

**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/ 0160/2022**

Mohomed Faris Mohomed Isham

**High Court of Colombo  
Case No. HC/1093/2019**

**ACCUSED-APPELLANT**

**vs.**

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

**COMPLAINANT-RESPONDENT**

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

**COUNSEL** : **Ruwan S.Jayawardena for the Appellant.  
H.I.Peiris, SDSG for the Respondent.**

**ARGUED ON** : **11/10/2023**

**DECIDED ON** : **05/02/2024**

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**JUDGMENT**

**P. Kumararatnam, J.**

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

As the Appellant pleaded not guilty to the charge, the trial was commenced on 28/09/2020.

After leading all necessary witnesses, the prosecution had closed the case on 15/03/2022. The Learned High Court Judge had called for the defence 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 closed his case.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant as charged and sentenced him to 09 years rigorous imprisonment and imposed a fine of Rs.15,000/- subject to a default sentence of 03 months simple imprisonment. In addition, a compensation of Rs.200,000/- was ordered with a default sentence of 01-year simple 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. Whether the Learned High Court Judge has correctly assessed that the prosecution has proved the offence described in the indictment against the Appellant that he had committed the offence on the specific place and date as described by PW1, beyond reasonable doubt.
2. Has the Learned High Court Judge misdirected himself in evaluating evidence of the prosecution by failing to identify the clear-cut contradictions between the evidence of PW1, PW2, PW4, PW6 and PW8.
3. Has the Learned High Court Judge failed to consider the improbabilities of the version of the prosecution.
4. Did the Learned High Court Judge err in sentencing the Appellant for an unreasonable and excessive term of imprisonment and granted an excessive compensation to the victim.

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

PW1 Farhan, was 17 years old when he gave evidence in court. The incident of grave sexual abuse was taken place when he was just 5 ½ years old. Although he was unable to disclose the date of offence on which the offence took place, he stated it happened to him either in 2008 or 2009. On the day of the incident when he was playing with his friends near the mosque, the Appellant had come there and taken him to a nearby house promising to give biscuits to him. In the house where the incident happened, he had seen an

old lady was sleeping on a bed and the Appellant had taken the victim upstairs of the house, removed his clothes and had committed anal sex on him. Although he tried to shout, he couldn't as the Appellant prevented him from doing so. After committing the offence, the Appellant had taken the victim to victim's grandmother's house and told them that the victim got injured when he climbed to an iron post. The victim did not tell to his grandmother about the incident due to fear of the Appellant. But later divulged the incident to his mother when he went to his home.

PW2, Shafeena, mother of the victim had corroborated what the victim told in court. She further said when the victim started to cry, she had asked him as to what happened and the victim had divulged incident and told her that the Appellant was the person committed the offence to him. Before lodging a police complaint, the matter was brought to the attention of the Appellant but he denied the incident.

According to PW6 Mahakumbura, the JMO who examined the victim stated that he examined the victim on 12/02/2009 at the Lady Ridgway Hospital, Colombo. As the victim could not give proper history due to his tender age, his mother PW2 had given the history to the doctor. The JMO had noted three injuries in the anal of the victim and confirmed that there is evidence of an anal intercourse.

The 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 Counsel for the Appellant contended that the date of incident and place of incident have not been established by the prosecution beyond reasonable doubt.

In the indictment, the date of offence has been clearly mentioned. The victim giving evidence had clearly said that the incident had taken place either in 2008 or 2009. The victim was just over five years old when he encountered this bitter ordeal. But PW2 had clearly mentioned the date of incident in her evidence. As per the Section 165 of the Code of Criminal Procedure Act No.15 of 1979, the Appellant had been given reasonable notice regarding the time of incident. For clarity the Section 165 of CPC is re-produced below:

**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 date of offence 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. The Learned High Court Judge in his judgment had addressed this issue very correctly to come to his decision. The relevant portion of the judgment is re-produced below:

Page 208-209 of the brief.

වින්දිත දරුවාට සිද්ධිය සිදු වූ දිනය නිශ්චිතව පැවසීමට හැකියාවක් නොමැති වුවද ඔහු සිද්ධිය සිදු වූ අවස්ථාවේදී අවුරුදු 5 ක කුඩා ළමයකු වීම සහ සිද්ධිය සිදු වී අවුරුදු 11 කට පමණ පසුව අවුරුදු 17 ක පාසල් සිසුවකු ලෙස සාක්ෂි ලබා දී තිබීම යන පසුබිම සලකා බැලීමේදී මෙවැනි ආකාරයේ අමිනිටි ලිංගික අත්දැකීම් සැබවින්ම හැකි ඉක්මනින් අමතක කර දැමීම සාමාන්‍ය මනුෂ්‍ය ස්වභාවය වන අතර මෙම සාක්ෂිකරු ද මෙම සිද්ධිය සිදු වූ දිනය අමතක කර දමා තිබීම සැබවින්ම විය හැකි කරුණකි. කෙසේ වෙතත් සිද්ධිය සිදු වූයේ 2008 වසරේ 2009 වසරේ මෙන් මතක බවට මෙම සාක්ෂිකරු පැහැදිලිව පවසා ඇති අතර අධිචෝදනා පත්‍රයේ සඳහන් චෝදනාවෙහි සඳහන් කර ඇත්තේ ද 2009 වසරේ දී මෙම අපරාධය සිදු වූ බවයි. ඒ අනුව සිද්ධිය සිදු වූ දිනය සම්බන්ධයෙන් මෙම සාක්ෂිකරුගේ සාක්ෂියෙන් නිෂ්චිතවම කරුණු හෙළි නොවුනද මෙම නඩුවේ සාක්ෂි ලබා දී ඇති පැ.සා. 2 එනම් වින්දිත දරුවාගේ මව වන මොහොමඩ් සාල්දින් අයුතුල් පපිනා නමැත්තියගේ සාක්ෂිය අනුව සිද්ධිය සිදු වූයේ 2009 පෙබරවාරි මස 10 වන දින සඳහන් කර ඇති පසුබිම තුළ අධිචෝදනා පත්‍රයේ වරද සිදු වූ දිනය ඒ අනුව මැනවින් සනාථ වී ඇත.

In the 2<sup>nd</sup> ground the Learned Counsel argued that the Learned High Court Judge misdirected himself in evaluating evidence of the prosecution by failing to identify the clear-cut contradictions between the evidence of PW1, PW2, PW4, PW6 and PW8.

In the 3<sup>rd</sup> ground Learned Counsel argued that the Learned High Court Judge failed to consider the improbabilities of the version of the prosecution.

As the 2<sup>nd</sup> and 3<sup>rd</sup> grounds are interconnected, both grounds will be addressed together hereinafter.

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 his 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”.*

The Learned High Court Judge in his judgment very extensively considered the evidence given by PW1 and is satisfied that the evidence given by the victim passes the credibility.

Additionally, after considering the testimony of each witness, it was determined that the contradictions marked on the evidence did not impact the case's foundation. (Pages 209-224 of the brief)

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”.*

Further, the Learned High Court Judge had very correctly held that that the evidence given by the witnesses pass the test of consistency, spontaneity, probability and concluded that the prosecution had proved the case beyond reasonable doubt.

In the final ground of appeal, the Learned Counsel contended that the Learned High Court Judge erred in sentencing the Appellant for an



unreasonable and excessive term of imprisonment and granted an excessive compensation to the victim.

When sentencing an accused, the judge ensures that he passed a fair sentence and in proportion to the crime. The sentence must also be in proportion to the accused's degree of responsibility. Further, the Judge must respect the minimum and maximum sentences set out in law and the sentence must be just.

The sentence prescribed for the offence under Section 365B (2) (b) of the Penal Code is as follows:

“(b) commits grave sexual abuse on. any person under eighteen years of age shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person. in respect of whom the offence was committed for the injuries caused to such person.”.

The Learned High Court Judge in his sentencing order had considered all factors which should have been considered before passing the sentence. The victim's age was taken into consideration by the Learned High Court, which is a factor that calls for a harsher sentence as the victim was a minor. He had also considered the age of the Appellant when he committed the offence.

Considering these factors, the Learned High Court Judge had passed a lower sentence which is very much reasonable considering the facts and the circumstances of the case. Further, he had passed a very reasonable fine and compensation.

Hence, I conclude that the appeal grounds raised by the Appellant have no merit.

As discussed under the appeal grounds advanced by the Appellant, the prosecution had adduced strong and incriminating evidence against the

Appellant. The Learned High Court Judge had very correctly analyzed all the evidence presented by both parties and had concluded that the Appellant is guilty to the charge.

As the Learned High Court Judge had rightly convicted the Appellant for the charge levelled against him in the indictment, I affirm the conviction and dismiss the Appeal of the Appellant.

Considering further, I order the 09-year rigorous imprisonment deem to have been commenced from the date of judgment i.e., on 16.06.2022.

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

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**