

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

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

C.A.No.02/2013

H.C. Panadura No.1903A/2004

Leonard Christie Perera

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Amila Palliyage with Nihara Randeniya,
Sandeepani Wijesuriya and Duminda de Alwis
for the Accused-Appellant.
Ayesha Jinasena (P.C.), A.S.G.. for the
respondent

ARGUED ON : 05th March, 2019

DECIDED ON : 24th May, 2019

ACHALA WENGAPPULI, J.

This is an appeal by the appellant against his conviction by the High Court of *Panadura* on a charge of grave sexual abuse, committed on one *Mahawaduge Suresh Perera*, a 12 year old student, during 1st January to 11th June 2003 at *Sri Chandrasekara College of Keselwatta*. He was sentenced to 3 years R.I. by the trial Court with a fine of Rs.10,000.00. He was also ordered to pay Rs. 25,000.00 as compensation. In default of fine and compensation the appellant was to serve an additional 6 months of imprisonment.

In his evidence before the trial Court, *Suresh* stated that he was in Grade 8 when the appellant, who was his English teacher, has had

intercrural sex with him near a *Kota Kimbula* tree, after the school was closed for the day.

Having invoked appellate jurisdiction of this Court to challenge the validity of the said judgment of the trial Court with his petition of appeal, the appellant sought to set aside his conviction and sentence on the ground that the trial Court had fallen into error in convicting him upon its failure to evaluate the evidence presented before it properly. Learned Counsel for the appellant contended that the trial Court had failed to apply the tests on evaluation of credibility on the evidence of *Suresh* and also had totally failed to consider the evidence placed before it by the appellant through his witnesses, although it found him guilty to the charge.

Learned Counsel for the appellant submitted that *Suresh* made this fabricated allegation against the appellant due to the animosity he had harboured against the appellant over several instances of punishment on discipline issues. Learned Counsel for the appellant relied on the admitted prior sexual experiences of *Suresh* with several others to impress upon this Court, that the said familiarity, considered in the light of the animosity against the appellant over punishment provides credence to the proposition that it had prompted him to level this allegation against the appellant.

Learned Counsel also submitted that the version of events as narrated by *Suresh* is an improbable one because there were afternoon classes that had been regularly conducted by other teachers to catch up with the arrears of work on syllabus before the scheduled exams and therefore the place where this incident claimed to have taken place is a place regularly frequented by others. It was also highlighted that the trial Court had failed to consider the important contradictions and omissions that are highlighted against *Suresh's* evidence, during his cross examination.

Referring to the defence case, learned Counsel submitted that the appellant, having made a statement from the dock, called two witnesses on his behalf and the trial Court had not even made a passing reference to their evidence in its impugned judgment.

Learned Additional Solicitor General, in her submissions in reply submitted the past sexual history of *Suresh* does not vitiate the reliability of his claim. She conceded that *Suresh* did not attribute a specific time period to the incident but was examined by the medical officer on 16.06.2013, upon being produced by the Police. She also highlighted that there was reference to the appellant in the short history, although recorded in summary form by the said medical officer, and moved this Court to apply proviso to Section 334(1) of the Code of Criminal Procedure Act No. 15 of 1979 to retain the conviction of the appellant.

This Court, having considered the evidence of the prosecution as a whole and in particular *Suresh's*, is of the opinion that the evidence of *Suresh* is unreliable owing to its inherent inconsistencies and improbabilities.

It appears that *Suresh* gave evidence after only two years since his complaint to Police. It is revealed from the cross examination that the past incidents of sexual abuse came to light only when the school authorities traced the origin of the pen, which *Suresh* had gifted to one of his friends. Only then his involvement with a foreigner (മുസ്ലിം) who had sexually abused him came to light. Upon further questioning, *Suresh* also implicated a monk of a nearby temple, another youth of the same area and also the appellant for having had sexual relations with him in addition to the foreigner. According to history given by *Suresh* all this happened within a space of two month period preceding his medical examination, which was conducted on 16.06.2003. He referred to the incident with the foreigner and also mentioned that he was abused by "three others" in the short history. However, no names were mentioned.

Suresh in his examination in chief claimed that the appellant, who saw him getting ready to leave after the school, told him to stay back because his English was poor. Only *Suresh* was asked to stay back after school. He complied. Then the appellant asked him to go near the *Kota Kimbula* tree and then the appellant had abused him. *Suresh* is emphatic that he was sexually abused four times by different individuals and

described three of them, including this incident and thereby leaving out the episode with the foreigner.

Suresh added more and more details to the incident, as he was being questioned by the appellant, during his cross examination. *Suresh* said that on his way home after school, the appellant asked him to stay back. He then came out with another version that when he went past the class room where the appellant was teaching English to senior students, he was asked to stay afterschool for extra lessons. He then had some water from the nearby tap and returned to the appellant's class waiting for him. At another point *Suresh* said when he went to drink water only the appellant called him. Then, after the school was over, the appellant wanted *Suresh* to pick a stick from the *Kota Kimbula* tree to be used as a cane to punish him. An omission was marked on this item of evidence, indicating that it was said for the first time in the High Court.

The contradiction V1 was marked off his statement that he told police that the appellant sent message that he would give something ("බඩුවක්") and for *Suresh* to stay back to receive it. Contradiction V3 was marked upon the statement where *Suresh* stated to police that he was told by the appellant to stay afterschool during school time.

These inconsistencies are important because it connotes two different scenarios. One inconsistency indicates that the appellant made

prior arrangement with *Suresh* to stay after school luring him with a promise of a gift. The other refers to a spontaneous reaction by the appellant, who upon seeing *Suresh* going past his class room, asking him to stay afterschool for lessons. Adding to these inconsistencies, the probability factor also weighs against *Suresh*. He admitted that the appellant taught him English in his lower grades but at the time of the incident it was his class teacher who taught him English and not the appellant. He also knew that the appellant who was expecting a transfer and therefore mostly confined to office, except when he was asked to do relief work in a class where the regular teacher was not available.

If this is the background in which the alleged incident occurred, the conduct attributed to appellant by *Suresh* is clearly improbable. There is no logical reason for the appellant to pick *Suresh* all of a sudden and out of the entire student population after a gap of few years to teach English after school. There was no evidence that *Suresh* was seen regularly by the appellant to help out in his English lessons prior to this incident. There is no explanation forthcoming as to why the appellant had shown a sudden interest in him. If *Suresh* was asked to stay after school only when he went past the appellant's class, then without any prior acquaintance it is improbable for a paedophile to pick his victim so randomly, especially after an incident where *Suresh's* aunt made a verbal complaint against him.

Only during his cross examination that *Suresh* did mention about the abuse by a foreigner, although he admitted that he used to visit his

Moratuwa house whenever the foreigner sent message for him. *Suresh* was suggested that he implicated several others in order to shield the foreigner from prosecution on the instructions of his aunt, who had a continuing relationship with the said foreigner. Adding to this, *Suresh* only did mention his abuse by the monk, the appellant and the youth in his evidence but strangely not the foreigner who allegedly and repeatedly abused him. This evidence is also relevant, since the appellant suggested that having had familiarity over sexual conduct with others, which the child admitted, it was easy for *Suresh* to make out a false allegation against the appellant who was hated by him for punishing him.

Having allowed a considerable margin of error for the memory lapses and limited power of expression to the 14 year old witness, who gave evidence only after two years since the alleged incident, we are not convinced that his evidence depicts a reliable account of the incident, on which the indictment was presented by the prosecution.

As submitted by learned Counsel there is no evaluation undertaken by the trial Court as to the testimonial trustworthiness of *Suresh*. The trial Court has considered his demeanour that he gave evidence before Court without any reluctance. However, the record bears that during his cross examination he remained silent on many occasions, especially when confronted with the allegation of fabrication. He did not offer any answer when did he inform his parents about this incident or whether he told police that the appellant wanted him to stay after school. He remained

silent when suggested that he visited the foreigner for months, in addition to the suggestion that his aunt wanted him to shield the foreigner. He was also silent when suggested that he did not go to school after falsely implicating the appellant.

The principal of the school was called by the appellant as a witness. She stated in her evidence that there were complaints by the teachers who taught the child that he displayed some abnormal behaviour as he used to urinate in public and expose his genitalia publicly. This strange behaviour was noted for some time, but was ignored by the teachers due to his young age.

In the judgment of the Supreme Court in *Gallage v Addaraarachchi and another* (2002) 1 Sri L.R. 307, Silva CJ held that;

"... if the evidence of the victim does not suffer from basic infirmity and the probability factor does not render it unworthy of credence, as a general rule there is no reason to insist on corroboration."

Almost identical words are found in *Mahalakotuwa v The Attorney General* - CA Appeal No. 176/2007 - decided on 22.06.2010. A similar approach was adopted by this Court in *Tikiribanda v Hon Attorney General* 2010 [B.L.R.] 92 when it stated that;

" ... there is no impediment on the part of the Court in acting solely on the evidence of the victim and it is only when the evidence of the victim suffers from some

infirmity or where the Courts believe that it would not be prudent to base a conviction, solely on that evidence, the Court should look for corroboration."

There is no corroboration of *Suresh's* evidence by any other item of evidence that had been adduced by the prosecution. The trial Court had held that there was corroboration of *Suresh's* evidence by medical evidence. This is clearly a wrong conclusion reached by the trial Court since there were no physical signs of abuse noted by the medical witness at the time of his examination. The history provided by *Suresh* to the medical officer, could only be utilised to evaluate his consistency, and could not be utilised to support his allegation against the appellant. The trial Court had erroneously accepted the short history as corroboration.

In view of these considerations, we are of the view that the appeal of the appellant is entitled to succeed. The trial Court had relied on clearly an unreliable account of *Suresh* in finding the appellant guilty to the charge of grave sexual abuse. This is not a situation where this Court should consider applying proviso to Section 334(1) since there is no reliable evidence before the trial Court to sustain a valid conviction despite the infirmities. The contention that the evidence of the defence witnesses were not considered by the trial Court need not be considered in view of these circumstances.

The conviction and sentence imposed on the appellant is thereby set aside. The appeal of the appellant is allowed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL