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

In the matter of a petition of appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979 in the Democratic Socialist Republic of Sri Lanka.

High Court (Batticaloa)

Case No: 2568/2008

C.A. Case No:106/2012

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant

Vs.

Burhan Mohomod Saibu

Accused

AND NOW BETWEEN

Burhan Mohomod Saibu

Accused Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant Respondent

BEFORE : **H.N.J. PERERA, J**

P.W.D.C. JAYATHILAKE, J

COUNSEL : Dharshana Kuruppu for the

Accused Appellant.

Dilan Ratnayake SSC for the

Respondent.

ARGUED ON : 28.10.2014

DECIDED ON : 30.03.2015

P.W.D.C. Jayathilake, J

Burhan Mohomod Saibu, the Accused Appellant was indicted for committing the offense of child abuse, punishable under Sec. 365 B (2) b of the Penal Code amended by No. 22 of 1995 and No. 29 of 1998. He was convicted after trial and sentenced to 10 years' rigorous imprisonment, and imposed a fine of Rs. 10,000/= carrying a default sentence of six months simple imprisonment. He was ordered to pay Rs. 50,000/= to the victim child carrying a default sentence of one year simple imprisonment. Being aggrieved with the conviction and the sentence, the Accused Appellant has preferred this appeal to this court.

The Accused Appellant had been a person of 43 years, married and having one daughter by April 8th of 2005. His wife had gone abroad twelve years ago. He

was living alone in a small house about 5, 6 meters from the house where his parents were living. He had a plantation of sugar cane.

Lafir Irfan, 8 year old student had been playing cricket with his friends near the Accused appellant's land. When his friends were playing Irfan was just waiting nearby as he had been out. Then the Accused appellant came there and called Irfan to give him sugar cane and mangoes. Accused Appellant had took Irfan into his house and closed the door. After switching on the ceiling fan, he asked Irfan to lie in the bed. Accused Appellant made Irfan lie on the stomach in the bed. Then the Accused Appellant removed Irfan's pair of trousers and his trousers. He got on Irfan's body, lay down and pushed his penis in Irfan's back. The friends of Irfan who were playing cricket had come to see Irfan, as he was late. Then they had noticed the door and windows of the Accused Appellant's house closed. They pushed the door, then it opened. They had seen Irfan lying with his face downwards and the Accused Appellant standing without the trousers. Then, they had gone with Irfan to his house and told his parents about the incident.

The learned counsel for the Accused Appellant contended that the prosecution story cannot be believed for the following reasons. Irfan, in his evidence, had admitted that the Accused Appellant had leveled an allegation that Irfan and his friends had stolen sugar cane. He had also accepted the suggestion made

by the defense counsel that the Accused Appellant hit him over the said allegation. The learned counsel also pointed out some discrepancies of the evidence of prosecution witnesses. The father of Irfan had said that he was told about the incident by his wife, the mother of Irfan. But Irfan's friend, Nibras had stated in his evidence that he told Irfan's father about the incident, not the mother. But Irfan's father had categorically stated that he came to know about the incident through his wife and Irfan.

The learned counsel for the Accused Appellant raised an argument that the evidence of the victim does not support the charge leveled against the Accused Appellant. What is mentioned in the charge is that by using Accused Appellant's organ on Irfan's thigh area, the said offence had been committed. But according to Irfan's evidence, the Accused Appellant had placed his organ on the back of Irfan. This implies that the Accused Appellant had used the rectum of Irfan.

It is pertinent to consider the evidence of the Judicial Medical Officer at this juncture. He had stated that he had examined both the back and thigh area of Irfan, but found no injuries. The defense counsel had asked whether, when one inserted his penis into the anus of a child, it is possible that the child gets injuries. In the answer given to this question, the Judicial Medical Officer had made the following explanation.

There are two kinds of sexual molestation and abuse. One method is inserting the penis between the two thighs in which there is no room or possibility of causing injuries and/or pain. The other is inserting the penis into the anus where there is a chance for injuries and pain, sometimes bleeding as well. In the cross examination, Judicial Medical Officer had explained that the child was 8 years and 2 months old, so he cannot say on which area of the body it was done because he has no knowledge about it. His opinion was that if it had occurred through the anus there would have been a possibility of getting injuries or wounds.

The learned Senior State Counsel responded that when the evidence of Irfan and the medical evidence are considered together, it is obvious that the physical act that had taken place was the 1st method where the chance of getting injured is absent. He pointed out that accordingly there is no clash between the charge sheet and prosecution evidence.

The Accused Appellant had made a dock statement where he had stated that the children helped him with cleaning the land and therefore he gave sugar cane and mangoes. After that, he had seen the boys cutting the sugar cane in his plantation and he had warned them. He had further stated that there was no electricity in his house at that time. But ASP Weerasinghe, in his evidence, had stated that the Accused might have been lying in the bed prior to their

arrival at his place, because the ceiling fan of the house had been working at that time.

It is a common allegation that we have experienced in the Criminal Court of Appeal that the judgments of the High Court Judges are only mere narrations of the evidence and they make no effort to analyze and evaluate the facts and the circumstances. We too have noticed that often they don't refer to the premises by which they come to the conclusions. In the instant case, the learned trial judge has begun the judgment by mentioning the charge explained in the indictment. She has noted the names of the prosecution witnesses and next the documents marked. After that, up to the last paragraph of the judgment, the learned judge has narrated the evidence of the prosecution case and the contents of dock statements. In the last paragraph of the judgment, with a short summary of the prosecution case, she has recorded her conclusion that the prosecution case has been established. "Therefore, the State Counsel has proved the case against the Accused beyond reasonable doubt and the court finds him guilty for the charge of child abuse," the trial judge has mentioned in her judgment as the last sentence.

She could have analyzed the evidence of the victim boy and his friend. Both of them had been students of grade 3 at the time of the incident. They had given evidence after 5 years of the incident and were students of grade 8 at the time

of giving evidence. One can observe the verity of the evidence by studying the line of moments leading to the occurrence of incident relevant to the charge.

The victim boy had innocently admitted the fact that the allegation of stealing sugar cane was brought against him while denying the said allegation. But, this allegation had not been suggested to Nibras the friend of the victim. The Accused Appellant, in his dock statement, had stated that stealing of sugar cane was done by children, (not the victim boy alone). These discrepancies suggest that the allegation of stealing sugar cane had been brought after the incident.

As per the above situation, the question arising is that whether the failure of the trial judge analyzing evidence would result in invalidating the conviction. Sisira de Abrew J in *premawansa V.A.G*[1] has expressed the view although there was no judicial evaluation of evidence, learned trial judge, on the evidence led at the trial could not have arrived at any other conclusion other than the conclusion reached by him.

Regarding this point, I hold that the mistakes of technicality made by the trial judge shall not result in invalidating the conclusion unless such mistakes have led to miscarriage of justice. On the other hand, the Supreme Court and the Criminal Court of Appeal have repeatedly stressed that deciding the question of facts is a task of the court of first instance, not the Court of Appeal. The

privy Council, in 1918, has decided in Fradd Vs. Brown & Company Limited[2] that

" Where the controversy is about veracity of witnesses, immense importance attaches, not only to the demeanour of the witnesses, but also to the course of the trial, and the general impression left on the mind of the Judge of first instance, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge of first instance upon a point of fact purely is over-ruled by a Court of Appeal".

Similar opinion has been expressed in the following decisions.

Dharmasiri V. Republic of Sri Lanka[3]

Alwis V. Piyasena[4]

Sri co-operative Industries Federation Ltd V. Kotalawala[5]

A.G. V. Mary Theresa[6]

It is a subtle point whether it is the intention or the desire that urges a man to commit a sexual offence. Unlike in other criminal offences, the sexual act that is *"Actus Reus"* itself speaks about the *"Mens Rea"* of the crime unless the offender has any other reason for excuse. But, when it comes to the offence of child abuse, there is no reason for excuse once the physical act has taken place.

The Accused Appellant in this case has gone up to the place where the children were playing cricket. He had called the victim boy to go to his house promising to give him sugar cane and mangoes. He had taken the boy into his house, made him lie on the bed and placed his penis on the back of the boy where by Accused Appellant had committed the offence of child abuse with which he had been charged. In the circumstances, this court is of the opinion that the learned trial judge had arrived at the correct conclusion and convicted the Accused Appellant. As such we have no reason to interfere with the conviction and the sentence imposed by the trial judge and therefore, we affirm the conviction and the sentence and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J.PERERA, J

I agree

JUDGE OF THE COURT OF APPEAL

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1. *(2009) 2 SLR 205*
2. *20 NLR 282*
3. ((2010)2 SLR 241)
4. ((1993) 1 SLR 119)
5. ((2009) 2 SLR 241)
6. ((2011) 2 SLR 292)