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

In the matter of an Appeal made under 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 Case No.
CA/HCC/ 011 A-B/2018
High Court of Colombo
Case No. HC/4267/2008

Thanthrige Ajith Priyantha

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Shanaka Ranasighe, P.C. with Tharakee Manchanayake for the Appellant.**
Anoopa de Silva, DSG for the Respondent.

ARGUED ON : **15/06/2022**

DECIDED ON : **25/07/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General under Section 365 B (2) (b) of the Penal Code for committing the offence of Grave Sexual Abuse on Kankanam Shasini Tharika Perera on 12/06/2006.

The trial commenced on 22/04/2009. After leading all necessary witnesses, the prosecution closed the case. The learned High Court Judge had called for the defence and the Appellant had given evidence from the witness box and had called three witnesses to give evidence on his behalf.

The learned High Court Judge after considering the evidence presented by both parties before different High Court Judges, convicted the Appellant as charged and sentenced the Appellant to 02 years of rigorous imprisonment suspended for 10 years and imposed a fine of Rs.10000/- subject to a default sentence of 04 months simple imprisonment. In addition, a compensation of Rs.100000/- was ordered with a default sentence of 06 months simple imprisonment.

Being aggrieved by the aforesaid conviction and the sentence the Appellant preferred an appeal to this court which had been numbered as CA/HCC/11/18-B.

In the meantime, the Hon. Attorney General also filed an appeal against the sentence, which had been numbered as CA/HCC/11/18-A.

At the hearing of this appeal, the parties agreed to argue the case No.CA/HCC/11/18-B first.

The Appellant who had been given a suspended sentence was present in court while the argument took place.

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

According to PW1 - the victim of this case, she had been about 07 years old when she faced this bitter ordeal. When she gave evidence, she was 10 years old and was schooling. Her family was given accommodation in the Ratmalana Air Force Base flats as her father was employed as an airman at the said base. Their house was situated on the ground floor of one of the flats. On the date of incident, she had returned home from school around 12.00 noon. Finishing her homework after lunch she had gone to play at Mayumi's house, which is situated on the upper floor of the same flat. Mayumi was two years senior to her. Mayumi's father Priyantha was also employed as an airman at the Ratmalana Air Force Base. When PW1 left her house to play, her two sisters were at home and her parents were not at home as they had gone for a funeral at Avissawella.

When she went to the Appellant's house, the Appellant's daughter Mayumi, his son and another girl from the house in front of the Appellant's house - Tharusi were all present at that time. Mayumi, Tharusi and PW1 got engaged in making a book by painting pictures. The Appellant had assisted them in making the book. At that time the witness had requested some tea from the Appellant and the Appellant had made tea for her. After that when all were playing with a ball inside the house, the ball had gone out of the house and Mayumi and Tharusi had gone downstairs to retrieve the ball. She was in the sitting room but Mayumi's younger brother had been nowhere to be seen.

At that time the Appellant had suddenly took hold of her and taken her to the room where they played by making her lie on the bed. The Appellant had then proceeded to pull down her under-garment up to knee level and raised her skirt and placed the Appellant's male organ on her female organ and had pressed it hard. Although it was painful, the victim had not shouted out. After the act, the Appellant had told her not to be afraid and that nothing would happen to her.

When the children who went downstairs to retrieve the ball knocked on the door, the Appellant had opened the door and had let them in. In the meantime, the victim had come out of the room after getting properly dressed and left the Appellant's house.

When she returned home, both her parents were already there. She had divulged the incident to her mother when she had developed a burning sensation in her vagina following a body wash. Upon being questioned by her mother, she had informed her of two previous instances where similar abuse had been committed on her by the Appellant when she went to play at the Appellant's house. But she had not informed anybody as the Appellant had praised her for being a good girl and had asked her not to tell her parents.

After listening to her daughter's recount of events, the victim's mother, PW2 had conveyed the information to the Appellant's wife and had taken the victim to the Air Force Base Hospital. From there the victim was transferred to the Kalubowila Hospital. Thereafter she was taken to Mount Levinia Police Station. After recording her statement, she was again taken to Kalubowila Hospital for medical examination.

The JMO had observed a 0.4 cm mucosal abrasion on the left side of the external genitalia just lateral to the hymen. According to the opinion of the JMO, the injury noted on the victim's vagina was quite consistent with the history recounted by her.

After the closer of the prosecution case, the defence was called and the Appellant had given evidence under oath and called witnesses on his behalf.

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

1. The Judgment is contrary to law and against the principles set out by law.
2. The learned High Court Judge who delivered the Judgment did not have the opportunity of hearing the case and did rely on the evidence recorded before his predecessor which action caused grave prejudice to the accused.
3. The learned High Court Judge failed to consider per-se and inter-se contradictions in the evidence of the prosecution witnesses.
4. The learned High Court Judge failed to consider the improbability of the version testified to by the victim.
5. The learned High Court Judge failed to give due weightage that the prosecution did fail to produce in evidence testimony of the independent witness who have alleged to be with the victim which failure caused a serious doubt on the case for the prosecution.
6. The learned High Court Judge failed to analyse the defence and to arrive at a decision as stipulated by law.

In a case of this nature, the testimonial trustworthiness and credibility of PW1, mainly probability should be assessed with utmost care and caution by the trial judge. The learned Trial Judge has to satisfy and accept the evidence of a child witness after assessing her competence and credibility as a witness. Hence, before analysing the grounds of appeal advanced in this case, I consider it of utmost importance that the following authorities from other jurisdictions on the topic be appraised.

It was recognized in England as early as 1778 that children could be competent witnesses in criminal trials.

In **R v. Brasier**168 Eng. Rep.202 [1779] the court held:

> "…….*that an infant, though underage of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take oath, their testimony cannot be received ….".*

In **Ratansinh Dalsukhbhai Nayak v. State of Gujarat** [2004] 1 SCC 64 the court held that:

> *"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an*

impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness".

In **Ranjeet Kumar Ram v. State of Bihar** [2015] SCC Online SC 500 the court held that:

"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one".

In **R v. Baker** EWCA Crim 4 [2010] Lord Chief Justice (England and Wales of Court of Appeal) held that:

(At para 40) "….. We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However, children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristic of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking

into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence".

In **R v. B.** (G),1990 CanLII 7308 (SCC); [1990] 2 S.C.R. 30, at pp.54-55 the Court held that:

> *"...it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children".*

E.R.S.R Coomaraswamy in his "Law of Evidence" Volume 2 Book 2 at page 658 has stated referring to child witness;

> "There is no requirement in English law, that the sworn evidence of a child witness needs to be corroborated as a matter of law. But the jury should be warned, not to look for corroboration, but of the risks involved in acting on the sole evidence of young girls and boys, though they may do so if convinced of the truth of such evidence…….This requirement is based on the susceptibility of children to the influence of others and to the surrender to their imaginations".
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> At page 659 it states "As regards the sworn testimony of children, there is no requirement as in England to warn of the risk involved in acting on their sole testimony, though it may desirable to issue such a warning, though the failure to do so will generally not affect the conviction".

Barry Nurcombe, M.D., F.R.A.C.P. in his article "The Child as Witnesses: Competency and Credibility" states:

> "Before the trial, the child is expected to recount the details of the alleged offense, again and again, to strangers. Repeated court appearance may be required. In court, the child will eventually be confronted by the accused who is exercising his or her constitutional rights. In contrast to the accused, the child has no advocate. His or her testimony is open to direct challenge on the grounds of incompetence, confabulation or fabrication. These considerations deter victims from reporting offenses, lead to false restrictions, and erode the apparent credibility of honest witnesses".

Considering the above cited judicial decisions and the writings, as the credibility of the evidence of a child witness would depend on the circumstances of each case, it is the duty of the Learned Trial judge to assess and decide on the evidence given by child witness.

As the appeal grounds one and two are interrelated as it speaks about the judgement, the said two grounds will be considered together in this judgment.

When this matter first came up before the learned High Court Judge who delivered the judgment on 10/05/2016, both parties agreed to adopt the proceedings led up to that point and continue the case.

As the learned High Court Judge who delivered the Judgment did not hear any single witness before him, acting under Section 439 of the Code of Criminal Procedure Act No.15 of 1979, made an order to recall PW1 to enable him to observe the demeanour and deportment of the witness. But on 26/01/2017, the counsel appearing for the aggrieved party made an application to cancel the said order considering the mental and psychological status of PW1 as she was preparing for her Advanced Level Examination at that time. As the State Counsel too supported the said application, the learned High Court Judge cancelled the said order and fixed the case for judgment on 30/03/2017.

The judgment was postponed for 26/05/2017 and the said learned High Court Judge who had delivered the judgment too had been transferred. Hence this case had come before a new judge on 26/05/2017. But the learned High Court Judge who delivered the judgment was re-appointed to conclude this matter on 27/06/2017. Accordingly, the judgment was delivered on 26/02/2018. Hence, it is apparent that no unnecessary delay had taken place as submitted by the learned Counsel for the Appellant.

In **The Attorney General v. Devunderage Nihal** SC/Appeal 154/2010 dated 03.01.2019 the court held that:

> *"This court is mindful of the fact that the witnesses testify before the trial judge and it is the trial judge who would have the benefit of observing the demeanour and the deportment of the witnesses. It is the trial judge who would have the benefit of observing the manner in which a witness faces the cross examination. Hence, in the absence of any other infirmities, having considered all these matters, if the trial judge forms the opinion that the witness is credible, I do not think the trial judge has any other option other than to accept the evidence and to act on it".*

In **Kumara De Silva and Others v. The Attorney General** [2010] 2 SLR 169 the court held that:

> *"Credibility is a question fact, not of law. Appeal Court Judges repeatedly stress the importance of the trial Judge's observation of the demeanour of witnesses in deciding question of fact".*

In this case the Judge who heard the evidence of PW1 had observed and noted down the demeanour of the witness as follows:

ඉන් අනතුරුව අධිකරණයෙන් අසන ලද ප්‍රශ්න වලට ඇය සාක්ෂි දී ඇති ආකාරය උගත් පූර්වගාමී විනිශ්චයකාරතුමිය මෙලෙස සටහන් කොට ඇත.

"මෙම සාක්ෂිකාරිය මනා ලෙස සිතමින් කල්පනා කරමින් සාක්ෂි දෙන ලදී. මනා අවබෝධයක් ඇති බුද්ධිමත් දැරියක් ලෙස පෙනී යයි. මා විසින් ප්‍රශ්න අසන විට මඳක් පැකිලෙමින් විත්තියේ නීතිඥ මහතා දෙස බලමින් සාක්ෂි දෙන ලදී."

Page 541 of the brief.

Learned High Court Judge who delivered the judgment had considered this narration and included it in his judgement which indicate that the judge had analysed the demeanour of the witness adequately to decide this case. Hence, no substantial rights of the Appellant had been prejudiced. Therefore, these grounds have no merit.

As the third and fourth grounds of appeal are interconnected and both are regarding the admissibility of evidence, those two grounds are also considered jointly hereinafter. In the third ground the Appellant contends that the learned High Court Judge failed to consider per-se and inter-se contradictions in the evidence of the prosecution witnesses and in the fourth ground he contends that the learned High Court Judge failed to consider the improbability of the version testified to by the victim.

The victim PW1 was a 7-year-old girl when she underwent the abuse. On the day of the incident after returning home from the Appellant's house she had taken a wash and had complained of discomfort around her vagina. When PW2, mother of PW1 had enquired further about it from her she had divulged the incident to her.

On behalf of the Appellant the learned President's Counsel argued that the evidence of PW1 should be analysed with additional care by calling additional evidence to corroborate her testimony.

Justice Dheeraratne in **Sunil and Another v. The Attorney General** [1986] 1 SLR. 230 held that:

> "*Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness' evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.*

In **Bhoginbhai Hirjibhai v. State of Gujarat** [1983] AIR 753 Indian Supreme Court stated that:

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

In this case the victim promptly informed her mother when she felt discomfort around her vagina. After inquiring and receiving the reasons for such discomfort, PW2 had promptly sought medical advice from the Air Force Camp Hospital and thereafter the victim was transferred to the Kalubowila Hospital. Further, PW12 who examined the victim expressed her expert opinion that the victim had been subjected to sexual abuse as also revealed by her narration of the chain of past incidents.

This sequence of evidence had not been contradicted during the trial. Further, challenges raised during cross examination of PW1 are not sufficient to affect the credibility of the witness. These matters have been accurately considered by the Learned High Court Judge in the judgment.

Next the Learned President's Counsel contended that the failure to disclose the incidents that happened prior to the incident in question raises serious doubts as to why the disclosure of such incidents at the earliest available opportunity had been withheld.

When the victim was questioned as to why she did follow her friends downstairs if she was afraid, as a result of the previous incidents that had occurred to her while she was with the Appellant, she very frankly told the court that she never expected that the Appellant would commit the same act on her on that day. Further, the victim had trusted that the Appellant would not treat her this way as he also had his own children. Due to this belief she had continued to visit the Appellant's house despite the previous abusive experiences.

Another reason why she had not divulged previous abusive experiences to anybody was that after committing the act of abuse on the victim, the Appellant had praised her commenting that she is a good girl and told her to keep these abusive encounters a secret. By this approach the Appellant had won the trust and confidence of the victim who was only 07 years old at that time and had also made her to believe that the abusive acts committed were not something wrong or something that should be complained about.

Further the Counsel argued that the positions taken up by the victim that she had continued to stay at the Appellant's house even after the incident and the failure to disclose the incident to her mother upon returning home had not been judicially analysed by the learned High Court Judge in his judgment, whereby the evidence of PW1 failed the test of spontaneity.

The learned Deputy Solicitor General submitted that the behaviour of a child of this age should not be compared with the standards of an elderly woman in a situation of the same nature. She further argued that as the victim was engrossed in playing with the children without being aware of the implications of the act, continuation of playing would be quite natural.

Further, according to the victim she had remained in the house as requested by the Appellant.

As discussed above, the victim without understanding the gravity of the act performed on her by the Appellant on that day continued playing and returned home when her mother called her. As usual she had taken a wash but as she felt an unusual pain around her vagina she had promptly informed her mother. This behaviour of the victim cannot be faulted taking into consideration the age of the victim. At the very first opportunity following the feeling of pain and discomfort the victim had divulged the incident to her mother.

The learned High Court Judge in his judgment had considered all these circumstances to arrive at the conclusion that the evidence of the victim had passed all the tests in this case. Therefore, these two grounds are also devoid of any merit.

In the fifth ground of appeal the Appellant contends that the learned High Court Judge had failed to give due weightage to the fact that the prosecution failed to produce in evidence the testimony of the independent witness who was allegedly with the victim, the failure of which caused a serious doubt on the case for the prosecution.

In **King v. Chalo Singho** 42 NLR 269 the court held:

> *"Prosecuting Counsel is not bound to call all the witnesses named on the back of the indictment or tender them for cross-examination. In exceptional circumstances the presiding Judge may ask the prosecuting counsel to call such witnesses or may call him as a witness of the Court".*

It is trite law that it is not necessary to call a certain number of witnesses to prove a fact. However, if court is not impressed with the cogency and the convincing nature of the evidence of the sole testimony of the witness, it is incumbent on the prosecution to corroborate the evidence.

In this case the creditworthiness of the evidence given by the victim did not suffer at any stage of the trial. The defence was only able to mark one contradiction which certainly does not affect the root of the case. The learned High Court Judge had considered the evidence given by PW1 with caution and care and correctly held that her evidence is convincing and cogent and sufficient on its own to prove the case against the Appellant.

In sexual offence cases corroboration is not a *sine qua non* to secure a conviction. As long as the victim's evidence does not suffer from ambiguity or infirmity in a manner which affects the root of the case, there is no bar for the court to act and rely on the said evidence to decide the case.

Hence, the argument put forward by the learned President's Counsel under this ground of appeal regarding the corroboration cannot be accepted. Further, as stated above, in this case the prosecution had adduced all necessary witnesses to prove their case. It is incorrect to say that the prosecution had withheld the independent witness to prove their case. Due to reasons given above, this ground is also not successful.

In the final ground of appeal, the Appellant contends that the learned High Court Judge failed to analyse the defence and to arrive at a decision as stipulated by law.

Jayant Patel, J. in the case of **Jusabbhai Ayubbhai v. State of Gujarat** CR.MA/623/2012 stated that:

> *".....It is by now recognized principles that justice to one party should not result into injustice to the other side and it will be for the Court to balance the right of both the sides and to up-hold the law."*

The learned High Court Judge in the judgment had considered all the evidence adduced by the defence and had given reasons as to why he acted on the evidence adduced by the prosecution. He has accurately analysed the defence evidence with correct perspective and arrived at the correct finding. Hence, it is incorrect to say that the learned High Court Judge had failed to analyse the defence evidence to arrive at his decision. Therefore, this ground of appeal is also sans any merit.

Considering the evidence led in this case and guided by the judgements mentioned 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 26/02/2018 against the Appellant. I therefore, dismiss the appeal.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL