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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC/45/2020 **VS**

High Court of Chilaw
Case No: HC/23/2016

Walimuni Arachilage Mendis *alias* Sugath *alias* Walimuni Arachilage Mendis Abeysekera

Accused

And now between

Walimuni Arachilage Mendis *alias* Sugath *alias* Walimuni Arachilage Mendis Abeysekera

Accused– Appellant

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Isansi Dantanarayana

for the accused-appellant

Shaminda Wickrema SSC

for the respondent

ARGUED ON : 16/11/2021

DECIDED ON : 12/01/2022

R. Gurusinghe, J.

The accused-appellant (the appellant) was indicted in the High Court of Chilaw for having committed the offence of trespass, an offence punishable under section 436 of the Penal Code and for having committed the offence of rape on Chitra Elisabeth, an offence punishable under section 364 of the Penal Code.

After trial, the appellant was convicted for both counts and,

(1) Sentenced to ten years rigorous imprisonment and rupees twenty-five thousand fine with a default term of one-year rigorous imprisonment for the first count.

(2) A term of twenty years rigorous imprisonment, and a fine of rupees twenty-five thousand with a default term of one-year rigorous imprisonment.

The appellant was also ordered to pay a sum of rupees five hundred thousand as compensation to the prosecutrix with a default term of two years rigorous imprisonment.

Being aggrieved by the said conviction and sentence, the appellant preferred this appeal, to this Court.

The grounds of appeal are as follows:

1) The Learned Trial Judge has failed to take into consideration the fact that there is a serious issue with regard to the identification of the appellant.

2) The Learned Trial Judge has failed to apply the test of probability and improbability to the prosecution witnesses.

3) The Learned Trial Judge has failed to apply the test of probability and improbability to the prosecution witness.

4) The Learned Trial Judge has failed to consider the motive behind falsely implicating the appellant.

5) The Learned Trial Judge has failed to apply the law and legal principles relating to defence evidence when convicting the appellant.

6) The Learned Trial Judge has imposed an excessive sentence on the appellant.

PW1 (the prosecutrix) stated that on the night of the incident, while she was asleep in a room, somebody switched off the lights in the living room. The person who came had then raped her twice.

PW1 stated in her evidence that the rapist was a person who came with Jagath to pluck coconuts. PW1 further said that she had seen the appellant on that occasion and also, she had seen the appellant going about in a hand tractor. However, in her complaint to the police, she had not mentioned that the person who raped her had come to her house earlier with Jagath to pluck coconuts.

PW1 should have stated to the police that she had seen the accused before the incident. She has failed to mention this fact. The defence had drawn the attention of the Court to this vital omission in the statement made to the police by PW1. In the event PW1 does not know the name of the rapist, the police would ask her whether she has seen the person before the incident or whether the person is someone known to her. This type of vital omission could not happen if she had ever seen the appellant before the incident.

The next important fact regarding the identity of the rapist is that, PW1 has stated that the rapist lit a lighter to show his face to her and mentioned that he is Sugath and asked her whether she could not recognize him. It is improbable that the person who switched off the lights to conceal his identity would show his face using a lighter. The Learned High Court Judge had not considered the improbability of this evidence. If he wanted to reveal his identity, he could have switched on the lights.

The Learned High Court Judge herself asked a leading question after re-examination of PW1, assuming that at some point the lights were switched on. On page 94 of the brief the Learned High Court Judge has asked the following question;

අධිකරනයෙන්;-

ප්‍ර: තමාගෙන් වුදිතගෙ නිතිඥ මහතා ප්‍රශ්න අහනකොට කිව්වා කවුරු හරි ගෙදරට ඇතුල් වෙච්ච ගමන් ලය්ට් එක ඔෆ් කලා කිව්වානේ. ඊට පස්සෙ වතුර බකට් එකේ හැප්පිලා වතුර හැලුනා

කියලා. ඊට පස්සෙ ගෙදර ලය්ට නැති වුනා කිව්වානේ. ගෙදර ලය්ට නැතිවුනාට පස්සෙ මහත්මිය නැවත ලය්ට දැම්මා කියලා කිව්වානේ. ඒ කොයි වේලාවේද?

උ: ලය්ට් එක දාන්න ආවා කාමරයට ඒ එක්කම බෙල්ලෙන් අල්ලා ගත්තා.

ප්‍ර: මහත්මිය ඒකරදර කරපු තැනැත්තා අදුන ගත්තේ කෝයි වේලාවේද?

උ: ලයිටරය පත්තු කරලා මගේ මුහුණ පේනවාද කියලා ඇහුවා.

However, it is to be noted that PW1 had not stated anywhere in her evidence that the lights were switched on during the time the rapist was in her house. The Learned High Court Judge has acted on the assumption that the lights were switched on at some point.

Even when a leading question was asked based on the assumption that the lights were switched on at some point, she did not say that the lights were switched on.

As per the evidence of PW2 Jagath, PW2 and his brother Sugath were arrested on suspicion of the rape and shown to PW1 in the police station. The police asked PW1 whether anyone of those persons had committed the rape. She answered in the negative. However, PW2 stated in his evidence that the police asked him to admit the commission of the offence, which he refused.

The Learned State Counsel argues, pointing out this piece of evidence, that PW1 is not a person who would "throw anyone under the bus." This argument cannot be accepted. Jagath and his brother were regular visitors to her house; they used to clean the garden of PW1 and pluck coconuts. PW1 could identify them without a mistake. The appellant is not a known person to PW1. She would have probably thought that the police had arrested the real culprit. Counsel for the respondent concedes the fact that the appellant was shown to PW 1 in the police station by this argument.

In her evidence at the trial, the Learned State Counsel asked a leading question, assuming that she had prepared tea for the person who had raped her (on page 80 of the brief). However, before this question was asked, she never said that she prepared tea for the person who raped her, but after this question, she readily admitted that she prepared tea for the rapist.

It is to be noted, the following observations in the medico-legal report:

> 'The psychiatrist's report revealed that this lady has chronic Schizophrenia who is with delusions and hallucinations and has no capacity to consent for sex. She needs to continue on her medication regularly to improve her mental state.'

PW1 has not mentioned anything regarding preparing tea for the rapist in her statement to the police. Her position in the evidence regarding food is that she never cooks her food. She buys food from a known person and pays for it. She usually keeps some food from her lunch to have as her dinner. She usually takes her dinner early by 6.00 or 6.30 pm. On this particular day, she had her dinner early as usual. The evidence regarding preparing tea is not reliable.

The investigation officer, PW4, a chief inspector, gave evidence at the trial. He was the Officer-in-Charge of the Dankotuwa Police station at the time of the offence. OnPage 126, he was questioned as follows:

ප්‍ර: දැන් මහත්මයා ඔබට මේ ස්ථානය පරීක්ෂා කිරීමෙන් විද්‍යාත්මක සාක්ෂි අනාවරණය කරගැනීමේ හැකියාවක් ලැබුනද?

උ: හැකියාවක් ලැබුනේ නැහැ.

He also stated that the SOCO officers were called, and they had not found fingerprints or scientific evidence to implicate the appellant.

In the evidence, PW1 said that the person who raped her told her that he was Sugath and asked if she could recognize him. PW4 investigating officer has not found evidence that the appellant was referred to as Sugath.

PW2 stated that he and his brother Sugath was arrested by the police and asked him to admit the guilt of the rape, which he refused. This evidence shows that even at the time of the arrest of PW2, the police had no idea as to who the rapist was. As per the evidence of PW2, police have shown PW2 and his bother Sugath to PW1 at the police station. Later after the arrest of the appellant, PW2 was also present in the police station. PW2 said that PW1 was seated at the police station. The police have shown the appellant to PW1 and asked whether this was the person who raped her. (The last answer in the re-examination of PW2).

It is quite clear that the appellant was shown to PW1 at the police station. It was argued for the respondent that now it was too late to complain about anything regarding the identification parade as the notes of the identification parade were admitted. What has been recorded in the notes was admitted. But PW2 said that the appellant was shown to PW1 at the police station.

The appellant also gave evidence under oath and said that he was shown to PW1 at the police station. The appellant was not represented by a lawyer at the time of the identification parade. The Learned High Court Judge asked the appellant why he did not complain to higher authorities if he was assaulted at the police station. The appellant has told the doctor who examined him on the 16th of December 2014, that he was assaulted and was forced to admit that he had committed the rape on PW1, which he did not commit. (On-Page 561)

It is to be noted that from the day that the appellant was arrested in December 2014, and upto date, he has been in custody. He is a person who was not able to furnish five thousand rupees cash bail to go out of remand custody. He was

never at large since his arrest. An assigned counsel represented him in the High Court and in the Court of Appeal.

Since it is very clear from the evidence that the appellant was shown to the prosecutrix in the police station, the value of the identification parade diminished almost to nothing.

When the evidence of identification parade is excluded, there is only dock identification.

Munirathne and others v. The State[2001] 2 Sri L.R.382 Kulatilaka, J. stated as follows;

"Jurists on Evidence have expressed the view that it is undesirable and unsafe for the Court to rely upon the identification of an accused in Court for the first time or dock identification, the reason being that a witness may well think to himself that the police must have got hold of the right person and it is, so easy for a witness to point to the accused in the dock. In this connection vide Cross on Evidence 6th Edition page 44-45; Archbold - Criminal Pleadings, Evidence and Practice 2000th Edition paragraph 14-2, 14-10 page 1303-1304; Phipson on Evidence 15th Edition 14-17 page 321 and also R vs. Howickf11 In Regina vs. Turnbull & Another 21 at 228 Lord Widgery referring to the evidence of visual identification, had this to say "such evidence can bring about miscarriages of justice and has done so in few cases in recent years." Regard to the evidential value of dock identification in this country - Wijesundera, J had to make the following observation in his judgment in Gunaratne Banda vs. The Republic S.C. 132 -136/76 H.C. Kegalle 79/75 SCM 2.3.1978.

> "The other witnesses identified the accused for the first time at the trial in the dock. Again it has been repeatedly said even in the recent past by this Court, in more cases than one that this type of evidence is worthless

and, if I may add, no useful purpose will be served in leading such evidence."

In the above circumstance identity of the person who alleged to have raped PW1 had not been established beyond reasonable doubt. For that reason alone, the appellant should have been acquitted. It is not safe to convict the appellant on the available evidence.

I set aside the conviction and sentence imposed on the appellant. The appellant is acquitted.

Appeal allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal