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/0168/20

High Court of Kalutara

Case No: HC/201/16

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Kottagodage Don Indra Kumara

ACCUSED

AND NOW BETWEEN

Kottagodage Don Indra Kumara

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Darshana Kuruppu with Jayaba Kalupahana for the Accused Appellant
	: Maheshika Silva, DSG for the Respondent
Argued on	: 26-01-2023
Written Submissions	: 25-10-2021 (By the Accused Appellant)
	: 18-05-2022 (By the Respondent)
Decided on	: 15-03-2023

Sampath B Abayakoon, J.

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

The appellant was indicted before the High Court of Kalutara for committing three acts of grave sexual abuse between the period of 1st November 2011 to 12th July 2012 on a minor, an offence punishable in terms of section 365 B (2) (b) of the Penal Code.

Of the three counts, the first count had been preferred on the basis that the appellant inserted his fingers into the vagina of the minor mentioned who is his own daughter.

The second and the third counts had been preferred on the basis that he engaged in intercrural sex with the same minor.

After trial, the learned High Court Judge of Kalutara by his judgement dated 21st July 2020 found the appellant guilty of all three counts preferred against him.

He was sentenced to 18 years rigorous imprisonment on each of the three counts and was also ordered to pay a fine of Rs. 10,000/- each. He was sentenced to 6 months simple imprisonment each on all three counts in default of paying the fine. In addition, he was ordered to pay Rs. 250,000/- to the victim as compensation and in the event of his failure to pay, it was ordered to recover that amount as a fine, and he was sentenced to one-year simple imprisonment in default.

Facts in Brief

The victim child who has given evidence as PW-01 at the trial was about 13 years of age during the period she had to face these incidents of sexual abuse. When she gave evidence in Court, she was 21 years of age and was a student preparing for her Advanced Level Exam for the 3rd time. She has two brothers younger to her.

In her evidence, she has stated that she faced these sexual abuses for the 1st time when she was studying in grade eight and in the latter part of the year 2011. During that period, she has been living with her father along with her two siblings. Her mother has left the matrimonial home in September 2010 due to the disputes her parents had over their matrimonial life.

During the time relevant to these incidents, she has been living in a place called Morapitiya, which was her father's village. Before she came to live in Morapitiya, she and her family had been living in Ratnapura area and her mother has left the house while they were living in Ratnapura. Although they have been living in Ratnapura even after the mother left the house and schooled there, her father has taken them to Morapitiya and had admitted the victim and her two brothers to a school in the area.

After living in a house of a relative for few months, the appellant has taken them to a partly built house where they have been living when the incidents of sexual abuse took place. It was also her evidence that she attained puberty while she

was living with the family in Ratnapura and her mother left the house on the day they had a party to celebrate her attaining of puberty.

She has explained the way she, along with her father and two brothers used to sleep in the house, where she says that there was only one bed and no electricity. She and her two brothers used to sleep on the bed, while the father was in the habit of sleeping on a mat nearby.

Explaining the first incident faced by her, it was her evidence that, while sleeping on one day, she awaked, and found that her father has taken her to the mat where he was sleeping. She has seen her father shaving her lower part of the body, and when she cried, the father stated that,

> "කෑ ගහන්න එපා, මේවා මම පොඩි කාලේ අල්ලලා තියෙනවා, දැන් මොකද බැරි."
>
> (Page 62 of the appeal brief)

She has noticed that her clothes have been removed and she was naked. Her two brothers were studying in grade 06 and grade o4 respectively at that time, and had been sleeping on the bed. It was her evidence that after stating as mentioned earlier, he fondled her breasts and inserted a finger into her vagina despite her protests and cries.

It had been her evidence that this incident happened about two weeks after she was severely beaten, stripped naked and forced to be on the water of a nearby stream by the father, because of a birthday card given to her by a boy. She has stated that following earlier mentioned incident too, the father sexually assaulted her when she was about to go to school in the morning.

It had been her evidence that she managed to obtain her mother's phone number and informed her that she cannot stay with the father, but the mother did not respond to her messages.

Explaining further of the sexual harassments faced by her, she has stated that during the December school vacation in the year 2011, she and her brothers along with the father went to Ratnapura where her grandparents lived. They have

stayed for the night in the house where they lived while living in Ratnapura, which was nearby. On one morning, she and her brothers wanted to go to the grandparent's house, but her father told her to stay while her brothers were allowed to go to their grandparents. It was her evidence that on that day too, her father committed sexual abuse on her. She has explained the abuses faced by her stating that the father fondled her breasts and licked her vagina using his tongue. Later in her evidence, she has stated that the father engaged in intercrural sex with her while in Ratnapura. However, she has stated that she cannot remember whether these two incidents happened on the same day or on two separate occasions.

Explaining what led to her leaving the father, she has stated that on 23rd February 2012, her mother came to the school where she was studying and wanted her to come with her. Although she said that she cannot leave her brothers because she was the one who used to prepare meals and feed them, she ultimately left with her mother and went to Balangoda where her mother lived at that time, and later made a complaint to the police.

Under cross-examination, it had been revealed that after she was taken to Morapitiya area and admitted to a school there by her father, once she returned to her mother, she could not get admitted to another school until November 2012, because she could not obtain the school-leaving certificate from the school she attended in Morapitiya. She has explained that due to fear, they could not go to the father's village, and only with the intervention of the police, the school-leaving certificate was obtained.

It appears that she has been cross-examined extensively by the learned Counsel who represented the appellant at the trial. It is clear from her evidence that although she has referred to several incidents of grave sexual abuse committed by her father, other than giving a time period, she had not been able to give specific dates as to the incidents to the Court at the trial. It becomes clear that she has forgotten the intricate details of some of the sexual abuses faced by her.

It had been suggested to her that she was uttering something that did not occur, and because her father assaulted her due to the birthday card received by her from a boy.

It had been suggested further that after going to the mother and the attempts made by them to obtain the school leaving certificate did not materialize, the victim and her mother went to the police and made a false complaint against the appellant and that is the reason why she could not remember some of the details of the incidents which are against her.

The mother of the victim (PW-02) in her evidence has narrated what led to her leaving the husband and the children in 2009. It was her evidence that her married life was a miserable one where she was subjected to frequent cruelty, and she was forced to leave the house on the day where there was a function to celebrate the attainment of puberty of the victim. It was her evidence that she came to know later that her husband has taken the children from Ratnapura to his home village and had admitted them to a school in Morapitiya. She has not visited them in Morapitiya because of her fear for the life at the hands of the appellant.

She has received an information from a fellow villager of the appellant somewhere in the latter part of 2011 or early part of 2012 that her daughter was severely beaten up by the appellant. It was her evidence that she made a complaint to the police and Child Protection Authority but could not get the children back to her and the police wanted her to go and live with the appellant.

Subsequently, in early 2012, she has received a phone message from her daughter stating that she cannot live with her father and to take her back. As a result of that, she has gone with some known persons to the school where the victim was studying and taken the victim under her care. She has been forced to live with a relative and later has gone to work in a garment factory while looking after the victim.

It was her evidence that initially her daughter did not tell her about any sexual harassment faced by her, but it was one Tekla who was unknown to her at that time, and a person living in Morapitiya where her husband also lived, who gave her a call and informed about the assault of the victim by the appellant. It was she who has requested her to probe into it further. It was her position that although her daughter informed her the incident of assault faced by her upon questioning, she did not say anything in detail about her being sexually abused by the appellant. It was her evidence that what she told her was that the appellant used to take her down and sometimes used to fondle her inappropriately. It was her position that when she went to the Child Protection Authority and made a complaint in this regard only the victim came out with the sexual abuse incidents faced by her.

It was her evidence that the earlier-mentioned Tekla informed her about the incidents about two weeks after she took the victim under her care, but did not go to police until about three months after Tekla informed her of the harassments faced by the victim. It was her position that she initially was careful about the information because she believed that it may even be a trap set up by the appellant, and decided to go to police only after being convinced of what she heard.

Under cross-examination, she had admitted that she is now living with another person whom she knew even before she left the matrimonial home. It was her position that it was her intention to take the other two children too under her care, but she was unsuccessful in that regard. To the suggestion that she has concocted a story against the appellant, it was her position that she had nothing to gain from her child by making up a false allegation against the appellant. She has denied that this complaint was lodged against the appellant because she could not obtain the school leaving certificate, stating that it was not a reason for her to make such an allegation.

The earlier mentioned Tekla, (PW-03) has given evidence in this action. She has confirmed that it was she who alerted the mother of the victim about the harassments faced by the victim. According to her evidence, the appellant was a classmate of hers and well known to her. It was the appellant who has provided the phone number of the mother of the victim telling her to call the number and find out where she and the victim were living.

However, it was her position that since she knew that the victim child was subjected to assault and harassment, she informed the mother to look into her daughter's condition. It was her evidence that even to her, the victim did not divulge in detail the sexual assaults faced by her, than making a general statement and neither did she inquire further, other than alerting the mother of the victim.

The Judicial Medical Officer (JMO) who has examined the victim after the relevant complaint was lodged has given evidence in this action producing his Judicial Medial Report marked as P-03. Under the history given by the patient, it has been stated that the victim is complaining about sexual harassments by the father. It has been his opinion that given the history, such acts could not be excluded as such things can happen without any telltale marks.

The prosecution has called the police officers who conducted investigations into this matter as well, to substantiate the prosecution case.

When called for a defence at the conclusion of the prosecution case, the appellant has made a statement from the dock. Although he has made a lengthy statement and narrated the relationship he had with his wife and the family, other than denying the charge against him, he has not stated anything that could be understandable to the trial Court in relation to the charges preferred against him.

The appellant has called his elder son who was the younger brother of the victim to give evidence on his behalf. At that time, he was 20 years of age, employed and living with the appellant. He has stated in his evidence that his father was

innocent of the charges and claimed that he has never seen any sexual abuse of his sister by the father. It has been his stand that such abuse cannot take place in the small room which they were living without him or his brother being alerted during the night, though they may have been sleeping.

The appellant has called one Kodithuwakku Arachchilage Ariyawathi on his behalf to testify that she did not tell witness Tekla that the appellant was in the habit of assaulting the victim child. The other witness called by the appellant was Nimesha Madushani who was his elder brother's wife. She has denied the evidence where the victim child has stated that after she was assaulted, stripped naked by the appellant, and made to stand in water, it was she who gave her a bed sheet to cover her up. She has claimed that she never saw the victim child being assaulted by the appellant.

The Grounds of Appeal

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

1. The learned High Court Judge had erred in law by perusing and relying upon the statement of the victim to convict the appellant for the 2nd and 3rd counts preferred against him.
2. The learned High Court Judge has shifted the burden on the accused to disprove or challenge the prosecution case and misdirected on the concept of reasonable doubt.
3. The learned High Court Judge has failed to consider that there was ample evidence in the case record to say that the charges against the appellant have been fabricated at the instance of the mother and her paramour in order to obtain the school-leaving certificate.
4. The learned High Court Judge has failed to consider that the story of the prosecutrix was not probable and had been contradicted by the medical evidence.

5. The appellant was denied a right to a fair trial by applying two different standards in examining the evidence of prosecution and that of the defence, and also by remanding the appellant until the conclusion of the evidence.

It was the contention of the learned Counsel for the appellant that the learned trial Judge was misdirected as to the burden of proof and the concept of reasonable doubt in a criminal case. Referring to the views expressed by the learned High Court Judge at page 07 of the judgement (page 355 of the appeal brief), it was his view that the learned High Court Judge has considered the reasonable doubt concept in relation to civil actions and therefore has come to wrong conclusions by determining that a mere doubt is not a reasonable doubt.

It was the position of the learned Counsel that the learned High Court Judge has referred to the facts that was not in evidence at page 18 and 19 (at page 366 and 367 of the appeal brief) of the judgment, but are in the statement made by the victim to the police and had come to wrong conclusions which vitiates the findings of the learned High Court Judge.

Commenting on what the learned High Court Judge has stated at page 44 of the judgement (page 392 of the appeal brief) where it has been stated that when the appellant made his dock statement, although he has made several allegations against the witnesses, when the relevant witnesses were giving evidence, the appellant has failed to confront them with such. It was his position that such a determination amounts to shifting of the burden of proof to the appellant. Referring to what has been stated at page 57 (at page 405 of the appeal brief) it was his view that the learned trial judge has shifted the burden of proof again when it was stated that "එකී ලිංගික අතවර කිරීමේ ක්‍රියාව පිළිබඳ සාධාරණ සැකයක් ඇතිවෙන කිසිදු කරුණක් චිත්තිය මගින් අනාවරණය නොකරයි."

Pointing out several instances of the evidences of the victim, it was the position of the learned Counsel that her evidence has several infirmities and omissions

which has created a reasonable doubt as to whether the appellant has committed these acts as alleged.

He pointed out to the fact that the mother of the victim has taken three months after she was informed of these alleged sexual abuses to lodge a complaint with the National Child Protection Authority, which in his view was a delay that was not acceptable. It was his view that this explains that it was the mother who has instigated such a false complaint against the appellant.

Commenting on the decision by the learned High Court Judge to remand the appellant until the conclusion of the trial, it was the view of the Counsel that this action has denied a fair trial towards his client. It was the position of the learned Counsel that the learned High Court Judge has failed to consider the defence put forward by the appellant and the evidence of the witnesses called on behalf of him in its correct perspective, especially the evidence of the son of the appellant who was the younger brother of the victim.

In her submissions before the Court, the learned Deputy Solicitor General (DSG) conceded that although the indictment preferred against the appellant was based on two instances of intercrural sex out of the three charges, there was no evidence placed before the Court to prove the 3rd count preferred against the appellant. The learned DSG conceded that in her evidence, the victim speaks about only one incident of intercrural sex, apart from the other instances of grave sexual abuse she has to endure from her father who is the appellant.

It was pointed out that the victim child was in a helpless position right throughout her ordeal and exposed to frequent violence. It was her position that there was no basis to doubt the evidence of PW-01 given the factual situations and the circumstances under which she has given evidence in Court. It was her contention that the mother of the victim has only attempted to provide an education to the child and there was no basis to conclude that the mother instigated the victim to concoct a story against the appellant, because of her

failed marriage with the appellant and because he did not give consent to obtain the school leaving certificate of the child.

Pointing to the evidence placed before the Court, it was the view of learned DSG that the 1st and the 2nd count preferred against the appellant has been established beyond reasonable doubt. However, she agreed with the Counsel for the appellant that what is stated at page 18 of the judgement (at page 366 of the appeal brief) as evidence given by the victim was not in the evidence given before the trial Court. However, it was the view of the learned DSG that this misdirection by the learned High Court Judge in his consideration of the evidence placed before the Court has not created any prejudice to the appellant or occasioned a failure of justice as the evidence led at the trial clearly establishes the culpability of the appellant for the 1st and the 2nd charges for which he was convicted.

It was the view of the learned DSG that the learned High Court Judge has well considered the relevant evidence as a whole to come to his findings which need no disturbance. The learned DSG expressed the view that the learned High Court Judge has well considered the defence put forward by the appellant and has followed the correct principles of law in that regard as well.

Consideration of the Grounds of Appeal

Although the learned Counsel for the appellant urged five separate grounds of appeal for the consideration of the Court, I will now proceed to consider the said grounds of appeal as a whole, since they are interrelated.

However, I wish to consider and comment on the 3rd ground of appeal where the learned Counsel urged that there was ample evidence placed before the Court to establish that this was a fabricated case against the appellant at the instigation of the mother of the victim and her paramour, and also in order to obtain victim's school leaving certificate, before considering the other grounds of appeal.

As I have commented before, the victim child was about 13 years old during the time relevant to these alleged incidents and had been living with the appellant

who was her father, along with her two younger brothers. Her mother has left the matrimonial home due to the disputes she had in her married life with the appellant. The appellant had taken the children from the house where they were living in the Ratnapura area to his home village and admitted the victim and her two brothers to a school in the area.

When the victim gave evidence in Court, she was a 21-year-old student preparing for her advanced level examination for the 3rd time. It clearly appears from her evidence that she was a very reluctant witness to come out in open Court the sexual abuse faced by her. I am of the view that this is a quite understandable behaviour of a young woman who had to undergo sexual abuse as claimed, at the hands of her own father, given the social stigma attached to such an incident and given the fact that it is she who has to live her life with the shame and embarrassment she has to endure. It is clear from the evidence that the victim has been forced to suffer silently because of her inability to communicate with anyone who is responsible and trustworthy enough for her to inform her situation.

Delay is a subjective factor which may vary according to circumstances. It was held in the case of **D. Tikiribanda Vs. Hon Attorney General 2010 BLR 92** that;

> *"If delay of making a statement is explainable, the evidence of a witness should not be rejected on that ground alone."*

In **Sumanasena Vs. Attorney General (1999) 3 SLR 138**, it was held that;

> *"Just because the witness is a belated witness, the Court ought not to reject his testimony on that score alone. Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable, the Court could act on the evidence of a belated witness."*

It is clear from the victim's evidence as well as the mother's evidence, that the mother has not responded initially to the text message sent by the victim

indicating that she cannot live with her father and requesting her to come and take her. It appears that under these circumstances only she has spoken to PW-03, Tekla and given her an indication that she is facing sexual harassment at home. I am of the view that her not mentioning of what was happening to her in detail is quite understandable under the circumstances. Even after she was taken from school by her mother, she has not directly informed the mother, the sexual abuses she had to face other than saying that in general terms to her.

It was after PW-03 Tekla alerted her only the mother has taken steps to make a complaint to the National Child Protection Authority, which has initiated investigations in this regard. Although it has taken several months for the mother of the victim to obtain the school-leaving certificate from her earlier school, there is no evidence placed before the Court to indicate that it was the reason why the complaint was made against the appellant. It is clear from the evidence that the victim and her mother was fearful of going to the area where the appellant lived to obtain the school leaving certificate. It was only some months after the complaint was made, they have gone to the school with the assistance of the police and obtained the school-leaving certificate.

It is very much clear from the victim's mother's evidence that she was telling the truth as to what the victim stated to her. If it was her intention to fabricate a story against the appellant, she could have stated in much detail as to what her child told her. However, it is clear from the evidence of the mother and even from the evidence of PW-03 Tekla, that the child had been very reluctant to come forward in any greater details of the sexual abuse faced by her, obviously, because it was against her own father, she has to come out with such grave sexual abuse allegations. It was only after she was asked to make a statement to the police, she has given the full details of her ordeal which is quite understandable under the circumstances.

For the reasons given as above, I find no reason to accept that this is a story concocted at the instigation of the mother of the victim and her paramour, hence no merit in the considered ground of appeal.

I am in agreement with the learned Counsel for the appellant that the learned High Court Judge has cited irrelevant judgements when he discussed the concept of reasonable doubt in his judgement.

The cited judgement **Ramaswamy Chetty Vs. Uduma Lebbe Marikkar 5 NLR 310** is a matter that has been decided on a promissory note in a civil action where it has been decided that no reasonable doubt exist as to the *bona fides* of the defence and it is the duty of the District Court to permit the defendant to appear and defend the case without security. The cited case **Moses Vs. The State (1999) 3 SLR 401** is a case where a failure by a trial Judge to give reasons in the judgement was considered.

However, I am unable to agree with the contention that the learned High Court Judge was misdirected as to the concept of reasonable doubt that needs to be considered in a criminal case. It is clear that what the learned High Court Judge has considered was that in a criminal case, beyond reasonable doubt does not mean without any iota of doubt.

For matters of clarity, I would now reproduce the relevant portion of the judgement which appears at page 6 and 7 of the judgement (at page 354 and 355 of the appeal brief).

> "එසේ අධිකරණයට පිළිගත හැකි සාක්ෂි මගින් සාධාරණ සැකයෙන් තොරව පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද අධිචෝදනාවන් ඔප්පු කරන තෙක් චිත්තිකරුට නිදෝශිභාවයේ පුවර්ි නිගමනයේ ආරක්ෂාව පවතී. සාධාරණ සැකයෙන් තොරව ඔප්පු කිරීම යනුවෙන් හඳුන්වනු ලබන්නේ පැමිණිල්ල විසින් ඉදිරිපත් කරන සාක්ෂි මගින් හෙළිදරව් වන කරුණු මත නාම මාත්‍රික සැකයක් ඇති කිරීම පමණක්ම නොවේ. සැකය උපදවන කාරණය කෙරෙහි සැකය හැර වෙනත් මතයකට පැමිණීමට නොහැකි තරම් එම කරුණු මත සැකය ප්‍රභල වී ඇත්නම් එවැනි තත්වයක් යටතේ එම කරුණු සම්බන්දයෙන් සාධාරණ සැකයක් ඇති වී ඇති බවට අධිකරණයට තීරණය කල හැක."

In the case of **State of Punjab Vs. Karnail Singh (2003) 11 SCC 271**, it was held,

> "*Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. Vague hunches cannot take place of judicial evaluation. 'A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties.' (Per Viscount Simon in Stirland Vs. Director of Public Prosecution (1944 AC(PC) 315) quoted in State of U.P. Vs. Anil Singh (AIR 1988 SC 1998). Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.*"

I find that the learned High Court Judge has considered the evidence placed before the Court by the prosecution as well as the defence with a sound understanding of the burden of proof required in a criminal case and the concept of reasonable doubt that can be arisen in such a situation in order to come to his findings. I find no merit in the ground of appeal urged in that regard either.

In this matter, the learned DSG conceded that the victim has spoken about only one incident of intercrural sex committed by the appellant towards her, although the 2nd and the 3rd count against the appellant has been formulated on the basis of two such acts committed on two occasions. The learned DSG agreed that she is in no position to defend the conviction of the appellant against the 3rd count preferred against him.

It is clear from the evidence that the victim has spoken about one incident of intercrural sex, although it appears that the grave sexual abuse towards her has been a continuous process. However, since the victim has spoken about only one incident of intercrural sex, I find no basis for the appellant to be convicted for the 3rd count preferred against him. I find that the learned High Court Judge was misdirected as to the evidence adduced at the trial when it was determined that the witness has stated about two occasions where the appellant committed acts of intercrural sex.

Although it was the contention of the learned Counsel for the appellant that the learned High Court Judge has made use of the statement made by the victim to police in that regard, I have no basis to agree. It is true that the witness has not spoken about two separate occasions of intercrural sex, but she has spoken about sexual advances made by the appellant towards her from time to time. However, she has given firm and cogent evidence on one occasion where she was subjected to intercrural sex. It appears that the learned High Court Judge has misdirected in this regard. Since the prosecution is now conceding that the 3rd count against the appellant has not been proved. I find that such a misdirection has not caused any prejudice to the appellant or has occasioned a failure of justice.

Article 138 of the Constitution is the general provision upon which the Court of Appeal has been provided with the appellate jurisdiction.

The proviso of Article 138 of the Constitution reads as follows;

"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

I am of the view that there was ample evidence placed before the trial Court in relation the 2nd count where intercrural sex has been alleged against the appellant, and also the 1st count preferred against him.

I am in no position to agree with the contention that the story of the appellant as to what happened to her was not probable and medical evidence does not support her version of events.

As I have stated before, her evidence needs to be looked at in relation to the conditions upon which she had to face this type of sexual abuses. As considered earlier, she has been a reluctant witness who was making an effort to erase her experiences from her memory. This clearly reflects by what she has stated to the question posed by the defence that she is replying to the matters not in favour of her as matters that she cannot remember.

The relevant answer which appears on page 105 of the brief reads as follows.

> "දැන් අවුරුදු 08 වෙනවා. මට ඒ කිසිම දෙයක් මතක නැහැ. නඩුව කතා කළේ නැති නිසා මම ඒක අමතක කරලා මගේ අධ්‍යාපන කටයුතු වල යෙදුනා. නඩු වාර 07 ක් යනතුරුත් මම දන්නේ නැහැ නඩුව කතා කරනවා කියලා. ඉතින් මම මේවා අමතක කරලා අධ්‍යාපන කටයුතු වල යෙදුනා. මේවා මම මතක තියාගෙන හිටියේ නැහැ."

It becomes clear that there would not be evidence of grave sexual abuse in the way it has been committed when a Medical Officer examines a victim some months after the alleged incidents. I am of the view that there is no basis to argue that the medical evidence does not support the version of events by the appellant.

It is settled law that a witness, especially a child sexual abuse victim would not be able to narrate what happened to her giving exact dates or giving a

chronological explanation of the events due to various factors and circumstances.

It was held in the Court of Appeal Case of **D. Tikiribanda Vs. The Attorney General-decided on 06-10-2009** reported in **Bar Association Law Reports 2010 (B.L.R.) 92** that;

> *"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 symptom). The offenders should not be allowed to capitalize or take mean advantage of these natural inherent weaknesses of small children."*

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)** very 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.*

3) *Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

4) *A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the*

fear of looking foolish or being disbelieved though the witnesses is giving truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.

I find that the victim's evidence was cogent and trustworthy and has not created any doubt in that regard, given the facts and the circumstances when taken as a whole.

I find it relevant to mention the Indian Supreme Court decision in the case of **State of Punjab Vs. Gurmeet Singh and others (1996) 2 SCC 384,** where it was held that;

"The Court must, whilst evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as it involved in the commission of rape on her."

The learned High Court Judge has decided to keep the appellant in remand custody and continue with the trial, which may be due to the fact that the appellant was the father of the victim and the other main lay witnesses are his wife and a villager from his village who are females, and due the facts that were revealed in the evidence of PW-01.

It can be stated that a fair trial has been denied to the appellant if the learned High Court Judge has taken that fact into consideration in his judgement. I find that nowhere in the judgement, the learned High Court Judge has considered the fact that the appellant was kept in remand custody during the trial as a reason for his conclusions.

I am unable to agree with the contention that the learned trial judge has applied different standards when he considered the prosecution evidence and the evidence of the defence. It is trite law that a trial judge needs to consider the prosecution as well as defence evidence in the same footing and come to a finding

whether the prosecution has proved its case beyond reasonable doubt or else, whether the defence taken up by an accused person has created a reasonable doubt in that regard, or has provided a reasonable explanation against the evidence placed before the Court by the prosecution.

I find that the learned High Court Judge has considered the dock statement made by the appellant and the evidence of the two witnesses, including the son of the appellant, in order to consider whether it has created a reasonable doubt on the cogent and trustworthy evidence adduced by the prosecution to prove the charges against the appellant. The learned High Court Judge has drawn his attention to the fact that although the appellant has made certain allegations against his wife and PW-03 Tekla in his dock statement, he has failed to confront the said witnesses when they gave evidence in Court under oath in that regard.

I find that the learned High Court Judge was correct in his determination that the allegations made by the appellant against the said two witnesses are clear afterthoughts which have not created a doubt in their testimony. The learned High Court Judge has well considered the evidence of the son of the appellant to conclude that his evidence cannot be relied upon, and the evidence of Ariyawathi as well, by giving clear reasons as to why he is rejecting the evidence of those witnesses.

For the reasons considered as above, I find no merit in the above considered grounds of appeal as well.

I find that the appeal is devoid of any merit in relation to the first and second count preferred against the appellant. Therefore, I affirm the conviction in relation to the said counts and dismiss the appeal of the appellant up to that extent.

However, for the reasons aforesaid, I allow the appeal in relation to the conviction of the appellant for the 3rd count preferred against him, as it cannot be allowed to stand. Therefore, I acquit the appellant on the 3rd count preferred against him.

Having considered the fact that the appellant has been sentenced to a rigorous imprisonment periods of 18 years each on each of the two counts to be effective consecutively to each other, which amounts to 36 years in prison, I am of the view that it is a sentence that is not warranted, given the maximum sentence that can be imposed to a person convicted for such an offence and also given the fact that the offences have been committed during a same period of time.

Hence, I order that the two sentences imposed on the 1st and the 2nd count shall run concurrently to each other.

The fines imposed in relation to the 1st and the 2nd count and the default sentences as well as the compensation ordered and the default sentence shall remain the same.

Having considered the fact that the appellant has been in incarceration from his date of conviction, it is also ordered that the sentence shall deem to have commenced from the date of his conviction namely, 21st July 2020.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal