IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal Case No:
CA/HCC/0048/2023
High Court of Hambantota
Case No. 61/2015

Siriwardena Kankanamge
Manjula Kumara

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Darshana Kuruppu with Buddhika Thilakarathna for the Appellant.**
Sudharshana De Silva, SDSG for the Respondent.

ARGUED ON : **03/06/2024**

DECIDED ON : **03/09/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter after referred as the Appellant) was indicted by the Attorney General before the High Court of Hambantota for committing an offence under section 364(1) of the Penal Code on Liyana Waduge Piyasili on or about the 10th of July 2012.

After a non-Jury trial, the Appellant was convicted as charged and was sentenced to 10 years of rigorous imprisonment and a fine of Rs.10000/- with a default sentence of 01-year of rigorous imprisonment had been imposed. In addition, Rs.125000/- was imposed as compensation payable to the victim 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 Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence. At the hearing he was connected via Zoom from prison.

On behalf of the Appellant following Grounds of Appeal are raised.

1. The learned trial Judge has failed to consider that the story of the prosecutrix has been contradicted by medical evidence.

2. The learned Trial Judge has failed to take into consideration that the prosecutrix is not a credible witness and it is unsafe to act upon the evidence owing to numerous inter se and per se contradictions that go to the very root of the prosecution case.

The prosecutrix in this case was 53 years old, married with three children and a grandmother at the time of the incident. On the date of the incident, she had gone to a nearby canal around 1.00 p.m. to have a bath. When she returned home afterwards, an unknown person had held her neck after closing her mouth, dragged her, pushed her on to the ground and raped her forcibly. Before he could have sexual intercourse, he had sucked her breast. After the intercourse he had demanded her to suck his penis, threatening her with a knife. After committing rape, the person had left the place in a motor bike. PW1 had been able to note down the motor bike number. After returning home, she had gone to the police with her grandson. On their way, she had seen the person who committed the crime passing them in the same motor bike. With the help of PW2, Nandasena and her grandson the said person was caught and detained at the residence of one Soma until he was handed over to the police. She identified the Appellant at the trial as the person who committed the offence.

The victim was examined by PW3, JMO Ambepitiya at the Hambantota Hospital and gave evidence at the trial.

When the defence was called the Appellant gave evidence from witness box and took up the defence of consent.

In a criminal trial the judge has to rely on the knowledge and opinion of certain experts to appreciate the technical details involved in a particular case. Evidence is given by the expert of the relevant field in the form of his opinion which is based on the information that he gathered from the facts of the case. This evidence supplements the assertions of the judge and together, they complement each other and combine to form the basis of the judgment.

However, the evidentiary value of the opinion given by the expert is not the judgment. However, the evidentiary of the opinion given by the expert is not unshakeable because of the discretionary power in the hand of court, which may choose to accept it or reject it.

Medical examination of the victim always plays a very important role in a case of rape. As there is usually no eye witness of the fact, and the victim usually say in her interest only, the medical evidence is one of the ways which can help to find out the true fact. As such, medical examination of the victim had always been a mandatory. The medical examination of the Accused equally too plays a vital role in a rape case.

In the case of the **State of Karnataka v S.Raju** (2007) 11 SCC 490 the court held that:

> *"In the case of absence of medical evidence, rape accused can be convicted. Therefore, the corroboration with medical reports is not necessary in every case."*

In the **State of MP v Dayal Sahu** (2005) 8 SCC 122 the court held that:

> *"An appellate court shall not reverse the findings of guilt on the basis of irrelevant circumstances. Where the evidence of victim and other witness was found reliable, accused shall not get the benefit of doubt for non-examination of doctor of the victim."*

The second explanation to Section 363 of the Penal Code as amended states:

> "Evidence of resistance such as injuries to the body is not essential to prove that sexual intercourse took place without consent"

In this case, although the victim said that she fell onto a thorn bush and due to this act, there were abrasions caused to her legs and her back. But the

JMO had not noted any injuries on her legs or back. When PW1 was confronted of this contradiction with the evidence of PW3, the JMO, victim had stated that the thorn bush that the Accused made her fall onto was a dead/rotten thorn bush.

The victim had further said that the Appellant had bit her lips and as a result her lips were swollen. But the JMO had not noted any abnormalities on her lips when he examined her.

In this case, although the victim was subjected to this gruesome act of violence, she was only examined two days after the incident. Hence, when questioned by the defence the above-mentioned injuries could not be visible due to the passing of time.

The learned High Court Judge, in his judgement had extensively considered the medical evidence and come to an accurate finding that medical evidence cannot override the ocular testimony of the witnesses.

The Counsel for the Appellant advanced in his second argument that the prosecutrix has deliberately tried to change or develop her evidence, especially when improbabilities in her story were highlighted during cross examination.

The victim in this case was 53 years old at the time the offence was committed and when she gave evidence, she was 56 years old. Hence, it is not possible for her to give evidence which is 100% accurate and in line with her statement to the police.

The learned High Court Judge in his judgment had extensively and accurately considered all omissions and the contradiction before he could come to a conclusion as to why he disbelieved the defence version.

Under our law the trial judge could disregard minor contradictions and omissions in a case if such contradictions and omissions do not go to the

root of the case. This orthodox position has been affirmed by several cases in Sri Lanka.

In the case of **Mazur Ivegen & Iana Bereznah vs AG** SC**/**TAB/1/2015 Supreme court held that:

> *"the contradictions and omissions marked by the defence are minor contradictions and omissions which did not go to the root of the prosecution case and therefore the lower court have correctly disregarded the contradictions and omissions."*

In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa [**2011] SLR Vol. 2 pg. 292 held,

> *"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgement on the nature of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance.*
>
> *Witnesses should not have disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter."*

In this case the learned Trial Judge had properly considered omissions and the contradictions and came to a correct conclusion that the omissions and contradictions marked are incapable of creating a doubt on the prosecutrix's evidence.

Finally, the Counsel of the Appellant contented that the learned Trial judge has failed to consider the lack of credibility of the prosecutrix and has erred in law by neglecting the need of cogent evidence on her part, especially in the absence of any corroborating evidence.

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 **Bhoginbhai Hirjibhai v. State of Gujarat** [1983] AIR 753 Indian Supreme Court stated that:

> *"refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury."*

In this case the evidence given by the prosecutrix was not tainted with any contradictions which affect the root of the case.

According to the prosecutrix the Appellant had forcibly raped her against her will. She had never consented nor had she known the Appellant earlier as contended by the Appellant. The Appellant had not put to the victim about being seen by a woman when both were having censual sex. Then immediately after the incident the victim had divulged to PW2 and her husband and with the help of her grandson and PW2 the Appellant was apprehended and handed over to the police. Further she had noted down the

number of the Appellant's motor bike and had handed it over to the police. Further there was no reason for her to implicate anyone other than the Appellant. Considering the evidence of the prosecutrix she was consistent right throughout in revealing the incident. The learned High Court Judge had accurately considered the defence evidence and given reasons as to why he rejected the defence evidence.

The grounds of appeal advanced by the Appellant have no merit as the learned High Court Judge had accurately acted on the overwhelming evidence given by the prosecutrix.

Therefore, I am of the view that there is no necessity to interfere with the conviction and the sentence imposed on the Appellant. I therefore, affirm the conviction and the sentence imposed upon the Appellant.

Considering the fact that the Appellant is in remand from the date of conviction, I, order the sentence imposed on the Appellant be operative from the date of sentence namely, 02.12.2022.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL