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

In the matter of an Appeal in terms of Article 154P (6) of the Constitution read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant

Court of Appeal Case No.

HCC/407/19

High Court of Rathnapura

Case No. 267/13

Vs.

Narangoda Arachchilage Sarath Kumara

Accused

AND NOW BETWEEN

Narangoda Arachchilage Sarath Kumara

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**
WICKUM A. KALUARACHCHI, J

COUNSEL : Shantha Jayawardena with Ashiq Hassim for the Accused-Appellant

Sudharshana Silva, DSG for the Respondent

WRITTEN SUBMISSION
TENDERED ON : 12.01.2021 (On behalf of the Accused-Appellant)

04.03.2021 (On behalf of the Respondent)

ARGUED ON : 22.02.2022

DECIDED ON : 24.03.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted before the High Court of Rathnapura with committing grave sexual abuse on or about 27.12.2007, an offence punishable under Section 365 B(2)(b) of the Penal Code. After the trial, the appellant was convicted of the charge and was sentenced to 14 years rigorous imprisonment and imposed a fine of Rs.25,000/-. It was also ordered to pay Rs.200,000/- as compensation to the victim. This appeal is from the said conviction and sentence.

At the time of this incident, the victim was a 15 years old boy. On 27.12.2007 evening, when the victim Mahesh Saman Kumara was returning from his aunt's place, the appellant caught him by the hand on the road and took him to a hall in the Balangoda Municipal ground. The accused-appellant was an unknown person to him. Mahesh was taken to a room in the Municipal grounds and the appellant committed this offence, according to the victim.

When Mahesh was coming after the incident, he met PW 9, the Police officer Amarasinghe who was on night-petrol duty and was informed about the incident. They had gone to the pavilion of the Municipal grounds around 11.40 p.m. as shown by the victim, the watcher Pushpa Kumara was in a room, and on information given by the watcher, they had gone to the room where the accused was boarded. When the accused came out from his room, the victim identified him as the person who sexually abused him. The police officer arrested the accused-appellant at 12.30 in the night and brought him to the police station.

Although four grounds of appeal have been stated in the written submission tendered on behalf of the appellant, the learned counsel for the appellant made his submissions only on the ground of false implication of the accused-appellant. When making submissions regarding the said ground, he contended that the identification of the appellant by the victim is also doubtful.

In respect of the ground of false implication, the learned counsel for the appellant contended that the police officers forced the victim to implicate the appellant for this offence. In substantiating this argument, the learned counsel pointed out two points. One point was that there is no evidence, where the victim was from midnight to the next morning. The other point was the prosecution story that the victim had gone with police officers to the ground and shown the appellant could not be believed.

It appears that where the victim was from the 27th midnight to the next morning is not a material fact to prove the prosecution case. How the offence was committed, how the victim showed the appellant to the police officers after the incident and how the appellant was arrested have been explained in evidence. What the victim did in the night after the appellant was arrested and taken by the police is not needed to

establish the prosecution case. If the appellant wanted to show anything to the court by disclosing where the boy was from midnight to morning, the learned defence counsel could have cross-examined the victim and disclosed the same. Hence, where the victim was from midnight to morning has no relevance to determine this case.

The argument whether the victim had not gone to the ground with the police to show the accused was advanced by the learned counsel for the appellant with the omission appears on page 93 of the appeal brief. By the said omission, it was drawn to the attention of the court that in the statement of the PW 1, Mahesh Saman Kumara to the police, it has not been stated that he went to the Municipal grounds with police officers.

It is very important to be noted that although the said omission was drawn to the attention of the court, even a single suggestion has not been made by the learned counsel for the accused-appellant to the victim that he did not go to the Municipal grounds with police officers. In the case of Banda and others V. Attorney General – (1999) 3 Sri L.R. 168 it was held that "Omissions do not stand in the same position as contradictions and discrepancies. The rule in regard to consistency and inconsistency is not strictly applicable to omissions". Therefore, the omission that was drawn to the attention of the court in this case, would remain just as an omission because the matter sought to be raised by the omission has not even been suggested to the witness.

It is to be noted that the reason of pointing out an omission is to draw the attention of the court to the fact that what was said in court while giving evidence was not stated in the statement given to the police. An omission gets a value, only if it is in line with the defence taken by the appellant. Here, the victim has explained in his evidence how he met police officers on the road, how he went with police officers to the Municipal grounds and how he pointed out the appellant. When the victim explained all those details, not a single question had been asked

and even a suggestion had not been made to him on behalf of the appellant that the victim did not go with the Police officers to the ground and point out the appellant. Without challenging the evidence in the trial court that the victim has gone with police officers to the Municipal grounds and identified the appellant, now the said facts could not be challenged in the appeal. Hence, the victim going with Police officers to the Municipal grounds to identify the appellant has to be considered as unchallenged evidence.

In addition, PW 9, PS Amarasinghe testified that he was on petrol duty and has met the victim in Balangoda town around 11.30 p.m. He corroborates the victim's evidence and states that the victim had complained about the incident and they have gone to the pavilion of the Municipal grounds around 11.40 p.m. as shown by the victim. He explained further, how they find the accused-appellant and specifically stated that the moment the accused came out from the room, the victim identified him as the person who abused him sexually.

As pointed out by the learned Deputy Solicitor General for the respondent, it is vital to be noted that when they first saw the watcher Pushpa Kumara who was in a room of the pavilion, the victim had stated that the watcher was not the person who abused him. Soon after the victim saw the appellant, he identified him. So, it is apparent that the victim had no uncertainty or difficulty in identifying the appellant. Therefore, the identification of the accused-appellant is precise. The learned High Court Judge has also evaluated the evidence and found that the victim has properly identified the appellant. Therefore, the facts of the victim being gone with Police officers to the Municipal grounds and identifying the appellant are well corroborated. Thereafter, the appellant was arrested and brought to the Police Station. In the said circumstances, there is no merit in the argument that the appellant had been falsely implicated.

The other matter pointed out by the learned counsel for the appellant was that the appellant was brought to the Police Station for an offence of theft and subsequently he was implicated for the sexual abuse incident. It is correct that when the appellant was in the Police Station, his statement regarding some other offence was recorded at 11:00 hours on 28.12.2007. Later on, at 12:45 hours, his statement regarding this sexual abuse was recorded. That does not mean the appellant had been taken into police custody for an offence of theft and he was implicated for this offence.

As stated previously, the victim had no reason to implicate the appellant falsely because, at the time of the incident, he was an unknown person to the victim. There is clear evidence that only after the appellant was shown to the PW 9 by the victim, the appellant was arrested and brought to the Police Station. Thereafter, Police officers may have recorded some other statement relating to a complaint received earlier. There is no strange in that. The same person may be a suspect of two offences. Hence, I regret that I am unable to accept the argument of the learned counsel for the appellant that the appellant was brought to the police station for an offence of theft and subsequently he was implicated for the offence of sexual abuse.

In this case, as the learned High Court Judge correctly observed, the victim has given evidence that can be accepted without reasonable doubt. Therefore, the charge could be proved on his evidence. In Regina V. W.G. Dharmasena – 58 NLR 15, it was held that "in charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated". The case before us is also a sexual offence and thus the same legal position applies in this case as well. In the cases of the King V. Themis Singho – 45 NLR 378 and Premasiri V. the Queen – 77 NLR 85, it was held that in a charge of rape, "it is proper for a Jury to convict on uncorroborated evidence of the complainant only when such

evidence is of such a character as to convince the Jury that she is speaking the truth".

In the instant action, the victim's evidence has been corroborated by the evidence of PW 9 as well as by the medical evidence. However, even without corroboration, the court could act upon the victim's evidence, as it is apparent that he speaks the truth. The doctor who gave evidence had stated that there was a 1mm laceration in the anus of the victim. So, there is sufficient evidence to prove that the victim was sexually abused. When the entirety of the evidence is considered together, it is established that the offence of grave sexual abuse has been committed by the appellant.

The victim has identified the appellant soon after the incident. Identifying a person immediately after an incident without delay is a strong identification. The complaint was made to the police without any delay. In fact, soon after the incident, the victim had narrated the incident to the police officers. So, there was no room for any other person to fabricate a story and teach him. On the other hand, the victim had no reason to make a false allegation to an unknown person. His complaint was recorded the next day. The learned High Court Judge has evaluated all the relevant evidence correctly, considered all contradictions and omissions and extensively dealt with the relevant facts and circumstances of the case in his well-considered 42-page Judgment.

In these circumstances, I see no reason to interfere with the judgment and the sentence of the learned High Court Judge. Accordingly, the conviction and the sentence imposed on the appellant are affirmed and the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL