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

In the matter of an Appeal made
under Section 331 of the Code of
Criminal Procedure Act No.15 of
1979.

**Court of Appeal Case No.
CA/HCC/ 0168/2018
High Court of Colombo
Case No. HC/4277/2008**

Ekanayake Mudiyanseelage Upali

Ekanayake

ACCUSED-APPELLANT

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.
P. Kumararatnam, J.**

COUNSEL : **Ajantha Lakmal for the Appellant.
Shanil Kularatne, SDSG for the
Respondent.**

ARGUED ON : **30/03/2022**

DECIDED ON : **25/05/2022**

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General for committing an offence under Section 365 B (2) (b) of the Penal Code for committing the offence of Grave Sexual Abuse on Rathna Kumara between the period of 03.09.2005 and 11.09.2005.

The trial commenced on 20/10/2009. After leading all necessary witnesses, the prosecution closed the case. The Learned High Court Judge had called for the defence and the Appellant had made a dock statement from the dock and closed the case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant as charged and sentenced the Appellant to 07 years of rigorous imprisonment and imposed a fine of Rs.5000/- subject to a default sentence of 06 months simple imprisonment. In addition, a compensation of Rs.100000/- was ordered with a default sentence of 12 months simple imprisonment.

Being aggrieved by the aforesaid conviction and the sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. It is further informed that the Appellant is on bail and he is waiting outside the court due to Covid 19 pandemic restrictions.

The following Grounds of Appeal are raised on behalf of the Appellant.

1. The victim's evidence is contradictory per se and inter se.
2. The delay of the victim's complaint is not explained in his evidence.
3. The prosecution has not led evidence favourable to the Appellant and have thereby violated Section 114(f) of the Evidence Ordinance.
4. Except the victim's evidence all other corroborative evidence called by the prosecution are hearsay evidence.

The Facts of this case *albeit* briefly are as follows.

According to PW1, the victim of this case, he was about 9 years old when he had undergone this ordeal. The Appellant was the caretaker of Karuna Sevana Children's' Home, Malabe where the victim was living at the time. Only 03 children were accommodated in the said home when the incident took place. In the morning of the date of the incident, the Appellant had called the victim to the kitchen and entrusted the victim with scraping coconut. While the victim was engaged in the said chore, the appellant had gone there, removed the victim's pair of shorts and had engaged in anal intercourse with the victim. As it was painful, the victim started shouting. After this incident the victim had vacated the home. One day the Appellant had come to his school and slapped him in front of the teacher. The victim had first informed the incident to the building workers who were engaged in repairing the children's home. Thereafter this was intimated to Rev. Balasooriya who was in charge of the children's' home.

In the first ground of Appeal the Appellant contends that the victim's evidence is contradictory per se and inter se.

The victim was 12 years old when he gave evidence before the court. His family was scattered when his mother went abroad for employment. After his mother left, his aunt brought him to Colombo and admitted him to the children's' home situated in Thalahena. He had then commenced his schooling from there. Several other children were also living there. Two persons had been working in the said home. Two young girls who were working there also had left during that period. Hence, he had been called upon to assist in the kitchen.

One day the Appellant called the victim to the kitchen in early hours and entrusted him to scraping coconut in the kitchen. This is when the Appellant had taken advantage of the victim as stated before. Only he and the Appellant were in the kitchen at that time. Other children were sleeping when this incident happened to him.

He had revealed this incident to his friends at the children's' house and they had in turn mentioned this to the people who have come to do the repair of the building during that time. The said workers had then informed this to the Rev. Father in charge of the children's' home and had filed a case against the Appellant. After 4-5 days the Appellant had quit the job and left the place.

One day after leaving the children's' home, the Appellant had gone to the victim's' school and slapped him in front of his teacher. Thereafter, a complaint had been lodged at the police station and the victim had been subjected to a medical examination.

In the cross examination the victim had given evidence without any contradictions or omissions. When the incident happened, he was only 8 years old. But his evidence was quite consistent and clearly implicated the Appellant. He denied that the persons who accompanied him to the police

had taught him things to be told to the police before going to the police station.

As the evidence given by the victim is clear and quite consistent, the Learned High Court Judge has accurately considered and accepted them in this case. Hence, this ground of appeal is devoid any merit.

In the second ground of appeal the Appellant contends that the delay of the victim's complaint is not explained in his evidence.

The victim's contention is that immediately after the incident he had told the incident to his colleagues and through them and the workers this had been intimated to the Rev. Father who was in charge of the home. When he was questioned as to when he lodged the complaint, the victim had said that he cannot remember. The incident had happened when he was 8 years old and when he gave evidence, he was 12 years old. From a child of this age, it is not possible to obtain all details accurately.

In this case the victim had given plausible evidence at all material points. As pointed out earlier, his evidence is not tainted with discrepancies or ambiguity. Due to aforesaid reasons, the second ground of appeal is also devoid of any merit.

In the third ground of appeal the Appellant contends that the prosecution has not led evidence favourable to the Appellant and thereby violated Section 114(f) of the Evidence Ordinance.

The prosecution had called all necessary witnesses to prove the case beyond reasonable doubt and the defence had the liberty to cross examine them. The Learned High Court Judge had considered all the evidence presented by both parties to come to his conclusion. Hence it is incorrect to state that the prosecution had not led evidence favourable to the Appellant. The Learned High Court Judge had accurately stated in his judgment that

the stance taken by the Appellant in his dock statement did not tally with his defence taken during the trial. Further, the learned High Court Judge had commented that the Appellant had taken a lethargic attitude despite the advice of the court to consider the seriousness of the charge.

Due to aforesaid reasons, the Appellant is not successful under this ground as well.

In the final ground of appeal, the Appellant contends that except the victim's evidence all other corroborative evidence called by the prosecution are hearsay evidence.

The victim in his evidence told the court that he revealed this incident to his friends namely, Tharaka, Thimira and Dilshan. In return they had told this to the persons who were engaged in building repair work.

PW3, the contractor who had undertaken the repair of the buildings in the children's home premises told that when he came to the work site on the day of the incident around 11:30 hours, his co-workers as well as the children of the home had told him about the incident committed on the victim. He had seen the victim crying at that time. He immediately informed this to the Rev. Father over the phone. Although his co-workers had decided to handover the Appellant to the police, he had prevented and informed the same to the Rev. Father instead.

PW2, Nihal Piyasena in his evidence told the court that the victim had told him about the incident that happened to him. He had told this to the contractor immediately.

PW8, Dilshan Chaturanga, a colleague of the victim at the children's home told the court that the victim had told him about the incident in the morning on the date of incident. He had told this to a "Sir" and he had told that to the Rev. Father.

PW11, the lady teacher who had witnessed the slapping by the Appellant on the victim gave evidence and corroborated the evidence of the victim.

All the persons who received the information about the sexual assault on the victim had given evidence in this case. Hence their evidence is not hearsay, as all necessary witnesses are called to corroborate the evidence of the victim.

Hence, this ground too has no merit.

In this case the victim had given firm evidence as to the atrocities committed on him by the Appellant. The subsequent conduct of the Appellant further strengthens the prosecution case.

Even though the incident had happened when the victim was at a tender age, he had given evidence without any contradictions or omissions.

In **Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 His Lordship held that;

“In considering the question as to whether evidence given by the witness should be accepted or not, the court has, no doubt, to examine whether the witness is, an interested witness and to enquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is whether there is a ring of truth surrounding his testimony.”

Similarly, Justice Thakkar in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** 1983 AIR SC 753 stated:

“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 video tape is replayed on the mental screen”.

Considering the evidence led in this case and guided by the judgements above, I conclude that this is not an appropriate case in which to interfere with the judgement delivered by the Learned High Court Judge on 30/08/2018 against the Appellant. I therefore, dismiss the appeal.

The Learned High Court Judge of Colombo is hereby directed to issue notice on the Appellant to appear before the High Court, as he is on bail pending appeal, and to comply with this judgement.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

JUDGE OF THE COURT OF APPEAL