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/0124/22

High Court of Embilipitiya

Case No. HC/83/2019

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Sujith Prasanna Hettiarachchi

No. 719, Waraya, Uswewa, Tangalle.

ACCUSED

AND NOW BETWEEN

Sujith Prasanna Hettiarachchi

No. 719, Waraya, Uswewa, Tangalle.

ACCUSED-APPELLANT

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Dephne Peiris Vissundara with Desapriya Vissundara and V. Krishnamoorthy for the Accused-Appellant

: Udara Karunathilake, SC for the Respondent

Argued on : 22-05-2023

Written Submissions : 02-02-2023 (By the Accused-Appellant)

: 22-02-2023 (By the Respondent)

Decided on : 11-07-2023

Sampath B Abayakoon, J.

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

The appellant was indicted before the High Court of Embilipitiya on the following counts.

1. That between the period of 1st April 2010 and 31st January 2011, the appellant engaged in intercrural sex with a minor boy under 16 years of age for sexual pleasure, and thereby committed the offence of grave sexual abuse punishable in terms of section 365B (2) (b) of the Penal Code as amended by Penal Code Amendment Act No. 22 of 1995, 29 of 1998 and 16 of 2006.
2. At the same period as mentioned earlier, the appellant on another occasion other than the occasion mentioned previously, engaged the same minor boy who is under 16 years of age to touch his penis, and thereby committed the offence of grave sexual abuse punishable in terms of the Penal Code as mentioned earlier.

3. During the same period as mentioned earlier, the appellant engaged in oral sex with the earlier mentioned minor boy child on an occasion other than the earlier mentioned 2 incidents, and thereby committed the offence of grave sexual abuse punishable as mentioned before.

After trial, he was found guilty as charged, and accordingly, sentenced by the learned High Court Judge for 12 years rigorous imprisonment for each of the three counts, which was to be served concurrently to each other. In addition, he was fined Rs. 12000/ each with default sentences and was ordered to pay a sum of Rs. 200000/- as compensation to the victim.

The Facts in Brief

The facts relevant to this matter in brief are as follows. The victim of these incidents had given evidence as the witness number 01. At the time relevant to these incidents, the victim had been a 10-year-old boy and he has given evidence for the 1st time in Court on the 7th January 2021 as a 20-year-old youth.

According to PW-01's evidence, the appellant was his younger brother's pre-school teacher. Apart from running a preschool, he has conducted English tuition classes. The parents of PW-01 had admitted him to the English tuition class which was held after school hours at the same place where the preschool was located.

It has been the evidence of PW-01 that he cannot exactly remember the dates in which these incidents occurred, but he was studying in grade 6 at that time, and these incidents happened during a period of about 2 weeks. He has admitted that he gave a statement to police in this regard on 2nd June 2011.

He has described the 1st incident faced by him stating that there were four children including himself who attended the tuition class and the class was held in the hall. There was a separate room where the appellant had his office. The witness says that on one day, the appellant gave some work for the children to complete and when he went inside the office room of the appellant to show his

work, the appellant called him near his chair and started touching his penis, later removed the trouser he was wearing, and bent over and started sucking his penis. He has stated that he did not resist, and after few minutes, the appellant stopped what he was doing and allowed him to go back to the class. It has been his evidence that although the office room door was open at that time, the other children could not see what was happening inside the office.

He has described the 2nd incident faced by him as when he went to the appellant's office room like previously, he started to embrace him, performed oral sex as before, and made him to lie down, and engaged in intercrural sex with him. It was his evidence that the 2nd incident happened when the tuition class was over and the other children left the class.

Describing the 3rd incident, he says that on another day, the appellant wanted him to hold his penis and shake it back and forth, and the appellant did the same to his penis. This too had happened at the office room of the appellant.

The witness has stated that the appellant used to give small sums of money like Rs. 20, Rs. 50 after these incidents. Although the victim was subjected to several incidents of sexual abuse, he has not divulged these incidents to his parents, but has refused to attend class. As a result, his parents have admitted him to another English class.

Some time after the alleged incidents, there had been an educational programme conducted by the teachers of the school where the PW-01 was studying at that time. At the end of the programme, one of the four children who attended the English class conducted by the appellant has informed his class teacher that he was subjected to sexual assault, which has resulted in PW-01 and other children divulging what had happened to them at the hand of the appellant to the teacher. The teacher has referred the children to the disciplinary master of the school, and through the principal of the school to the police.

The police have conducted the necessary investigations and the resultant indictment has been filed against the appellant. The witness has been clear that

these incidents occurred less than a year before he gave his statement to the police regarding the sexual abuses faced by him, but has stated that it last occurred about 6 months before the police statement. According to the birth certificate of the victim marked P-01, his date of birth was 30th June 2000.

Under cross-examination, it has been revealed that when the doctor examined the child, he has given the history as an incident of anal intercourse by the appellant apart from describing the other incidents as well. However, it is apparent from the answers provided by the victim under cross-examination, the 1st incident described by him to police had been the incident of intercrural sex.

The position taken up by the appellant when the victim child was cross-examined had been that because he reprimanded him for stealing money from a child attending the preschool and searched his pockets, the witness may be uttering falsehood against him.

The witness has been clear in his evidence and under cross-examination, that he cannot exactly remember the dates of the incidents because of the time gap. However, he has denied the suggestion that he is making false accusations against the appellant.

According to the evidence of PW-02, who was the father of the victim child, he has come to know about the sexual abuses faced by his son on 31st May 2011 when the principal of the school where the victim was studying summoned him and his wife and informed them about what his son has told him. Thereafter, he has taken the child to the police on 2nd June 2011 and the child has made a statement to police with regard to the sexual abuses faced by him. The father has identified the appellant as the tuition master whose tuition class, the victim attended.

In this matter, the school teacher who came to know about these sexual abuse incidents from the victim child has given evidence as well. She has confirmed that after an advisory session was conducted in the school regarding abuses of children, PW-01 and some other children came and informed her about the

sexual abuses faced by them. She has referred the matter to the teacher in charge of discipline and he in turn has informed the school principal which has resulted in this complaint being made.

The disciplinary teacher of the school has also given evidence in this matter confirming that the child informed him of the sexual abuses faced.

Both the teachers have given clear evidence in Court that they did not inquire deep into the allegations or attempted to record statements from the child since they did not want the child to be subjected to narrating an incident of this nature several times, but after coming to know about these incidents, referred the child to police for necessary investigations.

The police officers who conducted investigations into the incidents have given evidence in relation to the investigations conducted by them.

The doctor (PW-10) who examined the child too has given evidence, and had marked his Judicial Medical Report as P-02. When the doctor examined the child allegedly about 6 months after the incidents, he has not observed any specific injuries or marks, but has expressed the opinion that the alleged incidents can happen without leaving any marks or evidence in that regard.

At the end of the prosecution case, the learned High Court Judge, after having considered the evidence placed before the Court has decided to call for a defence from the appellant. The appellant has chosen to give evidence under oath. He has admitted that he conducted a tuition class during the period relevant to these incidents and the victim child was also a student under him. He has admitted that the class was conducted in the hall where he used to have a preschool in the morning hours, and he had an office in that building as well.

He has claimed that he received a complaint from another teacher of the preschool that PW-01 has taken money from a till of another child. He has claimed that he questioned PW-01 in that regard in front of the other children and checked his trouser pockets. He has claimed in his evidence that although

the police arrested him, they did not inform him a charge when he was arrested but later questioned about four complaints. He has claimed that the police did not allow him to read the statement made by him to the police and denied that he committed any grave sexual abuse on the victim child.

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. Belatedness of the complaint.
2. Uncertainty of the time as to the occurrence of the incident.
3. Uncertainties in the statement of the victim.
4. The improbability of the act that has been complained.
5. No fair trial was afforded to the appellant.

Consideration of The Grounds of Appeal

As the 1st and the 2nd grounds of appeal are interrelated, I will now proceed to consider the said grounds together to find whether there is any basis for the said grounds of appeal.

The evidence clearly suggests that the victim child has divulged the sexual abuses faced by him about 6 months after he stopped attending the tuition class conducted by the appellant. That too as a result of him becoming aware of the sexual abuses that a child can face as a result of an awareness programme conducted by the teachers of his school. As a result of this awareness programme, another child of the same age who attended the same tuition class along with the victim child has informed the teacher who was instrumental in the awareness programme, the sexual abuses faced by him. This has resulted in PW-01 also divulging the sexual abuses he had to undergo at the hands of the appellant.

This has resulted in the complaint made to the police in this regard. The facts as revealed in evidence clearly shows that there had been no belatedness in the

complaint. The victim child had been unaware that he had been subjected to grave sexual abuse or even if aware, had not known what steps he should take and the gravity of what has happened to him until it was made aware to him by the school authorities.

If it was not for the awareness programme, these incidents of sexual abuse may not have come to light and the child would have been subjected to mental trauma in silence. The victim child in his evidence has clearly stated that the three sexual abuse incidents faced by him happened during a period of about two weeks apart, and he refused to attend the tuition class afterwards. But did not inform his parents because the appellant informed him not to tell anyone and gave money to him in some instances. Through fear that the parents will subject him to punishment as a disciplinary measure, the child has not divulged things to his parents.

It is abundantly clear from the evidence that the child has got the courage to inform his school teachers after he was made aware of his rights. The evidence clearly shows that the school authorities have come to know about these incidents around 6 months after the occurrences.

Therefore, it may the reason why the prosecution, without giving a specific date or dates, has given a time period of 10 months as the period of these incidents in the three charges preferred against the appellant.

In terms of section 174 of the Code of Criminal Procedure Act, when a person is accused of more offences than one of the same kinds, committed within the phase of 12 months from 1st to last of such offences, he may be charged with and tried at one trial for any number of them not exceeding three, and in trials before the High Court, such charges may be included in one and the same indictment.

I am in no position to agree with the submissions of the learned Counsel for the appellant that the appellant had been prejudiced because of the failure by the

prosecution to give a definite date of the offence, and it has affected his ability to put forward a defence in challenging the allegations against him.

The earlier mentioned facts of this matter make it abundantly clear that the child victim was not in a position to remember the exact dates of the incidents. He had been trying to hide the incidents from the society without knowing even that they are sexual abuses in its proper sense. I find no reason to believe that this has hampered the ability of the appellant in his defence in any manner.

In the case of **R Vs. Dossi 13 Cr.App. R 158**, it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is not necessary although it would be a good practice to do so.

I am of the view that the appellant had not been deprived of a fair trial, since the necessary information regarding the allegation against him had been amply provided in the charges preferred against him.

For the reasons considered as above, I find no merit in the 1st and the 2nd ground of appeal urged.

In the 3rd and 4th grounds of appeal, the appellant contends that there were inconsistencies in the statement of the victim and the alleged act was improbable.

I am in no position to find inconsistencies in the evidence of the victim child that create any doubt as to the credibility of his evidence. A child of 10 years at the time of the incident who gives evidence after another 10 years, may tend to forget intricate details of the sexual abuse faced by him.

In this matter, the prosecution has preferred three charges based on three alleged incidents of grave sexual abuse. The victim has described the three incidents faced by him in detail, but not in the order mentioned in the charges preferred against the appellant. It may well be that he has forgotten as to what

incident happened first. However, his evidence clearly shows that he remembers the incidents very well, although may not be in the chronological order they occurred.

I do not find any reasons to believe that there are inconsistencies in the evidence of the victim.

There is no basis to believe that there are improbabilities of the story narrated by the victim to Court. As correctly pointed out by the learned State Counsel in his submissions, a sexual predator who looks for opportunities to pounce upon a child needs only few minutes to fulfill his desires. The evidence of the victim clearly shows the modus operandi of the appellant. After committing the sexual abuse, he has used the authority he had over the child, being his tuition master, to buy his silence and also by rewarding the child for his actions.

It is trite law that a victim of a sexual abuse may not be able to narrate everything what happened to him or her like in a perfect picture book scenario, as any victim would be trying to erase such horrific memories from his or her mind.

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 Hirjibhai 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.*

Another point taken by the learned Counsel for the appellant was that there was no corroboration to the alleged incidents of grave sexual abuse, and since the evidence of the victim was not reliable, the trial Court should have looked for corroboration. It was her view that the learned trial Judge was misdirected when concluding that the charges have been proved against the appellant without considering corroborative evidence.

It is the settled law that it is the quality of the evidence that matters and not the number. In cases of this nature, any abuser will make sure that his actions will not be witnessed by anyone else, unless it is a witness who has seen an incident of this nature by chance. The facts revealed in this matter clearly show that these

incidents have happened with no witnesses. I am of the view that the evidence of the victim was trustworthy and cogent enough for the learned trial Judge to rely on his evidence and the other relevant evidence presented before the Court to come to a finding of guilt against the appellant.

I find no merit in the 3rd and the 4th ground of appeal for the reasons considered above.

In the 5th ground of appeal, the appellant contends that he was denied a fair trial. I have previously dealt with the contention as to the date of offence mentioned in the charges.

The learned Counsel for the appellant contends that the police, in their investigations, have failed to record the statements of the relevant witnesses and the police have failed to read out the statement made by the appellant to him before he signed the statement. I do not find reasons to agree that the police have failed to record the statements of the relevant persons in their investigations. Although the appellant claimed that his statement was not read over to him before he signed the same, his evidence before the Court and other relevant factors does not provide a basis to accept such a claim.

I find that in this matter, the learned High Court Judge after having well considered the evidence placed before her in its totality, has reached her findings with a thorough knowledge of the applicable legal principles. The learned High Court Judge has not accepted the evidence of the victim for the sake of accepting, but has done so only after a good evaluation of the evidence. She has been mindful of the burden of proof in a criminal matter and it is the prosecution who has to prove the charges against an accused person.

The learned High Court Judge has considered the evidence of the prosecution as well as that of the defence in its totality, in reaching her determinations. Hence, I find no reason whatsoever to interfere with the conclusions of the learned High Court Judge and the conviction entered upon the appellant based on sound reasoning.

The learned High Court Judge has sentenced the appellant after giving due regard to the facts and the circumstances as well as the mitigatory circumstances placed before the Court.

Accordingly, I find no reason to interfere with the sentence imposed upon the appellant as well.

For the reasons as considered, the appeal of the appellant is dismissed for want of any merit.

However, having considered the fact that the appellant had been in incarceration from his date of the conviction on 20th May 2022, it is ordered that the sentence shall deem to have commenced from the date of the sentence, namely 20th May 2022.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal