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/0096/2020

High Court of Tangalle

Case No: THC/60/2016

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Mohomad Kalif Mohomad Nazeer *Alias* Nadeer

ACCUSED

AND NOW BETWEEN

Mohomad Kalif Mohomad Nazeer *Alias* Nadeer

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Rushdhie Habeeb, Supun Dissanayake, Hiruni Wijesinghe and Rizwan Uwais for the Accused Appellant
	: Chethiya Goonesekara, P.C., ASG, the Respondent
Argued on	: 26-10-2022
Written Submissions	: 10-06-2021 (By the Accused-Appellant)
	: 13-07-2021 (By the Respondent)
Decided on	: 30-11-2022

Sampath B Abayakoon, J.

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

The appellant was indicted before the High Court of Tangalle on the following counts.

1. That on or about 16th August 2004, he committed the abduction of a girl who was under 16 years of age from her guardian and thereby committed an offence punishable in terms of Section 354 of the Penal Code.
2. At the same time and at the same transaction, the appellant abducted another female child who was under 16 years of age from her lawful guardian and thereby committed an offence punishable in terms of Section 354 of the Penal Code.
3. At the same time and at the same transaction, he committed the offence of rape on the minor female child mentioned in the first count, and

thereby committed an offence punishable in terms of Section 364 (2) read with Section 364 (2) (e) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995.

After trial, the learned High Court Judge of Tangalle by the judgement dated 0309-2020 found the appellant guilty of the 1st and the 3rd counts preferred against him. As the victim child relating to the 2nd count, preferred against him never came to Court to give evidence, he was acquitted on the 2nd count.

By his sentencing order, learned High Court Judge after having considered the facts of the case and the mitigatory factors pleaded on behalf of the appellant, has sentenced the appellant for two years rigorous imprisonment for count one. He was also ordered to pay a fine of Rs. 5000/- and in default, he was sentenced for a period of three months simple imprisonment.

On count three, he was sentenced for a period of 10 years rigorous imprisonment and was ordered to pay a fine of Rs.10000/-. In default, he was sentenced for a period of six months simple imprisonment.

In addition to the above sentence, the appellant was ordered to pay a sum of Rs. 500,000/- as compensation to the victim. In default he was sentenced for a period of two years rigorous imprisonment.

He was also ordered to pay a sum of Rs. 3000/- to the fund established under the provisions of the Victim and Witness Protection Act. If he failed to deposit the said sum, he was sentenced to a further period of three months simple imprisonment.

The learned High Court Judge has ordered that the sentence imposed on count one and three should be operative consecutively.

However, it has been ordered that if the appellant fails to pay the fines imposed and the compensation ordered, and also to deposit the sum mentioned to the victim and witness protection fund, the default sentences ordered should run

concurrently to each other, but after the completion of the sentences imposed on count one and three preferred against the appellant.

The 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 prosecution has discharged its duty of proving the case beyond reasonable doubt against the appellant.
2. Whether the omissions in the evidence of the victim, namely, PW-03 go into the root of the case and hence, whether the conviction of the appellant can be sustained.
3. Testimonial creditworthiness of PW-03 who was the victim.
4. The lack of corroboration to support the version of events as narrated by the victim.

Facts in Brief

PW-03 who was the victim child in this case was about 10 years old at the time this incident occurred on 16th August 2004. She was 24 years of age when she gave evidence in Court for the first time on 20th February 2019 and was a teacher attached to a private school.

It is apparent from her evidence that she was a reluctant witness for obvious reasons. It is very much clear from her evidence that her reluctance has been not due to her not telling the truth, but her need to move forward with her life giving her social standing at the time of her giving evidence, and other related circumstances.

It had been her evidence that during the time relevant to this incident, she was studying in grade five in her school. Her family had nine siblings and she was in the habit of going to a nearby house to watch television. The appellant was also a neighbour and a person well known to her. On the day of the incident, while

returning around 6.30 – 7.00 p.m. with another girl of similar age who was the child in relation to the second count preferred against the appellant, she had been called upon by the appellant to come to his house.

It is in evidence that to reach her house from the house where she was watching television, she had to pass the house of the appellant. As the appellant had given food to the victim on previous occasions, the victim has gone inside the house. It was her evidence that her friend ran away when this incident happened. Once she got inside the house, the appellant has closed the door and taken her to an inside room, sat her on a bed, and has removed her undergarment. Fearing something worse, she has raised cries. However, according to her evidence, the appellant has lifted his sarong while holding his penis in one hand, and has started to touch her vaginal area. It was her evidence that in the process, he also attempted and inserted his penis into her vagina and a milk like substance came out of the penis of the appellant.

In her evidence, she has stated that subsequent to this, her neighbours came and started knocking on the door and the door was forced open, Because of the condition she was in, she went under the bed and hid and later fled the house. She has been taken to the police station immediately by her mother and later admitted to hospital where she was subjected to an examination by the Judicial Medical Officer.

Her birth certificate was an admitted document which has been marked as P-01 at the trial. The P-01 reveals that she was born on 24th July 1994.

PW-05 was a neighbour of the victim child. According to her evidence, she has seen PW-03 along with another girl going towards the house of the appellant at the time relevant to this incident. It was her evidence that although she did not see the appellant, she saw both the children going inside the house of the appellant. Later, when the mother of the victim child came and inquired about her daughter, she has informed her what she saw, which has alerted the mother of the child and the neighbours.

PW-01 was the mother of the child. When the child did not return as usual, and when she was informed that the child went inside the appellant's house, she and her neighbours have gone to his house. Since the door was closed, the door had to be forced open by the neighbours who gathered there and she has found her daughter inside the house and also the appellant. The victim child was in a corner of the room in a state of shock and was shivering heavily when PW-01 saw the child. Realizing what may have happened, she has immediately taken the child to the police and had lodged a complaint. It was also her evidence that when she saw the child on the floor, she had no undergarment and it was fallen nearby. She has taken that too to the police station along with the child.

She has also explained the circumstances under which the other child who was the witness number 04 named in the indictment, is not coming to give evidence in Court. According to her, she was married at that time and after hearing of what happened to her, more than fifteen years ago, her mother-in-law has chased her away from the house.

The police witnesses have given evidence in this action and has confirmed that a complaint was made on the day of the incident and the police witnesses have also given evidence in relation to their investigations into the incident.

The Judicial Medical Officer (JMO) who examined the child on 17th of August 2004 at 10.40 a.m., in the Matara General Hospital JMO's office has given evidence and marked his medico-legal report as P-02. The short history given by the victim to the doctor was consistent with the version of events narrated by her in Court, as well as the evidence of other witnesses. He has observed evidence of contusions over the genital region of the child and has opined that this had caused by an application of blunt force over the genital area although there was no evidence of vaginal penetration. He has also observed that she was having a Gonococci infection from the vaginal smear which indicates the sexually transmitted disease of Gonorrhoea, which is highly suggestive of sexual abuse. In his evidence, he has well explained that the blunt force observed by him was

suggestive of force between the labia of the child within her vulva. Explaining the presence of the Gonorrhoea infection, in the child, he has opined that when an inter labia sexual intercourse takes place and if there was a semen discharge, that semen can be applied on the labia and sometimes it may enter the vaginal passage which can lead to such an infection.

At the end of the prosecution case and when the appellant was asked for his defence, he has made a statement from the dock. He has denied the incident and has claimed due to a personal dispute he had over a land claim, they were against him and on the day of the incident, some eight to ten people came to his house and assaulted him, tied him up and handed over to the police. However, he has failed to disclose whom he meant by saying "they were against me."

Consideration of the Grounds of Appeal

All the grounds of appeal urged by the learned Counsel for the appellant will be considered together as they are interrelated.

I will now proceed to consider whether the evidence of the victim was credible and trustworthy and whether her story was probable before considering any other evidence placed before the learned High Court Judge at the trial.

As I have stated before, the victim had been 10 years of age when she faced this incident. She was 24 years of age and working as a teacher when she gave evidence in Court. If one looks at her evidence in its totality, it is abundantly clear that she was trying to erase the horrific memories of what she had to undergo on the day of the incident.

However, it is clear that through persuasion she has given evidence step by step and narrated in detail what happened to her.

In the case of **Perera Vs. The Attorney General (2012) 1 SLR 69, Ranjith Silva, J.** considering the credibility of the evidence of a victim observed as follows.

"It is inconceivable that one could apply the test of contemporaneity or spontaneity in rape matters especially in child rape matters. A perusal of the proceedings itself will give an indication as to how reluctant the victim was to come out with the story at the trial in the High Court. A fair amount of coaxing and persuasion which is justified under the circumstances was needed to extract the evidence from the victim."

I find that this was what exactly has had happened in this case as well, for reasons as considered earlier.

I am in no position to agree with the submission of the learned Counsel that the omissions in the evidence of the victim brought to the notice of the learned trial Judge are omissions that go to the root of the matter. I find that the highlighted omissions are trivial in nature which has not created any doubt as to the credibility of the victim's evidence.

Besides that, it is well-settled law that one cannot expect the evidence to be like a video recording of what happened when a person is giving evidence almost 15 years after an incident. Apart from the above, the victim was a 10-year-old child at that time and the circumstances under which she had to face this incident are concerned, her having forgotten some of the minute details of the incident should be expected.

At this stage, I find it appropriate to refer to the Indian case of **Bhoginbhai Hitijibhai Vs. State of Gujarat (AIR 1983-SC 753 at pp 756-758)** often cited in our Courts. It was held:

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 video tape 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.

When considering her evidence as a whole, it is very much probable, being a minor of 10 years of age, she and her friend who was also of similar age had been lured by the appellant to his house by offering food. She has well explained what she had to undergo inside the house of the appellant after he closed the door and took her to an inside room bed. Her statement as to what happened to her when the Judicial Medical Officer examined her was very much consistent with her evidence. The injuries on the genital examination of the victim child observed by the Judicial Medical Officer shows that she had contusions on both sides of the middle region of the vestibule, which is suggestive of inter labial penetration.

I am in no position to agree with the contention of the learned Counsel for the appellant that there was no evidence that the accused placed his penis between the labia of the victim child. On the contrary, the child has given clear evidence that the accused had been pressing his erected penis on her genitals and the semen came out of his semen as a result.

The relevant Section 363 (e) of the Penal Code as amended by the Act No. 22 of 1995 under which the appellant was charged reads as follows:

363 (e). With or without her consent when she is under 16 years of age, unless the woman is his wife who is over 12 years of age and is not judicially separated from the man.

Explanation-

1. **Penetration is sufficient to constitute sexual intercourse necessary to the offence of rape;**
2. **Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.**

Ranjith Silva, J. in the earlier mentioned case of **Perera Vs. The Attorney General** considered the following authoritative legal texts in this regard at **page 73** of the judgement.

In the book entitled **The Essentials of Forensic Medicine and Toxicology** by **Dr. K.S. Narayana Reddy** at **page 308** states as follows:

> *"The slightest penetration of the penis within the vulva, such as the minimal passage of glands between the labia or with or without the emission of semen or rupture of hymen constitutes rape. There need not be a completed act of intercourse. Rape can be committed even when there is inability to produce a penile erection. Rape can occur without causing any injury and as such negative evidence does not exclude rape."*

In the same book, the author at page 313, in regard to the rape of children opines,

> *"In young children there are few or no signs of general violence, for the child usually has no idea of what is happening and also incapable of resisting. The hymen is deeply situated, and as the vagina is very small it is impossible for the penetration of the adult organ to take place. Usually, the penis is placed within the vulva or between the thighs. As such the hymen is usually intact and there may be little redness and tenderness in the vulva."*

It was observed further, by **Ranjith Silva, J.**;

> *"It is my view that one should analyze the evidence in this case in the light of the above-mentioned expert medical opinion as the opinion expressed above is the opinion of almost all the text writers on forensic medicine and it has gained such notorious that any quote can take judicial notice of the same."*

It is my considered view that the evidence led in this action clearly establishes the fact that the offence of rape as described in Section 363 (e) of the Penal Code has been committed on the victim child by the appellant.

I find no merit in the argument that there was no corroboration to support the versions of events as narrated by the victim child. It is very much clear from the evidence as to the reasons as to why the other child relating to count number two of the indictment, which was a count of abduction, has not given evidence in Court. According to the evidence of other witnesses, the child was married when the case came up for trial and had been suffering again at the hands of her mother-in-law due to the discovery of the fact that she is a witness in this case. That may be the very reason why she has failed to appear before the Court to give evidence.

However, it was the evidence of a neighbour that she saw the victim child and the other child entering the house of the appellant.

It was the evidence of the mother of the child, that after hearing that her daughter entered the house of the appellant, she went to his house and the door was closed. Her efforts to get the door opened has failed. It was the neighbours who gathered had broken open the house door where they have found the appellant and the victim child inside. The victim child had been shivering and seated in a corner of the house when she was discovered. The mother and the neighbours have immediately taken the child to the police station and from there to the hospital. I find that these circumstances provide ample corroboration of the evidence of the victim child. There is no basis to conclude that there was no corroboration.

It is settled law that in a charge of this nature, even without corroboration, if the evidence of the victim is cogent and trustworthy, such evidence can be acted upon.

It was held in the case of **D. Tikiri Banda Vs. The Attorney General Bar Association Law Reports 2010 (BLR) 92**,

a. When the medical report is consistent with the version of a sexually harassed victim it can be taken as evidence consistent, and thus formed to some extent corroboration and is admissible under section 157 of the Evidence Ordinance (although that may not be corroboration in the strict sense).
b. 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 symptoms).
c. The offenders should not be allowed to capitalize or take mean advantage of these natural inherent weaknesses of small children.
d. Insignificant omission of such a victim or her utterance of dreadful words should not be taken as a contradiction having an effect or impact on the credibility of the victim.
e. If the evidence of the victim could be relied on, trustworthy, firm etc., there is no impediment on the part of the Court in acting solely on the evidence of the victim, and it is only when the evidence of the victim suffers from some infirmity or where the Courts believe that it would not be prudent to base a conviction solely on that evidence. The Court should look for corroboration.

I am of the view that this is a case where that the evidence of the victim child was cogent and trustworthy, and a case where her evidence has been supported by sufficient corroboration.

Therefore, for the reasons as considered above, I find no merit in any of the grounds of appeal urged by the learned Counsel for the appellant.

The appeal is dismissed as it is devoid of any merit. The conviction and the sentence affirmed.

However, considering the fact that the appellant has been in incarceration from the date of the conviction, it is directed that the sentence should deem to have taken effect from the date of the conviction namely 03-09-2020.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal