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/0228/17

High Court of Hambantota

Case No: HC/22/2009

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Ranasinghe Gamage Piyasena *Alias*

Piyasena Mama

ACCUSED

AND NOW BETWEEN

Ranasinghe Gamage Piyasena *Alias*

Piyasena Mama

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Senarath Jayasundara with Chathurangi Wedage for the Accused Appellant
	: Dishna Warnakula, DSG for the Respondent
Argued on	: 31-05-2023
Written Submissions	: 01-08-2018 (By the Accused-Appellant)
	: 12-11-2018 (By the Respondent)
Decided on	: 25-07-2023

Sampath B Abayakoon, J.

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

The appellant was indicted before the High Court of Hambantota on three counts of grave sexual abuse committed on a minor girl, between the period of 11th April 2004 and 11th June 2004 in Gangeyaya, Tissamaharama, and thereby committing offences punishable in terms of section 365B (2) (b) of the Penal Code, as amended by Penal Code (Amendment) Act No. 22 of 1995 and 29 of 1998.

After trial, the appellant was found guilty as charged by the learned High Court Judge, and he was sentenced to 12 years rigorous imprisonment for each of the three counts. In addition to the fines, a compensation of Rs. 150000/- was ordered.

The period of imprisonment ordered on the three counts were ordered to run concurrently to each other.

The Facts in Brief

The victim (PW01) was eighteen years of age when she gave evidence before the High Court on 22-03-2012, some eight years after the alleged incidents.

She was studying at fifth grade in her school at the time these incidents occurred. Her mother was deceased by that time, and she lived with her father, his second wife and her younger sister. Her father was a farmer and his wife, whom the victim referred to as the mother, used to leave the house early to attend to their daily farming work, and the victim and her sister used to be alone at home after they come from the school.

She knew the appellant well, as he was a neighbour, whom she identified as uncle (mama) in her evidence. It was her evidence that the appellant used to visit their house and was in the habit of sending her younger sister to the nearby boutique to get toffee, and take her on to a bed inside the house and commit sexual acts several times over a period of time. She has described the acts as removing her clothes and having engaging in intercrural sex with her. It has been her evidence that she was young at that time and is unable to remember the incidents in much detail.

She has stated that she did not inform what was happening to her to anyone because the appellant told her not to tell anyone and threatened her, but informed one of her teachers when it became unbearable to her any longer. It had been her evidence that these incidents happened at their house as well as the house of the appellant as he used to take her to his house as well. She has stated that she cannot remember the exact dates of the incidents, but gave a statement to the police after she informed the teacher of the incidents and she was subjected to a medical examination as well. According to the birth certificate marked P-01, her date of birth was 07-08-1994.

Under cross-examination, the PW-01 has stated that these incidents happened in the year 2004, but cannot remember the other details, and apart from the

appellant, she was sexually abused by four other persons as well, during the period.

After the complaint was made to the police, she has been sent under probation care and had been under the care of the probation until 2011. She has also been specific that she cannot identify the appellant by name since the incidents occurred more than seven years ago, but it was the appellant who committed the sexual abuse on her.

The prosecution has called the grandmother of the victim to testify in the Court (PW-04). It had been her evidence that she came to know about the incidents because her granddaughter has revealed them to her teacher at the school, and she identified four persons namely, Piyasena, Premasiri, Adlin, and another person called Kurun Mama as the persons who committed sexual abuse on her. It was her evidence that she was informed of the incidents during the Sinhala New Year period. It had been suggested to her by the defence that because she and the parents of the children wanted them to be taken under the care of the probation service, she concocted a false accusation against the appellant and several others, which she has denied.

The prosecution has called witness PW-10 who was the doctor who examined the victim child, where he has marked his Medico Legal Report as P-01. The doctor has examined the child on 12-06-2004, and the child has related the history of the incident to the doctor in the following manner.

> "මාසයකට කලින් පේමසිරි මාමා වඩාගෙන එයාගේ වූ දාන එක මගේ වූ දාන එකේ ඇතිල්ලුවා. පියසේන මාමාත් ලොකු මාමාත් ඒ විදිහට කරා."

The doctor has failed to observe any marks of sexual abuse on the child. However, he has explained that given the history that the incident has taken place one month prior to his examination of the child, any such marks may not be visible after such time, and has expressed the opinion that due to the same reason, there is no possibility of excluding such sexual abuse.

Apart from the doctor, the prosecution has called two police officers who conducted the investigations in relation to the incident. PW-08, retired Police Inspector Ranaweera has gone to the scene of the alleged crime and recorded his observations in addition to arresting the appellant as a suspect. He has also instructed a subordinate officer to record the statement of the appellant. According to his evidence, it was the two children who has pointed out where the alleged crime took place.

PW-07 was the female police officer who has recorded the first complaint in relation to the incident on 11-06-2004. She has received an information from the Divisional Secretary of Tissamaharama. Thereafter, the Child Rights Development Officer and the Grama Niladhari of the area has come and given the first complaint to the police. When she and the other police team visited the scene of the crime, the relevant children were at school and the female police officer has taken steps to inform the school principal and get down the children to their house, where she has recorded their statements. She has also taken steps to admit the children to the hospital. The official witnesses have referred to two children in their evidence, meaning the victim child and her younger sister.

After the prosecution closed its case, the learned trial Judge has decided to call for a defence, where the appellant had made a dock statement and had also called a witness to testify on his behalf.

In his statement from the dock, the appellant has claimed that this is a false complaint against him. It was his stand that the complaining party wanted the children to be admitted under the probation care, and to achieve their target, they have falsified a story against them. The appellant has apparently referred to him and the other persons against whom the victim child has made the allegation of sexual abuse. He has stated that the children's grandmother wanted to admit the children under probation care. When her initial attempts

failed, she was the person who was instrumental in making false allegations against him was his position. He has denied the charges against him.

Hewabattage Sunil, who has given evidence on behalf of the appellant, has claimed that the children did not attend school and Somawathi, who is the grandmother of the children wanted the children to be sent under probation care. However, he has stated that he came to know about the sexual abuse complaints against the appellant as well as several others, but he is unaware of any details. He has admitted that he came to give evidence because he thought that the appellant did not commit any crime.

Pronouncing his judgement on 31-08-2017, the learned High Court Judge found that the prosecution has proved the case beyond reasonable doubt against the appellant. In the process of analyzing the evidence, the learned High Court Judge has decided that the evidence of the victim has been sufficiently corroborated and there was no basis to consider that the victim child or her grandmother has made a false complaint against the appellant. He has rejected the argument of the defence that the victim has failed to identify the appellant as the perpetrator. The learned High Court Judge has justified the reasons for the doctor being unable to observe any visible evidence of sexual abuse, but has relied on the evidence where the doctor has stated that such grave sexual abuse cannot be overruled.

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 error in law by applying the negative aspect of medical evidence as corroborative or supportive of the prosecution evidence.

2. The charges in the indictment does not specify a date but states only a period, however the prosecution failed to lead evidence regarding that period either.

3. The identification of the appellant was not sufficient to convict him.
4. Some findings in the judgement does not support by evidence.
5. The defence evidence had not been considered and evaluated properly.

Consideration of The Grounds of Appeal

As the 2nd ground of appeal is a ground of appeal relating to the date of offence as mentioned in the charges preferred against the appellant on the basis that it was not proved, I will now proceed to consider the 2nd ground of appeal before considering the other grounds urged.

In the indictment, the prosecution has mentioned that the three instances of grave sexual abuse were committed during a period of 2 months. That is to say between 11th April 2004 and 11th June 2004. It was the contention of the learned Counsel for the appellant that the victim has failed to give evidence in that regard, but has stated that the complaint was made in the year 2004. She has failed to mention dates or months. Even the grandmother (PW-04) has failed to come out with any specific dates of the alleged offences was the contention. It was the position of the learned Counsel for the appellant that the relevant complaint has been made on 11th June 2004 and there was no basis to conclude from the evidence placed before the trial Court that the offences took place during the time period mentioned in the said charges.

It is clear from the evidence of the victim that when she faced these incidents of grave sexual abuse, she was studying in grade 5 of her school. The doctor has given her age as 10 years old in his MLR. The evidence of the victim clearly shows that the perpetrator of this crime has used the young age of the victim and her family situation to his advantage. The victim child who was without her natural mother has only revealed these abuses to her teachers at school, which has led to a complaint being made in this regard to the police. The said complaint had been made on the 11th of June 2004.

The victim in her evidence says that she can only remember the year as 2004, but cannot remember the months or dates of the incidents due to her young age, but has stated that she can remember that these incidents took place after the New Year period of 2004. The victim in her history given to the doctor has stated that these incidents happened about a month prior to the medical examination, which may be the reason why the prosecution has decided to mention a period of two months before the date of the complaint to the police as the relevant period of the incidents.

The importance of proving a date mentioned in a charge was sufficiently discussed in the case of **R. Vs. Dossi (1918) 13 Cr.App.R. at 158**;

> The indictment charged the accused with indecently assaulting an 11-year-old girl on 19th March 1918. The child gave sworn testimony at the trial and the trial Judge invoked the rule of practice that it would be dangerous to convict absent corroboration. The accused provided alibi evidence for 19th March 1918, but could not do so for any other day in March. The child gave no evidence of a specific date but referred to constant acts of indecency over a considerable period of time ending at some date in March 1918.
>
> The jury found the accused not guilty of the offence on the date alleged. The Crown then amended the indictment to read "on some day in March", whereupon, the jury found the accused guilty. The conviction was upheld on appeal,
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> **Per Atkin, J.** at page 159;
>
> > *"From time in memorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence."*

He continued at page 160;

> "*Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment.*"

It is clear from the above authority as well as several other authorities that followed, the date of the offence need not be proven in order for a conviction to result, unless time is an essential element of the offence.

In the matter under appeal, the position taken up by the appellant was a complete denial where the contention was that the grandmother and the other family members of the victim child has concocted a story against the appellant in order to send the victim and her sister under probation care.

Therefore, it is the view of this Court that the exact date of offence is not an essential element when it comes to the facts of this matter.

Although it was the contention of the learned Counsel for the appellant that even the time period mentioned in the indictment has not been proved by the prosecution, I am not in a position to agree. The victim child has given clear evidence to state that she had to face these incidents of grave sexual abuse in the year 2004 and after the New Year period. She has complained to her school teacher as she no longer could bear the abuse faced by her, which may have resulted in them reporting this to the Child Rights Development Officer of the relevant Divisional Secretary's office. Through the officer, a complaint has been lodged on 11th June 2004.

This is the end date mentioned in the indictment. The child has mentioned to the doctor who examined her that these incidents happened about a month prior to his examination, which may be the reason why the prosecution has decided to give a period of two months before the complaint made to the police as the relevant period.

For the reasons as considered above, I find no merit in the ground of appeal where it was argued that the prosecution has failed to establish the period of offence before the Court.

I will now proceed to consider the other 4 grounds of appeal urged by the appellant cumulatively, as they are interrelated, and since the relevant legal principles have to be considered together.

It was the argument of the learned Counsel for the appellant that the prosecution has failed to provide sufficient evidence to establish the appellant's identity as the perpetrator of the crime. However, it is my view that the question of identity was never in doubt in this matter. The victim has given clear evidence in the Court to say that the appellant was well known to her since he is a person living near their house. Although she was unable to name him, when she gave evidence, that does not mean that the identity of the appellant was unknown to the victim. She has given evidence some 8 years after the incident and 7 years after she left the village to live under probation care.

Under the circumstances, her being unable to identify the appellant by his name is not a matter that has to be taken as a matter that creates a doubt as to the appellant's identity.

When the victim was taken before the doctor, the doctor has recorded in the history part of the MLR stating the victim revealed several names, inclusive of the name of the appellant as persons who committed grave sexual abuse on her. That fact is also consistent with the evidence of the victim child in Court.

Under the circumstances, it can be safely assumed that she has forgotten the name of the appellant, as she was away from her village for over several years before she came and gave evidence in the Court.

The contention of the learned Counsel for the appellant was that the learned High Court Judge has considered the negative aspects of the MLR marked P-01 to consider it as corroboration of the evidence of the victim.

In his judgement, the learned High Court Judge has considered the evidence of the doctor (PW-10) as a witness called by the prosecution to corroborate the evidence of PW-01 who was the victim. The doctor's evidence had been that he could not observe any visible signs of sexual abuse because the alleged offences had taken place around a month before the victim child was examined by him. However, the doctor has stated that there is no possibility for him to rule out such grave sexual abuses, merely because there were no visible signs observed on the child.

The evidence of the doctor does not corroborate the evidence of PW-01 because there had not been visible signs of grave sexual abuse. However, the doctor's evidence cannot be disregarded on that fact alone. The doctor being an expert witness can express only an opinion as to his examination of the victim child. As there is a provision for him to record the history given by a victim and produce it as part of the MLR, such history, if relevant, can be considered to measure the consistency or the inconsistency of an evidence of a victim in a grave sexual abuse, rape, or any other matter at a trial.

Although the learned High Court Judge has not mentioned that he is considering the medical evidence to test the consistency of the victim's evidence, it is my considered view that there was no error of law by the learned High Court Judge in the manner he considered the medical evidence placed before the Court.

The learned Counsel for the appellant contented that the learned High Court Judge has considered some of the facts, which are not part of the evidence at page 4 of the judgement (page 152 of the appeal brief).

The learned High Court Judge has said that at the time relevant to these incidents, the father of the victim child was dead. Whereas, it was the mother of the child who was dead at that time.

Similarly, it was contended that the victim in her evidence stated that the appellant removed only her undergarments before committing the crime but the learned High Court Judge has determined that he removed all the clothes worn by the victim. To be fair by the learned High Court Judge, it needs to be stated that the victim child has initially stated that after taking her to the bed inside their house, the appellant removed her clothes. However, when probing further, she has stated that he removed her undergarment.

For such a misdirection as to the facts to become relevant, such misdirection should have the effect of causing a prejudice to the appellant. I find no prejudice whatsoever, because of the mentioned two misdirections by the learned High Court Judge when analyzing the evidence, as they are not material misdirections as to the facts.

In his 5th ground of appeal, the learned Counsel for the appellant contended that the learned High Court Judge has failed to consider and evaluate the evidence of the defence properly.

However, I have no basis to agree with that contention as well. The learned High Court Judge has considered the essence of the dock statement made by the appellant giving it the necessary value of a statement made by an accused person without subjecting himself to an oath or test of cross-examination.

The appellant's position had been that the grandmother of the victim made up a false story in order to send the children under the probation care. However, it becomes abundantly clear from the evidence led at this trial that the

grandmother or the parents of the child were unaware of these grave sexual abuse incidents until the police along with the officials of the Divisional Secretary's office came looking for them to their house.

Although the witness called by the defendant on behalf of him had stated that the children were not attending school, even at the time of the relevant officials came to the house, they had been at school, and police evidence clearly establishes the fact that they got down the children from the school in order to record their statements.

The witness called on behalf of the defendant has not stated anything that creates a doubt in relation to the evidence of the prosecution. He has merely stated that because he believes that the appellant has not done anything wrong, he came to give evidence on his behalf. He has stated further, that he is unable to state anything in relation to the alleged incidents of grave sexual abuse.

I find that the above matters had drawn the attention of the learned High Court Judge, and based on due consideration, the learned High Court Judge has decided to reject the defence put forward by the appellant.

In this matter, apart from the evidence of the victim child, there had been no eyewitness account of the incidents on grave sexual abuse, and the incidents of grave sexual abuse had been reported with a delay, which has been well explained by the victim child in her evidence.

As considered, correctly by the learned High Court Judge there was no reason before the trial Court to doubt the evidence of the victim, although there were no eyewitness accounts to corroborate her evidence.

In a trial of this nature, what matters is the credibility and trustworthiness of a witness, and not the number of witnesses called on behalf of the prosecution.

In terms of section 134 of the Evidence Ordinance,

> **"No particular number of witnesses shall be in any case required for the proof of any fact."**

The Indian Supreme Court in the case of **Bhoginbhai Hirijibhai Vs. State of Gujarat (1983) A.I.R. SC 753** held;

> *"In the Indian setting refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to the injury."*

It was held in the case of **D. Tikiri Banda Vs. Honourable Attorney General, Bar Association Law Reports 210 (B.L.R.) at 92;**

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

(b) When the medical report is consistent with the version of a sexually abused victim, it can be taken as evidence consistent and thus form to some extent corroboration and is admissible under section 157 of the Evidence Ordinance (although that may not be corroboration in the strict sense)

(c) 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.

(d) Insignificant omission of such a victim or her utterance of dreadful words should not be taken as a contradiction having effect and impact of the credibly of the victim.

(g) If the evidence of the victim could be relied on, is trustworthy, firm etc. there is no impediment on the part of the Court in acting solely on

the evidence of the victim and it is only when the evidence of the victim suffers from some infirmity or where the Court believe that it would not be prudent to base a conviction solely on that evidence, the Court should look for corroboration.

Although there had been some misdirections as to the facts and the law by the learned High Court Judge in the judgement, I am in no position to consider that those misdirections had prejudiced the substantial rights of the appellant or occasioned a failure of justice as considered above.

In the proviso to the Article 138 of The Constitution which provides jurisdiction for the Court of Appeal to exercise its appellate jurisdiction, reads thus;

> **"Provided that no judgement, 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 occasion a failure of justice."**

For the above-mentioned reasons, I find no merit in the appeal preferred by the appellant challenging his conviction and the sentence. Accordingly, the appeal is dismissed for want of merit. The conviction and the sentence dated 31st August 2017 affirmed.

Having considered the fact that the accused-appellant had been in incarceration from the date of his sentence, it is ordered that the sentence should deem to have taken effect from the date of sentence, namely 31-08-2017.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal