

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

*In the matter of an Appeal under section
331 of the Code of Criminal Procedure Act
No- 15 of 1979.*

Court of Appeal No:

CA/HCC/0084/21

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Chilaw

Damballage Buddhika Wimalarathna

Case No: HC/27/2017

ACCUSED

AND NOW BETWEEN

Damballage Buddhika Wimalarathna

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Ershan Ariaratnam for the accused Appellant
: Jayalakshi de Silva, SSC for the Respondent
Argued on : 01-09-2023
Written Submissions : 14-03-2022 (By the Accused-Appellant)
: 21-07-2022 (By the Respondent)
Decided on : 12-12-2023

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Chilaw for having committed the offence of rape on the female mentioned in the indictment on 28-10-2013, and thereby committing an offence punishable in terms of section 364(1) of the Penal Code as amended by the Penal Code (Amendment) Act No. 22 of 1995.

After trial without a jury, the appellant was found guilty as charged by the learned High Court Judge of Chilaw of the judgement dated 22-10-2021.

Accordingly, he was sentenced to a period of 10 years of rigorous imprisonment and was imposed a fine of Rs. 20000/-. In default of paying the fine, he was sentenced to a period of 1-year rigorous imprisonment. In addition, the appellant was ordered to pay Rs.400000/- as compensation to PW-01 who was the victim of this incident and in default, he was sentenced to a period of 2 years rigorous imprisonment.

During the sentencing hearing, the appellant has admitted two previous convictions where suspended sentences have been imposed on the appellant.

In Kurunegala Magistrate's Court case number 4781/PC/09, he has been sentenced to 1-year rigorous imprisonment, which has been suspended for a

period of 10 years. In the 2nd case in Magistrate's Court case number 32706/PC/05, he has been sentenced to a total period of 13 months rigorous imprisonment, which has been suspended for a period of 10 years. Both the suspended sentences have been imposed on 8th December 2010.

As the date of offence in the matter where the appellant was convicted by the learned High Court Judge was within the operative period of those two suspended sentences, the learned High Court Judge has directed that the sentence in this case should commence after the appellant served the suspended sentences, effectively ordering that the suspended sentence should become effective immediately as the conditions have been violated.

When this matter was taken up for argument, the prison authorities informed the Court in writing that the appellant escaped the prison custody on 6th May 2022, while receiving treatment at the Tangalle hospital. It was reported that he could not be apprehended thereafter.

Given the relevant facts and the circumstances, the learned Counsel for the appellant as well as the learned Senior State Counsel who represented the respondent intimated to the Court that as both parties have filed their written submissions, the appeal may be decided accordingly.

The Facts in Brief

The prosecutrix, namely PW-01 and her husband has started work about 3 weeks prior to the date of the incident in the coconut estate where this incident occurred. The husband of the prosecutrix has found work as a labourer in the estate and the prosecutrix and her husband (PW-02) was living in a house provided by the employer. The appellant who was the watcher of the estate was living about 150 meters away of the house of the prosecutrix with his wife and two children.

Although the prosecutrix has stated that this happened after about three months after they arrived at the estate, it is clear from the evidence of the husband that in fact this incident has happened 3 weeks after their arrival.

On the day of the incident, the husband of the prosecutrix has left for work. After her husband left, the appellant has forcibly entered the house, had got hold of the prosecutrix and had raped her. He has left the house after threatening her with death and informing her not to divulge this incident to anyone.

However, soon after the incident, she has heard the manager of the estate coming in his motorcycle and she had gone and informed him of the incident. The manager (PW-03) has instructed her to make a complaint to the police. After her husband arrived home for lunch about 12 noon, she has informed him about the incident and both of them have gone to the police station and has made a complaint.

She has been admitted to the hospital and the Judicial Medical Officer (JMO) has examined the victim on the following day, namely, 29-10-2013.

It is clear from the line of cross-examination on behalf of the appellant that he has not denied he had sexual intercourse with the prosecutrix. His position had been that it happened with the consent. The prosecutrix has denied that she gave any consent to the appellant or she had any affair with the appellant as claimed by him. During the cross-examination it has been revealed that the appellant has given a call to the prosecutrix before he came into the house. Although the prosecutrix has stated that she or her husband had no mobile phones with them at the time of the incident, it is clear from the answers provided by her that she has forgotten about that in her evidence in chief, but has remembered the fact that she had a phone with her only upon when that fact was put to her by the defence.

The husband of the prosecutrix (PW-02) has confirmed that, when he came home for lunch, his wife was crying and getting dressed. When inquired about the reasons, she has divulged that she was raped by the appellant.

The female police officer who recorded the statement of the prosecutrix at the police station has observed that the prosecutrix was in a disturbed state when she made her statement.

According to the evidence of the JMO, the history given by the prosecutrix was very much consistent with the evidence of the prosecutrix as to what happened. Although the JMO has not observed any obvious signs of rape on her body and any other injuries, he has expressed the opinion that the alleged incident cannot be excluded as the prosecutrix had given birth to a child and has had regular sexual contact with her husband.

It is clear from the cross-examination of the witnesses that an attempt has been made to tarnish the character of the prosecutrix on the basis that she and her husband became intimate with each other as a result of a missed phone call and she was pregnant before they got married.

The prosecution witness number 03, the manager of the estate was dead at the time this matter was taken up for trial. However, the prosecution had led the deposition he made before the Magistrate's Court at the non-summary inquiry in terms of section 33 of the Evidence Ordinance.

It is clear from the deposition that when he entered the estate on the day of the incident, namely, on 28-10-2013, the prosecutrix has come to him and had informed that she was raped by the appellant. He has instructed her to go and make a complaint to the police.

As I have stated before, the line of the defence of the appellant has been consent. However, when called for a defence at the end of the prosecution case, he has made a dock statement and had stated further that when he came out of the house of the prosecutrix, the manager saw him and since the manager had a dispute with him, he instigated the prosecutrix to go and make a complaint to the police.

The Grounds of Appeal

The learned Counsel for the appellant has formulated the following grounds of appeal for the consideration of the Court in his written submissions.

1. The learned High Court Judge has failed to consider the credibility and the probability of the prosecutrix's version.
2. The learned High Court Judge has placed an unwarranted burden of proof on the appellant.
3. The learned High Court Judge has unreasonably rejected the dock statement without considering the fact that the dock statement creates a doubt on the prosecution case.
4. The learned High Court Judge's intervention and interjections resulted in the denial of a fair trial towards the appellant.

Although the learned Counsel for the appellant has formulated several grounds of appeal, his written submissions are primarily based on the premise that the version of events as stated by the prosecutrix in her evidence are not probable and not creditworthy.

Hence, all the grounds of appeal will be considered together.

Consideration of the Grounds of Appeal

The argument that the version of events as narrated by the prosecutrix are not probable had been mainly based on the answers she gave when she was questioned as to how she met her husband, which are not in my view relevant as to the probability of the incident of rape as narrated by the prosecutrix .

About the telephone call that the appellant has allegedly given the prosecutrix before he came inside the house is concerned, it is abundantly clear from the evidence of the prosecutrix that when she gave her evidence in chief, she has in

fact forgotten that fact, and had only remembered it when it was put to her in cross-examination.

She has answered the questions put to her as to why she did not inform the wife of the appellant that the appellant was trying to come into her house by saying that as soon as she received the call, the appellant entered the house, leaving her no time to react to the phone call. She has well explained the reasons as to how the appellant knew her phone number as her husband has given it to the appellant for him to contact them in a case of need.

There had been no injuries on the body of the prosecutrix although she claims that the appellant pushed her onto the floor and raped her after removing her clothes. It appears that this submission has been on the basis that it was not probable for an incident of this nature to happen without any injuries to the prosecutrix, unless it was with consent.

However, I am of the view that a victim not having injuries on her body is in itself not a reason to doubt the evidence of a victim of rape. The prosecutrix has well explained the way the incident happened and the line of questioning had not created any doubt as to the occurrence of the incident. It has been suggested to her that she did not shout at the time of the incident as it happened with consent.

It is clear from the evidence that as soon as the incident occurred and the appellant had left the scene, the prosecutrix has informed the incident to the 1st person she met, namely PW-03. Thereafter, she has informed her husband promptly, as soon as he arrived home. If the incident happened with the consent of the prosecutrix, there was no reason for her to promptly complain to the manager of the estate and to her husband. PW-02, the husband of the prosecutrix has given clear evidence saying that there was no basis for the allegation that his wife had an affair with the appellant as they were living in the estate only for 3 weeks. It is clear from the evidence that soon after the incident, they have left the estate to live elsewhere, which shows that they wanted to get away from the place of the incident.

The appellant has taken up a defence in his dock statement stating that because of the dispute he had with the manager of the estate, it was the manager who instigated the prosecutrix to make a complaint to the police. In other words, he had admitted that the prosecutrix went and told the incident to the manager, which well corroborates the evidence of the prosecutrix.

Although the appellant has claimed that the manager instigated the prosecutrix, when the prosecutrix was giving evidence, no such position had been suggested to her, which goes on to establish that it has been an afterthought.

Although there was no direct eyewitness corroboration before the Court to corroborate the prosecutrix's evidence as to the incident of rape, that does not mean that her evidence should be considered as not substantiated.

In the case of **Gurcharan Singh Vs. State Of Haryana AIR 1972 SC 266 L**, the Indian Supreme Court held thus;

“As a rule of prudence, however, the Court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated.” However, we are mindful of the decision of the Indian Supreme Court in **Bhoginbhai Hirijibai Vs. State Of Gujarat (1983) AIR 753**, where the Indian Supreme Court stated thus;

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

In the case of **Sunil Vs. The Attorney General (1986) 1 SLR 230**, it was held that,

“Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring

corroboration is not credible; her 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."

In the matter under consideration, I do not find any reason to suspect the credibility of the evidence of the prosecutrix. As considered correctly by the learned High Court Judge, the prosecutrix had been very prompt in informing the incident to the manager of the estate as well as her husband. The police officer who recorded her statement has observed her demeanour and deportment at the time she went to the police station to make a complaint. Her history given to the JMO had been consistent with her evidence.

In the case of **D. Tikiribanda Vs. The Attorney General- Bar Association Law Reports 2010 BLR 92**, it was held;

"When the medical report is consistent with the version of a sexually harassed victim, it can be taken as evidence consistent and thus form to some extent corroboration and is admissible under section 157 of the Evidence Ordinance (although that may not be corroboration in the strict sense.)"

Under the circumstances, although there was no eyewitness account of the incident, the attendant circumstances provide sufficient circumstantial evidence to corroborate the evidence of the prosecutrix.

I do not find any reason to doubt the evidence of the prosecutrix merely because she had no injuries on her body which is not an essential requirement in proving a charge of rape.

The explanation (ii) to section 363 of the Penal Code which describes the offence of rape reads as follows;

(ii) Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.

Although the evidence of the prosecutrix had been that, she attempted to resist the appellant, that does not mean that there should be essential injuries on her as the evidence has to be considered in its totality, given the facts and the circumstances.

In the case of **D. Tikiribanda Vs. The Attorney General (supra)**, it was held;

“The law as it stands today in this country certainly does not expect the innocent victims of a sexual crime to struggle with the assailant valiantly that would not result in the victim sustaining injuries. Under the amended Penal Code Act No. 22 of 1995 the legislature has categorically expressed this view by way of explanation (ii) of section 363 of the Penal Code.”

For the reasons as considered above, I find no merit in the grounds of appeal urged by the learned Counsel for the appellant in relation to the probability and the credibility of the evidence placed before the Court.

One other matter contended by the learned Counsel for the appellant was that the appellant was not afforded a fair trial because of the questioning by the learned trial Judge when the prosecutrix gave evidence before the Court.

I find no basis under any circumstances to conclude that the questions put forward by the Court when prosecutrix was giving evidence has caused prejudice towards the appellant.

A trial Judge has a right to pose questions to a witness in order to discover or to obtain proper proof of relevant facts in terms of section 165 of the Evidence Ordinance.

It clearly appears that the learned High Court Judge has posed questions only in order to clarify the evidence of the prosecutrix.

I have no basis to conclude that the questions put forward has complimented the case of the prosecution other than clarifying matters which has not caused any prejudice towards the appellant or denied a fair trial towards him.

Accordingly, the appeal is dismissed as I find no basis for the grounds of appeal urged.

The conviction and the sentence affirmed.

However, having considered thee fact that the appellant has been in incarceration from the date of the conviction, it is ordered that the sentence shall deemed to have taken effect from the date of the sentence on 22-10-2021.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal