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/0124/2020

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Colombo

Case No: HC/211/2017

Thalaramba Vithanage Don Nimal *alias* Ukku Maama

ACCUSED

AND NOW BETWEEN

Thalaramba Vithanage Don Nimal *alias* Ukku Maama

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Geeth Karunarathna for the Accused Appellant

: Dilan Rathnayaka, SDSG for the Respondent

Argued on : 19-10-2022

Written Submissions : 28-10-2021 (By the Accused-Appellant)

: 19-11-2021 (By the Respondent)

Decided on : 28-11-2022

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 Colombo.

The appellant was indicted before the High Court of Colombo for three counts of grave sexual abuse of a minor, committed between the period of 21-11-2013 and 20-11-2014, punishable in terms of section 365B (2) (b) of the Penal Code as amended by Penal Code (Amendment) Act No- 22 of 1995, 29 of 1998 and 16 of 2006.

After trial, the learned High Court Judge found the appellant guilty as charged and he was sentenced to 10 years each rigorous imprisonment on each of the three counts preferred against him, to be served consecutively.

Apart from the above, he was ordered to pay a fine of Rs. 10000/- each on each of the counts and in default, he was subjected to six months each simple imprisonment.

The appellant was also ordered to pay the PW-01, who was the alleged victim of the incident Rs. 200000/- each of the three counts and in default he was sentenced to a period of two years each rigorous imprisonment on each of the counts.

Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

(1) Whether the learned High Court Judge has made a serious error in the consideration of the evidence placed before the Court by referring to some strange evidence which was never a part of the evidence, and thereby causing a denial of fair trial for the appellant.

(2) Whether the learned High Court Judge has failed to evaluate the vital discrepancy in the evidence as to the first charge preferred against the appellant.

(3) Whether the learned High Court Judge was in error in his consideration of the facts and the relevant law in deciding that the prosecution has proved the case beyond reasonable doubt.

(4) In any case, whether the sentenced imposed was excessive given the facts and the circumstances.

Facts in Brief

The facts that led to the indictment against the appellant as revealed in evidence can be summarized as follows.

The appellant was a neighbour of the victim minor who was the PW-01 in this case. He was a person who used to visit the house of the appellant frequently. The alleged three incidents of grave sexual abuse have happened at the house of the appellant. When the victim came home on the day the alleged sexual abuses were came to light, the father of the victim has questioned him after seeing his trouser zip being opened. Upon questioning, the victim has narrated what was happening to his father.

Based on the statement made to the police by the victim, the appellant had been indicted for three counts of grave sexual abuse between a period of one year.

The first count relates to an incident where the appellant was alleged to have used his penis between the thighs of the victim.

The second count refers to an incident where the appellant was alleged to have had oral sex on the victim.

The third count refers to the alleged last incident on 20th November 2014 where the appellant was alleged to have used the penis of the victim between his thighs.

The Judicial Medical Officer (JMO) who has examined the victim after the complaint was lodged has not found any evidence of sexual abuse, but has opined that the alleged incidents cannot be ruled out, given the nature of the incidents as narrated to him by the victim.

Consideration of the Grounds of Appeal

Having considered the first ground of appeal, the learned Senior Deputy Solicitor General (SDSG) on behalf of the respondent conceded that he is in no position to disagree with the said ground of appeal.

It was his submission that although it was his view that this is a fit case for sent for a re-trial, he will not be in a position to support even such a course of action, given the pointed-out deficiencies of the prosecution case.

This Court would like to express our appreciation to the learned SDSG for expressing his views on this matter with a clear understanding of the duty of a state prosecutor in assisting the Court to meet the ends of justice.

The 1st ground of appeal: -

In his judgement at page 08 (page 229 of the appeal brief), the learned High Court Judge refers to the following as the facts of the case.

> "නමුත් මෙම නඩුවේ දරුවාට වූ ලිංගික අතවරය සම්බන්දයෙන් ඔහු විසින් කිසිවෙකුට කියා නොමැත. මෙම සිද්දිය ඇසින් දුටු සාක්ෂිකරුවෙකු වන බෙන්ජමින් යන අය විසින් ඔහුගේ දෙමාපියන් දැනුවත් කර ඉන් පසුව විත්දින දරුවා විසින් ලිංගික අතවරය සම්බන්දයෙන් මවට හා පොලිසියට ප්‍රකාශ කර ඇත. ඒ අනුව මෙම නඩුවේ විත්දින දරුවාගේ සාක්ෂිය අනුසන්දනය කල හැකි ඇසින් දුටු සාක්ෂිකරුවෙකුද සිටි."

There was no person called Benjimin, even listed as a witness for the prosecution, leave aside there being any eyewitnesses to the incident. There are no eyewitnesses to the incident, contrary what has been stated by the learned High Court Judge in his judgment.

As pointed out by the learned Counsel for the appellant and rightly agreed by the learned SDSG, this is a serious defect which goes into the root of the judgment pronounced by the learned High Court Judge. It is my considered view that this ground of appeal alone would have the effect of vitiating the conviction and the sentence imposed on the appellant in this matter.

Although the appeal should succeed as mentioned above, I will now proceed to consider the 2nd and the 3rd grounds of appeal with the view of finding whether there is a basis to send the matter for a re-trial.

For a matter to be sent for a re-trial, there must be evidence which shows that the prosecution has a strong prima facie case to be tried for the second time. A case should not be sent for a re-trial for the prosecution to lead evidence to cover the deficiencies in the evidence led at the first trial.

In this matter, the sequence of events mentioned in the three counts have been on the basis that the 1st incident was an incident where the appellant used his penis between the thighs of the victim as I have stated before. The reason for mentioning the sequence of events in the three counts mentioned in the indictment may have been decided on the basis of the statement made to the police by the victim. However, in giving evidence in Court, the victim describes the 1st incident faced by him as the appellant placing the victim's penis between the appellant's thighs and engaging in sexual abuse. This description of the incident is in complete contrast to the relevant 1st charge against the appellant.

In the judgement, the learned High Court Judge in considering the evidence placed before the Court in relation to the 1st count has reproduced the relevant questions and answers at page 11 (page 232 of the appeal brief). However, rather than considering whether this evidence was sufficient to conclude that the 1st count preferred against the appellant has been proved, the learned High Court Judge has merely proceeded to convict the appellant on the 1st count when there was no evidence placed before Court in that regard.

As contended correctly by the learned Counsel for the appellant, the sequence of events alleged to have taken place becomes very much relevant when considering the charges preferred against the appellant and the evidence by the victim in Court.

The 2nd event of sexual abuse that has taken place according to the indictment was an incident where the appellant alleged to have had oral sex on the victim. But in giving evidence in Court, the victim has stated that the 2nd incident was an incident where the appellant had anal sex with him.

The 3rd count relates to the incident where the father of the victim has come to know about the incident of sexual abuse on 20th November 2014, which should be considered as the last incident of sexual abuse. In the indictment, the incident has been referred to as the appellant placing his penis between the thighs of the victim and engaging in sexual abuse. However, the victim in giving evidence at the trial has described the last incident as an incident where the appellant performed oral sex on the victim.

Although one can attribute these discrepancies in the evidence of the victim to the fact that he may have forgotten the minute details of the incident when he gave evidence in Court, I find that these are discrepancies that cannot be ignored on such a basis as the said discrepancies go to the root of the prosecution case. Therefore, I am in agreement with the submission of the learned Counsel for the appellant that although it is not necessary to have corroboration always in sexual offences of this nature, this is a case where corroboration should be looked into as the evidence of the victim was not cogent enough to act on itself.

In the case of **Sunil and Another Vs. The Attorney General (1986) 1 SLR 230**, it was held thus:

> *"It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence, but if evidence is convincing such evidence could be acted on even in the absence of corroboration.*
>
> ***Held further:*** *Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible such testimony should be rejected and the accused acquitted."*

I am very much mindful that looking for corroboration as a rule in this kind of sexual abuse matters are not necessary since a perpetrator who engages in sexual abuse will invariably make sure to maintain the secrecy of his actions.

However, as considered above, when the victim's evidence is not cogent enough, the duty of a Trial Judge is to look for some kind of corroboration in order to justify a conviction.

It is also necessary to mention that the consistency of a story cannot be considered as corroboration.

In the case of **Sana Vs. Republic of Sri Lanka (2009) 1 SLR 48,** it was held:

1. *"The corroborative facts and evidence must proceed from someone other than the witness to be corroborated. This means that his previous statements, even when admissible cannot be used to corroborate him, as such as proof of a complaint in a sexual case or a previous act of identification is not corroborative of the evidence of the witness, even though by showing consistency, it can to some extent strengthen his credibility."*

I find that in the judgement, the learned High Court Judge has failed to consider the infirmities in the evidence in the correct perspective and come to a correct finding as to the guilt of the appellant.

As contended rightly by the learned Counsel for the appellant, the learned High Court Judge, other than stating that the appellant has made a dock statement and rejecting it on the basis that it has not created any doubt as to the prosecution case, failed to analyze the dock statement and the defence put forward by the appellant in any manner which amounts to a denial of a fair trial towards the appellant.

This is a matter where the incident has occurred in the year 2013 where the victim was a 14-year-old boy at that time. If the matter is sent for a re-trial, the victim who will be over 23 years of age by now, would be subjected to the agony of relating something that had happened to him previously for a second time. I find that for an adult, this will be an experience he would want to avoid at all costs. Up to now, the defendant has been in incarceration for more than 2 years and 10 months.

In considering all the above-mentioned infirmities in the evidence of the victim and the misdirections by the learned High Court Judge in his judgement, I am of the view that this is not a case where a re-trial should be ordered.

The consideration of the 4th ground of appeal urged by the learned Counsel for the appellant would not be necessary as the appeal shall succeed on the above-considered grounds of appeal alone.

Accordingly, I set aside the conviction and the sentence of the accused appellant and acquit him of the charges preferred against him.

The appeal is allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal