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

The Petition of appeal under Article 138 of the constitution of the Democratic Socialist Republic of Sri Lanka and in terms of section 14 of the Judicature Act, read with section 331 of the code of criminal Procedure Act No. 15 of 1979 against the imposed convictions and sentence s of the learned High Court Judge in Case No.1325/03.

Court of Appeal Case No.
CA 220/10
HC Embilipitiya 36/08

Rajapaksha Ratnayaka Chandraratne,
No: 15/03,
Wewa para,
Sooriyawewa.

Accused-Appellant

Vs

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

Respondent

Before : **Achala Wengappuli,J**
Devika Abeyratne,J

Counsel : Dr. Ranjith Fernando for the Appellant
P.Kumararathnam, SDSG for the Respondent

Argued on : 19th of February 2020

Decided on : 24th of July 2020

Devika Abeyratne,J

The accused appellant (hereinafter sometimes referred to as the appellant) was indicted in the High Court of *Embilipitiya* for committing an offence punishable under section 364 (2) E of the Penal Code as amended by Act No 22 of 1995.

After trial, the accused appellant was convicted and sentenced to Five years rigorous imprisonment, a fine of Rs 5000/- and in default, six months of simple imprisonment, and ordered to pay the victim a sum of Rs 50000/- as compensation and in default, six months simple imprisonment.

Being aggrieved by the conviction and sentence the appellant has preferred this appeal.

The following grounds of appeal were urged by the counsel for the appellant as mitigating against the maintenance of the conviction; that there is no legal adoption of evidence as per section 48 of the Judicature Act by the learned trial Judge who delivered the judgment ; the learned judge did not have the benefit of the demeanor of the

victim and as such the appellant was denied a fair trial; as there are infirmities in the evidence of the victim it was unsafe to rely on her uncorroborated evidence; no evaluation of the material contradictions; the medical evidence is unsupportive of the evidence of the victim.

First, I will consider the submission of the counsel that the trial judge has not adopted the proceedings formally under section 48 of the Judicature act.

Section 48 of the Judicature acts provides as follows;

Any action, prosecution, proceeding , matter on any inquiry preliminary to the committal for trial or otherwise has been instituted or is pending can be continued before a successor of the judge in the case of death, sickness, resignation, removal from office , absence from Sri Lanka or other disability (of the judge who heard the case / inquiry)

1. *To act on the evidence already recorded by his predecessor or*
2. *To act on the evidence partly recorded by the predecessor and partly recorded by him- or*
3. *If he thinks fit to re summon the witnesses and commence the proceedings afresh.*

Out of the three Judges who heard the instant case, two judges have recorded that the proceedings before the predecessor judge is adopted and the learned judge who delivered the judgment has not so recorded.

Evidence has commenced before the learned judge on 26.08.2009 and the accused had been present and represented by counsel on that day. The registrar of the High Court has marked the Birth Certificate of the victim and the case for the prosecution has concluded, and the accused was explained his rights. On a subsequent date the accused has given his statement from the dock and the evidence of the witness for the defence has been led. No

application has been made on behalf of the accused to recall a witness or to commence proceedings afresh.

Section 48 does not stipulate a formal written statement to the effect that proceedings are adopted. In the instant case proceedings have continued without any application to recall any witness. Thus, it is safe to infer that the proceedings were duly adopted.

In ***Millaniya Ranminige Daniel vs Attorney General CA 164/2007*** decided on 21.07.2010 it was held by Justice W. L. Ranjith Silva *.....under section 48 of the Judicature act, the succeeding judge has the power to act on the evidence already recorded and thus the rule laid down in section 48 is in favour of an adoption of the proceedings by the succeeding judge. Even in the absence of a positive record of the fact of the adoption of the evidence, the fact that the succeeding judge had continued with the proceedings without any objection from either party would tantamount to an adoption of proceedings within the meaning of section 48 of the Judicature act ..."*

In the more recent Judgement of Justice Prasanna Jayawardena in ***SC Appeal No. SC/CHC/37/2013 Central Finance Company PLC Vs. Sappani Chandrasekera and another.***

It is stated that *section 48 vests a discretion in the succeeding judge in a civil trial to decide which of the three lines of action referred to in section 48 should be followed when a case heard by a predecessor judge is taken over.* It is stated,

> *"However, the discretion vested in the succeeding judge to follow one of the aforesaid three lines of action must be exercised reasonably since whenever the law vests a discretion in a Court, it is implicit that such discretion has to be exercised reasonably. When a succeeding judge is weighing how he should exercise the discretion vested in him by section 48 and which line of action envisaged in section 48 should be chosen by him, his decision will*

depend on the facts and circumstances of the case before him."

Justice *Jayawardena* has quoted with approval the following passage from ***Justice Salam's*** decision in; ***AG vs. SIRIWARDANE 2009 2 SLR 337*** *at pg. 354-355 who observed,*

> *"But the application of section 48 may vary depending on the facts and circumstances of each case. Since it is a discretion vested in court, it should have been exercised diligently for it is said that a person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so - he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reasons direct. He must act reasonably (Roberts us. Hapwood (8) at 613)."*

Justice *Jayawardene* in that case has further decided that the succeeding judge should have given the parties an opportunity to be heard with regard to which course of action outlined in Section 48 should be followed.

However in the instant case it can be clearly seen that the evidence of the last of the prosecution witness has been led before the learned judge who delivered the judgement. Thereafter several dates have been obtained before the rights of the accused was explained. The accused who was represented by counsel had ample opportunity to demand that the witnesses be *re-summoned* and *re-heard*, which he failed to do.

It is also clear that section 48 gave the judge discretion. "*To act on the evidence already recorded by his predecessor*" which the learned judge has correctly followed and proceeded to prepare and deliver judgement.

In the circumstances of the instant case, I cannot agree with the submission of the counsel of the appellant that the non-adoption of the proceedings formally in writing, was a violation of a fair trial or that there was a miscarriage of justice due to that reason.

With regard to the incident, according to the prosecution, the victim is a girl of 15 years of age who was living with the parents and one of her brothers, right opposite the house of the appellant. On 9.12.2002 PW I, the victim has returned home around noon from a tuition class to find the front door of her house locked and she was seated outside when the appellant had come and inquired whether his wife has come there , to which she has replied in the negative and has said there was no one at home.

Thereafter, the victim has gone to the back of the house where the kitchen is located and finding that it was unlocked was serving herself some food when the appellant has come there and asked for a few matchsticks. When she went to get it, the appellant has pushed her to the floor of the kitchen holding her hands tightly, and closing her mouth with his hand has removed her clothes and has engaged in sexual intercourse. At one point she is alleged to have fainted and has regained consciousness when the appellant was about to leave the kitchen. When she was getting up from the ground, from the open kitchen door, she has seen the wife of the appellant coming on the road. She has noticed blood on her underskirt and something liquid around her genitals when she stood up.

As per pages 59 and 79 of the brief she has told the wife of the appellant about the incident, but not all the details. She has washed the clothes she was wearing. When her mother came around 5 pm that evening she has informed that she was raped by the appellant, who in turn has informed the father. When they were getting ready to go to the police station which was about 5 miles away, the father has told that it was too late to go.

PW 1 and the mother have gone to the Police station the following day but were turned back by the police as they were busy attending a function. Finally, on 11.12.2002 a complaint has been

lodged and the victim was referred to the medical examiner who has examined her the following day being the 12.12.2002, that is on the third day after the alleged incident. The Victim has stated that the *Grama Sewaka* was informed of this incident before going to the police station in page 84 of the brief.

PW 5, *Dr Randombage* has evidenced that according to the short history given by the victim when she was examined at the Government Hospital *Sooriyaweva* on the 12.12.2002, that her neighbor *R.R. Chandraratne* has raped her on 9.12.2002 around 12.15 pm. He has observed two tears in the vagina which he has estimated to be about three days old. He has not observed any other external injury and he has not seen any redness or bleeding in the vagina area and that the victim did not complain of any pain to the touch which is usually not expected after 3 days of such an incident. In page 45 he has answered as follows;

ප්‍ර : කන්‍යාපටලයේ ඉරීම් නිශ්චිත වශයෙන් කාලනිර්ණය කරන්න පුළුවන්ද?

උ : පුළුවන්. මතුපිටින් අනුමාන වශයෙන් කිවහැකියි ඉතා සිදුවූ තුවාලයක්නම් වේදනාව ඇති වෙනවා එවැනි තුවාල දින තුනකට අඩු කාලයකදී සුව වෙනවා.

ප්‍ර : මේ තුවාල පරීක්ශා කරන වෙලාවේ ලේ ගැලීම් තිබුනද?

උ : නැහැ.

ප්‍ර : මේ තුවාල පරීක්ශා කරන වේලාවේ වේදනාව ඇති බව කිවුවාද?

උ : නැහැ.

ප්‍ර : ඒ අනුව තමයි ඔබතුමා කියා සිටින්නේ දින 3 කට වඩා පැරණි තුවාලයක් වියහැකියි කියා?

උ : එහෙමයි. ලේ ගැලීම් නිසා වේදනා නිසා එහි ඉරීම් වල රතුපාට නිසා ඉතා ආසන්නයේ වූ තුවාල කියා විය හැකියි

Therefore, his evidence has been that the short history given to him is compatible with his observations and confirmed that a penile penetration has taken place.

PW 3 is the mother of the victim who testified that when she was returning home around 5 pm after attending a "Samurdhi" matter , about 20 meters away from her home, she has met the wife

of the appellant who has cried and told about an incident which involved PW1 her daughter and when she came home, the victim has informed that she was raped by the appellant. When they were getting ready to go the police station that evening itself, was advised by her husband not to go as it was late evening.

The victim and the mother have given a plausible explanation regarding the delay in making a statement to the police. It is regrettable that the police without attending to the complaint straight away acted in an irresponsible manner, by which fact the medical examination was delayed. However, it is evident that PW 1 has complained at the earliest opportunity which presented itself therefore, the test of spontaneity and contemporaneity is in her favour.

In the Dock Statement of the accused he has admitted going to the victims house while one of his relatives was at home, (who gave evidence on behalf of the accused,) to ask for a few match sticks to light the fire to make tea. He has stated he spent about 10 minutes there, and when returning, his wife has seen him and scolded him for going to that house. According to him there was animosity between his wife and the victim's family, although he did not have any issue with them.

The witness for the accused has testified that he was at the appellant's house when the appellant went to the neighbour's to borrow some match sticks and it took about 10 minutes for him to return and that he heard the wife of the appellant scolding the appellant for going to the neighbour's house.

I shall now consider whether the evidence of the victim is credible. The victim is a minor known to the appellant and his family who are her immediate neighbours. The defence attempted to state that there was animosity between the wife of the appellant and the victim's family, the basis being the brother of the victim having an affair or a relationship with the wife of the appellant.

It was admitted by the victim and her mother, that at one time the two families were not good with each other, however, in the recent times they were having a cordial relationship. (pages 113, 104, and 112 of the brief).

pages 113

ප්‍ර : විත්තිකරුගේ භාර්යාව තමාට කතා කලේ?

උ : ඔව්.

ප්‍ර : කතා කරල මුලින්ම එයා මොකද කිවුවේ?

උ : අක්කෙ පොඩ්ඩක් නතර වෙන්න කියල කිව්ව.

ප්‍ර : පාරෙදී?

උ : ඔව්. එතනදි මම ඇහුව ඇයි කියල. ඒ පාර එයා මුහුන අතින් වහගෙන ඇඩුව. එතනදි මට ලොකු කුතුහලයක් ඇති වුණා. මොකද උනේ කියල කියන්න කියල මම කිවුවා.

ප්‍ර : තමා සමග ලාලනී කියල කෙනෙක් සිටියනේ ද?

උ : ඔව්.

ප්‍ර : එයා කවුද?

උ : ලඟ ගෙදරක කෙනෙක්.

pages 112

ප්‍ර : නමුත් ඒ කාලයේ විත්තිකරු තමාලා ආශ්‍රය කලේ නැහැ?

උ : ඒ කාලේ ආශ්‍රය කලා.

ප්‍ර : තමා ටිකකට කලින් කිවුවා නේද ගරගෙන් හිටිය කියල?

උ : ඒ. සිද්ධියට අවුරුදු දෙකකට කලින්. සිද්ධිය වන කාලයේ යාලුයි.

ප්‍ර : අවුරුදු දෙකකට උඩින් තරහ කාලයේ චන්දසීලි සිටියේ?

උ : රට.

ප්‍ර : චන්දුශීලි මුලින්ම ගෙදරට ඇවිත් කොහේද සිටියේ ?

උ : ගෙදර.

ප්‍ර : සුනිල් ශාන්ත කොහෙද සිටියේ?

උ : කොළඹ.

pages 104

ප්‍ර : ඒ මොන කාලෙද?

උ : මේක වෙන්න අවුරුදු 3,4 කට උඩදි.

ප්‍ර : මොන කාරණයක් උඩද තරහ උනේ?

උ : මෙයාගෙ බිරිඳයි, අපේ පුතාගෙයි අනියම් සම්බන්ධයක් නිසා ඒ මිනිස්සු තරහ වෙලා හිටිය අපිත් එක්ක.

ප්‍ර : මොන පුතා එක්කද?

උ : සුනිල් ශාන්ත එක්ක

ප්‍ර : ඒ හින්දා ගෙවල් වලට යන්නෙ , එන්නෙ නැතුව හිටියද?

උ : ඔව්

ප්‍ර : මේ සිද්දිය වූ කාලයේ විත්තිකරු කතා කලාද?

උ : කතා කලා, මෙම සිද්ධිය වෙන්න දින 2,3 කට වගේ කලින් ගම්පිරිතට ආවා.

ප්‍ර : මෙම සිද්දියෙන් පස්සෙ විත්තිකරු සමග කතා කරන්න පුලුවන් උනාද?

උ : කතා කලේ නැහැ.

This evidence has not been assailed. This fact can be further supported by the behavior of the appellant himself as according to the victim, the appellant has inquired whether his wife is at the victim's house when he first made conversation with her, which was not challenged in cross examination.

The evidence of the mother of the victim was that she got to know about the incident from the wife of the appellant and according to the victim she has told the wife of the appellant about the incident *albeit*, not all the details, soon after the incident. The appellant's dock statement and his witness's evidence have to be considered in that background. The reason for the wife scolding the appellant can be inferred from the above evidence.

The defense was not able to establish that the letter that was shown to the victim when cross examined, was written by her. The defense also failed to establish that the victim was involved with either Chamara (an unknown person) or Tharanga (a friend of the brother). It was apparent that mentioning of these two young males was an attempt to cast a doubt in the credibility of the evidence of the victim.

However, the appellant failed to cast a doubt in the evidence of the prosecutrix.

The counsel's contention that the evidence of the victim is unsupportive of any corroborative evidence is based on very immaterial facts, for example the mothers silence about the blood stains, the clothes the victim was wearing not been a production , the police being told the accused entered from the rear side door.

The counsel for the appellant contended that the learned trial judge has failed to evaluate the contradictions. The contradictions marked as V1 to V6 are not material contradictions that go to the root of the case and they have not created a doubt about the credibility of the witness at all nor has it caused any injustice to the appellant.

In ***Premasiri Vs The Queen*** 77 NLR 86 The Court of Criminal Appeal held *'in a charge of rape it is proper for a jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such character as to convince the jury that she is speaking the truth.'*

In ***Sunil and another vs The Attorney General*** 1986 1 SLR 230 it was held *'Corroboration is only required and or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible, his testimony should be rejected and the accused appellant acquitted. Seeking corroboration of a witnesses' 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 uncorroborated testimony of a woman victim of a sex offence but if the evidence is convincing such evidence could be acted even in the absence of corroboration.

In ***Sumanasena vs Attorney General*** [1999] 3 Sri LR 137 it was held *that evidence must not be counted but weighed and the evidence of a single witness if cogent and impressive could be acted upon by a court of law.*

When considering the totality of the evidence, it is my considered view that the evidence of the prosecutrix is credible, cogent and impressive and that her evidence is corroborated by the evidence of the mother and the medical evidence.

The evidence for the defense was not strong enough to create a doubt in the case for the prosecution and I am of the opinion that the prosecution has proved the case beyond reasonable doubt. Therefore, I see no reason to interfere with the learned trial judge's conviction.

With regard to the sentence, section 364 (2) E stipulates a minimum mandatory sentence of 10 years. The learned State Counsel has stated that the sentence is manifestly inadequate and contrary to law. Considering that the victim was a girl under the age of 16 at the time of the incident, we are mindful of the fact of the requirement of imposing the mandatory sentence imposed by the law. Accordingly, we set aside the sentence of Five years rigorous imprisonment imposed and substitute 10 years rigorous imprisonment to be entered against the accused. The rest of the sentence to remain unchanged.

Subject to the above variation of the sentence, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI ,J

I Agree

JUDGE OF THE COURT OF APPEAL