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

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

Court of Appeal Case No.
CA/HCC/ 0046/2020
High Court of Ratnapura
Case No. HCR/235/2017

Desakara Mudiyanselage Dissanayake alias Gamini alias Podde

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P.Kumararatnam,J.

COUNSEL : **Sanjaya Senevirathne for the Appellant.**
Jayalakshi De Silva, SSC for the Respondent.

ARGUED ON : **15/02/2024**

DECIDED ON : **20/06/2024**

****

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General under Section 365 B (2) (b) of the Penal Code as amended by Act No. 22 of 1995 for committing the offence of Grave Sexual Abuse on Kankanam Thotapalle Palihawadana Ralalage Prarthana Sithumini on 03/03/2009.

The trial commenced on 07/01/2019. After leading all necessary witnesses and marking productions, the prosecution had closed the case. The learned High Court Judge had called for the defence and the Appellant had made statement from the dock, called his brother as a defence witness, and closed his case.

The learned High Court Judge after considering the evidence presented by both parties before him, convicted the Appellant as charged, and sentenced the Appellant to 14 years of rigorous imprisonment and imposed a fine of Rs.25000/- subject to a default sentence of 06 months simple imprisonment. In addition, a compensation of Rs.200000/- was ordered with a default sentence of 01-year rigorous imprisonment.

During the argument the Appellant was connected via Zoom platform from prison.

The Facts of this case *albeit* briefly are as follows.

According to PW1 - the victim of this case, she had been about 07 years old when she faced this bitter ordeal. When she gave evidence, she was 16 years old and was schooling. The victim was staying at her house under the guardianship her mother as her farther was employed in Colombo.

On the day of the incident, when she was playing with another girl, the Appellant had called the victim, shown a child's picture in his mobile and had taken the victim to nearby abandoned house. He made her lie on the floor, removed her undergarment, positioned his genitalia between her legs near her vagina, and committed severe sexual abuse against her.

Although she resisted, she could not escape from the captivity of the Appellant. At that time the Appellant had close her mouth preventing cry for help. After committing the sexual act, the Appellant had left the place leaving the child. She had felt pain around her vagina as a result. Immediately after the incident she had informed the incident to her mother and her mother informed the same to her father over the phone. Her father had assaulted the Appellant with pole and lodged a complaint in the police on 04.03.2009 on the very next day of the incident. The prosecutrix had given evidence after about 10 years of the incident.

PW2, Karunatilake, her father and PW3 Nilanthi her mother also gave evidence.

The JMO who had examined the victim had opined that the examination findings of genital area exclude rape. But he had not excluded sexual abuse.

After the closure of the prosecution's case, the defence was called, and the Appellant had given statement from the dock, called his brother as a defence witness and closed his case.

The following Grounds of Appeal were raised on behalf of the Appellant:

1. Creditworthiness and trustworthiness of the prosecution witnesses are questionable
2. The evidence of the victim has not been corroborated with other evidence.
3. Contradictions, omissions, and inconsistencies on the evidence of medical officer is not considered by the Learned High Court Judge.
4. The prosecution has failed to prove the case beyond reasonable doubts.

In a case of this nature, the testimonial trustworthiness and credibility of PW1, mainly the probability should be assessed with utmost care and caution by the trial judge. The learned Trial Judge must satisfy and accept the evidence of a child witness after assessing her competence and credibility as a witness. Hence, before analysing the grounds of appeal advanced in this case, I consider it of utmost importance that the following authorities from other jurisdictions on the topic be appraised.

It was recognized in England as early as 1778 that children could be competent witnesses in criminal trials.

In **R v. Brasier168 Eng. Rep.202 [1779]** the court held:

> "…….*that an infant, though underage of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take oath, their testimony cannot be received ….".*

In **Ratansinh Dalsukhbhai Nayak v. State of Gujarat [2004] 1 SCC 64** the court held that:

> *"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness".*

In **Ranjeet Kumar Ram v. State of Bihar [2015] SCC Online SC 500** the court held that:

> *"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one".*

In **R v. Baker EWCA Crim 4 [2010]** Lord Chief Justice (England and Wales of Court of Appeal) held that:

> *(At para 40) "….. We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However, children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristic of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence".*

In **R v. B. (G),1990 CanLII 7308 (SCC); [1990] 2 S.C.R. 30, at pp.54-55** the Court held that:

> *"...it seems to me that he was simply suggesting that the judiciary should take a common-sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child*

witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children".

E.R.S.R Coomaraswamy in his "Law of Evidence" Volume 2 Book 2 at page 658 has stated referring to child witness;

"There is no requirement in English law, that the sworn evidence of a child witness needs to be corroborated as a matter of law. But the jury should be warned, not to look for corroboration, but of the risks involved in acting on the sole evidence of young girls and boys, though they may do so if convinced of the truth of such evidence…….This requirement is based on the susceptibility of children to the influence of others and to the surrender to their imaginations".

At page 659 it states, "As regards the sworn testimony of children, there is no requirement as in England to warn of the risk involved in acting on

their sole testimony, though it may desirable to issue such a warning, though the failure to do so will generally not affect the conviction".

Barry Nurcombe, M.D., F.R.A.C.P. in his article "The Child as Witnesses: Competency and Credibility" states:

> "Before the trial, the child is expected to recount the details of the alleged offense, again and again, to strangers. Repeated court appearance may be required. In court, the child will eventually be confronted by the accused who is exercising his or her constitutional rights. In contrast to the accused, the child has no advocate. His or her testimony is open to direct challenge on the grounds of incompetence, confabulation, or fabrication. These considerations deter victims from reporting offenses, lead to false restrictions, and erode the apparent credibility of honest witnesses."

Considering the above cited judicial decisions and the writings, as the credibility of the evidence of a child witness would predominantly depend on the circumstances of each case, it is the duty of the Learned Trial Judge to assess and decide on the evidence given by the child witness.

As the grounds of appeal raised are interconnected, all grounds will be considered cumulatively hereinafter.

The Counsel for the Appellant contend that the victim child had no memory about the incident when she came to give evidence on 07.01.2019. Even when she was questioned, she remained silent without giving answers. As such the Learned High Court Judge had adjourned the trial for another day. The Counsel further argued that the victim gave evidence on 05.02.2019 after she was couched by her parents. Denying this proposition, in the re-examination the victim clarified that she was frightened on the first day of the trial. But she determined to give evidence on the next day.

Although the Counsel for the Appellant contended that the victim had given contradictory evidence, the defence was not able to mark a single contradiction on her evidence. Although the defence highlighted three omissions on evidence, considering that she was 7 years of age at the time of incident and gave evidence after 10 years in court, the Learned High Court Judge had very correctly disregarded the same considering the dictum expressed in several cases that a witness is not expected to give evidence with a photographic memory and with mathematical accuracy.

The Learned Deputy Solicitor General rightly submitted that the omissions highlighted are not forceful enough to shake the credibility of the victim or the core issues of the case against the Appellant.

The Learned High Court Judge after a careful consideration of the evidence of the victim stated that he did not observe any exaggeration in the testimony of the victim.

It is undisputed that the victim informed her mother, PW3, about what had happened to her. PW3 then communicated this to her husband, PW2, who was working in Colombo. The next day, PW2 returned home, sought out the appellant, and assaulted him. Afterward, PW2 went to the Balangoda Police Station with his daughter and PW3 to file a complaint about the incident.

Next, the Counsel for the Appellant contended that the evidence of the victim was not corroborated with the evidence given by PW2 and PW3.

In her testimony, PW3 stated unequivocally that, as a mother, she took all the necessary actions required of her.

Although the Learned Counsel made an attempt to show that PW2 gave contradictory evidence with regard to his arrival to his house after receiving information about the incident from PW3. PW5, Sgt 21325 Samaraweera confirmed that the first complaint was lodged by PW2 on 04.03.2009, which was the very next day of the incident. Further, in the dock statement, the Appellant had admitted that he was assaulted by PW2 on 04.03.2009 which

was admitted by PW2 in his evidence. Further, the defence witness brother of the Appellant too confirmed that his brother was assaulted by the Appellant on 04.03.2009. Hence, it was proved that PW2 was present in his village on the very next day of the incident.

Corroboration is not the sine-quo-non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Viewing the evidence of the girl or the women who complains of rape or sexual molestation with the aid of spectacles fitted with lenses tinged with doubt, disbelief, or suspicion, is to justify the charge of male chauvinism in a male dominated society. [287 F. 288 C-D] Rameshwar v. The State of Rajasthan, [1952] S.C.R. 377 @ 386 followed.

Likewise, in this case too, the victim's evidence, event though it does not require corroboration, it is very well corroborated on the material points of the evidence of PW2 and PW3. The Learned High Court considered this aspect very clearly in his well-written judgment and not caused any prejudice to the Appellant.

The Learned Counsel based on his argument of the medical evidence, contended that omissions and inconsistencies in the short history given by the patient escaped the proper assessment of the Learned High Court Judge.

The admissibility of the recorded history in the Medico-Legal Report as evidence in criminal trials has been discussed in several decided cases.

In **Gamini Dolawatte V. Attorney General [1988] 1 Sri. L. R 221** held that:

> "*While a Medico-Legal Report is admissible in evidence under Section 414(1) of the Code of Criminal Procedure Act, hearsay evidence by way of the case history embodied in such a report is not admissible as such history is information is not ascertained by the Doctor from his own examination of the injured".*

In **Bhargavan v.State of Kerala AIR 2004 SC 1058 (Supreme Court of India)**

> "At para 20*: So far as non-disclosure of names to the doctor, same is really of no consequence. As rightly noted by the Courts below, his primary duty is to treat the patient and not find out by whom the injury was caused".*

Although the victim had not revealed to the doctor about the sexual abuse committed on her in her history, the doctor had not excluded the alleged sexual abuse involving the genital area.

The Learned High Court Judge, while accepting the Medico-Legal Report and Medico-Legal Examination Form marked as P1 and P2 respectively, stated in the judgement that even though there are certain mistakes made in the report, such errors can be called as practical errors, which can be disregarded.

As the finding of the doctor is immensely consistent with the evidence given by the victim in court, there is no justification for undervaluing the victim's testimony in this case.

Finally, the Counsel for the Appellant submits that the prosecution had not proven their case beyond reasonable doubt.

In this case, the creditworthiness of the evidence given by the victim did not suffer at any stage of the trial. No contradictions were highlighted in her evidence. Three minor omissions were highlighted are not capable of attacking the core of the case. The learned High Court Judge had considered the evidence given by PW1 with caution and care and correctly held that her evidence is convincing and cogent and sufficient on its own to prove the case against the Appellant.

The victim's evidence is further supported by the evidence given by her father P2 and her mother PW3.

Hence, the argument put forward by the Learned Counsel under the grounds of appeal cannot be accepted. Further, as stated above, in this case the prosecution had adduced all necessary witnesses to prove their case.

In sexual offence cases, corroboration is not a *sine qua non* to secure a conviction. As long as the victim's evidence does not suffer from ambiguity or infirmity in a manner which affects the root of the case, there is no bar for the court to act and rely on the said evidence to decide the case.

Considering the evidence led in this case and guided by the judgements mentioned above, I conclude that this is not an appropriate case in which the judgement delivered by the learned High Court Judge of Ratnapura on 22/05/2020 against the Appellant can be interfered upon. I therefore, dismiss the appeal.

Considering all the circumstances of the case, we order the sentence be effective from the date judgment, i.e.; on 22/05/2020.

The Registrar of this Court is directed to send this judgement to the High Court of Ratnapura along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL