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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:

CA/HCC/154/2022

Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Vs.

High Court of Badulla

Case No: 35/2018

Karunavirudu Durayalage Wimaladasa

ACCUSED

AND NOW BETWEEN

Karunavirudu Durayalage Wimaladasa

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Ruchindra Fernando for the Accused-Appellant
	: Jayalakshi de Silva, S.S.C. for the Respondent
Argued on	: 29-04-2024
Written Submissions	: 06-09-2023 (By the Respondent)
	: 13-06-2023 (By the Accused-Appellant)
Decided on	: 10-07-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Badulla for committing the following offences.

1. That he kidnapped the minor child mentioned in the charge from her lawful guardian at a place called Bowela in Welimada, on or about 31-07-2008, and thereby committed an offence punishable in terms of section 354 of the Penal Code.
2. At the same time and at the same transaction, he committed the offence of grave sexual abuse for sexual gratification by having intercrural sex with the mentioned minor child, and thereby committed an offence punishable in terms of section 365B(2)(b) of the Penal Code as amended by the Penal Code (Amendment) Act No. 22 of 1995 and 29 of 1998.

After trial, the learned High Court Judge of Badulla found the appellant guilty as charged of his judgment dated 12-09-2022.

After having considered the aggravating as well as mitigatory circumstances, the learned High Court Judge sentenced the appellant for a term of 1-year rigorous imprisonment on count 1. He was ordered to pay a fine of Rs. 2,500/- and in default, to serve 6 months simple imprisonment.

On count 2, the appellant was imposed a rigorous imprisonment period of 9 years and was ordered to pay a fine of Rs. 5,000/- with a default sentence of 6 months simple imprisonment.

In addition to the above, he was also ordered to pay Rs. 250,000/- as compensation to the minor child, and if the appellant fails to pay the said compensation, it was ordered to be recovered as a fine, with a default sentence of 12 months simple imprisonment.

The learned High Court Judge has directed that the two rigorous imprisonment periods shall run consecutive to each other, which means a total period of 10 years rigorous imprisonment.

It is against this conviction and sentence; the appellant has preferred this appeal on the basis of being aggrieved.

The Facts in Brief

This is an incident that has occurred on 31-07-2008. The victim child who has given evidence as PW-01 before the High Court was a six and a half-year-old school-going child at that time. The appellant was a known person to her to whom she has referred to as 'uncle' (මාමා).

On the day of the incident, she has returned from school and after having her meal, she has gone to a neighbour's house to play with some of her friends. She has seen the appellant seated on a chair on the veranda of that house, and there had been another old grandmother at that house. She has played with two children in front of the house. While they were playing, the appellant has come and told the victim child to come with him so that he can pick some mandarins from a tree situated near an abandoned house, which was close to the place where they were playing.

Although the child has resisted, the appellant has taken her to the abandoned house and had made her lie down on the floor. Thereafter, he has removed her clothes and spitted on to her vagina, and has had intercrural sex with the child.

Although the child has attempted to scream, it has not attracted anyone. After the act, the appellant has given two mandarins to her and asked her to go home. When she returned home, only her father had been at the house and the child has narrated to him what happened to her. The father has taken her to the police station where she has made a statement, and a doctor has examined her at the hospital.

The child has been cross-examined on the basis that although an incident may have occurred, she was not sure as to the identity of the person who committed sexual abuse to her. It appears that this line of cross-examination has been based on the evidence of the child where she identified the perpetrator of the crime only as the uncle (මාමා). However, it is abundantly clear from the evidence of the child that the appellant was not a stranger to her, but a person well known to her, although she has had no regular contacts with him. It appears that the child has come to know the appellant's name as Wimale (විමලේ) subsequent to the incident, which may have been the reason why she has referred to him as Wimale Maama (විමලේ මාමා) in her evidence.

The fact that the victim child was a minor under the age of 16 years has been an admitted fact during the trial.

According to the evidence of the father of the child (PW-02), he has come home around 3.30 in the afternoon after attending to his day's work. At that time, his youngest son and the wife's mother had been at home. When inquired about the victim child, he has been informed that she went to play at the neighbour's house, which was not unusual for him. Sometime later, the child has come crying with two mandarins in her hand, and has informed that Wimale Maama (විමලේ මාමා) dragged her to the forest and committed a sexual act on her. Since his wife was not home at that time, he has immediately taken the child to the police station and informed of the incident. The person mentioned as Wimale Maama (විමලේ මාමා) by the victim child was a neighbour well known to him.

Under cross-examination, he too has been suggested to the effect that the victim child was not sure about the person who committed the crime on her, but the witness has been firm saying that the child always used to refer to the appellant as uncle (මාමා) and he was well known to her.

The Judicial Medical Officer (JMO) who has examined the child after the incident has testified and marked the relevant Medico-Legal Report (MLR) as P-02 before the Court. The child has been examined on 01-08-2008 at 10 a.m. In giving the history of the incident, he has made a consistent statement of the evidence the child has given before the trial Court. The JMO has observed one scratch mark on the left side of her face. He has not observed any injuries to the vaginal area of the child, but has expressed the opinion that intercrural sex as described by the child can occur without any injuries or marks being present on the victim child. The doctor has stated that he is not certain whether the child described the person who committed the act on her only as an uncle (මාමා), however he has further stated that he took down the person's name as Wimaladasa. After leading the evidence of police witnesses who conducted the investigations into the matter, the prosecution has closed its case.

When the accused was called upon for a defence by the learned High Court Judge, he has decided to make a statement from the dock. It has been his position that he was arrested only on suspicion and he never took the child anywhere.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

1. The burden of proof has been shifted to the appellant by the learned High Court Judge.
2. Identification of the accused-appellant is doubtful.

3. The learned High Court Judge has failed to consider the improbabilities and impossibilities of the prosecution evidence.
4. The learned High Court Judge has failed to consider omissions and contradictions highlighted during the trial in his judgment.

Consideration of The Grounds of Appeal

I will now proceed to consider the 2nd, 3rd and the 4th grounds of appeal before I would proceed to consider the 1st ground of appeal as the earlier-mentioned grounds of appeal are interrelated.

The argument that the identity of the appellant was doubtful appears to have been based on the evidence of PW-01 where she has initially referred to the appellant as 'one uncle' (මාමා කෙනෙක්) to argue that the victim child has failed to clearly identify the perpetrator.

It is well settled law that the evidence of a witness cannot be considered by bearing in mind few words uttered in its isolation, but the evidence has to be taken in its totality. Especially, the evidence of small children in relation to sexual abuse matters.

In **James Silva Vs. Republic of Sri Lanka (1980) 2 SLR 167**, it was clearly stated that;

> "*A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty*."

When taken in its totality, there can be no doubt that the appellant was a well-known person to the child. It may be that the child did not know the name of the appellant when he confronted her and committed the act of sexual abuse on her. It may be that she has come to know the name of the appellant as Wimale Maama (විමලේ මාමා) subsequent to the incident, which does not mean that she has failed

to identify him positively at the time the incident occurred. It is not uncommon in a village setting to address most of the known males and females of the village as uncle (මාමා) and aunty (නැන්දා) etc. This may be the very reason why the child has described the perpetrator as uncle (මාමා). I am of the view that the evidence of the victim child has been cogent and trustworthy to the effect that she had no issue in identifying the appellant when the incident occurred.

The appeal under consideration is not an incident where the victim only had a fleeting glance at the perpetrator to consider Turnbull Guidelines set in the case of **Regina Vs. Turnbull (1977) Q.B.224** as relevant.

In the case of **Segera Vs. The Attorney General (2011) 1 SLR 201** was case the question of identity of the accused had been discussed. It was held:

> *"The identification was not in a difficult circumstance or in a multitude of persons in a crowd or in a fleeting moment. To apply Turnbull principles, the identification had to be made under difficult circumstances."*

For the reasons as considered above, I find no basis for the argument that the identification of the appellant was doubtful.

In his submissions before the Court, the learned Counsel for the appellant stated that since the incident was said to have occurred in a place where several other houses are situated, if the child screamed as claimed by her in her evidence, there was no reason for the neighbours not hear her screams. It was also submitted that the police have failed to record statements from her friends who were said to be playing along with her and any other members of the household of the house where the appellant was alleged to have been seated before he took the child away. It was also contended that the evidence of the victim child's mother was not led at the trial, although she was listed as PW-03 in the indictment.

It was pointed out that the police have recorded the victim child's father's statement more than 1 year after the incident. It was further argued that the

alleged history of the incident narrated by the child to the JMO could not be considered since it is clear that it was the mother of the child who has given the history to the doctor. The learned Counsel pointed out the evidence of the victim child in that regard which appears at page 86 of the appeal brief to support his contention.

The learned Counsel also invited the Court to consider the failure by the prosecution to call the mother of the victim child as a witness in terms of section 114 (f) of the Evidence Ordinance in favour of the appellant.

In relation to the improbabilities raised as a ground of appeal, it was contended that if the child was dragged by the appellant as claimed, there should have been injuries on her and since there were no injuries, such a narrative cannot be considered probable. In relation to the omissions as claimed, it was pointed out that when questioned by the learned Counsel who represented the appellant at the trial, the child has stated that as far as she can remember, she told the uncle's name to her father, whereas it has been pointed out that she has not stated that in her police statement.

In the victim child's evidence, she has stated that when she refused to go with the appellant, he took her despite her protests and when he removed her clothes and started performing intercrural sex on her, she screamed. When the evidence of the victim child is taken as a whole, it is clear that the screaming of a 6-and-a-half-year-old child when a grown-up person subject her to intercrural sex, may not be what one that can be expected to be heard by a person even a little distance away from the place of the incident. The evidence is clear that the incident has occurred in an abandoned house not frequented by the neighbours.

A person who is committing grave sexual abuse on a child or any sexual act done without consent would normally make sure that his actions are not being witnessed by anyone, else unless it is an unexpected sighting by a witness. I have no basis to agree that the child's evidence in that regard was improbable or not trustworthy merely because no one has heard her screams.

I find no basis to consider the alleged failure of the police investigators to record statements from the friends of the victim child with whom she had been playing at the time of the incident or members of the relevant household, as a reason to doubt the evidence of the victim child or to conclude that the prosecution has failed to prove the charges.

The evidence of the child is clear that after the incident, she came home and informed her father about what happened. Thereafter, the father has taken the child to the police and the statement of the child has been promptly recorded by the police officers in that regard. Although it appears that the victim child's father's statement has been recorded after a lapse of more than 1 year from the incident, the said lapse by the part of the investigating officers cannot be attributed as a doubt in relation to the evidence led at the Court. The evidence of the victim child as well as her father corroborates the sequence of events and are consistent with each other.

I find no basis to doubt the evidence of both the witnesses. The evidence clearly establishes the fact that when these incidents occurred, the mother of the victim child was not at home and she was unaware of the incident and would not be able to say anything relevant to the incident proper, other than staying with the child at the hospital. Therefore, I find no reason to consider the failure of the prosecution to call her as a witness in terms of section 114 illustration (f) of the Evidence Ordinance as there is no basis to consider if produced, such evidence would be unfavourable to the prosecution's case.

When it comes to a history of an incident narrated to a JMO or any other Medical Officer as to an incident, it is settled law that such a history does not amount to corroboration, but a matter of consistency as to the evidence of the relevant witnesses.

In the case of **D. Tikiribanda Vs. The Attorney General- Bar Association Law Reports 2010 BLR 92**, it was held;

> *"When the medical report is consistent with the version of a sexually harassed victim, it can be taken as evidence consistent and thus form to some extent corroboration and is admissible under section 157 of the Evidence Ordinance (although that may not be corroboration in the strict sense.)"*

In the matter under appeal, the child under cross-examination at page 86 of the appeal brief, when the learned Counsel for the appellant asked the question "who spoke to the doctor?", has stated that it was the mother.

However, the evidence of PW-15, the JMO who examined the child has been to the effect that it was the child who narrated the history to him. The JMO has given clear evidence as to the history given by the victim child to him, which was very much consistent to the evidence of PW-01 at the trial. When the JMO was cross-examined by the same Counsel who represented the appellant, no questions have been put to the JMO as to who narrated the history to him or to say that it was the mother of the victim child who did so. The only question asked had been to the effect that the victim child told the doctor that it was one uncle (මාමා කෙනෙක්) who did this to her and it was the guardian who was with the child who informed the name of the person.

I am of the view that having failed to challenge the evidence of the JMO in that regard, the appellant is not entitled to harp on what the child stated in her evidence to argue that it was the mother who narrated the history to the doctor. It is obvious that when a 6-and-a-half-year-old child is taken to a hospital, any doctor would speak to his or her mother as well, to ascertain certain facts. I am of the view that does not mean that the JMO has taken down the history from the mother of the victim child since the JMO has given clear evidence in that regard.

There had been no material contradictions as to the evidence of any of the witnesses who testified before the Court. The alleged omission highlighted during the arguments of this matter, in my view, is not an omission that can be described as a material omission which can be considered in favour of the appellant.

It is my considered view that the evidence of PW-01 was cogent and trustworthy which can be relied upon. Her evidence has been corroborated by the evidence of PW-02 at material points. The victim child has been consistent as to what happened to her when she gave the history of the matter to the JMO. The investigating officers have confirmed the locations stated by the witness as to the place of the offence. I am of the view that this is a case where the prosecution has established the charge against the appellant beyond reasonable doubt. Therefore, I find no merit in the considered grounds of appeal.

The 1st ground of appeal raised by the learned Counsel for the appellant was on the basis that the learned High Court Judge has shifted the burden of proof and therefore, was misdirected as to the relevant law when the appellant was convicted.

In the judgement after having considered the evidence placed before the Court and having analyzed the same, the learned High Court Judge has come to a firm finding that the prosecution has established a strong *prima facie* case against the appellant. Having determined so, the learned High Court Judge has proceeded to consider the defence put forward by the appellant in order to find whether it has created a reasonable doubt as to the evidence against him.

The learned High Court Judge has considered that the appellant has made only a statement from the dock when he was called upon for a defence. He has also considered the value that can be attached to such a dock statement which amounts to a mere denial of the allegations against him.

For matters of clarity, I will now reproduce the contentious part of the judgment which reads as follows.

> "ඉහත චූදිතගේ ප්‍රකාශයට අවධානය යොමු කිරීමේ දී මෙම අපරාධය සිදු කලේ චූදිත බවට නිසි පරිදි හඳුනා ගැනීමකින් තොරව ඔහුට විරුද්ධව මෙම චෝදනා ගොනු කර ඇති බවට සඳහන් කර ඇත. එහෙත් මෙම නඩු තීන්දුවේ වෙනත් ස්ථානයක දක්වා ඇති පරිදි පැමිණිල්ල විසින් ඉදිරිපත් සාක්ෂීන්ට අවධානය යොමු කිරීමේ දී පැසා. 1 ට අපරාධය සිදු කරන ලද තැනැත්තා චූදිත බවට නිසි පරිදි හඳුනා ගැනීමකට ලක් කර ඇත. තව ද, විත්දිත දැරිය කිසිදු ස්ථානයකට රැගෙන නොගිය බවට චූදිත විත්ති කූඩුවේ සිට ප්‍රකාශයක් කර ඇත ද, එකී ප්‍රකාශය මගින් 01, 02 චෝදනාවන්හි සඳහන් අපරාධයක් චූදිත විසින් සිදු කිරීම සම්බන්ධයෙන් සැකයක් මතු කිරීමට විත්තියට හැකියාව ලැබී නොමැත. යම් හෙයකින් චූදිත මෙම අපරාධය සිදු නොකළ බවට ප්‍රකාශ කරන්නේ නම් ඒ බැව් මෙම අධිකරණයට පිළිගත හැකි සාක්ෂීන් මගින් තහවුරු කල යුතු වුවත්, එවැනි කිසිදු සාක්ෂියක් මෙම අධිකරණයට ඉදිරිපත් වීමක් ද සිදු ව නොමැත. එකී තත්වය මත චූදිතගේ ප්‍රකාශය මගින් පැමිණිල්ලේ නඩුව කෙරෙහි කිසිදු සැකයක් ජනිත වී නොමැති බවට තීරණය කරමි."

Although the last sentences of the above-mentioned paragraph may give an impression that the learned High Court Judge has shifted the burden to the appellant, I find that such a contention would be misleading.

I find that the learned High Court Judge has used the wrong words when it was stated that the appellant should have produced acceptable evidence to substantiate his claim. However, it is clear that when considering the way the learned High Court Judge has analyzed the dock statement, no such burden has been placed on the appellant. The learned High Court Judge has considered not only the dock statement, but also the evidence by the prosecution to come to a firm finding that the stand taken up by the appellant has not created a doubt in relation to the evidence of the prosecution witnesses.

I find that despite the comment as considered above, the learned High Court Judge has correctly considered the relevant legal provisions in this regard. I am of the view that the said alleged misdirection, if it can be termed as a misdirection, has not prejudiced the substantial rights of the appellant or

occasioned a failure of justice as the relevant legal principles has been correctly adhered to by the learned High Court Judge.

The proviso of Article 138 of The Constitution which provides for the appellate jurisdiction of the Court of Appeal in relation to the judgments pronounced by the High Court reads as follows.

> **Provided that no judgment, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.**

The corresponding section 436 of the Code of Criminal Procedure Act No. 15 of 1979 reads as follows.

> **436. Subject to the provisions hereinbefore contained any judgment passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account –**
>
> > **(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or**
> >
> > **(b) of the want of any sanction required by section 135, unless such error, omission, irregularity, or want has occasioned a failure of justice.**

For the afore-mentioned considerations, I am of the view that the alleged misdirection has not caused any prejudice towards the appellant or has occasioned a failure of justice towards him. Accordingly, I find no merit in the 1st ground of appeal urged as well.

The appeal is accordingly dismissed. The conviction and the sentence dated 12-09-2022 by the learned High Court Judge of Badulla is affirmed. However, having

considered the fact the appellant has been in incarceration from his date of conviction, it is ordered that his sentence shall deem to have commenced from the said date of conviction and the sentence, that is from 12-09-2022.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal