

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

Welayudan Subramaniam alias kannaiya

Appellant

V.

CA 344/2017
HC Matara 10/2016

Attorney General,
Attorney General's Department,
Colombo 12

Respondent

BEFORE

: **A.L.SHIRAN GOONERATNE, J**
 K.PRIYANTHA FERNANDO, J

COUNSEL

: Razeek Zarook, PC with Rohana Deshapriya
 and C.Liyanage for the Accused Appellant.
 Sudharshana de Silva, DSG for the
 Respondent.

ARGUED ON : 01.03.2019

WRITTEN SUBMISSIONS

FILED ON : 03.07.2018-Accused-Appellant
03.10.2018-Respondent

JUDGMENT ON : 30.04.2019

K. PRIYANTHA FERNANDO, J.

1. The Accused Appellant (Appellant) was indicted in the High Court of Matara for committing an offence of grave sexual abuse on Maradan Sumithra Devi (Victim) who was under 16 years of age, punishable under section 365b(2)b of the Penal Code.
2. After trial, the learned High Court Judge convicted the Appellant and was sentenced to imprisonment for 12 years, and also imposed a fine of Rs. 10,000/- in default of payment of the fine, imprisonment for 6 months. Further the Appellant was ordered to pay Rs. 150,000/- as compensation to the victim and a default sentence was imposed.
3. Being aggrieved by the said conviction the Appellant appealed against the same on the following grounds;

1. The learned Trial Judge failed to evaluate the vital omissions and that contradictions V1, V3, and V4 marked by the defence.
2. The learned Trial Judge has failed to consider that the prosecution has not proved the charge beyond reasonable doubt.
4. We carefully considered the evidence adduced at the trial, judgment of the learned Trial Judge, written submissions filed and the submissions made by Counsel for both Appellant and Respondent at the hearing of the appeal.
5. Case for the prosecution mainly rests on the evidence of the alleged victim who had been 10 years old at the time of the incident. Her evidence in a nutshell was that they were living in line rooms. House of the Appellant also had been in the same line. She had gone to the toilet that was outside. Her father had been sleeping. From the toilet she had come to the tap to wash. Then the Appellant had closed her mouth with a cloth and had dragged her towards his kitchen. Appellant had been wearing a sarong. He had taken her inside the kitchen made her lean against the wall and removed her trouser and had kept his penis on to her vagina. She had said that he did it for about 1 hour.
6. Then the victim had gone and told her father and then the mother. Same day they had reported the matter to Police.

Ground No.1

7. Counsel for the Appellant contended that the learned Trial Judge failed to evaluate the vital contradictions and the omissions in the evidence of the main witness Sumithra Devi. When evaluating the evidence of the victim it is pertinent to note that the victim was 10 years old when the alleged sexual assault was committed on her. At the same time, it is also important to note that she was 18 years old when she gave evidence in Court, which means 8 years after the offence was committed. Therefore, her evidence has to be evaluated taking her age and the time passed in giving evidence into consideration.
8. It was submitted by the Counsel for the Appellant that the victim had omitted to mention to the Police in her statement that her mouth was covered with a cloth. As mentioned before, when she went to the Police Station, she was 10 years old. Obviously, she would have been more concerned about the sexual act the Appellant performed on her. The learned Trial judge has considered above omission carefully at page 14 of his judgment and correctly had come to the conclusion that it had not affected the credibility of the victim.
9. The contradiction marked as V1 was whether she felt pain when the accused committed the sexual act on her. In her statement to Police she had said that she did not feel pain. The learned Trial Judge had given careful consideration into V1 as well. As the Learned Trial Judge mentioned in his

judgment at page 14, correctly explained as to how that answer became inevitable.

ප්‍ර: කොච්චර වෙලාවක් හිටියද සුමිත්‍රාගේ වූ කරන එකට තිබ්බා කිව්වා නේ කොච්චර වෙලාවක් හිටියද තියල?

උ: පැයක් විතර තිබ්බා.

ප්‍ර: මොනවද දැනුනේ ඒ වෙලාවේ මොනවාහරි දැනුනද?

උ: ඔව්.

ප්‍ර: මොකක්ද දැනුනේ? කොතනද රිදුනේ?

උ: මුත්‍රා කරන තැන.

10. There had been two questions put together, so even if she answered the first, she was compelled to say that she felt pain. However, the contradiction V1 will not affect the credibility of the victim.

11. Contradictions V3 and V4 are also the same. Those will not go to the root of the case. All those contradictions were well considered by the learned Trial Judge in his judgment. Contradiction marked V3 is from the evidence of the mother of the victim Letchchami. Letchchami had said in evidence that her two sons had gone to school. However, she had told the Police in her statement that the two sons had gone to her father's house close by. That contradiction marked from Letchchami's evidence will not create a doubt on the evidence of the victim that she was sexually assaulted.

12. Contradiction marked V4 is also from the evidence of Letchchami. Letchchami had gone in search of the Manager of the estate to complain

about the incident. On the way back to the Police Station she had met Kankani. The issue in cross examination was whether she told the incident to kankani. She said that she told him but denied removing the child's trouser and showing Kankani. This again was considered by the learned High Court Judge at page 18 and 19 of his judgment and rightly concluded that it would not affect the case for the prosecution.

- 13.As submitted by the Senior State Counsel for the Respondent, The Indian Supreme Court in *State of Uttar Pradesh V. M.K Anthony* [1984] SCJ 236/ [1985] CRI. LJ. 493 at 498/499 held;

“While appreciating the evidence of a witness, the approach must be whether the evidence of a witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here and there from evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court

which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless there are reasons weightly and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

This was referred to and followed in case of Oliver Dayananda Kalansuriya V. Republic of Sri Lanka CA 28/2009 (13.02.2013).

14.The learned Trial Judge has carefully considered the above contradictions and omissions in the evidence of witnesses for the prosecution and rightly found that those would not go to the root of the case and would not affect the case for the prosecution. Therefore, this ground of appeal has no merit.

Ground No.2

15.Counsel for the Appellant submitted that the evidence of the victim was not corroborated and that it is unsafe to convict the Appellant on uncorroborated testimony of the victim.

16.Sexual offences on children are often committed in isolation and not in public. Therefore, very seldom you find eye witnesses other than the victim. If the evidence of the victim is credible, consistent and trustworthy, court is entitled to convict an accused on the uncorroborated testimony of the prosecutrix.

17.The victim in this case was a 10-year-old child when she was allegedly sexually abused. Age of a victim is not determinative of her ability to give truthful and accurate evidence, and, if found competent, it is open to the Court to convict on the evidence of a single child witness, whatever her age. (*R. V. B. [2010] EWCA Crim 4; [2011] Crim. L.R. 233*)

18.Indian Supreme Court in case of *Bhoginbhai Hirjibhai V. State of Gujarat [1983] AIR SC 753* said;

“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”

19.In case of *Thambarasa sabaratnam V. A.G. CA 127/2012*, after discussing a series of cases said;

“Therefore, it is clear that an accused person facing a charge of sexual offence can be convicted on the uncorroborated evidence of the victim when her evidence is of such character as to convince the Court that she is speaking the truth.”

20.In the instant case the victim child promptly complained to her father about the sexual assault committed by the Appellant and a complaint to the Police was made the same day. Although the complaint being recent cannot be considered as corroboration, it enhances the credibility of the victim being consistent. The learned Trial Judge had evaluated the evidence carefully of the prosecution and the defence to find that the victim is credible

and truthful. It is the Trial Judge who has the opportunity to observe the demeanour and deportment of the witness. We see no reason to find that the learned Trial Judge erred when he found that the prosecution had proved its case beyond reasonable doubt. Therefore, ground of appeal No 2 will not succeed.

21. In the above premise, we find that the appeal has no merit and we affirm the conviction and the sentence of the learned Trial Judge.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL