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

Hon. The Attorney General

Complainant

CA/HCC/251/2020

HC Ratnapura 61/2008 -VS-

Shyaman Kithsiri Hemakkodi

Accused

And now between

Shyaman Kithsiri Hemakkodi

Accused – Appellant

-Vs-

Hon. Attorney General

Complainant- Respondent

Before : Menaka Wijesundera J.
B. Sasi Mahendran J.

Counsel : A.S.M.Perera, PC with Prabodhini Kumarawadu, Uvindu Jayasiri and Chathunika Vitharana for the Accused – Appellant.

Janaka Bandara, DSG for the State.

Argued on : 31.10.2023

Decided on : 23.11.2023

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 17.12.2020 of the High Court of Ratnapura. The Accused-Appellant (hereinafter referred to as the appellant) has been indicted for committing rape under the provisions of the Penal Code.

Upon conclusion of the case the trial judge has found the Appellant guilty of the offence and has convicted him for the charge in the indictment.

The evidence adduced at the trial was that the victim who had been born on 1990.11.06 has met the wife of the appellant as she had been the probation officer in Balangoda because the farther of the victim had been in the habit of getting drunk and harassing the family. As such the mother of the victim had brought the victim to the wife of the appellant in order to get some relief through the Probation and Child care services.

The wife of the appellant had offered to keep the victim at home and make arrangements to send her to school. According to the appellant at the very outset she had been sent to school but later on when the appellants maids at home had gone on leave, the victim had been asked to stay back and look after the kids of the appellant.

The appellant had been a lecturer in Political Science at the University of Sabaragamuwa and the appellant and the two children and his wife had been living in the University quarters.

The victim had been brought to the house of the appellant in January 2007 and she had remained in the house until September 2007.

The appellant has had maids other than the victim and according to the victim the appellant has had sexual intercourse with her on numerous occasions when the wife had gone to work.

The victim had said that her experience with the appellant has been her first experience sexually but we observe that in the medico legal examination form filled by the doctor on examining her had taken down the history given by her in which she had said that she has had sex with the appellant with out consent

but with her boy friend she has had sex more or less during the same time with consent.

The Dr Dassanayake who has examined her is the person who has revealed her experience with the boy friend for the very first time in the entire case, and by that time the evidence of the victim had been concluded. The medico legal examination form had been marked as P1 and the medico legal report had been marked as P2.

But we note that the trial judge had chosen to disregard this evidence on the basis that there is a contradiction between P1 and P2 because the doctor had failed to mention the boyfriend in the history of the medico legal report…

But what is most important is that the existence of the boy friend and her dealings with him simultaneously to the purported activities with the appellant shakes the creditworthiness of the victim.

At the examination it has been revealed that she had been 10 weeks pregnant but the fetus had been aborted.

The evidence of the prosecution is that while she had been in the house of the appellant the victim had been visited by her mother on a regular basis but she had not told the mother nor anyone else the behavior of the appellant until she had been found pregnant by the doctor.

The victim had been in a different house before being diagnosed of being pregnant, and in that house, she had been there for nearly a month according to the victim and in that house has had developed headaches and the mother had taken her to the doctor on the 1st of November.

The mother of the victim had corroborated in the way the victim was introduced to the house of the appellant and how frequently she visited the victim and also, she had in fact had stayed as an inhouse maid in the house of the appellant.

But she has contradicted in the period of time the victim had been in the house of a neighbor of the appellant with the narration of the victim.

Hence the prosecution has led the evidence of the mother of the victim, the doctor and the police and when the defense was called the appellant has made a dock statement denying the allegation.

The defense had called many witnesses and they had said that during the time the allegation was made there had been several maids in the house of the appellant and the victim had not divulged the purported activities of the appellant to anyone of them which is surprising.

The defense witnesses had further said that the victim had received several telephone calls to the house and the wife of the appellant has said that the victim has had a boyfriend by the name of Sarath and that he had been in the habit of calling her.

The defense witnesses have further said that the victim had told one of the maids who had been there with her that she had complained against the appellants family and had asked for her also to do the same so that they can earn some money.

All the defense witnesses had been extensively cross examined but this Court observes that they have stood the test of cross examination.

But upon perusal of the evidence of the prosecution and the defense we find the following factors,

1) The victim who had been according to her had been raped many times by the appellant has not divulged the matter to her mother or to any one else when she has had so many instances to do so, which is a little thought provoking.
2) The victim has said in evidence that her experience with the appellant was her very first experience sexually but the history given by her to the doctor has contradicted the same.
3) Hence the question arises whether she can be believed.
4) The mother of the victim has said that she and her elder daughter had once come to the house of the appellant to take the victim home but the victim had refused, therefore again the question arises as to why the victim did not respond to the request of the mother and the sister if she had been abused by the appellant.

Hence the matters stated above creates a reasonable doubt in the story of the prosecution.

The grounds of appeal raised by the Counsel for the appellant were,

1) **The improbability of the story of the prosecution,**
2) **The trial judge not considering the infirmities in the prosecution thereby denying a fair trial to the appellant.**

The trial judge had written a very long judgment, most of it reproducing the evidence of both sides but we note that he has failed to analyze the evidence and instances which has created a reasonable doubt in the story for the prosecution.

He has disregarded the history in the medico legal examination form merely for the reason that it is contrary to the history in the medico legal report but

this we observe to be incorrect for the reason that the doctor had said in the history of the medico legal report that she has said that she had "sex with a known person with consent and with the accused without consent", hence there is no contradiction only the omission to mention the boyfriend's name. But what we must not forget is that it has created the exitance of a boyfriend in the life of the victim at the time of the offence which she had completely denied in her evidence in Court. In such a case can the Court rely on the evidence of the victim where she is the sole witness to the entire incident.

It has been said in the case of AG vs Mohamed Ismith 87-97 decided on 13.7.1999 by Justice Jayasuriya that "Testimony must be weighed and not counted".

Hence in the instant instance we find that in weighing the evidence the credibility of the victim terribly fails in no uncertain terms.

Furthermore, the victim not telling anyone of the sexual harassment of the appellant is also extremely difficult to believe. The trial judge had said that the delay in the victim complaining to anybody was a result of the threats she had been subjected to by the appellant. But we note that the mother of the victim had visited the victim very regularly and in fact at one point, the mother had come with the elder sibling to request the victim to return home but she had refused, hence if the victim was truthful that would have been the best opportunity for her to get her release from the appellant.

As such the probability factor in the story of the prosecution is very prominent in this matter and the same has not been properly addressed to by the trial judge. A trial judge must read the evidence, understand and apply the same to the ingredients of the offence and also give benefit of the doubt to the accused.

We also observe that the case for the defense had been rejected on the basis that the defense had failed to mark any discrepancies in the evidence of the victim and secondly that the dock statement of the appellant has been rejected on the basis that he had contradicted the evidence of the defense itself, and he had said that from the dock the appellant had for the very first time mentioned the existence of a boyfriend of the victim named Sarath, but we find this to be very wrong because the doctor who prepared the medico legal examination form had mentioned the person Sarath in evidence and he had been very lengthily cross examined , and the trial judge had rejected the same on the basis that he cannot rely on that evidence .

In the case of **B.A,Premamratne vs The Democratic of Sri Lanka CA 168-2009 decided on 20.02.2014 by Justice Sisira De Abrew that in evaluating a dock statement the judges must be mindful of**

1) A dock statement is evidence but that it is not subjected to cross examination and is unsworn,

2) if it is believed it must be acted upon,

3) if it creates a reasonable doubt in the case for the prosecution it must be acted upon,

4) the dock statement of one accused must not be used against the other.

As such we see a certain amount of bias in the mind of the trial judge in analyzing the case for the defense which is a denial of a fair trial to the appellant which is provided for in the Constitution itself.

It has been held in the case of by Justice Rodrigo in **James Silva Vs. Republic of Sri Lanka** 1980 (2) **SLR 167.**

"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the court adduced whether by the prosecution or by the defense in its totality without compartmentalizing and, ask himself whether as prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not - see the Privy Council Judgement in Jayasena vs. Queen 72 NLR 313."

Hence in the instant matter we find that if it is considered as a prudent man as stated above the victim not mentioning the sexual harassment not even to the mother when she has had so many opportunities and the exitance of a boy friend simultaneously to her stay at the appellants house should have been considered more seriously by the trial judge rather than merely believing every detail narrated by the victim.

As such we see an undue bias on the part of the trial judge and an overly sympathetic attitude towards the victim which we think has caused grave prejudice to the case for the defense and it has deprived the appellant of a fair trial which is guaranteed in our Constitution.

As such we are compelled to set aside the conviction and the sentence entered by the trial judge.

As such we allow the instant appeal.

JUDGE OF THE COURT OF APPEAL

Hon. Justice B. Sasi Mahendran

I agree.

JUDGE OF THE COURT OF APPEAL