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.

Court of Appeal Case No.
CA/HCC/ 0155/2022

High Court of Matale
Case No. HC/224/2019

Tikirage Mahinda Rajapaksha
No.46, Yaya 10, Kattiyawa, Eppawala.

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Mohan Weerakoon, PC with**
R.Maniwannan and Champaka Wijeratna and S.Peiris for the Appellant.
Anoopa De Silva, DSG for the Respondent.

ARGUED ON : **28/08/2023**

DECIDED ON : **24/11/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted in the High Court of Kurunegala for committing one count of grave sexual abuse on the victim Paboda Shasni Ivon, punishable under Section 365(B) 2 (b) of the Penal Code as amended by Acts No.29 of 1998 and No.16 of 2016.

The trial commenced on 16/10/2020. After leading the evidence of the victim, the prosecution had amended the charge from fingering the vagina to licking of the vagina of the victim by the Appellant.

After leading all necessary witnesses, the prosecution had closed the case on 02/11/2021. The Learned High Court Judge had called for the defence on the same day and the Counsel for the Appellant had moved for a day to call witnesses on his behalf. The Appellant had made a dock statement and called four witnesses in support of his case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant charging under Section 365 (B) (2)(b) of the Penal Code as amended, and sentenced the Appellant to 08 years rigorous imprisonment and imposed a fine of Rs.10,000/- subject to a default sentence of 06 months simple imprisonment. In addition, a

compensation of Rs.50,000/- was ordered with a default sentence of 01-year rigorous imprisonment.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned President's Counsel for the Appellant informed this court that the Appellant had given consent to argue this matter in his absence due to the Covid 19 pandemic. The Appellant was connected via Zoom from prison during the argument.

The following grounds of appeal were raised on behalf of the Appellant at the argument.

1. The date of incident has not been established by the prosecution.
2. There is no corroboration for the evidence of the key witness PW1.
3. There are material omissions and contradictions in the evidence of PW1 which the Learned High Court Judge had failed to take into consideration.

Background of the case *albeit* **as follows:**

PW1 Praboda born on 25.08.2009, was studying in grade five at the Monty Gopallawa Primary School when she encountered the unpleasant incident as she described in her evidence. She had known the Appellant since she was in grade three. The Appellant was a frequent visitor to her home with his wife and the victim was aware that the Appellant used to sell coconuts and jackfruits under a mango tree near a place called King Water. The Appellant used to stay at the victim's house with his wife whenever he goes to sell coconuts and jackfruits.

The victim's house consisted with two rooms. Whenever the Appellant stayed with his wife in her house, they used to sleep in one room and the victim with her parents occupy the other room. The incident had happened during the April school holidays in the year 2018. One day during the vacation,

when the Appellant and his wife were at home, the victim went to sleep and suddenly woke up having felt that someone licking her vagina. When she opened her eyes, she had seen the Appellant near her bed and her undergarment had been removed half way down. When she tried to go to her grandmother, who was the only person at home at that time, the Appellant prevented her and had threatened that he would kill her father and mother in the event she divulges this incident to her parents. Although the victim managed to go to her grandmother, had not disclosed anything to her due to fear. After committing this offence, the Appellant left victim's house with his wife. The fear engulfed on her prevented her from divulging this incident to her parents too.

According to the victim, she had first informed this incident to her classmate Mihirangi PW10, in presence of another classmate Janani. One day the victim had a fight with Janani in the classroom while their English teacher was teaching English. The reason for the fight was that Janani had threatened the victim that she was going to leak this incident to the teacher. Seeing this incident, the English teacher PW9 Chaturangi Konara, after making inquiry from the victim, had taken the victim to year 01 class teacher PW8 Wasantha Samaranayake. After returning from the school, the victim had narrated the incident to her mother PW2 Damayanthi Hemamali.

Before lodging a police complaint, the matter was brought to the attention of PW7 Lalitha Rajapaksha, the Grama Sevaka of the area on 02/08/2018 by PW2 the mother of the victim.

According to PW5 Waidyaratne, the JMO who examined the victim stated that he examined the victim on 14/08/2018 at the District Hospital, Matale. In the history, the victim had stated that the Appellant after licking had inserted his finger into her vagina. He had also threatened not to divulge this incident to anybody.

In the indictment filed by the prosecution, it had only referred to the act of fingering into the vagina of the victim by the Appellant. But when the victim giving evidence before the High Court, she restricted her evidence to the act of licking her vagina by the Appellant only. Hence, immediately after the conclusion of victim's evidence, the Learned State Counsel with the permission of the Court amended the indictment from the act fingering to licking of her vagina. As such, the indictment was read to the Appellant again after the amendment. Although an opportunity was awarded to the Appellant to cross examine the victim over the amendment to the indictment, the Learned Counsel for the defence had waived that opportunity. (Page 159 of the brief)

The basic foundation in a criminal trial is the charge. By charging, an accused is provided information as to the nature of the allegation levelled against him. The charge must identify the act committed by the accused, the law alleged to have been violated by him and particulars pertaining to the alleged offence must be specified in the charge.

It is the profound duty of a prosecutor to frame the charge/s after careful consideration of evidence available in the case at the time of drafting the charge. The requirements of a valid charge are set out in Sections 164 and 165 of the Code of Criminal Procedure Act No.15 of 1979.

In the first ground the Learned President's Counsel for the Appellant contended that the date of incident has not been established by the prosecution.

In the indictment the date of offence mentioned as "between 01st April 2018 and 30th April 2018". The victim giving evidence had clearly said that the incident had taken place during the April school vacation of the year 2018. As per the Section 165 of the Code of Criminal Procedure Act No.15 of 1979, the Appellant had been given reasonable notice the time of incident. For clarity the Section 165 of CPC is re-produced below:

165. Particulars as to time, place and person.

(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 matter with which he is charged and to show that the offence is not prescribed.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of movable property, it shall be sufficient to specify the gross sum or, as the case may be, the gross quantity in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 174:

Provided that the time included between the first and last of such dates shall not exceed one year.

(3) When the nature of the case is such that the particulars mentioned in section 164 and the preceding subsections of this section do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

In **Bhoginbhai Hirjibhai v. State of Gujarat** (supra) the court held further:

"In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters."

"It is unrealistic to expect a witness to be a human tape recorder."

In **R. v. Dossai** 13 Cr.App.R. 158 the court 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. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided that there is no prejudice below) where it is clear on the evidence that if the offence was committed at all, it was committed on the day other than that specified."*

As the Appellant had been given sufficient notice regarding the period under which he had been indicted and led plausible evidence through witnesses regarding the period, I conclude that this has not caused any prejudice or failure of justice as the Appellant had raised a totally different issue in the trial. Hence, this appeal ground has no merit.

In the 2nd ground the Learned President's Counsel argued that there is no corroboration for the evidence of the key witness PW1.

The victim had informed the alleged act of abuse for the first time to her classmate PW10 Mihirangi in the presence another classmate Janani. Thereafter, this had been intimated to her class English teacher PW09 Chaturangi Konara. Thereafter, the victim was taken to PW8 Wasantha Samaranayake. According to the victim, she had told them what kind of abuse she suffered from the Appellant.

When PW10 Mihirangi was called to give evidence to corroborate the evidence given by the victim, she did not disclose in her evidence as to the kind of sexual abuse she had suffered from the Appellant. At that point the Learned State Counsel made an application under Section 159(2) of the Evidence Ordinance. Amidst the objection raised by the defence Counsel, the Learned High Court Judge had allowed the said application. Even the relevant portion given to the police was read to the witness, and she failed to answer after

listening the same. Hence, her evidence failed to corroborate the evidence given by the victim. Although an irregular procedure was adopted by the Learned High Court Judge led to an unfair prosecution, at this juncture I am not going to comment regarding the State Counsel's application under Section 159(2) of the Evidence Ordnance and allowing the same by the Learned High Court Judge, as evidence of PW10 had failed to corroborate the evidence given by the victim.

PW08, Wasantha Samaranayake too had failed to corroborate the evidence given by the victim regarding the act of abuse. Further, this witness when inquired from the victim as to what happened to the victim, had said in her evidence that the victim had told her that the Appellant had touched her body and her vagina.

His Lordship Justice Dheeraratne in **Sunil and others v. Attorney General [1986] 1 Sri.L. R 230** held that:

> "*Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.*
>
> *It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even the absence of corroboration."*

In **Premasiri v. Attorney General [2006] 3 Sri.L.R** held that:

> *"The rule is not that corroboration is essential before there can be a conviction in a case of rape but the necessity of corroboration as a*

matter of prudence except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge".

In **State of Andra Pradesh v. Garigula Satya Vani Murty** AIR 1997 SC 1588, it was held that:

" …the courts are expected to show great responsibility while tying an accused on a charge of rape. They must deal with such cases with utmost sensitivity".

Considering the evidence given by the victim, her evidence is not corroborated by very important witnesses PW9, PW08 and PW10 who heard the victim's story very first. As such the victim had failed to satisfy the court the test of consistency, spontaneity and probability. Hence, I conclude this ground has merit.

In the final ground of appeal, the Learned President Counsel contended that the Learned High Court Judge had failed to take into consideration the material omissions and contradictions in the evidence of PW1 and PW9.

The victim in her evidence stressed the point that she had a fight with Janani and not with PW10 Mihirani. But she had told the police that she had fight with PW10. This contradiction is marked as V1.

Although the victim had told that she had a fight with Janani, but told police that PW10 Mihirangi had threatened that she would tell this to others. This contradiction was marked as V2.

PW9, the English teacher who had witnessed the fight happened between the victim and Janani, but had told police that she had witnessed the fight between the victim and PW10. This contradiction was marked as V5.

PW9 in her evidence told court that she had called Janani after seeing the fight. But she had told police that she had called PW10 after seeing the fight. This contradiction was marked as V6.

Although PW9 had told that she had asked from Janani what she heard from the victim, in fact she had told police that she called PW10 to ask what the victim had told her. This contradiction was marked as V7.

PW2, mother of the victim had failed to tell police that the complaint was delayed due to the insistent of the victim. This was brought to the notice of the Court as an omission.

The victim had told Court that she had told the incident to PW08. But according to PW8, she had told Court that the victim had told her that the Appellant had only touched her body and her vagina.

The above highlighted contradictions of PW1, PW10 and PW9 cannot be considered as trivial contradictions. The *inter se* contradiction highlighted between the victim and PW08 is strong challenge to the prosecution version. They certainly attack the root of the matter very strongly.

In the book **Sarkar on Evidence, 15th Edition** at page 112 states:

> *"Minor discrepancies are possible, even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence.* ***[Sidhan v. State of Kerela [1986] Cri LJ 470, 473(Kerala)].*** *But discrepancies in the statements of witnesses on material points should not be passed over, as they seriously affect the value of their testimony* ***(Brijlal v.Kunwar, 36A 187: 18CWN 649: A1914PC38).****The main thing to be seen in whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however, no such benefit will be available to it.* ***(Krishna Pillai Sree Kumar v. State of Kerala A [1981] SC 1237,1239).****"*

In **The Attorney General v.Sandanam Pitchai Mary Theresa** [2011] 2 SLR 292 the court held that:

> *"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are true material to the facts in issue".*

Hence, I conclude this ground of appeal also has merit.

In a case of this nature, the testimonial trustworthiness and credibility of the victim, 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.

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 this case PW1, PW2, PW8, PW9 and PW10 are the key witnesses. Their evidence is not clear and not matched on material points discussed above. Their evidence is tainted with much ambiguity and uncertainty which definitely affects the root of the case. Hence, the appeal grounds 2nd and 3rd advanced by the Appellant have very serious impact on the prosecution case.

Taking into consideration, all these circumstances, I am of the view that the conviction of the Appellant cannot be allowed to stand as the prosecution had failed its duty to prove this case beyond reasonable doubt. I set aside the conviction and sentence imposed by the Learned High Court Judge of

Matale dated 28/07/2022 on the Appellant. Therefore, he is acquitted from this case.

Therefore, the appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL