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 Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA. No. 237/2013

High Court of

Puttalam

Case No.107/2003

Vs.

Weligoda Muditha Chandralal Weligoda

Accused

And Now Between

Weligoda Muditha Chandralal Weligoda

Accused-Appellant

Vs.

The Democratic Socialist Republic of Sri Lanka.

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Anura Meddegoda PC., with Nadisha Kannangara for the Accused-Appellant.

Haripriya Jayasundera SDSG., for the Respondent.

ARGUED ON : 01.03.2021

DECIDED ON : 29.04.2021

R. Gurusinghe, J.

The accused-appellant was indicted in the High Court of Puttalam for committing the offence of grave sexual abuse of three boys under the age of sixteen between 20th October 1996 and 19th October 1997 at Ilanthadiya within the jurisdiction of the High Court of Puttalam, an offence punishable under Section 365 (b) (2) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998. The appellant had pleaded not guilty to the charges. The prosecution called the prosecution witnesses No. 1,2,3,4,5,6,7,9,10,11 and 13. At the conclusion of the prosecution's case the appellant on being called for his defence had made a statement from the dock. After trial the appellant was convicted for counts one and two and sentenced to a term of seven years of imprisonment and also imposed to a fine of thousand rupees with a default term of imprisonment for one month. The appellant was also ordered to pay fifty thousand rupees each, to PW1 and PW2. In default of payment of compensation, a term of six months' imprisonment was imposed. The appellant was acquitted of count three.

The accused-appellant has appealed against the said conviction and the sentence.

The following grounds of appeal were set out by the appellant.

1. The prosecution has failed to prove its case beyond reasonable doubt.

2.The learned Trial Judge had failed to consider and evaluate the evidence placed before Court.

3.The learned Trial Judge has misdirected himself with regard to the evaluation of evidence of witnesses who testified before Court.

4. The learned Trial Judge has failed to consider relevant and pertinent evidence of testimony of prosecution witnesses.

5. The learned Trial Judge has not considered the relevant evidence.

6. The learned Trial Judge has misdirected himself in the application of criteria to assess the credibility of witnesses.

7. The learned Trial Judge has failed to consider relevant and pertinent evidence in assessing the credibility of the witnesses.

8. The learned Trial judge has failed to consider the inter se and per se contradictions in the evidence of the prosecution witnesses.

9. The learned Trial Judge has failed to consider the dock statement and misdirected himself in the consideration of the dock statement made by the appellant.

The period in which the alleged offence was committed was between 20th October 1996 and 19th October 1997.

PW2 gave evidence first. According to him the incident happened on 20th October 1996. A complaint was lodged to the police on 6th July 1997. There is about nine months' delay. According to the Respondent, the delay was reasonably explained. On behalf of the Appellant, it was submitted that the explanations given by PW1 and PW2 for the delay were not plausible and convincing.

The Trial Judge stated in the judgment that the date of offence was not revealed by PW2. The date was suggested by the prosecution. PW2 had accepted the date as 20th October 1996. When giving evidence PW2 was 25 years and PW1 was 29 years old. PW1 and PW2 were 14 years and five months old at 20th October 1996 and 15 th October 1996. The judgment states that they were only 12 years of age at the time of the offence. Both of them had used a slang term for intercrural sex. They knew the exact meaning of that term at the time they lodged the complaint.

The Trial Judge has stated that there was no reason for him to disbelieve the evidence of PW1 and PW2. Further, he says that the reason for not telling the elders were clearly stated by the witnesses. However, the reasons given by the witnesses and why he believed such reasons were not discussed in the judgment. The proposition that children would not lie or not concoct a story cannot be supported when considering the evidence of this case.

20th October 1995 was accepted by PW2 as the date on which the alleged of incidence had taken place. The appellant had shown that 20th October 1996 was a Sunday. The 20th October 1995 was given by PW 1 PW 2 to the police as the date of incident. Both PW1 and PW2 had admitted that the incident happened on school days and not during a weekend. The Appellant in his dock statement has stated that he had never stayed at the school during weekends**.** This date even though suggested by the prosecution, PW2 had accepted as the date on which the incident happened. When giving evidence, he was 25 years old. If the date was not sure, he could have stated so without accepting the suggested date. If the incident happened on a school day and not during the weekend, there is a serious doubt as to the correctness of PW2's evidence. In the evidence in chief (at page 64 of the appeal brief) of PW 1he had stated that on that particular date the school had closed at 2.00 p.m., and he had stayed at home in that night. PW2 stated (at page 67) that the accused had asked him to stay the night with him. At page 68 he stated that he had gone to the school room roughly between 7 to 8 pm. By the time he had gone there, there was Dinesh also. When cross examined, PW2 stated at page 96 and 97 as follows:

ප්‍ර: මේ කට උත්තරය මංඡුල දීල තියෙන්නේ 1997.07.06 කිව්වොත් පිළිගන්නවාද?

උ: ඔව්.

ප්‍ර: කට උත්තරය දීල මංඡුල කියල තියෙනවා මුදිත සර් සවස 6.30 විතර අපේ ගෙදරට ඇවිත් කිව්වා ලොකු අම්මාට සර් තනියම හින්දා රෑට ගුරු නිවාසයට යන්න කියලා. ඊට පස්සේ මම සර් එක්ක ආපු දිනේෂ් එක්ක ගුරු නිවාසයට ගියා යනුවෙන්. මංඡුල මෙහෙම කිව්වාද පොලිසියට ?

උ: ඔව්.

There is a contradiction per se. However, the learned Senior Deputy Solicitor General argued that there were no contradictions.

PW2's explanation at page 97 is as follows:

ප්‍ර: මංඡුල මීට මොහොතකට පෙර සාක්ෂි දුන්නා හැන්දෑවෙ මම කාල ඉවරවෙලා ගුරු නිවාසයට ගියා තනියම යනුවෙන්. දැන් මංඡුල කෝකද මේ දෙකෙන් හරි. හවසත් යනවා ඇවිදින් එක්ක ගිහිනුත් තියෙනවා.

උ: එහෙම අනන්ත වෙලා තියෙනවා. අපි යනවා. අපිත් යනවා හවසට.

When the contradiction was confronted to him, he shrewdly avoided it by saying that he had gone there on numerous occasions. However, evidence of PW 2 is that the alleged incident happened to him only once. Again, in the evidence in chief PW2 stated that they had slept on the floor using mats. (At page 69). During the cross examination he had stated that they had slept on the desks. (At page 98)

PW2 in cross examination stated as follows (At page 99 and page 101)

ප්‍ර: මේ සිද්ධිය මංඡුල කාට හරි කිව්වද?

උ: පස්සෙ දිනේෂ්ට කිව්වා.

ප්‍ර: කොහෙදිද කිව්වේ?

උ: ඉස්කෝලෙදි.

ප්‍ර: කොයිවෙලාවෙද කිව්වේ?

උ: හවස කිව්වේ.

ප්‍ර: හවස කීයට විතර වගේ ද කිව්වේ? ඉස්කෝලේ ඇරිලද කිව්වේ?

උ: ඇරිල කිව්වේ.

ප්‍ර: කොහේදිද කිව්වේ?

උ: පිට්ටනියෙදි කිව්වේ.

At page 101 he says as follows:

> පස්සේ උදේ හයට විතර අපි මූණ හෝදන්න ලිද ලඟට ගියා. ලිද ලඟට යන කොට ඉස්කෝලෙ සුරුවම ලඟදි දිනේෂ් මට සර් ගෙන් වුන දේ කිව්වා. එතකොට දිනේෂ්ටත් මම සර් ගෙන් වුන දේ කිව්වා.

ප්‍ර: මෙහෙම කිව්වද පොලීසියට?

උ: ඔව්.

ප්‍ර: මංෂුලට සර් ගෙන් වෙච්ච සිද්ධිය දිනේෂ්ට කියල තියෙන්නේ උදේ හයට විතර කියල තමයි පොලිසියට කියල තියෙන්නේ? දැන් සාක්ෂි දෙමින් කියා සිටියා මංෂුල කිව්වේ ඉස්කේලේ ඇරිලා කියල? කෝකද හරි, පොලිසියට කිව්ව දේද හරි, උසාවියට ඉදිරිපත් කරපු දේද හරි?

උ: පොලිසියට කිව්ව දේ හරි.

ප්‍ර: මේ සිද්ධිය උදේ තමයි දිනේෂ්ට කියල තියෙන්නේ?

උ: ඔව්.

ප්‍ර: මීට පෙර උතුමාණන් ඉදිරියේ හවස කියල කිව්ව කාරණය වැරදි කරුනක්?

උ: පිළිතුරු නැත.

When this contradiction was confronted, he conveniently changed his position. When he was confronted with the police statement, he swiftly changed the position and accepted that what had been stated to the police as correct. He avoided the chance of marking a contradiction with the police statement. However, there are contradictions per se. PW2 further stated that after this incident they had not gone to sleep with the teachers. (At page 101 bottom)

> පස්සේ අපි ගියේ නැහැ නිදා ගන්න.

If this evidence is true, there cannot be a second incident with regard to PW2. In the statement to the police PW 2 had stated that his younger sister Samadi had come to know about the

incident and she had told it to his elder sister PW 4. When PW 4 had asked him, he told her as to what had happened.

PW 4 did not state the same story. She did not mention anything about what Samadi had come to know about the incident. PW4's evidence was that her brother, PW2 was scared of one Nishantha and not of the Appellant. PW4 did not state anything of the alleged offence to PW 2. According to PW4, PW2 had not told her about the alleged incident.

PW1 gave evidence after PW 2. He stated that there were two male teachers who stayed in a room in the school. When one of them had gone to their home, PW1 and PW2 and one Viraj would go there as one teacher was alone. His position was that they had slept on the desks. PW1 had stated that the accused had intercrural intercourse with him. Thereafter he did not go to sleep with the teachers for about a month.

After about a month again, he had to go there on the parents' request. His evidence is that the accused-appellant had informed his parents that he avoided the classes and the parents forced him to go. His position was that he had not divulged this incident to anybody other than Manju, PW2. PW1's position was that the appellant had slept in their house also, and the accused had intercrural intercourse there as well. According to him, there were two rooms and the living room in his house. The appellant and PW 1 had slept on the floor in the living room where such an incident had taken place. No reason was given for the appellant to sleep at the house of PW 1. When all the members of the family including the father and the mother were there, to do such a thing in the living room by the appellant is difficult to believe.

At page 120.

සර් ගොඩක් හිතවත්ව තිබුණා. මට ඇහිච්ච හැටියට අපේ අක්කා සර්ට බන්දල දෙන්න කථා කරල තිබුණා. අපි කිව්වාට මොනවත් විශ්වාස කරන්නේ නැහැ. සර් කියන ඒවා විශ්වාස කරන්නේ.

At page 121 PW2 stated as follows:

අපේ තාත්තා එක්ක ගොවිතැන් කලා. තාත්තගේ යහලුවා හයසින්. ඒ දෙන්න හවුලේ ගොවිතැන් කරලා විකුණලා බෙදා ගන්නවා. කොහොම හරි ඉස්කෝලේට ලියුමක් ඇවිල්ලා ආරංචි වෙලා තිබෙනවා සිස්ටටත්. මට ගෙදරට එන්න කිව්වා. 5.30 ට විතර ඇති හයසින් මාමා ගෙදරට එන්න කිව්වා. මෙහෙම සිද්ධියක් වුනා කියලා ආරංචි වෙලා තිබෙනවා. මම ඉස්සර වෙලා නැහැ කිව්වා. බය වෙන්න එපා ඇත්ත කියන්න කියලා. පස්සේ මෙහෙම සිද්ධියක් සිදුවුනා කියල මම කිව්වා. මට බැන්නා ඇයි තාත්තට කිව්වේ නැත්තේ කියල. මම කිව්වා විශ්වාස කරන එකක් නැහැ කියල. හයිසින් මාමා එන්න කිව්වා මට තාත්තලා ඉදිරියේ තෝ බොරු කියන්න එපා. සර් එහෙම නෑ. තාත්තා සර්ට ගෙදර එන්න කිව්වා. ඊට පස්සේ මොකද වුනේ තාත්ත මගෙන් ඇහුවා මම කිව්වා. මෙහෙම දෙයක් වුනා කියලා. ටික දවසක් යද්දි සර්ගෙන් අහල තියෙනවා මෙහෙම වුනාද කියලා? සර්ල නැහැ කියල. සතිදෙකකට ඉහතදි වුන සිද්ධියක්. සතිදෙකක් සිද්දිය මංඟුලට වුනා කියලා ගමේ ඉස්කෝලේ හයිසින් මාමා දැනගෙන තියෙනවා. තාත්තා තීරණය කලා පොලීසි යන්න.

According to PW1, the first incident had happened when the accused, PW2 and PW1 were in the school room at night.

(At page 130)

ප්‍ර: මුල් දවසේ කියන මේ සිද්ධිය වන පළවන අවස්ථාව් තමුනුත්, මංඟුත් විතරයි හිටියේ. ඕක තමයි ඇත්ත හරිද?

උ: එහෙමයි.

ප්‍ර: තමුනුයි, මංඟුත් සිටින වෙලාවෙ තමයි තමුන්ට මේ විත්තිකරු ලිංගික අතවර කරලා කිව්වේ?

උ: එහෙමයි.

ප්‍ර: සිද්ධිය වුනේ මොන කාලෙදිද? දවල් කාලෙදිද? රෑ කාලෙදිද?

උ: ඇ කාලෙදි.

He had changed his position within the evidence on the same page. He had stated as follows:

ප්‍ර: කලින් ප්‍රකාශ කරලා තියෙනවා සටහන් වල තමනුයි, මංඡුයි , විරාඡුයි සිටියා කියලා? ඒක වැරදිද?

උ: මම මංඡුයි විතරයි හිටියේ.

ප්‍ර: එහෙම නම් මමයි, මංඡුයි, විරාඡුයි නිදාගෙන ඉන්නැද්දි පළමුවැනි අවස්ථාවෙ සිද්ධිය වුනා කියලා ඒක වැරදිද?

උ: ඒක වැරදියි.

The complaint was lodged about nine months after the alleged incident. The explanation was that the parents believed the accused than PW1. The father and the mother of PW1, PW5 and PW9 had given evidence. None of them stated that PW1 had shown any reluctance to go to the school room or PW 1 had often gone to the school room. They did not state anything that they had trusted the accused than their son. They did not state that there was a proposal to marry their daughter to the accused. They did not state that the accused had stayed in their house at any occasion. The reasons given by the PW1 for nine months' delay in complaining was not at all corroborated by his parents.

As per the evidence of PW1 and PW2, they had not divulged the incident to anyone. However, their evidence was that there were rumours and an anonymous letter was received by the principal. PW1 did not state any specific date on which the alleged incident happened. He gave evidence after PW 2.

PW5 had not corroborated the reasons for delay given by PW1. PW13 the medical officers' evidence does not corroborate the alleged offence except the fact that PW1 and PW2 were produced before him by the Police to examine them. There was not any medical evidence which supports the version of the prosecution. There were contradictions per se and inter se of the evidence of PW1 and PW2. Those contradictions were not considered in the judgment.

Explanation given by PW1 and PW2 for the delay of nine months to complain was clearly within the knowledge of the father and the mother of PW1 and the sister of PW2. None of these witnesses gave any evidence which is supportive of the explanation given by PW1 and PW2.

PW1 did not give any date on which the alleged incident had happened. The explanation given by PW1 was not plausible. PW1's evidence regarding the alleged offence was not corroborated by other evidence. The reasons for him to divulge the incident to the parents were also not convincing. In first complaint he had stated it as follows.

'මම සර්ලගෙන් වුන කරදරය කිව්වෙ නැහැ. පස්සේ අම්මලට සිද්දිය ආරංචි වෙලා තිබුණා. මගෙන් මේ ගැන ඇහුවා. මම සිද්ධිය කිව්වා.

අපේ ගමේ ඉන්න හයිසින් මුදලාලිට මේ සිද්දිය ආරංචි වෙලා ගමේ අය කැඳවලා මේ සිද්දිය ඇහුවා'

In the evidence in Court, he said that somehow Hyoscine Uncle had come to know the incident and when Hyoscine Uncle asked him, he had to tell him. Thereafter, Hyoscine Uncle had told the incident to his father. The evidence of PW 6, Hyoscine Appuhamy stated in his evidence that PW 1 Dinesh had come and told him. In view of these contradictions and infirmities, the evidence of PW1 cannot be considered as credible evidence. There are contradictions in the evidence of PW2 and the explanation given by PW 2 regarding delay in making a complaint to the police was not supported by the other witnesses who should have known those facts. According to PW2 the incident did not happen during a weekend. However, the date he had given was a Sunday. Therefore, the evidence of PW2 cannot be considered as credible.

In a criminal case, the burden of proof is on the prosecution to prove the case beyond reasonable doubt. In this case, there was no prompt complaint. There are contradictions inter se and per se.

PW1 had not given any date on which allege offence was committed and thereby made it very difficult for the accused to set up his defence. The position of PW2 is that the incident had happened on 20th October 1996, which was a Sunday. PW 1 had given the same date in the complaint to the police. The PW1 and PW2 stated that the incident did not happen during a weekend.

The appellant had stated in his dock statement that he had never stayed at the school during weekends. His position was that he used to come to the school on Monday and leave on Friday.

In the above circumstances, I hold that the charges levelled against the appellant were not proved beyond reasonable doubt and the conviction is not safe.

It was submitted that the inclusion of both Penal Code (Amendment) Acts No 22 of 1995 and 29 of 1998 in the charges in the Indictment caused a grave and substantial prejudice to the appellant.

The amendment to the Penal Code effected by Act No 29 of 1998 came into operation with effect from 4 June 1998. The offence is said to have been committed between 20/10/1996 and 19/10/1997.

In the case of *Nimal Senaratna v The Democratic Socialist Republic of Sri Lanka CA 126/2001 HC Anuradhapura 17/2000* Decided on 26.08.2014, A W A Salam, J (P/CA) held that the accused appellant had been adversely prejudiced by the incorrect reference made to Act No 29/1998 in the charge. His Lordship further stated that "This undoubtedly has occasioned in a miscarriage of justice."

The above case is similar to this case with regard to the charges.

By reason of the appellant having been charged under a Law which was not in force at that time, I hold that the charges are bad in law.

For the reasons set out above, the conviction of the appellant and the sentence imposed on the appellant is set aside. The appellant is acquitted of the charges. The appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal