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

In the matter of an Appeal under Section 331 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.

The Democratic Socialist Republic of Sri Lanka

**Court of Appeal Case No. CA/HCC/0055/2021**

**High Court of Monaragala Case No. HC/73/2018**

**Complainant**

V.

Attanayake Mudiyanselage Ajith *alias* Bappa

**Accused**

AND NOW BETWEEN

Attanayake Mudiyanselage Ajith *alias* Bappa

**Accused–Appellant**

V.

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

**Complainant–Respondent**

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

**COUNSEL** : Migara Doss with Nirmal Kodithuwakku for the Accused – Appellant.

Panchali Witharana, State Counsel for the Respondent.

**ARGUED ON** : 09.11.2022

**WRITTEN SUBMISSIONS**
**FILED ON** : 18.04.2022 by the Accused – Appellant.

04.11.2022 by the Respondent.

**JUDGMENT ON** : 15.12.2022

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

1. The accused appellant (hereinafter referred to as the appellant) was indicted in the High Court of *Monaragala* on two counts of grave sexual abuse, punishable in terms of section 365B(2)(b) of the Penal Code in counts no.1 and no.2, and for committing sexual abuse in terms of section 345 of the Penal Code in count no.3. After trial, the learned High Court Judge convicted the appellant for the first count of grave sexual abuse and acquitted him of the second and the third counts. Thereafter, the learned High Court Judge proceeded to sentence the appellant to 15 years rigorous imprisonment, and in addition, imposed a fine of Rs. 10,000/- with a default sentence of 3 months simple imprisonment. The appellant was ordered to pay a further sum of Rs. 250,000/- as compensation to the victim, with a default sentence of 2 years rigorous

imprisonment. Being aggrieved by the above conviction and sentence, the appellant preferred the instant appeal.

2. Although the learned Counsel for the appellant has urged three grounds of appeal in his written submissions, at the hearing of this argument he only pursued the following ground of appeal.

    I. The evidence of the prosecution witness has been influenced in a manner so as to deny the appellant a fair hearing.

3. The brief facts of the case as per the evidence led by the prosecution are as follows,
   As per the testimony of the child victim (PW1), she had been about 9 years of age when the alleged offences were committed on her. The appellant was the uncle of the PW1, who was married to her mother's elder sister. The PW1 has been residing at her house with her sister (PW2) and her father (PW3). Her mother has been away working in *Colombo* and used to come and visit them about once a month. The appellant has come over to the PW1's house when her father was away and has committed the alleged sexual abuses on her. Her evidence was that, the appellant used to come over to her house and lift his sarong showing his private parts to her and her sister. On some other occasions, the appellant has got on top of her and placed his penis between her thighs. The PW1 also stated that, the appellant used to give the PW1 and her sister sweets and chocolates on some occasions when he came to their house. When the defence was called, the appellant has made an unsworn statement from the dock. While denying all the allegations against him, he has stated that, he used to wear the sarong short and so he doesn't know whether the victim saw anything or not.

4. The learned Counsel for the appellant submitted that, the learned High Court Judge has failed to evaluate the evidence properly. In that, the learned Counsel referring to page 3 of the judgment (page 161 of the appeal brief)

submitted that, the learned High Court Judge in his judgment has wrongly considered some evidence as unchallenged. It is observed that, the learned High Court Judge was right in observing some facts as unchallenged. Those facts were, the place in which the victim resided, the fact that her mother has been working elsewhere and has been coming home once or twice a month, the fact that the PW1 has been residing with her sister and her father, the fact that she had been studying in grade 5 in the year 2009 and the fact that the father of the PW1 has been cooking meals for the children daily and has been working as a labourer. These facts were elicited in evidence and were unchallenged.

5. The learned Counsel further submitted that, the PW1 has failed to inform the officers who audio recorded her statement that her clothes were removed or the fact that her skirt was lifted when the appellant committed the sexual acts on her. However, as rightly submitted by the learned State Counsel for the respondent, the fact that the PW1 failed to mention in her statement as to whether her clothes were removed or lifted when the sexual act was committed will not affect her credibility. The above omission does not go to the root of the matter, and therefore, will not be a reason to reject or doubt the testimony of the child victim.

6. The learned Counsel for the appellant further submitted that, the complaint to the police has been made eleven months later. It was further submitted that, although the PW1 in her evidence has said that she informed her father about the incident, the father has stated that he got to know about this incident from a friend. Upon being questioned by the police sergeant *Chithra* of the Child Protection Authority, the PW1 has stated that she told her father about the incident in which she was abused on the floor. However, the PW1's evidence suggests that she has initially avoided or has been reluctant in informing her father about the incidents. Her father's position was that,

although he had got to know about the incident from a friend, he was reluctant to ask the daughter about it.

"ප්‍ර: දුවගෙන් මේ අවස්ථාවේදී තමුන් ගිහිල්ලා ඇහුවාද?
උ: නෑ. අහන්න බෑ.
ප්‍ර: ඇයි ඒ අහන්න බැරි?
උ: අහන්න බෑ නේ එහෙම තාත්තෙක්ට දුවගෙන් අහන්න බෑ නේ."
(Page 106 of the appeal brief)

7. Analysing of the evidence of child victims of sexual offences was discussed in case of ***Thimbirigolle Sirirathana Thero v. Attorney General*** *CA/194/2015* the Court observed 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)*

8. The PW1 in this case had been about 9 years of age when the alleged sexual abuse occurred. When it comes to cases of domestic violence, especially in our culture, some children are reluctant to immediately complain to the parents or adults regarding sexual assault committed by an adult within the family. In the circumstances, the learned trial judge has rightly found the PW1 to be a credible witness and has accepted her evidence.

9. In case of ***Fradd v. Brown and Co. Ltd.*** *20 N.L.R. (Page 282)* it was held that,

> *"Where the controversy is about veracity of witnesses, immense importance attaches, not only to the demeanour of the witnesses, but also to the course of the trial, and the general impression left on the mind of the Judge of first instance, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a*

*Judge of first instance upon a point of fact purely is overruled by a Court of Appeal. ”*

10. In the instant case, the question turns on the demeanour and deportment of witnesses. The High Court Judge who heard the evidence of the child victim (PW1) who had the opportunity of seeing the demeanour and deportment of the PW1 has written the final judgment. Therefore, on factual matters like the credibility of the PW1, this Court would not disturb the findings of the learned High Court Judge.

11. The learned Counsel for the appellant submitted that, the PW1 in her evidence has said that there was vaginal penetration when the appellant sexually assaulted her. However, the medical evidence revealed that there had been no vaginal penetration. The officer of the Child Protection Authority who questioned the PW1 had asked,

“පළමු සාකච්ඡාකරු : එතකොට ඒ කරනකොට කකුල් දෙක කොහොමද ඇග ඇතුළටත් එයාගේ ඒ වූ කරන එක ගියාද?

සන්ධ්‍යා : ඕ. (දැරිය හිස ඉහළ පහළ සොලවයි.)”

(Page 416 of the brief)

It is obvious that a 9 year old girl child will not be mature enough to describe penile penetration. As explained by the Judicial Medical Officer, absence of injuries caused to the hymen or the inside the vagina will not exclude intercrural sexual activity. The PW1’s answer to the question on penetration into the vagina, will not affect the credibility of the evidence of PW1 regarding the sexual abuse caused to her by the appellant.

12. Further, the learned Counsel for the appellant submitted that, the learned High Court Judge has not only failed to properly consider the dock statement made by the appellant, but has also shifted the burden on to the appellant when considering his dock statement. The learned State Counsel submitted that, the learned High

Court Judge has not shifted the burden on to the appellant and has clearly analysed the dock statement. At page 7 of his judgment (page 165 of the brief) the learned High Court Judge has clearly reasoned out as to why he rejected the dock statement. The learned High Court Judge in his judgment has stated that, the position taken up by the accused in his dock statement was never put to the victim when she was cross examined. The learned High Court Judge has further stated that, the appellant has failed to create any doubt on the evidence adduced by the prosecution by his statement from the dock. Therefore, this cannot be considered as shifting of the burden of proof to the defence. In rejecting the dock statement, the learned High Court Judge has also taken into consideration what was said by their Lordships in case of ***Jayantha Wijeratne v. AG 2013*** *(CA Appeal No. 218/2018).*

13. The learned Counsel for the appellant submitted that, the prosecution has failed to elicit the exact date on which the PW1 was abused. According to the evidence of the PW1, she was sexually abused by the appellant on several occasions. The above issue was also discussed at length in case of ***Thimbirigolle Sirirathana Thero v. Attorney General*** CA/194/2015. It was held that, in cases of sexual offences against children, the victims very often find it difficult to remember the exact date of the offence by the time they testify in court after a long lapse of time. However, the accused should not be deprived of a fair trial. This aspect was sufficiently discussed in case of ***R. V. Dossi***, 13 Cr.App.R.158.

> *"In Dossi (supra), it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided that there is no prejudice,*

*below) where it is clear on the evidence that if the offence was committed at all it was committed on the day other than that specified.*

*In case of Wright V. Nicholson 54 Cr.App.R.38, it was held that the prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in Dossi if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation, as to the importance of the provision of such particulars in the context of the right to fair trial under art.6 of the ECHR."*
(Archbold Criminal Pleading Evidence and Practice 2019, 1-225 at page 83).

This position was accepted and followed in ***Pandithakoralage v. Selvanayagam*** *56 N.L.R. 143*.

14. Neither in his dock statement nor when the prosecution witnesses gave evidence, has the appellant taken a defence of alibi. All what he stated in his dock statement was that, he used to wear the sarong short and therefore he doesn't know whether the victim saw anything or not. Hence, providing a time period as the date of offence has not caused any prejudice to the appellant.

15. Although the learned Counsel for the appellant submitted that the sentence imposed on the appellant by the learned High Court Judge is excessive, the learned Counsel was not able to submit any valid reasons to show that the sentence imposed on the appellant by the learned High Court Judge was illegal or wrong in principle. In the above premise, I find that there is no merit in the ground of appeal pursued by the learned Counsel for the appellant.

16. Therefore, I am of the view that, there was sufficient evidence adduced by the prosecution to prove beyond

reasonable doubt, the offence mentioned in count no.2 as well. However, the learned High Court Judge has only convicted the accused on count no.1. There is clear evidence adduced in Court to prove that the accused committed the offence mentioned in count no. 2 (apart from the similar offence mentioned in count no.1). However, as the Hon. Attorney General has not preferred any appeal against the acquittal of the appellant from count no.2, I will not consider the acquittal in count no.2.

17. Thus, I affirm the conviction and sentence imposed on the appellant by the learned High Court Judge.

Appeal is dismissed.

**PRESIDENT OF THE COURT OF APPEAL**

**WICKUM A. KALUARACHCHI, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**