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

In the matter of an Appeal in terms of Section 331 of the Code of Criminal Procedure Act No 15 of 1979.

Court of Appeal No:

CA/HCC/0086/21

High Court of Ratnapura

Case No: HCR/123/2018

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Muthumalage Wijeratne *alias* Beeri Kalu Ayya

ACCUSED

AND NOW BETWEEN

Muthumalage Wijeratne *alias* Beeri Kalu Ayya

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Yuwin Matugama for the accused-appellant
	: Maheshika Silva, D.S.G. for the State
Argued on	: 13-10-2023
Written Submissions	: 27-09-2022 (By the Accused-Appellant)
	: 30-11-2022 (By the Respondent)
Decided on	: 14-02-2024

Sampath B. Abayakoon, J.

This is an appeal preferred by the accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and sentence by the learned High Court Judge of Ratnapura.

The appellant was indicted before the High Court of Ratnapura for committing grave sexual abuse on a male minor between the periods of 01-02-2012 and 14-03-2012, at a place called Kiribathgala, Watapatha, within the jurisdiction of the High Court of Ratnapura, and thereby committing 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, 29 of 1998 and 16 of 2006.

After trial, the learned High Court Judge of his Judgement dated 30-07-2021 found the appellant guilty as charged, and after hearing the submissions on behalf of the appellant in mitigation, sentenced the appellant for 12 years rigorous imprisonment. He was also ordered to pay a fine of Rs. 20,000/- and to serve a default sentence of 6 months simple imprisonment.

In addition to the above sentence and the fine, he was also ordered to pay Rs. 150,000/- to the victim child who has given evidence as PW-01 during the trial as compensation, and in default, he was sentenced to 1-year simple

imprisonment. It has been ordered that the default sentences should be served consecutively.

The Grounds of Appeal

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

1. The date of the offence and the place of offence has not been proved by the prosecution.
2. The prosecution has failed to adduce any evidence to establish that the accused was present on the alleged date and place of the offence.

Facts in Brief

Since the grounds of appeal are in relation to the date and the place of offence, I will now summarize the evidence led before the Court in that regard.

PW-01, who was the victim child, had been a 12-year-old at the time relevant to this incident. The evidence led before the Court clearly establishes the fact that although he was 18 years of age at the time he gave evidence, he was a person who has studied only up to grade 3 and a person who is unable to read and write. It appears that the learned High Court Judge has taken note of this fact, and before allowing the prosecution to lead evidence of PW-01 had satisfied himself by posing several questions to PW-01 as to whether he is a person who can give evidence before the Court, could understand the proceedings and whether the Court can rely on his evidence, despite him being almost an illiterate person.

Having satisfied on the above facts, the learned High Court Judge has allowed the prosecution to lead his evidence. It is clear from his evidence that he was unable to remember the date upon which he faced the grave sexual abuse incident.

However, he has been very clear that it was the appellant whom the witness has referred to as Beeri Kalu Ayya (බීරි කළු අයියා) who committed this grave sexual abuse on him. The evidence shows that this was not the only incident of sexual abuse faced by him. This sexual abuse incident has come to light after another person has abused the child in the similar manner and when that complaint was lodged at the police station.

Under cross-examination, it has been revealed that when the Judicial Medical Officer (JMO) examined the child after the 2nd incident, he has informed the doctor that the incident involving the appellant occurred one month before. However, it has also been revealed that the child in his statement to the police has stated that the 1st incident was the incident involving the other person who is said to have abused the child. His evidence also shows that this incident has occurred in a rubber estate called Ayagama Estate, which is an estate situated near the village.

The defence taken up by the appellant had been a mere denial. The evidence of PW-01 had been the only evidence in relation to the incident as the complaint had been made some time after the incident when another incident of similar nature had come to light.

The evidence of the JMO does not reveal any visible signs of sexual abuse, obviously due to the reason that this was an incident that has happened some time back to the date of examination of the victim. However, the JMO's evidence reveals that in giving the history of the incident, the child has stated that about one month prior to the examination, the person called Beera had anal intercourse with him. The doctor's evidence also confirms that the victim child was a child with low IQ, and an incident of this nature can occur even without visible injuries to an anus.

The evidence given by the police officers who conducted investigations into this matter reveals that the child has made a statement after what was revealed by

him to the JMO about this incident of grave sexual abuse when he was produced before the JMO for examination in relation to another incident of similar nature.

At the conclusion of the trial, when the learned High Court Judge decided to call for a defence from the appellant, he has made a dock statement and had only stated that he has done nothing wrong to PW-01 and because of that to discharge him from the case.

It appears from the line of cross-examination of the witnesses including the victim that the stand taken by the appellant had been a mere denial. It has been suggested to the victim that when the complaint was made in relation to the other incident, PW-01 failed to mention anything about the incident relating to the indictment because no such incident happened. However, the victim had denied that position and stated that such an incident occurred as stated by him in his evidence.

Consideration of The Grounds of Appeal

It is trite law that no witness can be expected to have a photographic memory of what happened in an incident of this nature, especially when it comes to a child of 12 years old and a person of low IQ. No Court can expect such a child to be 100 percent perfect in his evidence.

However, this Court is very much mindful of the fact that the duty of proving the charge is always on the prosecution and the standard of proof is beyond reasonable doubt. Just because the witness is a child and a person of low IQ, that does not mean the standard of proof become lower than in normal circumstances, but it remains the same. Any evidence led in relation to an incident of this nature has to be viewed keeping the above principles in mind.

As the two grounds of appeal contended by the learned Counsel for the appellant are interrelated and relates to the place of the incident and the date of incident, I will now proceed to consider the said grounds of appeal together.

The evidence of the child clearly establishes the fact that this incident happened in the village where he was living. In his evidence, he has given his place of residence as Kiribathgala, Watapatha which is the place of the incident mentioned in the charge sheet. Therefore, there was no basis for the appellant to be misled as to the place of the incident mentioned in the indictment, since, this is the place where the victim child and the appellant himself live.

The evidence shows that at the time of the incident, the victim child had been riding his foot cycle near his home and the incident has happened in a rubber estate nearby. It also reveals that the appellant is a well-known person to the victim child and he has not revealed this incident to anyone, may be due to the fact of his inability to understand the gravity of what he has faced.

It has been revealed in his evidence that even the 2nd incident of grave sexual abuse faced by him had not been revealed by him to his elders, and it had only come to light because another villager has seen the 2nd incident, which has led to a complaint being made to the police.

As considered above, I find that there was clear evidence placed before the trial Court as to the place of the incident, and the learned High Court Judge has well considered that fact and had come to a firm finding that the incident had occurred at Kiribathgala, Watapatha as mentioned in the indictment. I find no reason to disagree with the said finding of the learned High Court Judge. I am of the view that it was the only finding that an be reached when considering the evidence as a whole.

When it comes to the date of the incident, it is correct to say that the victim child has failed to give the date of the incident. It appears that based on what the child has said to the JMO when he was examined as to the date of the incident, the prosecution has given a time period between 01-02-2012 to 14-03-2012 as the period upon the incident occurred.

Section 165 (1) of the Code of Criminal Procedure Act which refers to the particulars as to time, place and the person that should be stated in a charge reads as follows.

> **165. (1) The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed.**

The section itself is clear that the purpose of giving the date and place of the incident is to give sufficient notice of the charge against him to the accused. Therefore, only if it can be shown that the appellant has been misled or could not put forward his defence as a result of the witness who speaks about the incident being unable to give a specific date of the incident, it becomes relevant to say that the prosecution has failed to establish the charge against him.

This aspect was sufficiently discussed in the case of **Rex Vs. Dossi 13 Cr. App. R. 158,** where it was held that a date specified in an indictment is not material unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment, amendment of the indictment is unnecessary although it will be a good practice to do so (provided that there is no prejudice to the accused), where it is clear on the evidence that the offence was committed and it was committed on the day other than that specified.'

In the case of **D. R. M. Pandithakoralage (Excise Inspector) Vs. V. K. Selvanayagam 56 NLR 143**, it was held that 'a mistaken date in an indictment is not a material error unless the date is of the essence of the offence or the accused is prejudiced.'

As considered before, the accused had not taken up any particular line of defence other than a mere denial. He has not disputed that both himself and the victim child knew each other well and lived in the same area mentioned in the

indictment. Therefore, I am of the view that the appellant had not been prejudiced under any circumstances by PW-01's failure to give a specific date of the incident, as the prosecution has mentioned a period of time as the period of the incident based on the facts available to the prosecution.

Although there are few omissions and discrepancies in the evidence of the victim child, as I have stated before, they become material only if they create a reasonable doubt with regard to the truthfulness of the evidence of PW-01.

In the case of **Mahathun and Others Vs. Attorney General (2015) 1 SLR 74**, it was held,

> *"1. When faced with contradictions in a witness testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness.*
>
> *2. Too great a significance cannot be attached to minor discrepancies, or contradictions.*
>
> *3. What is important is whether the witness is telling the truth on the material matters concerned with the event.*
>
> *4. Where evidence is greatly reliable, much importance should not be attached to the minor discrepancies and technical errors.*
>
> *5. A Court of Appeal will not lightly disturb the findings of a trial Judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong."*

Another matter, which needs attention in a case of this nature, is the fact that it was only the PW-01, namely the victim child who has given evidence in relation to the incident faced by him.

It is settled law that corroboration is unnecessary in a case of this nature if the evidence of a victim is cogent and reliable, since the evidence should be weighed, not counted.

Having considered the evidence in its totality, I find that the evidence of the victim child was highly reliable and cogent. The evidence of the JMO establishes that the child had been consistent in his story at all relevant points. The stand taken up by the appellant had not created any doubt as to the truthfulness of the evidence by the victim and the other witnesses who gave evidence before the trial Court.

Another matter that needs to be mentioned is that it was the same learned High Court Judge who has heard the evidence from the very commencement to the end. Therefore, he had the priceless advantage of observing the witnesses throughout the trial. It is with that advantage the learned High Court Judge has proceeded to consider the evidence in order to come to his finding of guilt of the appellant.

In the case of **Alwis Vs. Piyasena Fernando (1993) 1 SLR 119, G.P.S. de Silva, C.J.** stated that

> *"The Court of Appeal would not lightly disturb the findings of primary facts made by a trial Judge unless it is manifestly wrong as they have the priceless advantage of observing the demeanour of witnesses which the Judge of the Court of Appeal does not have."*

I find that the learned High Court Judge has well considered the evidence placed before the Court with a thorough understating of the legal principles that he has to bear in mind when considering the evidence in a case of this nature. The learned High Court Judge has considered the probability factor of the evidence by the victim child and has considered as a whole the credibility and truthfulness of the evidence. He has also considered the discrepancies and omissions in its correct perspective and the defence put forward by the accused with the weight that needs to be given to a dock statement made by an accused.

After having considered the evidence, the learned High Court Judge has come to his finding of the guilt of the accused, which I find no reasons to disagree with, as it was sound in law as well as the facts placed before the High Court.

Accordingly, I find no merit in the considered grounds of Appeal. The appeal is dismissed, and the conviction and sentence affirmed.

However, having considered the fact that the appellant had been in incarceration from his date of conviction on 30-07-2021, it is ordered that the sentence shall deem to have been commenced from the date of the sentence, namely 30-07-2021.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal