

219/12

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

In the matter of an appeal under
Section 331 of the Code of Criminal
Procedure Act No.15 of 1979 as
Amended.

Kinippuli Arachchilage Don
Gunapala alias Kade Mama

Accused-Appellant

C.A.Case No:-219/12

H.C.Gampaha Case No:-123/11

V.

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

Before:- H.N.J.Perera, J &

P.W.D.C.Jayathilake, J.

Counsel:-Saliya Peiris for the Accused-Appellant

Dilan Ratnayake S.S.C. for the Respondent

Argued On:-29.01.2015/06.02.2015

Written Submissions:-19.03.2015

Decided On:-15.05.2015

H.N.J.Perera, J.

The accused-appellant was indicted on two counts in the High Court of Gampaha for committing the offence of grave sexual abuse on Hettiarachchige Navodaya Prabashini between the 1st of January 2011 and 17th October 2011, an offence punishable under section 365(b) 2(b) of the Penal Code as amended by Act No 29 of 1998.

After trial the learned High Court Judge convicted the accused-appellant on the first count and acquitted him on the second. The accused-appellant was sentenced to 10 years RI with Rs.10,000/- fine. Being aggrieved of the aforesaid conviction and sentence the accused-appellant had preferred this appeal to this court.

The case for the prosecution was that the victim H.Navodaya Prabashini was 9 years old at the time of the incident. It is her position that on this day she and her brother with two other children was playing near a Rambutan tree and when the other children went in search of the ball Gunapala alias Kade mama dragged her away and abused her.

She says she was threatened not to tell her parents about the incident. She first stated that she was subjected to a similar incident twice. Learned Counsel for the accused-appellant urged four grounds of appeal as militating against the maintenance of the conviction .It is submitted that the learned trial Judge has failed to consider the contradictions which went to the root of the case and also failed to-

- (a)analyse the case for the defence including the evidence given by the accused-appellant

(b) failed to give reasons in his judgment for rejecting the defence version

(c) comply with section 283 of the Code of Criminal procedure Act No.15 of 1979 requiring giving reasons

(D)has deprived the accused a fair trial as envisaged by Article 13(3) of the Constitution.

The main and sole witness in this case is the prosecutrix in this case. Her evidence is not corroborated in any material or particularly by the other witnesses.

The doctor has examined Prabashini on 05.11.2011. At that time he was aware of the history narrated to him by Prabashini, to the effect that she was sexually abused by the accused-appellant on 11.10.2011 that is about six days prior to her 10th birthday. The doctor has examined her after about three weeks from the date of the incident and had not observed any internal or external injuries on Prabashini. But he does not exclude the possibility of the offence being committed on Prabashini. In my opinion the medical evidence does not support the evidence of the prosecutrix. Thus the case depends only on the evidence of the prosecutrix.

In Premasiri V.The Queen 77 N.L.r 86 Court of Criminal Appeal held:-

“In a charge of rape it is proper for a jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the jury that she is speaking the truth.”

In Sunil and another V. The Attorney General 1986 1 SLR 230 it was held:-

"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-appellant 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.

It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted even in the absence of corroboration."

I shall now consider whether the victim in the present case has given truthful evidence. The victim was only 9 years at the time of the incident. It was her evidence that she was playing with her brother and other two children near the Rambutan tree. When the other three children went in search of the ball the accused-appellant who she refers to as Kade Mama dragged her away in to the kitchen of his boutique and abused her. She says she was threatened by the accused-appellant not to tell this to her parents. She first stated that she was subjected to a similar incident twice, but in cross-examination she said she was subject to abuse only once. The defence has marked this contradiction as V1 where she had told the police that on another day she went to the boutique with her brother and the accused-appellant having sent her brother away dragged her into the kitchen and molested her.

Witness Sanjeewani who is the victim's mother said that her daughter told her about the incident on 4.11.2011. She further state that her daughter came home around 2.pm . She said she went to the boutique leaving the daughter with her brother and came back within 15 minutes. Then her daughter said 'that a man showed a

knife to her and called her". Witness Sanjeewani said her daughter had claimed that the man was on the other side of the window. It is clear that the mother had checked with others and has found out that there was no such person. Again in the evening the girl has claimed she could see someone waving at her with a knife in hand. She also has claimed that she saw someone hiding in the shrubs behind her house, which could not be seen by anyone else, and she got frightened by the same.

As contended by the learned Counsel for the defence, when this evidence is considered in the light of her mother's evidence it is apparent that the prosecutrix was suffering from some form of delusion or was imagining things.

The accused-appellant gave evidence from the witness box wherein he denied the incident. He states that on the night of the 4th November 2011 he was set upon by the relatives of the prosecutrix who assaulted him and thereafter he was arrested. He claimed that there was an animosity with the prosecutrix's family over some money being owed to him.

In this case the prosecutrix's evidence is not corroborated by any other witness. Even the doctor's evidence does not directly support the evidence of the prosecutrix. The whole case depends on the sole evidence given by the prosecutrix. Has she given truthful evidence? Is it safe to act on her evidence without any other evidence to corroborate her evidence. I hold the view that an accused person in a charge of rape or of a similar offence can be convicted on the uncorroborated evidence of the victim only when her evidence is such a character as to convince the court that she is speaking the truth.

As contended by the Counsel for the accused-appellant I am of the view that it would be unsafe to convict the accused-appellant on the uncorroborated evidence of the prosecutrix. The evidence of the mother of the prosecutrix confirms the position that the prosecutrix was imagining or being delusional. The learned trial Judge has clearly failed to consider whether it was safe to convict the accused-appellant on the evidence of the prosecutrix in the light of his own finding that she was suffering from some mental confusion. The learned D.S.G also has conceded that the approach of the trial Judge in this case is not correct.

For the aforesaid reasons I find that it is unsafe to allow the conviction to stand. Accordingly I set aside the conviction and the sentence dated 03.09.2012, and acquit the accused-appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C.JAYATHILAKE, J.

I agree.

JUDGE OF THE COURT OF APPEAL