COUNSEL	:	Anil Silva PC with Isuru Jayawardena for the Accused Appellant. Janaka Bandara SSC for the Respondent.
ARGUED ON	:	11.06.2019
WRITTEN SUBMISSIONS		
FILED ON	:	28.08.2018 by the Complainant Respondent. 04.04.2018 by the Accused Appellant.
JUDGMENT ON	:	17.09.2019

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted in the High Court of Avissawella for committing the offence of grave sexual abuse on a child, punishable under section 365 b (2) b of the Penal Code. After trial, the Appellant was convicted and was sentenced to rigorous imprisonment for 18 years. Further, the Appellant was ordered to pay a fine of Rs. 20,000/- and also to pay a sum of Rs. 200,000/- to the victim. Being aggrieved by the said conviction and the sentence, Appellant preferred the instant appeal. I considered the evidence adduced at the trial, petition of appeal, and the grounds of appeal urged by the Appellant, submissions made by the counsel at the argument, and the written submissions made by the counsel for both Appellant and the Respondent.

02. Although 12 grounds of appeal were urged by the Appellant in his petition of Appeal, those can be summarized into 08 grounds.

1. That the judgment of the learned Trial Judge is contrary to law and facts of the case.
2. Learned Trial Judge has not considered the contradictions in the evidence in delivering the judgment.
3. Learned Trial Judge has not considered the improbability of the incident.
4. Learned Trial Judge has failed to take the delay in making the complaint into consideration.
5. The learned Trial Judge has failed to consider the reason for making the complaint, being thinking that the Appellant would make a complaint against the complainant first as mentioned by the witnesses for the prosecution.
6. That there had been no corroborative evidence on the complainant's evidence, neither by producing the clothes that the complainant was wearing nor by medical evidence.
7. Learned Trial Judge has failed to give reasons for rejecting the evidence for the defence.
8. Sentence imposed by the learned Trial Judge is excessive.

03. According to the complainant, she had been around 10 to 11 years of age when the incident occurred. She was born on 10.11.1990. By the time she testified in Court, she was about 19 years old and married. On the day of the incident, her father had told her to go and collect the Samurdhi book from the Appellant who was the samurdhi officer at the community centre. There had been a Samurdhi meeting that day. Her father had been cleaning a well. She had gone to the community centre by 2.30-3.00 pm. Appellant had been seated on a chair in front of the table and had asked her to select their book. No one had been there other than the Appellant. Appellant had come and leaned on to her. She had said that she had to go to the class.

04. At this stage, the witness had tried to avoid relating the incident stating that she could not remember what happened thereafter. However, on further being asked by the state counsel, she had come out with the story. The Appellant had held her and had taken his penis out. He also had lifted her frock. She had felt something dripping from the Appellant's penis that

dripped along her thighs. She said that she was scared. Appellant had given her two 5-rupee coins and had told her not to tell her mother.

05. She had initially not told the mother as she was feeling shy. However, she had told the mother the same day. Mother had told the father. She said that her clothes were washed by the mother but could not remember exactly. Following day they had made a complaint to the police.

06. In cross examination she said that, the Appellant dragged her and kept her on his lap. Further answering the questions put to her, she said that the Appellant made her squeeze his penis with her hands.

07. Grounds of appeal 1,2,3,4 and 5 can be considered together. Counsel for the Appellant submitted that, although the particulars of the offence say that the Appellant got the PW1 to fondle his private part, the evidence of the PW1 was that the Appellant had intercrural sex with her. The evidence of the PW1 has to be considered as a whole.

08. The PW1 had been about 11 years old when the Appellant allegedly committed the sexual acts on her. By the time she gave evidence, she was about 19 years old. She was married. In her examination in chief, she initially was reluctant to come out with the story for obvious reasons that she explained later. She said that her husband even did not know about the case. If he gets to know that, it would affect their married life. She even said that, all what she wanted was to conclude this case even by settling without compensation (pages 81 and 82 of the brief). She further said that after the incident, she did not even go towards 'Delgahakande' area as friends used to mock at her. In cross examination, she clearly explained as to how the Appellant made her fondle his penis. She had been consistent by relating to the doctor about the sexual acts the Appellant performed. I see no reason in the circumstances to doubt her evidence as to the sexual act the Appellant committed as stated in the particulars of the offence. The learned Trial Judge has rightly accepted the evidence of the victim.

09. The complainant said in court that, she could remember that the Appellant was wearing a trouser. However, she had told the police that he was wearing a sarong. It is important to note that the victim was 11 years old at the time the alleged offence was committed on her and about 8 years had passed when she testified in Court.

10. In case of ***Bharwada Bhoginbhai Hirjibhai V. State of Gujarat [1983] AIR 753,*** Indian Supreme Court held;

> *'Discrepancies that 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. The reasons are; (1) by and large a witness cannot be expected to possess a photographic memory and 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. ...'*

11. The Appellant in his evidence had admitted that the complainant child came to the community centre building to collect the samurdhi book. However, he denied the allegation. As I mentioned before, the complainant gave evidence on an incident that happened about 8 years ago. More importantly, when she was about 11 years of age at the time of the incident. In the circumstances, when the presence of the complainant with the Appellant alone in the community centre is not in dispute, the above difference in evidence on the dress of the Appellant will not affect the testimonial trustworthiness of the complainant.

12. It is the contention of the learned President's Counsel for the Appellant that the complainant has not explained the delay in making the complaint to the police. In that counsel said that, the mother and the father of the complainant had given different reasons for the delay in going to the police station. Although the alleged incident had taken place on the 6th January 2002, the complaint to the police had been made on 9th January 2002.

13. Just because a witness is a belated witness, Court ought not to reject his testimony on that score alone. Court must inquire into the reason for the delay, and if the reason for the delay is plausible and justifiable, the Court could act on the belated witness.
*(**Sumanasena V. Attorney General 99 3 Sri L R 137**).*

14. Mother of the complainant (PW2) had been cross examined at length on the delay in making the complaint to the police. She had said that she did not have money to go to the police station. Further, she had said that the child refused to go as she was scared. However, her mother had told her that the Appellant might make a complaint first, stating that they made a false complaint. Her evidence was that, when the Appellant came to the place where they were cleaning the well after the alleged incident, she had assaulted the Appellant. Therefore, her mother had told her that the Appellant might make a complaint to the police against the said assault, stating that they make false allegations.

15. Father of the complainant (PW3) also testified about the assault on the Appellant by his wife. He also confirmed that they went to the police because they thought that the Appellant might go and complain to the police against the assault. Finally he said that he did not go to the police immediately, thinking that he would have had to face problems at the police station (page 180).

16. Complainant had been 11 years old. Therefore, she could not have gone to the police station alone. Although she was reluctant to tell the father about the sexual assault, she had immediately told her mother when she was questioned. Being ordinary villagers who are labourers, may be reluctant to make complaints on this kind of sexual offences on their daughter, thinking twice about the girl's future. PW2 also in her evidence said that, they considered the embarrassment that would cause to the child as well. However, it is clear that the complainant child had told the mother the same day without any delay, which shows that she was consistent. Hence, the delay of the parents in taking her to the police station will not affect the

credibility of the victim child. In the above premise, I find that grounds of appeal 1, 2, 3, 4 and 5 should fail.

17. It was submitted by the counsel for the Appellant that, as the complainant is the sole witness to the incident, her evidence has to be corroborated. In that he said that the clothes contained semen were not produced in evidence. Counsel further added saying that, there is no presumption that the children would tell the truth.

18. Complainant in her evidence said that, she felt semen between her thighs. In her words she said that, urine dripped on her thighs from the penis of the Appellant. Neither her mother nor she had preserved the clothes. She said that, the mother may have washed the clothes. PW2 said that, clothes were washed whilst the complainant had a body wash. They had gone to the police after 3 days. Merely because no test was done for semen in the clothes, one cannot say that the evidence of the complainant on the sexual act should not be accepted. PW2 has even handed over the two 5-rupee coins that were given to the complainant by the Appellant. Complainant had also told what the Appellant did to her to the doctor. Doctor who examined her had given evidence to that effect.

19. A conviction can be based on the testimony of a single eyewitness and there is no rule of law or evidence which says to the contrary, provided the sole witness passes the test of reliability. So long as the single eyewitness is a wholly reliable witness, the Courts have no difficulty in basing conviction on his testimony alone. *(**Anil Phukan V. State of Assam [1993] 3SCC 282, Wijepala V. Attorney General Sc Appeal 104/99 3rd October 2000.**)*

20. Sexual offences are often committed in isolation, not in public. Hence, seldom you get eyewitnesses. Children who are victims of sexual offences are not accomplices to the crime to look for corroboration.

21. As I said before, as the complainant had been consistent, reliable and promptly had told the mother about the incident without delay and therefore, it is not unsafe to act on her testimony alone. Hence, ground of appeal No.6 should also fail.

22. Counsel for the Appellant contended that, the learned Trial Judge has applied the 'Lucas' Principle wrongly in this case. Further, it was submitted that the learned Trial judge has not analysed the defence case.

23. In page 44 of his judgment (page 384 of the appeal brief) the learned Trial Judge has rejected the defence version that this complaint was made to take political revenge. The position taken by the Appellant in his evidence was that, he was a politician and was the chairman of the society of a political party. His opponents had threatened him that they would make him loose the job. This defence was never put to the witness No.3 for the prosecution by the Appellant. The suggestion put to the PW3 was that, this complaint was made due to the fear of Appellant making a complaint for scolding the Appellant (page 193). It was suggested to witness No. 2 that, this complaint was made due to the instigation of his political rivals. Hence, defence has suggested conflicting defences to the prosecution witnesses. On the evidence taken as a whole it is my view that, the learned Trial Judge was correct when he rejected the defence version and accepted the evidence of the complainant that was consistent, probable, and trustworthy. Hence, the ground of appeal No. 7 is without merit.

24. In page No. 38 of his judgment (Page 378 of the brief), learned Trial Judge has applied the '*Lucas*' principle that was discussed in ***"Rex V. Lucas [1981] 2 All ER 1008"***.

25. Learned Trial Judge rejecting the version of the Appellant and concluded that, the Appellant had lied and therefore it strengthens the prosecution case. As I mentioned before, the learned trial judge was correct in rejecting the defence version. However, I am of the view that, the '*Lucas'* principle cannot be applied to every case where you do not accept the defence

version. Although the learned High Court Judge was entitled to reject the version of the Appellant, that could not be taken as a fact to strengthen the prosecution case unless he comes to a finding that the lies told in Court fulfill the criteria stipulated in case of *Lucas*. At page 38 of his judgment, learned High Court Judge has come to a finding not only that the evidence of the Appellant should not be accepted, but also that the Appellant had lied in Court. It is clear on the evidence placed before the learned Trial Judge that, even without applying the *Lucas* principle the only conclusion that the Trial Judge could have come to was that the accused is guilty as charged. For the reasons stated before, the learned Trial Judge has not erred when he found that the prosecution has proved the charge beyond reasonable doubt and this court has no reason to interfere with the conviction. Hence, the conviction is affirmed and the appeal against the conviction is dismissed.

26. Ground of appeal No.8 is on the sentence. Counsel for the Appellant submitted that the sentence imposed on the Appellant is excessive. Senior State Counsel for the Respondent submitted that, sentence is a matter for the Court.

27. This Court would not interfere with a sentence imposed by a Trial Judge unless it is against the law or wrong in principle. The sentence prescribed by law for the offence of grave sexual abuse in terms of section 365 b (2) b of the Penal Code is rigorous imprisonment for a term not less than 7 years and not exceeding 20 years and with a fine and compensation to the victim as determined by Court. Therefore, the sentence of 18 years of imprisonment ordered by the learned Trial Judge is well within the prescribed sentence.

28. When deciding on the sentence to be imposed within the prescribed period, Court has to take into account the aggravating and mitigating factors. The learned Trial Judge on pages 4, 5 and 6 of his sentencing remarks has taken into account all the aggravating and mitigating factors submitted by counsel for the Prosecution and Accused respectively.

29. The mitigating factors submitted by the counsel for the Accused (Appellant) had been his age, his personal details, that he is married with 2 children and the fact that he was a first offender. Although the learned Trial Judge has miscalculated the age difference between the victim child and the Appellant to be more than 40 years, the correct age difference of 24 years should be considered as an aggravating factor, not as a mitigating factor. The Appellant had been a 34-year-old man when he sexually abused the 11-year-old victim. Therefore, the only remaining mitigating factor submitted other than his personal circumstances is that he was a first offender. The learned Trial judge has given sufficient reasons as to why a deterrent punishment should be imposed and to justify the sentence imposed by him. Hence, this Court will not interfere with the sentence as well.

The conviction and the sentence imposed on the Appellant by the learned High Court Judge is affirmed.

Appeal against the conviction and the sentence is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL