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

In the matter of an Appeal under and in terms of Article 138 (1) of the Constitution read with Section 11 (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 with Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No:

HCC 207/20

HC of Vavuniya Case No:

HCV /2813/18

The Democratic Socialist Republic of Sri Lanka

Complainant

v.

Vinayagamoorthy Karunakaran

Accused

AND NOW BETWEEN

Vinayagamoothy Karunakaran

Accused-Appellant

v.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

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

Counsel: Champika Monarawita for the Accused-Appellant
Maheshika Silva, DSG for the State.

Written Submissions On: 18.08.2022 (by the Accused-Appellant)
Not Filed (Respondent)

Argued On: 04.09.2023

Decided On: 25.10.2023

Sasi Mahendran, J.

The Accused Appellant (hereinafter referred to as 'the Accused'), being the father of the victim, one Karunakaran Kishobana, faced indictment before the High Court of Vavuniya on the subsequent three counts:

Count 1: That on or between 28th February 2017 in Mulliyavalai within the Jurisdiction of the High Court of Vavuniya the accused committed an offence punishable under Section 364(a)(1) of the Penal Code as amended by Act No.22 of 1995 and that thereby committed an offence punishable under Section 364(3) of the Penal Code as amended by Act No.22 of 1995;

Count 2: In the course of the same transaction and on the said date mentioned in the 1st count above in Mulliyavalai within the Jurisdiction of the High Court of Vavuniya the accused committed an offence punishable under Section 365(b)(2)(b) of the Penal Code as amended by Act No.22 of 1995, 29 of 1998 and 16 of 2006; and

Count 3: That on or about the 1st of March 2017 in Mulliyavalai within the Jurisdiction of the High Court of Vavuniya the accused committed an offence punishable under Section 364(a)(1)

of the Penal Code as amended by Act No.22 of 1995 and that thereby committed an offence punishable under Section 364(3) of the Penal Code as amended by the Act No.22 of 1995.

The Prosecution called six witnesses and introduced two pieces of evidence, marked as P1 and P2, before closing its case. The Accused subsequently issued a statement from the dock. Upon conclusion of the trial, the Learned High Court Judge found the Accused guilty on the second count of grave sexual abuse, while acquitting him on the first and third counts.

Consequently, for the second count, the Accused was sentenced to 14 years of rigorous imprisonment and fined Rs. 5,000/-. Failure to pay the fine would result in an additional six months of simple imprisonment. The judgment was delivered on July 31, 2020.

Aggrieved by the conviction and sentence, the Accused has filed an appeal with this Court.

The following grounds of appeal were urged by the Counsel for the Accused:

i. That the Learned High Court Judge had failed to properly consider the delay on the part of the PW1 to make a complainant and failure to give justifiable reason for the said delay; and

ii. That the Learned Trial Judge had failed to properly consider that the evidence of the PW1 fails the test of consistency.

The facts pertaining to this case and the background to the incident may be set out briefly as follows;

According to PW1, Kisobana (the victim and daughter of the Accused), testified that in the year 2017, she, who was then a student in the 7th grade, returned home from school in the afternoon to find that her mother (now deceased) and her siblings were not present at the residence. She was seated on a chair outside the verandah where her father (the Accused) subsequently returned to the residence and escorted PW1 to the shrine room, where he proceeded to remove her jeans and undergarment. He then placed his left hand on her female organ, inserted his index finger inside her for a little while and there after let her go. Subsequent to the aforementioned incident, PW1 immediately confided in her maternal aunt, identified as PW2, who then advised her uncle to report the matter to the Child Probation

Division. Following this, PW1 was relocated to a hostel before being taken to the police station to formally record her statement. She further clarified that this was an isolated incident. Upon cross-examination by the prosecution regarding her failure to inform her mother, PW1 articulated that due to her mother's deteriorating health condition, she refrained from apprising her of the grievous event so as not to aggravate her condition. She also disclosed that her mother had filed a formal complaint with the police subsequent to being notified by PW2, PW1 was then taken to the hospital by her mother where a male doctor examined PW1's vaginal region and here she affirms that she told the doctor about this incident.

During the course of PW1's cross-examination, she averred that her mother was the one who initially provided a statement to the police regarding her father's misconduct. She confirmed that her own statement was recorded by the police approximately two months subsequent to the date of the incident. Following her mother's complaint, PW1 elaborated to the police on the actions taken by her father with his hands. The Defense Counsel raised the issue of her paternal uncle, Udaya Kumar, potentially being present at the time, an assertion that PW1 refuted. When questioned as to why she had not raised an alarm, she responded that she had been threatened by the Accused to remain silent. She also corroborated that she had informed PW2 of the incident the next day

We are mindful of the following observation made by **Justice S. Thurairaja PC, J** in the case **AG v. Daradadagamage Chandraratne, CA/85/2013, decided on 25.05.2018, His Lordship** held that;

"The last ground of appeal is that the evidence of the prosecutrix is unreliable.

As we discussed above the child was 11 years 10 months and 11 days at the time of the incident, she gave evidence after 8 years and subjected to cross examination fors a period more than 3 year.

Time and again Courts have discussed the acceptance of evidence of children of tender ages. Our Judges are not there to test the memory of the witness, they are expected to find the actual fact and the truth. Witnesses are human being, they are not memory machines nor robots to repeat the incident as it was. Further the natural behaviour of human beings is

to forget incidents, especially sad memories. No one wants to re- visit painful moments and keep detailed memories with them. We are also mindful most of our courts with due respect, are not child friendly. In this case a child giving evidence after 8 years and subjected to cross examination more than 3 years is sufficient to create certain contradictions in her testimony. It is human nature. We carefully perused the evidence of the Prosecutrix and others and found some contradictions inter-se and per-se. The learned trial Judge had considered most of those and made his decision."

In considering the testimony of the prosecutrix, PW1, it is noteworthy that she remained largely consistent throughout the proceedings. While minor discrepancies were observed, these do not strike at the core of the case. Given that she is a minor who has endured a highly distressing experience, it is to be expected that some inconsistencies might arise, especially considering the emotional and psychological toll such an event would have. It is crucial to highlight that her testimony was against her own father.

Therefore, it would be unrealistic to expect a child of such tender years to recount every detail with absolute precision. In support of this stance, I shall refer to the following precedent:

We are mindful of the sentiments expressed by **Justice Shirani Tilakawardane, J.** in the case of **AG v. Mahadurage Dimson and 3 Others, CA 141/A-B-2000, decided on 24.11.2003, Her Ladyship** held that**;**

"The Courts must, while evaluating evidence, bear in mind that in a case of rape especially a girl of tender age would not come before a Court merely to make a humiliating statement against her honour. Therefore, contradictions which have no material effect on the veracity of the prosecutrix case should not be allowed to throw out an otherwise reliable prosecutrix case."

Therefore, it is judicious to conclude that the Learned Trial Judge astutely assessed the prosecutrix, who underwent rigorous cross-examination. Taking into account her demeanor and deportment on the stand, her testimony was adjudged to be both credible and truthful. Upon a meticulous review of her statements, she was found to be consistent and honest even under cross-examination; accordingly, we deem her testimony to be creditworthy and conclude that she has not falsely implicated the Accused.

In the matter of PW2, Udayakumar Agalya (aunt to PW1 and sister-in-law to the Accused, residing in proximity), she attested that PW1 approached her in the afternoon concerning an incident involving her father. On the basis of her understanding, she suspected that the issue related to child abuse. She elaborated that, owing to the fragile health condition of PW1's mother, she neither reported this to the police nor confronted the Accused; instead, she left PW1 at her grandmother's residence. PW2 corroborated PW1's testimony regarding her mother's health condition, specifying that her reticence to inform her stemmed from the likelihood of aggravating her condition. PW2 has also furnished a statement to the police.

During her cross-examination, she confirmed that her awareness of the incident came after PW1 confided in her. Through this corroborative evidence, it is manifest that the prosecutrix promptly reported the incident to PW2. The defense counsel contested that there was a delay in presenting this evidence, but such an argument is belied by the prompt reporting to PW2.

When considering the contention whether the evidence of a belated witness can be accepted or not, we shall observe the cases considered by **Justice Sisira De Abrew** in the case of **Anandappan Vishawanadan v AG, SC Appeal 15/2018, decided on 12.2.2021, His Lordship** held that:

"I hold that court should not reject the evidence of a witness who has made a belated statement to the Police if the delay has been explained. In the present case the delay in making the statement to the Police has been explained. Thus the decision of the learned trial Judge to accept the evidence of witness Murugase Ravindran cannot be found fault with."

In **Sumanasena v Attorney General [1999], 3 SLR 137, His Lordship Justice Jayasuriya** held:

""Just because the witness is a belated witness the Court ought not to reject his testimony on that score alone and that a Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness."

In **Ajith Samarakoon v The Republic of Sri Lanka [2004], 2 SLR 209, His Lordship Justice Jayasuriya** held:

"Just because the statement of a witness is belated the Court is not entitled to reject such testimony. In applying the Test of Spontaneity the Test of Contemporaneity and the Test of Promptness the Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced by the witness are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement."

In the case of **Dharmasiri v The Republic of Sri Lanka [2012] 1 S.L.R 268, Her Ladyship Shirani Tilakawardane, J** held that:

"Two critical tests before considering belated evidence as reliable evidence are: firstly reasons for delay and secondly, whether those reasons are justifiable."

Taking into account the foregoing observations, I am convinced that the explanations given for the delay in presenting evidence are credible. As a result, I find the information offered by these witnesses to be both reliable and creditworthy. Therefore, we dismiss the objection raised by the Learned Counsel for the Accused regarding any purported delay.

PW13, O.I.C Ratnasingham, indicated that the first complaint was received from PW1 and that she also identified the location of the incident. After making the necessary observations, he escorted PW1 to the hospital for admission, and her grandmother was designated to look after her during her stay.

Upon cross-examination, the Defense Counsel inquired about Udayakumar. PW13 clarified that PW1 had not mentioned him, as her complaint was specifically focused on her father's alleged misconduct. He confirmed that after obtaining PW1's account, her mother's statement was subsequently documented

According to the testimony of PW12, Dr. Jayantha Herath, who conducted the medical examination of PW1, he noted that her hymen exhibited a 'crescentic' form. Due to its elastic nature, the likelihood of detecting injuries is minimal. Dr. Herath further opined that the possibility of two fingers being inserted into the prosecutrix's genitalia could not be conclusively ruled out.

In his cross examination, we note that the defense put forward the disturbing question of whether PW1 had engaged in self-indulgence to gain sexual pleasure, PW12 stated that according to his observation as mentioned there is a possibility of the insertion of two fingers and PW12 further claimed that it is unusual for a child of this age to engage in self-indulgence, he further elucidated that the veracity of the situation could often be ascertained through a brief patient history, affirming that they rely on the patient's own account for this purpose.

In my assessment, I deem the line of inquiry advanced by the Defense to be wholly unfounded. To insinuate that a child of such a young age and vulnerable state could partake in dishonorable actions and subsequently fabricate accusations against her own father is both derogatory and baseless.

According to the dock statement presented by the Accused, he alleged that his daughter's neglect of her studies in favor of watching videos on a mobile device prompted him to discipline her physically. However, it is crucial to highlight that the Accused did not challenge the specific allegations leveled against him. This omission was noted by the Learned Trial Judge, who subsequently dismissed the Accused's dock statement for failing to introduce any reasonable doubt.

Moreover, it was not posited in the Accused's dock statement that the testimonies provided by PW1 and PW2 were untruthful.

In **Abeygunawardane Vs. Attorney General C.A. 105/97 decided on 18/05/99** it was held that,

"Where the accused never suggested in his dock statement that the prosecutrix or her mother gave false evidence was a fact that could be relied on in deciding the credibility of the two witnesses".

When we peruse this evidence, we are of the view that the prosecution has proved the case beyond reasonable doubt, therefore I do not intend to divert from the findings of the Learned Trial Judge and thereby affirm the conviction and sentence. This appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL