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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No: Democratic Socialist Republic of Sri Lanka

HCC-0140-10

High Court of Batticaloa Case No:

HC/57/2008

COMPLAINANT

Vs.

1.Navoor Thambi Rifnas

2.Mustapha Mohamed Rimshan

3.Mohamed Yoosuff Rifnas

4.Abdul Rasheed Rikash

ACCUSED

AND NOW BETWEEN

1. Navoor Thambi Rifnas

(First Accused-Appellant)

2.Mustapha Mohamed Rimshan

(Second Accused-Appellant)

3.Mohamed Yoosuff Rifnas

(Third Accused-Appellant)

4.Abdul Rasheed Rikash

(Fourth Accused-Appellant)

ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : K Priyantha Fernando, J. (P./C.A.)

: Sampath B Abayakoon, J.

Counsel : Mahinda Jayawardena, for the 1st Accused-Appellant

: A.S.M Perera, PC with Prabodhini Kumarawadu, for the 2nd Accused-Appellant

: Saliya Pieris, PC with Susil Wanigapura, for the 3rd Accused-Appellant

: Indika Mallawarachchi, for the 4th Accused-Appellant

: R. Bary, DSG for the Respondent

Argued on : 16-11-2021

Written Submissions : 29-05-2017(By the First Accused-Appellant)

: 13-07-2017 (By the Second Accused-Appellant)

: 03-02-2021 (By the Third Accused-Appellant)

: 04-10-2021 (By the Fourth Accused-Appellant)

: 08-07-2017 (By the Respondent)

Decided on : 17-12-2021

Sampath B Abayakoon, J.

This is an appeal by the accused appellants (hereinafter sometimes referred to as the appellants) on being aggrieved by the conviction and sentence of them by the learned High Court judge of Kalmunai.

The appellants were originally indicted before the High Court of Kalmunai for 13 counts against them. The 1st count was against all the appellants on the basis of Kidnapping a minor named M.I.I. Ahamad from the lawful guardian and thereby committing an offence punishable in terms of section 354 of the Penal Code.

The 2nd to 4th counts were against the 1st appellant on the basis of grave sexual abuse of the above mentioned minor, punishable in terms of section 365b(2)b of the Penal Code.

The 5th to 7th counts were against the 3rd appellant on the basis that he committed the offence of grave sexual abuse on the minor Ahamad, punishable in terms of section 365b(2)b of the Penal Code.

The 8th to 13th counts were against the 4th appellant on the basis that he aided and abetted the 1st and the 3rd appellants in committing the offence of grave sexual abuse of the said minor, punishable in terms of section 365b(2)b of the Penal Code.

Before the indictment was read over to the appellants, counts 14 to 19 have been added to the indictment against the 2nd appellant on the basis that he too aided and abetted the 1st and the 3rd appellants to commit grave sexual abuse of the minor mentioned, punishable in terms of section 365b(2)b of the Penal Code.

All the mentioned offences are said to have been committed at Akkaraipattu on or about 12th January 2003.

The trial has been proceeded against the 3rd appellant in absentia under the provisions of section 241 of the Code of Criminal Procedure. The learned High Court judge by her judgment dated 27-08-2010 found the appellants guilty in the following manner and sentenced accordingly.

All the appellants were found guilty on count 01, and were sentenced to a term of 7 years of rigorous imprisonment and a fine.

The 1st appellant was convicted for the 2nd, 3rd, and the 4th counts against him as well, and was sentenced to a term of 10 years rigorous imprisonment on each count and a fine.

The 3rd appellant was found guilty of the 5th, 6th, and the 7th counts against him, and was sentenced to a term of 10 years rigorous imprisonment on each count and a fine.

The 4th appellant was acquitted of the 8th, 9th, and the 10th, charges against him, and was convicted on the 11th, 12th, and the 13th, charge. He was sentenced to a term of 10 years imprisonment on each of the counts he was convicted, in addition to a fine.

The 2nd appellant was acquitted of the rest of the charges against him, namely, 14th to 19th counts.

The sentences imposed on the appellants were ordered to run concurrently, while the 1st,2nd, and the 3rd appellants were also ordered to pay compensation amounting to Rs. 100,000.00 each, to the victim.

At the hearing of the appeal, although several grounds appeals have been urged in their respective written submissions, the following grounds were urged and argued as the main grounds of appeal by the learned President's Counsel and the other counsel for the consideration of the Court.

(1) The alleged victim's evidence was not credible and reliable enough for the Court to act on his evidence alone.

(2) The learned High Court judge was misdirected when she decided that the evidence of the Judicial Medical Officer (JMO) was corroborative of the victim's evidence.

(3) The 2nd appellant was wrongly convicted for the offence of kidnapping without any evidence against him.

Evidence in brief: -

PW-01 who was the victim of this sexual assault has commenced his evidence on 07-10-2009. It has been his evidence that when he went to the school playground on the day of the incident to play a game of cricket with his friends, the 3rd and the 4th appellants who came there wanted to play cricket with them forcibly. Thereafter, they lined the boys who were present and the 4th accused after assaulting him with a steel bar, handed him over to the 3rd appellant. The 3rd appellant who forcibly took PW-01 to the urinal nearby sexually assaulted him. According to the evidence of PW-01 the 3rd appellant has first put his male organ between his thighs and has put the male organ in the mouth. Thereafter, he has spat onto the anus of PW-01 and had anal intercourse.

It has been the evidence of PW-01 that when he came out of the urinal after the sexual assault, the 1st appellant who was there assaulted him using his hands and told him to take the bicycle and run. When the 4th appellant said that he wanted to see the size of his male organ, the 1st appellant has assaulted him too. Upon questioning, he has stated that the 3rd and the 4th appellants appeared to be drunk at that time, but has not stated so about the 1st appellant. The evidence of that day clearly appears that the witness had been repeatedly asked by the prosecuting State Counsel as to what the 1st appellant did to him, but the witness has maintained the same stand with regard to the 1st appellant. As for the 2nd appellant, it has been his evidence that he saw him outside after the incident and he was with the others and he too scolded him.

In a nutshell, it has been the position of PW-01 that it was only the 3rd and the 4th appellants who were involved in the offence of sexual assault on him.

However, when continuing his evidence in chief on the next day of the trial, namely, on 17-11-2009, in complete contrast to the first day's evidence as to the 1st appellant, he has stated that after the sexual acts by the 3rd appellant, the 1st appellant too performed the same acts as the 3rd appellant did on him and only thereafter, he was asked to go. He has stated that when this was happening two persons who were brothers of his friend came and asked the 1st appellant to release him.

PW-02 was the father of PW-01, who was not an eyewitness to the incident, but his evidence establishes the emotional and mental trauma his son had to undergo because of what happened to him.

PW-04, M. Ameer Riyas appears to be one of the persons whom the PW01 says that came to the scene of the incident. It was his evidence that when he came to the school playground that day, he saw the 3rd appellant who was a student at the same school, fighting with a small boy near the entrance of the play ground and the 2nd appellant was sleeping drunk near the gate. He has seen

the 1st appellant standing nearby along with several other persons. He has also seen the small boys who were present throwing stones at the elder boys.

PW-05 was a boy who was in the same grade as the PW-01, who has come to play on that day. His evidence was that the 3rd appellant took the victim to a place behind the playground and did not see the incident. He has not implicated any of the other appellants to the incident.

PW 12 was one of the Police investigators into the incident. According to him, PW-01 in his first statement to the Police has revealed the names of two persons who were responsible for the sexual attack on him. However, I find that the prosecution has failed to explain the need for having an identification parade with regard to all the appellants if two of them were known to PW-01.

The next witness of importance was the doctor who was the then District Medical Officer (DMO) of the Akkaraipattu base hospital. He has examined the victim four days after the incident. In the short history given to the doctor the victim boy had informed that he was subjected to anal intercourse apart from other sexual acts on him. The doctor has specifically stated that the victim mentioned two or three names of persons who are responsible, but he did not take down any notes as to the names. It has been his evidence that although he examined the boy including his anus for injuries, he was unable to observe any, but has not ruled out the possibility of sexual abuse of the victim. He has expressed this opinion on the basis that injuries in an incident of this nature can disappear within hours of it happening and also on the basis that such acts can happen without injuries being caused.

When questioned by the Court, the doctor has stated that when the victim was admitted to the hospital on the day of the incident, namely on the 12th, the doctor who examined the patient initially, has also noted that were no visible injuries to the victim.

When called for a defence at the conclusion of the prosecution evidence, making dock statements, the 1st, 2nd and the 4th appellants who were present in Court have denied any involvement of a sexual assault on PW-01.

Grounds of Appeal: -

Relying heavily on the prosecutions failure to get an explanation from PW-01 for the reasons for him to implicate the 1st appellant when he gave evidence on the second day of the trial, it was the view of the learned Counsel for the appellants that it was a matter that cut across the case of the prosecution. It was their contention that without a proper explanation as such, the evidence of PW-01 cannot be considered credible and trustworthy on its own.

Furthermore, it was argued that although a trial judge can rely on even only one solitary witness to an incident, this was not an action where it was safe to act without corroboration.

It was contended further that it may be the very reason why the learned High Court judge looked for corroboration for the evidence of PW-01, however, the evidence of the doctor was not corroborative as considered by the learned trial judge.

It was the contention of the learned DSG that although the prosecution has failed to get an explanation as to the discrepancy of the evidence of PW-01, it has not lowered the credibility of his evidence. It was his view that PW-01 may not have implicated the 1st appellant through fear as he was present in Court, but has implicated the 3rd appellant who was absconding. He pointed out that it was the same judge who heard the evidence in its entirety had pronounced the judgment after considering the evidence in its totality, which needs no disturbance from the Court.

However, he conceded the weak nature of the evidence against the 2nd appellant for him to be convicted for the offence of kidnapping.

It was his position that the convictions against the 1st, 3rd, and the 4th appellants should stand as they have been reached after giving due consideration to the evidence.

As pointed out correctly, in his evidence on the first day, PW-01 has been very specific in his evidence that it was the 3rd and the 4th appellants who were involved in the sexual attack on him. His evidence even suggestive that the 1st appellant was trying to send the victim away from the scene of the crime and that he even assaulted the 4th appellant in the process.

I find that for a reason known only to him, he has changed the version of events in order to implicate the 1st appellant on the second day of his evidence. This leads to an obvious presumption that PW-01 may have been coached after the first day of the trial in some form or another, unless otherwise explained by the prosecution through evidence the reasons for his about turn on the involvement of the 1st appellant.

In this action the Counsel for the appellants has not cross-examined PW-01 on this discrepancy of his evidence. However, it is not a matter that can be held against the appellants as it was the duty of the prosecution to prove the charges levelled against an accused beyond reasonable doubt.

In the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148** it was held:

> *"The burden of proof is always on the prosecution to prove all ingredients of the charge beyond reasonable doubt and there is no burden in our law for the accused to give any explanation (unless in certain cases where specific provision is made by law). In my view it is sufficient if the accused gives an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt."*

I am not in agreement with the learned Counsel for the appellants that whatever the truth may be, this non-explanation as to this vital piece of evidence was a matter that goes into the root of the credibility of the evidence of

PW-01, unless otherwise corroborated by some other independent evidence, but in agreement when it comes to the evidence against the 1st appellant with regard to his involvement to the crime.

It is to be noted that it was the same learned High Court judge who heard the evidence in its entirety has pronounced the judgment.

In the case of **D. Tikiribanda Vs. The Attorney-General C.A. Case No-64/2003 decided on 06-10-2009, reported in BASL Law Reports (2010) BLR 92,**

Held:

(1) While a Court of Appeal will always attach the greatest possible weight to any finding of fact of a judge of a court of first instance based upon oral testimony given before that judge, it is not absolved by the existence of these findings from the duty of forming its own view of the facts, more particularly in a case where the facts are of such complication that there right interpretation depends not only on any personal impression which a judge may have formed by listening to the witness but also upon documentary evidence, and upon inferences to be drawn from the behaviour of these witnesses (demeanour and deportment) both before and after the matters on which they give evidence. A Court of Appeal in such situations is free to overrule such findings of facts if it appears that the trial judge has misdirected himself on the facts or that wrong inferences have been drawn from the facts.

(2) If the evidence of the victim could be relied on, is trustworthy, firm, etc. 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 Court believe that it would not be prudent to base a conviction, solely on that evidence, the Court should look for corroboration.

I find that the learned High Court judge has gone on the basis that the evidence of PW-01 was trustworthy and consistent. However, I find that it was necessary for the learned trial judge to address her mind to the material discrepancies of the evidence of PW-01 on the first and the second days of the trial against the 1st appellant and come to a firm finding whether a reasonable explanation has been provided by the prosecution in that regard, or whether that fact can be disregarded, before deciding to accept the evidence against the 1st appellant. I am unable to find that this vital matter has drawn the attention of the learned trial judge in the judgement, which I see as a misdirection to that extent.

In the instant action, I find that the learned High Court judge while stating that the evidence of PW-01 was consistent as to what happened to him on the day of the incident has stated (at page 286 of the appeal brief) *that;*

> *"At this stage even though the Court does not consider the evidence given by the medical officer as corroborative evidence, the Court finds it as evidence consistent with the 1st witness."*

Later in the judgment (at page 288 of the appeal brief) it has been stated that;

> *"Therefore, medico legal examination report submitted examining the affected boy after four days of the incident is consistent with the evidence of the affected boy. The Court views the medical officer's evidence as corroborative to a certain extent of the small boy who was affected."*

The DMO who has examined the victim boy four days after the date of the incident has found no evidence of a sexual attack. He has expressed the opinion that such an attack can take place without leaving any injuries. In the instant situation the obvious part of the body where there can be telltale signs would be the anal area of the victim, since it was his evidence that both the 1st and the 3rd appellants had anal intercourse with him. Although the DMO has

stated that he examined the whole body of the victim including the areas mentioned in the short history given to him, he has not been specific as to his examination other than making a general statement as such.

The victim was a 13-year-old boy at the time of the incident and when the doctor who examined the victim says that there were no injuries to the victim, his evidence cannot be considered corroboration of the evidence of the victim. Hence, I am in no position to disagree with the contention that the evidence of the DMO was not corroborative of the evidence of the victim.

This Court finds that the learned trial judge who had the benefit of listening to the entirety of the evidence had at no stage of the judgment had concluded that the evidence of the victim of any of the other witnesses for that matter was not cogent enough. She has not looked for corroboration on such a basis. The learned trial judge who had the benefit of observing the demeanor and the deportment of PW-01 has considered him as credible and trustworthy witness with good reasoning.

Under the circumstances, I find that that the learned trial judge has looked at the evidence of the DMO only as an additional piece of evidence which is consistent with the version of the victim and not because she was looking for corroboration on the basis that the evidence of the victim was not cogent enough to act on that evidence alone.

Although the evidence of the DMO cannot be considered corroboration of the evidence of the victim per say, I find that the evidence given by PW-05 who was a boy playing with the PW-01 at the playground on the day of the incident as relevant and corroborative of the evidence of PW-01. According to him the 3rd appellant has taken PW-01 to a place behind the playground and has not returned for some time. This has prompted him to go and alert the parents of the victim. Although he has not seen the sexual acts by the 3rd appellant, this evidence, in my view, is corroborative of the evidence of PW-01 as to what happened to him thereafter. I find that this a matter that has escaped the

attention of the learned High Court judge in analyzing evidence of the prosecution.

If one takes the evidence of PW-01 and the other witnesses who testified in this trial as a whole, the victim's failure to implicate the 1st appellant when he gave evidence on the first day of the trial cannot be construed as that he was lying as to what happened to him, but as coming out with additional evidence on the second day of the trial.

However, in the absence of any acceptable explanation from the witness in this regard, this is a matter that has to be considered in favour of the 1st appellant only, and not in favour of the others, as the evidence of PW-01 was otherwise trustworthy and consistent with regard to what happened to him on that day.

I am unable to agree with the contention of the learned DSG that the victim boy may not have come out with the full incident and he may have implicated the 3rd appellant who was not present in Court, because of his fear of the 1st appellant. I find no basis for this argument. If that was so it would have been the evidence in the form of an explanation and not in the form of an argument to justify the failure of the prosecution by the learned DSG.

This Court is also very much mindful that looking for corroboration of a sexual attack of this nature is not warranted as a rule.

In the case of **Bhoginbhai Harigibhai Vs. The State of Gujarat 1983 AIR SC 753** it was stated that *"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration is adding insult to injury."*, which is very much so in the Sri Lankan setting as well.

For the reasons considered as above, I am of the view that it was not safe to convict the 1st appellant for the charges preferred against him. Therefore, I set aside the conviction and the sentence passed on the 1st appellant and acquit him of all the relevant charges.

I find that there was no evidence against the 2nd appellant for him to be convicted for the charge of kidnapping as has been seen at the place of the incident only after the alleged act and the conviction against the 2nd appellant cannot be allowed to stand. Hence, I set aside the conviction and the sentence of him. The 2nd appellant is acquitted of the kidnapping charge for which he was convicted.

As discussed before, I find that the evidence presented before the Court against the 3rd appellant as to the grave sexual abuse of PW-01, and as to the aiding and abetting of the 4th appellant for the 3rd appellant to commit the act, has been proved beyond reasonable doubt. The appeals by the 3rd and the 4th appellants are hereby dismissed as they are devoid of merit.

The appeals of the 1st and the 2nd accused appellants allowed.

The appeals of the 3rd and the 4th accused appellants dismissed.

Judge of the Court of Appeal

K Priyantha Fernando, J. (P./ C.A.)

I agree.

President of the Court of Appeal