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

In the matter of appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No: 15 Of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA No: CA/HCC/ 0320/2019
HC: Rathnapura: HC 108/09

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

Complainant

Vs.

Anura Liyanaarachchi

Accused

And now between

Anura Liyanaarachchi

Accused- Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J. P/CA**

&

M. Ahsan R. Marikar J.

Counsel: Amila Palliyage, AAL with MS Sandeepani Wijesooriya AAL, Ms. Udugampola AAL, Subaj De Silva AAL and Lakith Wakistaarachchi, AAL for the accused-appellant

Maheshika Silva, DSG for the Respondent

Written Submissions: By the Accused-Appellant on 27.10.2023

By the Complainant-Respondent 26.10.2021

Argued on : 19.09.2023 and 05.10.2023

Decided on : **13.11.2023.**

N. Bandula Karunarathna J. (P/CA)

This appeal is preferred against the Judgement, delivered by the learned Judge of the High Court of Rathnapura, dated 31.07.2019, by which, the accused-appellant, was convicted and sentenced to 7 years rigorous imprisonment and Rupees Five Thousand fine in default of 03 months simple imprisonment and Rupees One Hundred and Fifty Thousand compensation in default of 12 months simple imprisonment.

The accused-appellant, hereinafter referred to as the "appellant", was indicted with two others in the High Court of Rathnapura on the following charge;

> that on or about 10.09.2006 at Gileemele Hospital, within the jurisdiction of Rathnapura High Court, you the above-named accused committed an offence of grave sexual abuse on Kehelovita Arachchilage Sameera Sampath, punishable under Section 365 b (2) b of the Penal Code as amended by the Amendment Act No. 22 of 1995 and by Act No. 29 of 1998.

The victim who was 13 years of age at the time of the incident, went to the Doctor who is the Accused person, to have a wound on his foot treated on 10.09.2006. The victim's foot was tended to by the Accused person and he was subsequently asked to lie down on the bed in the examination room after which the Accused proceeded to commit Grave Sexual Abuse on the victim by using his hands on the victim's male organs and well as placing such inside the mouth of the Accused person.

Grounds of Appeal are as follows;

i. The learned Judge had not properly considered the doubt that had arisen regarding the possibility of the incident occurring.

ii. The Prosecution contention that the treatment took place at the Accused's residence could not be confirmed by the evidence of the Investigating officer.

iii. The Learned Judge did not consider the delay in making of the complaint.

iv. The learned Judge had not adequately considered the doubt that had been created on important aspects of the case.

At the trial, on behalf of the prosecution the following witnesses were led and the following documents were marked;

- K.A. Sameera Sampath (PW 01)
- M. Geethangani Polhena (PW 02)
- M. A. Dimuthu Roshan Abeysiri (PW 03)
- PS J.G. Podihamine (PW 05)
- IP K.M. Pushpalatha (PW 06)
- Dr. W.M.K.B. Wijetunga (PW 09)
- Medico-legal report dated 11/10/2006 (P 1)

According to the prosecution witnesses on or about 10.09.2006, PW 01 went to the Gileemele hospital for dressing a wound which was on his foot. He was accompanied by his cousin, PW 03, up to the hospital junction. PW 01 was told by an unnamed person that the hospital was closed but that he could get his wound cleaned and dressed at the appellant doctor's quarters. Following this, PW 01 had gone to the residence of the appellant from the backdoor where the appellant and his wife were present. He was led to a small dispensary in the house where only the doctor was present. PW 01 alleges that the appellant dressed his wound, asked him to lie down on the bed and checked for any moles and then removed his trousers and sucked his male genitalia. PW 01 further alleges that the action continued for about 5 minutes and the appellant then opened the window and spat out.

Thereafter, PW 01 paid for the dressing and immediately left the appellant's quarters. Afterwards PW 01 had met PW 03 near a boutique shop and told him what happened. But had not told anyone else and when PW 03 suggested they go ask the appellant about it, PW 01 had prevented PW 03 from doing so. PW 03 had then told of the incident to his mother, PW 04 (whose evidence was not led in trial), who in turn had told this to PW 01's mother, PW 02. Thereafter PW 02 had gone to the police and a formal complaint was made on 11.10.2006, a month after the alleged incident.

At the conclusion of the prosecution case, the appellant made a dock statement and led 4 defence witnesses.

- Pradeep Wimal Wijetunga (DW 1)
- M. Chandrasiri Kumara (Hospital Assistant) (DW 2)
- K.A. Sujatha (officer of the Office of Provincial Director of Health Services) (DW 4)
- W. Ashoka Priyangani (DW 5)

Appellant being aggrieved by the said conviction and sentence had now appealed to this court.

PW 01 later stated that once his mother, PW 02, got to know of the incident he did not go with her to the Police Station as he was sick. It must be noted that PW 02 got to know of the incident on or about 16.09.2006 and a complaint was made and the statement of PW 01 was recorded on 11.10.2006. The only explanation to the delay of one month was the fact that PW 01 was not feeling well. But no evidence shows that PW 01 was so sick that he could not go to the police station to make a complaint about this alleged incident as soon as possible. Delay in making a complaint can be excused if there is a reasonable explanation for such delay and simply being sick, fails to meet the standard of reasonableness as set by law.

Learned counsel for the accused-appellant argued that the delay in making a complaint had been overlooked by the Learned Trial Judge in his judgment which is prejudicial to the appellant. In this case, the learned trial Judge had remarked in his judgment the failure by the defence to mark any contradictions in PW 01's evidence. Through some of prosecution and defence witnesses, the defence had attacked the credibility of PW 01 and the probability of his narration of the alleged incident.

PW 01 alleged that he had a wound on his foot which got worse with severe pain which resulted in difficulty in walking. Despite this wound, his cousin PW 03 had let him walk up the hill to the appellant's residence by himself and had stopped to talk to a friend. When specifically asked from PW 06 and PW 09 whether, when they checked for the wound as told by PW 01, whether they noticed such wound or any sign of a healed wound. This was answered in the negative by both. If

the wound as alleged by PW 01 was so serious to result in difficulties in walking and severe pain, there must be in the least some blemish or a mark of a healed wound. Therefore, the learned counsel for the appellant submits that it is evident that PW 01 had fabricated this narration about a wound to bring bogus allegations against the appellant.

PW 01 admits that according to his knowledge the appellant's wife was present in the quarters at the time of the alleged incident. The evidence of PW 06, can be gathered the place shown by PW 01 as the place of the incident was merely covered with curtains. According to PW 01 the alleged incident took place for about 5 minutes, which gives PW 01 sufficient time to protest and react to the alleged action. The absence of any such reaction suggests that the alleged incident did not in fact take place.

Not only that PW 01 alleged that when he went to the Hospital it was closed. This is a government hospital and no governmental hospital closes even on Poya days. There is a possibility of doctors taking leave but there is at least one doctor on duty in such occasions. Besides, evidence emanates from DW 01 and DW 02, who are independent witnesses, that in the event there is no doctor on duty, the hospital will take necessary steps to bring down a doctor and this was facilitated by the fact that the doctors' quarters were in the hospital grounds. DW 02, during cross-examination by the prosecution and questions by the Judge, confirms repeatedly that no patients will be sent to the Doctors' quarters under any circumstance and the procedure is to bring the doctor to the hospital and the hospital staff usually attend to the dressings of wounds in the ward or OPD.

Both DW 02 and DW 05 testify that no consultations were done privately by the Doctors in their quarters. This evidence goes on to show that alleged incident as narrated by PW 01 could not have occurred, failing the test of probability, and affecting the credibility of PW 01's evidence.

Learned counsel for the respondent argued that evidence of the prosecutrix does not satisfy the test of spontaneity and the test of probability. In the instant case the test of spontaneity must be considered on several factors. According to the Training Programme on the Treatment of Child Victims and Child Witnesses of Crime for Prosecutors and Judges, UNODC those factors are as follows;

(a) When did the victim divulge the incident to a 3rd party?
    - On the same date. Victim divulged the incident to his cousin PW3 soon after the offence.

(b) When did the 1st complainant hear about the incident?
    - 16.9.2006.

(c) When was the 1st complaint made to the Police and the criminal law set in motion?
    - On the same date that 1st complainant heard of the offence 16.9.2006

(d) When was the statement of the victim recorded?
    - 11.10.2006

(e) Was delay in recording the statement of the victim was the delay reasonably explained?
    - Yes- The victim in this case suffered from several types of physical and emotional and behavioural changes associated with victims of child abuse.

The learned counsel for the respondent submits that the victim was not healthy enough to make a statement for one month. There is no requirement to establish by medical records that the victim was of ill health as the victim, PW 2 and PW 6 who gave evidence regarding that fact on

personal knowledge and available documents are all worthy of credit. Reaction of the victim and impact of the sexual abuse on the victim Immediate impact on the victim.

The accused was a doctor serving at the Gilieemele hospital and the sexual abuse was committed in the official bungalow of the accused. The learned counsel argued on behalf of the respondent that this is a case where the acts of sexual abuse, were committed by the accused in the guise and in the same transaction as a purported medical examination. The child victim was manipulated by the accused in such a manner that the sexual abuse formed the same transaction as the medical examination. After dressing the wound on the leg of the victim, and examining some other parts of the body of the victim, it was alleged that the accused rubbed his hands on the genital organ of the victim and thereafter committed an act of oral sex by placing the genital organ of the victim in the mouth of the accused.

Victim told the accused that he was scared and that he wanted to leave. Victim testified that he wanted only to escape and he asked how much the treatment cost from the accused and thereafter gave Rs 40/- to the accused-appellant. He told the victim not to divulge the incident to anyone. Victim divulged the incident to his cousin who was only one year older than him soon after the incident. PW 3 cousin of victim told the victim that maybe the act of oral intercourse which was committed "due to the injury". The evidence of the victim regarding this has not been challenged in cross examination. Victim asked his cousin not to divulge the incident to anyone.

Other psychological and emotional changes in the victim developed over time. Child Victim became worried that he will die as a result of the injury. Victim suffered from headaches and felt faintish. He became ill. The mother of the victim stated that the victim was continuously deep in thought, was vomiting, and suffered from headaches. The mother of the victim testified that after the incident the victim could not even go for classes for one week as he was ill. when she sent him to the class after coercion, there had been a message sent that the victim was ill and PW 2 had to bring him back home. It was the contention of the learned counsel for the respondent that to take the behavioural, emotional, physical changes of the victim as items of evidence that make the version of the victim, that he was subject to child abuse highly probable and credible. In deciding on whether the version of the victim is true, the cause, alleged abuse, and the effect of the said cause on the victim both in the short term as well as the long term should be considered in totality.

In the case of Tikiri Banda Vs the Attorney General (2010) BLR 92 It has been held that;

> "mostly victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible. The offenders should not be allowed to capitalize or take mean advantage of these natural inherent weaknesses of small children."

In the case of Attorney General vs DC Jayawardena alias Shantha CA / 85/ 2013 it was held;

> "time and again courts have discussed the acceptance of evidence of children of tender ages. Our Judges are not there to test the memory of the witness, they are expected to find the actual fact and the truth. Witnesses are human beings, they are not memory machines nor robots to repeat the incident as it was further the natural behaviour of human beings is to forget incidents, especially sad memories. No one wants to re- visit painful moments and keep detailed memories with them. We are also mindful most of our courts with due respect, are not child friendly".

In the case of Sirirathana Thero vs Attorney General CA194/2015 it has been held as follows;

> "In cases of sexual offences, courts have found the victims of sexual offences can react in different ways. Some of them complain immediately. Others may feel, for example, afraid, shocked, ashamed confused or even guilty and may not speak out until sometime has passed. There is no typical reaction."
>
> "When it comes to a child victim, he or she may even find it difficult to explain to court the delay in making the complaint. The Trial Judge, before whom the witnesses testified, is the best person to decide on the credibility of the victim and the other witnesses as he observed the demeanour and deportment of the witnesses. In this case the learned Trial Judge in his judgement has given careful consideration to the above aspects and also to all the evidence adduced by the prosecution and defence at the trial."

The victim divulged the incident to his cousin who accompanied him soon after the incident. The gravity of the offence eluded both the victim and his cousin as the victim was 13 years and his cousin was 14 years at the time of offence. The cousin (PW 3) divulged the incident to one of their relatives. Mother of victim was informed her sister-in-law Hema Malini that an incident of oral sexual abuse had been committed on the victim. Mother of the victim went and confronted the accused after she heard the incident. The wife of the accused had met the wife of the accused and told her what the accused had committed. The reaction of the wife of the accused was to offer money and to avoid going to the police. However, the mother of the victim had not accepted money.

Thereafter, the mother of the victim had lodged the 1st complaint at the Rathnapura Police Station on 16.09.2006. Although, the mother of the victim had asked the victim to come to the police he had refused to do so. Victim had suffered from fainting and headaches. Finally, upon questioning the victim, as to whether what Hema Malini divulged to her was true, the victim 's mother had been informed by the victim that the abuse was committed by the accused, on the night of the day that the complaint was lodged.

In Dayananda Lokugalappaththi & Eight others (Embilipitiya murder case) vs. State 2003 (3) SLR 362 at 363 it has been held as follows;

> "In applying the test of spontaneity and test of contemporaneity and the test of promptness court ought to scrupulously proceed to examine the reasons for the delay. lf the reasons for the delay adduced are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement."

In the Kobaigane murder case 2004 (2) SLR 209 it has been held that;

> "Just because the statement of a witness is belated the court is not entitled to reject such testimony. In applying the Test of Spontaneity, the Test of contemporaneity and the Test of Promptness the Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced by the witness are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement."

If there was a delay in recording the statement of the victim after the 1st complaint was lodged and if so, was the delay reasonably explained? It was the evidence of PW 5 who recorded the 1st statement, that when she inquired about why the victim was also not brought to the Police the

mother of the victim informed her that the child was unwell. The victim also stated that he could not go with him to the Police as he was unwell and suffered from fainting spells and headaches. Police Witness W.I.P Pushpalatha was also questioned as to the delay in recording the statement of the victim. Her position was that an officer P.C 42664 Weerasinghe had been deployed to record the statement of the victim, however the officer had recorded that the victim was unwell and had given instructions to bring the victim to the Police when he recovered. On behalf of the respondent, it was argued that although there is a delay after the 1st complaint was lodged, to record the statement of the victim, the delay has been attributable to the ill health of the victim. Learned counsel for the respondent says that as the delay was reasonably explained, there is no basis to reject the evidence of the victim, solely on the ground of delay.

Another argument raised by the learned counsel for the accused-appellant was that the evidence of the Judicial Medical Officer clearly contradicts the version of the victim and the learned High Court Judge misdirected himself when he came to a finding that the medical evidence corroborates PW1. The basis taken up on behalf of the accused appellant to establish the purported position that the medical evidence contradicts the version of the victim is the absence of an injury on the foot of the victim at the time of medical examination. There is no medical evidence whatsoever as to the nature of the injury or the gravity of the injury which was located on the foot of the victim that necessitated obtaining treatment from the accused. The victim describes the injury as subjecting him to pain when he placed his foot down, on the date of offence.

Medical evidence of Dr. Wijetunge (PW 10) stated that there was no injury on the leg at the medical examination. The short history had revealed that the offence was committed on 10.09.2006 and that there had been an injury on the leg of the victim. However, at the time of the medical examination one month later there was no injury on the leg detected. Medical evidence was to the effect that whether a wound can be there or not there after one month of infliction of the wound is dependent on the type of the injury, healing pattern of the injury. Accordingly, an opinion could not be given on whether a wound existed one month ago or not. Learned counsel for the respondent submits that the purported position taken up on behalf of the accused appellant that merely because the victim was unable to walk on the date of offence, necessarily means that the injury should be grave enough and of a nature that will be visible in one month when the JMO examined, has no legal or medical basis.

The degree of discomfort or ability to walk cannot be the sole determining factor of an injury. Medical opinion regarding the incident of oral intercourse taking place is that such an act cannot be excluded.

In the case of Bhoginbhai Hirjibhai vs State of Gujarat 1983 AIR 753,1983 SCR (3) 280 it was held;

> "And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury which is not shown or believed to be self-inflicted is

the best witness in the sense that he is least likely to exculpate the real offender. The evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding and while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence."

It is to be noted that corroboration is not a *sine qua non* for a conviction in a rape case. In the Asian set up refusal to act on the evidence of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury. If the evidence of the victim does not suffer from basic infirmity and the probability factor does not render it unworthy of credence, generally there is no reason to insist on corroboration. The principles that must be borne in mind when considering the evidence of the prosecutrix have been clearly laid down in several decisions of the Supreme Court. It has been held that the prosecutrix cannot be considered to be an accomplice. As a rule of prudence, however, it has been emphasized that courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and the person accused of abduction or rape has not been falsely implicated.

The view that no conviction without corroboration was possible has not been accepted. The only rule of law is the rule of prudence, namely the advisability of corroboration should be present in the mind of the Judge. Where the case is tried with the aid of a jury it is necessary that the Judge should draw the attention of the jury to the advisability of looking for corroboration, wherever corroboration is needed. But where the case is tried by a Judge alone as it is now being done in our country there must be an indication in the course of the judgment that the trial Judge had this rule in mind when he or she prepared the judgment.

In a certain case if the Judge thinks that there is no need of corroboration, he should give reasons for dispensing with the necessity of such corroboration. But if a conviction is based on the evidence of the prosecutrix without any corroboration it will not be illegal on the sole ground of absence of corroboration. However, it is always safe to look for corroboration. The evidence of both PW 3 and the victim was that PW 3 was not present when the abuse took place. The precise time that PW3 separated from the victim to go to a shop as alleged in Medico Legal Report short history and the High Court evidence may be slightly different. Learned counsel for the respondent says that this does not reach to the root of the case as such discrepancy can occur when giving evidence 10 years after the offence.

Learned counsel for the accused-appellant argued that evidence of PW 1 is clearly contradicted by the evidence of PW 2. වි 1 marked in the evidence of PW 2 relates to whether the victim informed his mother that the genital organ was touched by the hand of the accused. වි 1 contradiction has been proved through PW 5. Victim in his evidence clearly stated that the accused touched the victim's genital organ by hand, prior to committing the oral sexual abuse. Therefore, it was argued on behalf of the respondent that the discrepancy is in the evidence of PW 2 per say and not between the victim and PW 2. Although an omission has been marked as that Hema Malini did not tell PW 2 that an act of oral intercourse took place, none of the omissions marked in the case have been proved through Police evidence.

A third party who was not called in evidence at the trial told and/or did not tell PW 2, will in any event be hearsay and can be used only for the purpose of explaining the conduct of PW 2, of going to the Police. It cannot be considered as substantive evidence and the truth of the statement made by Hema Malini cannot be relied upon as it violates the rule of hearsay. The victim takes up the

position that he was with his mother when she went to question the accused. The position of PW 2 in the High Court was that the victim did not come to the hospital when PW 2 went to confront the accused. However, her position in her statement was that she went to the Gileemele Hospital with her son.

Learned counsel for the respondent says that this is a contradiction per say in only PW 2's evidence and not a material contradiction between victim and PW 2 as alleged. Regarding the allegation that the victim should have been able to go to the police if he was well enough to go to the hospital with his mother. Once he is placed in the scene of crime and been face to face with the accused and reminded of the harrowing experience. it is quite likely that the child may refuse to go to the police as alleged by the mother of the child and show physical illness or symptoms or manifestations relating to child abuse due to the secondary victimization.

Another ground of appeal raised by the appellant was that the learned High Court Judge has failed to consider and evaluate the defence case. The dock statement and the evidence of defence witnesses have been evaluated by the learned High Court Judge. The provision giving medical services from quarters or bungalow of the accused was not in accordance with hospital procedures and government circulars, but was in fact taking place. The defence led several witnesses to establish that according to proper medical procedures followed in the hospital, no patient would be sent to the private residence or bungalow of the doctors on duty at the hospital.

This is a situation where the two children, victim and his cousin who was one year older found out that the medical treatment was given at the bungalow from a friend of PW3 and one aiya according to the victim who they met by chance. Therefore, there was no formal referral through hospital staff to the bungalow of the accused.

In the circumstances the evidence of defence witnesses on the proper procedures and circulars are of no relevance to the facts and circumstances of the case. PW3 had earlier received treatment from the bungalow. The fact that there was in fact an unregulated provision of medical services in the bungalow of the doctors is evident even in the evidence of PW 3 who says that he himself has received medical treatment at the residence of the accused on a day that he was not in OPD. Therefore, it is quite probable that the victim also received medical treatment at the residence of the doctor.

The victim could not have shown the scene of crime to the Police if he had never visited the house of the accused. The scene visit was conducted on 11.10.2006 by PW 6. At the time the bungalow was still occupied by the family of the accused and the wife of the accused was present during the scene visit. The evidence of PW6 was that the victim guided the police to a room inside the house with a desk and two chairs as the place of offence. There were two ways of entering the room where the offence was committed from the front and rear of the house. There were two curtains observed one curtain separating the corridor leading to the room and another curtain in the room itself. The victim in his evidence described a bed being placed in the room on the date of offence. Being privity to the contents of the 1st complaint PW 6 has observed that the proportions of the room made it possible to place a bed in it.

It is interesting to note that the argument raised by the learned counsel for the respondent that presence of the wife of the accused in the bungalow at the time of offence does not automatically negate the occurrence of sexual abuse. Although the victim testified that the wife of the accused was inside the bungalow, he made it very clear that the room used for medical treatment was

separate from the other areas as described. The position of the wife of the accused was that the practice had been stopped by discussion by accused and his wife and in compliance with applicable circulars. The wife of the accused admitted that there had been private medical assistance given in official bungalows of doctors in the past. It was her contention that in hospitals they were attached to in the past, the practice of giving medical services in the private bungalows, had led to their child contracting pneumonia. Therefore, there had been such a past practice even according to the defence.

Another argument raised by the learned counsel for the accused-appellant was that in response to the Ground of Appeal that the learned High Court Judge acted on mere surmise, the purported "mere surmise" discussed on behalf of the accused-appellant was that of the brief the Judgement refers to the possibility of a bed being removed from the room within the period of one month which is from 16.09.2006 to 11.10.2006. There is a possibility that cannot be excluded since the victim refers to the presence of a bed and PW 6 refers to the proportions of the room being adequate to place a bed there. To the extent of the furniture in the room etc PW 6 in fact does corroborate the victim.

It is an admitted fact by both the prosecution and the defence, on that day and at the time of the incident, the wife of the appellant was also present in the premises where this alleged incident took place. According to the evidence of the police officers, the place was just covered with a curtain and at any given time, the wife of the appellant could have walked in where the prosecutrix alleged to have been abused by the appellant.

As narrated by the prosecutrix in his testimony, the act of grave sexual abuse lasted for about five minutes. The question arises, whether a prudent man would opt to commit such an offence in the presence of his wife. Therefore, the version of the prosecutrix is highly improbable. The prosecutrix was a 13-year-old boy at the time of the incident. He had been sent to meet a doctor to get his wound treated or dressed, without having any guardian. Such a situation seems highly improbable according to the evidence led at the trial.

The entire version of the prosecution is that the prosecutrix had a wound on his dorsum and he wanted to get it dressed from the government hospital of the area. As narrated by the prosecutrix, the incident took place on a Sunday. Both PW1 and PW3 were informed that the Gileemele Hospital was closed. Another small boy who is a friend of PW 3, were directed to the bungalow of the appellant in order to get the wound dressed or treated. As further narrated by the prosecutrix, after getting treatments, he paid a sum of Rs.40/- to the doctor. It is a well-known fact that doctors will not charge for any treatments in government hospitals. Paying a sum of Rs. 40/- after the purported act of committing grave sexual abuse is highly improbable under the abovesaid circumstances.

According to the testimony of the prosecution witnesses, Gileemele Government Hospital was closed on the day of the incident and the reason given by PW 1 and PW 2 to visit the bungalow of

the appellant was that there were no doctors at the hospital and they were directed to go to the appellant's bungalow. The government hospitals are not closed on holidays and, Chandrasiri Kumara (DW 2) confirms this position in his evidence and testified that there had been no such practice, procedure, or protocols to send patients to the private bungalow of the doctor, other than calling the doctor to the ward in a case of an emergency. This was confirmed in the testimony of DW 2, who is an independent witness and by the evidence of the wife of the appellant who is also a doctor.

According to the evidence of the prosecutrix, he was asked to lie on the medical bed and his pants were removed and thereafter, his male genitalia was taken into the mouth by the appellant. This version is highly improbable considering the notes of the investigating officer who had visited the crime scene after one month from the date of the purported incident.

According to the evidence of the Police, there was no such medical bed, medical instruments, or medicine in the Bungalow premises where the appellant resided with his wife. Considering the absence of a bed at the place where this purported incident is said to have taken place, there is a serious doubt cast on the case for the prosecution. The question arises, whether the version of the prosecutrix is probable and could be upheld by a reasonably prudent person, as he testified that the incident took place while he was lying on the bed. The Learned Trial Judge, in order to overcome this issue, mainly, the non-availability of a bed at the crime scene, had arrived at a speculative finding that, since there had been a gap from the date of the incident, to the date the police had gone to visit the scene of crime, the appellant had had ample time to remove the bed from the scene of crime. This contention is hypothetical, completely erroneous and had been based on pure surmises and conjectures not supported by the evidence placed before the Trial Court.

The mother of the prosecutrix had lodged a complaint to the police regarding this incident on 16.09.2006 stating that the incident had occurred on 10.09.2006. The prosecutrix made his statement to the police after one month, on 11.10.2006. PW3, one Dimuthu Roshan had made his statement to the police after forty-nine days on 29.10.2006, from the date of the incident.

According to the prosecution case, it was PW 4 who first got to know about this incident and who had divulged this incident to the mother of the prosecutrix. Ironically, PW 4 who should have been a crucial witness was not summoned as a prosecution witness. Although, she is listed as a witness on the back of the indictment.

Section 114(f) of the Evidence Ordinance is as follows;

> "that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

According to the evidence, the mother of the Prosecutrix first went to the police station without the Prosecutrix to make a complaint and the reasons given by the mother for not taking the Prosecutrix to the police accompanied by her was that, the prosecutrix was sick and had some symptoms of headache, drowsiness and a vomitish feeling. It is incumbent upon the Learned Trial Judge to consider whether such an explanation could be admitted as evidence and could be acted upon by a court of law. The Prosecutrix testified that there had been a function at his house and therefore, he could not divulge this incident to his mother. He had further testified, because of the sickness he was unable to go and make a statement to the police. However, in his own

testimony, it had been transpired and admitted that he went and confronted the appellant accompanied by his mother, when they wanted to inquire about this incident from the appellant.

When the mother was giving evidence, she was cross-examined on the same matter and a vital contradiction was brought to the notice of court. Whether she went to Gileemale Hospital to meet the doctor along with her son. The Prosecutrix who could not walk to a police station to make a prompt complaint with regard to the incident, had gone to the hospital with his mother to inquire from the doctor with regard to the alleged incident. The position taken up by the mother of the Prosecutrix becomes untenable and completely unacceptable in light of the said contradiction.

Then the reasons given by the prosecution for the belatedness becomes untenable and unacceptable as well. While conceding to the fact that the belated statements can be acted upon if there is sufficient explanatory evidence on the part of the witness, such explanation should be a plausible explanation. In this particular matter, the explanation has become a fanciful explanation, and as has been demonstrated in the trial Court, from the evidence of the prosecution, there had actually been no such difficulty or serious illness to avoid either the Prosecutrix or his mother to lodge a prompt complaint to the police. Learned counsel for the appellant argues that this is the settled law pertaining to the belatedness of complaints adopted by the Apex Court of this country.

Therefore, in the aforementioned circumstances, the purported evidence placed by the prosecution, in this matter, has no evidential value. The fact that remains unchallenged, is, there had been a delay of one month which was not sufficiently explained or elicited by the prosecution to convince the trial Court. On this count itself, conviction could not be allowed to stand as there exists a serious doubt created in the prosecution case.

It is important to note that the Learned Trial Judge had come to an erroneous finding that the evidence of the prosecution witnesses is consistent and corroborated by the testimonies of each other. The person who first received the information, who had first conveyed the purported incident to the mother of the prosecutrix was not called to give evidence by the prosecution though the name of the said witness was listed under the list of witnesses for the prosecution. The contention of the appellant in this matter, was further corroborated through the evidence of the police officer who recorded the statement of the Prosecutrix, the police officer questioned whether the mother of the prosecutrix observed any blemish or mark on the dorsum of the right foot of the Prosecutrix and the answer was "negative". In addition to the aforesaid contention, according to the short history, PW 3 Dimuthu Roshan was also there with the doctor and he left the place where the incident took place while the leg of the Prosecutrix was being treated. But, the evidence of the prosecutrix and the said Dimuthu Roshan at the Trial was completely contradictory in nature as far as the presence of PW 3 at the crime scene is concerned.

It is my view that the defence evidence should be considered equally and the same yard sticks shall be used when evaluating the evidence. The Learned Trial Judge was completely misdirected in arriving at the decision that the defence evidence is not reliable and does not create a reasonable doubt in the prosecution's case. The contention of the Learned Deputy Solicitor General during the course of her submissions was that there was no animosity between the parties to falsely implicate the Appellant in this matter. However, there is no reason to enter a conviction on unreliable evidence of the Prosecution. That would certainly not strengthen a weak case for the prosecution. Therefore, the learned counsel for the Appellant moves this Court to allow this appeal and acquit the Appellant for the charge levelled against him in the indictment.

In the statement made by the mother of the Prosecutrix, she complained about an act, "touching the genital area", of the Prosecutrix. She did not say anything about taking the male genitalia of the Prosecutrix into the mouth of the Appellant. The mother was confronted with her first statement to the police and this was brought to the notice of the Learned Trial Judge. Not calling PW 4 as the first person who received this information is fatal to the conviction and the provisions under the evidence Ordinance - Section 114(f) would operate against the prosecution. In light of the above-said contradiction, it is emanating from the evidence of the prosecution, that the "act" first complained of, by the mother to the police and the act of grave sexual abuse stipulated in the indictment are two different acts. That shows the inconsistency between the evidence of the Prosecutrix and the mother. The finding of the Learned Trial Judge is that the evidence of the Prosecutrix is consistent with his mother and is corroborated. However, such finding is *ex facie* wrong and erroneous in light of the evidence that has been led at the trial.

When considering the medical evidence and according to the short history given to the doctor, the incident had occurred about a month prior to the said medical examination. However, in the short history, the Prosecutrix referred to the wound that he wanted to get dressed on that day. Judicial Medical Officers examine patients referred to them based on the short history given in order to ascertain whether such short history is compatible with the physical examination. The Judicial Medical Officer, after examining the prosecutrix, he had observed no blemish, no mark, no healed wound marks on the dorsum of the right foot of the Prosecutrix. Even under cross-examination, the Judicial Medical Officer was categorical on this point. On the contrary, the short history given by the prosecutrix to the Judicial Medical Officer reveals that there were in existence blemishes, marks, or healed wounds on the dorsum of the right foot.

It is obvious that the version of the prosecutrix is not credible and contradicted by the medical evidence. According to the evidence of the PW 1, the Prosecutrix had a wound on the upper surface or dorsum of his right foot and he treated it at home, two to three days prior to the incident. The Prosecutrix wanted to get it treated and dressed from the hospital, he joined PW 3 Dimuthu Roshan in order to go to the Hospital. As the Prosecutrix described in his evidence, he could not keep his foot on the floor and walk properly and he was limping. After one month when he was examined by the Judicial Medical Officer, there was no such healed injury or a blemish on his skin to show that his wound had been so severe.

Considering the totality of all the above-mentioned circumstances, the learned counsel for the accused appellant submitted that neither the conviction nor the sentence in this matter could be sustained in law and therefore, to acquit the Appellant from the charges levelled against him.

Lack of animosity between the victim's family and the accused is another important ground which was raised by the accused-appellant. Victim specifically states that there was no animosity between the accused or family of accused and the family of the victim. On behalf of the respondent learned counsel indicates that no suggestion whatsoever that the alleged incident was fabricated due to influence of a third party was suggested to the victim in cross examination. Therefore, the defence of animosity of third party and fabrication was an afterthought placed before court after the evidence of the victim was concluded. No suggestion was made that the victim was giving false evidence on any point whatsoever when the victim was cross examined.

Although it was suggested on behalf of the defence that the victim fabricated the incident of sexual abuse made to the mother of the victim, it was categorically denied by the mother of the victim. It was suggested to the police witness that the 1st complainant mother of the victim came

to the police with one Bothungaarachchi and this suggestion was categorically denied. When PW 2 was questioned on whether the incident of abuse was told to Lalith Bothungaarachchi she denied. When it was suggested that the case was fabricated at the said Lalith Bothungaarachchi's influence this suggestion was also denied by PW 2. She has also categorically stated that there was no animosity between herself and the accused or wife of accused.

In the case of State of Uttar Pradesh vs Krishna Master and other AIR 2010 SC 3071 it has been held that;

> "A child of tender age is incapable of having any malice or ill will against any person, there must be something on record to satisfy the court that something had gone wrong between the date of the incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of serious nature"

Absence of denial of the victim's version and cross examination is based on the fact that victim received treatment from the bungalow.

Learned counsel for the respondent says that there is not even a suggestion to the victim in cross examination that the incident of sexual abuse mentioned by him in his examination in chief was not committed by the accused. There is no suggestion that the victim is giving false evidence. It was argued that not a single contradiction or omission has been marked in the evidence of the victim. When the version of the victim is not assailed in cross examination, it is safe to rely on the evidence of the victim to convict the accused appellant. A careful scrutiny of the cross examination of the victim reveals that he has been questioned on the basis that there were no medical services in the hospital on that day due to the day being a holiday or Sunday and that he went to the bungalow because there was no medical service in the hospital.

The Supreme Court has cited with approval the following cases in Galagamage Indrawansa Kumarasiri, and others vs. the Attorney General (Angulana Murder case) SC TAB Appeal 02/2012 in the passage that is reproduced below;

> " Dadimuni Indrasena & Dadimuni Wimalasena vs. AG (2008) where it was stated that - Whenever the evidence given by a witness on a material point is not challenged in cross examination it has to be concluded that such evidence is not disputed and is accepted by the opponent"
>
> "This principle is echoed in Pilippu Mandige Nalaka Krishantha Kumara Tissera vs. AG (2007) and is line with the approach adopted by Indian Courts as well as evidenced by the decisions in Sarwan Singh vs State of Punjab (2002) (AIR SC 111) where it was held that;
>
> "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted', and in Motilal vs. State of Madhya Pradesh (1990) (CU NOC 125 MP) which held that the Absence of cross examination of Prosecution Witnesses of certain facts leads to inference of admission of that fact`."

Learned Counsel for the respondent focus the attention for this court on undue Influence exercised on the victim's family by the family of the accused. Mother of the victim went and confronted the accused after she heard the incident. The wife of the accused had met and told

her what the accused had committed. The reaction of the wife of the accused was to offer money for not going to the police. However, the mother of the victim had not accepted money. A person who identified himself as the brother-in-law of the accused had visited the house of the victim, and offered Rs 25,000, in exchange for failing to proceed with the case in the lower court. However, she had not accepted the money stating that she "will not sell her child and eat"

The above-mentioned allegations should have been proved before the trial court. At least there should be a police complaint against the accused appellant to take necessary legal action if he has acted in such a manner. The said allegation cannot be considered against the accused appellant as it was not proved before the trial judge.

It was argued on behalf of the respondent that the learned trial Judge has duly considered the tender age of the victim who was a mere 13 years of age in terms of the delay in his making of the complaint. The Accused alludes to doubt arising in terms of truthfulness of the victim's stance and possibility of the incident occurring because of the delay in making of the complaint. The incident occurred on 10.09.2006 and the complaint was made on 16.09.2006. The child was not present on this day as he was ill.

It was the contention of the learned counsel for the Respondent that the said delay does not materially affect the truthfulness of the position of the child victim as it can be seen that, immediately after exiting the treatment center, which is the house of the accused-appellant. The victim informs his relative who accompanied him (Prosecution witness 03), of the acts of the accused on him and subsequent to which he fainted. Once the relative was informed, he in return informed his mother who then informed the Victim's Mother of the incident, which prompted the making of the Complaint.

Learned Counsel for the respondent says that this all speaks to the trauma experienced by the young child in light of the incident and gives a reasonable explanation for the delay in making of the complaint and confirms the possibility of the purported acts occurring.

Rajapaksha Ratnayaka Chandraratne vs The Attorney General CA 220/10 dated 24.07.2020;

> It is evident that PW 1 has complained at the earliest opportunity which presented itself therefore, the test of spontaneity and contemporaneity is in her favour.

Bandara vs The State 20012 SLR 63 it was held that;

> "If there is a valid reason or explanation for the delay and if the trial Judge is satisfied with the reasons and explanations given, no trial Judge would apply the test of spontaneity and contemporaneity and reject the testimony of a witness in such circumstances" and "delayed witnesses evidence could be acted upon if there were reasons to explain the delay."
>
> "It is out of fear for her life that the Victim did not reveal the abuse she was undergoing and the mother had her reasons for delaying the complaint and as such, considering the sensitivity of the matter at hand, it is apt to consider that delay in making of the complaint is justified and the learned trial Judge has rightly done so, in arriving at the conviction."

In Sumanasena V. Attorney General 1999 (3) SLR 138 it was held that;

"Just because the witness is belated witness, court ought not to reject his testimony on that score alone, court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the court could act on the evidence of a belated witness."

Kahadawela Arachchilage Wijeratne vs. The Attorney General CA63/2014 dated 16.11.2015; In this case the victim has given a plausible reason for the delay in making a complaint to the police. In fact, the evidence of the victim shows that he never intended to make a complaint about this incident to anyone. But after some time, due to circumstances beyond his control he was compelled to divulge the said incident to the police. One cannot say that the victim wanted to falsely implicate the accused-appellant due to a third party's intervention.

The learned counsel for the accused appellant argued that the trial Judge had failed to consider that the version of the prosecution failed to satisfy the test of probability. The Learned Trial Judge had failed to properly evaluate the evidence given by defence witnesses which creates ample doubt in the case for the prosecution. DW 02, a hospital assistant, testifies to the fact that no private consultations were taken place even in emergency situations as the protocol was to call the doctors and bring them in to the hospital. This is corroborated by DW 01 and DW 05.

DW 01 states every time he went to the hospital there were doctors on duty and in the rare event no doctor was available, they called a doctor and brought them into the hospital. A doctor (DW 05) at the Gileemele hospital and the wife of the Appellant, affirms the fact that no consultations took place at their residence due to a personal reason and regulations issued advising against such private consultations. This simple fact which emanates from 3 independent witnesses has not been properly evaluated by the Learned Trial Judge in his impugned judgment, to the detriment of the Appellant. Therefore, it was argued on behalf of the accused-appellant urged that the conviction of the Appellant is unsafe.

It is evident that the prosecution has not proved its case beyond reasonable doubt. The case for the prosecution is entirely based on inconsistent evidence unworthy of credit and fails to satisfy the test of probability in every juncture. The judge had failed to direct his judicial mind to the belatedness of the complaint and the defence evidence which create ample doubt in the case for the prosecution. When such evidence is taken separately and cumulatively, they create reasonable doubt in the case for the prosecution. Considering the totality of all the above-mentioned circumstances, appellant make a request from this Court to Acquit the Appellant from the charges levelled against him.

It was held in Wickremasuriya Vs. Dedoleena and Others 1996 (2) SLR 9 that;

A. "A Judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."

B. Arriving at determinations with regard to credibility and testimonial trustworthiness of a witness is a question of fact and not a question of law.

Applying the Test of Probability and Improbability in the light of sequence of events and contradictory evidence of the prosecution, there are adverse findings in regard to prosecution

case and their witnesses. The child's testimonial trustworthiness is not reliable. The contradictions and in consistencies found in the evidence of the case of the prosecution can be considered as inherent weaknesses in the case of the prosecution which affect testimonial trustworthiness of the prosecution witnesses.

The inbuilt improbabilities in the version of the prosecution which will go to show that no conviction could be possible even if the evidence of the witnesses is taken on their face value warrant a court dealing with a criminal appeal not to shut its eyes particularly when the criminal proceedings set in motion against the appellant appear to be a probable cause of abuse of process of court to put the appellant's liberty in jeopardy.

In the totality of aforesaid circumstance, it is evident that the accused-appellant did not commit the said offence and the prosecution failed to establish, ingredients of the offence beyond reasonable doubt. The learned High Court judge erred in law in convicting the Accused -Appellant.

Though the legal proposition points towards such evidence not strictly requiring corroboration, in the singular facts and circumstances of the present case, having regard to the quality of the version of the prosecution about the incident, it cannot be safely relied upon to sustain the conviction against the accused of multifaceted reasons.

Taking into consideration, all these circumstances, I am of the view that the conviction of the accused-appellant cannot be allowed to stand as the prosecution had failed to prove the case beyond all reasonable doubts.

The conviction and the sentence are quashed.

Accused-appellant is acquitted and discharged from the charge in the indictment.

Appeal allowed.

President of the Court of Appeal

M. Ahsan R. Marikar J.

I agree.

Judge of the Court of Appeal