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

In the matter of an appeal in terms of Section 331 of the code of Criminal Procedure Act No: 15 of 1979.

Democratic Socialist Republic of Sri Lanka

Complainant

C.A. Case No: **HCC-0384/2017**

Vs.

Kurundukara Hakuruge Ariyadasa

H.C. Kalutara Case No: **HC 186/2009**

Accused

AND NOW BETWEEN

Kurundukara Hakuruge Ariyadasa

Accused-Appellant

Vs.

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

Complainant-Respondent

Website Copy
Website Copy

BEFORE : K. K. Wickremasinghe, J.
K. Priyantha Fernando, J.

COUNSEL : AAL K. Kugaraja for the Accused-Appellant

Sudarshana De Silva, DSG for the Complainant-Respondent

ARGUED ON	:	12.06.2019
WRITTEN SUBMISSIONS	:	The Accused-Appellant – On 30.10.2018 The Complainant-Respondent– On 14.01.2019
DECIDED ON	:	05.12.2019

K.K.WICKREMASINGHE, J.

The Accused-Appellant has filed this appeal seeking to set aside the judgment of the Learned High Court Judge of Kalutara dated 08.12.2017 in case No. HC 186/2009.

Facts of the case:

The accused-appellant (hereinafter referred to as the 'appellant') was indicted under three charges in the High Court of Kalutara, for committing Grave sexual abuse on his daughter, an offence punishable under Section 365B (2)(b) of the Penal Code as amended.

The appellant was convicted after trial and sentenced to 18 years rigorous imprisonment for each charge and said sentences were ordered to run concurrently. Additionally, a fine of Rs.60,000/= with a default term of 6 months simple imprisonment and Rs.300,000/= as compensation were ordered to be paid to the victim.

Being aggrieved by the said convictions and the sentences, the appellant preferred this appeal.

The Learned Counsel for the appellant submitted following grounds of appeal, in the written submissions;

1. Prosecution had failed to establish the date of offence.
2. Conviction is unsafe in view of the fact that the prosecutrix's evidence is not credible.

Website Copy
Website Copy

3. The appellant has been denied a fair trial as the defence has been evaluated improperly.
4. The Learned Trial Judge misdirected himself in law and facts.

The incident relevant to the instant case is as follows;

The prosecutrix had testified that, the incidents took place about two years prior to testifying, when she was in Grade 8 (Page 94 and 95 of the brief). At the time of the trial, she was 16 years old. The prosecutrix testified that the appellant had abused her 5 or 6 times. One incident had taken place when she was on her way to the aunt's house to watch television with her two brothers and the appellant. At this occasion, the brothers were going in front of her and she was going with the appellant and the appellant had put her to the ground and had pressed his penis against her vulva after removing her under garment (Page 100 of the brief). The prosecutrix had not revealed this to anyone since the appellant had threatened to kill her.

Another incident had taken place at home, when the mother of the prosecutrix was away. The elder brother of the prosecutrix was asked to go to temple to get beetle leaves. Thereafter, the appellant had put the prosecutrix on the bed and pressed his penis on her vulva (Page 101 of the brief).

The third incident had taken place on a rock close to her home where the appellant had pressed his penis against the prosecutrix's vulva.

The prosecutrix testified that she had to divulge this incident to her mother since the appellant had told the mother about everything he had done to the daughter, and the mother had questioned her. Therefore, the prosecutrix had revealed the entire incident to her mother. Thereafter, the mother had taken the prosecutrix to the Police Station. As per the prosecution evidence, the incident had taken place three months prior to making the Police complaint (Page 107 of the Brief).

Website Copy
Website Copy

The birth certificate of the prosecutrix was marked as 'P 1' and it was admitted by the defence under Section 420 of the Criminal Procedure Code (Page 108 of the Brief).

The JMO, who examined the prosecutrix, testified that no injuries were found but the possibility of a sexual abuse cannot be excluded as per the short history given by the prosecutrix (Page 316 and 317 of the brief).

When the defence was called, the appellant made a dock statement denying the commission of the offence. The appellant had taken up the position that he was falsely implicated by his wife as he caught her with her paramour. The appellant stated that his wife lodged a complaint at the police station asking for the custody of the children and he denied the same. Thereafter, the wife challenged him that she would send him to the prison and would take the custody of the children. The appellant called witnesses to give evidence on his behalf and the said witnesses testified to the effect that his wife had an affair with a person called Neville.

The Learned Counsel for the appellant contended that the prosecution had failed to establish the date of offence. As per the indictment, the sexual abuse was committed during the period from 01.06.2007 to 17.01.2008. The Learned Counsel for the appellant argued that the prosecution has failed to elicit any evidence from the victim with regard to the date of the alleged incident and the said date was not extracted from the prosecutrix even by way of a suggestion. It was further argued that the prosecutrix had categorically stated that she could not remember when this incident took place (Page 168 of the brief) and therefore, the prosecution has failed to establish a vital ingredient of the charge which is a serious lapse on the part of the prosecution.

In reply to the above contention, the Learned DSG for the respondent submitted that the prosecutrix had clearly stated that the incident took place in latter part

Website Copy
Website Copy

of 2007. I observe that the prosecutrix had testified that the incidents took place about 3 months prior to making the complaint at the Police Station (Page 107 of the brief). During the cross-examination, the prosecutrix answered that the first incident of sexual abuse happened in the latter part of year 2007 when she was in Grade 08 of the school (Page 138 of the brief).

In the instant case, the perpetrator was the father of the prosecutrix who was normally expected to be in the same house with the prosecutrix regularly. Since the appellant is closely associating the prosecutrix daily, it is quite impossible for her to remember the exact date of offence. Further, the prosecutrix has mentioned about 4 or 5 incidents of sexual abuse within the said period of time.

In the case of **R. V. Dossi [13 Cr.App.R. 158]**, it was held that,

> *"The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him Not Guilty and that that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence...*
>
> *Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence..."*

Website Copy
Website Copy

I am of the view that when a small child is abused by someone who is associating her/him on daily basis/more frequently, the victim would not be able to specify the exact same date of offence. It is more difficult to mention such a specific date if the perpetrator has abused the victim in several occasions. In the instant case, the prosecution has mentioned a specific period of 07 months,

within which the appellant had abused the prosecutrix. Upon considering the evidence of the prosecutrix, it is proved that she was abused in several occasions within the mentioned period of time. Therefore, the first ground of appeal should fail.

Now I wish to consider the 2nd ground of appeal in which it was contended that conviction is unsafe in view of the fact that the prosecutrix's evidence was not credible. The Learned Counsel for the appellant brought to the attention of this Court, about the contradictions and omissions in the testimony of the prosecutrix.

In the evidence of the prosecutrix, an omission was brought to the notice of Court that she had failed to mention in her Police statement, that the appellant told not to shout during the incident and he would kill her if she revealed the incident to anyone (Page 133 and 148 of the brief). A contradiction was marked as 'V1' from her Police statement that she had told the Police incident took place at one Samantha ayya's tea estate she could not remember the name of the owner of the tea estate during the trial. The prosecutrix had admitted in her evidence that the appellant goes to work in the morning and returns back late in the night and she had been with her mother. The Learned Counsel for the appellant argued that a serious doubt arises as to why she did not divulge the incident to her mother when the appellant was not home (Page 110 and 180 of the brief).

The Learned DSG for the respondent replied to the above argument that, even though the prosecutrix was cross examined in length by the defence Counsel, he failed to mark any more contradictions or omissions in her evidence other than what is mentioned above.

I observe that the Learned High Court Judge has evaluated the evidence of the prosecutrix in a lengthy manner. The Learned High Court Judge has not acted

Website Copy
Website Copy

on the sole testimony of the prosecutrix and he had considered whether her version was corroborated by other witnesses. In this regard, the Learned High Court Judge was satisfied that the version of the prosecutrix was corroborated by the prosecution witnesses as well as the defence witness Darshana who was the elder brother of the prosecutrix. The prosecutrix testified that she was abused while going to watch TV at the house of her aunt and the said road was narrow and was covered with trees. She further testified that her two brothers were walking ahead of her and the appellant, so the appellant had opportunity to abuse her. The investigating officer, Kamal Prasanna (PW 09), testified that he examined the said road and it was a very narrow road which was covered with trees. The relevant portion of evidence is reproduced as follows;

"ප්‍ර: මේ පාර කොපමණ විතර පළලද?

උ: අඩි 1 1/2ක් අඩි 1ක් විතර පළල මාර්ගයක්

ප්‍ර: ඒ පාරේ යනවිට කොහොමද ගමන් කරන්නේ?

උ: පාරේ යනවිට එක පෙළට එක්කෙනෙක් පසුපස එක්කෙනෙක් ගමන් කළ යුතුයි. දෙපැත්තේ කටු පඳුරු තියෙන නිසා.

ප්‍ර: පුද්ගලයන් දෙදෙනෙකුට සමාන්තරව පාරේ ගමන් කිරීමේ හැකියාවක් තියෙනවද?

උ: නැහැ." (Page 267 and 268 of the brief)

The brother of the prosecutrix, who was called as a defence witness, testified as follows;

"ප්‍ර: ඒ පයින් යන පාර මොන වගේ පාරක්ද?

උ: අතු පාරක්, කැළෑව තියෙන්නේ

....

ප්‍ර: පා පැදියක්වත් ගමන් කරන්න පුලුවන්කමක් තිබුණේ නෑ?

උ: නැහැ.

Website Copy
Website Copy

....

ප්‍ර: ඒ යනකොට ඉදිරියෙන්ම පුරුද්දක් හැටියට ගියේ කවුද?

උ: මමයි, මල්ලියි.

ප්‍ර: තමුන්ගේ නංගි පුරුද්දක් හැටියට කොහොමද එන්නේ?

උ: හිමිහිට එනවා

....

ප්‍ර: තමුන්ට නංගියි තාත්තයි එන ආකාරය දකින්න පුලුවන්කමක් තිබුණද?

උ: එහෙම නැහැ. පස්ස බලන්නේ නැහැ.

ප්‍ර: තාත්තයි නංගියි තමුන්ලාගේ පිටුපස්සෙන් ඇවිදගෙන එනවා පේනවාද?

උ: ඒගොල්ලන්ව දාලා යනවා ටක්ගාලා" (Page 408 – 410 of the brief)

Considering these, the Learned High Court Judge came to the conclusion that in fact the evidence of the prosecutrix was corroborated by other witnesses as well.

In the case of **Premasiri V. Attorney General (2006) 3 Sri L.R 106**, Justice E. Basnayake observed that,

> *"The learned counsel complained that the accused was convicted on uncorroborated evidence. There is no rule that there must in every case, be corroboration before a conviction can be allowed to stand. (Gour on Penal Law of India 11th Edition page 2657 quoting Raghobgr Singhe vs. State(2); Rameshwar, Kalyan Singh vs. State of Rajasthan(3)). It is well settled law that a conviction for the offence of rape can be based on the sole testimony of the prosecutrix if it is reliable, unimpeachable and there is no infirmity. (**Bhola Ram vs. State of Madhya Pradesh (4)**). If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particular. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and*

Website Copy

Website Copy

be sensitive while dealing with cases involving sexual molestation. ***State of Punjab vs. Gurmit Singhe(5)****.*

The rule is not that corroboration is essential before there can be a conviction in a case of rape, but the necessity of corroboration as a matter of prudence, except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge. (Schindra Nath Biswas vs. State(6)... " (Emphasis added)

In the case of **B. Bhoghinbhai Hirjibhai V. State of Gujarat (AIR) 1983 SC 753,** it was held that,

> *"...in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to the injury."*

Therefore, it is clear that, our law as it stands today, allows the trial Judge to act on the sole testimony of a prosecutrix if the said evidence appears to be trustworthy and reliable. In this regard, the Judge must be completely satisfied that the prosecutrix is speaking the truth and the version narrated by her/him creates a ring of truth. In the instant case, the Learned High Court Judge had made the following observation;

> "එසේම ඇය මවටත් වඩා පියාට ආදරයෙන් සිටි බවත් ඇය සාක්ෂි දෙමින් මෙම අධිකරණය ඉදිරියේ ප්‍රකාශ කොට තිබේ. පියා කෙරෙහි කිසිදු වෛරයකින් තොරව ඇය මෙම අධිකරණය ඉදිරියේ ඉතාමත් විශ්වසනීය ලෙස සාක්ෂි දී තිබේ...
>
> ...ඇය මා ඉදිරිපිටදීද සාක්ෂි විභාගයට ලක්වූ ආකාරය අනුව ඇය සාක්ෂි කූඩුවේදී සාක්ෂි දුන් විලාශය අනුවද, ඇය ඉතාමත් පියාටද ලැදියාවකින් යුතුව සත්‍ය තත්වය හෙළිකරමින් මෙම අධිකරණය ඉදිරියේ ඇයට පියාගෙන් සිදුවූ ලිංගික අතවරය පිළිබඳව හෙළිදරව් කොට ඇති බව මෙම අධිකරණයට සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු වී ඇත..." (Page 487 of the brief)

Website Copy
Website Copy

Therefore, it is manifestly clear that the Learned High Court Judge was satisfied about the trustworthiness of the witness. It is trite law that the appellate Court should not disturb the findings of the Trial Judge who has a better opportunity of observing the witnesses and the case as a whole, unless such finding of the Trial Judge is manifestly wrong [vide ***Dharmasiri V. Republic of Sri Lanka (2010) 2 Sri LR 241 & Chaminda V. Republic of Sri Lanka (2009) 1 Sri L.R. 144***]. Therefore, I do not see any merits in the 2nd ground of appeal.

Now I wish to consider last two grounds of appeal together, in which it was argued that the appellant had been denied a fair trial as the defence has been evaluated improperly and the Learned Trial Judge misdirected himself in law and facts.

The appellant, in his dock statement, stated that he had a dispute with his wife as she was having an affair with another man and she had challenged him that she would send him to prison and take the custody of the children. It was further submitted that the defence witnesses also corroborated the fact that the appellant's wife was having an affair with a man called Nevile.

I observe that the Learned High Court Judge was of the view that the victim's mother having an affair with another man is not relevant to this case and the evidence of defence witnesses proved to be false. The Learned High Court Judge rejected the said evidence stating that the relatives of the appellant were trying to get the appellant released by testifying falsely. I observe that the Learned High Court Judge has evaluated the defence case properly and has given reasons for his decision to reject the same.

The Learned Counsel for the appellant submitted that the Learned High Court Judge failed to consider the two different versions stated by the prosecutrix for her belated complaint and further concluded that the above omission does not go to the root of the case, which caused serious prejudice to the appellant. Since

Website Copy
Website Copy

I have already addressed the issue of credibility of the prosecutrix under second ground of appeal, I do not wish to repeat the same again. For the above reasons, the 3rd and 4th grounds of appeal too should fail.

In the case of **Chaminda (Supra)**, it was held that,

> *"Court of Appeal will not lightly disturb the findings of a judge who had come to a favourable finding with regard to the testimonial trustworthiness of a witness whose demeanour and deportment had been observed by the trial judge. This view is supported by the judicial decision in Alwis Vs. Piyasena Fernando(3) wherein G.P.S. de Silva CJ remarked thus: "It is well established that findings of primary facts by a trial judge who hears and sees witness are not to be lightly disturbed on appeal."..."*

I observe that the Learned High Court Judge had evaluated all the evidence placed before him properly and delivered a well-reasoned judgment. I see no reason to interfere with the findings of the Learned High Court Judge. Therefore, I affirm the convictions and the sentences dated 08.12.2017.

The appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

Website Copy

Website Copy

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. R. V. Dossi [13 Cr.App.R. 158]
2. Premasiri V. Attorney General (2006) 3 Sri L.R 106
3. B. Bhoghinbhai Hirjibhai V. State of Gujarat (AIR) 1983 SC 753
4. Chaminda V. Republic of Sri Lanka (2009) 1 Sri L.R. 144
5. Dharmasiri V. Republic of Sri Lanka (2010) 2 Sri LR 241

Website Copy
Website Copy