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

In the matter of an appeal against the order made by the High Court of Chilaw on 03.10.2019 under and in terms of Section 331 (1) of the Code of Criminal Procedure act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka

Complainant

CA Appeal No: HCC 91/2020

Chilaw HC: 11/2017

v.

Bulathwalage Rexy Tennyson Fernando alias Bulathwalage Rexy Tennyson alias Semson alias Bulathwalage Tennyson Trexy Fernando

Accused

AND NOW

Bulathwalage Rexy Tennyson Fernando alias Bulathwalage Rexy Tennyson alias Semson alias Bulathwalage Tennyson Trexy Fernando

Accused-Appellant

Vs.

1. Officer-in-Charge
   Police Station
   Chilaw

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

Respondent

Before : **Menaka Wijesundera, J.**
B. Sasi Mahendran,J.

Counsel : Shyamal A. Collure with A.P. Jayaweera for the Accused-Appellant
Maheshika Silva, DSG for the State

Written Submissions: 23.11.2021 (by the Accused-Appellant)
on 12.05.2022(by the Respondent)

Argued on: 04.04.2023

Decided on: 27.06.2023

B. Sasi Mahendran,J.

The Accused Appellant (here in after referred to as the Accused) was indicted in the High Court of Chilaw for having committed the offence of Grave Sexual Abuse by having placed his male organ between the two thighs of the victim child who was under sixteen years of age, on or about 17th March 2007, punishable under Section 365 B (2) of the Penal Code as amended by Act, No. 22 of 1995, and as further amended by No. 29 of 1998 and No. 16 of 2006.

The prosecution led evidence of four witnesses, marked the production and closed the case. The Accused made a dock statement. After trial, the Accused was convicted and sentenced to 20 years of rigorous imprisonment and a fine of Rs. 50,000/- with a default sentence of one-year rigorous imprisonment. Accused was also ordered to pay compensation worth of Rs. 400,000/- with a default sentence of two years rigorous imprisonment.

Being aggrieved by the aforesaid conviction and sentence, the Accused preferred this appeal to this Court. The Learned Counsel appearing for the Accused submitted the following grounds of appeal:

Ground of Appeal

a. The learned trial judge of the high Court has failed to consider the intrinsic infirmities of the Prosecution Case; particularly as to the charge in the indictment and the evidence of an alleged rape: and the said failure vitiates the said judgment, conviction and sentence.

b. The learned trial judge of the High court has failed to appreciate that the ingredients of the offence of rape and those of the offence of grave sexual abuse are different; and therefore, the said Judgment, conviction and sentence are bad in law.

c. The learned judge of the High Court has erred in law in failing to conclude that the Appellant was not guilty of the offence with which latter was charged.

d. The learned judge of the High Court has failed to take in to account the contradictory positions of the judicial medical officer in the observations contains in "P1" and the evidence given by the said witness at the trial.

e. The said judgment and conviction are contrary to law and the evidence adduced at the trial and hence, are completely unreasonable and unjustified as the learned High Court judge has failed to conclude that there was no evidence warranting the conviction of the Appellant of the charge in the indictment; for the prosecution has failed to establish its case beyond reasonable doubt.

f. The learned trial judge has misdirected herself by concluding that the Appellant has not denied the charged leveled against him or he has not challenged the evidence led by the prosecution by establishing that the same is false evidence.

g. The learned trial judge of the High Court has failed to appreciate that the investigating officers had failed to investigate in to the items of clothes alleged to have been taken in to custody as well as the alibi taken by the Appellant in his statemen to the police: thereby denying the Appellant a fair trial.

h. The learned trial judge has failed to appreciate that the appellant had been arraigned upon incomplete and partial investigations.

The prosecution case which gave rise to this conviction is as follows. According to PW1, namely, Hadunpurage Nilmini Subhashini, who was in grade 7 in school, on the day in question at around 6.30-7.00hrs, she went on her father's bicycle to the nearby bakery to buy a loaf of bread. Since the bakery was closed, she was to return home when the Accused stopped and called her. When she refused to go near him, the Accused grabbed her by the hand, threw her bicycle in the nearby shrub and dragged her towards the house. According to PW1, all the neighbor's houses were closed and she couldn't scream as the Accused was threatening to kill her. Once inside the house she was taken to a room, pushed onto a bed, causing her to hit her head on the wall in the process. Thereafter, the Accused has asked her to remove her clothes and when she refused to do so, the Accused forcibly removed them, and then removed his own clothes before getting on top of her.

According to PW1, the Accused mounted her, put his sex organ in between her thighs, rubbed his sex organ against hers, all the while keeping her legs apart forcibly. Relevant words uttered in her evidence is reproduced below; (On page 84 of the Brief)

උ - එයා චූ කරන එක මගේ එකට ගෑවා

ප්‍ර - එතකොට එහෙම කරන අවස්ථාවේදී ඔබට නැගිටලා යන්න හැකියාවක් තිබුණද?

උ - නැහැ. එයා තදකරගෙන හිටියේ.

ප්‍ර - එයාගෙ චූ කරන එක ඔබගේ චූ කරන එකේ ගාපු එක කොච්චර චිතර වෙලාවක් එහෙම කළාද?

උ - මතක නැහැ.

ප්‍ර - එහෙම ඔබගේ ඇඟ උඩ නැගලා ඔය ක්‍රියාව ටෙනී මාමා, මේ චිත්තිකාරයා කරන වෙලාවෙදි නිල්මිණිගේ කකුල් දෙක කොහොමද තිබුණෙ?

උ - ඇත් කරලා.

ප්‍ර - කවුද කකුල් දෙක ඇත් කළේ?

උ - එයා.

She had cried during the incident as she has felt a burning sensation on her private parts. Although initially she had not divulged this incident to anyone in fear of the Accused, but as the burning sensation on her private parts became worse, she told her mother about the incident four days later. The mother examined, and found her private parts to be swollen with a white color. They both went to the police station and lodged a formal complaint, and thereafter she was examined by the judicial medical officer.

PW1 was cross examined in length by the defence. It should be noted that in the cross examination there is no single defence taken up regarding the allegations made by her but instead lots of questions on the intricacies of her version of the story.

When we peruse the evidence, we observe a number of those questions with regard the way she got to the house, the distances from which she was approached and about the inside of the house, despite the fact that she was consistent that she hadn't been to the house earlier. We further observe that some of these questions are hardly irrelevant to the case, but rather serves the purpose of chipping away at PW1's credibility by pointing out her failure to keep precise consistency throughout. We're mindful towards the fact that when the incident occurred, PW1 was only 11 years of age. PW1 using words such as ඡුන්ඩා, බික්ක in the original statement given to the police 11 years ago, are showings of innocence in a child, a child that does not understand sex, let alone rape. We're also mindful that the prosecutrix's evidence was recorded on 7th November 2018, that is 11 years after the incident. By that point, PW1 is 23 years old, married and with a child. It's safe to assume that her perception of the world, and sex especially is vastly altered over the past decade. Therefore, it cannot be reasonably expected from a person in prosecutrix's circumstances to recall the horrendous turn of events she experienced as a child to absolute precision. Furthermore, we observe since the contradictions marked by the defence does not go to the root of the case, they simply do not invoke any doubt in the prosecutrix's evidence. At this juncture it is worth reiterating the words of his Lordship Thakkar J. in Bhoginbhai Hirjibhai V. State of Gujarat AIR 1983 SC 753;

"By and large a witness cannot be expected to possess a photo graphic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen."

The above observation was followed by W. L. Ranjith Silva J., in Simonge Ekanayake v Attorney General, CA 129/2005, decided on 30th March 2010, and further held that;

"I hold that the contradiction marked V1 is not a contradiction but a confusion, as to the place from where he witnessed certain parts of the incident or the sequence in which he witnessed the whole incident."

At this juncture it is pertinent to reproduce the observations made by D. A. Desai J. with regard to how the court approach the discrepancies and infirmities pointed out in the evidence in the case of State of Uttar Pradesh v. M.K. Anthony, reported in Supreme Court Journal 1984 (2) page 498,

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

With the above dictums in mind, when we consider the prosecution evidence, especially of PW1, we find that the defence case does not create any doubt in regard to the Grave Sexual Abuse done by the Accused. The learned High Court Judge has correctly

considered the evidence of PW1 and has come to conclusion that the said witness is a truthful witness.

Generally, where the prosecution evidence is based on a single eye witness, our courts have insisted upon corroboration.

In Sunil and Another vs. Attorney General 1986 1 SLR 230,

"Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible."

When we consider the evidence of the judicial medical officer, we can clearly identify PW1 evidence was corroborated with an expert opinion, rendering her evidence credible. According to the doctor who examined the prosecutrix, there were injuries to her thighs and labia majora, and there was a contusion measuring at 1.5cm-2.cm on her labia minora, along with some swelling and redness around the area. There was no rapture of her hymen, nor any injuries to her hymeneal tissues, therefore there is no vaginal penetration. Even so, the medical officer in his expert opinion has given evidence saying the injuries are likely caused by penile friction and rough contact around the area.

As the evidence of the prosecutrix is credible, that is to say her evidence was convinced to the learned High Court Judge that she is speaking the truth, with the evidence of the doctor, the learned High Court Judge has no other option but to convict this Accused.

Regarding the defence version, the Accused made a dock statement and has taken up an alibi, which notably was not suggested to PW1 or to her mother during cross examination. The alibi is merely mentioned by the Accused. Therefore, learned Trial Judge has correctly rejected his defence.

We're mindful that the grounds of appeal are mainly based on facts involving the credibility of the witnesses. Our courts are reluctant to interfere with the findings unless

the findings of the judges perverse. In Alwis v. Piyassena Fernado 1993 (i) SLR 119, observed G. P. S. DE SILVA, C. J on page 122,

"It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings of this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the court of appeal could have reserved the findings of the trial judge"

We hold that the learned judge has correctly analyzed the evidence of the prosecution and came to conclusion that the defence has not created any reasonable doubt.

With regarding the sentences, the learned counsel for the Accused has brought to the notice of this court that the sentence is excessive. When we perused the Brief, it is clear that the learned High Court Judge has considered all the relevant facts before he pronounced the sentences.

Therefore, we see no reason to interfere with the conviction and the sentence. This appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL