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

In the matter of an Appeal under section 333 of the Code of Criminal Procedure Act No. 15 of 1979 read with the provisions of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 and Article 138 of The Constitution.

Court of Appeal No:

CA/HCC/0036/2020

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Gampaha

Case No: HC/48/2012

Maarukku Kankanamalage Anura Kumarasiri

ACCUSED

AND NOW BETWEEN

Maarukku Kankanamalage Anura Kumarasiri

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Kamal Perera with A. Fernando for the Accused-Appellant
	: Sudharshana de Silva, S.D.S.G. for the Respondent
Argued on	: 01-04-2024
Written Submissions	: 08-02-2021 (By the Accused-Appellant)
	: 01-03-2021 (By the Respondent)
Decided on	: 11-06-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Gampaha for committing the offence of grave sexual abuse on a minor by having intercrural sex with her, for sexual gratification on or about 18-05-2007 at a place called Hanepola, within the jurisdiction of the High Court of Gampaha, and thereby committing an offence punishable in terms of section 365B(2)(b) of the Penal Code as amended by Penal Code Amendment Act No. 22 of 1995, 29 of 1998 and 16 of 2006.

After trial, the learned High Court Judge of Gampaha of the judgment dated 24-01-2020 found the appellant guilty as charged and he was sentenced for a period

of 14 years rigorous imprisonment and was also ordered to pay a fine of Rs. 10,000/-. In default of paying the fine, he was sentenced for a period of 8 months simple imprisonment.

In addition to the above, the appellant was ordered to pay Rs. 200,000/- as compensation to PW-01, who was the victim of this incident. In default of paying the compensation, it was ordered that the said amount shall be recovered as a fine, and in default, he should serve a rigorous imprisonment period of 2 years.

It was also ordered that the default sentences in relation to the fine and compensation should be served consecutive to each other.

Being aggrieved of his conviction and the sentence, the appellant preferred this appeal.

Facts in Brief

The victim of this incident (PW-01) was a 12-year-old minor girl during the time relevant to this incident, and when she commenced her evidence before the High Court on 10-08-2016, more than 9 years after the incident, she was a 22-year-old married woman. Although she has attended school up to grade 9, she is a person who cannot read or write, but who can only place her signature.

Her mother has passed away when she was a child, and she has been living with her father and the grandmother at Hanepola since 2006. She had two other elder brothers who were also living with them. At one point, she had been admitted to a children's home before this incident came to light. After the incident relating to this action, she was institutionalized again and had returned home after reaching 18 years of age.

According to her version of events, this incident has occurred at her home. During this period, her father was invalid due to a fall from a tree. The appellant was a person well known to her, who had been a frequent visitor to her home who used to have liquor with her father.

She has stated that she gave a statement to the police after about two weeks from the incident, and on that day, when the appellant came to her house, she was alone as her father had gone to a nearby boutique. The appellant has come to her house and after coming to know that her father was not at home, has taken the PW-01 to a room of the house. Thereafter, he had removed her clothes and has had intercrural sex with her.

In describing what happened (at page 82 of the appeal brief), she has explained the incident in the following manner,

> උ: එයාගේ චූ පැටියා දැම්මා.
>
> ප්‍ර: කාගේ චූ පැටියාද?
>
> උ: විත්නිකරුගේ.
>
> ප්‍ර: කොහාටද දැම්මේ?
>
> උ: මගේ චූ පැටියා ගාවට.

However, at a later stage of her evidence, she has stated that the appellant inserted his penis into her vagina. After engaging in the act, the appellant has left the house telling her not to divulge the incident to anyone.

However, she has informed her grandmother of the incident faced by her on the following day, but no one has taken any steps in that regard. When the incident was informed to her father, he had scolded stating that not to go to the police station. She has further stated that even before this incident, the appellant took her to the forest on one day, and on that occasion too, he did the same thing to her as described earlier.

Although the victim or her family members had not complained to the police about these abuses, the police appear to have received an information about these incidents, which has resulted in the police coming to her house and recording a statement and initiating investigations which led to the indictment against the appellant.

When the victim was cross-examined, she has stated that the appellant inserted his penis into her vagina and it happened for about half an hour, and there was blood after the incident, which the appellant wiped off using his sarong.

The learned Counsel for the appellant has brought to the notice of the Court that she has neither stated that there was blood on her, or the incident occurred for about half an hour in her statement to the police.

It appeared from her evidence that the victim child had been admitted to a children's home previous to this incident and had returned home after some time. The incident relevant to this matter has occurred thereafter, and she has been institutionalized again until she reached the age of 18.

According to the evidence of PW-04 who was one of the police officers who investigated this incident, the investigations have commenced as a result of a 119-call received by police informing about the relevant sexual abuse incident. After being informed by the police to come for an investigation, her grandmother and the child have gone to the police station where PW-04 had recorded their statements on 23-05-2007. It is she who has produced the victim child before the doctor.

PW-06 was the doctor who examined the victim child and prepared the Medico-Legal Report marked P-02. The examination has been done on 24-05-2007 at the Gampaha hospital. Giving the history of the incident, the child had stated that Mahathun Uncle came in the night and assaulted her father and he has previously come about three times and used to remove her clothes and place his penis on her legs and used to do something.

The doctor has observed her having a fimbriated hymen, but has not observed any injuries or any other marks in her vaginal area. However, he has opined that he cannot exclude intercrural sex, because such sex can happen without leaving any marks. He has also expressed the opinion that although he could not observe any injuries on the vagina of the child, since she was having a fimbriated hymen, even penile penetration is possible without causing any tears or any other marks

to the vagina. Several other police officers who assisted the investigations into the matter has given evidence. After the conclusion of the prosecution case, the learned trial Judge has decided to call for a defence from the appellant.

Making a statement from the dock, he has stated that he is working in brick kiln industry and when he came home around 5.00 p.m., he saw Wasantha Rohana scolding his mother, which resulted him assaulting the said Rohana using a club. He has claimed that he went back to work after the incident and around 10.00 p.m. the police came and arrested him, informing him that he is wanted as a suspect of a quarrel. He has claimed that he only came to know subsequently that he was arrested as a suspect in a rape case and was unaware any such incident.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

1. The learned High Court Judge has failed to evaluate the evidence of PW-01 properly, and thereby had failed to give the benefit of the doubt to the accused appellant.
2. The prosecution has failed to prove the date of offence and had led conflicting evidence with regard to the date of offence.

It was the submission of the learned Counsel for the appellant that the prosecution has failed to establish the date of offence as mentioned in the indictment and the evidence of the victim child in that regard was conflicting. He also submitted that even the alleged incident which has been described in the indictment as having intercrural sex with the victim has not been established beyond reasonable doubt against the appellant. It was his contention that the victim child has spoken about a penile penetration at one time and her evidence had been conflicting in that regard as well.

He was of the view that there was a reasonable doubt as to the incidents spoken of by the victim child, and since there is no other evidence to corroborate the incidents, the doubt that arises should be held in favour of the appellant. He also pointed out that the victim child was also not certain as to whether this incident occurred during the daytime or the night.

He lamented that the learned High Court Judge has failed to consider the omissions brought to the notice of the Court in favour of the appellant and has considered what should have been held in favour of the appellant as a justification for the failures in the victim's evidence in the second paragraph of page 4 (page 150 of the appeal brief) of the judgment.

He was of the view that several other instances relating to the incident that should have been held in favour of the appellant has been justified without a sufficient basis in order to find the appellant guilty.

It was the submission of the learned Senior Deputy Solicitor General (SDSG) on behalf of the respondent that the evidence of the victim child needs to be considered in its totality, and the prosecution has proved the case beyond reasonable doubt against the appellant. The learned SDSG pointed out the age and the social background of the victim child and her evidence as to the date of the offence to argue that the prosecution has proved the date of the offence to the satisfaction of the Court.

Consideration of the Grounds of Appeal

I will now proceed to consider the 2nd ground of appeal where it has been contended that the prosecution has failed to prove the date of offence, as I find that it is a matter that should be considered before considering the 1st ground of appeal urged.

In the indictment, the prosecution has stated the date of the offence as on or about 18-05-2007.

Section 165(1) of the Code of Criminal Procedure Act No.15 of 1979, which provides guidance on particulars as to time, place and the person that should be mentioned in a charge reads as follows;

> **165(1). The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the manner with which he is charged and to show that the offence is not prescribed.**

Section 166 of the Code of Criminal Procedure Act which refers to the effects of any errors mentioned in a charge reads thus;

> **166**. **In error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or those particulars shall not be regarded at any stage of the case as material unless the accused was misled by such error or omission.**

The above mentioned relevant statutory provisions clearly stipulate the purpose of mentioning the date of an offence and other particulars is to give sufficient notice to any accused person as to the charge against him and for the purposes of showing the offence has not been prescribed. Any omission or error in giving the required particulars in a charge becomes material only if such error or omission has caused the accused to be misled as to the charge or charges preferred against him.

When it comes to the facts and the circumstances of the appeal under consideration, there is nothing to indicate the appellant was misled in any manner as to the charge against him.

The question whether the prosecution has failed to prove the date of the offence to the satisfaction of the Court has to be taken into consideration not by taking

into account the evidence of the victim child, but by considering the evidence led in the trial in its totality.

The evidence clearly shows that the victim child was virtually living as an orphan because her mother has passed away when she was young and her father has become an invalid person due to a fall from a tree and a person which appears to be addicted to liquor. The only person who has looked after her appears to be her grandmother. Although the child has attended school, when she gave evidence at the age of 22, it has been found that she was a person who could not read or write, which shows that the level of care given towards her by her father and the elders of the family, who should have cared for her.

According to the evidence of the PW-04, who was one of the police officers who conducted investigations into the matter, it was after receiving a 119 message that a child is being repeatedly raped at a house, the police have commenced their investigations. After commencing the investigations, they have gone to the house of the victim child on 20-05-2007, and had recorded the statement of the grandmother of the child on 23-05-2007.

In her evidence, PW-01 has stated that she made a statement to the police two weeks after the incident. However, even at that stage, it has been clear that the victim was not certain about the date of the offence. I find that it was under these circumstances the date of offence has been stated as on or about 18-05-2007, in order to give sufficient notice to the appellant as to the allegations against him.

There is nothing to indicate that the appellant has been misled or prejudiced by the victim child's inability to give an exact time or date of the incident, or a reason to conclude that it has created a reasonable doubt as to the evidence of the victim child.

At this juncture, I would like to draw my attention to the case of **R. Vs. Dossi 12 Cr. App. R., 158** where this aspect was sufficiently discussed.

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 maybe convicted although the Jury find that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be a good practice to do so (provided there is no prejudice) where it is clear on the evidence that if the offence as committed at all, it was committed on the day other than that specified."*

In the case of **D.R.M Pandithacoralage Vs. V.K Selvenayagam 56 NLR 143**, it was held that a mistaken date in an indictment is not a material error unless the date is the essence of the offence or the accused is prejudiced.

It needs to be noted that the victim child was an 12 year-old when these incidents occurred and has given evidence before the High Court, 09 years afterwards. The ability of a person to remember things that occurred a decade ago or the day or dates upon which such incidents occurred depends on the mental capacity of such a person and several other factors.

In the case of **D. Tikiri Banda Vs. The Attorney General, Bar Association Law Reports 2010 (B.L.R. 92**) it was held,

1. *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 would not be allowed to capitalize or to take mean advantage of these natural, inherent weaknesses of small children.*

2. *If the evidence of the victim could be relied upon as trustworthy, firm etc., there is no impediment on the part of the occur 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 conviction solely on that evidence the Court should look for corroboration.*

In the case of **Attorney General Vs. Dardadagamage Chandraratna Jayawardene *alias* Shantha, CA 85/2013 decided on 25-05-2018, Thureirajah, J.** observed,

> "*Time and again the Courts have discussed the acceptance of the evidence of children of tender ages. Our judges are not there to test the memory of the witnesses. 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.*"

However, this does not mean that every mistake or contradiction can be brushed aside in favour of a victim of a sexual crime. However, I am of the view that discrepancies, omissions or whatever the drawbacks of a prosecution's case have to be material discrepancies or omissions that creates a reasonable doubt as to the credibility of a witness. I do not find any basis to conclude that the evidence of the victim child and other supporting evidence, when taken as a whole, has created any doubt in relation to the narration of events by the victim child. Hence, I find no basis for the 2nd ground of appeal.

The 1st ground of appeal urged by the learned Counsel was that the learned High Court Judge has failed to evaluate the evidence in the proper perspective and has failed to give the benefit of doubt in matters that favoured the appellant to him.

It was contended that the evidence of the victim where she has stated at one point that the appellant had intercrural sex with her and at another point he inserted his penis into her vagina should have been considered in favour of the appellant on the basis that the victim was not consistent in her evidence, but the learned High Court Judge has considered it otherwise, in favour of the victim's version of events.

I do not find any basis to consider the above submission as a weakness in the analysis of evidence by the learned High Court Judge. The judgment clearly provides that the learned High Court Judge has correctly considered the evidence in its totality, and has considered all the relevant factors to come to a finding that the evidence of the victim was cogent enough for him to believe as truthful, for which I find no reason to disagree. It is amply clear from the judgment that the learned High Court Judge has well considered all the discrepancies alleged in relation to the evidence placed before the Court, and has come to his determinations with sound reasoning.

The defence taken up by the appellant has not created an iota of doubt as to the evidence of the victim.

For the completeness of this judgment, I would like to quote the Indian Supreme Court judgment in **State of Uttar Pradesh Vs. M.K Anthoney (1984) S.C.J 236-1985 Cri. L.J. 493 at 498**.

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the 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 and 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. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weightily and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

The Appeal is dismissed, as I find no merit in the grounds of appeal urged.

The conviction and the sentence dated 24-01-2020 affirmed.

However, since the appellant had been in incarceration from his date of conviction, it is directed that his conviction shall be deemed to have commenced from the date of the conviction, namely from 24-01-2020.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal