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

In the matter of an Appeal made under 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 Case No.
CA/HCC/ 0342/2018
High Court of Monaragala
Case No. HC/55/2017

Wannige Priyantha Wijebandara alias Dany Priyantha

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Niroshan Mihidukulasuriya for the Appellant.**
Anoopa de Silva, DSG for the Respondent.

ARGUED ON : **31/01/2023**

DECIDED ON : **17/03/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General under Sections 354 and 365 B (2) (b) of the Penal Code for committing the offence of Kidnapping from lawful guardianship and Grave Sexual Abuse on Kankanam Kapuge Tharushika on 02/06/2013.

The trial commenced on 12/02/2018. After leading all necessary witnesses, the prosecution closed the case. The learned High Court Judge had called for the defence and the Appellant had made statement from the dock and closed his case.

The learned High Court Judge after considering the evidence presented by both parties before him and his predecessor, convicted the Appellant as charged, and sentenced the Appellant to 05 years of rigorous imprisonment and imposed a fine of Rs.5000/- subject to a default sentence of 03 months simple imprisonment for the first count.

For the second count the Appellant was sentenced to 12 years of rigorous imprisonment and imposed a fine of Rs.5000/- subject to a default sentence of 06 months simple imprisonment.

In addition, a compensation of Rs.300000/- was ordered with a default sentence of 03 years rigorous imprisonment. The Learned High Court Judge had further ordered the sentences imposed on count one and two to run concurrent to each other.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom platform from prison.

The Facts of this case *albeit* briefly are as follows.

According to PW1 - the victim of this case, she had been about 08 years old when she faced this bitter ordeal. When she gave evidence, she was 12 years old and was schooling. The victim and her other two siblings had been staying with the grandparents at the time of the commission of the offence as her father had deserted the family when she was a small girl. Her mother was suffering from a mental illness. Hence, the children were looked after by the grandparents.

In the afternoon on the day of the incident, being a school holiday, when the children were playing, the Appellant had called the victim from a distance to take an axe to the village temple. At that time, the grandparents were not at home as they had gone for employment. When the victim went near the Appellant to collect the axe, the Appellant forcibly held her and had taken under a nearby tree, made her lie on the ground on his sarong laid under the tree. After removing the skirt and the pair of shorts of the victim, the Appellant had kept his male organ between her legs close to her vagina and committed grave sexual abuse on her. Although she resisted, she could not escape from the captivity of the Appellant. The victim was freed after having seen the approach of somebody. She had divulged this incident to her

grandmother when she came home after two days. By this time, someone had given an anonymous called to the police under emergency number 119.

The JMO who had examined the victim had opined that the examination findings of genital area are consistent with alleged sexual abuse involving genital area.

After the closure of the prosecution's case, the defence was called, and the Appellant had given statement from the dock and closed his case.

The following Grounds of Appeal were raised on behalf of the Appellant:

1. The Learned High Court Judge misdirected himself with regard to the Medical Evidence.
2. The Learned High Court Judge had failed to consider the failure of the prosecution to call PW4.
3. The Learned Trial Judge had failed to consider the glaring contradictions which diminish the credibility of the victim.

In a case of this nature, the testimonial trustworthiness and credibility of PW1, mainly the probability should be assessed with utmost care and caution by the trial judge. The learned Trial Judge must satisfy and accept the evidence of a child witness after assessing her competence and credibility as a witness. Hence, before analysing the grounds of appeal advanced in this case, I consider it of utmost importance that the following authorities from other jurisdictions on the topic be appraised.

It was recognized in England as early as 1778 that children could be competent witnesses in criminal trials.

In **R v. Brasier168 Eng. Rep.202 [1779]** the court held:

> "…….*that an infant, though underage of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take oath, their testimony cannot be received ….".*

In **Ratansinh Dalsukhbhai Nayak v. State of Gujarat [2004] 1 SCC 64** the court held that:

> *"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness".*

In **Ranjeet Kumar Ram v. State of Bihar [2015] SCC Online SC 500** the court held that:

> *"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one".*

In **R v. Baker EWCA Crim 4 [2010]** Lord Chief Justice (England and Wales of Court of Appeal) held that:

> *(At para 40) "….. We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However, children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristic of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence".*

In **R v. B. (G),1990 CanLII 7308 (SCC); [1990] 2 S.C.R. 30, at pp.54-55** the Court held that:

> *"...it seems to me that he was simply suggesting that the judiciary should take a common-sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children".*

E.R.S.R Coomaraswamy in his "Law of Evidence" Volume 2 Book 2 at page 658 has stated referring to child witness;

> "There is no requirement in English law, that the sworn evidence of a child witness needs to be corroborated as a matter of law. But the jury

should be warned, not to look for corroboration, but of the risks involved in acting on the sole evidence of young girls and boys, though they may do so if convinced of the truth of such evidence…….This requirement is based on the susceptibility of children to the influence of others and to the surrender to their imaginations".

At page 659 it states, "As regards the sworn testimony of children, there is no requirement as in England to warn of the risk involved in acting on their sole testimony, though it may desirable to issue such a warning, though the failure to do so will generally not affect the conviction".

Barry Nurcombe, M.D., F.R.A.C.P. in his article "The Child as Witnesses: Competency and Credibility" states:

> "Before the trial, the child is expected to recount the details of the alleged offense, again and again, to strangers. Repeated court appearance may be required. In court, the child will eventually be confronted by the accused who is exercising his or her constitutional rights. In contrast to the accused, the child has no advocate. His or her testimony is open to direct challenge on the grounds of incompetence, confabulation, or fabrication. These considerations deter victims from reporting offenses, lead to false restrictions, and erode the apparent credibility of honest witnesses."

Considering the above cited judicial decisions and the writings, as the credibility of the evidence of a child witness would predominantly depend on the circumstances of each case, it is the duty of the Learned Trial Judge to assess and decide on the evidence given by the child witness.

In the first ground of appeal, the Learned Counsel argued that the Learned High Court Judge misdirected himself about the Medical Evidence.

The Learned Counsel drew the attention to the history narrated to the doctor by the victim. In her history she had said that the Appellant had spread her legs and licked her vagina and nothing else. But in her evidence, she had said that the Appellant had kept his male organ on her vagina. Hence the Counsel argued that the evidence given by the victim is not consistence with her history to the doctor.

The admissibility of the recorded history in the Medico-Legal Report as evidence in criminal trials has been discussed in several decided cases.

In **Gamini Dolawatte V. Attorney General [1988] 1 Sri. L. R 221** held that:

> "*While a Medico-Legal Report is admissible in evidence under Section 414(1) of the Code of Criminal Procedure Act, hearsay evidence by way of the case history embodied in such a report is not admissible as such history is information is not ascertained by the Doctor from his own examination of the injured".*

In **Bhargavan v.State of Kerala AIR 2004 SC 1058 (Supreme Court of India)**

> "At para 20*: So far as non-disclosure of names to the doctor, same is really of no consequence. As rightly noted by the Courts below, his primary duty is to treat the patient and not find out by whom the injury was caused".*

Although the victim had not revealed to the doctor about the sexual abuse committed on her in her history, the doctor after the genital examination of the victim found two symmetrical reddish patches, each measuring 3mm X 3mm on inner sides of both labia minora on sides of the hymeneal orifice. Further, the doctor had opined that the examination findings of genital area are consistent with alleged sexual abuse involving genital area.

As the finding of the doctor is immensely consistent with the evidence given by the victim in court, there is no justification for undervaluing the victim's testimony in this case. Hence, this ground has no merit at all.

In the second ground of appeal, the Counsel contended that the Learned High Court Judge had failed to consider the failure of the prosecution to call PW4.

In **King v. Chalo Singho 42 NLR 269** the court held:

> *"Prosecuting Counsel is not bound to call all the witnesses named on the back of the indictment or tender them for cross-examination. In exceptional circumstances the presiding Judge may ask the prosecuting counsel to call such witnesses or may call him as a witness of the Court".*

It is trite law that it is not necessary to call a certain number of witnesses to prove a fact. However, if court is not impressed with the cogency and the convincing nature of the evidence of the sole testimony of the witness, it is incumbent on the prosecution to corroborate the evidence.

In this case, the creditworthiness of the evidence given by the victim did not suffer at any stage of the trial. No contradictions or omissions were highlighted in her evidence. The learned High Court Judge had considered the evidence given by PW1 with caution and care and correctly held that her evidence is convincing and cogent and sufficient on its own to prove the case against the Appellant.

The victim's evidence is further supported by the evidence given by her grandmother PW2. In her evidence she said that when she was informed about the incident to her by the victim, she had confronted with Appellant immediately. At that time, the Appellant had admitted the crime committed on the victim. The relevant portion is re-produced below:

(Page 86 of the brief)

ප්‍ර : ඊට පස්සේ තමන් ප්‍රියන්තලාගේ ගෙදරට ගියා ද ?

උ : මම ඊට පස්සේ ගියා. යනකොට දොර වහලා තිබුණා. එයාගේ භාර්යාව වෙන ගෙදරකට ඉඳලා ආවාට පස්සේ භාර්යාවට කිව්වේ නැහැ. මම ඊට උඩ පැත්තකට ගිහිල්ලා ඇහුවා ප්‍රියන්ත කුමාර දැක්කා ද කියලා. පොල්ලෙලි ගහනවා අපේ ගෙදර දානෙකට කියලා කිව්වා. ඊට පස්සේ එයාව අඬ ගහගෙන එක්කගෙන ඇවිත් ඇහුවා.

ප්‍ර : අද ඉන්නවා ද ප්‍රියන්ත ?

උ : ඉන්නවා.

ප්‍ර : කොතැන ද ඉන්නේ ?

උ : විත්තිකූඩුවේ ඉන්නවා. (විත්තිකූඩුවේ සිටින විත්තිකරු හඳුනා ගනී.)

ප්‍ර : අඬ ගහගෙන ඇවිත් ප්‍රියන්තගෙන් මොකක් ද ඇහුවේ ?

උ : මම ඇහුවා ප්‍රියන්ත මෙහෙම දෙයක් මගේ දරුවාට කළා ද කියලා ඇහුවා. ඒ ගමන ඇඬුවා බුදු නැන්දේ මයේ අතින් යම් කරදරයක් සිද්ද වුනා. මම ඒ වෙලාවේ මම බීලා සිටියේ කියලා කිව්වා. එයා ඇත්තම කිව්වා. එයා කියාපු එක පිළිගත්තා.

ප්‍ර : පිළිගත්තා ඒ වෙලාවේ ?

උ : ඒ වෙලාවේ පිළිගත්තා.

Under the cross examination too, PW2 maintained the same which certainly strengthens the version of the victim. The relevant portion is re-produced below:

(Page 92 of the brief)

ප්‍ර : සාක්ෂිකාරිය මම තමුන්ට යෝජනා කර සිටිනවා ඔය ප්‍රියන්ත එහෙම ඇවිල්ලා තමුන්ට එහෙම සමාවෙන්න නැන්දේ මගෙන් නංගිට කරදරයක් වුණා කිව්වා කියන්නේ අසත්‍යයක් කියලා ?

උ : බොරුවක් නෙවේ ඇත්ත. එයා ඒක පිළිගත්තා. මම අහන කොට පිළිගත්තා කරදරයක් වුණා කියලා.

ප්‍ර : සාක්ෂිකාරිය අර තරුෂිගේ අයියායි තරුෂිගේ නංගියි හිටියා නේ ඒ දෙන්නාත් ඒ කාලේ පාසැල් යන වයසේ දරුවෝ දෙනනෙක්ද ?

උ : පොඩි දුව පාසැල් යන්නේ නෑ. පුතා පාසැල් යනවා.

Hence, the argument put forward by the learned Counsel under this ground of appeal regarding the corroboration cannot be accepted. Further, as stated above, in this case the prosecution had adduced all necessary witnesses to prove their case. It is incorrect to say that the prosecution had withheld the independent witness to prove their case. Due to reasons given above, this ground is also not successful.

In the final ground of appeal, the Counsel for the Appellant contended that the Learned Trial Judge had failed to consider the glaring contradictions which diminishes the credibility of the victim.

Although the Learned Counsel argued that the victim gave contradictory evidence, not a single contradiction or omission was marked on her evidence by the defence.

In the examination-in-chief, the victim had said that she was only wearing a skirt and a pair of shorts and those were the garment the Appellant removed before committing the offence. But in her cross examination she had said that she was also wearing underwear and the Appellant removed it as well.

The Learned DSG highlighting this evidence of the victim rightly submitted that even if this was to be considered as an omission, it is not forceful enough to shake the credibility of the victim or the core issues of the case against the Appellant.

In sexual offence cases, corroboration is not a *sine qua non* to secure a conviction. As long as the victim's evidence does not suffer from ambiguity or infirmity in a manner which affects the root of the case, there is no bar for the court to act and rely on the said evidence to decide the case. Hence, this ground of appeal also devoid any merit.

The Learned High Court Judge when writing the judgment had combined the history given to doctor and the evidence given in court by the victim. Although this is a misdirection, it had not caused any prejudice to the Appellant.

Article 138 of The Constitution of Democratic Republic of Sri Lanka states:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any court of First Instance, Tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitution in integrum, of all cases, suits, actions, prosecutions, matters and things of which such High Court of First Instance, Tribunal or other institution may have taken cognizance;
>
> **Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect, or irregularity, which has not prejudiced the substantial right of the parties or occasioned a failure of justice". [**Emphasis added**]**

The above-mentioned provision of the Constitution clearly demonstrates that any failure to adhere to the legal provisions can be considered only if such failure prejudices the substantial rights of the parties or occasion a failure of justice.

Considering the evidence led in this case and guided by the judgements mentioned above, I conclude that this is not an appropriate case in which the judgement delivered by the learned High Court Judge on 18/10/2018 against the Appellant can be interfered upon. I therefore, dismiss the appeal.

The Registrar of this Court is directed to send a copy of this judgement to the High Court of Monaragala along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL