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

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

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal No:
CA/HCC/61/2021
High Court of Hambanthota
HC/50/2011

Vs.

Wanigathungage Nihal Shantha

Accused

AND NOW

Wanigathungage Nihal Shantha

Accused – Appellant

Vs.

Hon. Attorney General,
Attorney General Department,
Colombo 12.

Complainant- Respondent

Before : MenakaWijesundera J.
Wickum A. Kaluarachchi J.

Counsel : Saliya Pieris, PC with Geeth, AAL and Anushankan for the Accused-Appellant.

Janaka Bandara, DSG for the State.

Argued on : 18.03.2024

Decided on : 03.04.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 9.2.2021 of the High Court of Hambantota.

The accused appellant has been indicted with others unknown to the prosecution for two counts of gang rape and robbery under the provisions of the Penal code to have been committed on the 5.9.2002.

The prosecution led the evidence of the two victims and their mother and the police and the doctor who had examined the victims. The prosecution had also relied on the evidence of the identification parade which had been held 10 months after the incident but the appellant had been identified at the parade.

The learned trial judge upon the conclusion of the trial had convicted the appellant for the charges of gang rape and robbery.

The appellant being aggrieved by the said conviction and sentence had lodged the instant appeal.

The grounds of appeal raised by the counsel for the appellant were as follows,

1)Identity of the appellant was not being proved beyond a reasonable doubt,

2)the trial judge wrongly considering the omissions,

3)the trial judge failing to consider the case for the defense,

4)the trial judge wrongly considering the Ellenborough dictum and the Lucas principle.

According to the evidence of **PW3** who was the mother of the two victims had said in Court that on the day of the incident in the night when all of them had gone to sleep, a gang of about six persons had entered their house and had robbed and raped her two girls. She had further said that the entire incident

had taken place for about two hours and the gang had been covering their faces.

But at one point she had said that one person was identified because his face was not covered, but to police she had said that their faces were covered with black cloths.

Thereafter she had said that the appellant was identified because he had come in the afternoon to collect a beetle leaf but in evidence, she had said that she had not seen him before.

Furthermore, in evidence she had said that she identified the appellant with the aid of a torch but that too she had not told police and an omission had been brought to the notice of Court.

She had also said that they had occupied a small Cadjan house on Pattie mahattayas land and his son was a frequent visitor to their house. She had lodged the 1st complaint two days after the incident and she had said that the victims had been very week and that they were taken to the hospital instead, of going to the Police.

But this Court observes that her evidence had not been very consistent and the form of identification of the appellant appears to be very questionable.

Thereafter, the prosecution had led the evidence of victim **number 2** and witness number 2 namely **Lakmali** who had corroborated the mother but she had very specifically said that in the crowd who came Pattie Mahattayas son namely Udayakumara had been present and that he dragged her out of the house and raped her.

She had said that at the time they entered the house she had identified the appellant and the Pattie mahattaya's son with the aid of the torch light held by her brother. But apparently, she had not said the same to the police. (165 of the appeal brief)

She had further said that she identified the appellant when his face mask fell off but the same, she had not told the police. (167 of the brief)

Later in evidence she had denied that the brother had carried a torch although she had said at the beginning that the brother has had a torch and with the aid of the same that she identified the appellant.

But to Court when questioned at page 170 and 171 the witness had very clearly said that the appellant raping her, she could not say with certainty.

But she speaks to the presence of Udaya kumara and he dragging her away and but the said Uadayakumara had been discharged by the Attorney General.

Hence, the evidence of the instant victim appears to be very uncertain and vacillating all the time which creates a reasonable doubt with regard to the identity of the appellant at the scene.

This doubtful situation is further aggravated by the fact that the person who had been identified by the name had been discharged by the Attorney-General.

Next, the prosecution had led the evidence of PW1, who had been a victim and she corroborates the other witnesses but does not identify any one other than Pattie mahattaya's son Udaya kumara.

But we note that the said Udaya kumara had been discharged by the Attorney General.

The doctor who had examined the victims had given evidence and has said in evidence that the two victims in their history had implicated Pattie mahattaya and his son and no one else. Hence, the discharge of Pattie Mahattaya and his son Udaya Kumara raises our concerns.

The police had received the first complaint two days later and accordingly investigations had commenced but the statements recorded had not revealed the name of any suspect but investigations had continued and the appellant had been taken into custody ten moths later and had been produced to an identification parade and at the parade he had been daintified.

But police had admitted that the appellant had been photographed while in the cell.

The prosecution had concluded leading the evidence and the defense had been called and the appellant had made a statement from the dock in which he had denied the entire incident and had called his mother also to give evidence and she has corroborated him.

The trial judge had at the end of the trial convicted the appellant for all the charges in the indictment and had sentenced him accordingly.

Upon considering the submissions of both parties we note that the main witnesses in the case for the prosecution had been as said before been vacillating and not being very cogent and consistent which creates a serious doubt in the case for the prosecution with regard to the identity of the appellant at the scene.

This doubt is further substantiated by the fact that both the victims and their mother had spoken with regard to the presence of Pattie mahattaya's son and Pattie Mahattaya at the scene and in fact actively participating by dragging PW2 out of the house, has been discharged by the Attorney General.

The only source of illumination had been a bottle lamp in the house which also according to the witnesses had been extinguished and the brother of the victim had been holding a torch but that too is later denied by the witnesses.

The police also had said that the only source of illumination to the house is the bottlelamp. Hence, it raises a serious doubt with regard to the identification of the appellant at the scene.

Apart from that PW2 who had identified the appellant as he entered the house, but she had not said anything to the police including her mother. Hence, the said omission creates a serious doubt in the credibility of the prosecution witnesses which the trial judge had failed to consider.

Infact, the trial judge had said that the omissions had not been proved by the defense but we observe that there was nothing to prove because the prosecution had admitted the omissions and the contradictions marked at page 329 of the brief.

Therefore, we have to agree with the learned President's counsel for the appellant that the omissions had been wrongly considered by the trial judge.

The prosecution had depended on the evidence of the identification parade but we observe that the said parade had been held 10 months after incident and the evidence at an ID parade is only corroborative evidence and not substantive evidence.

It has been held in the case of CA-120-2004 Ranmukaarachchige Chaminda Roshan vs The Attorney General by Justice Sarath DeAbrew that " identification parade must be held at the earliest if it is to be of value so that the impression of the witnesses remains fresh in their minds and do not have the opportunity to compare notes with the others".

Hence, as the evidence with regard to the identity of the appellant given in Court appears to be very doubtful and vacillating the identity parade evidence having been held very belatedly and violating the principles of a proper ID parade does not add any value to enhance the validity and the acceptability of the identity of the appellant.

But the trial judge had failed to address her mind to these factors.

As such, we have to agree with the learned President's counsel for the appellant that the identity of the appellant has not been proved beyond a reasonable doubt.

The third ground of appeal raised by the appellant is that his defense has not been properly considered by the trial judge.

At page 471 of the judgment of the trial judge we find that trial judge had unduly and very shockingly had cast an undue responsibility on the appellant to prove his innocence which is not to be found anywhere in the history of criminal law prevalent in our country. Furthermore, she had cast undue aspersions on the appellant for failing to give evidence on oath and opting to make a statement from the dock to which the appellant is more than entitled under the law prevalent in this country.

But we observe that the trial judge has been naive to these principles in criminal law.

Hence, we find that the trial judge had not only failed to consider the defense but has shockingly failed to understand the basic rights of an accused person enshrined in our Constitution.

As such, we find that the appellant has been denied a fair trial in the trial court.

Lastly, the counsel for the appellant has raised that the trial judge had considered the Ellenborough dictum and the Lucas principle wrongly, by reading the judgment and by reading the comments of the trial judge with regard to these two principles we find that she has grossly misunderstood the said principles and has tried to apply them wrongly thereby causing a serious miscarriage of justice to the appellant.

As such, this Court finds no reasonable ground to uphold the conviction and the sentence of the trial judge hence, we set aside both the conviction and the sentence of the trial judge and acquit the appellant and allow the instant appeal.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal