RENUKA SUBASINGHE
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
CA 139/2001
HC COLOMBO 9143/98
MARCH 27, 2007
MAY 7, 2007

Penal Code – Amended by Act 22 of 1995 – section 308A – Cruelty to children – Credibility of victim – Contradictions per se and inter se – faulty memory – lack of corroboration – Criminal Procedure Code – Section 414(1) – Proof of age of victim – Evidence Ordinance – Section 45, Section 114(f) – Expert evidence – Evidence not challenged considered as admitted?

The accused-appellant was indicted for acts of assault committed on one "S" – an offence punishable under section 308(A) Penal Code – cruelty to children.

It was contended by the accused appellant that:

(i) the victim was coached by the Police and hence unreliable;
(ii) evidence of the victim was not credible as there were material contradictions;
(iii) evidence of the victim was not corroborated;
(iv) no evidence to prove that the victim was below the required age

Held:

(i) The only witness to the alleged act of cruelty was the victim, and there are significant contradictions *per se* and *inter se*.

(ii) But that does not mean that the entire evidence of the victim should be rejected as being false. Contradictions may occur due to various factors, such as faulty memory.

Ranjith Silva, J.,

"It is true that the Police had tutored the victim to state various facts that were not within her knowledge such as the names of the accused and her husband – but I have no doubt that the instances of cruelty alleged by the victim such as the accused pinching and assaulting the victim have taken place if not exactly the way she narrated" at least in some form or other.

(iii) Even though it transpired in the course of the evidence that the Police has tutored the victim yet there is overwhelming evidence given by the victim in regard to various other acts of cruelty and ill treatment meted out to her by the accused and the Doctor and the JMO have corroborated the evidence of the victim, the evidence of the two expert witnesses have gone virtually unchallenged;

(iv) The findings are based largely on credibility of witnesses and the findings of the High Court Judge cannot be branded as perverse;

(v) According to the facts and circumstances of the case it was not necessary to lead the evidence of the osteologist/anatomist or dental surgeon to prove that the victim was less than 18 years of age at the time of the incident;

(vi) The evidence with regard to the age of the victim given by the victim herself and the JMO – who is not a qualified osteologist/anatomist or dental surgeon – could be acted upon as what was not challenged when one had the opportunity to challenge has to be taken as admitted especially so according to the facts and circumstances of the case.

APPEAL from the High Court of Colombo.

Cases referred to:

(1) *Bhojraj* v *Sita Ram* – AIR 193

(2) *Bharwada Bhoginbhai Hirijibhai* v *State of Gujarat* – AIR 1983 SC 753 LJ – 1983 Cr. L.J. 1983 1096

(3) *Samaraweera* v *Attorney-General* – 1990 – 1 Sri LR at 256

(4) *Kashi Nath Panday* v *Emperor* – AIR 1952 – Cal 214

(5) *Sugal* v *The King* – (1945) 48 Bom LR 138

(6) *State v Shanker Prasad* – AIR (1952) All 776 – 1952 Cr. LJ 1585

(7) *Wickremasooriya* v *Dedoleena* – 1996 2 Sri LR 95

(8) *Alwis* v *Piyasena Fernando* – 1993 1 Sri LR 119 at 122
(9) *Fraad* v *Brown & Co. Ltd.*– 20 NLR at 282
(10) *Mohamed Syedol* v *Ariffin* – AIR 1916 PC 242
(11) *Laimayum Tonjou* v *Manipur Administration* – AIR Manipur 5 (V49 C3)
(12) *Sulthan* v *Emperor* – AIR 1934 Sind 119
(13) *Regina* v *Pinhamy* – 57 NLR 169
(14) *Queen* v *Kularatne* – 71 NLR 529 at 542
(15) *Visaka Ellawela* v *Attorney-General* – CA 52/02 – HC 180/99 Colombo
(16) *Gratiaen Perera* v *The Queen* – 61 NLR 522 at 524
(17) *Ajith Samarakoon* v *Attorney-General* (Kobeigane Murder) 2004 – 2 Sri LR 209 at 230
(18) *Sarwan Singh* v *State of Punjab* – 2002 AIR (Sc) (iii) 3652 at 3655, 3656
(19) *Boby Mathew* v *State of Karnatake* 2004 – 3 Cri LJ 3003
(20) *Himachal Pradesh* v *Thakur Dass* – 1983 2 Cri LJ 1694 at 1983
(21) *Motilal* v *State of Madya Pradesh* – 1990 – Cri LJ No.C 125 MP
(22) *Phillippu Mandige Nalaka Krishantha Kumara Thisera* v *Attorney-General* – CA 87/2005 – CAM 17.5.2007

D.P. Kumarasinghe PC for accused-appellant.

Jayantha Jayasuriya D.S.G. for accused-appellant.

Cur.adv.vult.

June 04, 2007

RANJITH SILVA, J.

The accused-appellant was indicted in the High Court of Colombo for acts of assault committed on one Welayudan Sivakumari between the 20th of January 1996 and 20th of January 1997 an offence defined as "Cruelty to children" punishable under sec. 308(A) of the Penal Code as amended by the Penal Code (Amendment) Act No. 22 of 1995. **Sec. 308(A)** of the Penal Code reads.:

"Whoever, having the custody, charge or care of any person under 18 years of age, willfully assaults, ill treats, neglects or abandons such a person or causes or procures such a person to be assaulted, ill treated, neglected or abandoned in a manner likely to cause him suffering or injury to health (including injury to or loss of sight or hearing or limb or organ of the body or any mental derangement) commits the offence of cruelty to children."

The prosecution in support of their case led the evidence of Sivakumari the victim, Dr. H. Sivasubramaniam, Drs. L.B.I. de Alwis (JMO), Nalin de Silva, a technician at the JMO's office, WPC Gayani and WSI Indrani. The accused gave evidence from the witness box denying the charges.

After trial on the 28-2-2001 the accused-appellant who shall hereinafter be referred to as the accused was found guilty of the charge and was sentenced to a term of three years rigorous imprisonment. In addition the accused was ordered to pay compensation in a sum of Rs. 20,000 to the victim and in default was sentenced to a term of one year rigorous imprisonment. Aggrieved by the said judgment and sentence the accused has preferred this appeal to this Court challenging the judgment pronounced and the sentences imposed on the accused.

The Counsel for the accused argued that the conviction should be set aside on the following grounds:

(1) The victim was coached by the police and therefore she was an unreliable witness.

(2) The evidence of the victim was not credible as there were material contradictions in her evidence.

(3) The evidence of the victim was not corroborated by Dr. Alwis the JMO.

(4) The absence of acceptable evidence to prove that the victim was below the required age.

The first two grounds of appeal are inter related and can be dealt with together

The entire case for the prosecution rests on the Credibility of the witness Sivakumari the victim in this case. In this regard the principles enunciated by Lord Roche in *Bhojraj* v *Sita Ram*[1] are very pertinent. Lord Roche observed in the above mentioned case I quote "How consistent is the story with itself? (Consistency *per se*) How does it stand the test of cross-examination? (Stability under cross-examination) How far does it fit in with the rest of the evidence and the circumstances of the case (consistency *inter se*)."

The only witness to the alleged acts of cruelty was Sivakumari the victim. I find on a perusal of the brief and the oral and written submissions made on behalf of both parties that there are some

significant contradictions *per se* and *inter se* in the evidence of the victim. The evidence of the victim in respect of one of the injuries found on her body (injury No. 2 fractured teeth) was contradictory to the medical evidence led in the case, and the victim herself has contradicted her own evidence in regard to injuries No. 1 and 2.

Referring to an injury on the head, above the right eye, (No. 1 in the JMO report), the victim having first attributed it to the accused, later in her evidence admitted that the child of the accused had hit her on the head with a stick causing that injury, although she made an attempt to show that the accused too inflicted an injury on the same place. The victim admitted in cross examination that she had told the police that it was the child of the accused who inflicted that injury. (Vide pages 58 and 59 of the brief)

As regard injury No. 2 (fractured teeth), according to the JMO's report and her evidence in Court the victim had given several contradictory versions as to how it happened. She had told the doctor the JMO that the accused bashed her head on the floor. (Vide 155 of the brief) But what she had stated in her evidence in court is somewhat baffling and confusing. In her evidence she had stated that the accused held her hair and bashed her on the floor, in the same breath she had stated that the accused held her by the hair and hit her on the teeth and as there was some water on the floor, she slipped her leg and fell down and due to the fall two of her teeth broke into pieces. (Vide page 45 and 65 of the brief)

It is thus apparent that the victim had taken contradictory positions as to the first and the second injuries found on her body. It is also in evidence that some of the injuries were old scars of burn injuries inflicted by her own father when she was at home. Dr. Sivasubramaniam instead of corroborating the evidence of the victim has stated in his evidence that the 2nd injury could not have been caused as a result of a fall on the ground and thus contradicted the evidence of the victim with regard to injury No. 2 Dr. Sivasubramaniam has assigned good reasons for forming this opinion. He has stated that if the front two teeth were fractured as a result of a fall on the ground, there ought to have been other injuries and since he did not observe any injury on the nose or the chin the injury to the teeth could not have been caused as a result of a fall on the ground. (Vide page 127 lines 9 and 10 and the first few lines of page 128)

Dr. Sivasubramaniam has further stated that the injury to the teeth could have been caused by hitting with a weapon or by banging the face of the victim against some object by holding the victim by her hair. (Vide page 108). Both these positions described by Dr. Sivasubramaniam were flatly contradicted by the evidence of the victim.

There is another important factor that needs consideration by this Court namely undue influence that was brought to bear upon the victim by the police. The learned trial judge himself has stated in no uncertain terms highlighting a few instances that it was *ex facie* evident that the victim had been subjected to undue influence or pressure by the police in the course of their investigations and that there had been a colossal attempt to build up a case against the accused. (Vide the judgment at page 287 of the brief) What is discernible from the comments made by the trial judge appears to be that the two investigating police officers were unduly and culpably interested in the outcome of the case and that they tutored the victim to give false evidence against the accused. The learned trial judge has referred to various unsatisfactory and grossly indecent actions on the part of the police, deploring such practices. But the learned trial Judge has discreetly refrained from stating that the victim gave false evidence.

Thus in the light of the contradiction *per se* on very material points referred to above and the contradictory nature of the expert medical evidence, with regard to the injury No. 2, coupled with the undue influence exerted by the police it is seen that the evidence of Sivakumari with regard to certain matters, is vague and unreliable. But that does not mean that the entire evidence of the victim should be rejected as being false. Contradictions may occur due to various factors such as faulty memory etc.

The learned trial Judge in his judgment has commented and expressed his sentiments with regard to the crooked practices on the part of the investigating officers. Yet the learned trial Judge had opted to rely and act on the evidence of the victim despite the infirmities in her evidence. I cannot but admire and appreciate the efforts of the learned Judge to do what he thought was just, without taking the easy way out. The approach of the learned Judge does not baffle me in any way for the following reason.

It is true that the police had tutored the victim to state various facts that were not within her knowledge, such as the names of the accused and her husband. But I have no doubt that the instances of cruelty alleged by the victim such as the accused pinching and assaulting the victim have taken place if not exactly the way she narrated, at least in some form or the other. Even though the victim gave contradictory versions as to how injuries I and 2 occurred I find that it happened as a result of a faulty memory and not exactly because the victim was tutored. The victim had sustained the 2nd injury about four years prior to the date she gave evidence in Court. She was only 12 or 13 years of age at the time of the incident. The incident itself was not such a palatable or a pleasant one that ought to have remained imprinted in her memory. To say the least one cannot expect a child of such tender years to recall in the order of sequence an incident that occurred under such tragic and traumatic conditions. (Vide *Bharwada Bhoginbhai Hirijibhai* v *State of Gujarat* [2].

In *Samaraweera* v *The Attorney-General* [3] at 256, it was held, I quote "The maxim *falsus in uno falsus in omnibus* could not be applied in such circumstances. Further all falsehood is not deliberate. Errors of memory, faulty observations, or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim ..... In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so ..... The jury of Judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can be separated from the true."

The third ground of Appeal – Lack of Corroboration

The tender years of the child coupled with the other circumstances such as demeanour and unlikelihood of tutoring may render corroboration unnecessary but that is a question of fact in each case. On the contrary, the facts and circumstances in the instant case indicate that the police had tutored the victim.

In *Kashi Nath Panday* v *Emperor* [4] it was held "... it is a sound rule of practice not to act on the uncorroborated evidence of a child whether sworn or unsworn but is a rule of prudence, not to law". (See also *Sugal* v *The King* [5]).

In *State* v *Shanker Prasad* [6], it was held that the evidence of a child should be examined with great caution.

Even though it transpired in the course of the evidence that the police has tutored the victim yet there is overwhelming evidence given by the victim in regard to various other acts of cruelty and ill-treatment meted out to her by the accused such as the accused pinching and assaulting her on numerous occasions. What is more Dr. Sivasubramaniam and the JMO who examined the victim has corroborated the evidence of the victim. The evidence of the two expert witnesses has gone virtually unchallenged. Therefore one cannot argue that there isn't corroboration of the evidence of the victim. The victim had been examined by a competent dental surgeon and the medical evidence has referred to the observations of the dental surgeon as well. The report of the dental surgeon was marked as P3 subject to proof but has gone unchallenged when the prosecution closed its case leading in evidence P1 to P8. Sec. 414(1) of the Criminal Procedure Code reads thus; (only the relevant portions are reproduced below).

'Any document purporting to be a report under the hand of ..... Government Medical Officer upon any person matter or thing duly submitted to him for examination ..... may be used as evidence in any inquiry, trial or proceeding under this code although such officer is not called as a witness.'

The identity and the regularity of the report of the dental surgeon could be presumed under section 114 of the Evidence Ordinance. Ever if the dental report were to be rejected yet there is other evidence independent of the dental report corroborating the evidence of the victim. (Vide the evidence of Dr. Sivasubramaniam and the JMO)

It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings of this case are based largely on credibility of witnesses. An appellate court can and should interfere even on questions of facts although those findings cannot be branded as

"perverse" unless the issue is one of credibility of witnesses keeping in mind that the trial Judge is better equipped to adjudicate on facts as the trial judge is the one who has the priceless advantage and the privilege of observing the demeanour and the deportment of the witnesses.

A question of fact is a compendious expression comprising of three distinct issues. In the first place what facts are proved? In the second place, what are the proper inferences to be drawn from the facts which are either proved or admitted? And in the last place what witnesses are to be believed? It is only in the last question any special sanctity attaches to the decision of a court of first instance. On the first two questions no special sanctity attaches. By any special sanctity is meant the disinclination on the part of an appellate body to correct a judgment as being erroneous. (Vide *Wickremasooriya* v *Dedoleena* [7].

In *Alwis* v *Piyasena Fernando*[8] at 122 it was observed by the learned Judges who heard that case as follows. "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings of this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the Court of Appeal could have reversed the findings of the trial Judge."

In *Fraad* v *Brown & Co. Ltd.*[9] at 282 it was held I quote"... it is rare that a decision of a judge so express, so explicit, upon a point of fact purely, is overruled by a Court of Appeal because a Court of Appeal recognizes the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and as specific as these, a Court of Appeal will overrule a Judge of a first instance." It was further held in that case that when the issue is mainly on the credibility of witnesses an appellate Court should not interfere unless the findings of the Judge are perverse.

In the instant case the findings are based largely on credibility of witnesses and the findings of the learned High Court Judge cannot be branded as perverse. I am therefore of the view that there is no reasonable basis upon which the Court of Appeal could reverse the findings of the trial judge.

For the reasons I have adumbrated above I reject the first three ground of appeal taken by the defence.

Now I shall turn to the 4th ground of appeal which is as follows

'The absence of acceptable evidence to prove that the victim was below the required age.'

The Counsel for the accused argued that the most important element in a charge under section 308(A) of the Penal Code is the age and that the best evidence to prove the age is the birth certificate or, if it is not available, evidence of the mother or the father of the victim could have been placed before Court. He further argued that the prosecution has failed to lead the best evidence but called the JMO Colombo to give an opinion, he is not properly qualified to express. In this context the Counsel for the accused has invited this Court to draw a presumption under sec.114 (f) of the evidence ordinance.

114(f) of the E.O.:

The evidence which could be and is not produced would if produce, be unfavorable to the person who withholds it.

In support of this contention (4th ground of appeal) the defence has cited several Indian and local reported cases which I have cited below.

In *Mohamed Syedol* v *Arriffin*[10] (decision of the Privy Council) "A certificate given by a doctor about the age on an examination of the teeth, appearance, and voice etc is not the certificate of an expert, but only an assumption of his opinion which was worthless.

In *Laimayum Tonjou* v *Manipur Administration*[11] it was held *inter alia* I quote: "As far as we know from medical jurisprudence the conclusive test in such matters of age is the ossification of bones and for this X ray examination of the bones was absolutely necessary. (see also *Sulthan* v *Emperor)*[12].

In order to emphasize that it is only an osteologist, or an Anatomist who is properly qualified to perform ossification test and to some extent, dental surgeon, by examining the dentition and no other medical person can give an authoritative opinion as to the age, the defence has cited *Regina* v *Pinhamy*[13] where it was held "The mere

reference to the medical witness as JMO Colombo is insufficient for the purposes of making his evidence relevant under section 45 of the Evidence Ordinance in regard to matters other than those which properly fall within the function of a medical practitioner." (See also *Queen* v *Kularatne*[14] at 542)

In *Visaka Ellawela* v *A.G.*[15] it was held that it is only an osteologist / anatomist and or a dental surgeon who is properly qualified to express an opinion as to age and no doctor qualified in other fields is regarded as an expert in this field.

I have my highest regards and utmost respect for the observation made and the views expressed by the eminent justices in the above mentioned *dicta.* Whether the same would be applicable to the facts and circumstances of this case and if so what the scope is, in its application are matters that need the attention of this Court.

A trial Judge is not prevented from bringing an independent mind to bear upon the question of age using what ever the legal admissible evidence that is available to him, including his observations where possible. Expert evidence is not the *sine qua non* in each and every case where "proof of age" is in issue if the trial Judge can safely and correctly form an opinion of his own, independently of any expert medical evidence. There could be instances; a decision on such an issue would not be possible without the assistance of an expert, qualified in the particular field. At the same time there may be instances where such opinion would not be necessary and the trial Judge himself, or with the assistance of a medical officer like a JMO, even though such a medical officer may not be an expert on matters relating to age such as an osteologist/anatomist or a dental surgeon, could decide the issue.

In *Gratiaen Perera* v *The Queen*[16] at 524 Sinnathambi, J. observed I quote: "While I would not go to the extent of saying that an experts evidence would only afford 'some slight corroboration of the conclusion arrived at independently' I would hesitate to act solely upon it. If there is other independent evidence in support of the conclusion reached, recourse need not be had at all to the expert evidence." It was further held in that case by Sinnathambi, J. "A Court cannot of course without the assistance of an expert come to an opinion on so **difficult a question.** (emphasis added). At the same

time the decision being the Judge's he should not be delegate his functions to the expert. The opinion of the expert is relevant, but the decision must nevertheless be the Judge's".

A careful study of this dictum of Sinnathamby, J. reveals that if the question is a difficult one 'expert evidence' may some times be necessary but if the question is not a difficult question then expert evidence may not be necessary. Thus if a child of three years is raped and the birth certificate of the child is not available or the whereabouts of the parents of the child are not known should the trial judge or the defence insist on a report from an osteologist/anatomist or a dental surgeon. Such a proposition undoubtedly would be absurd and ludicrous.

In *Laimayum Tonjou* v *Manipur Administration (supra)* the age of the child was 15 years and the required age limit in that case was 16. Under the circumstances of that case as the margin was very thin (one year) it was held in that case that the prosecution should have proved the age of the victim by leading expert evidence of an osteologist/anatomist or a dental surgeon. In that case the age of the victim being 15 years and the age limit 16 it would have been a very difficult question for the trial judge to decide on his own whether the child was under 16 years of age, without the assistances of an expert qualified in that particular field.

But the facts and circumstances are rather different in this case and the question to be decided was not a difficult one. In the instant case the child was about 12 years at the time of the incident and the required age limit is 18 years according to section 308(A) of the Penal Code. In the instant case the gap is about 6 years and the trial Judge could easily decide that the child was below 18 years. On the other hand the victim stated in evidence that she was 14 years of age at the time she gave evidence at the trial and that should have alerted the prosecution that the child was 12 years of age at the time of the incident. Although the JMO was not a qualified osteologist/anatomist or a dental surgeon I hold that one need not be so qualified to observe that the victim did not have hair in her armpits or that her breasts were in the formative stages and express the opinion that the victim was below 18. I hold that even without the dental report there was ample evidence for the trial judge to conclude that the victim was less than 18 years of age at the time of the incident.

For these reasons I hold that according to the facts and circumstances of the case it was not necessary to lead the evidence of an osteologist/anatomist or dental surgeon to prove that the victim was less than18 years of age at the time of the incident.

On the other hand the age of the child was never in dispute.The evidence of the victim or the JMO was not challenged not for nothing but for obvious reasons best known to the defence. At this stage I would like to cite a few authorities in order to show that the evidence, with regard to the age of the victim given by the victim herself and the JMO could be acted upon. What was not challenged when one had the opportunity to challenge has to be taken as admitted, especially so according to the facts and circumstances of this case.

In the *Kobaigana Murder* Case *Ajith Samarakoon* v *A.G.*[17] at 230 Ninian Jayasuriya, J. held 'that evidence not challenged or impugned in cross examination can be considered as admitted and is provable against the accused.'

In *Sarwan Singh* v *State of Punjab* [18] at 3655, 3656 , "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* v *State of Karnataka*[19].

In *Himachal Pradesh* v *Thakur Dass* [20] at 1983 V.D. Misra, CJ. held: "Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed."

"Absence of cross examination of prosecution witnesses of certain facts leads to the inference of admission of that fact". *Motilal* v *State of Madya Pradesh*[21].

For a recent case I would like to refer to the Judgment of His Lordship Sisira de Abrew, J. in *Pillippu Mandige Nalaka Krishantha Kumara Thisera* v *A.G.*[22], I quote "....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."

For the reasons adumbrated above, in my judgment, on the facts and the law, as there is no merit whatsoever in any of the grounds of appeal urged by the defence, I find no justification in interfering with the verdict, findings or the judgment entered or the sentence imposed by the learned High Court Judge on the accused on 28.02.2001.

I affirm the conviction and the sentence and dismiss this appeal.

SISIRA DE ABREW, J. – I agree.

Appeal dismissed.