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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act.

Hon. Attorney General
Attorney General's Department,
Colombo 12.

C.A. Case No.HCC/435/19 **Complainant**

High Court of Kuliyapitiya

Case No. 58/2017 **Vs.**

Marasinghe Arachchige
Wijesinghe

Accused

AND NOW BETWEEN

Marasinghe Arachchige
Wijesinghe

Accused –Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**

WICKUM A. KALUARACHCHI, J

COUNSEL : N.D.N Anuradi Nakandala with Sanjeewa Anthony for the Accused-Appellant

Sudarshana de Silva, DSG for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 17.05.2022 (On behalf of the Accused-Appellant)

24.06.2022 (On behalf of the Respondent)

ARGUED ON : 29.08.2022

DECIDED ON : 27.09.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted before the High Court of Kuliyapitiya on two counts of having committed grave sexual abuse on or about 08th August 2011, offences punishable under section 365(b)(2)(b) of the Penal Code. He was convicted of both charges and sentenced after the trial.

This appeal is preferred against the said convictions and sentences. Prior to the hearing, written submissions were filed on behalf of both parties. At the hearing of the appeal, the learned counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions.

Briefly, the facts relating to the case are as follows:

The victim was an 8-year-old girl at the time of the incident. The appellant was about 63 years old at the time. The victim was living with her mother, and the appellant was a known neighbour of the victim who ran a boutique close to the victim's house, which was nearly 50 meters away.

According to the prosecution, the victim went to the boutique on the day of the incident, 12.08.2011, to purchase an ice packet. The Appellant had given her some peanuts and asked her to come to the kitchen while no one else was present. Thereafter, the appellant had shown his penis to the victim, raised her skirt, lowered her underwear, and pressed the penis against her vagina. The appellant had touched her breasts and her vaginal area with his fingers. The appellant then squeezed the victim's vaginal area, inflicting pain on her. The appellant had warned her not to cry and had threatened to kill her father and mother. He had also told the victim not to tell this to her parents. The victim had seen blood in her vaginal area after going home. She had told her mother about the incident after three days of the incident. Thereafter, the mother of the victim made a complaint to the police on 12.08.2011.

The accused-appellant gave evidence in this case and called a witness on his behalf. The appellant's position was that the victim's mother fabricated this story because of an animosity she had with the appellant over a boundary fence dispute.

Although, five grounds of appeal have been stated in the written submissions tendered on behalf of the appellant, the learned counsel

for the appellant confined his arguments to two grounds at the hearing of the appeal. The first ground was that the evidence of the victim regarding the first count has not been corroborated by the medical evidence. The second ground was that there is no evidence to prove the second count. While advancing the said two grounds, the learned counsel took up the position that the victim's evidence is false and that this is a fabricated story.

In reply, the learned Deputy Solicitor General contended that no mother would make up a false story that her little daughter was sexually abused. Furthermore, the learned Deputy Solicitor General contended that there could not be a boundary dispute as stated by the appellant, because police investigations revealed that there was a land and a house between the appellant's land and the victim's land. Therefore, the learned Deputy Solicitor General submitted that the defence taken up by the appellant necessarily fails.

Before dealing with the said two grounds of appeal, I wish to mention at this stage that although it was not taken up at the hearing, the learned counsel for the appellant has stated in his written submission that the case for the prosecution entirely depended on circumstantial evidence. I regret that I am unable to agree with that argument because this is not a case entirely based upon circumstantial evidence. The victim (PW-1) described the appellant's acts of grave sexual abuse against her. This is direct evidence regarding the offences and not circumstantial evidence. So, there is no issue with evaluating circumstantial evidence.

Now, I proceed to deal with the first ground of appeal. The appellant had been charged with two offences of grave sexual abuse. The

learned counsel for the appellant pointed out that PW1 stated in her testimony about sexual penetration by answering as follows;

ප්‍ර: මතු පිටින් තද කිරීමක්ද කලේ?

උ: ඇතුළට.

(Page 70 of the appeal brief)

However, it is my view that the said answer does not imply sexual intercourse or sexual penetration because she has stated that the appellant pressed his penis inside but has never stated that it went inside the vagina. When PW 6, the Judicial Medical Officer gave evidence, he clearly stated that there could be no injuries when this kind of sexual abuse is committed. The doctor specifically stated that causing the acts of grave sexual abuse could not be excluded for the reason of not having injuries. Therefore, the absence of corroborative medical evidence is not a reason to fail the charges of grave sexual abuse.

Although on certain occasions, it has been held in our Courts that the victim's evidence in respect of sexual offences has to be corroborated by other evidence, sexual offences could be proved on the uncorroborated evidence of the victim, if the court is convinced that the victim is speaking the truth as decided in the cases of The King V. Themis Singho - 45 NLR 378 and Premasiri and another V. The Queen - 77 NLR 85. Also, it was held in Regina V. W.G Dharmasena - 58 NLR 15 that in a charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated.

In the case at hand, there is no reason to disbelieve the evidence of PW-1. It was pointed out during the cross-examination of PW1 that she stated different times to the Police and in Court, in respect of the time she went to the appellant's boutique. Other than that, no single

contradiction was marked or omission was brought to the notice of the court in cross-examination. The victim was an 8-year-old small child when she faced this unfortunate incident. She gave evidence regarding the incident after 6 years of the incident. Even then, no single contradiction could be marked or omission could be brought to the notice. Also, there was no issue regarding the probability of her story. Hence, there was no reason whatsoever to disbelieve her evidence. Her evidence could be acted upon without corroboration.

The second ground urged by the learned counsel for the appellant was that there was no evidence to prove the second charge. The PW-1 has clearly stated that the appellant has touched her vaginal area with his fingers and also squeezed the vaginal area. (Pages 71 and 72 of the appeal brief) In addition, she stated that she was having pain in the vaginal area. Therefore, the ingredients of the second count have been clearly established. Hence, there is no merit on the second ground of appeal as well.

This court has also considered the delay in making a complaint to the police. The incident took place on 08.08.2011 and the complaint was made on 12.08.2011. According to PW-2, the mother, PW-1, had informed her about the incident on 11.08.2011 morning. The PW2 stated that she went to take medicine from an ayurvedic doctor on that day, came back in the evening, and there was no time to go to the police station. The very next day, a complaint was made to the police. So, there was no delay in making the complaint to the police after the mother was informed about the incident. PW2, the mother, explained why a complaint could not be made on the 11th of August. The short delay occurred because the victim child told this incident to her mother after three days.

In the case of Thimbirigolle Sirirathana Thero V. OIC, Police Station, Rasnayakepura – CA No. 194/2015, decided on 07.05.2019, it was held that "when a child is sexually assaulted by an adult, it is also natural for the victim's family to think twice before making a complaint to the police. There can be adverse effects on the child when this kind of offence is exposed." Also, it was held that "in cases of sexual offences, Courts have found that victims of sexual offences can react in different ways. Some may complain immediately. Others may feel for example afraid, shocked, ashamed, confused, or even guilty and may not speak out until some time has passed. There is no typical reaction". *(Crown Court compendium part 1, May 2016)* So, when considering the behavior of a child victim of this nature, as explained in the aforementioned case, the four-day delay in making a complaint with the police does not cast reasonable doubt on the prosecution case.

The only other matter to be considered is that PW-1 has not stated about pressing the appellant's penis against her vagina when giving the short history to the doctor who examined her. As pointed out by the learned Deputy Solicitor General, after two days of admitting to the hospital, she was examined by the doctor. One cannot expect an 8-year-old small girl to recount every detail of the incident all of the time. Before being examined by the doctor, she made a statement to the police as well. However, in cross-examining the PW1, no single contradiction with the police statement was marked or no single omission was brought to the notice of the court. It indicates that she has stated all important details of the incident to the police. If she had fabricated a false story, she could have told the doctor also everything that she stated to the police. Hence, the aforesaid minor omission in the short history given by her has no impact on the credibility of PW1's evidence.

On the other hand, when the PW1 stated that she was sexually abused when she went to the appellant's boutique, at least, the appellant has not stated in his evidence whether he accepts the fact that PW1 came to his boutique on the day in question. The appellant neither admits nor denies that she came to his boutique. He simply claims that this story was fabricated because of her mother's animosity towards him due to a boundary dispute. Although the appellant said so in his evidence, this main defence was not even suggested to the PW1 on behalf of the appellant, when she was cross-examined. Therefore, his version is uncertain. So, the uncertain defence version which was not even suggested to the victim would not cast any doubt on the prosecution case.

For the foregoing reasons, I hold that the learned High Court Judge's decision to convict the appellant on both counts is correct.

However, there is a defect in passing the sentence. The 10 years of rigorous imprisonment for each count, the fine, compensation, and default sentences imposed by the learned High Court Judge are perfectly correct. However, the learned Judge has imposed a condition that 10 years of imprisonment imposed on each count should run concurrently if the compensation is paid. The said condition implies that the 10 years of imprisonment imposed on two counts should run consecutively if the compensation is not paid. Imposing such a condition is not in compliance with the legal provisions governing sentencing. Therefore, I set aside the said condition and direct 10 years of rigorous imprisonment for counts one and two to run concurrently. The rest of the sentence namely, the fine, compensation, and default sentences remain unchanged.

Subject to the above variation in respect of the sentence, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL