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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Case No.83/2009

H.C. Trincomalee Case No. 1719/2000

Shanmugalingam Yogeswaran,
Lower Road, Orrs Hill,
Trincomalee.
ACCUSED-APPELLANT

-Vs-

Hon. The Attorney General,
Attorney General's Department,
Colombo 12.
COMPLAINANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J. and
M.M.A. Gaffoor, J.

COUNSEL : Dr. Ranjith Fernando for Accused-Appellant

P. Kumararatnam, DSG and Nawaratne Marasinghe, SSC for the Complainant-Respondent

Decided on : 13.07.2018

A.H.M.D. Nawaz, J.

The Accused-Appellant in this case was indicted before the High Court of the Eastern Province holden at Trincomalee for committing the offences of statutory rape on count No.1, an offence punishable under Section 364(2)e of the Penal Code and on count No.2 for committing the offence of grave sexual abuse, an offence punishable under Section 365(b) 2(b) of Penal Code (as amended by the Act No.22 of 1995 and Act No.29 of 1998), and these offences were alleged to have been committed on Yogarasa Pathmalatha on a date between 1st March 1999 and 31st March 1999.

If I may delve into a narrative, the facts emerge as follows. The accused-appellant was one of the school teachers of the victim Yogarasa Pathmalatha at Tamil Mahavidyalam, Nilaveli. He was married with two children and incidentally as the record bears out, one of his children was of the same age as the victim in this case. The victim attended the school from a student hostel which was facilitated by a Catholic charity, and she was studying in year 6 at the time of the incident. She was without her father and one of her elder sisters also studied in a higher class in the same school. Oftentimes the accused-appellant used to teach lessons in the class room of the victim. The story unfolds from prosecution witnesses and let me turn to them.

The first witness for the prosecution was the victim herself Yogarasa Pathmalatha whose testimony becomes material.

Testimony of the victim

According to the victim, on the day in question the accused appellant accosted her during the 7th period of the school to come to staff room so that he could correct her exercise book, and thereafter told her to go inside a bathroom nearby. He also told her that he would dole her money. She testified that as she was afraid of him, she went inside the bathroom and then the appellant came in, closed the bathroom door and asked her to remove her clothes. At that time the victim was in a standing position. Afterwards the appellant squeezed her breast and kissed her. In addition to the osculation, he also felt her tongue with his. He then proceeded to hit her genital organ with his hand *(sic)*. The

Accused-Appellant had indulged in this tactile activity for a long time. He also intromitted his genital organ into hers and she felt pain and cried. The victim further testified that there was a white emission after he had intromitted his organ. This evidence is clearly borne out in her evidence at pages 65, 66 and 68 of the record, which is in the Tamil language. The victim was specific that the incident took place on 26.03.1999. The victim further testified that her school mates Nishanthini and Madumei told her they saw her coming out of the bathroom. They also quizzed her as to why she had gone there. Her response was that she went in lest she be physically chastised by the teacher-the Accused-Appellant. She was 15 when this incident took place. The Accused-Appellant repeated this on 01.04.1999. As to a question why she did not report this immediately the victim proffered an explanation namely for fear of getting scolded, she had not revealed this incident to anyone.

This testimony was not dented nor did the credibility of the victim suffer so much in cross examination as to induce disbelief in the story narrated by the victim. I will presently draw attention to the contradictions marked in her evidence.

Evidence of Yogarasa Annapoornam, the mother of the victim

She testified almost 6 years after the incident. She stated that she had no educational background and her husband had died due to violence in 1989. She was a mother of eight children. She came to know of the incident pertaining to her daughter when she came home on April vacation in 1999. She further testified that when the victim came home for April vacation, she came of age and at that time a female teacher from Nilaweli Vidyalaya where the Accused-Appellant had been teaching, tried to obtain the signature of the victim to a document stating that the Accused-Appellant had been transferred from the school. At that time this witness refused and did not allow her to obtain the signature of the girl as she was staying in the hostel. She had told the teacher that she would only give her daughter's signature after having inquired into the incident.

It transpired in evidence that the teacher who came from Nilaveli had tried to offer Rs.25,000/- which the witness did not accept. Thereafter the witness went to the hostel and found out as to what had happened to her daughter.

Thus it is very clear that there had been several attempts to hush the incident by offering money to the mother of the victim. This is quite evident from the evidence of this witness- for instance vide pages 131, 132, 152, 153 and 154 of the record. Just before cross-examination ended, the witness was emphatic that the Accused-Appellant offered even a sum of Rs 150,000 as hush money in the company of many people with whom he had come.

Thus it is manifest upon evidence that the Accused-Appellant had attempted to prevent the witness from taking any action against him. It was due to these attempts that the witness began to question the victim and found out what had happened. The victim thereafter bared it all. This conduct on the part of the Accused-Appellant spoken to by the witness remains uncontradicted. The witness also states that only after this, authorities came to her house and inquired about this and thereafter they went to the Police and then the Police took the victim child to the hospital. Then from the hospital they took her to the Police for further inquiries. She testified that the police came in search of them and from the school to her house to inquire about this.

Was there undue delay in lodging first complaint?

The fact remains that the mother of the victim had not promptly made a complaint. She got to know about the incident from her victim daughter during latter part of April 1999, and only after she made proper inquiries, she took the step to make the complaint.

On account of apprehension emanating from the status of the Accused-Appellant the mother had not straightaway made the complaint and this aspect of the matter has been taken cognizance of by the High Court Commissioner. The reasoning of the High Court Judge as to the delay in the complaint is plausible and cannot be faulted.

The learned High Court Commissioner has properly analyzed the evidence placed before him to arrive at a finding of guilty in respect of the 2nd count of grave sexual abuse committed on the victim. The Commissioner has acquitted the Accused-Appellant of the 1st count for the reason that the victim had been medically examined after one and half years and on its account the medical evidence was not accepted by the court. The Commissioner's finding is that corroboration was required as regards the count of

statutory rape and more particularly evidence of penetration needed corroboration. We find no reason to interfere with this conclusion.

In regard to the 2nd count of grave sexual abuse, we take the view that the learned High Court Commissioner has correctly evaluated the evidence for finding the accused-appellant guilty.

Evidence of Corroboration

The evidence by Nishanthini which is unchallenged and unassailed inculpates the Accused-Appellant and in the course of her testimony the witness stated that the incident occurred in the 3rd month of 1999 while she was studying at Tamil Mahavidyalayam. She saw the victim Pathmalatha and the Accused-Appellant-teacher Yogeswaran standing inside the toilet, and she also saw them going inside the toilet. The toilet door was closed at that time. The evidence of the victim Pathmalatha is also that she was inside the toilet with the Accused-Appellant-teacher, where he digitally intromitted her inside her genitalia.

This witness Nishanthini is an independent witness and her evidence strongly incriminates the Accused-Appellant. The victim stands corroborated with the unchallenged evidence of Nishanthini.

The assertion of presence inside the toilet spoken to by the witnesses was not controverted by the Accused-Appellant.

It is indeed a rule of practice that Courts require corroboration in sexual offences and this Court is not persuaded to be led into a conclusion that the story narrated by the victim lacks corroboration. The narrative as told by the victim that the Accused-Appellant digitally penetrated her inside the school toilet is convincing enough as another student had seen the Accused-Appellant and the victim coming out of the toilet. The door of the toilet was closed and she also has seen them coming out the said toilet.

In the case of *Guruharan Singh v. State of Haryana* AIR (1972) SC 2661 the Indian Supreme Court held that in cases of sexual offences, a prosecutrix is not considered to be an accomplice. Her testimony is not equated with that of an accomplice of an offence. As a

rule of prudence, however, court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated.

In the oft-cited case of ***Bharvada Bhoginibhai Hirjibhai v. State of Gujarat*** 1983, AIR 753 the Indian Supreme Court held that corroboration in the form of an eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offence, having regard to the very nature of the offence.

In ***Sunil and Another v. The AG,*** (1986) 1 Sri L.R 230, it was emphasised that 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 acquitted. Seeking corroboration of a witness' 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 on even in the absence of corroboration.

In the case of ***R v. Dharmasena***, 58 N.L.R 15,the Court of Criminal Appeal held that there is no presumption, as in the case of an accomplice, that a prosecutrix in a case of rape is unworthy of credit unless she is corroborated in material particulars. Except where corroboration is expressly required by statute, our Evidence Ordinance Section 134 is that no particular number of witnesses shall in any case be required for the proof of any fact. In a charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated.

Thus fellow student Nishanthini's testimony amply corroborates the version proffered by the victim and as correctly pointed by the Senior State Counsel that the statement of the learned High Court Commissioner that the mother of the victim offered corroborative evidence of the victim is erroneous in view also corroborated the evidence of victim in view of the case of ***S. Rajaratnam v. Republic*** (1975) 79 N.L.R 73 wherein it was held that a statement made by a prosecutrix to her grandmother, after the event cannot constitute the kind of corroboration required. Notwithstanding this assertion by the Learned High Court

Commissioner, the Accused-Appellant was in no way prejudiced as the testimony of the victim was amply corroborated by Nishanthini.

In the case of ***Inoka Gallage v. Kamal Addararachchi and Another*** (2002) 1 Sri L.R 307, it was held that corroboration is not a *sine qua non* for a conviction in a rape case. It is only a rule of prudence. If the evidence of the victim does not suffer from basic infirmities and the probability factor does not render it unworthy of credence, as a general rule there is no reason to insist on corroboration. But, in a trial without a jury there must be an indication in the judgment that the judge had this rule in mind.

This criterion adumbrated in the above judgment has been borne in mind by the learned High Court Commissioner.

In the case of ***Premasiri v. AG*** (2006) 3 Sri L.R 106 the Court of Appeal held that there is no rule that there must be corroboration in every case, before a conviction can be allowed to stand. It is well settled law that a conviction for the offence of rape can be based on the sole testimony of the prosecutrix, if it is reliable, unimpeachable and there is no infirmity; it was further held in said case that if evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. It was further reiterated that the rule is not that corroboration is essential before there can be a conviction in a case of rape but the necessity of corroboration as a matter of prudence except where the circumstances makes it unsafe to dispense with it, must be present to the mind of the judge-also see ***Neel Pusphapkumara Premathilake v. Attorney-General*** (2009-2) ACJ 13.

The fact that the victim and the teacher had both been present on 26th March 1999 has been confirmed by the respective attendance registers that were produced by the Principal of the school Chellapillai Gobalapillai.

Contradictions marked in the case

When one turns to the contradictions marked in the case, they were three in number and

it would appear that they are not material contradictions. The first contradiction marked is that the victim in her statement made to the police had stated that "on the date of the incident our class teacher Jayanthi did not come to school".

The 2nd contradiction marked is that the victim in her statement made to the police had stated that "in my class there are altogether 43 male female students are there"-page 88 of the Original Case Record.

The 3rd contradiction is that the victim in her statement made to the police had stated that "I cried saying Amma...Amma"-page 101 of the Original Case Record.

The conclusion of the learned High Court Commissioner that these contradictions do not go to the root of the case is unassailable.

The learned High Court Commissioner has adverted to His Lordship Justice F.N.D. Jayasuriya in the case of ***Keerthi Bandara v. AG*** (2000) 2 Sri L.R 289 and the cased of ***State of Andra Pradesh v. Garigula Satya Vani Murthy*** AIR 1997 SC 1588, where it was held that:-

> *"The courts are expected to show great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and to get swayed by minor contradictions or insignificant discrepancies in the statement of the witness, which are not of a fatal nature to throw out allegations of rape."*

Even in the case of ***Kamal Addararachchi v. State*** (2000) 3 Sri L.R 393 the Court pointed out that that trivial contradictions can be ignored but not contradictions which got to the very core of the Accused-Appellant's case.

I observe that the learned High Commissioner has correctly borne in mind the principles pertaining to contradictions in rejecting the contradictions marked in this case as trivial.

The version of the Accused Appellant

According to the Accused-Appellant, this was a case of false implication. For instance he stated that he had some issues with the School Principal with regard to the science lab of the school. As the senior state counsel correctly pointed out, none of these reasons were

ever suggested or even put in cross-examination to the victim when she was giving evidence in court.

He also stated that he had some issues with School Development Society and due to this he was falsely implicated. He finally stated that as the Head of the Teachers' Association, he had some issues with the School Development Association, and it was on account of these issues that he was falsely implicated in this case.

There was no rhyme or reason for the victim to make a false complaint against the Accused-Appellant as she had no involvement with the issues that the Accused-Appellant claimed he had with the School Development Society or the Principal. It was not even put to the victim that she acted at the dictates of the members of the School Development Society or the Principal. It is intrinsically improbable that a 13 year old school girl would falsely implicate her teacher for some extraneous reason. In the circumstances the learned High Court Commissioner correctly rejected the evidence proffered by the Accused-Appellant.

I take the view the prosecution has placed sufficient evidence in respect of the offence of grave sexual abuse committed by the accused. Unlike the offence of rape, penile penetration is not an essential element of the offence of grave sexual abuse.

According to Section 365(b) of the Penal Code (as amended by the Act No.22 of 1995) Grave Sexual Abuse is committed any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any instrument on any orifice or part of the body of any other person.

In the instant case, the Accused-Appellant has gone inside the toilet, closed the door and, got the victim to remove her clothes, and thereafter used his fingers to intromit the vagina of the victim.

It is manifest that the Accused-Appellant had indulged in these acts to derive sexual gratification. The conduct of the Accused-Appellant hitting the female genital organ of victim Yogarasa Pathmalatha with his finger amounts to the commission of the offence of

grave sexual abuse as enumerated in the Section 365(b) of the Penal Code as amended by the Act No.22 of 1995.

We arrive at the conclusion that the learned High Court Commissioner has correctly found the Accused-Appellant guilty of the 2nd count in the indictment and accordingly sentenced him according to law.

We have to point out that the learned Counsel for the Accused-Appellant brought to the notice of this Court by a motion dated 24.09.2015 that this Court could proceed to pronounce the judgment despite the fact that the Accused-Appellant had passed away after the conclusions of oral submissions in this case. Dr. Ranjith Fernando cited the cases reported in (1987) 1 Sri L.R 281, 1987 1 Sri L.R 284 and 1988 2 CALR 138 to support the proposition that the widow of the Accused-Appellant could come within the category of aggrieved person for the prosecution of this appeal. The learned Counsel further submitted that that the proviso to Section 358(1) of the Code of Criminal Procedure Act permits this application to be made and the learned Deputy Solicitor General P. Kumararatnam concurred with this submission. We are of the view that the proviso to Section 358(1) of the Code of Criminal Procedure Act, No.15 of 1979 permits a widow of a deceased Accused-Appellant to prosecute the appeal in so far as the finding of guilt is concerned and it was in these circumstances that this Court allowed the motion of the widow of the Accused-Appellant to intervene and prosecute the appeal.

Upon the foregoing we take the view that the case against the Accused-Appellant has been established beyond reasonable doubt and we proceed to affirm the conviction and sentence imposed by the learned High Court Commissioner and dismiss the appeal of the Accused-Appellant.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor, J.

I agree.

JUDGE OF THE COURT OF APPEAL