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

In the matter of an appeal in terms of Section 33(1) of the Code of Criminal Procedure Act No: 15 of 1979.

CA No: CA/HCC/ 0227/2017

HC: Colombo: HC 6353/2012

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

K.M. Tilak Pushpakumara Collure

Accused

And now between

K.M. Tilak Pushpakumara Collure

Accused- Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Indica Mallawaratchy AAL with Dineru Bandara for the accused-appellant

Riyaz Bary, DSG for the complainant-respondent

Written Submissions: By the accused-appellant on 25.01.2018 and 26.06.2020

By the complainant-respondent 28.04.2021

Argued on : 06.09.2022

Decided on : **20.10.2022.**

N. Bandula Karunarathna J.

This appeal is preferred against the Judgement, delivered by the learned Judge of the High Court of Colombo, dated 24.05.2017, by which, the accused-appellant, was convicted and sentenced to 45 years rigorous imprisonment and Rupees Thirty Thousand fine in default 2 years rigorous imprisonment and Rupees Three Hundred Thousand compensation in default 2 years rigorous imprisonment.

Further, it was directed that all sentences run consecutively.

The accused-appellant, hereinafter referred to as the "appellant", was indicted in the High Court of Colombo on the following charges;

Count 01: that on or between 06.08.2006 and 05.08.2007 the accused-appellant committed grave sexual abuse on his daughter, Konaraka Mudiyanselage Tharushi Shivanthi Collure, who was under 16 years of age by liking her genitals and thereby committing an offence punishable under section 365(b) (2)(b) of the Penal Code as amended by Act No 22 of 1995 and Act No. 29 of 1998.

Count 02: that during the time and place other than count 01 the accused-appellant committed grave sexual abuse on his daughter, Konaraka Mudiyanselage Tharushi Shivanthi Collure, who was under 16 years of age by liking her genitals and thereby committing an offence punishable under section 365(b) (2)(b) of the Penal Code as amended by Act No 22 of 1995 and Act No. 29 of 1998.

Count 03: that during the time and place other than counts 01 and 02, the accused-appellant committed grave sexual abuse on his daughter, Konaraka Mudiyanselage Tharushi Shivanthi Collure, who was under 16 years of age by touching her genitals and thereby committing an offence punishable under section 365(b) (2) (b) of the Penal Code as amended by Act No 22 of 1995 and Act No. 29 of 1998.

After the trial, the learned High Court Judge found the accused-appellant guilty in respect of all 3 counts and proceeded to impose the following sentences.

In respect of Count 01: 15 years of rigours imprisonment, fine of Rs. 10,000/- and carrying a default sentence of 2 years of rigours imprisonment. Also, Rs. 100,000/- compensation should be paid to the victim's daughter and in default another 2 years of rigours imprisonment.

In respect of Count 02: 15 years rigours imprisonment, fine of Rs. 10,000/- and carrying a default sentence of 2 years of rigours imprisonment. Also, Rs. 100,000/- compensation should be paid to the victim's daughter and in default another 2 years of rigours imprisonment.

In respect of Count 03: 15 years rigours imprisonment, fine of Rs. 10,000/- and carrying a default sentence of 2 years of rigours imprisonment. Also, Rs. 100,000/- compensation should be paid to the victim's daughter and in default another 2 years of rigours imprisonment.

The learned High Court Judge directed the sentences imposed on all three counts to run consecutively. The accused-appellant preferred this appeal against the said conviction and sentence.

The grounds of appeal are as follows;

(i) Conviction of the appellant is unsafe in view of the inordinate delay in lodging the first complaint.

(ii) The prosecution version woefully fails the test of probability.

(iii) Following closely on the heels of grounds 1 & 2, the assessment of the testimonial trustworthiness of the prosecution witnesses by the learned Trial Judge is deficient and flawed.

(iv) Basis of the conviction being that the evidence of the victim is corroborated by medical evidence and police evidence is flawed.

(v) When evaluating the dock statement, the learned Trial Judge has misdirected himself on a critical issue of fact, thereby causing serious prejudice to the appellant, consequently rendering the rejection of the dock statement factually untenable.

(vi) Failure on the part of the prosecution to lead the evidence of PW/4 namely Akash Collure entitles the court to draw an adverse inference against the prosecution in terms of sec. 114(f) of the evidence ordinance.

It transpires from the evidence of the victim, Konaraka Mudiyanselage Tharushi Shivanthi Collure (PW 1) that at the time of the trial she was 22 years of age and a 3rd year undergraduate at the Sri Jayawardenepura University and that the appellant was her father. The victim further testified that the mother was a teacher at Dharmapala Vidyalaya, Kottawa. The victim has testified that she cannot recall when the first incident had taken place but it was her evidence that the father had returned from abroad when she was in year 1 and that the appellant had sexually abused her touching and licking her genital region from the time, she was in the Primary School.

A complaint was lodged only in the year 2007 when she was in year 10. Victim whilst testifying that she is unable to state the year that she was first subjected to acts of grave sexual abuse, has testified that she was continuously abused in the years 2005, 2006 & 2007 and that the police complaint had been made on 05.08.2007. PW 1 has further testified that the appellant would touch her genital region, grope her breasts and make holes in the bathroom and peep

into it when she is inside the bathroom and when she would pass by him he would lower her underwear and was also in the habit of assaulting her.

It was the evidence of the said victim that during the period the afore-mentioned acts were committed by her father, her two younger brothers aged 9 and 7 respectively and the maternal and paternal grandfathers were living with them.

The paternal grandfather was a retired school principal. Witness has further testified that whilst the appellant would lower her underwear in the presence of everybody, acts of a more serious nature were committed in their absence. She first informed her mother of the sexual abuse committed on her by the appellant when she was in year 7 and that on one occasion when the victim was sleeping with the mother and the appellant, the latter had put his arm over her mother and touched her genitals. It was the evidence from the victim that the father had exerted death threats on everybody which prevented them from making a prompt complaint.

The victim describing the specific acts of grave sexual abuse committed on her has testified that the father would touch her genital area, insert his finger and would lie on her body. Upon answering a question posed by the court, the victim has testified that the mother was aware of the incidents 1 1/2 years prior to lodging the police complaint but no action whatsoever had been taken by the mother but it was her evidence that the mother had requested the father not to commit such acts. The victim has further testified that the father had made an attempt to get her to watch an adult-only video but she had refused to do so.

It warrants mentioning that the delay in lodging a police complaint has been attributed to the death threats exerted on them by the appellant. The victim has admitted that when her younger brother's birth was registered, the appellant had refused to give his name as the father but at the time of admitting the younger brother to school, the appellant had given his name to be registered as the father.

The victim has further testified that there were continuous marital disputes between the appellant and her mother, over the former suspecting the mother, and has further testified that the appellant had assaulted the younger brothers with clubs. The victim in cross-examination has testified that she was aware that the father was peeping through the bathroom door since she was familiar with his body odour. The victim explaining the circumstances under which the complaint came to be made, has testified that there was a marital dispute between the mother and the appellant which prompted the mother to lodge a complaint of assault against the appellant at which point the complaint relating to the sexual abuse too had been made.

The mother of the victim, L.P.Theja Perera (PW 2) has testified that at the time of the incident she was a school teacher at Dharmapala Vidyalaya, Kottawa. Witness has categorically and consistently testified that she was aware that the daughter was being sexually abused by the father for 1 1/2 years but it was her position that she had not complained to the police. Witness whilst reiterating the fact that she was aware of the despicable acts of abuse the daughter was subjected to at the hands of the appellant, has testified that she did not lodge a police complaint but was vigilant and had taken precautionary measures such as keeping a

hawk-eye on the daughter and sending the daughter for extra classes in order to prevent the daughter from being at home.

PW 2 has further testified that the appellant would undress the daughter in her presence and it was the evidence of the said witness that she had tried to advise the appellant as she was a “Daham Pasal” teacher and the appellant had denied the acts but it was the evidence of the said witness that the appellant had got caught in the act.

This witness has admitted the fact that the police complaint was made only in the year 2007 when the daughter was 15 years of age and the witness had admitted that 1 1/2 years prior to lodging the complaint she had been aware of the sexual abuse that the daughter was subjected to at the hands of the appellant which prompted the Court to question her to the effect "මේ අවුරුදු එක හමාර මහත්තයාට විරුද්ධව කිසිවක් කරන්නේ නැතුව ඉවසගෙන හිටියා දරුවට ඕන මගුලක් වෙච්චාවෙ කියලා.".

The witness in the answer has testified that she was hell-bent on settling the issue amicably and preserving the marriage as the three children need a father and she wanted a husband and also wanted to safeguard her profession. Witness further testified that another reason which prevented her from complaining to the police was that the appellant was her first love and they had kindled their love affair during the time, she was doing her Advanced Level Exam and the relationship culminated in marriage. The appellant was overly suspicious of her and explained the circumstances which prompted her to make a police complaint. Witness PW 2 has testified that the appellant had locked her up in a room and had assaulted her with a stick and when she went to make a complaint in that regard, she had lodged a complaint in relation to the sexual abuse committed to her daughter by the appellant.

This witness further explaining the failure to make a prompt complaint has testified that since the appellant had threatened her and her daughter, they refrained from going to the police. Witness reiterated that she had seen the appellant abusing the daughter and that she had been informed of the disgraceful acts of sexual abuse committed on the daughter by the appellant. In cross-examination, the witness has admitted that on 05.08.2007, the appellant had come in search of her at her school and that there had been a dispute between the appellant and the witness over the latter coming home late and that she had been assaulted which prompted her to inform her sister.

It was her evidence that they had complained the following day with regard to the assault. Witness has further admitted that the daughter had accompanied her to the police station and on the same day she lodged a complaint relating to the sexual abuse committed on the daughter by the appellant. It was the evidence of the said witness that all five family members sleep in one room on two beds and on one occasion, she had seen the appellant putting his hand under the mosquito net and abusing the daughter but it was her evidence that she had pretended to be asleep.

PW 2 has admitted the fact that the appellant who was unduly suspicious of her had advised her with regard to her conduct. It warrants mentioning that it was suggested to the witness that due to the assault on her by the appellant over illicit affairs she was having, the witness had falsely implicated the appellant which suggestions were denied by the witness.

The victim had been examined by the Judicial Medical Officer (JMO) on 06.07.2007. JMO has testified that the victim in her history has stated that she had been sexually abused at the hands of her father. JMO has further testified that the father would touch, kiss and lick her genital area and that he would press her genital area with his fingers and would also exhibit his male organ to her. JMO has further testified that the hymen was worn out between 5 - 7 O'clock positions and it was the opinion of the JMO that it is consistent with the hymenal area being pressed for a long period of time. He has testified that it is consistent with something hard but with a smooth surface being inserted.

After the prosecution case concluded the appellant decided to make a dock statement. In his dock statement whilst denying the allegations, has stated that it was the wife who had complained, falsely implicating him. The appellant has further stated that the wife was a school teacher by profession and that when she was attending Gonawala training college, he had sensed that she was having an illicit affair. The appellant has stated that since then until 2007 there were marital disputes, but it was his position that he never assaulted her but had admonished her on several occasions.

It was the position of the appellant that on the last date of the term, even though school sessions were concluded by 1.30 p.m., his wife had not returned home until 6.00 p.m. at which point, he had severely assaulted the wife prompting the wife to complain of assault and had further falsely implicated him in the instant sexual abuse charges.

It was the evidence of the victim, upon being questioned when the 1st incident of sexual abuse took place, that she is unable to recall the exact year but it was her evidence that the father had returned from an overseas stint when she was in year 1 and ever since, she had been subjected to sexual abuse at the hands of the father from the time she was in the primary section and that the complaint was made only in the year 2007 when she was in year 10. The victim has further testified that the appellant abused her continually in the years 2005 and 2006.

The victim has further testified that she first informed her mother when she was in year 7. This was 1 $^1/_2$ years prior to complaining to the police and although the mother was aware of the abuse committed to her by the father, the mother had not taken any action but had advised the father to refrain from committing such acts. It was the evidence of the said victim that the mother had on one occasion seen the father abusing her.

The learned counsel for the accused-appellant in the backdrop of the afore-mentioned evidence, whilst the victim had failed to inform the mother of the incident for over 4-5 years, the mother had been privy to the sexual abuse committed by the father on his own daughter 1 $^1/_2$ years prior to lodging a police complaint.

In the said circumstances, the learned counsel for the appellant argued that the victim has woefully failed the test of promptness which militates against her credibility. It is pertinent to note the circumstances under which the complaint of abuse came to be made.

Victim explaining the circumstances under which the complaint came to be made, has testified that there was a marital dispute between the mother and the appellant which prompted the mother to lodge a complaint of assault against the appellant at which point the

complaint relating to the sexual abuse committed by the appellant too had been made. The mother of the victim has testified that she had seen the appellant abusing the daughter and that she had been informed by the daughter of the disgraceful acts of sexual abuse committed on the daughter for 1 ½ year by the appellant but had not lodged a complaint.

The mother of the victim has admitted in cross-examination, that on 05.08.2007, the appellant had come in search of her at her school and that there had been a dispute between the appellant and the witness over the witness coming home late. She had been assaulted which prompted her to inform her sister and it was her evidence that they had complained on the following day with regard to the assault. The mother of the victim has further admitted that the daughter had accompanied her to the police station and that on the same day she lodged a complaint relating to the sexual abuse committed on the daughter by the appellant.

It is important to note that in the said circumstances whilst the mother had turned a blind eye to the despicable acts of sexual abuse committed on her daughter for well over 1 ½ years, what motivated her to lodge a complaint against the appellant was the assault on her. At this moment it would be pertinent to discuss the explanations adduced by the victim and the mother with regard to the belatedness.

PW 1 namely Tharushi Shivanthi (victim) has testified that though the mother was aware that she was being abused by the appellant for 1 ½ year, no legal action was taken due to the death threats exerted on them by the appellant but it was her position that the mother had advised the appellant.

PW 2 namely Theja, mother of the victim has admitted the fact that the complaint relating to the sexual abuse committed by the appellant on her daughter was made in the year 2007 when the daughter was 15 years of age and that she had been aware that the daughter was subjected to grave sexual abuse for 1 year to 1 ½ year since the daughter was 12-13 years of age. PW 2 has testified that she had tried to settle the matter amicably since the three children needed a father and she need a husband and also, she had to safeguard her profession and career.

In the said circumstances, the learned counsel for the appellant argued that the reasons adduced by PW 1 and especially by PW 2 are not merely unjustifiable and unreasonable but preposterous and scandalous. PW 2 has further testified that due to the threats exerted on her and the daughter she had not lodged a prompt complaint which prompted the court to inform her that she is giving inconsistent evidence with regard to the failure to make a prompt complaint. However, it warrants mentioning that PW 2, has categorically admitted in cross-examination that consequent to the complaint there were no major issues between her and the appellant except for the fact that the appellant had come to school frequently creating problems for her.

The learned counsel for the appellant says that the reasons adduced by PW 1 and PW 2 are more offensive than the purported offences committed by the appellant especially taking into consideration the fact that PW 2 would demonstrate such passive, dormant conduct as a mother when her one and only daughter was continually sexually abused at the hands of the father for such a prolonged period of time thereby shirking her responsibility as a mother. The learned High Court Judge in justifying belatedness has held that although there was

belatedness to a certain extent, he has come to a finding that it is probable that a mother would be reluctant to make a police complaint of sexual abuse against the father considering the fact that if it is divulged, it would have drastic and adverse consequences on the daughter's future and marriage.

It is incumbent upon the Trial Judge in considering the explanation for belatedness to consider the reasons adduced by the victim and the mother which in the instant case is wholly fanciful and offensive and does not import the opinion of the learned Trial Judge in justifying belatedness. In the said circumstances, learned counsel for the appellant argued that had the Trial Judge evaluated the evidence relating to belatedness in its correct judicial perspective and the circumstances under which the said belated complaint came to be made, the learned High Court Judge would no doubt have come to an accurate assertion that the belatedness on the part of the victim and mother is wholly unjustifiable and that it militates against their credibility.

It was the evidence from the victim that she was sexually abused from the time she was in primary school until the complaint was lodged in 2007 when she was 15 years of age. It is an admitted fact that though the mother was aware of the sexual abuse 1 ½ years prior to lodging the complaint, the mother had not informed the police promptly. It warrants mentioning that the mother was a teacher at Dharmapala Vidyalaya Kottawa and also a daham pasal teacher. It was also evidence from the victim that her grandfathers lived with them and that the paternal grandfather was a retired Director of Education which is indicative of the fact that the victim came from a decent and educated background.

It does not favour the test of probability that the mother would turn a blind eye and a deaf ear virtually condoning such atrocious conduct of the appellant and subject her daughter to be sexually abused by the father continuously. It warrants mentioning that even the learned Trial Judge who heard the evidence of the mother of the victim had questioned her thus "දුවට ඕන ඉලව්වක් වෙනකන් බලන් හිටියද?". It warrants mentioning that the victim was the only daughter and when considering the reasons adduced by the mother of the victim justifying belatedness, it does not favour the test of probability that a mother would permit the father to sexually abuse her merely to save her marriage, family, her career and simply because the appellant was her first love.

When considering the probability factor, the social background of the victim and the mother must be taken into consideration. The delay in making a prompt complaint could somewhat be justified had the victim and the mother come from a rural background and was illiterate, but in the instant case the mother being a teacher at a recognized school in the Colombo district and being a daham pasal teacher, the fact that no action whatsoever was taken and remained dormant and passive until the mother was assaulted over suspicion by the appellant certainly does not favour the test of probability by any stretch of the imagination.

It was the contention of the learned counsel for the appellant that the conduct of the mother defies logic and not law consequently rendering the conviction untenable and flawed. Learned High Court Judge has opined that although the victim when testifying has shown resentment towards the appellant, the victim could have implicated the appellant in an offence of a more serious nature and the absence of such a false implication, a high degree

of credibility could be attached to the evidence of PW 1 and that there is no impediment to forming the basis of the conviction on the uncorroborated evidence of PW 1.

The learned Trial Judge has opined that though the complaint is somewhat belated, it is justified that the mother did not make a prompt complaint for the simple fact that if such abuse was revealed it would have had drastic consequences on the daughter's future and marriage. However, it warrants mentioning that even though the mother of the prosecutrix was privy to the disgraceful acts of sexual abuse committed on her only daughter by the appellant for over 1 1/2 years, no complaint whatsoever was made by the mother until the mother was assaulted. Mother on her admission, at the time she lodged a complaint of assault against the appellant, had lodged a complaint of sexual abuse too against the appellant which creates doubt as to whether the complainant was motivated by sheer wrath and anger thus giving rise to false implication.

It was argued by the learned counsel for the appellant that the mother had not divulged this incident even to the appellant's father and her own father who was living in the same house and assuming without conceding that her evidence is true, mother in being very passive and failing to take prompt stringent action against the appellant had virtually aided and abetted the appellant to continuously abuse her young only daughter. In the said circumstances, had the learned Trial Judge addressed his mind to the inordinate delay and the fact that the mother virtually turned a blind eye until she was assaulted to lodge a complaint and the wholly implausible reasons adduced for the delay in its correct judicial perspective, the Trial Judge would have come to an accurate judicial finding that the version does not favour the test of probability.

Learned Counsel for the appellant concedes the fact that the Superior Courts will not interfere lightly with the factual findings of Trial Judges as they possess the priceless advantage of observing the demeanour and deportment of witnesses which is an important yardstick in assessing the credibility of witnesses. However, it warrants mentioning that in the instant case the learned Trial Judge who delivered the judgment of the trial court did not have the advantage of observing the said demeanour and deportment of PW 1 and PW 2. The learned counsel for the accused-appellant submitted that the Trial Judge had attached credence to the evidence of the victim on the footing that "her evidence is amply corroborated by medical evidence, police evidence and police observations which are considered as independent evidence", which factual assertion is flawed and the assessment of the testimonial trustworthiness of the prosecution witnesses by the learned Trial Judge is deficient.

It warrants mentioning that the learned Trial Judge has held that there is a legal impediment in relying upon the evidence of PW 2 and in the said circumstances evidence of PW 2 will not be considered against the appellant. The Trial Judge having evaluated the medical evidence and addressing his judicial mind to the history recorded by the JMO has come to a factual finding that the evidence of the victim is somewhat corroborated by the history and therefore it is consistent.

The basis of the conviction by the learned Trial Judge is that the evidence of the victim is amply corroborated by medical evidence and independent police evidence and observations. He has held that considering the observations of the JMO, the fact that the victim has been

subjected to abuse for a prolonged period during the period testified by the victim is amply corroborated by medical evidence. The Trial Judge has further asserted that the fact that the appellant peeps through the bathroom door and the evidence relating to adults-only CDs have been corroborated by independent police evidence and observations.

It is trite law that corroboration in a rape case must come in the form of independent testimony. To buttress the said proposition, counsel for the appellant relies on the following legal authorities, namely;

In Athukorale vs. The Attorney General 50 NLR 256, the Court of Criminal Appeal held thus;

> "a complaint made by the prosecutrix to the police, in which she implicated the accused, cannot be regarded as corroboration. The reason is that this evidence lacks the essential quality of coming from an independent quarter."

In Rajarathnam vs. The Republic of Sri Lanka 79 NLR 73, it was held thus;

> "corroboration required in a rape case was some independent testimony which affected the accused by connecting or tending to connect him with the crime and that a statement made by the prosecutrix to her grandmother after the event cannot constitute the kind of corroboration required."

In the case of The King vs. Ana Sheriff 42 NLR 169, five Judges of the Court of Criminal Appeal held thus;

> "The corroborative evidence must affect the accused by connecting or tending to connect him with the crime. The confirmation must relate to connecting to some fact which goes to fix the guilt of the particular person charged. The corroboration must consist of some circumstances which involve the identity of the accused."

In the instant case, it was the opinion of the JMO that there were no hymenal tears but the hymen was worn out between the 5 and 7 O'clock positions suggestive of some kind of rubbing and friction of the hymen for a long period of time. JMO has ruled out a rigid object being inserted into the vagina as it would result in causing an injury but was of the opinion that the insertion of a firm but soft object such as a piece of wood may result in the injuries afore-mentioned.

In the said circumstances, whilst it was the opinion of the JMO that the observations were compatible with the history, it must be noted that the medical does not fix the appellant to the crime and in that backdrop finding of the Trial Judge that the evidence of the victim is amply corroborated by medical evidence is legally flawed and only consistency could be attributed to the victim.

In Jarlis vs. The King 52 NLR 457, Dias S.P.J., speaking for the Court of Criminal Appeal, quoted with approval the following statement;

> "if a Judge points to a piece of evidence as being capable in law of amounting to corroboration, and it turns out that it is not capable of amounting to corroboration, the conviction may be quashed"

In the said circumstances, learned counsel for the accused-appellant says that in view of the afore-cited authorities, the basis of the conviction being "the evidence of the victim is amply corroborated by medical evidence, police evidence and observations", the said factual assertion is fallacious rendering the conviction untenable. It was the observation of the chief investigating officer that there was a hole in the bathroom door for the purpose of peeping into the bathroom which at the time of observation had been covered with a rubber stopper. However, contrary to the afore-mentioned observations of the police officer, PW 1 has testified that the appellant would peep into the bathroom through a hole in the wall and also from the gap between the door and the floor and that she was aware of his presence from his body odour.

The learned High Court Judge when evaluating the dock statement of the appellant has come to a factual finding that the appellant in his dock statement has taken up the position that since he had admonished the daughter over the relationship she was having with a boy and on the same day having assaulted the wife, they had falsely implicated the appellant. The Trial Judge has opined that the defence had not suggested this position to the victim and in the said circumstances it was the finding of the learned High Court Judge that there was no consistency with regard to the defence.

It was argued on behalf of the appellant that the afore-mentioned factual assertion on the part of the learned Trial Judge is erroneous as it was the appellant's position that he was falsely implicated by his wife. Whilst the appellant has stated that he had admonished the daughter to give up a love affair that she was having and concentrate on her studies, the appellant has categorically stated that the reason for implicating him originated on the last day of the school term, namely 07.08.2007 when the wife had not returned home until 6.00 p.m. which prompted him to assault the wife at which point, the wife had falsely implicated him in relation to the instant case.

The mother of the victim has admitted that she was prompted into lodging a complaint of assault against the appellant when he had locked her up in a room and assaulted her due to suspicion. Witness PW 2 has further testified that when she complained of assault against the appellant, she had lodged a complaint of sexual abuse too. In cross-examination of PW 2, pertinent suggestions were put forward to the said witness, to the effect that due to her coming home late on the last date of the term, a dispute had arisen between her and the appellant, resulting in the appellant assaulting her prompting her to lodge a complaint of assault against the appellant at which point the complaint relating to sexual abuse too had been made and the witness had answered the said suggestions in the affirmative.

The victim too has testified that the appellant had assaulted the mother prompting the mother to make a beeline to the police station and that she too accompanied the mother when the mother lodged a complaint against the appellant with regard to the assault on her, a complaint of sexual abuse too had been lodged against the appellant. In the said circumstances, learned counsel for the appellant argued that the factual misdirection on the part of the learned High Court Judge when evaluating the dock statement had been wholly prejudicial to the appellant which resulted in the Trial Judge rejecting the dock statement on an erroneous premise thereby occasioning in a deprivation of a fair trial.

It is manifest that the accused is of a violent nature and that is the reason for the victim not coming forth regarding the abuse she was subjected to. The accused made multiple threats to the victim forcing her not to reveal the abuse that was taking place. It is upon the complaint made by PW 2 regarding assault she was subject to at the hands of the appellant who is her husband that the atrocities caused to the child victim, her daughter came to light.

In the said circumstance, the mother of the victim was aware of the abuse the child was subject to but did not take action on the matter on the footing of 'keeping the family intact. This has been raised by the Counsel for the accused to allude to the inability to place faith in the truthfulness of the Witness. In my view, failure and shortcomings on the part of the mother in taking the necessary steps to safeguard her Child in the eyes of the appellant, should not in any way adversely affect the case for the child in question.

The inaction on the part of the mother for whatever selfish reason, (Which was rightly addressed by the learned High Court Judge by the sentiment "මේ අවුරුදු එකහමාරම මහත්තයාට විරුද්ධව කිසිවක් කරන්නේ නැතුව ඉවසගෙන හිටියාද දරුවට ඕන මගුලක් වෙච්චාවෙ කියලා" in no way negatively reflects on the Victim and her creditworthiness. The child is a helpless victim of abuse and for the Counsel, for the appellant to regard the reasons adduced by the witnesses for the delay in making the complaint as being more offensive than the offence committed thwarts the meting out of Justice for the child victim.

The assault on PW 2 by the accused-appellant and the complaint that ensued is a blessing in disguise as it prompted the revealing of the abuse on the child. However, the situation that came to light is immaterial and the abuse on the child is of utmost importance the learned Trial Judge has aptly considered such in addressing the abuse suffered by the Child victim.

In Bandara vs. The State 2001 (2) SLR 63 it was held that;

> "If there is a valid reason or explanation for the delay and if the trial Judge is satisfied with the reasons and explanations are given, no Trial Judge would apply the test of spontaneity and contemporaneity and reject the testimony of a witness in such circumstances" and "delayed witnesses evidence could be acted upon if there were reasons to explain the delay."

It is out of fear for her life that the victim did not reveal the abuse she was undergoing and the mother had her reasons for delaying the complaint as such, considering the sensitivity of the matter at hand, it is apt to consider that delay in the making of the complaint is justified and the Trial Judge has rightly done so, in arriving at the conviction.

PW 2 and her delay in the making the complaint on behalf of her child find its roots in the social stigma attached to bringing issues such as this to light. As much as this may be an archaic or dated concern to some, it may pose a heavy burden on others given the social climate in the country. The Assault inflicted on PW 2 was the final straw that pushed the witness to make the complaint not only regarding the assault but also the abuse on her child. These are issues Trial Judges must weigh in evaluating evidence placed before them, which was done in the case at hand.

Although as pointed out by the learned counsel for the accused-appellant, the mother was a teacher in a leading School in Colombo District and Dhamma school. This does not negate or

make her immune to the effects of certain social stigmas that still plague society. This being the reason for the delay neither diminishes the credibility of the witness nor does it cast doubt on the probability of the abuse the victim suffered. It is possible that if PW 2 was in pursuit to falsely implicate the appellant out of rage because of the assault inflicted on her, more serious allegations would be made against him which was not seen here. Furthermore, the wounds seen on the victim are consistent with that of what may be the result of acts of abuse complained of.

When considering acts of grave sexual abuse, the element of corroboration of evidence submitted in that regard is only a rule of practice and not a rule of law.

It is indeed a rule of practice that Courts require corroboration in sexual offences and this Court is not persuaded to be led to a conclusion that the story narrated by the victim lacks corroboration. Bharvada Bhoginibhai Hiljibhai vs. State of Gujarat 1983, AIR 753 the Indian Supreme Court held that

> "corroboration in the form of an eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offence, having regard to the very nature of the offence".

Therefore, even if the appellant contends that there was no corroboration and only consistency was affirmed, the evidence given by the victim alone is sufficient.

The injuries sustained were consistent with that of what may be the result of the acts committed, which was affirmed by the JMO examination, upon investigation the adult film C.D's mentioned by the victim was found and the hole through which the appellant would peep into the bathroom to look at the victim was also found which buttresses the position of the minor victim.

With regard to the minor discrepancy of the hole is found on the wall instead of the door as mentioned by the Victim the following is apt;

In State of Andra Pradesh vs. Garigula Satya Vani Murthy AIR 1997 SC 1588, where it was held that;

> "The courts should examine the broader probabilities of a case and to get swayed by minor contradictions or insignificant discrepancies in the statement of the witness, which are not of a fatal nature to throw out allegations of rape."

In Mohamed Niyas Naufer & Others V. Attorney General SC Appeal. 01/2006 decided on 08.12.2006 Shirani Thilakawardena, J held that;

> "When faced with contradictions in a witness's testimonial, the court must bear in mind the nature and significance of the contradictions, viewed in the light of the whole of the evidence given by the witness." It was further held in the same case that "too greater significance cannot be attached to minor discrepancies or contradictions."

It is apparent that the appellant is of a violent nature as evident by his own admission of the act of assault he committed on PW 2 in his Dock statement. This speaks to the reason for the delay in the making of the complaint in fear of threat to one's life. The stark correlation

between his violent nature and its effect on the delayed complaint and the nature of the wounds found and the claim of the abuse to the victim cannot be blatantly dismissed and has been rightly considered by the learned High Court Judge.

In the above circumstances, we decide that there is strong and cogent evidence that establishes the fact that the Prosecution has proved its case beyond a reasonable doubt. It is proper for the learned Trial Judge to decide that the accused-appellant did commit the offences in the indictment.

Considering the above there is no reason to interfere with the findings of the learned High Court Judge.

We affirm the conviction dated 24.05.2017.

As there was no previous conviction for the appellant we decided that the imprisonment imposed by the learned Trial Judge on 3 counts namely fifteen years for each count, to run concurrently.

The fine of Rs. 10,000/- for each count will remain and the default sentence, be altered to 6 months simple imprisonment and it should run consecutively

The compensation of Rs. 100,000/- for each count will remain and the default sentence, be altered to 10 months simple imprisonment and it should also run consecutively.

The appeal is dismissed subject to the above alteration on the sentence.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal