

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

*In the matter of an Appeal under and in
terms of Article 138 of the Constitution*

Court of Appeal No:

CA/HCC/0126/2023

The Democratic Socialist Republic of Sri
Lanka.

COMPLAINANT

Vs.

High Court of Matara

Case No: HC/153/2016

Mohomed Shaheer Mohamed Asmir

ACCUSED

AND NOW BETWEEN

Mohomed Shaheer Mohamed Asmir

ACCUSED-APPELLANT

Vs.

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

2. Officer-In-Charge,
Police Station, Morawaka.

COMPLAINANT-RESPONDENTS

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Razik Zarook, P.C. with Rohana Deshapriya and
Chanakya Liyanage for the Accused-Appellant
: Sudharshana De Silva, S.D.S.G for the Respondent
Argued on : 26-07-2024
Written Submissions : 19-12-2023 (By the Accused-Appellant)
: 11-03-2024 (By the Respondent)
Decided on : 10-10-2024

Sampath B. Abayakoon, J.

This is an appeal by the accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Matara.

The appellant was initially indicted before the High Court of Matara for committing the offence of grave sexual abuse of a minor on or about 15-12-2002, and thereby committing an offence punishable in terms of section 365B (2)(a) of the Penal Code.

However, after the commencement of the evidence of the said minor, namely PW-01 mentioned in the indictment, the prosecuting State Counsel has withdrawn the indictment filed on the basis of grave sexual abuse and has substituted the charge with that of a rape, punishable in terms of section 364(2) of the Penal Code.

The appellant has pleaded not guilty to the said charge, and after trial, the learned High Court Judge of Matara of the Judgment dated 16-01-2023 has

found the appellant guilty as charged and of the sentencing order of the same date has sentenced the appellant for a period of 15 years rigorous imprisonment in addition to a fine of Rs. 25,000/-. He has been ordered to serve a simple imprisonment period six months in default.

In addition to the above, it has been ordered that the victim, namely the PW-01 should be paid compensation in a sum of Rs. 250,000/- and in default of paying the said sum, it shall be recovered as a fine and the appellant should serve one year imprisonment in default.

Facts in Brief

The victim was a 30-year-old married woman with 3 children when she gave evidence at the trial on 30-05-2018.

She has been living with her mother's younger sister's family since she was 3 or 4 years old, as her mother was having a mental disorder. She was born on 06-11-1987 and has studied up to grade eight in her school. The appellant was her mother's younger sister's husband. In her evidence she has stated that she had to face the incident relevant to this case when she was 15 years of age and on 15-12-2002. By that time her mother's sister had 5 children out of the marriage with the appellant and all have been living in the same house. On that day, the victim's mother's sister, the wife of the appellant, has gone overseas for employment. According to the evidence of the victim, the appellant has returned from the airport and he was drunk at that time. When he came home, all the children were at sleep and the victim was also sleeping in a room.

While sleeping, she has been awoken by the presence of the appellant near her. Thereafter, he has removed her clothes and had forcible sexual intercourse with her. She has described the acts committed by him and had stated that, she started bleeding as a result of the sexual intercourse because she was having her menstruation at that time. She has stated further that, this was not the first time an incident of this nature occurred, but previously also the appellant committed the same act on her without the knowing of his wife.

She has stated that, she did not inform the rape committed on her previously to anyone, because she was fearful of the appellant and he threatened her not to divulge it to his wife.

On the following day morning, the victim has gone and informed one of her neighbours who was also a relative about what happened to her and on her instructions had gone to the grama niladhari's office to lodge a complaint. She has stated that she could not complain to the grama niladhari because the appellant came and took her away. After taking her back to the house, it was alleged that the appellant took her to the hospital to look after one of his younger children who was warded at the hospital at that time. Later, she has made a statement to the police as to the incident faced by her.

The victim has been cross-examined at length on behalf of the appellant and it has been suggested that because of a love affair, the victim had with a neighboring boy and because the appellant opposed it, she is making a false allegation against him, which she has denied. The way the victim has answered the questions during cross-examination makes it clear why she has been a reluctant witness because of the fact that she was now happily married with 3 children of her own.

The prosecution has called the grama niladhari mentioned by PW-01 to give evidence in the case. The grama niladhari was retired at that time, but a person who knew the victim as well as the appellant and their families very well. On 16-12-2002 while engaged in his duties, PW-01 has come to his office around 11-12 noon and has been seated in his office while crying. When questioned, she has reluctantly informed him that, her 'Bappa', referring to the appellant, harassed her, without specifying what was the harassment. He has advised her to go and inform the police, and has seen the victim leaving his office. In the evening of the same day, he has gone to the house of PW-01 to inquire into the matter and had been informed that she went to the police with

two of her relatives. The grama niladhari has given a statement to the police in this regard later.

The relative mentioned by PW-01, as the person to whom she related this incident in the morning, has also given evidence as PW-03 in this action. According to her evidence, she has been living next door to the appellant and had been a relative of the family. On 16-12-2002 around 9:00 a.m., PW-01 has come and informed her that she was raped by the appellant during the previous night. She has instructed her to go to the grama niladhari and complaint. She has seen the victim going towards the grama niladhari's office. Later, she has observed the appellant assaulting the PW-01 while chasing her around the house. She has witnessed this incident around 1:30-2:00 in the afternoon after PW-01 has returned from the grama niladhari's office. After the assault, the PW-01 has again come to her house, and she has been the one instrumental in taking her to the police station.

According to the evidence of the Judicial Medical Officer (JMO) who has examined the child after the incident, he has observed an old tear in her hymen. Although the victim has had no fresh injuries to her vagina, the doctor has observed contusions on her vaginal walls. The doctor has recorded the history given by the witness as rape by a known person.

According to the police officer who conducted the investigations into the incident, the victim has come to the police station on the 18-12-2002 along with two females and grama niladhari of the area and had complained about an incident of sexual abuse committed on her by the appellant. This has resulted in conducting investigations in that regard and the arrest of the appellant.

Once the prosecution case was closed and the learned High Court Judge called for a defence from the appellant, he has decided to make a statement from the dock. He has admitted that the PW-01 was living with his family from a very young age and has stated that it was he who looked after her. He has admitted

that his wife left for overseas employment on 15-12-2002 and that he came home after dropping her off at the airport.

He has claimed that, after coming home he went to sleep and in the morning asked the PW-01 to prepare tea. It was his position that, PW-01 left the house to fetch some water and did not return. While looking for PW-01, he has found her at a house of one of his wife's relative. He has been informed that PW-01 wants to go to the grama niladhari. He has claimed that in the afternoon police came and arrested him. The appellant has denied any involvement in committing the alleged offence to the victim.

The wife of the appellant has also given evidence on behalf of him, and has admitted that it was she who looked after the PW-01 because her mother was suffering from a mental disorder. She has admitted leaving the country for employment on 15-12-2002 and has claimed that the PW-01 had a love affair with a person called Zawahir and her husband opposed the affair. She has claimed that after the incident, PW-01 was sent for treatment for a mental disorder and has denied that the appellant committed rape on PW-01.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel formulated the following two grounds of appeal for consideration;

1. The learned High Court Judge has failed to evaluate the vital omissions and the relevant contradictions marked V-01, 02 and 03.
2. Totality of the evidence has not been taken into account and as a result, the learned High Court Judge has failed to evaluate the evidence on the basis of lack of consistency, probability and spontaneity.

It was the submission of the learned President's Counsel that the evidence of PW-01, namely, the alleged victim, lacks consistency as to the alleged offence committed on her by the appellant. It was his position that the learned High

Court Judge was erred when it was decided that the marked contradiction does not go to the root of the matter, and therefore does not create a doubt in the evidence of the victim. It was also his position that, the learned High Court Judge has failed to consider several omissions brought to the attention of the Court in the corrects perspective.

It was contended further that the evidence of PW-01 and PW-08 who were the police officer who conducted investigations, shows that there were several *inter se* contradictions in the evidence of PW-01 as to the manner the complaint was made to the police and in her police statement the victim has failed to mention that the appellant was drunk at the time the offence was committed on her.

It was also submitted that the PW-01 also claimed forgetfulness as an excuse for her inconsistent evidence, and that there was no basis to consider that in the favor of the prosecution case. The learned President's Counsel referred to the medical evidence to argue that, the victim has not mentioned to the doctor as to who committed the rape on her since the doctor has recorded the history as raped by a known person.

It was the position of the learned President's Counsel that the evidence led by the prosecution when taken as a whole creates a reasonable doubt as to the truthfulness of the evidence, which should have been considered in favor of the appellant. He submitted that the learned High Court Judge has failed to consider the dock statement made by the appellant and the evidence called on his behalf in its correct perspective. He moved for the acquittal of the appellant on the basis that the prosecution has failed to prove the case beyond reasonable doubt against the appellant.

The learned Senior Deputy Solicitor General making submission on behalf of the complainant-respondent, brought to the attention the age of the victim when this incident occurred and the clear evidence given by her as to the incident of rape committed on her. It was his position that there were no reasons to believe that the victim or the other witnesses called on behalf of the

prosecution were lying or not telling the truth. He submitted that the evidence of the PW-01 can be accepted as cogent and truthful and the prosecution has proved the case beyond reasonable doubt against the appellant.

Referring to the evidence of the JMO, it was the position of the learned Senior Deputy Solicitor General that the doctor has observed clear contusions in the vaginal walls of the victim even after 5 days of the alleged incident, which clearly corroborates the evidence regarding rape by the victim. It was also his position that there was no reason whatsoever for the victim to falsely implicate the appellant who was the person who looked after her from a very young age.

It was submitted that the learned High Court Judge has well considered the alleged contradictions, omissions, and whether the evidence can be believed, and also the defence taken by the appellant, in his determinations, which needs no interference from this Court.

Consideration of the Grounds of Appeal

As the two grounds of appeal are interrelated, I will now proceed to consider the said grounds of appeal together.

Although, the learned Presidents Counsel made submissions on the basis that the learned High Court Judge has failed to consider the marked contradictions and the pointed-out omissions in the correct perspective, I find no basis to agree with such a contention.

It is amply clear from the Judgment that the learned High Court Judge has methodically considered the mentioned contradictions marked V-01 to V-03 and also the alleged omissions in the evidence of PW-01.

As correctly considered by the learned High Court Judge, no one is expected to have a photographic memory of a horrific incident faced by an under-age minor girl, which happened some 16 years before the victim was required to give evidence in Court in its exact details or in a video like description.

It was held in the Court of Appeal Case of **D. Tikiribanda Vs. The Attorney General-decided on 06-10-2009 reported in Bar Association Law Reports 2010 (B.L.R.) 92** that;

“Mostly the victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible (withdrawal symptom). The offenders should not be allowed to capitalize or take mean advantage of these natural inherent weaknesses of small children.”

At this stage, I find it appropriate to refer to the Indian case of **Bhoginbhai Hirjibhai Vs. State of Gujarat (AIR 1983-SC 753 at pp 756-758)** very often cited in our Courts. It was held:

- 1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*
- 2) Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*
- 3) Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*
- 4) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witnesses is*

giving truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.

As I have considered before, it is clear that by the time the victim gave evidence she was a 30-year-old and was happily married with three children. Her evidence needs to be considered in that context as well. I do not find any material contradiction in the alleged contradiction marked V-01. When considering the evidence of PW-01 and the relevant grama niladhari, what is relevant is the fact that the victim has gone to the office of the grama niladhari at the first available opportunity to make a complaint. It is clear from the evidence of the Grama Niladhari, that the victim has come to his office and had informed that the appellant harassed her. However, before he could inquire further into it, the girl has left the place. It also appears that the grama niladhari has advised her to go to the police, which may be the reason why he has not probed further into it.

As considered correctly by the learned High Court Judge, the alleged contradiction marked V-02 is not a contradiction that can be considered relevant. And also, the contradiction marked V-03 where she has stated to the police that at the time the appellant committed rape on her she did not feel pain and there was no blood. The evidence of PW-01 amply provides that, she has found blood due to her menstruating period being active. The evidence of the JMO provides that this was not the first time she has been subjected to penile penetration, as the scars found in her vagina were old ones which are suggestive of previous sexual intercourse as stated by the victim in her evidence.

Similarly, as well considered by the learned High Court Judge, the mentioned omissions are not material when the evidence is considered in its totality as to the trustworthiness of the evidence of PW-01.

I have no basis to agree that the learned High Court Judge has failed to consider the evidence in its totality rather than compartmentalizing the same or has failed to consider the consistency, probability and spontaneity of her evidence.

The learned High Court Judge, after having drawn his attention to the essential ingredients that need to be proved in a criminal case has addressed his mind to the above factors before evaluating the evidence of the victim, as well as other witnesses.

The fact that the victim was living with the family of the appellant since she was a very young girl is an admitted fact. Her mother who was the elder sister of the wife of the appellant was suffering from a mental ailment was also an admitted fact. The appellant has admitted that, his wife left for overseas employment on 15-12-2002 and he returned home late in that night after dropping her off at the airport.

It is the evidence of the victim has been that the appellant he was drunk and committed rape on her on that night. She has also given evidence to the effect that this was not the 1st time, but it happened previously as well, without her aunt being aware of such acts committed by the appellant. She has stated that she did not understand the gravity of what was happening to her until late. It is clear from the evidence that the victim has informed her relatives who lived next door about the incident faced by her on that night. The testimony of PW-03 confirms that fact. It was she who has advised the victim to go and meet the grama niladhari. The grama niladhari (PW-04) confirms that the victim came to his office and remained there while crying, and also the fact when inquired briefly, she complained about harassment of her by the appellant.

Although it was not clear as to the events that took place thereafter, it is clear that the victim has left the grama niladhari office before the grama niladhari could probe further into it, which may be the reason as to why he has taken upon himself to go and inquire about it in the afternoon.

According to the evidence of the police officer who conducted investigations into the matter, it is clear that the victim has come to the police station along with two females and the grama niladhari to complain about what happened to her.

When considering the evidence in its totality, there cannot be any doubt as to the fact of the victim lodging a complaint to the police under difficult circumstances faced by her at that time. I do not find any reason to believe that the circumstances under which the victim made her complaint to the police, as a reason to doubt the evidence of PW-01 and other relevant witnesses. The admitted mental ailment suffered by PW-01 has resulted after the incidents of rape faced by her, which has been clearly explained in her evidence. This is not a reason to suspect the truthfulness of the evidence of PW-01.

The Indian Supreme Court, in the case of **Ramakant Rai Vs. Madan Rai AIR 2004 SC at 84**, observed;

“A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to ‘proof’ is an exercise particular to each case. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favorite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary trivial or a merely possible doubt: but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. The concepts of probability, and the degree of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the

evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and ultimately, on the trained intuitions of the Judge. While the protection given by the criminal proceeds to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice.”

After having considered the prosecution evidence and being satisfied that the prosecution has established a strong *prima facie* case against the appellant, the learned High Court Judge has proceeded to consider the defence put forward by the appellant, which was the correct approach in considering evidence in a criminal case. The learned High Court Judge has well considered the manner under which such a defence should be considered and after having drawn his attention to the relevant legal principles in that regard, has cogently considered whether the defence case put forward has created a reasonable doubt against the evidence of the prosecution or at least whether it has provided a reasonable explanation in that regard.

The position taken up by the appellant had been that the victim is orchestrating a false narrative because he opposed a love affair she had with a neighbouring boy. I do not find that as a reason for a girl of 15 years of age who was dependent on the appellant and his family, to make a serious false accusation of this nature and consistently maintain that stand.

When one looks at the evidence as a whole, it is quite obvious that such a position has not created any reasonable doubt about the evidence of PW-01 and other witnesses. PW-03 and PW-04 can have no reason to give false evidence if such a thing did not happen as they narrate. The evidence of the wife of the appellant who gave evidence on behalf of him cannot speak about the incident of rape alleged to have happened after she left the country. Her evidence does not provide a basis to hold that, a doubt has been created or a

reasonable explanation has been provided against the overwhelming evidence placed before the Court by the prosecution.

For the reasons as stated above, I find no basis in the grounds of appeal urged before this Court on behalf of the appellant.

Accordingly, the appeal is dismissed for want of merit. The judgement and the sentence dated 16-01-2023 affirmed.

However, having considered the fact that the appellant has been in incarceration from his date of conviction and sentence, it is ordered that the sentence shall deem to have commenced from his date of sentence, namely, from 16-01-2023.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal