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

In the matter of an Appeal made under Section 331(1) 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.

**Court of Appeal Case No.**
**CA/HCC/ 0172/2020**
**High Court of Panadura**
**Case No. HC/3440/2016**

Kotagala Dhammarathana

**ACCUSED-APPELLANT**

**vs.**

The Hon. Attorney General
Attorney General's Department
Colombo-12

**COMPLAINANT-RESPONDENT**

**BEFORE** : **Sampath B. Abayakoon, J.**
**P. Kumararatnam, J.**

**COUNSEL** : **Amila Palliyage with Sandeepani Wijesooriya, S.Udugampola and Subaj De Silva for the Appellant.**
: **Maheshika Silva, DSG for the Respondent.**

**ARGUED ON** : **06/09/2023**

**DECIDED ON** : **08/12/2023**

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**JUDGMENT**

**P. Kumararatnam, J.**

The above-named Appellant was indicted by the Attorney General under Section 365 B (2) (b) of the Penal Code for committing two counts of the offence of Grave Sexual Abuse on Weruphannadige Rasidu Ruckshan Fernando between the period of 05.10.2013 to 04.10.2014.

The trial commenced on 10/05/2019. After leading all necessary witnesses, the prosecution closed the case. The learned High Court Judge had called for the defence and the Appellant had given evidence from the witness box and closed the case.

The learned High Court Judge after considering the evidence presented by both parties before the High Court Judge, convicted the Appellant as charged and sentenced the Appellant as follows:

- 1st Count – 20 years rigorous imprisonment with fine of Rs.1000/-. In default three months simple imprisonment.
  Ordered a compensation of Rs.100,000/- with a default sentence of 01-year rigorous imprisonment.
- 2nd Count - 1st Count – 20 years rigorous imprisonment with fine of Rs.500/-. In default three months simple imprisonment.

- The court further ordered the sentence imposed on 1st and 2nd counts to run concurrently.

Being aggrieved by the aforesaid conviction and the sentence the Appellant preferred an appeal to this Court.

The Learned Counsel for the Appellant informed this court that the Appellant has given his consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing, the Appellant was connected via Zoom platform from prison.

**The Facts of this case *albeit* briefly are as follows.**

According to PW1 - the victim of this case, he had been about 17 years old when he faced this bitter ordeal. When he gave evidence, he was 21 years old. During the time period relevant to this case, when PW1 was attending some duties in the temple, the Appellant being a priest in the temple, called the victim to his room to give some bananas. On that pretext, when the victim went to the Appellant's room, he had been sexually abused by the Appellant by firstly performing anal intercourse and secondly performing oral sex on him. When the Appellant performed the anal intercourse, the victim had felt severe pain. The victim further said that he only realised that he had been deceived when he went to the Appellant's room.

There is an eyewitness to the incident. According to PW3, Sanjeewa Luckshan, he had seen the victim going into the Appellant's room and after

that he had seen the Appellant performing oral and anal intercourse on the victim. PW3 had witnessed the incident from a higher elevation. The investigating officer also confirmed that the inside of the Appellant's room is clearly visible to the place from where PW3 had witnessed the incident. Although it was painful, the victim had not shouted out.

After the close of the prosecution case, the defence was called, and the Appellant had given evidence under oath and called witnesses on his behalf.

**The following Grounds of Appeal are raised on behalf of the Appellant:**

1. The Learned High Court Judge has failed to consider the element of implied consent in the impugned judgment as the victim had admitted that he was 17 years of age at the time of the incident.
2. Even the medical evidence is suggestive of the consent of the part of the victim as there were no injuries observed by the Judicial Medical Officer suggestive of force.
3. The Learned High Court Judge has erroneously applied Ellenborough Dictum in the impugned judgment.
4. The sentence imposed by the Learned High Court Judge is excessive.

In a case of this nature, the testimonial trustworthiness and credibility of PW1, mainly the probability should be assessed with utmost care and caution by the trial judge. The learned Trial Judge has to satisfy and accept the evidence of a child witness after assessing his competence and credibility as a witness. Hence, before analysing the grounds of appeal advanced in this case, I consider it of utmost importance that the following authorities from other jurisdictions on the topic be appraised.

It was recognized in England as early as 1778 that children could be competent witnesses in criminal trials.

In **R v. Brasier**168 Eng. Rep.202 [1779] the court held:

> "…….*that an infant, though underage of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take oath, their testimony cannot be received ….".*

In **Ratansinh Dalsukhbhai Nayak v. State of Gujarat** [2004] 1 SCC 64 the court held that:

> *"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness".*

In **R v. Baker** EWCA Crim 4 [2010] Lord Chief Justice (England and Wales of Court of Appeal) held that:

> *(At para 40) "….. We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However, children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristic of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence".*

In **R v. B.** (G),1990 CanLII 7308 (SCC); [1990] 2 S.C.R. 30, at pp.54-55 the Court held that:

> *"...it seems to me that he was simply suggesting that the judiciary should take a common-sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child*

*witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children".*

**E.R.S.R Coomaraswamy** in his "Law of Evidence" Volume 2 Book 2 at page 658 has stated referring to child witness;

"There is no requirement in English law, that the sworn evidence of a child witness needs to be corroborated as a matter of law. But the jury should be warned, not to look for corroboration, but of the risks involved in acting on the sole evidence of young girls and boys, though they may do so if convinced of the truth of such evidence…….This requirement is based on the susceptibility of children to the influence of others and to the surrender to their imaginations".

At page 659 it states "As regards the sworn testimony of children, there is no requirement as in England to warn of the risk involved in acting on

their sole testimony, though it may desirable to issue such a warning, though the failure to do so will generally not affect the conviction".

Considering the above cited judicial decisions and the writings, as the credibility of the evidence of a child witness would depend on the circumstances of each case, it is the duty of the Learned Trial Judge to assess and decide on the evidence given by child witness.

The Learned Deputy Solicitor General in keeping with the highest tradition of the Attorney General's Department, before commencement of the argument informed this Court that she is not contesting the conviction and the sentence imposed in respect of second count in the indictment as there was no evidence placed before Court of a second incident of grave sexual abuse. Hence, this Court consider the conviction and sentence imposed on first count only.

As the appeal grounds one and two are interrelated, speaking about the consent, the said two grounds will be considered together in this judgment.

Section 365B (1) of the Penal Code reads as follows:

*(1) 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, being an act, which does not amount to rape under section 363, in circumstances falling under any of the following descriptions, that is to say-*

*(a) without the consent of the other person;*

*(aa) with or without the consent of the other person when the other person is under sixteen years of age;"*

*(b) with the consent of the other person while such other person was in lawful or unlawful detention or where that consent has been obtained, by*

*use of force, or intimidation or threat of detention or by putting such other person in fear of death or hurt;*

*(c) with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or was in a state of intoxication induced by alcohol of drugs.*

*Explanation: "injuries" includes psychological or mental trauma.*

According PW2, the mother of the victim, the victim is a low intelligence person who does not know how to refer numbers. According to her, the victim only had gone to school up to grade 08 as he is a mentally substandard person. His IQ is very low in comparing with other children of same age.

According to the victim, he could only write his name and nothing more. There is a difficulty in ascertaining the numbers of times the offence committed due to his substandard mental condition coupled with the fact that the sexual abuse was committed by another priest in the temple as well.

In this case, the victim was 17 years of age when the incident had occurred. According to the Section 365B (1) referred above, consent is a material fact which needs to be considered with great care.

Consent is the voluntary agreement or approval of what is done or proposed by another. It can be influenced by factors such as age, duress, coercion, or drugs.

Implied consent refers to situations in where it is assumed that a person consented to something by his action. This means that, although the person has not given a verbal or written consent, circumstances exist that would cause a reasonable person to believe the other had consented.

According to the evidence transpired, the victim went to the Appellant's room remained there until the grave abuse committed on him by the Appellant. This includes that the victim has remained in the Appellant's room when the Appellant removed his clothes, applied some cream on to his penis and

inserted his penis in to the anal of the victim which ended up Appellant discharging white foam from his penis.

Hence, the Counsel for the Appellant argues that during this entire scenario, no evidence reflects that the victim resisted the conduct of the Appellant, or to show that it was done against his will. The Counsel further contended that if the act was done truly against his will, the victim had ample opportunity to leave the room or protest and resist the activity. But for him to sit through the entire series of events imply that there was consent.

Furthermore, the Counsel contended that the victim had continued to go to the temple after the incident and no complaint was made until his mother, PW2 enquired about it. Therefore, the Learned Counsel on behalf of the Appellant strenuously argued that the incident pertains to first count had taken place with the consent of the victim.

The victim in his evidence clearly said that he did not consent for the act committed by the Appellant. In fact, the victim was deceived by the request to give banana by the Appellant. As such he had gone to the Appellant's room. Although he told the Appellant not to commit the act, the Appellant committed the offence telling the victim not to shout. As a result, the victim had stopped attending to Dhamma Classes after the incident. Further, whenever he goes to temple to clear the offerings of flowers at the temple, he took care to ascertain whether the Appellant was in the temple through the helper of the temple. Further, considering the mental condition of the victim, it is quite clear that he had no understanding of the gravity of the offence on him and the necessity to divulge the incident to an elder without any delay.

The Counsel's argument as to the fact that the victim has suffered no injuries suggestive of force detected, reveals that the incident had occurred with the consent of the victim.

The JMO who gave evidence, had stated that no wound had been detected over the anal of the victim. But in his opinion, he has not excluded the

possibility of anal intercourse. According to the JMO, anal intercourse could happen without any injuries.

Additionally, the Counsel for the Appellant contended that the evidence given by the victim contained contradictions and omissions which are very important in relation to the admissibility of evidence of the victim.

Justice Thakkar in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** 1983 AIR SC 753 stated:

> *"By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen".*

The Learned High Court Judge very correctly had considered the contradictions and omissions in the evidence of the victim and had come to the conclusion that the contradictions and omissions marked are not able to create a doubt on the prosecution evidence.

The sequence of evidence had not been contradicted during the trial. Further, challenges raised during cross examination of PW1 are not sufficient to affect the credibility of the witness. These matters have been accurately considered by the Learned High Court Judge in the judgment. Therefore, the first two grounds are devoid of any merit.

In the third ground of appeal, the Appellant contends that the Learned High Court Judge had erroneously applied the Ellenborough Dictum in this case.

The defence took up the position of total denial of the incident. But when he gave evidence from witness box, the very first-time he advanced the defence of consent which clearly shows his afterthought. Under these circumstances

I don't think any prejudice has caused by applying the Ellenborough Dictum in this case. Hence, this ground has not merit either.

The learned High Court Judge in the judgment had considered all the evidence adduced by the defence and had given reasons as to why he acted on the evidence adduced by the prosecution. He has accurately analysed the defence evidence with correct perspective and arrived at the correct finding.

In the final ground, the Appellant contends that the sentence imposed in this case is excessive.

Section 365B (2) b (2) of the Penal Code carries following sentence:

*(2) Whoever-*

> *(b) Commits grave sexual abuse on any person under eighteen years of age, shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;*

Hence, sentence under this Section carries a minimum mandatory sentence. A mandatory sentence means a punishment for which a judge has no room for discretion. If sentencing is mandatory, judges may "fit the punishment to the crime." Hence, it is the duty of the trial judge to impose an appropriate sentence considering all the circumstances of the case.

In this case, the Appellant is a Buddhist Priest of a temple and was 39 years old at the time of sentencing. And had completed 25 years of priesthood. He is an ordinated priest. He has no previous or pending case. The Appellant was the person who looked after the chief priest of the temple who was 86 years old.

Considering the submissions made on behalf of the Appellant and the prosecution I consider imposing maximum sentence of 20 years is not

appropriate in this case. Hence, considering all the circumstances of the case, I consider imposing 12 years rigorous imprisonment is an appropriate sentence to the Appellant. Hence, his 20 years sentence imposed on first count is reduced to a 12-year rigorous imprisonment. Fine and compensation imposed on first count will remain same.

Considering further, we order the 12-year rigorous imprisonment deem to have been commenced from the date of judgment i.e., on 24.09.2020.

The Appeal is dismissed subject to the above variation in the jail sentence.

The Registrar of this Court is directed to send this judgment to the High Court of Panadura along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**