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

*In the matter of an Appeal in terms of Section 331 of the Code of Criminal Procedure Act No 15 of 1979.*

**Court of Appeal No:**

**CA/HCC/0226/20**

**High Court of Gampaha**

**Case No:** HC/171/07

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

Thanthrige Don Shantha Alwis

**ACCUSED**

**AND NOW BETWEEN**

Thanthrige Don Shantha Alwis

**ACCUSED-APPELLANT**

**Vs.**

The Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT-RESPONDENT**

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| Before | : Sampath B. Abayakoon, J. |
| | : P. Kumararatnam, J. |
| Counsel | : Suhada Gamlath, P.C. with Sumudu Hewage for the Appellant |
| | : Hiranjan Peiris, S.D.S.G. for the State |
| Argued on | : 07-11-2023 |
| Written Submissions | : 06-11-2023 (By the Accused-Appellant) |
| | : 24-08-2022 (By the Respondent) |
| Decided on | : 21-02-2024 |

**Sampath B. Abayakoon, J.**

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Gampaha for committing the following offence.

1. That he committed the offence of rape on or about 3rd July 2003, at a place called Yatawaka within the jurisdiction of the High Court of Gampaha, on the female victim mentioned in the charge, and thereby, committed an offence punishable in terms of section 364(1) of the Penal Code as amended by Penal Code Amendment Act No. 22 of 1995.

After trial without a jury, the appellant was convicted by the learned High Court Judge of Gampaha of the judgement dated 02-09-2020, and after having considered the mitigatory and aggravating circumstances, sentenced the appellant for a period of 10 years rigorous imprisonment and to a fine of Rs. 10,000/-. In default of paying the fine, he has been sentenced to 3 months simple imprisonment.

In addition to the fine, he has been ordered to pay compensation of Rs.100,000/- to the victim of the crime, and in default, to serve a 1-year simple imprisonment.

It is against this conviction and the sentence; the appellant has preferred this appeal. .

**Evidence in Brief**

Before considering the grounds of appeal, I will now briefly summarize the evidence led at the trial.

The victim of this incident who has given evidence before the High Court as PW-01 was married, and a mother of a child during the time relevant to this incident.

On the day of the incident, her husband had been away, and she has gone to the Gramasewaka's office of the area to obtain a letter from him. She has left the Gramasewaka's office around 12 noon in order to get back to her house. Without taking the normal route, she has taken a shortcut footpath through a rubber plantation in the area.

While she was walking through the plantation, she has seen two persons standing on the footpath, one of them being the appellant. He was holding a rock in his hand and both of them were unknown to her.

When she was passing them, the appellant has called her 'අක්කේ' and had come and grabbed her. He has dragged her while covering her mouth with his hand. She has been dragged towards a ditch on the land. Although she has attempted to escape, her attempts had failed.

The other person who was with the appellant has done nothing, but had covered himself behind rubber trees. After dragging the victim towards the ditch, the appellant has lifted her clothes, removed her panty, and has forcibly committed sexual intercourse on her. She has stated further, that the perpetrator only removed her panty up to her knee, and committed rape on her.

Although she has shouted seeking help, no one has come. However, her evidence has been that there were no houses nearby and there was nobody in the houses situated some distance away at the time of the incident.

After having sexual intercourse with her, the appellant has left, and PW-01 has returned to her house and informed her husband and the mother-in-law. They have immediately gone to the police station and had lodged a complaint of the incident of rape. She has testified that the clothes she was wearing at the time of the incident was later handed over to the police and had identified them in the Court. The said clothes had been marked as P-01, P-02, and P-03. After the police complaint, she has been admitted to the hospital and on a subsequent day, she has identified the appellant as the person who committed rape on her at the identification parade held in the Magistrate's Court.

Under cross-examination, she has stated that she knows the appellant now as Shantha Alwis, but at the time of the incident, she did not know him and had never seen him before, but now knows that he is a person living in the neighbouring village.

It is noteworthy to mention that she has referred to the appellant as 'මම මල්ලි' in her evidence. Under cross-examination, it has been suggested to her that the appellant was a 17-year-old at the time of the incident, which may explain as to why the victim has referred to him as a younger brother.

In her statement to the police, she has stated that the person who raped her was a person of about 25 years, dark and appears to have a squint eye and was a person who has eaten betel.

Since she has denied making a statement to the police in that manner, the said contradictions had been marked as V-01 to V-04.

She has been very specific that she did not see the appellant until she identified him at the identification parade.

It appears that PW-03 mentioned in the indictment had not been in a position to give evidence before the Court due to a medical condition, and PW-02, the mother-in-law of the victim was deceased at the time the matter came up for trial.

The prosecution has called PW-11, the Officer in Charge (OIC) of Crimes Division of Nittambuwa Police during the time relevant to this incident.

According to his evidence, PW-01 had come to the police station on 03-07-2003 at 16.10 hours in a highly shocked state, and had informed that she was raped. The OIC has directed a female sub-inspector to record her statement and had immediately proceeded with the victim to inquire into the matter. The victim has shown him the place of the incident and he has observed a disturbance in the grass in the place shown by the victim. He has observed that the place was a rubber plantation. The house of the victim had been about 500 meters away from the place of the incident.

After the inspection, he has gone with the victim to her house, and had taken over the garments she was wearing as productions. Thereafter, the victim had been admitted to the hospital. He has identified the productions marked P-01, P-02, and P-03 as the clothes the victim was wearing when she came and complained to the police about the rape.

During his investigations, he has come to know about the suspect involved in the incident, namely the appellant, but had been unable to arrest him. According to him, the appellant has been arrested some days later during the night.

He has denied the suggestion by the defence that after the arrest, the appellant was kept at the police station in a manner others can see him. It had been the evidence of the OIC that since the appellant was due to be produced for an identification parade, he was kept properly concealed and produced before the Magistrate's Court for that purpose under similar care.

The police officer who arrested the appellant, namely PW-14 has testified that the appellant was arrested at 02.15 a.m. in the morning of 04-07-2003.

The defence has admitted that after the arrest, the appellant's statement was recorded at 9.40 am on 04-07-2003.

The police witnesses have denied the defence suggestion that the appellant was assaulted while in police custody.

The female Sub-Inspector of Police, namely PW-12, who recorded the statement of the victim has also given evidence and had confirmed that when the victim was making the statement, she was in a highly disturbed state and crying.

Since the medical officer who examined the victim after the incident was not available to give evidence before the Court, the prosecution has called the Acting Judicial Medical Officer (JMO) of Gampaha general hospital as PW-15 to produce and give evidence as to the medical examination of the victim.

The said Medico-Legal Report (MLR) has been marked as P-04. According to the MLR, the victim had been a 30-year-old female, and she had been admitted to the hospital on 03-07-2003 at 9.53 p.m. She has been discharged from the hospital on 05-07-2003.

The doctor has observed 3 nail marks on the victim. The 1st one had been to the left index finger and 2nd nail mark was on the left side of her nose. The 3rd injury had been referred to as multiple nail marks found on either side of the face. The JMO has explained the reasons as to why the said injury marks were identified as nail marks. On the examination of the vagina of the victim, the doctor has found no visible injuries or marks, but has opined that the victim being a married woman who has given birth to a child, an incident of this nature can happen without leaving any visible marks due to that reason. However, he has opined that nail marks observed on the face and the finger can be a result of the struggle with the attacker or an attempt to prevent her from shouting.

At the trial, the identification parade report has been admitted in terms of section 420 of the Code of Criminal Procedure Act.

At the conclusion of the prosecution case, the learned High Court Judge has decided to call for the defence of the appellant. Making a statement from the dock, he has denied any connection to the offence. He has stated that he was 16

years of age when the police arrested him for this offence, and was sleeping at his home he has claimed that he had no opportunity of raping the victim. He has also claimed that the police officers assaulted him and forced him to sign a statement.

**The Grounds of Appeal**

At the hearing of this appeal, the learned President's Counsel who represented the appellant formulated 2 grounds of appeal for the consideration of the Court.

1. The evidence led in the case was solely based on leading questions put to the witness and the weight that could be attached to such evidence is highly questionable.
2. The identification of the accused was based on totally unsatisfactory evidence and the learned High Court Judge has failed to evaluate the evidence in its correct perspective.

**Consideration of The Grounds of Appeal**

As the learned President's Counsel has taken up two grounds of appeal which are distinct from each other, I will now proceed to consider the said grounds of appeal separately.

**The 1st Ground of Appeal:-**

The submission of the learned President's Counsel was that the prosecution has extracted evidence from the victim in a manner unacceptable in a criminal trial. It was his submission that this amounts to a denial of a fair trial towards the appellant.

However, I am in no position to agree that the manner in which the prosecution led the victim's evidence had caused any prejudice towards the appellant.

In her evidence, after describing the manner she was dragged towards a ditch in the rubber plantation, when she was asked what happened to her, she has stated that it was him, meaning the appellant and no one else.

When probing further of what did he do, she has stated that he lifted her frock and the underskirt and did the thing (වැඩේ කලා).

When probed further in order to clarify what she was attempting to say before the Court, she has stated that the appellant inserted his male organ into her. She has explained that she was forced to lie on the ground face-up, and he inserted his male organ to her female organ. She has explained further that what was done by the appellant was similar to when she was having sex with her husband as a married person.

The evidence of the victim when taken as a whole, clearly shows that she was a person who has had no proper education, and a housewife with little contact outside of her family circle. She was not a person who could properly explain an incident of rape explaining the necessary ingredients of the offence as expected of a witness who has some knowledge of the offence of rape.

When taken as a whole, it is clear that the evidence of PW-01 has been to the effect that the appellant forcibly dragged her into a ditch and performed sexual intercourse on her without her consent. I do not find a reason to believe that the prosecuting State Counsel has put unwarranted questions with a view boosting the case, causing prejudice towards the appellant. It is abundantly clear that the questions put to the witness had been to get clear clarifications of the evidence narrated by her using terms familiar to her.

I find it relevant to mention the Indian Supreme Court decision in the case of **State of Punjab Vs. Gurmeet Singh and others (1996) 2 SCC 384,** where it was held that;

> *"The Court must, whilst evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as it involved in the commission of rape on her."*

I am of the view that the evidence of the victim needs to be looked at along with the other evidence led at the trial.

Soon after the incident, she has gone to the police station and complained as to what happened to her. The OIC of the Crimes Division of Nittambuwa Police as well as the female Sub-Inspector who recorded her statement has clearly observed the highly disturbed and emotional state of the victim when she came to the police station. This clearly shows that she was not trying to concoct a story that she was raped.

Her evidence had been that when she attempted to cry out, the appellant forced her mouth shut by using his hand while dragging her away. The medical evidence clearly establishes the nail marks on her face which corroborate the evidence of the victim.

Since the victim was a married female with a child, the JMO being unable to observe any visible injuries on her vagina has been clearly explained.

For the reasons as consider above, I find no merit in the 1st ground of appeal.

**The 2nd Ground of Appeal:-**

The contention of the learned President's Counsel was that the identity of the appellant as the person who committed rape on the victim had not been established beyond reasonable doubt.

He submitted that the prosecution has failed to lead evidence from PW-01 to establish the physical features of the person who committed the offence on her, when she was giving evidence.

It was his view that this was an encounter occurred within a short span of time and there was hardly any opportunity for the victim to have a clear memory of the person who committed the crime.

Citing from Turnbull Guidelines as to the way the Court should look at questionable identity, it was his submission that the learned High Court Judge has failed to consider the evidence in the proper perspective.

Citing the contradictions marked P-01 to P-04, it was his submission that the description given by the victim in her police statement as to the assailant, does not fit the appellant, although he was identified at the identification parade.

It was submitted that; therefore, the trial Court should not have relied on the identification parade notes as to the identity of the appellant. It was submitted further that the learned High Court Judge has failed to consider the dock statement made by the appellant in the judgement.

The evidence of the victim is clear that the incident happened when she was walking past the appellant and the other person who was with him. By referring to the appellant as a younger brother (ඔහු මල්ලි), she has identified him as a young person. She has been dragged for some distance. There had been a struggle between the victim and the assailant. The victim has been forced to the floor in a face-up position and had been raped. I find that this is not a situation where the victim has only had a fleeting glance of the assailant, but had a clear opportunity to have in her memory the person who raped her.

Since this is a matter where the identity of the appellant had come into question, I find it relevant to mention the guidelines set in the case of **Regina Vs. Turnbull (1977) Q.B. 224,** which held that where a case against an accused depends wholly on the correctness of the identity of that person, the Judge should warn the jury of the special need for caution before relying on the correctness of the identification by the witness.

The said Turnbull guidelines require a trial Judge to be mindful that;

- *Caution is required to avoid the risk of injustice.*
- *A witness who is honest may be wrong even if they are convinced, they are right.*
- *A witness who is convincing may still be wrong.*
- *More than one witness may be wrong.*
- *A witness who recognizes the defendant even when the witness knows the defendant well may be wrong.*

Some of the circumstances a Judge should direct the jury to examine in order to find out whether a correct identification has been made include;

- *The length of time the accused was observed by the witnesses.*
- *The distance the witness was from the accused.*
- *The state of the light.*
- *The length of time elapsed between the original observation and the subsequent identification.*

The case of **Sigera Vs. The Attorney General (2011) 1 SLR 201** was a case the question of the identity of the accused had been discussed. It was held:

> "*The identification was not in a difficult circumstance or in a multitude of persons in a crowd or in a fleeting moment. To apply the Turnbull principles, the identification had to be made under difficult circumstances. In this case, although the incident took place during night, there was ample light shed by the bulb of the lamppost that was burning. There was no congregation of multitude of persons in a crowd but only the accused appellant and the deceased. In order to inflict the injuries on the deceased, the assailant had to come very close to the deceased.*"

Similarly, in the given situation only the assailant and the victim have been present, and this was an incident happened in broad daylight. The victim had struggled with the assailant and the victim had a clear opportunity to see the assailant. Hence, I am of the view that this was no a situation where Turnbull guidelines have a strict applicability.

In this matter, although the defence has marked four contradictions as to the features of the person mentioned by the victim when she made her statement to the police, I find that those contradictions are immaterial in the context that the appellant has been positively identified at the subsequent identification parade and the relevant facts and the circumstances taken as a whole.

The contradiction marked V-01 relates to the possible age of the person. She has stated in her statement to police that the person who committed rape on her was about 25 years of age, which clearly depends on the physical appearance of the person. Even a young person may look like much older. That does not mean that the victim had failed to identify the appellant correctly.

The contradiction marked V-02 is about the skin colour of the person where she has mentioned that the assailant was dark in complexion which also may be subjective to the persons observation of that fact.

The contradiction V-03 is about a squint in the eye, however it is clear that she has not made a definite statement on that. What she has stated was, that the person appeared to be a squint-eyed person.

The 4th contradiction relates to what the victim has stated to police that the assailant was a person appeared to be one who chewed betel nuts. That is also a thing that the victim may have observed as to the state of the person who sexually assaulted her at that time.

When PW-01 was giving evidence, although the Counsel who represented the appellant has cross-examined PW-01 on these contradictions, if the

contradictions were material contradictions, he could have confronted the witness in a manner that establishes the appellant was not a person with such physical features. Although the probable age observed by the victim in 2003 cannot be materially challenged when the victim gave evidence in 2017, some 15 years after the incident, at least two of the features, namely, if the appellant was not a dark-skinned person or a squint-eyed person, should have been put to the witness to challenge the credibility of her evidence. I find that no such suggestion has been put to the witness, other than saying that the witness has identified a wrong person.

Although she has been questioned on the basis that she identified a person who had no squint eye at the parade, no direct question has been put to the witness in this regard.

In the case of **The Attorney General Vs. Sanadnam Pitchi Theresa (2011) 2 SLR 292 at page 303, Shirani Tilakawardane,J.** stated:

> *"…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 and tenor 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.* ***(Vide-Bogm Bhai Hirji Bhai Vs. State of Gujarat, AIR (1983) SC 753)"***

Another matter that needs the attention of the Court is whether there was any possibility for PW-01 to see the appellant before she identified him at the identification parade.

Other than stating that when the appellant was arrested, he was kept at the police station in a manner that others can see him, there has been no allegation that an opportunity was provided to PW-01 by the police to look at the appellant before he was remanded. The victim has given clear evidence to show that she

was able to see the appellant only at the identification parade after the incident. The evidence led at this action clearly establishes that fact.

According to the evidence led in this case, after the incident of rape happened on 03-07-2003, the victim had been admitted to the hospital on the same day at 9. 53 in the night. She has been discharged on 05-07-2003. The appellant has been arrested in the early hours of 04-07-2003 at 2.15 am, which means that he had been in remand custody when the victim was released from the hospital.

This sheds no doubt as to the identification of the appellant at the identification parade.

It was submitted by the learned President's Counsel that the learned High Court Judge has failed to consider the dock statement made by the appellant in the judgement.

It is settled law that even a dock statement can be considered as evidence subject to the infirmities it carries, not being subjected to an oath or the test of cross-examination. In this matter, the appellant has made a short dock statement which amounts to a denial of the charge against him, claiming that he was a person of young age at that time and innocent of any wrongdoing.

A dock statement becomes relevant if it creates any reasonable doubt as to the evidence of the prosecution or if it can be considered as a reasonable explanation as to the evidence against the appellant. I do not find any basis to consider as such, when considering the dock statement of the appellant.

Although there may be infirmities in the judgement of the learned High Court Judge, such infirmities become relevant only if it has occasioned a failure of justice and caused a prejudice to the substantial rights of the appellant.

The Article 138 of the Constitution is the provision which confers jurisdiction to the Court of Appeal to hear and determine appeals of this nature. The proviso of Article 138 reads as follows;

**"Provided that no judgment decree or order of any court shall be reveres or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

The similar statutory provision in section 436 of the Code of Criminal Procedure Act reads as follows;

**436. Subject to the provisions hereinbefore, contained in any judgement passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-**

**(a) Of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this court; or**

**(b) Of the want of any sanction required by section 135,**

**Unless such error, omission, irregularity or want has occasioned a failure of justice.**

The following test was formulated by Viscount Simon L.C. in the case of **Stirland Vs. D. P. P.- (1944) A.C. 315 at 321,** which reads;

*"A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."*

I find that even if there are infirmities in the judgment, if properly considered, it would not have altered the final verdict.

For the above reasons considered, I do not find merit in the 2nd ground of appeal urged by the learned President's Counsel either.

Accordingly, the appeal is dismissed for want of merit.

However, having considered the fact that the appellant had been in incarceration from the date of his conviction on 02-09-2020, it is ordered that the sentence of 10 years of rigorous imprisonment shall deem to have commenced from 02-09-2020.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal