IN THE COURT OF APPEAL OF THE DEMOCRATIC 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/0156/18

High Court of Hambantota

Case No: HC/18/2008

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Amadoru Galappaththige Siripala

ACCUSED

AND NOW BETWEEN

Amadoru Galappaththige Siripala

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel	: U.R. de Silva, P.C. with Savithri Fernando and Kasun Liyanage for the Accused Appellant
	: Rohantha Abeysuriya, P.C., ASG for the Respondent
Argued on	: 06-06-2022
Written Submissions	: 02-05-2019 (By the Accused-Appellant)
	: 01-07-2019 (By the Respondent)
Decided on	: 26-07-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Hambantota.

The appellant was indicted before the High Court of Hambantota on three counts of grave sexual abuse of a minor between the period of 11th October 2004 and 10th October 2005, punishable in terms of Section 365B (2) (b) as amended by the Penal Code (Amendment) Act No. 22 of 1995 and Penal Code (Amendment) Act No. 29 of 1998.

After trial, he was found guilty of all three counts preferred against him and was sentenced to a period of 15 years of rigorous imprisonment on each count and ordered to pay a fine of Rs. 5000/- each and in default, he was ordered 3 months of simple imprisonment. In addition, he was ordered to pay a compensation of Rs. 150,000/- to PW-01 who was the victim, and in default he was ordered to serve one-year simple imprisonment.

Considering the appellant's age, the jail terms imposed on all three counts have been ordered to serve concurrently.

The Facts in Brief: -

The victim child (PW-01) was a student studying in grade 05 of the Lunugamvehera Sri Rohana Vidyalaya. Her class teacher at that time was PW-04. After observing some toffee wrappers near her table, PW-04 has questioned the child as to how she was able to purchase the sweets. She has answered that it was uncle Siripala who gave the money to her. Upon further questioning, the child has revealed that she is being sexually abused by the said Siripala. The child has further revealed that these incidents have happened at an abandoned house and at the house of Siripala. Upon informed of this fact, she has taken steps to inform what she came to know to her Principal. The principal, (PW-03) has stated in his evidence that the class teacher of grade 05 informed him of an unusual behaviour of a student studying in her class, and informed him of a sexual abuse faced by the child.

After receiving the information and after summoning the school disciplinary committee, he has questioned the mentioned child with the aid of the female Deputy Principal. The child has revealed that one uncle Siripala used to take her home from school and treat her with sweets, buns etc., and sexually abused her several times. She has also revealed that the mentioned Siripala has given her small amounts of money and also has revealed how and where the sexual abuses took place. The principal has come to know of these incidents officially on 4th October 2005. According to him, the child has revealed that she faced these sexual assaults about 5 times previously. He has also observed that the child has been suffering from mental trauma. He has found that the child has not informed her abuse to anyone other than to her class teacher when inquired. He has further stated that the child's mother and father are separated, and her only brother was working in Colombo at that time, and she was living with her grandmother without proper protection.

After coming to know about the incidents of sexual abuse, the principal has taken steps to inform the Probation and Child Care Officer of the area and also to give a statement to the police.

Giving evidence further, he has stated that when the identity of the person was revealed, and since he knew him as a parent of two children studying in his school, he was summoned by him to his office before he informed the incident to the police. He has come to his office around 8.30 am and when questioned about the allegation made by the child, he has flatly denied it. However, the appellant has returned around 1.20 – 1.30 pm on the same day and the principal has observed him to be of a different mood from what he saw him in the morning. He has come to his office and worshipped him and has stated that he lied in the morning and he is admitting his guilt and he needs to meet him privately. At that time, the Deputy Principal and the other female Deputy Principal were at the office. Fearing something would happen, he along with the Deputy Principal has escorted the appellant to the science room of the school. In the science room, the appellant has stated that *"Please do not tell this to anyone. If told, I will poison the child and I too will commit suicide".* However, it was the evidence of the principal that he proceeded to inform this matter to the relevant authority. He has identified the appellant before the High Court as the person concerned.

The victim of this grave sexual abuse (PW-01) was 17 years of age at the time she gave evidence before the High Court. She was born on 9th December 1995 (birth certificate marked P-01). Giving evidence, she has stated that she had to face these incidents while studying in grade 4 and 5 but, cannot exactly remember how many times she faced the abuse. However, she has stated it was about 8 or 9 times and it was the appellant who sexually abused her. She has studied in grade 05 in the year 2005 at Sri Rohana Junior School during the time relevant to the incident. She has stated that she had to face these incidents at several places, including an abandoned house near her home, and also at the house of the appellant. It has been her evidence that the appellant used to come and take her after school on his bike and one day, he took her to an abandoned

house mentioned earlier, removed her clothes, threatened her and sexually abused by kissing and placing his male organ between her thighs and her female organ. She has described her ordeal as being raped by the appellant. This has happened several times over a period and the appellant has been in the habit of giving her money which she has used to buy various items to eat. She has stated that she did not reveal the sexual abuse faced by her to anyone because of fear, until she was questioned by her class teacher. Her evidence also reveals that at the time relevant to these incidents, she has been living with her grandmother, and her grandfather was also dead at that time. Her parents have been divorced and were living elsewhere.

During the cross-examination of PW-01, the stand taken on behalf of the appellant was that she made a false statement to police at the instigation of the Probation Officer, which she has denied.

The Judicial Medical Officer who examined the victim has given evidence in this case and has marked his medico-legal report as P-02. It has been revealed that the child has narrated the same thing with regard to the sexual abuse incidents she had to face. The JMO has failed to observe any injury or other marks upon his examination of the victim child. However, he has not excluded such an incident happening to the child as the incidents narrated by the child can happen without any evidence of sexual abuse.

The deputy principal mentioned by the principal in his evidence has also given evidence in this case. He was a member of the School Disciplinary Committee and has taken part in the inquiry with regard to the sexual abuse incidents faced by the victim child. It was his evidence that the appellant who was a known party to him came to the school and met the principal and he saw him accompanying the principal and going to the school science room. The police officer who has conducted the main investigation into the incident has observed an old abandoned house near the home of the victim child and it has been his observation that there are no buildings nearby.

At the conclusion of the prosecution evidence and when called for a defence, the appellant has chosen to make a dock statement. In his dock statement, he has stated about his life and his employment and that he was a person who did social services in the area. He has admitted that upon hearing the allegations against him made by the victim child, he went to the school principal's office somewhere in October 2005 and met the principal. After being informed that an allegation of sexual abuse has been made against him, and due to mental agony, he left his house and surrendered himself to Lunugamvehera police on the 13th October 2005 was his stand. It has been his position that, he used to take the child in his motor bicycle as for his habit of helping others and when the child said that she did not eat, he was in the habit of giving money to her. He has claimed that he has helped the child and her family.

He has also called a witness on his behalf to testify that the appellant was a person who used to engage in social service activities in his village and help other needy families through non-governmental organizations.

After hearing the submissions of the respective parties, the learned High Court Judge of Hambantota by his judgement dated 13th November 2018, found the appellant guilty of all three counts preferred against him and he was sentenced as stated before.

At the hearing of this appeal, the learned President's Counsel on behalf of the appellant, formulated the following grounds of appeal for the consideration of the Court.

1. The learned High Court Judge has not arrived at a definite conclusion as to whether the offences specified on the indictment has in fact been committed during the period specified in the indictment.
2. The learned trial Judge has misdirected himself as he has found the accused appellant guilty of the charges without evaluating the defence case.

3. The judgement of the learned trial Judge dated 13/11/2018 is not a judgment within the meaning of the section 283 of the Code of Criminal Procedure Act, in as much as it is a mere repetition or/and narration of the evidence.

It was the contention of the learned President's Counsel that in a criminal case it is the duty of the prosecution to indicate a proper date of offence for an accused to understand the charge or charges against him. It was his submission that, the way the three counts against the appellant have been framed with regard to the date of offence is confusing. It was his position that in such a scenario, if the appellant's defence was a defence of alibi, he would not be able to take such a defence when a charge is formulated giving a time period rather than being more specific.

It was his position that the learned High Court Judge's view that considering the victim child's age, her being unable to give specific dates are acceptable, was a misdirection.

It was his submission that the learned High Court Judge has failed to evaluate the dock statement of the appellant and the evidence led on his behalf other than merely rejecting the defence put forward by the appellant. Making submissions further, it was the contention of the learned President's Counsel that in the judgement which runs through 19 pages, the evidence of the prosecution has been summarized up to the 16th page and no proper evaluation of the evidence has been done before the appellant was found guilty. It was his position that the judgement cannot be considered a proper judgement in terms of section 283 of the Code of Criminal Procedure Act.

It was his view that the comment by the learned High Court Judge that the evidence of the victim child has been corroborated by the teacher and the doctor was a wrong conclusion. It was also his position what the learned High Court Judge has said at page 18 of the judgement "මෙම අදාල අපරාදය දැරියට සිදු නොවූ බවට කිසියම් සාධාරණ සැකයක් ඇති කිරීමට සාක්ෂි කරුවන්ගේ හරස් ප්‍රශ්න තුලින් හෝ විත්තිය වෙනුවෙන්

කැඳවන ලද විත්තියේ සාක්ෂි තුලින් හෝ විත්තිකරු විත්ති කූඩුවේ සිට කරන ලද ප්‍රකාශ තුලින් හෝ හැකියාවක් ලැබී නොමැත" was a misdirection where he has shifted the burden of proof to the appellant. It was also his contention that the learned High Court Judge has failed to consider the omissions pointed out in the evidence of the victim child, which are omissions that goes into the root of the matter.

It was the view of the learned Additional Solicitor General (ASG) on behalf of the respondent that the three counts preferred against the appellant in the indictment has been properly drafted as required by section 174 of the Code of Criminal Procedure Act on the basis of similar offences. It was his position that since the victim child was not in a position to remember the exact dates of the sexual abuse faced by her, the prosecution has taken the decision to limit the indictment for three instances of grave sexual abuse. It was his position that mentioning a time span of one year in the three counts preferred against the appellant has caused no prejudice to him as there was no barrier for the appellant to set up his defence, where his defence was not a defence of alibi. The learned ASG pointed to the admission the appellant has made to the school principal whose evidence have not been materially challenged. Admitting that the learned High Court Judge should have elaborated more in analyzing the evidence, it was his contention that itself is not a reason to vitiate the conviction as it has not caused any material prejudice to the appellant or occasioned a failure of justice. It was his argument that the appeal is devoid of any merit.

Consideration of the Grounds of Appeal

The 1st Ground of Appeal

I am in no position to agree with the contention that the learned High Court Judge has failed to come to a finding with regard to the time period as alleged in the indictment with regard to the commission of these offences. In the indictment, all three counts preferred against the appellant relates to offences of grave sexual abuse committed between the period of 11th October 2004 and 10th October 2005. When considering the evidence led in this action, it is clear that

the end date of the offences has been decided based on the complaint made by the school Principal on 10th October 2005. This fact has been drawn the attention of the learned High Court Judge. The fact that the failure of the victim child to disclose the sexual abuses she has to undergo at the hands of the appellant has also been considered by the learned High Court Judge in justifying her failure to name a particular date or a place where the incidents happened.

Section 165 (1) of the Code of Criminal Procedure Act No. 15 of 1979 which provides guidance on particulars as to time, place and the person that should be mentioned in a charge reads as follows;

> **Section 165 (1)- the charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are *reasonably sufficient to give the accused notice of the manner with which he is charged and to show that the offence is not prescribed*.** *(The emphasis is mine)*

Section 166 of the Code of Criminal Procedure Act which refers to the effects of any errors mentioned in a charge sheet reads thus;

> **Section 166- any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or those particulars shall not be regarded at any stage of the case as material *unless the accused was misled by such error or omission.*** *(The emphasis is mine)*

The relevant above two sections clearly establishes that the purpose of mentioning time, place and the person in a charge is to give sufficient notice to an accused as to the charge against him and to show that the offence has not been prescribed, and as shown in section 166, any omission or error in giving the required particulars in a charge sheet becomes material only if such error or

omission has misled the accused against the charge/charges preferred against him.

It is very much clear from the evidence placed before the Court as correctly viewed by the learned High Court Judge, the victim child has faced sexual abuse over a period of time and on several occasions. She has stated to the principal that she had to face such harassments on about 5 occasions. When giving evidence before the High Court, she has stated that it was about 8 or 9 occasions. She has also stated in her evidence that these incidents happened when she was studying in grade 4 and 5 of the school. According to the evidence of the class teacher and the principal, the child has been studying in grade 5 when these incidents of sexual abuse came to light. I find that given the age of the child and the family background of the child, she has not been able to give a definite particular date or dates as to the sexual abuse incidents she had to undergo. However, she has been specific as to a particular time period in her evidence which clearly appears to be the reason why the indictment refers to three counts of grave sexual abuse committed within a period of one year given, the legal restrictions as provided for in section 174 of the Code of Criminal Procedure Act.

At this juncture, I would like to draw my attention to the case of **R. vs. Dossi 13 Cr. App. R. 158** where this aspect was sufficiently discussed.

It was held:

> "*That a date specified in an indictment is not a material matter unless it is an 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 there is no prejudice) where it is clear on the evidence that if the offence as committed at all, it was committed on the day other than that specified.*"

In the case of **Wright vs. Nicholson 54 Cr. App. R. 38,** it was held 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 **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 as to the importance of the provision of such particulars in the context of the right to fair trial. **(*Archbold on Criminal Pleading Evidence and Practice 2019, 1-225 at page 83*)**

In the case of **D.R.M. Pandithakoralage vs. V.K. Selvanayagam 56 NLR 143**, it was held that a mistaken date in an indictment is not a material error unless the date is the essence of the offence or the accused is prejudiced.

This principle was discussed and accepted in the **Court of Appeal Case No. CA/194/2015 decided on 07-05-2019.** as well.

The evidence led in this action is clearly compatible with the time period mentioned in the charges, although the learned President's Counsel argued, based on a hypothetical situation of the appellant being deprived of a defence based on alibi, I find no basis for such an argument. The appellant has never taken up such a position at the trial. Therefore, it is not open to argue the appeal based on hypothetical situations as contended.

Besides that, the appellant in his dock statement and in his stand taken up when the prosecution witnesses were giving evidence has been clear that he had the full understanding of the time period of the alleged offences where he was accused of. It is therefore clear that the accused has not been misdirected or misled in any manner as to the charges or his defence. Therefore, I find no merit in the first ground of appeal urged on behalf of the appellant.

The 2nd Ground of Appeal: -

It was the position of the learned President's Counsel that, the learned High Court Judge failed to evaluate the defence case in his judgement. The stand of

the appellant when the prosecution witnesses gave their evidence had been a denial that he committed grave sexual abuse on the child. When called for a defence, he has made a dock statement and called a witness on his behalf. The learned President's Counsel in his submissions before this Court admitted that the evidence of the witness called on behalf of the appellant has no material value as the witness has spoken about the character of the appellant. Although the appellant has made a dock statement at length, I find little value in that when it comes to the charges preferred against him. In the dock statement he has mostly narrated about his life story and he being a person doing social service.

In contrary to the argument that the learned High Court Judge has failed to consider the defence case, I find that the learned High Court Judge has well considered the defence put forward by the appellant by taking the evidence in its totality, which has led to the determination that his defence has failed to create a reasonable doubt as to the evidence of the prosecution.

I am of the view, that the learned High Court Judge has correctly analyzed and considered the evidence of the appellant at its material points in relation to the charges preferred against him and had come to a correct finding. I find no merit in the 2nd ground of appeal either.

The 3rd Ground of Appeal: -

It was the argument of the learned President's Counsel that the judgement dated 13th November 2018 by the learned High Court Judge of Hambantota cannot be considered a judgement in terms of section 283 of the Code of Criminal Procedure Act. It was his position that the judgement was merely a narration of the evidence and finding of the accused appellant guilty without any proper evaluation of the evidence.

The relevant section 283 (1) and (2) reads as follows;

> **283- the following provisions shall apply to the judgements of courts other than the Supreme Court or Court of Appeal,**

(1) The judgement shall be written by the judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in the case where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.

(2) It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.

As pointed out correctly by the learned ASG, it would have been better if the learned High Court Judge elaborated more in his analysis of the evidence. However, that does not mean that the learned High Court Judge has failed to analyze the evidence and has only narrated the evidence before he determined that the appellant was guilty as charged.

In the judgement, after determining the charges against the appellant, the learned High Court Judge has drawn his attention to the relevant legal provisions that needs to be considered and keep in his mind when considering the evidence presented in the case. He has been well possessed of the fact that it is the prosecution that has to prove the case against the appellant beyond reasonable doubt. With that in mind, the learned High Court Judge has summarized the evidence presented by the prosecution and has also summarized the evidence of the defence. Thereafter, he has considered the arguments presented on behalf of the appellant to argue that the case has not been proved beyond reasonable doubt against the appellant as well as the submissions on behalf of the prosecution.

In his consideration of the evidence presented by the prosecution, he has considered the age of the victim child at the time she had to face this sexual abuse and the way the child has given evidence in Court. I do not find anything wrong in the way the learned High Court Judge has analyzed the child's evidence.

Although it was the argument of the learned President's Counsel that the delay in the child making the complaint with regard to sexual abuse has not been considered by the learned High Court Judge, I am in no position to agree. The learned High Court Judge has well considered the age of the child and her family background in concluding that not complaining until questioned by the class teacher can be justified under the circumstances.

Delay is a subjective factor which may vary according to circumstances. It was held in the case of **D. Tikiri Banda vs. The Attorney General (2010) BLR 92** that;

> *"If delay of making a statement is explainable, the evidence of a witness should not be rejected in that ground alone".*

In this action, I find no reasons to accept that the statement of the child victim is a belated statement given the facts and the circumstances unique to this case.

The omission in her first statement to the police, where she has not mentioned the appellant threatened her with death if divulged what was happening between him and her, is not a material omission as claimed in this appeal. That is not a matter that goes into the root of the matter.

Although it was a short analysis of the evidence by the learned High Court Judge, I am of the view that the said analysis had covered all the relevant material evidence presented in this case. I find that the comment that the evidence of the doctor has corroborated the evidence of the child may not be the correct terminology that should have been used by the learned High Court Judge in his judgement. The evidence of the doctor was very much consistent with the evidence of the victim child. It is clear that the learned High Court Judge has considered the fact that there were no visible injuries on the child with regard to grave sexual abuse can be accepted given the timeline of the events and the way the child has stated as to how the sexual abuse took place.

In the case of **D. Tikiri Banda vs. The Attorney General (Supra),** it was held;

"When the medical report is consistent with the version of a sexually harassed victim, it can be taken as evidence consistent and from to some extent corroboration and is admissible under section 157 of the Evidence Ordinance (although that may not be corroboration in the strict sense)."

As I have stated before, although it was better if the evidence was analyzed in more detail, I find no reason to believe that it has caused any prejudice to the substantial rights of the appellant or has occasioned a failure of justice to him.

The proviso of Article 138 of the Constitution reads as follows;

Provided that no judgment decree or order of any court shall be reveres 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.

The similar statutory provision in section 436 of the Code of Criminal Procedure Act reads as follows;

436.Subject to the provisions herein before, contained in any judgement passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-

(a) Of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this court; or

(b) Of the want of any sanction required by section 135,

Unless such error, omission, irregularity or want has occasioned a failure of justice.

It is my considered view that even if the learned High Court Judge considered and evaluated the evidence more elaborately, his final conclusions would be the

same conclusions he reached in his judgement, where the appellant was found guilty as charged. Therefore, I find the 3rd ground of appeal urged has no basis.

The appeal of the appellant is therefore dismissed for the reasons stated above, and the conviction and the sentence affirmed.

However, considering the fact that the appellant has been in incarceration since his date of conviction and the sentence on 13-11-2018, I order that the sentence shall be considered effective from 13-11-2018.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal