

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

*In the matter of an Appeal in terms of  
section 331 (1) of the Code of Criminal  
Procedure Act No. 15 of 1979.*

**Court of Appeal No:**

CA/HCC/0170/22

**High Court of Vavuniya**

Case No: HCV 2863/19

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

1. Rasakumar Nirosh Kumar
2. Sritharan Anton Jason

**ACCUSED**

**AND NOW BETWEEN**

1. Rasakumar Nirosh Kumar

**ACCUSED-APPELLANT**

**Vs.**

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

**COMPLAINANT-RESPONDENT**

Before : Sampath B. Abayakoon, J.  
: P. Kumararatnam, J.  
Counsel : K. Kugaraja for the Accused-Appellant  
: Azard Navavi, S.D.S.G. for the Respondent  
Argued on : 27-08-2024  
Written Submissions : 08-01-2024 (By the Accused-Appellant)  
Decided on : 11-11-2024

**Sampath B. Abayakoon, J.**

This is an appeal by the 1<sup>st</sup> accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Vavuniya.

The appellant, along with the 2<sup>nd</sup> accused indicted was indicted before the High Court of Vavuniya for committing the following offences.

- (1) That the appellant, having ganged up with the 2<sup>nd</sup> accused named, committed rape on the female mentioned in the indictment, on or about 29-05-2011 at Nelukulam within the jurisdiction of the High Court of Vavuniya, and thereby committed the offence of gang rape described in section 364(2)(g) of the Penal Code as amended by the Penal Code (Amendment) Act No-22 of 1995, 29 of 1998 and 16 of 2006, punishable in terms of section 364(2) of the same.
- (2) At the same time and at the same transaction, the 2<sup>nd</sup> accused indicted ganged up with the appellant and committed rape on the female mentioned in the indictment, on or about 29-05-2011 at Nelukulam within the jurisdiction of the High Court of Vavuniya, and thereby committed the offence of gang rape described in section 364(2)(g) of the Penal Code as amended by the Penal Code

(Amendment) Act No-22 of 1995, 29 of 1998 and 16 of 2006 punishable in terms of section 364(2) of the same.

As the 2<sup>nd</sup> accused indicted has absconded the Court, the trial has proceeded against him in his absence under the terms of section 241 of the Code of Criminal Procedure Act.

At the Conclusion of the trial, the learned High Court Judge of Vavuniya of his judgment dated 02-08-2022 found the appellant guilty of the 1<sup>st</sup> count preferred against him while the 2<sup>nd</sup> accused was found guilty of the 2<sup>nd</sup> count.

Accordingly, the appellant has been sentenced to a period of 10 years rigorous imprisonment, and to a fine of Rs. 5000/-, with a default sentence of one-month rigorous imprisonment.

He has also been ordered to pay compensation in a sum of Rs. 500,000/- to the prosecutrix, and in default of paying the said amount, to serve a period of two years rigorous imprisonment.

The 2<sup>nd</sup> accused indicted has also been imposed a similar sentence, and an open warrant has been issued against him.

### **The Facts in Brief**

According to the evidence of the prosecutrix (PW-01), she was 18 years of age when she had to face this incident on 29-05-2011. She has been a 30-year-old married mother of one child by the time she has given evidence before the High Court. On the day in question, she has left her home to attend the church service, and had boarded a bus around 1.30 in the afternoon to return home. After reaching Nelukulam area where she lived, she has alighted from the bus near the 7<sup>th</sup> lane. Her home is situated about a kilometer away on that lane.

She has stated that after getting down from the bus she went to the Mohan's shop to buy some things but changed her mind and set out to go home. While she was walking towards her home, a red colour three-wheeler driven by the

appellant has come and the appellant along with the 2<sup>nd</sup> accused indicted who was in the rear seat of the three-wheeler has forced her into the three-wheeler.

Once she was taken into the vehicle, they have told her that they will take her home, but has tied her face with a shawl. She has fallen unconscious soon thereafter. When she was awakened, she has observed that she is in a dense jungle area and has seen the two persons who took her standing near her.

Initially, she has stated that when she regained consciousness there was bleeding from her vagina, but has later described the incident stating that the appellant and the other person, referring to the 2<sup>nd</sup> accused indicted, removed her clothes and had sexual intercourse with her without her consent. She has also stated that she saw the 2<sup>nd</sup> accused filming her being raped by the appellant using his mobile phone. She has stated further that afterwards, she got dressed and traveled with the two persons in the same three-wheeler in order to get back home, and has stated that they pushed her out of the vehicle near a paddy field at Kulumaattu junction and fled.

Thereafter, some persons have taken her near a shop situated in the area where she has informed the police officers who arrived the incident faced by her. According to her evidence, the police officers have arrested the appellant and the 2<sup>nd</sup> accused shortly thereafter, and she has identified them as the persons who raped her when they were brought under police custody and shown to her near the shop where she was waiting.

The PW-02 was a person who lived near the Kulumannu junction mentioned by the prosecutrix in her evidence, and a person who knew her father. He has gone to a nearby shop to buy some petrol in the evening of the day of the incident where he has observed the prosecutrix seated in front of the shop. The shopkeeper has informed him that she was there for some time, and when questioned, she has informed him that she is weak. When inquired further, she as informed him that two persons raped her.

After hearing that, PW-02 has immediately informed that to the police officers who were on duty at the checkpoint nearby. He has seen the police bringing two arrested persons before the prosecutrix, but has stated that he cannot identify them due to passage of time.

PW-05, PS 59970 was the police officer instrumental in commencing investigations into the incident and arresting the suspects. He has been on duty at the police checkpoint situated at the Kulumaattu junction on 29-5-2011. While on duty in the afternoon, he has observed a girl coming from the direction of Nelukulam area. He has observed her crying and when inquired with the assistance of one Thuraisingham Pradeep who assisted in translating what the girl says, he has come to know about the incident of rape faced by the girl. The mentioned Pradeep appears to be the PW-02 who gave evidence at the trial. After informing the parents of the girl, he and a police team have gone looking for the suspects. They have come across a parked three-wheeler which matched the description given by the prosecutrix with two persons seated inside. As they could not give satisfactory answers to his questions, he has arrested them around 6 p.m. The two persons being the appellant and the 2<sup>nd</sup> accused indicted. When the police officer brought them to the place where the prosecutrix was, she has identified them as the two persons who took her and dropped her off at place near Nelukulam junction after sexually abusing her. He has taken steps to get the prosecutrix admitted to hospital and had handed over the suspects to the police station for further investigations.

The Medico-Legal Report (MLR) prepared by the Judicial Medical Officer who examined PW-01 after her admission to the Polonnaruwa hospital and a report prepared by the Government Analyst has been admitted in terms of section 420 of the Code of Criminal Procedure Act and, hence, no evidence has been called in that regard.

It is clear from the MLR that the prosecutrix has given the short history of the incident to the doctor saying that when she was coming from work two unknown people came and forcefully took her to a jungle area and one of the persons engaged in sexual intercourse and the other person took a video of the incident with a camera.

The JMO has observed a healing abrasion measuring 0.5 cm in length over the left side lower middle region on the back of the trunk. The genital examination has revealed that she is having a fimbriated type hymen with fresh tear at 6 o' clock position, which was suggestive of recent vaginal penetration.

At the trial, several other officers who assisted in the investigation have given evidence apart from the witnesses mentioned above.

When the prosecution case was closed and the appellant was called upon for a defence, he has given evidence under oath.

It has been his position that he knew the prosecutrix well as both of them studied together at Kalaimahal Vidyalayam, in Nelukulam. He has stated that he worked at Mohan Sound Service shop situated in Mohan Multi Complex situated as Veppamkulam. He has known the 2<sup>nd</sup> accused also well, and knew that he had a red-coloured three-wheeler. While he was at the shop, the 2<sup>nd</sup> accused has come to the shop in his vehicle. The prosecutrix has also come, and all three of them have gone to a nearby ice-cream parlour. According to his version of events, after they had ice cream, the prosecutrix and the 2<sup>nd</sup> accused has invited him to come with them as they have somethings to talk about, which has resulted him taking them in the three-wheeler belonging to the 2<sup>nd</sup> accused. They have gone to Pamparimadu together. He has admitted that they went about 100 meters into the jungle and two of them went inside the jungle while he remained in the three-wheeler.

He has claimed that both of them returned after sometime and while they were returning, the 2<sup>nd</sup> accused removed the chain the prosecutrix was wearing and that was the reason for her to lodge a false complaint of rape against them. He has denied that he raped her.

### **The Grounds of Appeal**

At the hearing of the appeal, the learned Counsel for the appellant formulated the following grounds of appeal for consideration of the Court.

1. No identification parade was held, which caused prejudice towards the appellant.
2. The learned High Court Judge has rejected the defence version of events on a wrong premise.
3. The version of the prosecutrix does not favour the test of probability.

### **Consideration of The Grounds of Appeal**

It was the contention of the learned Counsel for the appellant, since the prosecutrix has claimed that the two persons who allegedly abducted her were strangers, the police should have taken steps to hold an identification parade once the appellant and the 2<sup>nd</sup> accused were arrested.

It was his view that the dock identification made by the prosecutrix at the trial has caused prejudice towards the appellant.

In relation to this ground of appeal, the learned Senior Deputy Solicitor General (SDSG) relied on the Supreme Court judgment in **Wanasinghe Vs. The Attorney General and Another (2011) 1 SLR 01** to argue that an identification parade in order to identify a suspect would not be necessary at all times, but only under certain circumstances. It was his view that since the arrest has been made soon after the incident and the prosecutrix has clearly identified the persons who committed the crime, there was no necessity to hold an identification parade.

In this context, I find it necessary to consider the stand taken up by the appellant in his evidence. It had been his position that the prosecutrix is known to him from his school days and the 2<sup>nd</sup> accused had an affair with the prosecutrix, which shows that the position of the appellant had been that both of them were well known to her. If that was the case, there would be no purpose in holding an identification parade as the prosecutrix will in anyway could clearly identify them. The facts revealed in evidence also shows that soon after the arrest, the prosecutrix has informed the police that the two persons arrested were the ones who committed the offence on her, which again mean that holding a parade would have served no purpose.

Therefore, I am unable to agree with the submission of the learned Counsel that the failure to hold an identification parade has caused prejudice towards the appellant.

Having determined as such, I will now proceed to consider the 2<sup>nd</sup> and the 3<sup>rd</sup> ground of appeal together, as they are interrelated.

The prosecutrix was an 18-year-old at that time and appeared to have been independent enough to move about on her own. According to her version of events, she has attended the church service on her own and had returned. While walking towards her home, which was about a kilometer away, she has been forced into a three-wheeler by two strangers and soon after she was taken in, a cloth has been placed on her face which resulted her getting unconscious. Her initial evidence had been to the effect that, when she regained consciousness, she saw blood in her vaginal area which is suggestive of the fact that she has been raped while being unconscious. However, subsequently, she has stated that the appellant raped her while the 2<sup>nd</sup> accused was filming it and later, the 2<sup>nd</sup> accused also raped her.



According to her version of events, after the incident, she has travelled again in the same three-wheeler towards the place where she was forced into the three-wheeler in order to get off of it, and later, the appellant and the other accused pushed her out of the three-wheeler.

The appellant, who gave evidence had given a different version of events. According to him, the prosecutrix was well known to him from his school days and she has come to the shop he was working in the afternoon of the day of the incident, where she met up with the 2<sup>nd</sup> accused. After consuming ice-cream together, he has agreed to take the prosecutrix and the 2<sup>nd</sup> accused in the three-wheeler of the 2<sup>nd</sup> accused as they informed him that they have things to discuss.

He has admitted to driving the three-wheeler and going into a wooded area and has claimed that the prosecutrix and the 2<sup>nd</sup> accused went inside the jungle and returned after sometime. He has claimed that while travelling back, the 2<sup>nd</sup> accused took the chain worn by the prosecutrix which resulted in a false complaint of rape against him.

I am of the view that since the appellant has also given evidence and had faced the test of cross-examination, the learned High Court Judge should have given equal weight to both the version of events in order to test the story narrated by the appellant.

In the case of **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167 at 176** following the Privy Council case of **Jayasena Vs. The Queen 72 NLR 313 (PC)** it was observed;

*"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality, without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

According to the version of events as described by the prosecutrix, there cannot be any eyewitnesses to the incident. Therefore, it is necessary for the Court to consider whether her evidence is cogent enough to be accepted without any corroboration in that regard.

It is an accepted fact that a person who is committing a crime of this nature would make sure no one will notice his actions, unless it happens by chance. It is therefore necessary to consider whether the version of events as narrated by the prosecutrix is probable under the circumstances relating to the offence committed.

In her evidence, the prosecutrix has admitted that after she got down from the bus, she went to the Mohan's shop, although she has claimed that she changed her mind and returned. The evidence of the appellant had been to the effect that she in fact came to the Mohan's shop where he worked and the 2<sup>nd</sup> accused also came there, and all of them had ice-cream together before leaving the place in the three-wheeler belonging to the 2<sup>nd</sup> accused.

Under the circumstances, it is necessary to consider whether the prosecutrix's claim that she was taken into the three-wheeler forcibly by the appellant and the other person can in itself be cogent enough to be believed. She has also claimed that when she was taken into the three-wheeler, they covered her face with a shawl which made her unconscious.

However, this version of events by the prosecutrix can also be construed as an attempt to show that she had no connection whatsoever with the accused persons in order to cover up what may have actually happened. As correctly pointed out by the learned Counsel for the appellant, the evidence of the appellant has not been contradicted to conclude that he is uttering falsehood in order to put the blame on the 2<sup>nd</sup> accused.

Under the circumstances, I am of the view that what happened after the alleged rape should also needs to be considered as material in deciding whether the prosecutrix's evidence was cogent enough in that regard.

According to the evidence of PW-02, he has seen the prosecutrix near a shop at the town and had come to know that she was there for some time. When questioned, she has informed him the problem faced by her which has led to PW-02 informing that fact to the police post nearby, and the police arresting the appellant and the other person.

However, according to the evidence of the police officer who made the arrest, while he was on duty near the Kulumaattu junction checkpoint, he has observed a girl approaching him while crying. He has got the assistance of one Pradeep which is a reference to PW-02 to inquire from the girl as to the reasons of her crying and had come to know about the incident of rape. Thereafter, the said police officer, together with some other officers had gone in pursuit of the suspects and had arrested the appellant and the 2<sup>nd</sup> accused a short distance away, while they were seated in a three-wheeler. This goes on to show that the evidence of the prosecution witnesses as to how they came to know about the incident or how they met the prosecutrix does not provide sufficient corroboration of the evidence of the prosecutrix.

According to the prosecutrix's version of events, after she was pushed out of the three-wheeler, it was some people from the area who took her near the shop and informed the police, which is different to the evidence of PW-02 and the police officer who made the arrest.

Another matter that concerns me is the reason as to why the appellant and the other accused and the prosecutrix travelled back together in order to drop off the prosecutrix in the same three-wheeler they have allegedly abducted her and committed rape on her.

The normal human behaviour would be to abandon her in a lonely spot or where the offence was committed, and move away from the place of the offence in order to cover their tracks. Especially, if they made her unconscious and committed this offence on her, they would have easily left after committing the act, leaving the prosecutrix to fend for herself.

The way the police officer who made the arrest had arrested the appellant and the other person shows that the two of them had not fled the area or attempted to cover up any crime, since they have been arrested in the vicinity of the checkpoint while being on the same three-wheeler. I find that all these factual matters require looking for some kind of corroboration as to the version of events by the prosecutrix if the trial Court is to act on her evidence alone.

On the question of requiring corroboration, **Glanville Williams** in his book ***Proof of Guilt* 3<sup>rd</sup> Edition at page 58 and 59** states as follows.

*“On a charge of rape and similar offences, it is the practice to instruct the jury that it is unsafe to convict on the uncorroborated evidence of the alleged victim. The rule applies to a charge of indecent assault, or any sexual offence, including an unnatural offence between males. There is a sound reason for it, because these cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl’s refusal to admit that she consented to an act of which she is now ashamed.”*

In **Gurucharan Singh Vs. State of Haryana AIR, 1972 S.C. 2661**, the Indian Supreme Court held thus;

*“As a rule of prudence, however, court normally looks for some corroboration on her testimony so as to satisfy its consciences that she is telling the truth and that the person accused of rape on her has not been falsely implicated.”*

However, this Court is very much mindful of what the Indian supreme Court observed in **Bhoginbhai Hirjibhai Vs. State of Gujarat (1983) AIR S.C. 753** which is equally applicable to Sri Lankan setting as well.

It was observed;

*“In the Indian setting, refusal to act on a testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to the injury.”*

As I have stated before, although one cannot always expect corroboration in a case of rape and other sexual abuse matters, I am also of the view that for the Court to act based only on the prosecutrix's evidence, such evidence should be probable and cogent enough to be believed.

In this regard, I find considering whether the prosecutrix has been consistent in her version of events should also be given equal consideration by the Court. When the prosecutrix was produced before the doctor, the history given by her to the doctor is a good yardstick that can be considered in order to conclude whether the prosecutrix has been consistent.

When she was produced before the doctor, she has informed the JMO that she faced this incident while coming back home from work, which is different to her evidence that she returned after attending Church service. She has informed the doctor that after taking her to a jungle area, one person engaged in sexual intercourse with her, and the other person took a video of the incident with a camera, which is also a different version to what the prosecutrix narrated in Court, where she has stated that both of them raped her.

I am of the view that this inconsistency of evidence invariably causes a reasonable doubt as to whether the prosecutrix has come out with the true version of events that took place when the incident occurred.

Although it appears that the learned High Court Judge has relied somewhat on the weaknesses of the defence case put forward by the appellant, it is trite law that a conviction cannot be entered based on the weaknesses of the defence.

In the case of **Kamal Addararachchi Vs. The State (2000) 3 SLR 393**, it was observed;

*“It is an imperative requirement in a criminal case that the prosecution case must be convincing no matter how weak the defence is, before the Court is entitled to convict an accused. What the Court has done in this case is to bolster up a weak case for the prosecution by referring to the weaknesses in the defence case, that cannot be permitted. The prosecution must establish its case beyond reasonable doubt.”*

At this juncture, I would also like to refer to what was stated at page 408 of the same judgement referring to the observation of **Justice Mackenna** referred to by **E.R.S.R. Coomaraswamy** in his book, the *Law of Evidence* Vol II (Book 2) page 1052 which reads thus;

*“When I have done my best to separate the truth from the false by these more or less objective tests, I say which story seems to me the more probable, the plaintiff’s or the defendants, and if I cannot say which, I decide the case as the law requires me to do in the defendant’s favour.”*

In the case of **Narender Kumar Vs. State of Delhi (NCT of Delhi, AIR 2012 SC 2281)**, it was held:

*“Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of the defence. However great the suspicion against the accused and however strong the moral belief and conviction of the Court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for the offence. There is an initial presumption of innocence of the accused and the prosecution has to bring*

*home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.”*

I am of the view that the appeal under consideration is also falling under the category where it is difficult to conclude whether the version of events narrated by the prosecutrix is probable enough to be believed as cogent, and therefore, a matter that should be decided in favour of the appellant on the basis that the prosecution has failed to prove its case beyond reasonable doubt against him.

I am of the view that it is not safe to let the conviction and the sentence stand in view of the considered discrepancies in the evidence placed before the Court.

Accordingly, allowing the appeal, I set aside the conviction and sentence of the appellant, and acquit him of the 1<sup>st</sup> count preferred against him.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal