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

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

Court of Appeal No:

CA/HCC/0052/2022

High Court of Batticaloa

Case No**:** HC 3229/2018

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Mohammad Abdul Cader Mohammad Siththar

ACCUSED

AND NOW BETWEEN

Mohammad Abdul Cader Mohammad Siththar

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Nizam Kariapper, P.C. with M.I.M. Iynullah and A. Ilhan Kariapper and Chathurika Perera for the Accused-Appellant
	: Azard Navavi, S.D.S.G for the Respondent
Argued on	: 06-06-2024
Written Submissions	: - (Not filed by the Accused-Appellant)
	: 30-01-2024 (By the Respondent)
Decided on	: 26-08-2024

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 the sentence by the learned High Court Judge of Batticaloa.

The appellant was indicted before the High Court of Batticaloa for committing the following offences.

1. That he committed the offence of kidnapping a minor male child on or about 04-09-2009, at Katthankudi within the jurisdiction of the High Court of Batticaloa, 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 thrusted his male organ into the mouth of the said minor male child, and thereby committed the offence of grave sexual abuse 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 20 of 1998.

After trial, the learned High Court Judge of Batticaloa found the appellant guilty as charged of his judgment dated 01-11-2021.

After having heard the mitigatory as well as the aggravating circumstances relating to the case, the learned High Court Judge sentenced the appellant on 03-11-2021 in the following manner.

> **On count 1-** to a period of 1-year rigorous imprisonment, and in addition, to a fine of Rs. 1,000/-. In default of paying the fine, to a 1-month simple imprisonment period. The 1-year rigorous imprisonment period was suspended for a period of 5 years.
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> **On count 2-** to a rigorous imprisonment period of 7 years, and a fine of Rs. 1,000/-. In default of paying the fine, to a 1-month simple imprisonment period.
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> In addition to the above, the appellant was ordered to pay compensation of Rs. 20,000/- to the victim boy, with a 6 months simple imprisonment period in default.

The learned High Court Judge has also directed that the appellant should pay 20% of the fine imposed, to the Fund of The Protection of Witnesses.

Facts in brief

PW-01, the victim child of this incident was a 17-year-old youth when he gave evidence before the High Court on 07-11-2018. In his evidence, he has stated that the incident occurred in the year 2009, while he was studying in grade 4 at his school. On the day of the incident, the victim child who was 9 years old at that time, has gone to the nearby mosque for his daily prayers. While he was returning from the mosque, he has met the appellant, who was a salesman at a shop situated near the mosque. The appellant was not a stranger to the victim as he has seen him previously working in the shop. When he was passing the shop, the appellant has asked the victim child to help him to take some boxes

which were outside the shop. When the victim child obliged, he has forced him inside the shop and closed the door.

In his initial evidence, the victim child has stated that after closing the door, the appellant showed his male organ to him and he pushed open the door and ran away and informed his mother what happened.

However, upon questioning further, the victim child has stated that after showing the male organ to him, the appellant held him by his hands and inserted his male organ into the mouth.

According to his evidence, the shop was situated near his house and soon after he informed his mother of the incident faced by him, he has gone with her to the shop and showed the appellant to her.

Under cross-examination, the victim child has stated that when he left for the mosque, he received Rs. 5/- from his mother, and purchased some toffees, not from the appellant's shop, but from another shop near the mosque. He has stated that after telling the mother, she informed his father who was working away from home, and they went to the police station on the following day.

The mother of the victim child has given evidence as PW-02. According to her evidence, her son has left their house to attend to prayers at the nearby mosque where usually the prayers conclude around 7.30 p.m. However, on the day in question, her son has gotten late to come home and had come at around 8.30 p.m. After returning home, he has begun to weep uncontrollably and was retching. He has come out of what happened to him only after being repeatedly questioned by her and has told that a person working in a shop took him inside and inserted his male organ into his mouth. The learned High Court Judge has observed that the mother of the victim child being very emotional when she had to narrate the incident that her minor son had to face.

She has immediately taken the child to the shop he mentioned, and the child has shown the appellant to her. Thereafter, she has phoned her husband who

was working away from home, and had gone and lodged a complaint with the police on the morning of the following day.

It has been revealed at the cross-examination that the parents of the child have initially taken the child to a private hospital and thereafter, on the advice of the doctor at the hospital, had taken him to the Katthankudi Base Hospital where he has been examined by the Judicial Medical Officer (JMO). The said JMO has given evidence in this action as PW-04. He has examined the child on 07-08-2009, some two and a half days after the incident. Although he has not observed any visible marks as to a sexual assault or abuse, he has opined that an incident of the nature described to by the child can occur without any marks being present and, therefore, cannot overrule such an incident.

The JMO has given evidence as to the way he obtained the history of the incident. According to him, he had been unable to get a proper history of the incident from the child. It had been his mother (PW-02) who has given the history. She has stated that her son returned home around 7.00 p.m. on 04-08-2009, and she noticed something different in the boy and he was attempting to vomit. When she questioned the child about his behavior, he has revealed to her that a person from a nearby shop took him inside a room of the shop and thrust his penis into the child's mouth.

The police officers who conducted the investigations have also given evidence at the trial.

At the conclusion of the prosecution case, when the learned High Court Judge called of a defence from the appellant, he has made a statement from the dock. He has stated that he was employed in a shop and while working there on the day of the incident, a boy poked a stick, which resulted in the goods stacked in the shop collapsing. Because of that, he got very angry and wanted to attack the boy with a pair of scissors. It had been his position that the boy went away and later came with his mother and another person and threatened him. When he went to the shop on the following morning, the same boy came with some police

officers and arrested and assaulted him and took him to the police station had been his position. He has denied that he committed any sexual abuse on the victim.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel who represented the appellant formulated the following ground of appeal for the consideration of the Court.

1. PW-01's evidence, when taken in the line of his mother's and the doctor's evidence clearly demonstrates that PW-01's evidence was not credible and the learned High Court Judge would not have acted upon such evidence to convict the accused-appellant.

The Consideration of the Grounds of Appeal

The learned President's Counsel pointed to the commencement of the evidence by the victim (PW-01) where he has stated several times that the appellant took him inside the shop and showed his private part, and thereafter, he ran away from the place.

It was the position of the learned President's Counsel that the victim has child mentioned that the appellant held him by his hands and inserted his male organ into his mouth only after the prosecuting Sate Counsel put some leading questions to the witness. He lamented that the learned High Court Judge has failed to consider the obvious discrepancies in the victim child's evidence as to what really happened to him.

Pointing to the evidence of the mother of the victim child, it was stated that the child has come and told his mother that the appellant gave some chocolates or toffees and committed this act on him, whereas, the child in his evidence has stated that he did not buy toffees from the appellant, but purchased from another shop.

Referring to the evidence of the JMO who examined the child after the incident, the learned President's Counsel pointed out that the history of the incident has been given by the mother to the JMO, and not by the child. However, the learned High Court Judge in his judgment has considered the history as corroboration of the child's evidence, which was a misdirection as to the value that can be attached to the history given by a patient to a doctor.

It was also contended that the learned High Court Judge has only narrated the evidence, but has failed to analyze it in its correct perspective. It was his view that if analyzed correctly, there was no basis before the High Court to convict the appellant for the charge preferred against him.

It was the submissions of the learned Senior Deputy Solicitor General (SDSG) that the child was an 8-year-old boy when this incident of grave sexual abuse occurred and a young person of 17 years of age when he gave evidence. He was of the view that there can be discrepancies in the evidence due to the time factor which cannot be considered as someone not telling the truth of what happened. He was of the view that the child's evidence had been perfectly corroborated by what the mother observed of the child after he came home.

After coming to know what happened to her child, the mother has immediately gone with him to the shop where the appellant worked, and has confronted him. She has immediately informed her husband, and gone to the police station on the following day morning, and lodged a complaint. It was the view of the learned SDSG that the child has no reason to concoct a story against the appellant and the evidence, when taken in its totality, shows that this was an incident that actually occurred, where the prosecution has proved the case beyond reasonable doubt.

Having considered the evidence placed before the Court, I am of the view that the initial statement of the victim child where he has stated only about the

appellant showing his male organ to him needs to be looked at not only taking that piece of evidence in its isolation, but also looking at the entire picture.

The evidence of the victim child as well as his mother clearly shows that they come from a conservative society. The child who was about 9 years old at the time of this incident, was a 17-year boy who had a better understanding of the social stigma attached to this type of an incident. That may be the very reason why he was initially reluctant to come out with the full story as to what happened to him.

I am not inclined to look at the questions posed by the prosecuting State Counsel to the witness as prompting questions under the circumstances. It is well-settled law that when a child victim is giving evidence, it may be necessary to put questions to such a child to make the child calm and comfortable with the Court environment, enabling him to come out with what happened. The child has stated that after facing the incident, he came home and informed his mother about what he had to undergo. At that point, the learned prosecuting State Counsel has posed the following questions.

> Q: Witness did this accused after showing his male organ, asked you to do anything?
>
> A: Yes.
>
> Q: What did he asked you to do?
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> A: He, after holding my hands, took his male organ and placed it in my mouth. I pushed him and came away.
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> Q: Witness you said that you talked about the incident to your mother?
>
> A: Yes.
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> (Pages 78 and 79 of the appeal brief)

In the case of **Perera Vs. The Attorney General (2012) 1 SLR 69, Ranjith Silva, J.** considering the credibility of the evidence of a victim observed as follows;

> *"It is inconceivable that one could apply the test of contemporaneity or spontaneity in rape matters especially in child rape matters. A perusal of the proceedings itself will give an indication as to how reluctant the victim was to come out with the story at the trial in the High Court. A fair amount of coaxing and persuasion which is justified under the circumstances was needed to extract the evidence from the victim."*

I am of the view that this was a situation which required such questioning given the circumstances.

In the case of **D. Tikiribanda Vs. Attorney General, CA 64/2003 decided on 6-10-2009 reported in Bar Association Law Journal (2010) (B.L.R.) 92**, it was held;

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

When it comes to the mother's evidence, she confirmed that when the child came home later than usual, he was sobbing uncontrollably and retching. This has prompted her to question the child, where the child has come out with what happened to him. Initially she has described the incident stating that her son came and told her that such a thing was done to him. When questioned in detail only she has stated that her son told her that a person put his male organ into his mouth.

She has been very emotional when she was giving evidence as any mother would be when forced to narrate such an incident in public. She has immediately gone with the child and confronted the appellant, and at the same time has informed her husband who was working away from home. After her husband arrived, both of them had taken the child to the police station on the following day and had lodged a complaint, which shows that they have acted promptly in that regard.

As argued by the learned SDSG, evidence of a case, especially in a case of this nature, has to be taken and considered in its totality without compartmentalizing the same.

In the case of **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167 at 176** following the Privy Council case of **Jayasena Vs. The Queen 72 NLR 313 (PC)** it was observed;

> "*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 it comes to the facts and the circumstances of the matter, and when taken in its totality, it is abundantly clear that the child and his mother are not concocting a false narrative against the appellant, and they have had no reason to make a false allegation against him risking the repercussions the young child may face in the future.

It is settled law that discrepancies, contradictions, or omissions in evidence of a witness or witnesses has to be material so that it creates a reasonable doubt as to such evidence.

In the case of **Mahathun and Others Vs. The 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 generally reliable much importance should not be attached to the minor discrepancies and technical errors.
(5) The 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.

In the case of **State of U.P. Vs. M. K. Anthony, AIR 1985 SC 48**, it was held:

"While appreciating the evidence of a witness the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole."

The discrepancies highlighted in this matter is about whether the child purchased toffees elsewhere, or it was the appellant who gave him chocolates after taking him inside the shop. The evidence of the mother had been that her son told her that the appellant gave him chocolates after taking him inside the shop, but the evidence of the child in that regard had been to the effect that he purchased toffees elsewhere.

As considered above, this discrepancy in no way relates to the actual occurrence of the sexual abuse faced by the child. The child and the mother, possibly due to the passage of time, may have forgotten such a detail as to the incident, which cannot be interpreted as a discrepancy which affects the credibility of both the witnesses.

According to the evidence of the JMO, as the child was not in a position to explain what happened to him, it was his mother who has narrated the history. In that process, the mother has informed the JMO what her son told her, as well as what she observed when the child came home on that day.

It is settled law that the history given in an incident to a doctor cannot be considered as corroboration of a fact, but only as evidence consistent of a fact.

Although the learned High Court Judge may have been misdirected in that regard, it is my considered view that fact alone would not make the judgment faulty. Although what the mother has told the doctor about the information provided by her son becomes hearsay and cannot be used as evidence, the mother of the victim has informed the doctor of what she observed of the child, which in my view are very much consistent with the evidence of the victim child.

I am of the view that the said misdirection has not caused any prejudice towards the appellant. I find that even without considering the history given by the patient or his mother to the doctor, the prosecution has placed ample evidence before the trial Court to prove the charge against the appellant beyond reasonable doubt.

Another matter that needs to be considered is the defence taken up by the appellant when he was called upon for a defence. He has taken the position that because the boy was instrumental in the collapse of the stacked goods that were on display in his shop, he got angry and attempted to stab him with a pair of scissors, which resulted him going to his mother and complaining.

However, it needs to be noted that when the child gave evidence, no such position has been put to him and confronted. The child's mother has not been confronted in that regard as well.

It is trite law that when an accused person takes up a certain position as his defence, he must put that position to the relevant witnesses so that they can respond to it. If a person comes out with a story for the first time when he was called upon for a defence, that is also without giving evidence under oath, but only as a dock statement, such a statement has little or no value.

Although it was contended that the learned High Court Judge has failed to analyze the evidence in its correct perspective, I am in no position to agree. I find that although there had been a misdirection in the judgment which has not created any prejudice towards the appellant, the learned High Court Judge has well considered the evidence placed before the Court in coming to his findings.

At this juncture, I would like to reproduce the proviso of Article 138 of The Constitution, which gives appellate powers of the Court of Appeal to determine appeals, which reads thus;

> **"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."**

I am of the view that the prosecution has placed evidence, which has proved the charge beyond reasonable doubt against the appellant, which needs no disturbance from this Court.

Accordingly, the appeal against the conviction is dismissed for want of merit. The conviction dated 01-11-2021 affirmed.

However, It needs to be noted that the learned High Court Judge, in sentencing the appellant for the first count has proceeded to suspend the sentence imposed upon him. I find that the learned High Court Judge was misdirected as to the relevant provisions of section 303 of the Code of Criminal Procedure when the suspended sentence was imposed, which should be corrected by this Court.

The relevant section 303(2) reads as follows;

> **303(2) A court shall not make an order suspending a sentence of imprisonment if-**
>
> **(a) A minimum mandatory period of sentence has been prescribed by law for the offence in respect of which the sentence is imposed; or**
> **(b) If the offender is serving or yet to serve, a term of imprisonment that has not been suspended; or**
> **(c) The offence was committed when the offender was subject to a probation order or conditional release or discharge; or**
> **(d) The term of imprisonment imposed or the aggregate terms of imprisonment where the offender is convicted for more than one offence in the same proceedings, exceeds two years.**

Having considered the sentences imposed by the learned High Court Judge on the appellant, it is clear that the two periods of imprisonment imposed upon the appellant falls within the ambit of section 303(2)(b) and (d) of the Code of Criminal Procedure Code, where the sentence on the 1st count cannot be suspended.

Accordingly, acting under the powers vested in this Court in terms of section 335(2)(b) of the Code of Criminal Procedure, the sentence given in relation to the 1st count preferred against the appellant is hereby varied by deleting the part

where it states that the 01-year rigorous imprisonment period is suspended for a period of five years.

However, since the 1st and the 2nd count preferred against the appellant refers to offences committed in one and the same transaction, it is ordered that the two periods of imprisonment imposed shall be served concurrently to each other, which means a total period of 7 years imprisonment.

With the above variance to the sentence the appeal against the sentence dated 03-11-2021 is dismissed.

Having considered the fact that the accused-appellant had been in incarceration from his date of sentence, it is ordered that the sentence shall deem to have taken effect from that date, namely 03-11-2021.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal