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

In the matter of an Appeal under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 331(1) of the Criminal Procedure Code.

Court of Appeal Case No. HCC/127/2022

High Court of Ambilipitiya Case No. HCE/70/2018

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

Complainant

Vs.

Kottage Chandrasena alias
Kiri Mama,

Accused

AND NOW BETWEEN

Kottage Chandrasena alias
Kiri Mama,

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Harshana Matara Arachchi for the Accused-Appellant.

Azard Navavi, S.D.S.G. for the State

ARGUED ON : 22.01.2024

DECIDED ON : 22.02.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Embilipitiya on three counts of grave sexual abuse, offences punishable under Section 365 B(2)B of the Penal Code. Three charges were framed on the basis that the girl who is the first witness of this case and who was about eight years of age at the time of the incident had been sexually abused by the accused-appellant on three separate occasions during the period from 01st of January 2014 to 16th May 2014 in Moraketiya. After trial, the learned high court judge acquitted the accused-appellant from the second and third counts and convicted him for the first count. The accused-appellant was sentenced to eight years of rigorous imprisonment and a fine of Rs.10,000/- was imposed. Additionally, he was ordered to pay a compensation of Rs. 150,000/- which carries a default sentence of 6 months rigorous imprisonment.

This appeal is preferred against the said conviction and sentence. Only the accused-appellant filed written submissions prior to the hearing. At the hearing of the appeal, the learned counsel for the appellant and the learned Senior Deputy Solicitor General for the respondent made oral submissions.

Briefly, the prosecution case is as follows:

The accused-appellant was using his three-wheeler to provide transportation for school and preschool children, and the victim was one of the children who had been traveling in the appellant's vehicle to school. According to the victim, she was the last amongst the other school children traveling in the transportation service to be dropped off from the vehicle on the way back from school to their homes. The accused-appellant had dropped off the other children at their homes and then stopped the vehicle in a nearby forest area and forced the victim child to perform oral sex on the accused-appellant inside the three-wheeler. On these occasions, the accused-appellant lifted the victim's school dress, removed her undergarments, and pulled on the child's genitals. The victim child had been subjected to the same kind of sexual abuse on several occasions, according to her.

The grounds of appeal have not been specifically stated in the written submission tendered on behalf of the appellant. At the hearing of the appeal, the learned counsel for the appellant based his arguments on the following grounds:

I. PW-1 and PW-2 have both failed to specifically adduce evidence in respect of the commission of alleged offences during the time period stipulated in the charges.
II. In terms of Section 165(1) of the Code of Criminal Procedure Act, the accused-appellant did not have sufficient notice of the particular place and the incident of what he is charged of as all three charges were in respect of alleged incidents said to have occurred over a particular period.
III. As the evidence in respect of charge one is also the same as the evidence that was adduced in respect of the other two charges, the learned trial judge could not convict the accused-appellant for the first count when she decided to acquit the accused from counts two and three.

IV. The learned trial judge failed to apply the test of probability to the evidence adduced at the trial.

V. The learned trial judge failed to do a proper evaluation and application of the evidence adduced at the trial, especially, failing to consider the contradictions *inter se.*

The learned senior DSG appearing for the respondent contended in reply that when mentioning the time of the offence, a period of time can be mentioned in the charge, and the same kind of offences committed within twelve months can be brought in the same indictment. The learned senior DSG contended further that all three charges in the indictment have been framed in terms of Section 165(1) of the Code of Criminal Procedure Act. While submitting that there was no issue regarding the probability of the prosecution case, the learned DSG pointed out that the evidence of PW-1 should be considered, keeping in mind possible omissions, forgetfulness, and entanglements that can be made by a child witness, and the learned trial judge has carefully and extensively evaluated the evidence of the case, taking into account those aspects relating to the evaluation of evidence.

In the case at hand, PW-1, the victim had not stated to her parents about the sexual abuse she had experienced until her mother inquired about it. In ***The Crown Court Compendium Part I*** (published in May 2016 - page 10-22), a child's reason for silence has been explained as follows:

"Experience has shown that children may not speak out about something that has happened to them for a number of reasons. A child may

- *be confused about what has happened or about whether or not to speak out;*
- *blame him/ herself for what has happened or be afraid that he/ she will be blamed for it and punished;*

- *be afraid of the consequences of speaking about it, either for him/herself and/or for another member of the family (such as {specify});*
- *may feel that s/he may not be believed;*
- *may have been told to say nothing and threatened with the consequences of doing so;*
- *may be embarrassed because s/he did not appreciate at the time that what was happening was wrong, or because s/he enjoyed some of the aspects of the attention they were getting;*
- *simply blank what happened out and get on with their lives until the point comes when they feel ready or the need to speak out {e.g. for the sake of a younger child who s/he feels may be at risk};*
- *may feel conflicted: loving the abuser but hating the abuse."*

In the case at hand also, although the appellant continuously abused the victim, she had not told about these incidents to her parents. It is clear that one or more of the aforesaid factors may be the reason for not informing her parents of those incidents. One of the main reasons for her silence was fear. PW-1 stated in her evidence that the appellant had threatened her that if she tells these things to her parents, her mother and father would be killed (page 232 of the Appeal Brief). Also, PW-1 stated that once the appellant told her "If she speaks about these things, both of them would be killed" (page 77 of the Appeal Brief). According to the aforementioned reasons for child's silence, one of the reasons for PW-1's silence is that she was afraid of the consequences of speaking about it, either for herself and/or for another member of the family. Another reason is that PW-1 may have been told to say nothing and threatened with the consequences of doing so. Therefore, there is no improbability in the prosecution case or there is no reason to draw an inference that the prosecution story is an afterthought for the reason of PW-1 not telling her parents about the sexual abuses done by the appellant. However, it is apparent from the mother's evidence that the victim had told her mother that she cannot travel in the appellant's

three-wheeler to the school, she had hidden when the appellant visited their house and had shown unusual behaviours during the period of time that she was being sexually abused.

Another issue had been raised on behalf of the accused-appellant in the high court that even after the mother came to know about these sexual abuses, she had not complained to the police immediately and there was a delay in making a complaint to the police. The learned high court judge has dealt with this issue. PW-2, the mother of the victim explained why she could not go to the police immediately. Her explanations are found on pages 254, 255 and it is my view that the said explanations can be accepted. Before making a complaint, to the police, even the father of the victim had met the appellant and inquired about this (page 264 of the Appeal Brief). It was held in the Court of Appeal case ***Thimbirigolle Sirirathana Thero v. OIC, Police Station, Rasnayakepura*** bearing No. CA No.194/2015, decided on 07.05.2019 it was held that "when a child is sexually assaulted by an adult, it is also natural for the victim's family to think twice before making a complaint to the police. There can be adverse effects on the child when this kind of offence is exposed." Therefore, in the instant action, the delay in making a complaint is clearly understandable.

Now, I proceed to consider the aforesaid grounds of appeal. Grounds I, II, and III are with regard to the charges in the indictment, and they could be considered together. In the indictment, there were three charges of grave sexual abuse in terms of Section 365B(2)(b) of the Penal Code. In all three charges, the act of grave sexual abuse committed by the appellant has been explained. In all three charges, the act of grave sexual abuse is the same. When describing the place of the alleged offence in the charge, it is sufficient to state that the offence was committed in 'Moraketiya' and it is not essential to state the exact place where the offence was committed because the particulars mentioned in the charges are sufficient for the accused-appellant to

understand the nature of the charges leveled against him. Therefore, the manner of committing the offence and the place of the offence have been described sufficiently in the three charges leveled against the appellant.

According to Section 174(1), three offences of same kind committed by an accused within a year can be brought together in the same indictment. In specifying the time of the offence, a period of time within twelve months could be stated. In the instant case, three charges were framed on the basis that sexual offences of similar nature were committed within the specified period mentioned in the first charge. Hence, the charges in the indictment have been framed in accordance with Section 165 of the Code of Criminal Procedure Act.

In addition, the Supreme Court in ***A.K.K.Rasika Amarasinghe V. O.I.C. Special Investigating Unit and Hon. Attorney General*** - SC Appeal No.140/2010 decided on 18.07.2018 held that it is well-settled law that if a charge sheet is defective, objection to the charge sheet must be raised at the very inception. In determining this case, the Supreme Court relied on the judgment *King V. Kitchilan* reported in 45 NLR 82, wherein the Court of Criminal Appeal held that "The proper time at which an objection of the nature should be taken is before the accused has pleaded",

Hence, even if the accused-appellant did not have sufficient notice of the place and the incident of which the appellant is charged, it is too late to raise that objection because the arguments raised by the learned counsel for the appellant regarding charges cannot be raised at the stage of appeal according to the aforesaid Supreme Court decision. Anyhow, it has been explained previously that the accused-appellant had sufficient notice regarding the place and the incident of which he is charged, and thus, the aforesaid ground II of appeal is devoid of merit.

The learned high court judge found that an act of sexual abuse explained in the charges had been committed at least in one occasion within the period of time specified in the first charge. Therefore, the learned judge convicted the appellant for the first charge. Although there was evidence that the appellant sexually abused PW-1 several times in the same manner, the learned judge has not convicted the appellant for the second and third charges because there was no proof that the other occasions where PW-1 was sexually abused in the same manner by the appellant fell within the period of time specified in the charges. Therefore, I regret that I am unable to agree with the argument that when the appellant was acquitted of the second and third charges, he could not be convicted of the first charge.

As explained previously, the learned trial judge has found with reasons that the sexual offence described in the first charge had been committed within the period specified in the said charge. PW-1 or PW-2 has not stated in their evidence a specific date on which the sexual abuse has occurred. The contention of the learned counsel for the appellant was that PW-1 and PW-2 have both failed to specifically adduce evidence in respect of the commission of alleged offence during the time period stipulated in the charges.

Now, I proceed to consider the aforesaid argument. PW-2 made the first complaint regarding the sexual abuse to the police on 05.06.2014. It transpires from the evidence of the case that the mother went to the police station three weeks after becoming aware of this incident. That means she became aware of the incident 21 days before 05.06.2014. Therefore, it can be assumed without any doubt that the incident occurred before 16th of May 2014. Also, the evidence reveals that PW-1 was sexually abused by the appellant when she was in Grade 4 in the year 2014. Hence, the offence must have been committed on a certain day between the 1st of January 2014 and 16th of May 2014. Thus, it is clearly established that the offence for which the appellant was

convicted was committed within the time frame stipulated in the first charge.

In ***Archbold Criminal Pleading Evidence and Practice* 2019 1-225 at page 83** the case of *R. v. Dossi, 13* Cr. App.R. 158 was discussed as follows:

"In *Dossi* (supra), it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment."

For the reasons stated above, I hold that the aforesaid grounds I, II and III are devoid of merit.

Another ground of appeal raised is the probability of the prosecution case. PW-1 testified that when she was returning from school in the appellant's three-wheeler, the appellant dropped all the other children who were traveling with her, and when she was alone in the three-wheeler, the appellant drove her to a remote and isolated location, and then, she was sexually abused. The learned counsel for the appellant stated that, according to the evidence of PW-2, the victim's mother, the appellant's son, and daughter were also there among the children who returned home in the three-wheeler with PW-1, and thus, PW-1 could not have remained in the three-wheeler alone. The learned counsel contended further that the evidence of PW-2 raises a serious concern about the probability of the occurrence of the alleged incident narrated by PW-1. In response, the learned Senior DSG pointed out that PW-2 has not stated that she saw all the children traveling with PW-1 were in the three-wheeler every day.

It is correct that PW-2, the mother of the victim in her evidence did not state that she observed all of the children traveling with PW-1 in the

three-wheeler every day. In addition, although PW-2 stated the order in which children usually get off the three-wheeler, she had not stated that every day during the period specified in the charge, all the children were dropped off according to the same order. It is apparent that if the appellant wanted to sexually abuse PW-1, he would select an occasion where PW-1 was alone in the three-wheeler. PW-1's evidence was that on a day that she was alone in the three-wheeler, the incident happened. Therefore, because of the evidence of PW-2, no improbability occurs with regard to PW-1's evidence that on this particular day, when she was alone in the three-wheeler, the appellant sexually abused her.

The victim in this case was eight years old when she was sexually abused. She gave evidence in the High Court after six years of the incident. In the said circumstances, when considering the fifth ground of appeal, I wish to focus on the following factors outlined in ***The Crown Court Bench Book*** (published in March 2010 - at page 367) that should be considered when evaluating the evidence of a child witness.

"Children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realise that what they are describing is, by adult standards, bad or, in their perception, naughty."

Taking into consideration the aforesaid guidelines, the next ground of appeal to be addressed is the evaluation of evidence by the learned trial judge, with a special focus on the impact of the contradictions *inter se* and omissions demonstrated by the learned counsel for the appellant. I have dealt previously with the contradiction between PW-1 and PW-2

shown by the learned counsel and found that the said contradiction *inter se* has no impact on the findings of the learned trial judge. The learned high court judge had considered the omissions of the case and stated in her judgment, the reasons why those omissions do not affect the credibility of the prosecution witnesses.

However, it is necessary to consider whether the omissions of this case affect the credibility of the prosecution case. Apart from the aforesaid discrepancy in the evidence of PW-1 and PW-2 about the order in which the children were dropped off from the three-wheeler, the learned counsel for the appellant did not show any other contradiction in this case at the hearing of the appeal. He contended that there were about 10 to 12 omissions in PW-1's testimony that affected her credibility. When the court asked the learned counsel to show vital omissions that go to the root of the case, he pointed out the omissions that were brought to the attention of the court appearing on pages 143,145,146, and 152 of the appeal brief. The learned high court judge has dealt with these omissions and she has correctly found with reasons why those omissions do not affect the credibility of PW-1. I agree with her reasoning and hold that none of these omissions affects the credibility of the testimony of PW-1 because the testimony of a child must be evaluated carefully considering the mentality of a child who is a victim of sexual abuse.

When a child faces this kind of sexual abuse at the age of eight years and gives evidence after six years of the incident, minor discrepancies, omissions, and mixing up the sequence of events could occur. The learned trial judge has evaluated the evidence of the case taking into consideration the observations made in the case of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*** 1983 AIR 753, 1983 SCR (3) 280. Therefore, in this judgment, I do not wish to repeat the said observations in respect of the evaluation of evidence. Apart from that, in ***Daradadagamage Chandraratne Jayawardane alias Shantha***

v. The Attorney General - Court of Appeal case No. CA/85/2013, decided on 25.05.2018, it was observed as follows:

"*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 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*."

PW-1's testimony must be evaluated considering the aforementioned factors that are important in evaluating the testimony of a child. I find that the learned trial judge has correctly evaluated the evidence of the case considering those factors.

In addition, the learned judge had analyzed the dock statement of the accused-appellant and found that the dock statement did not cast a reasonable doubt in the prosecution case. In fact, the learned counsel for the appellant did not make any submission to the effect that the analysis of the dock statement is wrong.

In his dock statement, the accused-appellant denied the allegations made against him. The appellant stated that this is a false allegation made against him. According to him the reason for making a false allegation was a minor dispute arose between the parents of PW-1 and the appellant as a result of non-payment of "seettu salli" by the parents of PW-1. When the said reason was suggested to the mother of the victim on behalf of the appellant, it is precisely apparent from the very answers she gave that they would never make a false allegation that their daughter became a victim of a sexual abuse for a minor dispute such as non-payment of "seettu salli". Therefore, I wish to reproduce the questions posed to her and the answers given by her.

ප්‍ර: තමුන්ලාට තිබුණ ණය බර නිසා සීට්ටු දෙකත් අරගෙන සල්ලි ගෙවන්න බැරි නිසා බොරුවට ආරවුලක් හදා ගත්තා කියලා යෝජනා කරනවා.

උ: මගේ දරුවා විකුණගෙන කන්න තරම් මම එච්චර පහත් තත්වයට වැටුණේ නැහැ. මගේ මහත්තයා සතියේ දවස් පහම පොළේ ගියා. අපි හම්බ කර ගත්තා. මේ මනුස්සයාගේ සල්ලිවලට මගේ දරුවාගේ ජීවිතය බිලි දුන්නේ නැහැ. ඒක අමූලික බොරුවක්.

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ප්‍ර: තමුන් සීට්ටු ප්‍රශ්නය මත තමයි මේ අසත්‍ය පැමිණිල්ල තමුන්ගේ දුව ලවා සිදු කරන්නේ කියලා යෝජනා කරනවා.

උ: බොරු. ඒක අමූලික බොරුවක්. කවදාවත් තමන්ගේ අම්මා කෙනෙක් ඒ වගේ අසික්කිත වැඩක් කරන්නේ නැහැ. මගේ දරුවාට ඉස්කෝලේ යන්න බැහැ. සෑහෙන අසරණ කළා. කවදාවත් පිරිමි ළමයෙක් එක්ක යන්න බැහැ කියලා මගේ දරුවා සෑහෙන්න වැටිලා ඉන්නේ. අපේ දරුවෝ හදන්නේ අපි සාධාරණව දුක් මහන්සි වෙලා හම්බ කරලා.

(Page 262 of the Appeal Brief)

Anyone with common sense understands that in a rural area like Moraketiya, the situation that a girl and her family will face when it becomes known in the area that the girl has been sexually abused. Parents would never falsely claim that their little daughter was sexually abused, especially because of a minor incident such as a resentment caused by not being able to settle "seettu salli", even though it is assumed that the story of not settling “seettu salli” is true. Therefore, the suggestion made on behalf of the appellant to PW-1 in cross-examination for making a false complaint against the appellant was not at all a suggestion based on a plausible reason. In addition, as the learned high court judge correctly observed, a girl of this early age cannot descriptively describe a sexual act of this nature as PW-1 did to the police and in Court if it is a fabrication of her parents. For the foregoing reasons, I hold that the reasoning in the impugned judgment and the conclusions of the learned high court judge are correct.

The learned counsel for the appellant did not canvass the sentence imposed on the appellant. The sentence is reasonable and lawful. Therefore, I find no reason to interfere with the judgment, conviction, and sentence imposed by the learned high court judge.

Accordingly, the judgment dated 27.05.2022, conviction, and the sentence imposed on the accused-appellant are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J
I agree.

JUDGE OF THE COURT OF APPEAL