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:

CA/HCC/0082/2020

High Court of Kegalle Case No:

HC/3882/2018

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Madduma Ralalage Gunasena

ACCUSED

AND NOW BETWEEN

Madduma Ralalage Gunasena

ACCUSED-APPELLANT

Vs.

The Attorney General
Attorney General's Department
Colombo 12

RESPONDENT

Before : Sampath B Abayakoon, J.

: P. Kumararatnam, J.

Counsel :R. Arseckularatne, P.C. with Chamindi Arsekularatne, Evanga Yakandavala and Thilina Punchihewa for Accused Appellant

: R. Jayaratne S.C. for the Respondent

Argued on : 16-03-2022

Written Submissions : 28-10-2021 (By the Accused-Appellant)

: 17-12-2021 (By the Respondent)

Decided on : 20-05-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Kegalle on three counts of grave sexual abuse of a minor (hereinafter referred to as the victim) between the period of 1st May 2010 and 31st April 2011, punishable in terms of section 365 B (2)(b) of the Penal Code as amended.

In the first and the second counts, it was alleged that the appellant kissed the genital area of the victim child and in the third count, the allegation was that he touched the genital area of the victim child.

It needs to be noted that initially, all three charges against the appellant were on the basis that he touched the genital area and thereby committed the offence. However, the 1st and the 2nd charge had been amended as above before the commencement of the trial against the appellant.

After trial, the appellant was found guilty for the 1st and the 3rd count preferred against him by the learned High Court Judge of Kegalle, while he was acquitted

of the 2nd count. He was sentenced to 12 years rigorous imprisonment on each of the two counts to be served concurrently. In addition, he was ordered to pay a fine of Rs. 10000/- for each of the counts where he was found guilty, and in default six-month imprisonment on each count was ordered.

Being aggrieved by the conviction and the sentence, the appellant preferred this appeal.

Facts in brief: -

It was an admitted fact that the victim (PW-01) was born on the 02nd of April 1999. According the evidence of the victim the alleged incidents happened to her when she was in grade 7 at her school and during the early part of the year. However, she was not able to give an exact date or dates of the incidents. When prosecution suggested the dates as between 01-05-2010 and 31-04-2011 she has agreed that she faced the incidents during that period. She has stated that she was about 11 years old at that time. However, when she gave evidence in the Court, she had been a 19-year-old youth. She had a younger sister who was seven years her junior. Her mother worked at a garment factory while the father had no fixed occupation. He was in the habit of leaving the younger sister in the care of the victim and leave the house looking for liquor once she returned from school.

The appellant, whom the victim identified as “Mama” (මාමා), at the trial was a neighbour who lived close to their house with his family, and he had a daughter of similar age to her sister. The appellant was in the habit of coming to their house to take her sister to his house in order let her play with his child. The victim child also used to go with her to the house of the appellant as she could not send her alone.

According to her, during these visits, the appellant, using opportunities where he could avoid other members of the household seeing his actions, used to touch her genital area and when she resisted the appellant threatened her and

her family with death telling her not to tell her parents. In her evidence she has stated that this continued over a period of time and at one point he tried to insert his finger into her genitalia and on another occasion kissed her genitalia. However, she has not divulged what was happening to her to the parents due to the fear she had for the appellant. When it came to a situation where she could no longer bear what was happening, she has gone after school to her grandmother's house which was some distance away from their house and had informed the grandmother that she is being sexually abused by the appellant and had wanted her to inform the parents.

As their house had no telephone facility, it was to the house of the appellant the grandmother had given a call and had got in touch with the mother of the victim. On the information they received, the parents of the victim had gone to the house of the grandmother in the night and had complained to Deraniyagala police on that night itself. Later, the police have produced her before a doctor for a medical examination. The position of the appellant had been that the this was a false allegation against him due to a land dispute he had with the family of the victim, which the witness has denied saying that before the complaint they had no disputes.

It was the evidence of the mother of the victim that on the day relevant to the incident, when she came home from work, she was informed by her husband that the elder daughter did not return home from school. It was her evidence that her family and the family of the appellant had a very close friendly relationship and she used to leave her children under their care often. While looking for the child she has received a call from her mother informing that the child is with her and requiring to come immediately to take the child to the hospital. As their house had no telephone facilities the call has been given to the house of the appellant as for the usual practice. She and her husband has found the child at her mother's house around 10.00 p.m., and after inquiring from her what happened, they have gone to the Deraniyagala police on that

night itself and had lodged a complaint. According to her, the complaint was made to the police at around 2.00 a.m. on 2nd April 2011.

PW-03, Seelawathie the grandmother of the victim has given evidence in this case. It was her evidence that the elder child of her eldest daughter came to her home and informed that a 'සීයා' with whom the child had been left with sexually harassed her and because of that she is not willing to go back home. After keeping the child with her, she has informed her daughter through a telephone call given to the house of the appellant as her daughter had no telephone facilities that such a thing had happened to the victim, namely, her granddaughter Priyangika Dharshini.

According to her the child has informed that it was 'මල්ලිකා මිස්ගේ ඒ සීයා' that did the things mentioned to her and she has identified the appellant as the person concerned.

The police officer who investigated the complaint PS-30858 Gunaratne in his evidence has stated that the victim and the appellants houses were about 30 meters apart and the child failed to show a particular place where the incidents happened but it was revealed that the incidents happened in the child's house.

After the investigations the appellant had been arrested on the 02-04-2011. The fact that the first complaint in that regard was received by the police on 02-04-2011 at 1:00 am and the fact that the appellant's statement was recorded on 03-04-2011 at 7:05 am are facts that had been admitted. As the medico legal report with regard to the child has also been an admitted fact. It has been marked as P-02 at the trial.

After the conclusion of the prosecution evidence and when the defence was called, the appellant had chosen to give evidence under oath. It has been his evidence that he was a person who retired after serving in the army and he is not guilty of the offence.

Under cross examination, he has admitted that the family of the victim and his family are neighbours and there were no issues between the families until this incident. However, when asked for the reason for such a serious allegation to be leveled against him, he has stated that his wife works at Basnagala Maha Vidyalaya as a teacher and the victim child's father's younger brother (බාජපා) was the person who ran the school canteen. He had an animosity with his wife because of her refusal as a teacher of the primary classes of the school for the children to visit the canteen often. It was his position that because of this, the child's relative harassed his wife and prevented her from doing her job and threatened that he will teach a good lesson to him, referring to the appellant. As a result, the said relative of the child and the mother of the child got together and made this false allegation against him was his stand.

At the conclusion of the trial the learned High Court Judge convicted the appellant for the first and the third counts preferred against him and sentenced the appellant as stated before.

Grounds of Appeal

At the hearing of the appeal, the learned President's Counsel, although he has formulated 12 separate grounds of appeal in his written submissions, submitted the following matters for the consideration of the Court.

It was the position of the learned President's Counsel that the second and the third counts preferred against the appellant in the indictment refers to something that happened at different times and not in the same transaction. Referring to the provisions relating to joinder of charges as referred in the Code of Criminal Procedure Act No. 15 of 1979, it was his contention that the three counts so preferred against the appellant had been wrongly combined as they appeared to be not in the same transaction as stated in the charges itself.

He contended further that there was no April 31 in a year, and since it was an admitted fact that the appellant was arrested on the 02nd of April, there was no

reason for the prosecution to extend the period of the offence up to a non-existing date like the 31st of April, and therefore, the charges preferred against the appellant are bad in law.

Making submissions as to the credibility of the evidence by the prosecutrix, it was contended that although the prosecution has formulated two counts against the appellant on the basis that he kissed the genital area and another count on the basis on touching the genital area, apparently, based on what the victim said to the police and based on the investigations, the testimony of the prosecutrix before the Court was different.

In the testimony, what she has stated was that the kissing of the genital area happened only once. It was his position that under the circumstances, the learned High Court Judge should have looked for corroboration of the evidence of the prosecutrix, and it was not safe to act only on her evidence given the infirmities in the evidence.

The learned President's Counsel further argued that it was strange for a child to not to inform her parents what was happening to her, even though the child has claimed that she was threatened with death by the appellant. Further, it was contended that the evidence of PW-03 the grandmother of the child was different to what the child has said in Court and the grandmother's evidence suggests that the child has not spoken about any sexual acts as she narrated in the Court.

It was also his position that if informed of sexual harassment by the appellant, it was strange for the grandmother to call the house of the appellant who was the person against the allegations are being made, and inform her elder daughter about the situation of the prosecutrix as claimed by the witnesses.

According to the evidence of the police the child has pointed to a different place as the place of the incident and she was unable to point to a particular place as to where the incidents happened. It was the position of the learned President's

Counsel that this was a concocted story by the police against the appellant and under the circumstances the failure by the prosecution to mention a particular date as the date of offence has caused prejudice to the appellant.

Finally, it was his submission that the case against that the appellant was not proved beyond reasonable doubt before the Court and hence, the appellant should have been acquitted by the learned High Court Judge rather than convicting him for the first and the third counts preferred against him.

It was the submission of the learned State Counsel that no prejudice has been caused to the appellant due to the wrong mentioning of the time period of the offence ending as at 31-04-2011 since it is apparent to anybody that there is no 31st day in the month of April. Although the appellant has been admittedly arrested on 02-04-2011 there was no evidence by any of the witnesses before the trial Court that the incidents happened after the arrest.

It was contended that there was no belatedness in the complaint, given the facts and the circumstances. It was his position that the charges had been correctly framed and proven beyond reasonable doubt.

Consideration of the Grounds of Appeal

The evidence of the victim child clearly suggests that she was subjected to sexual abuse over a period of time and the child has gone to her grandmother after it became unbearable to her.

Under the circumstances, it clearly appears that the prosecution has preferred three counts of grave sexual abuse against the appellant considering the limitations as to the joinder of charges as provided for in the Code of Criminal Procedure Act No. 15 of 1979 (Act). The prosecution has formulated the charges based on Section 174 of the Act which reads as follows:

1. **When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first**

to the last of such offences maybe charged with and tried at one trial for any number of them not exceeding three, and in trials before the high court such charges maybe included in one and the same indictment.

2. **Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Penal Code or of any special or local law."**

Clearly, the prosecution has chosen to charge the appellant for three offences of same kind committed within a period of one year, punishable in terms of Section 365B(2)(b) of the Penal Code as amended by Act No. 22 of 1995 and 29 of 1999.

It is correct that in formulating the charges the prosecution has wrongly included the end date of the offence as 31-04-2011, where there is no date as 31st for the month of April. However, I am in agreement with the learned State Counsel that the said mistake has caused no prejudice whatsoever to the appellant, since there was no allegation against him beyond his date of arrest.

The proviso to Article 138 of the Constitution of the Republic, which gives the jurisdiction to the Court of Appeal to hear and determine the appeals from any Court of First Instance reads as follows;

"Provided that no judgment, decree, or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

Hence, I find no basis in the above discussed ground of appeal as the said irregularity has not caused any prejudice to the appellant or occasioned a failure of justice.

Before considering any other ground of appeal urged, I would now consider whether the victim's failure to give evidence as to a specific date or dates that she was subjected to the grave sexual abuse by the appellant can be considered as a basis to conclude that the prosecution has failed to prove its case beyond reasonable doubt, or amount to a denial of a fair trial for the appellant.

It is abundantly clear from the evidence of the victim that she was speaking of several acts of sexual abuse over a period of time by the appellant by taking advantage of her age and the vulnerable position that she was in, during the time period relevant to this action. According to the victim, she was studying in grade 7 in the school when the incidents happened and they happened during the early part of the year. The victim was a child of about 11 years of age at the time relevant to the incident and a 19-year-old married mother of a child, when she gave evidence in the High Court in February 2019. One has to understand her evidence under that context, given the stigma attached in our society to these kinds of incidents. Very often than not, child victims tend to forget the exact dates upon which they had to face such sexual abuse.

I am of the view that the victim's failure to mention specific dates rather than mentioning a time period becomes relevant in an action of this nature only if it can be determined that it had caused any prejudice to the appellant. I am unable to come to any conclusion as such, given the fact that the indictment was not based on a particular date but during a period of one year. Admittedly the appellant was arrested on the 2nd of April 2011, soon after the complaint against him was lodged with the police. Given the fact that the victim in her evidence has narrowed down the relevant period to the early part of the year before she informed what was happening to her grandmother, there would have been no difficulty for the appellant to understand the relevant period as to the allegations against him.

The case of **Madawala Gedara Premadasa Vs. The Attorney General C.A.261/2009 decided on 26-05-2014** was a matter where the facts as to the date of the incident was similar to the matter under consideration in this appeal. It was held:

Per Anil Gooneratne, J.

> *"On the question of vagueness of the incident regarding the date of the incident and the reference made therein to the period, we cannot see any prejudice being caused to the accused party, on this aspect since it was not an incident but the alleged acts had been committed on several dates, which shows repetition and continuation of acts."*

Considering the necessity of affording a fair trial to an accused in a case where a specific date has been mentioned in the charge, unlike the appeal under consideration, it was held in the case of **R. Vs. Dossi 13 Cr. App. R. 158;**

> *"That a date specified in an indictment is not a material matter unless it is essential part of the alleged offence, the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so. Provided that there was no prejudice, where it is clear on the evidence that if the offence was committed on the day other than that specified."*

Further, it was stated in the case of **Wright Vs. Nicholson 54 Cr. App. R. 38**;

> *"That the prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in the 'Dossi' if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation."*

For the reasons adduced above, I find no merit in the considered ground of appeal as there is no basis to conclude that the appellant was misled as to the charges against him or any prejudice has been caused to him.

Having considered the grounds of appeal as above, I will now turn my attention to the contention that the evidence of the victim was not credible enough as to the alleged incidents of sexual abuse and was also not probable, for the learned trial judge to rely on her evidence alone, and he should have looked for corroboration as to the evidence of the victim and also the contention that the evidence of the grandmother does not corroborate the evidence of the victim.

As I have discussed earlier, no reasonably prudent person can expect a child of about 11 years of age at the time of facing several acts of sexual abuse as alleged to remember all the minute details of such acts long after the incidents. It is my considered view that the issue of credibility is a matter that has to be decided after considering the evidence of a victim of child abuse in its totality and not by considering parts of evidence in its isolation.

It was held in the Indian case of **Bhoginbhai Hitijibhai Vs. State of Gujarat AIR 1983- SC 753 at page 756-758,** that;

1) *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen.*

2) *Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

3) *The powers of observation differ from person to person. What one may notice, and the other may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part another.*

4) *By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purpose of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

5) *In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates of such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

6) *Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

7) *A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witnesses is giving truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.*

As I have stated earlier, the evidence clearly establishes the fact that the victim has been subjected to sexual abuse over a period of time, although the charges have been formulated limiting them to three acts of sexual abuse over a period of a year given the legal constraints in formulating charges in a situation like this. Therefore, her evidence needs to be evaluated in that context in mind.

Although the charges have been framed on the basis of two acts of kissing of the genital area, I am unable to agree that the victim's evidence that kissing of her genital area by the appellant happened only once and her failure to come up with what she has stated to the police in her statement in detail when giving evidence, as matters that affects the credibility of her version of events.

When considering the argument that it was strange for the victim to not to inform her parents of the sexual abuse suffered by her even if there was a death threat, that fact needs to be considered given her home environment that prevailed during the time relevant to the alleged offences. According to her evidence, her father was a person who was addicted to liquor and the mother being the only stable income earner of the family had to be away from home most of the day. The victim had been a child burdened with household chores in addition to her studies, including looking after her younger sister. It is obvious that the victim has done the next best thing after the sexual abuses suffered by her became unbearable by informing her grandmother who lived away from their own home.

I am unable to agree with the contention that if the victim told the grandmother that she was being sexually abused by the appellant, would she give a call to the house of the appellant and inform that to the mother of the child. It is clear from the evidence that until the victim went and informed her grandmother what was happening to her, the two families who lived close to each other had a good relationship between them. According to the evidence of the grandmother, as her daughter's house had no telephone facilities whenever she wanted to contact her it was to the house of the appellant she used to call and get in contact with her daughter. It appears that she has followed the usual practice on this occasion also, which was not unusual.

The evidence of the mother of the victim shows that her mother contacted her by giving a call to the appellant's house and informed her to come immediately and the child needs to be taken to the hospital. This has prompted the parents

going to the house of PW-03 and after learning what has happened, the have gone to the police station in the night itself and made the relevant complaint.

In her evidence, the grandmother of the child has confirmed that her granddaughter came to her and informed that she is being sexually harassed by the appellant to whom the grandmother says that the child referred to as "මල්ලිකා මිස්ගේ ඒ සීයා"". Mallika is the name of the wife of the appellant. It appears from her evidence that when the parents came and inquired from her, she was even reluctant to tell them what the child told her, instead she has asked the mother of the child to inquire from the child. It appears even in Court when giving evidence she was reluctant to narrate it in detail the exact words told to her by her granddaughter. I find that this is perfectly understandable behaviour of an elderly village woman who had to listen to the sexual abuses faced by her granddaughter at the hand of an elderly known person.

The evidence of the police officer who conducted the inquiries, namely police sergeant Gunaratne, confirmed that the complaint with regards to this incident received by the police station at 1:00 a.m. on 02-04-2011. It was evident that the victim has failed to pinpoint one particular place where the incident or incidents took place. I find that this was very much in line with the evidence of the victim. In her evidence she has clearly stated that the incidents of sexual abuse happened in the house of the appellant and also the appellant used to come to their home for the same purpose and she used to avoid as much as possible.

For the reasons stated as above, I find that the evidence of the victim was credible and cogent enough. It is an accepted fact that any sexual offender would be careful that his actions would not be seen by others. Therefore, it is virtually impossible in an offence of this nature to find corroborative evidence of eye witnesses to such an incident or incidents. It is well settled law that in offences of this nature, if the evidence of the prosecutrix is cogent, trustworthy

and credible a trial court can act on that evidence alone. However, in the instant action, I am of the view the evidence of the mother as well as the grandmother and the medical officer who examined the child are consistent with the evidence of the victim.

The Indian Supreme Court in **Bhoginbhai Hirijibai Vs. The State of Gujarat (supra)** it was held:

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

In the case of **D. Tikiri Banda Vs. Attorney-General CA 64/2003 decided 06-10-2009 reported in the Bar Association Law Journal (2010) (BLR) 92** held:

> *"a) If delay of making a statement is explainable the evidence of a witness should not be rejected on that ground alone.*
>
> *c) Mostly the victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible (withdrawal syndrome). The offenders should not be allowed to capitalize of take mean advantage of these natural inherent weaknesses of small children.*
>
> *d) Insignificant omission of such a victim or her utterance of dreadful words should not be taken as a contradiction having effect or impact on the credibility of the victim.*
>
> *g) 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 courts 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 appellant has failed to create any reasonable doubt or provide a reasonable explanation as to the incriminating evidence against him. His explanation that there was a land dispute between the parties when the victim was giving evidence and the victim's "බාප්පා" had a dispute with his wife in his evidence, are contradictory to each other, which does not create any doubt as to the evidence of the prosecution. I find no reason for the victim or her family members to accuse the appellant falsely, given the close relationship the family of the appellant and the family of the victim had and also given the fact that no parent would involve a girl child of this age falsely in a complaint of this nature due to the social stigma attached to such complaints.

For the reasons as adduced above, I find that the prosecution has proved the case against the appellant beyond reasonable doubt and the learned High Court Judge has reached his verdict after giving due consideration as to the facts and the relevant law, with clear reasoning. Hence, I find no reason to interfere with the conviction and sentence of the learned High Court Judge.

The appeal therefore is dismissed as it is devoid of merit. The conviction and the sentence affirmed. However, considering the fact that the appellant had been in incarceration since the date of the conviction, the sentence is ordered to be effective from the date of the conviction namely, from 04-09-2020.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal