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 of 1979.

Court of Appeal No:

CA/HCC/0120/2022

High Court of Mannar

Case No: HC/MN/20/19

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Pathinathan Consal Dias

ACCUSED

AND NOW BETWEEN

Pathinathan Consal Dias

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Saliya Pieris, P.C. with K. Kugaraja for the Accused-Appellant
	: Nishanth Nagaratnam, S.C. for the Respondent
Argued on	: 20-11-2023
Written Submissions	: 04-05-2023 (By the Accused-Appellant)
	: 01-06-2023 (By the Respondent)
Decided on	: 25-03-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Mannar for committing the following offences.

1. That he abducted a minor girl child on or about 01-01-2013, at Pesalai within the jurisdiction of the High Court of Mannar, 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, inserted one of his fingers into the vagina of the mentioned minor girl child, and thereby committed the offence of grave sexual abuse on her, 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.

The appellant has pleaded not guilty to the charge and after trial, he was found guilty as charged by the learned High Court Judge of Mannar of the judgment dated 29-06-2022.

After considering the mitigatory, as well as aggravating circumstances, the learned High Court Judge has sentenced the appellant in the following manner.

1. On count 01-2 years rigorous imprisonment. In addition, Rs.10,000/- fine, and in default, 6 months simple imprisonment.
2. On count 02-7 years rigorous imprisonment. In addition, Rs.10,000/- fine, and in default, 6 months simple imprisonment.

   The above two sentences have been ordered to run concurrently to each other.

   It has also been ordered that the appellant should pay Rs.100,000/- as compensation to the victim child, and in default, he has been ordered to serve 6 months simple imprisonment.

It is against this conviction and the sentence, the appellant has preferred this appeal.

Facts in Brief

The victim child who was born on 09th June 2004, has given her evidence as PW-01 before the High Court. When she gave evidence for the first time, she had been a grade 11 student in her school.

Although she was unable to give the specific date of the incident, she has stated that it occurred on either 11th or 13th of January 2013. She has stated that this incident happened when she went with two other friends to drop off a Catholic nun at the house of a relative of the appellant.

There had been a house warming ceremony at the next-door neighbour's house of PW-01, and the wedding of the appellant's son had been held at the same time at the appellant's house. PW-01 and her mother had attended the house warming function on that day, and it was from there she has gone with the Catholic nun to drop her off at the relatives' house.

The time was around 7.30 or 8.00 in the night and the two other girls who accompanied the victim child has gone inside a house of one of them, namely Richvini.

At that point, she has met the appellant whom she referred to as grandpa. He has asked her the reasons for not attending the wedding function at his house. The victim has informed him that her mother said that they would be attending the function tomorrow. Thereafter, the appellant has held the victim child on his lap, talked to her, and had taken her in between two dolphin vans parked nearby. There had been no light, and it was dark.

The evidence of the victim child clearly shows that she had been reluctant to come out with what happened to her thereafter. She has stated that after taking her there, the appellant started to touch her and lifted the dress she was wearing. He has started touching her thighs and moved upwards and touched her genitals. At that point, she had been able to take his hand off her body and had run away. Upon questioning further, she has clearly stated that he kept on touching her undergarment and touched her genitals.

After escaping the appellant's grip, she has gone and informed the incident to her grandmother, but it appears that the grandmother has not taken any notice of what the victim child was stating to her.

She has been studying in grade 4 of her school at that time, and it appears that the victim has been silently suffering because of this incident.

As a result of an awareness program conducted in the school, she has come out as to what happened to her by informing the incident to one Osman Kulas, who was the person who conducted that awareness program. This has resulted in police being made aware of this incident and the resultant investigations had led to the charges against the appellant.

The cross-examination of the victim child reveals that she has informed this incident to the earlier mentioned person only in the year 2014, and the said person was the Child welfare Service Officer attached to Assistant Government Agent's office in the area. It has also been revealed that when the child informed her grandmother, she has gone and scolded the appellant.

The mother of the child has given evidence at the trial. She has come to know about this incident one and a half years after it occurred, and only when the police came and inquired about the incident.

She has come to know later that when this incident occurred, her daughter has informed it to her mother, namely, the child's grandmother, but because the grandmother has told the child not to inform anyone, her daughter has not informed the incident to her.

The defence has admitted the Medico-Legal Report (MLR) relevant to the examination of the PW-01 and accordingly, it has been marked as P-02 without the Judicial Medical Officer (JMO) being called to give evidence. Obviously, the JMO has failed to observe any visible injuries on the victim child.

Apart from the above witnesses, the prosecution has only called police witnesses who conducted investigations into the matter and has closed the case.

Once the appellant was called upon for his defence by the learned High Court Judge, he has chosen to give evidence under oath. He has also called several witnesses on his behalf.

Interestingly, although the prosecution has failed to call the grandmother of the child to whom the victim child has narrated the incident soon after its occurrence, and also the person who conducted the awareness programme at her school to whom the child has narrated the incident for the second time, and the JMO who examined the child, as prosecution witnesses, the appellant has called them as defence witnesses, and several others, and in the process, connecting the missing links of the prosecution case.

The appellant in his evidence has stated that he had a wedding reception at his house on the 12th and 13th without specifying the month and the year. He has stated that about 100-150 people attended the function on each day and in the afternoon, he was engaged in activities connected to the function. He has stated that the victim child's grandmother lives in the adjoining land to his house and

since his family is a good family with educated children, all are jealous about his family. He has also stated that, because he refused a marriage proposal to his son made by the victim child's family, they are angry with him, and the whole village is angry with him because he supported a candidate opposed by the villages in an election.

He has also stated that the villagers are also jealous with him because his children are educated. Although he has not stated anything specific about the allegation against him in his evidence, it appears that his claim was that, a false complaint was made against him due to jealousy.

Under cross-examination by the prosecution, he has stated that because he purchased the land next to their land, which they wanted to purchase, there was an enmity between them. He has failed to specify as to whom he referred to as 'they' in his evidence.

On behalf of the appellant, the grandmother of the victim child, Christina Kulas has been called as a witness. She has confirmed that there was a marriage celebration in relation to the appellant's son's wedding, as well as a house warming function in her village during the time relevant to this allegation against the appellant.

She has confirmed that the child came and told her that the appellant touched her inappropriately and put his hands inside her knickers and she ran away subsequently. It had been her evidence that since no rape has been committed, she did not take what was told to her by her granddaughter seriously, but she met the appellant and warned him. She has not taken any steps to inform this incident to the mother of the child thinking that it would lead to a problem, and had also informed the child not to tell the incident to her mother. She has stated that, nevertheless the incident has come to light one year later when the police came and started investigations.

On behalf of the defence, the person to whom the child says that she informed about the incident after the awareness program has also been called as a

witness. He had been the Child Rights Welfare Officer attached to the relevant Government Agents Office. He has confirmed that he conducted an awareness seminar about child protection at the school where the victim child was studying, and after the seminar, the child came and told him the incident.

The appellant had called the JMO who examined the child to give evidence on behalf of him, and he has confirmed that it was he who prepared the Medical Report dated 27-05-2014. He has not found any external injuries, and upon examining her female genitals, he has found that she was a child who had not attained puberty at that time. There had been no injuries to her vagina as well as in her anal area. But the JMO has opined that sexual abuse cannot be excluded.

The appellant has also called the friend mentioned by PW-01 in her evidence, namely, Richvini with whom she has gone to drop off the Catholic nun near the house of the appellant. The evidence does not reveal anything relevant to the incident.

Although the appellant has several other witnesses to give evidence on behalf of him, I find that none of the witnesses voiced anything relevant to the incident, other than speaking about peripheral matters as questioned by the learned Counsel on behalf of the appellant when they were giving evidence.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel on behalf of the appellant formulated the following grounds of appeal for the consideration of the Court.

1. In view of the belatedness of the complaint and the discrepancies of the evidence of PW-01 taken with other witnesses, whether the conviction could be sustained.
2. In the light of the specific act mentioned in the indictment, whether the prosecution has failed to prove the charge of grave sexual abuse.

3. The offence of kidnapping cannot be sustained in the light of the evidence.
4. Whether the learned High Court Judge has failed to adequately consider the defence, especially the evidence of the appellant.

Consideration of the Grounds of Appeal

As the mentioned grounds of appeal are interrelated, I will now proceed to consider the said grounds of appeal as a whole.

It is trite law that in a criminal case, the evidence placed before the Court has to be considered as a whole, whether it was by the prosecution or by the defence, in coming to a finding whether the prosecution has proved its case beyond reasonable doubt and whether the evidence has created a reasonable doubt as to the guilt of the accused, or at least has provided a reasonable explanation as to the evidence placed before the Court against the accused. Any doubt that arises out of the evidence has to be considered in favor of the accused, where he should be granted the benefit of the doubt.

In the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148,** it was held:

> "*As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt."*

In the Indian Supreme Court case of **Narender Kumar Vs. State (NCT of Delhi), AIR 2012 SC 2281 : (2012) Cri LJ 3033 : (2012) 3 JCC 1888 : (2012) 5 SCALE 657 : (2012) 7 SCC 171 : (2012) AIRSCW 3391 : (2012) 4 Supreme 59,** it was held:

> *"Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt*

on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.

Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony."

In this matter, although the prosecution has listed several witnesses, only the victim child, namely PW-01, her mother (PW-02), and the police officer who conducted the investigations had been called on behalf of the prosecution.

The fact that the victim child was a girl under 16 years of age at the time of this alleged incident was an admitted fact, and since the appellant has admitted the MLR, the JMO who has examined the child has also not been called to give evidence.

However, when the accused was called upon on for his defence, apart from giving evidence under oath, it is the appellant who has called the grandmother of the child, the listed prosecution witness number 3, to whom the child states in her evidence that she went and informed the incident soon after its occurrence. The appellant has also called Jude Osman Kulas, the Child Rights Welfare Officer of the relevant area who has conducted an awareness program at the school of the victim child, where the victim child is said to have divulged this incident after listening to the said program.

On behalf of the appellant, the friend of the victim child with whom she mentions that she went near the house of the appellant before she faced this sexual abuse has also been called. Apart from these witnesses, the JMO who examined the child and issued the MLR marked P-02 has also been called, among other

defence witnesses. I find that by this process, the appellant himself has completed the vital missing links of the witnesses called on behalf of the prosecution.

It is well settled law that it is the totality of the evidence that has to be considered in a trial, be it for the prosecution or defence, rather than compartmentalizing the evidence.

It was held in the case of **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167** that;

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters adduced before the Court, 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 question whether this is a belated complaint, that fact has to be considered in relevance to the facts and the circumstances that led to the complaint. The evidence of the victim child is clear that the appellant was a person well-known to her and a person she referred to as a grandpa, which shows that he is an elderly person who had the respect of the child.

The child had been around 9 years of age at the time of the incident. Soon after its happening, she has gone and narrated the incident to her grandmother. The grandmother has confirmed in her evidence that, in fact, the child came and informed the incident, but since no rape has been committed, she informed the child not to divulge it to anyone.

However, the child's evidence clearly shows that this was an incident which she could not forget and only when there was an awareness program of sexual abuse and aspects relating to it by the Child Rights Welfare Officer of the area, she had gained the courage to inform the incident to him. This was after about one and a half years from the incident.

The evidence of the mother of the child also has established the fact that as a result of this information being provided to the police, the police have come in search of them and initiated investigations which resulted in the indictment against the appellant. I am of the view that, belatedness of the complaint was not due to the complaint being a false one, but for the reasons as considered above, which can be highly justified.

In the case of **D. Tikiribanda Vs. Attorney-General CA 64/2003 decided 06-10-2009 reported in the Bar Association Law Journal (2010) (B.L.R.) 92** it was held:

> *"If delay of making a statement is explainable the evidence of a witness should not be rejected on that ground alone."*

In the case of **Gamage Prabhath Janaka Nayana Priyantha Perera Vs. Attorney General [CA/107/2012] decided on 27.05.2016 at page 6**, **A.H.M.D Nawaz, J.** observed that

> *"Why the witness did not reveal a dastardly act or otherwise is a fact for him or her to explain and in fact if the explanation is plausible and credible the Court must act on the testimony albeit belated. If the explanation of erred for the delayed statement is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion made by the trial court for accepting the belated testimony".*

The other matter taken up by the learned President's Counsel was that due to the discrepancies in the evidence of the PW-01 and other witnesses, it is not safe to let the conviction stand. I am unable to find any justifications in that regard. I do not find any material discrepancies in the evidence of PW-01, her mother, her grandmother, and the relevant Child Rights Welfare Officer, as well as the JMO, and the mentioned friend of PW-01, who are the relevant witnesses in this matter.

One has to be mindful that the child has given evidence more than 7 years after the incident. Her evidence clearly shows that she had been silently suffering as a result of this incident and this establishes that she has been trying to forget about the whole incident and move on with her life. Being a child of tender age, her ability to exactly remember and narrate an incident that happened several years ago has to be considered. Besides that, the fact that the child was a grown-up youth of about 17 years old when she was required to give evidence in Court should also needs be taken into consideration in evaluating her evidence.

It was held in the Court of Appeal Case of **D. Tikiribanda Vs. The Attorney General (Supra)** that;

> *"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."*

A witness is not supposed to have a photographic memory of the events that took place in a given scenario and the Court needs to be aware of such situations when considering evidence.

At this stage, I find it appropriate to refer to the Indian case of **Bhoginbhai Hirjibhai Vs State of Gujarat (AIR 1983-SC 753 at pp 756-758)** very often cited in our Courts. It was held:

1) *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

2) *Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

3) *Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

4) *A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witnesses is giving truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.*

It is also necessary to bear in mind any contradiction or omission has to be material to the issue at hand.

It is well established law that for a contradiction to be relevant in a case, such contradiction or contradictions should have the effect of shaking the core of the case, and trivial contradictions should not be considered in such a manner when considering the totality of the 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 the testimony of a witness unless it is manifestly wrong.

For the reasons as considered above, I find that the evidence taken in its totality had been cogent and trustworthy, which provides no basis for the considered grounds of appeal.

The learned President's Counsel argued that in the 2nd count preferred against the appellant, the act alleged to have been committed by the appellant which amounts to grave sexual abuse was inserting a finger into the vagina of the victim child. It was the submission of the learned President's Counsel that since the victim child has not stated specifically that the appellant inserted the finger into her vagina, the prosecution has failed to prove the specific charge.

The definition of grave sexual abuse as stated in Section 365B of the Penal Code refers to an act committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any instrument on any orifice or part of the body of any other person, being an act which does not amount to rape in terms of Section 363 of the Penal Code on circumstances falling under the categories mentioned in Section 365B (1) and (2).

When scrutinizing the evidence of the child given before the trial Court, it is quite apparent that the victim child has been a reluctant witness, for obvious reasons. I find no basis to believe that her reluctance has been due to her saying something that did not happen or due to her making a false statement. Her initial evidence has been that the appellant touched her with his hand, touched her thighs and started moving up, and at that point, she took his hands off and ran away. When questioned further, she has been specific that the appellant lifted her dress and touched her genitals, but has stated that she cannot say the manner in which he touched her genitals.

The grandmother to whom the child has gone and narrated the incident has stated in her evidence that the child came and told her that the appellant touched her stomach and tried to put his hands inside her undergarments, and she ran away after that.

Although the child has been unable to say that the appellant inserted a finger into her vagina as mentioned in the indictment in describing the act committed by the appellant, she has been specific that the appellant touched her vagina, but, unable to describe what he did to her vagina. As I have considered before, if one considers her evidence as a whole, this was not due her narrating something that did not happen, but due to the possible reasons considered as above. I am of the view that the necessary ingredients of the offence have been established by the prosecution beyond reasonable doubt.

I do not find any basis to accept that the necessary ingredients of the offence of kidnapping have not been established either. The evidence clearly provides that the child was a minor under 16 years of age and a female. The evidence establishes that when the child went near the house of the appellant, he has taken the child between two parked vans and it had been without the consent of the lawful guardian of the minor child. Since the grave sexual abuse incident has occurred as a result of the child being taken to the place where the offence was committed, I find that the offence of kidnapping from the lawful guardianship has been established in this case.

The other matter that needs consideration is whether the learned High Court Judge has failed to give adequate consideration to the defence taken up by the appellant. When the victim child gave evidence, the position taken has been that no such incident happened and the victim child is lying about it. It has been suggested to her that because Osman Kulas, the Child Rights Welfare Officer, who is a relative of the victim, it is he who instigated this false complaint to take revenge from the appellant's family.

However, when called for a defence, his evidence has been to the effect that, because his family and children are well educated, the villagers are jealous of them, and it was the reason for this false complaint. Apart from that, he has taken the position that because he supported a relative of him in the election against the wishes of the people of the village, the villagers are against him.

I find that none of these positions had been suggested to the relevant witnesses when they gave evidence. Even if it is to be assumed that the victim child, due to her age, may not be able answer such a suggestion, at least that suggestion should have been put to the mother of the victim child, which was not the case. In fact, her mother has confirmed that she and her daughter attended the wedding function that was held in the appellant's house, which shows that there had not been any enmity between them, which may be the very reason why no such suggestion has been put to the mother of the victim child.

It is well-settled law that when an accused person takes up a particular line of defence, that has to be put to the relevant witnesses when they come and give evidence before the Court so that they can be confronted with the said stand. Failure to do so will be a factor that has to be considered against the relevant person.

In **Sarwan Singh Vs State of Punjab 2002 AIR Supreme Court iii 3652 at 36755,3656,** it was observed;

> *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted."* This case was cited with approval in the case of **Boby Mathew Vs State of Karnataka 2004 3 Cri. L. J.3003**

His Lordship Sisira de Abrew, J. stated in **Pilippu Mandige Nalaka Krishantha Kumara Thisera Vs A.G CA 87/2005 decided on 17-05-2007** that;

> *"….I hold that whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."*

This Court is very much mindful that the weaknesses of the defence case would not be a reason to conclude against the accused person in a criminal trial. However, I am of the view that irrespective of the weaknesses of the defence case, the prosecution has proved the case beyond reasonable doubt against the appellant when considering the evidence as a whole.

Therefore, I find no reasons to interfere with the conviction and sentence by the learned High Court Judge.

The appeal is dismissed due to want of any merit. The conviction and the sentence affirmed.

Since the appellant is on bail pending appeal, the sentence against him shall take effect from the date this judgment is pronounced upon the appellant by the learned High Court Judge of Mannar.

Judge of the Court of Appeal

P, Kumararatnam, J.

I agree.

Judge of the Court of Appeal