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/0016/22

High Court of Anuradhapura

Case No: SHC/142/2019

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Wanasinghe Mudiyanselage Samantha Rajapaksha *alias* Akku

ACCUSED

AND NOW BETWEEN

Wanasinghe Mudiyanselage Samantha Rajapaksha *alias* Akku

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Ruwan S. Jayawardena for the Accused Appellant

: Rajindra Jayaratna, SC for the Respondent

Argued on : 14-03-2023

Written Submissions : 05-09-2022 (By the Accused-Appellant)

Decided on : 15-05-2023

Sampath B Abayakoon, J.

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

The appellant was indicted before the High Court of Anuradhapura for committing grave sexual abuse on a minor by inserting his penis into the anus of the victim, on or about 23-03-2017, in a place called Galenbindunuwewa, and thereby committing the said offence punishable in terms of section 365B (2)(b) of the Penal Code, as amended by Amendment Act No. 22 of 1995, 29 of 1998 and 16 of 2006.

After trial, the learned High Court Judge of Anuradhapura found the appellant guilty of his judgement dated 10th December 2021, and he was sentenced to 8 years rigorous imprisonment and to a fine of Rs. 25,000/-. In default of paying the fine, he was sentenced to 6 months rigorous imprisonment.

In addition, the appellant was ordered to pay Rs. 100,000/- as compensation to the victim child and in default, he was sentenced to 2 years rigorous imprisonment.

The Facts in Brief

The victim child was 9 years old at the time of this incident. She has given evidence as PW-01 before the Trial Court. When she gave evidence on 8th June 2020, she had been 12 years of age, and studying in grade 8 of her school. According to her evidence, on 23rd March 2017, she was at her home alone as she has fallen ill. Her mother has gone to her school to clean the school premises and her father and two brothers were also not at home. While she was there, a person has knocked at the door. When she opened the door, she has seen the appellant in front of the house. When questioned, he has said that "I am a friend of your father," and requested some water. He is a known person to her. She has identified him as Akku mama, a person living in the village.

When she went inside the house to fetch some water, the appellant has followed her and has got hold of her from behind. Thereafter, he has taken the victim child to the rear side of the house, removed her clothes, bent her over, and inserted his penis into the anus of the victim. After he committed the act, he has threatened the victim with death if she divulges this incident to anybody, and had left the house.

Due to this fear, she has not informed anything to her mother when she came home for the day. However, due to the strange behaviour of the victim, her mother and other relatives had believed that she has attained puberty, and taken steps to follow the usual ritual procedures. Later, she has divulged what happened to her mother and mother's elder sister when they questioned her.

Before the trial Court, she has given her date of birth as 12-12-2007 marking her birth certificate as P-01. It had been her evidence that she was taken to the hospital and examined by a doctor, and gave a statement to the police at the hospital several days after the incident.

The defence taken up by the appellant had been that he was not the person who committed this offence. He has raised the possibility that it may be another person called Akku and not him.

It needs to be noted that in her evidence, PW-01 has identified the person who committed the offence to her as Akku mama.

PW-02, the mother of the victim has corroborated what the victim said in her evidence as to the reasons why she left the house on the date of the incident. It was her evidence that when she left home, she met the appellant about four houses away from their house. She has identified the appellant as Samantha Rajapaksha but has identified him as the person known in the village as Akku aiya.

When she returned home, she has observed some strange behaviour of her daughter which made her to believe that she has attained puberty, which has resulted in her and the other relatives taking steps to organize the necessary rituals in that regard.

However, since they found that the victim has not attained puberty, but acting strangely, she, along with another relative called Malani who is the wife of her brother, has questioned the victim. As a result, she has come out with the sexual abuse she had to face and had informed them that it was "තිලකේ අත්තත් එක්ක යන මාමා" who committed this offence to her. It was her evidence that, at that time, her daughter did not know the name of the appellant, but the moment she told them that it was the person who travels with Thilake aththa, they realized that it was the appellant who committed this.

Under cross-examination, it was her position that she did not complain against the appellant merely because of what her daughter said to her. But after having realized what the daughter is saying was true because her daughter's fear of seeing the appellant subsequent to the revelation.

The Malani mentioned by the mother of the victim has given evidence as PW-03. She has corroborated the evidence of PW-02 and that of PW-01. However, it was her evidence when she asked the victim as to what happened, she informed her that "අක්කු අත්තා මට මොකක්ද කෙරුවා" and when questioned further, she said that "තිලකේ අත්තා එක්ක ඉන්න අක්කු අත්තා."

The Judicial Medical Officer who examined the victim on 28th March 2017, has given evidence at the trial and has marked his Medico-Legal Report as P-02. At the time he examined the victim, the victim was 9 years and 3 months old. It had been his evidence that in the MLR, under the column 'short history given by the patient', what he has referred was the summary of what the victim said, but he took down the detailed history in his Medico-Legal Examination Form. Upon questioning further, the JMO has marked the Medico-Legal Examination Form, which was in his possession as P-02-අ, in order to substantiate what was said in the Medico-Legal Report.

He has found that the anus of the victim child had been injured and the injuries compatible with the history given by the victim.

Apart from the mentioned witnesses, the police officers who conducted investigations have also given evidence for the prosecution.

Upon considering the prosecution evidence, the learned trial Judge has decided to call for a defence from the appellant and he had given evidence under oath before the trial Court.

It had been his position that he is not the person mentioned by the victim as Akku. However, he has not denied that he is known as Akku, but his position had been that there are several other persons in the village commonly known as Akku. He has taken up the position that the victim child was unknown to him, and there are several other persons called Thilake as well in the village.

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. The learned High Court Judge has wrongly admitted internal notes made by the Judicial Medical Officer (PW-07) in terms of section 32 (2) of the Evidence Ordinance.

2. The learned High Court Judge has misdirected himself by failing to evaluate the clear discrepancies between the evidence of PW-01, 03, 04 and 07.
3. The learned High Court Judge was misdirected as to the identification of the accused.
4. Improbabilities of the evidence were not considered.
5. The learned High Court Judge has failed to consider and give due credit to the admissions by the appellant in his sentencing order.

This Court had the opportunity of listening to the learned Counsel for the appellant in relation to the grounds of appeal urged, and the submissions of the learned State Counsel in that regard, in determining the appeal.

Consideration of the Grounds of Appeal

The First Ground of Appeal: -

It was the contention of the learned Counsel for the appellant that there exists a doubt whether PW-01 has given a short history of what happened to her to the JMO as stated by him in the Medico-Legal Report marked P-02.

It was pointed out that PW-01 in her evidence before the trial Court had stated that she did not make any statement to the doctor. At a later stage of her evidence, she has stated that it was the mother who said. It was also pointed out that although the PW-01 has given evidence in the Court stating that it was a person called Akku who committed the crime to her, the doctor's note as to the short history given by the patient does not mention about a person called Akku. Commenting on the learned Trial Judge's decision to mark the internal notes made by the JMO in the Medico-Legal Examination Form as P-02-ඒ in terms of section 32 (2) of the Evidence Ordinance, it was the contention of the learned Counsel that it was a clear misdirection as to the provisions of section 32 (2).

I have no reason to disagree with the submission of the learned Counsel for the appellant in relation to the comments that had been made by the learned High

Court Judge admitting the said P-02-ඇ, purportedly in terms of section 32 (2) of the Evidence Ordinance.

Section 32 of the Evidence Ordinance is a section where statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be precured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable are themselves relevant facts in certain mentioned instances. Section 32 (2) relates to a situation where the relevant facts made in the ordinary course of business.

I find that there is a clear misdirection by the learned High Court Judge in the way the evidence has been admitted as it was the person who made the notes namely, the JMO, who has given evidence before the Court. Hence, there was no need to admit the document in terms of section 32 (2) under any circumstance.

However, the mentioned misdirection to become relevant in an appeal, there must be a basis to contend that it had caused prejudice to the substantial rights of the parties or occasioned a failure of justice in terms of the proviso to Article 130 of the Constitution.

The JMO in his Medico-Legal Report has stated the short history given by the patient in a summarized manner in English language. The JMO refers that the victim told him that “an uncle living in the village (an uncle going with Thilake aththa) is the person who did this to her”. Explaining the manner a JMO takes information for the short history given by a patient, he has stated that he takes down the details of the statements made to him in his Medico-Legal Examination Form and subsequently uses them to provide a summarized report in the Medico-Legal Report.

In his evidence, the JMO has referred to the victim stating to him that it was one Akku who did this grave sexual abuse to her. In explaining reasons as to why it was not stated so in the short history column in the MLR, it has been stated by the JMO that although he takes detailed notes of what was stated to him, he

provides only the history relevant to the examination of the patient as whatever stated to him in relation to the perpetrator of a crime would not be evidence in that regard in a Court of law.

I find that in order to substantiate that, he in fact took down the notes in the manner he stated in his evidence, the JMO has produced the Medico-Legal Examination Form, which has been subsequently marked as P-02-ඒ.

Since whatever stated by a victim to a JMO in giving the history of the incident, is not corroborating the evidence of a victim, but only a matter where consistency of a statement by a witness can be established, I do not find the mentioned misdirection by the learned High Court Judge as a matter that has a vitiating effect on the other findings in the judgment.

When it comes to the argument that PW-01 has stated in her evidence that she did not say as to what happened to the doctor, it is clear that the learned Counsel for the appellant is taking only a small portion of the evidence by PW-01 in its isolation.

The victim had been 9 years and 3 months old when she had to experience this horrific grave sexual abuse. She has received serious injuries to her anus as revealed by the MLR. The JMO has clearly expressed the mental condition of a victim of sexual abuse, especially a young victim and the behavioural pattern of such a victim to the Court. Evidence of PW-02, the mother of the victim and that of PW-03, clearly establishes the behaviour of the victim after she had to endure this grave sexual abuse, which has led them to believe that she has attained age.

It was subsequent to that, and upon questioning only, the victim has come out as to what happened to her. Under cross examination in Court, she has stated that she cannot remember whether she spoke to the doctor. When asked repeatedly, she has stated that it was to the mother who was present when the doctor examined her, she narrated what happened. Upon probing further, she has stated that she did not give a statement to the doctor.

It is trite law that a part of the evidence of a witness cannot be taken in its isolation, but it is the totality of evidence that needs to be considered.

In the Privy Council judgement in **Jayasena Vs. Queen 72 NLR 313,** it was held:

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

For the reasons set out as above, I find no merit in the considered first ground of appeal.

The Second Ground of Appeal: -

It was the contention of the learned Counsel for the appellant that although it was the evidence of the victim that she informed her mother as to the grave sexual abuse faced by her, the mother's evidence had been that in fact her daughter told what happened to her to PW-03. The learned Counsel referred to this as a major contradiction in the evidence. It was contended further that what the victim child has stated to the JMO when the child was examined by him was also different to the evidence of the victim child in Court.

There again, it is my view that the learned Counsel for the appellant had taken a single answer in its isolation and portraying that as a major contradiction. If one reads the evidence of PW-01 who is the victim child in its totality, it becomes very much clear that the child has not informed anyone initially as to what happened to her through fear. It had been the mother and the other relatives who have concluded that the child has attained puberty because of the strange behaviour of the victim. However, they have realized that the reason for the strange behaviour was not that the victim has attained puberty. This has led them probing further from the victim.

It is clear from the evidence of the victim, that when she divulged what happened, it was not only to her mother but to PW-03 as well, whom she referred to as mother's elder sister, in the company of both of them. The evidence of the mother is clear that it was her sister (PW-03) who questioned the child and the victim narrated what happened to PW-03 in her presence. PW-03's evidence further corroborates this position. I find no infirmity in the evidence of the said witnesses in this regard.

In her evidence, the victim has stated that she did not inform what happened to her to the doctor, but told it in front of the doctor to her mother who was near her when the medical examination took place. It is very much understandable that a child of 9 years of age would prefer to talk in front of her own mother when asked about a horrific experience like this, rather than speaking directly to a stranger. It is clear from JMO's evidence that the child had been suffering from mental trauma and other mental health related issues clearly as a result of this experience. It is obvious that the doctor has gathered information for his investigations from what the child has stated to him as well as the statement of the mother. I find no reason to conclude that there is a discrepancy between the evidence of PW-01 and the JMO.

For the reasons as considered above, I find no merit in the 2nd ground of appeal as well.

The Third Ground of Appeal: -

It was the contention of the learned Counsel for the appellant that the learned High Court Judge has failed to consider the serious contradictions in the identification of the appellant as the perpetrator of this crime.

He relied on the portion of the evidence of the victim where she has stated that when the appellant first came to the house and knocked at the door, she questioned him as to who, for which the person who came told that he is a friend of her father. It was his contention that this shows that the perpetrator was unknown to the victim child and if that was so, there should have been an

identification parade for the purposes of identification. It was his position that the child has not identified the perpetrator but the appellant has been framed only on suspicion.

PW-01 in her evidence has clearly stated that the person who came to the house was a person known to her and who is a person living in the same village. She has maintained this position right throughout her evidence. She has identified the person as Akku mama. It had been the evidence of PW-02 and 03 that when they questioned the child as to who committed this crime to her, she informed them that it was Akku mama. When questioned further by them, the child has further described the person as the uncle who travels with Thilake aththa.

It was the evidence of the mother that she did not go to the police on that information alone. She, as well as PW-03, has stated that when they were preparing the victim child to be taken to the hospital, they saw the appellant walking past their house. The mother in her evidence states that when the child saw the appellant, she got frightened of him which gives a strong indication that the victim child has clearly identified the perpetrator who committed the crime to her.

I find no discrepancy in the identification of the appellant by the victim child and find no merit in the ground of appeal urged.

The Fourth Ground of Appeal: -

The improbability of the evidence the learned Counsel for the appellant urging in this appeal is on the basis that in the mother's evidence she has stated that she met the appellant four houses away from their house around 7.00 in the morning, but PW-01 says that the incident happened around 7.30 – 8.00 a.m. in the morning.

It is clear from the evidence that both these witnesses have spoken about the time not by looking at a clock, but by guessing the times as to the relevant facts. It is obvious that the mother may not have envisaged that her daughter will be

subjected to a grave sexual abuse by the appellant and had no reason to remember the exact time where she met him. Similarly, a child of 9 years of age would not be able to give an exact time as to the grave sexual abuses faced by her other than saying what she can remember. I am not in a position to conclude that when taking the evidence as a whole, any improbability of the evidence by the witnesses.

It is settled law that a witness who gives evidence long after the incident is not expected to have a photographic memory as to the sequence of events that took place within a short span of time like in the given incident.

At this stage it is 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) *The powers of observation differ from person to person. What one may notice, and the other may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part another.*

4) *By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purpose of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

5) *In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates of such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

6) *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.*

7) *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.*

The Fifth Ground of Appeal: -

I find no merit whatsoever in the contention that the learned High Court Judge has failed to consider the admissions made by the appellant at the trial in his sentencing order.

The admissions by the appellant had been with regard to the birth certificate of the victim child, the competency of the JMO to give evidence and other incidental matters and on nothing else.

For a person convicted for an offence of this nature, the minimum mandatory sentence would be a rigorous imprisonment period of not less than 7 years and not exceeding 20 years, in addition to a fine and ordering of compensation.

It is very much clear that the learned High Court Judge has considered all the mitigatory factors when it was decided to sentence the appellant for a period of eight years, given the heinous nature of the crime.

For the reasons as determined above, I find no merit in the grounds of appeal urged. Accordingly, the appeal is dismissed.

However, having considered the fact that the appellant had been in incarceration from the date of the conviction and sentence, it is ordered that the sentence shall deemed to have taken effect from the date of the sentence, namely, from 10th December 2021.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal