YOGA VS. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW, J.
ABEYRATNE, J.
CA 55/06
HC KANDY 352/06

Penal Code Section 365 (B) – grave sexual abuse – Sexual gratification – Burden of proof? – Test of probability

The accused-appellant was convicted for committing the offence of grave sexual abuse on a girl-one M and was convicted and sentenced. On appeal

Held

(1) To establish a charge under section 365 (B) of the Penal Code the prosecution must establish that the alleged act was done with the intention of having sexual gratification. This aspect must be proved beyond reasonable doubt. Prosecution case does not satisfy the test of probability.

APPEAL from the judgement of the High Court of Kandy.

Dr. Ranjit Fernando for accused-appellant.

Rohantha Abeysuriya SSC for respondent.

February 24th 2009

SISIRA DE ABREW, J.

Head both counsel in support of their respective cases. The accused-appellant in this case was convicted for committing the offence of grave sexual abuse on a girl named Dulanjalie Madushani and was sentenced to a term of 10 years R.I and to pay a fine of Rs. 5000/- carrying a default

sentence of one year R.I. In addition to the above sentence, the accused-appellant was ordered to pay a sum of Rs. 50,000/- as compensation to the victim carrying a default sentence of 02 years R.I.

This appeal is against the said conviction and the sentence. The facts of this case according to the prosecution case may be summarized as follows. On the day of the incident around 9 a.m, when the victim who was playing, came near the accused who was in the compound of the victim's house, he (the accused) pulled the victim and as a result of this act, the victim fell into his lap. The mother of the victim who was inside the house saw the accused-appellant putting his hand thorough the underpants of the girl. When she ran to the said place, the victim on being questioned, informed the mother that the accused-appellant touched her vagina. The mother did not see the accused-appellant touching the vagina of the victim. Suggestion made by the learned defence counsel that she only suspected this incident and such an incident did not take place was admitted by the mother of the victim – vide page 54 of the brief.

The accused-appellant in his dock statement stated that the victim who was playing threw saw dust at him and thereupon he pulled her and she fell into his lap. He further stated that when the child was falling, he pulled the child's underpants. When the evidence of both sides is considered, we have to consider whether the story of the prosecution satisfied the test of probability. The time was 9 in the morning and the incident took place in the compound of the victim. There were people living in the neighbourhood. Under these circumstances one should consider whether the accused person with the intention of having sexual gratification would indulge in a sexual act. This question has to be answered in

the negative. I therefore hold that the prosecution case does not satisfy the test of probability.

The other thing that the Court must consider is whether the accused did the alleged act with the intention of having sexual gratification.

To establish a charge under section 365 B of the Penal Code, the prosecution must establish that the alleged act was done with the intention of having sexual gratification. This aspect must be proved beyond reasonable doubt.

When we consider the evidence, we doubt whether the act, alleged to have been committed, was done with the intention of having sexual gratification. This shows that the mental element envisaged in section 365B of the Penal Code was not proved beyond reasonable doubt. In these circumstances, we hold that the conviction of the accused-appellant cannot be permitted to stand. For the aforementioned reasons we hold that the prosecution has failed to establish the charge that has been leveled against the accused beyond reasonable doubt. In these circumstances, we set aside the conviction and the sentence and acquit the accused of the charge leveled against him.

ABEYRATHNE, J. – I agree.

Appeal allowed.