

**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:

Democratic Socialist Republic of Sri Lanka

CA/HCC/0354/18

COMPLAINANT

Vs.

High Court of Hambantota

Denagama Witharanage Punyadasa *alias*

Ananda Gamage

Case No: HC/50/2007

ACCUSED

AND NOW BETWEEN

Denagama Witharanage Punyadasa *alias*

Ananda Gamage

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Yalith Wijesurendra for the Accused Appellant
: Sudarshana De Silva, D.S.G. for the Respondent

Argued on : 08-06-2022

Written Submissions : 15-06-2022 (By the Accused-Appellant)
: 27-09-2019 (By the Accused-Appellant)
: 09-10-2019 (By the Respondent)

Decided on : 28-07-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Hambantota on two counts of grave sexual abuse of a minor between the period of 15th May 2005 and 25th September 2005, an offence punishable in terms of section 365B (2) (b) of the Penal Code as amended by the Penal Code (Amendment) Act No. 22 of 1995 and 29 of 1998.

After trial, the learned High Court Judge found the accused guilty as charged and he was sentenced to 15 years rigorous imprisonment and for a fine of Rs. 5000/-, in default 3 months simple imprisonment on count one.

On count two, he was sentenced to 15 years of rigorous imprisonment and for a fine of Rs. 5000/-, in default 3 months simple imprisonment.

The 15-year rigorous imprisonment period imposed on both counts was ordered to be served concurrently.

In addition, he was ordered to pay a compensation of Rs. 200,000/- to the victim child, and in default, sentenced to one-year simple imprisonment.

Being aggrieved by the above conviction and the sentence, the appellant filed this appeal. At the hearing of the appeal, the learned Counsel for the appellant formulated the following grounds of appeal.

- (1) There was no corroboration as to the victim's evidence, therefore, the conviction of the appellant solely based on his evidence is bad in law.
- (2) The learned High Court Judge has failed to evaluate the contradictions inter se and per se of the evidence of the victim and his father.
- (3) The learned High Court Judge has failed to consider the evidence which reveals malice towards the appellant that may have led to a false accusation against him.

Before considering the grounds of appeal in detail, I will now proceed to consider the facts in brief, as revealed in evidence.

Facts in Brief: -

PW-01 is the victim child relating to the charges. His evidence reveals that the time relevant to the incident was a few months after the December 2004 Tsunami tragedy. His family was also victims of the tragedy. His father was a fisherman who owned two boats. As a result of the tragedy, the house they were living has been completely destroyed and the boats and the fishing equipment of his father have also been destroyed. The victim child and his family were in a destitute situation due to the tragedy they had to face. They were living in a house belonging to the child's grandmother and his father was unable to earn a decent income due to the fact of his livelihood being lost. The child was studying in a school at Tangalle. His father could afford to send him to school in a private school transport van. However, after the tsunami, since he could no longer afford to pay for the van, the child has got used to travel on the bus to get to his school. According to the birth certificate of the child marked P-01, the child has been born on 10th October 1991, and at the relevant time, was 14 years old. The victim child has met the appellant at the Tangalle bus stand while returning home from a tuition class. Although the appellant was unknown to him at that time, the

appellant has initiated a conversation with the child and after getting to know about the child's situation, he has promised to provide tsunami student support and had gone with the child to meet the child's family to their home. At their house, he has informed the child's father that he is a person working at Matara Finance Ministry and able to provide tsunami student welfare to the child. He has built a close relationship with the child and the family members, thereby gaining the child's and his parents' confidence in him.

As a result, the father has allowed the child to go with him on several occasions, believing that the appellant is helping them out in various ways. On one occasion the appellant has taken the child to Matara town and purchased a foot bicycle for him. A few days after the purchase of the foot bicycle, the appellant has taken the child to one of his friend's houses and has stayed one night. It was the evidence of PW-01 that, on that night, the appellant sexually abused him by the use of the appellant's male organ between his thighs. However, the child has not revealed this to his parents when he returned home on the following day.

During this time, the appellant has promised to provide boats and fishing equipment through a non-governmental organization, which he said he was working for, in order to rebuild the livelihood of the father. Since the appellant had the full confidence of the child's father, the father has allowed the child to be away with the appellant whenever the appellant wanted to take the child away. According to the victim child, the father has permitted the appellant to take the child with him to Katharagama to see the Katharagama Festival. He has taken the child to a circuit bungalow in Katharagama and in the night, he has abused the child in the similar way he abused him on the previous occasion. Yet the child has not revealed this to his parents after his return. However, when the appellant came again to take the child away, the child has refused to go with him and had informed his father that he is being sexually abused by the appellant. This has led to the father making a complaint to the police, and the arrest of the appellant.

In his evidence-in-chief, apart from saying that these incidents happened in 2005, child has not been able to give a definite date or month where the incidents took place. However, under cross-examination by the Counsel for the appellant, the child has admitted that he met the appellant in May 2005 and the incidents happened thereafter. This well explains the time period mentioned in the indictment as the period where the offences have been committed. The child has given his evidence before the High Court on 2nd February 2012 which was 7 years after the incident, and he was a youth of 20 years of age at that time. It is clear from the evidence that the child has not been able to give a definite time period in relation to the months and dates because he has forgotten such details several years after the incidents.

PW-02 Ranjith is the father of the victim child. In his evidence, he has confirmed the difficulties his family had to undergo as a result of the tsunami tragedy and the relationship he and his family built with the appellant because he came and offered them help to get over their economic problems. He has admitted that as a result of the confidence he developed with the appellant, he allowed his son to accompany the appellant on several occasions and to stay away from his home on some nights, because the appellant wanted the child to accompany him to various places in the pretext of helping. Allowing the appellant to accompany the child on a trip to Katharagama was one such occasion. PW-02 has explained the reasons as to why he complained to the police stating that when the appellant came to take the child away some days after the Katharagama trip, his son informed him of the sexual abuse he had to face at the hands of the appellant. He has been specific that he did not ask detailed questions from the child with regard to the abuses he had to face, but it was the police officers who took a detailed statement from the child. He has been firm in his evidence that he did not ask for much detail from the child and even at the time of giving evidence he was unaware of the details of what happened to his child other than he was sexually abused. Under cross-examination, the defence has marked several contradictions on the basis that they are contradictory in relation to the

statement made by the father to the police. It has been the allegation on behalf of the appellant that it was the father who instigated the child to make a false statement against the appellant and the statement was recorded from the child in the way the father wanted it to be. However, he has denied that allegation and has stated that he was asked to be away from the child when the police recorded the child's statement.

The doctor who examined the child after the complaint was lodged on 26th September 2005 has not observed any injuries or signs of sexual abuse on the body of the child. However, he has expressed the opinion that, the incidents of sexual abuse as mentioned by the child can happen without visible injuries or marks being present. The police officers who conducted the investigation and recorded the relevant statements have also given evidence in this case.

After the conclusion of the prosecution case and when the learned High Court Judge decided to call for a defence from the appellant and after he was informed of his rights, the appellant has chosen to give evidence under oath.

It was his position that in 2005, he served in a non-governmental organization (NGO) and he came to know the father of the child after he came to the NGO where he worked and wanted help to rebuild his boats destroyed due to the tsunami. He has denied committing grave sexual abuse on the child, but has stated that he helped the child and his family through the NGO to rebuild their lives. He has admitted having purchased a foot bicycle for the child and building up a very close relationship with the child and the family. It was his stand that the father of the child became angry with him after he refused to give the money demanded by him and as a result, the father threatened him which led to a complaint of this nature against him.

After the conclusion of the evidence, the learned High Court Judge pronouncing his judgement dated 13-12-2018, found the appellant as guilty as charged, and sentenced him as stated above.

Consideration of The Grounds of Appeal

1st Ground of Appeal: -

No one can expect any outsider to actually witness an act of grave sexual abuse, as any sexual perpetrator would make sure that his acts will not be seen. Under the circumstances having no eyewitness account to corroborate the evidence of the victim is not a matter that can be considered against the evidence of the victim child. What needs to be considered is whether the victim's evidence is cogent and trustworthy enough to act on that evidence alone when considered in its totality with the other supporting evidence.

Section 134 of the Evidence Ordinance, which deals with the proof of any fact reads as follows;

134. No particular number of witnesses shall in any case be required for the proof of any fact.

In the case of **Bhoginbhai Harigibhai Vs. The State of Gujarat 1983 AIR SC 753** it was stated that *"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration is adding insult to injury."*, which is very much so in the Sri Lankan setting as well.

In the case under consideration, it is clear that the modus operandi of the appellant had been to develop a friendship with the victim as well as his family members and to gain their trust towards him before committing the sexual abuse. The evidence of the father and the child shows that buying gifts to the child and offering the father help in the areas where he was in desperate need, was part of the same scheme.

The PW-01's failure to remember the exact dates of the incidents of sexual abuse can be expected from a young person who is giving evidence some seven years after the actual events and who obviously want to forget his bad experiences and move on with his life. However, that does not mean that his evidence was not cogent enough to act on them. I find that in his evidence he has narrated what

he had to endure in detail, which has not created any doubt as to the trustworthiness of his evidence.

In the earlier mentioned Indian case of **Bhoginbhai Hirigibhai Vs. State of Gujarat AIR 1983- SC 753** held further **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.*

I would also like to mention the Court of Appeal case of **D.Tikiribanda Vs. The Attorney General CA Case No-64/2003 decided on 06-07-2009, reported in Bar Association Law Reports 2010 (BLR) 92**, where it was held that corroboration is not the 'sine que non' for a conviction in sexual offences.

Held:

- (a) 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 symptom). The offenders should not be allowed to capitalize or take mean advantage of these natural inherent weaknesses of small children.
- (b) If the evidence of the victim could be relied on as trustworthy, firm etc. there is no impediment on the part of the Court in acting solely on the evidence of the victim and only when the evidence of the victim suffers from some infirmity or where the Court believe that it would be prudent to base a conviction solely on that evidence, the Court should look for corroboration.

As considered above, the evidence of the victim child was cogent and trustworthy as to what happened to him at the hands of the appellant. Hence, I find no basis for the ground of appeal.

2nd Ground of Appeal: -

I am unable to agree that there are material contradictions *per se* or *inter se* in the evidence of the PW-01 and PW-02. The evidence of the father (PW-02) was very much consistent with that of the victim child as to the relationship the appellant developed with the child and his family. The father has come to know about what was happening to his son only when the child refused to go with the appellant few days after they returned from a trip to Katharagama. As any parent would do, he has done the next best thing by lodging a complaint with the relevant authority seeking redress, which has activated the police to investigate into the crime.

The marked contradictions in the father's statement to the police are contradictions not with regard to the actual sexual abuse, but about the promises the appellant has made to the father in relation to helping him to obtain fishing gear, the date the appellant was told not to visit the house again, and on the day the child told the father about the sexual abuse he had to endure.

It is clear from the testimony of the father that in fact he has told the Court what he came to know about the sexual abuse his son had to face. It is also clear from the evidence of the father that his attempt was also to move forward with their lives by trying to erase the experience from their minds.

In the case of **Bhoginbhai Harigibhai Vs. State of Gujarat (Supra)**, it was stated;

“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 subconscious 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.”

I am of the view that the appeal under consideration is a good example where the evidence should be looked at as a whole without compartmentalizing. If considered in its totality, it becomes amply clear that the father's evidence was consistent with the evidence of PW-01 on all material points.

For the reasons as stated above, I find no merit in the 2nd ground of appeal.

3rd Ground of Appeal: -

Although it was the argument that the evidence has revealed malice towards the appellant and that fact has not drawn the attention of the learned High Court Judge, I am unable to find a basis for such an argument.

It is clear from the evidence that the victim child and his family members, including the father of the victim has trusted the appellant, although they have had reason to doubt as to whether he can help them in the way he has claimed. The father has allowed the boy to go with him freely without ever suspecting that his son would be subjected to sexual abuse.

The father has made a prompt complaint to the police when the child informed him that he is being sexually abused by the appellant. It is not possible to believe that the father has made a false complaint against the appellant because he had malice towards him in the absence of any evidence which directs towards such a conclusion. I find no merit in the 3rd ground of appeal either.

At this juncture, I would like to draw my attention to the argument that the appellant has not been afforded a fair trial because of the learned High Court Judge's failure to evaluate the evidence in the manner required in a judgment.

It is clear from the opening comments by the learned High Court Judge in his judgment, that the learned High Court Judge was well possessed of the relevant legal principles that a trial judge should bear in mind when considering the evidence in a case. After summarizing the evidence of each witness, the learned High Court Judge has considered whether the evidence can be believed and whether the trustworthiness and the consistency of the witness has been dented in any manner.

Thereafter, the learned High Court Judge has considered the defence put forward by the appellant, and has rejected the same on the basis that it cannot be accepted.

The learned High Court Judge has proceeded to convict the appellant on the basis that the prosecution had proved the case beyond reasonable doubt against the appellant.

I find that this is not the expected standard when considering the evidence led in a criminal case as rightly contended by the learned Counsel for the appellant. However, I am in agreement with the learned Deputy Solicitor General (DSG) that in view of the provisions of Article 138 of the Constitution and as provided in section 436 of the Code of Criminal Procedure Act No 15 of 1979 and also the relevant case law, what needs to be looked at is whether the irregularity in the consideration of the evidence has caused any material prejudice to the appellant or has occasioned a failure of justice.

The proviso of Article 138 of the Constitution 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.

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

436. Subject to the provisions hereinbefore, 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.

The following test was formulated by Viscount Simon L.C. in the case of **Stirland Vs. D. P. P.- (1944) A.C. 315 at 321**, which reads;

“A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.”

In the case of **Lafeer Vs. Queen 74 NLR 246**, H.N.G.Fernando, C.J. stated;

“There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal.”

In **Mannar Mannan Vs. The Republic of Sri Lanka (1990) 1 SLR 280**, in dismissing the appeal, the following view was expressed by Bandaranayake, J.

“The judgment of House of Lords in Stirland V. D.P.P. (1944) A.C.315 has been received and adopted in Sri Lanka for many years, and the tests suggested there have influenced the development of the law in this area in this country. It provides for a flexible and sensible approach to the facts and the circumstances of each case which must be the underlying criteria of decision and in consonant with the language of section 334(1) of the Criminal Procedure Code. I am satisfied that this is an appropriate case where the exception could be applied.”

It is my considered view that in this action, even if the learned High Court Judge had elaborated more on the evidence and analyzed it more substantially, the ensuring result would be the same as held by the learned High Court Judge.

Therefore, I am of the view that no prejudice has been caused to the appellant nor has it occasioned a failure of justice due to the weaknesses in the judgment.

The appeal is dismissed for the aforementioned reasons, as it is devoid of merit.

The conviction and the sentence affirmed.

However, considering the fact that the appellant has been in incarceration from the date of the conviction on 13-12-2018, the sentence is ordered to be effective from 13-12-2018.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal