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

In the matter of an Appeal in terms of Article 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:
CA/HCC/51/21
High Court of Rathnapura
Case No: HC/417/19

The Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

Hapuarachchilage Don Sisira Kumara Kularathna

Accused

AND NOW

Hapuarachchilage Don Sisira Kumara Kularathna

Accused – Appellant

Vs.

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

Respondent

Before : Menaka Wijesundera J.
Wickum A. Kaluarachchi J.

Counsel : Ashanthi De Almeida for the Accused-Appellant.

Maheshika Silva, DSG for the Respondent.

Argued on : 08.05.2024

Decided on : 11.06.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 1.4.2021 of the High Court of Ratnapura.

The accused appellant had been indicted for two charges of abduction and three charges of grave sexual abuse. The appellant had pleaded not guilty and the trial had commenced and evidence had been led and upon the conclusion of the evidence, the trial judge had convicted the appellant for all the charges. The charges had been framed to run within the period of 1.1.2002 to 5.12.2002.

The grounds of appeal raised by the learned Counsel for the appellant were as below,

!) The trial judge had failed to evaluate the evidence of the prosecution in the correct perspective,

2) The dock statement had been wrongly considered,

3) The prosecution had failed to prove its case beyond a reasonable doubt.

The victim had given evidence after 18 years from the incident and she had admitted her date of birth to be on the 27th June 1994. She had in Court had very reluctantly given evidence and had said she cannot remember certain things.

But basically, what she had said is that after being asked many times over, that the appellant is related to her and three times when she had been in year three that the appellant had sexually abused her.

Beyond that what she had said is that she cannot remember and the trial judge had given many postponements to the prosecution for the victim to give a break but she had not changed her stand.

The mother of the victim also had been called to give evidence and she had said that one day the victim had complained of a stomach ache and she had taken the victim to the doctor, and she had said that the appellant who is related to them had taken the victim to the jungle and had removed her undergarment and had abused her. She had said that at that time she had been in year three.

She had been lengthily cross-examined and she had said the same thing in cross-examination also.

Hence, the mother of the victim also does not say anything more of the alleged sexual abuse.

The doctor had been called to give evidence and according to him the victim had given him a case history and according to which the victim had said that the appellant was in the habit of taking her to the jungle and removing her undergarment and keeps his genitals between her legs. (page 132)

The doctor had proceeded to examine the victim and he had found a certain redness in the vaginal area which he said is indicative of intervention on the area which could be frequent fondling.

The doctor had been cross-examined.

Hence the doctors' evidence and the case history corroborate the victims very reluctantly given evidence.

Thereafter, the prosecution had led the evidence of the investigative officers and the prosecution had been closed and when the defense was called the appellant had made a statement from the dock, and he had denied the incident entirely.

The main ground of appeal raised by the learned Counsel for the appellant is that the trial judge had failed to evaluate the evidence of the prosecution adequately.

Upon perusal of the brief, the victim had given evidence after 18 years which is no fault of the victim and by that time she had been married and has had children. Hence, obviously her outlook has changed and it is only but natural that she would not have wanted the old wounds to surface once more.

Therefore, as very obvious from the proceedings she had been a very reluctant witness and she had to be prompted on numerous occasions and the learned trial judge had been very patient and mindful of the fact that the victim giving evidence after 18 years would invariably cause some lapses in the evidence of the victim.

The victim had been very passive in the witness box on multiple times but she had not failed to state as to what had happened to her in the bare minimum way.

She had said at page 71 of the appeal brief as to the act which had taken place and she had said that she had been in year three and any way her age had been accepted by the defense.

The victim had been cross-examined and even in her cross- examination she had narrated the earlier position and had been corroborated by the doctor.

It has been held in the case of Oliver Dayananda alias Raja vs Republic of Sri Lanka CA 28-2009 decided on 13.02.2013 by Justice Sisira De Abrew that "it is an accepted fact that a criminal case cannot be proved with mathematical accuracy by evidence given by human witnesses".

Hence, considering the time lapse from the date of offence to the date on which the victim had given evidence, the reluctance on the part of the victim can be understood, and the trial judge had evaluated the evidence in the proper perspective being mindful of the relevant legal principles relevant to a case of this nature and had been very judiciously tolerant of the victims reluctance to give evidence

The trial judge had meticulously analyzed the evidence of the prosecution and in addition to that he has had the priceless advantage of watching the demeanor and the deportment of the victim in giving evidence, and having done so only he has arrived at the current decision.

Hence, when the Court of Appeal is considering those decisions of the trial judge, we have to be mindful of the priceless opportunity the trial judge had in watching the demeanor and the deportment of the witnesses.

Hence, in view for the reasons set above this Court is of the view that the evidence of the victim had been properly analyzed by the trial judge.

The second ground of appeal raised by the appellant was that the trial judge had not considered the dock statement of the appellant adequately.

This also we are unable to agree with for the reason that the trial judge had analyzed the statement from the dock adequately and had rejected the same with reasons.

As such, we see no reason to set aside the instant appeal but to affirm the conviction and the sentence imposed by the trial judge.

But having regard to the fact that the incident had taken place in the year 2002 and now it's 2024, I think it is only but faire to consider the changes that

may have taken place in the lives of the victim and the appellant both and make a variation in the sentences imposed by the trial judge, as follows,

1st charge the imprisonment to vary from 3 years to 1 year imprisonment and the fine to remain the same,

2nd charge the imprisonment of 8 years to be reduced to 7 years RI and the rest to remain the same,

3rd charge 3 years RI to be amended to 1 year's imprisonment and the rest to remain the same,

4th charge the imprisonment of 8 years RI to vary to 7 years RI and the rest to remain the same,

5th charge also same as above.

All terms of imprisonment to run concurrently and to be operative from the date of the conviction which is 1st April 2021.

Subject to the above variations in the sentence, the instant appeal is dismissed.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal