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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979, read with Articles 138 and 154 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0202/17

High Court of Colombo

Case No: HC/5922/11

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Maji Senadheera

ACCUSED

AND NOW BETWEEN

Maji Senadheera

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Asthika Devendra with Kaneel Maddumage for the Accused Appellant
	: Udara Karunathilaka, SSC for the Respondent
Argued on	: 03-08-2023
Written Submissions	: 28-07-2023 (By the Accused-Appellant)
	: 06-02-2019 (By the Respondent)
Decided on	: 20-11-2023

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo for the offence procuration of a female on or about 28-02-2006 in Kollupitiya, within the jurisdiction of the High Court of Colombo to become a prostitute, and thereby committing an offence punishable in terms of section 360A(1) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995.

After trial, the appellant was convicted as charged by the learned High Court Judge of Colombo of the Judgement dated 28-02-2017, and was sentenced to a rigorous imprisonment period of 3 years. She was ordered to pay a fine of Rs. 50000/- and in default, she was sentenced for a period of 1-year rigorous imprisonment.

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

The facts as revealed in evidence before the High Court can be briefly summarized as follows.

Facts in brief

PW-01 was serving as a police inspector attached to the Foreshore police station during the time relevant to this incident. He has received an information about an operation of a brothel house (ගණිකා නිවාසයක්) at No. 49 A, Dickman place, Kollupitiya.

After assembling a team of officers to conduct a raid in that regard, and after having obtained a search warrant from the Fort Magistrate's Court, he has proceeded to conduct the raid. He has chosen two police officers, Bandara and Wimalasena and has given Rs. 2000/- to police officer Wimalasena, instructing him to go to the place where the prostitution operation was going on and obtain the services of a female by paying money to the manager of the place.

Police officer Bandara has been instructed to accompany Wimalasena, and send a signal to PW-01 when the deal is complete.

The aforementioned Wimalasena and Bandara has gone into the house and had met up with the appellant who was the person in charge of the operation. There had been 11 females in the company of the appellant. Officer Wimalasena has given money to the appellant and upon the direction by her, has chosen one of the females paraded. He has been directed to go to a cubicle which had no door, but only a covering.

According to the evidence of Wimalasena, once they were inside, the female had removed her clothes, and while she was in the process of removing his shirt, he has given a pre-arranged signal to Bandara who was seated outside in the hall. The officer Bandara in turn has sent a signal to PW-01 who was outside of the house on the main road, indicating that the transaction has been completed. Accordingly, PW-01 and his team has entered the house and arrested the

manager who was the appellant, the female who was with police officer Wimalasena and other females who were in the house.

At the scene of the alleged crime, the PW-01 and his team has recovered the money paid by officer Wimalasena to the appellant in a drawer of the table where the appellant was seated and several condoms as well.

The charge of procuration against the appellant has been framed based on the above facts.

The prosecution has led the evidence of only two witnesses, namely PW-01, the police inspector who organized and conducted the raid, and that of police officer Wimalasena who was the person went inside the house and obtained the services of the female.

It needs to be noted that police officer Bandara who went along with Wimalasena and observed what was happening until Wimalasena entered the cubicle with the female and saw in what state they were after the raid was conducted, had not been called as a witness. It was he who could have provided a clear corroboration as to the events that took place at that time. He was the prosecution witness number 3 named in the indictment. The female alleged to have been engaged in the act of prostitution with the officer Wimalasena has also not been called as a witness and she was not a listed witness in the indictment.

It appears from the defence taken up by the appellant that she has not denied that a raid took place on the day relevant to this incident. Her stand had been that she was never engaged in the profession of prostitution, but only conducted a business of operating a massage parlour. Her stand had been that she was operating this massage parlour without any issue over a long period of time and in accordance with the rules governing the trade.

After hearing the evidence, and after listening to the submissions of the respective parties, the learned High Court Judge of Colombo has pronounced the

impugned Judgement, where it had been determined that the prosecution has proved the case beyond reasonable doubt against the appellant.

After discussing the basic principles of evidence that a trial Judge should be mindful when deciding a criminal trial against an accused person, it appears that the learned High Court Judge has very correctly identified the basic ingredients of the charge that should be proved before the Court by the prosecution in order to prove the charge beyond reasonable doubt against the appellant.

On page 11 of the Judgement (page 181 of the appeal brief), the learned High Court Judge has observed the following;

> "චුදිත තැනැත්තියට එරෙහිව ගොනු කර ඇත්තේ, දණ්ඩ නීති සංග්‍රහයේ 360(ආ) වගන්තිය යටතේ වන කුට්ඨනය කිරීමේ චෝදනාවකි. මෙම චෝදනාව ඔප්පු කිරීම සඳහා චෝදනාවේ සඳහන් දින මෙම චුදිත තැනැත්තිය විසින් හේමා පුෂ්පලතා නැමැත්තියව ඇගේ කැමැත්ත ඇතුව හෝ නැතුව ගණිකාවක් බවට පත් කිරීමට කුට්ඨනය කල බව හෝ කුට්ඨනය කිරීමට තැත් කල බව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කල යුතු වේ. ඒ අනුව, විත්තිකාරිය පුෂ්පලතා නැමැත්තියක් ගණිකාවක් බවට පත් කිරීමට කුට්ඨනය කල බව මූලිකව ඔප්පු කල යුතු වේ."

Although the learned High Court Judge has wrongly mentioned the penal section under which the appellant was indicted before the High Court as section 360B [360(ආ)], instead of the correct section which was section 360A(1) [360අ(1)], I would like to attribute it to a typographical error as the learned High Court Judge has correctly identified the ingredients of the charge.

For matters of clarity, I would now reproduce the relevant section 360A(1) of the Penal Code, which reads thus.

> **360A. Whoever -**
>
> **(1) Procures, or attends to procure, any person, whether male or female of whatever age (whether with or without the consent of such person) to become, within or outside Sri Lanka, a prostitute;**

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

commits the offence of procuration and shall on conviction be punished with imprisonment of either description for a term of not less than 2 years and not exceeding 10 years and may also be punished with a fine.

It clearly appears from the Judgement that the learned High Court Judge has been guided by the Judgement pronounced in the case of **Rosemary Judy Perera Vs. The Republic CA Appeal 283/2012 decided on 17-01-2014**, where the facts were strikingly similar to the facts of the appeal under consideration.

Following the matters that need to be proved in a case of this nature, as discussed in the above-mentioned Judgement, the learned High Court Judge has determined the following; as the matters that need to be established by the prosecution.

> "ඒ අනුව, කුට්ඨනයට ලක් වූවා යැයි නම් සඳහන් තැනැත්තිය සාක්ෂියට කැඳවීමේ අනිවාර්ය අවශ්‍යතාවයක් නැති බව තීරණය කර ඇත. මීට අමතරව, විත්තිකාරිය විසින් එකී තැනැත්තියව ගණිකාවක් වශයෙන් සිටි තැනැත්තියක් වූව ද, ගණිකාවකගේ සේවාව යමෙකුට ලබා ගැනීම සඳහා මැදිහත් වී කරනු ලබන කුට්ඨනය මෙවැනි චෝදනාවක් ඔප්පු කිරීමේ දී ඔප්පු කල යුතු බව තීරණ කර ඇත. එනම්, එකී නඩු තීන්දුවත් මෙම වගන්තියේ සඳහන් කරුණුත් සලකා බැලීමේ දී විත්තිකාරිය මැදිහත් වීමක් සිදු කොට යම් මුදලක් ලබා ගෙන, උපාය දූතයා ලෙස කටයුතු කල පැ.සා. 02ට පුෂ්පලතා නැමැත්තියව ලිංගික සේවාවක් එනම් වශයෙන් කටයුතු කිරීමට ක්‍රියා කල බව පැමිණිල්ල විසින් සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කල යුතු වේ."

After having analyzed the evidence led in the trial, and the defence taken up by the appellant, the learned High Court Judge has determined that the defence of the appellant, where she has claimed that she only conducted a business of a spa cannot be accepted.

The final conclusion of the learned High Court Judge reads as follows. The mentioned section 360(ආ) [section 360B] again appears to be a typographical error whereas it should be 360A(1).

<u>අවසානය</u>

"ඒ අනුව, පැමිණිල්ල විසින් චෝදනා කර ඇති පරිදි විත්තිකාරිය විසින්ම හේමා නැමැත්තියව ගණිකාවක් වශයෙන් ලිංගික සංසර්ගය සඳහා පැ.සා. 02ට මුදලට ලබා දුන් බව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කර ඇති බව තීරණය කරමි. ඒ අනුව, විත්තිකාරියට එරෙහිව ඉදිරිපත් කර ඇති හේමා පුෂ්පලතා නැමැත්තිය ගණිකාවක් බවට පත් කිරීමට කුට්ඨනය කිරීමේ චෝදනාව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කර ඇති බව තීරණය කරමි. ඒ අනුව, විත්තිකාරිය දණ්ඩ නීති සංග්‍රහයේ 360ආ(1) වගන්තිය යටතේ චෝදනා කර ඇති වරදට වරදකාරිය කරමි."

It is clear from the said final conclusion of the learned High Court Judge, it has been determined the proof of the fact that the appellant obtained money and gave the services of the female to engage in sexual intercourse with the decoy as a prostitute, would be sufficient to prove the offence of procuration in terms of section 360A(1) of the Penal Code.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

1. The prosecution cannot maintain the charge against the accused-appellant as the raid conducted by the police is illegal due to non-production of the warrant.
2. Failure to lead the evidence of the lady who was alleged to have been procured to be a prostitute leads to a reasonable doubt on the prosecution case.
3. Failure to lead the evidence of the person who assisted the decoy leads to a reasonable doubt on the prosecution case.

4. Non-listing of the lady who was alleged to have been procured to be a prostitute in the back of the indictment as a witness has prevented the accused from her right to a fair trial.
5. Whether the version of the prosecution fails the test of probability.
6. The learned High Court Judge has failed to properly consider the material contradictions between the evidence of PW-01 and PW-02.
7. The learned High Court Judge has failed to consider and evaluate the dock statement of the appellant properly.
8. Without prejudice to the above grounds of appeal urged, the learned trial Judge could have imposed a non-custodial sentence on the appellant considering her age and medical condition.

In his submissions before this Court, the learned Counsel for the appellant relied mainly on the Judgement pronounced by their lordships of the Supreme Court in the case of **Rosemary Judy Perera Vs. The Democratic Socialist Republic of Sri Lanka SC Appeal 154/14 decided on 14-12-2020.** This is an appeal preferred before the Supreme Court with leave, challenging the Court of Appeal decision in **CA Appeal 283-2012 decided on 17-01-2014**, which was the Judgement heavily relied on by the learned High Court Judge to find the appellant guilty for the charge preferred against her.

It was the submission of the learned Counsel for the appellant that the Supreme Court, after having considered the appeal preferred by the appellant in the above-mentioned case has overturned the conviction and acquitted the appellant.

He was of the view that since the facts elicited by way of evidence before the High Court are very much similar and the law that should have been considered was also very much similar, and there cannot be any basis to allow the conviction and the sentence of the learned High Court Judge as the matters considered are no longer relevant in that context.

It was his contention that the main ingredient that needs to be proved in a case of this nature would be that the accused person procured or attempted to

procure the female to become a prostitute, and the evidence led at the trial was insufficient to prove the said ingredient under any circumstance.

He agreed that although the person engaged in the act of prostitution, namely, the relevant female mentioned in this action, who is alleged to have been engaged in an act of prostitution at the time of the raid, may not be necessary to prove the charge. However, it was his view that given the facts and the circumstances of the case, not calling her, as well as the other police officer who allegedly accompanied the officer Wimalasena to pay money and obtain the services of the female, needs to be considered in favour of the version of events by the appellant.

He was of the view that non-calling of the said material witnesses amounts to a failure to prove the case beyond reasonable doubt.

The learned State Counsel vehemently argued in favour of the conviction and invited this Court to consider the Supreme Court Judgement in **SC Appeal 154/2014** as a Judgement pronounced *per incuriam*. He was of the view that their Lordships of the Supreme Court who pronounced the majority Judgement in that case was misdirected on the law when they decided to follow the Judgements pronounced in England on a similar law. It was also his view that the Supreme Court was misdirected on the relevant facts as well.

It was contended that there was no evidence before the trial Court that the female who is said to have engaged in prostitution with the decoy was already a prostitute at that time. He contended that there was no missing link in the evidence led by the prosecution to prove the charge and non-production of the search warrant was not a material defect in the prosecution case as the evidence led as to the search warrant was never challenged by the appellant.

The learned State Counsel moved for the dismissal of the appeal on the basis that the grounds of appeal have no merit.

Consideration of the Grounds of Appeal

Although the learned Counsel for the appellant formulated eight grounds of appeal for consideration, as they are interrelated, I will proceed to consider the grounds of appeal together, as it would be more appropriate, given the context of the appeal.

Since the Court of Appeal Judgement upon which the learned High Court Judge relied on to consider the relevant ingredients of the offence that needs to be proved before the Court has now been overruled by the Supreme Court, I am of the view that the appeal before this Court will have to be considered in terms of the legal principles discussed in the Supreme Court judgment and not as provided for in the relevant Court of Appeal Judgement considered by the learned High Court Judge.

Although the learned State Counsel contended that this Court should not consider the *ratio decidendi* of **SC Appeal 154/2014** on the basis that the conclusions have been reached *per incuriam*, I find no basis to agree with such a contention. I am of the view that this Court is bound by the majority determination of their Lordships of the Supreme Court as the matter has been determined by interpreting the same section in relation to the evidence led in the High Court on very much similar facts.

It was held in the **SC Appeal 154/2014 (supra)** that,

> *"The issue, as I see it, is bereft of complications; if it can be said with certainty that the 'act of offering women for lewdness (sexual acts or sexual intercourse) in return for a payment,' is subsumed within the meaning of 'procuring a person to become a prostitute.' Then the accused-appellant should be guilty as charged. It also must be noted that there is no legislative definition given to the term 'procuring' and in the circumstances, the construction that can be given to this legislative provision is a literal one. In the 12th Edition of Maxwell on the Interpretation of Statutes by St. J. Langan at page 28, it is stated that 'the most elementary rule of construction is that*

it is to be assumed that the words and phrases of technical legislation are used in the technical meaning, if they have acquired one, and otherwise in their ordinary meaning.'

In the absence of a technical meaning the word 'procuring' must be construed in its ordinary meaning."

It was held in the case of **Martison Vs. Hart (1854) 14 CB 357**,

"The rule is that words used by legislature should be given their plain and natural meaning. By plain and natural meaning, it is meant the literal and popular meaning as opposed to figurative or technical meaning." [N. S. Bindra's Interpretation of Statutes 12th edition at page 212]

Their Lordships of the Supreme Court in **SC Appeal 154/2014** has considered section 9(1) of the Vagrants Ordinance No. 4 of 1841 as the relevant legislative provision that should be considered applicable to the facts proved before the Court, archaic one may say, but the legislation very much part of the prevailing law.

Section 9(1) of the Vagrants Ordinance reads as follows;

9.(1) Any person who –

(a) knowingly lives wholly or in part on the earnings of prostitution;

(b) systematically procures persons for the purpose of illicit or unnatural intercourse shall be deemed to be an incorrigible rogue within the true intent and meaning of this Ordinance, shall be liable...

It appears from the judgement that the Supreme Court has decided to consider the decisions of the Courts in other jurisdictions, in particular common law jurisdictions, in the absence of any precedents that can be followed based on the judgments of our Courts on the issue.

It is in that context the decisions reached in the United Kingdom under the **Sexual Offences Act of 1956** has been considered in comparison to section 360A(1) of the Penal Code.

I am not in a position to agree with the contention of the learned State Counsel that the Supreme Court has determined that a female who engaged in prostitution previously, but decided to leave her past behind and moved away from her life as a prostitute has to be considered on the basis of once a prostitute always a prostitute. What the Supreme Court has decided was that if the female was already a prostitute at the time of the alleged procuration, the necessary ingredient of the offence of procuration as required by section 360A(1), namely, 'procuring to become a prostitute' cannot be established.

After having considered the relevant decisions and the legislative provisions, it has been determined that;

> *"In order to establish the offence of procuration it must be proved that the person procured was not a prostitute before the alleged procuration. The burden is on the prosecution to establish that fact beyond reasonable doubt, the degree of proof required in criminal cases, which is an evidentiary burden. I do not think that one could say that there is a legal burden to establish that fact by placing the testimony of the person procured before the Court. This Court also appreciates the challenge the prosecution may face in discharging its burden in instances where a person may fairly be said to be living in whole or in part on the earnings of prostitution, that is to say when there is parasitic relationship between the prostitute and 'the tout,' 'the bully,' 'protector' or the 'pimp' as one may call the other."*

It is therefore clear that the person alleged to have been procured is not an essential witness to prove a charge given the particular facts and the circumstances in relation to a case. However, the burden of proving the charge that the accused person procured the person who engaged in the act of prostitution to become a prostitute as stated in the section remains with the

prosecution. It is in that context, the prosecution's failure to call witnesses named by the prosecution in the indictment becomes relevant.

In the judgment under consideration, the learned High Court Judge has decided to reject the stand of the appellant that she was only running a spa and not an operation of prostitution. I am of the view that however weak the defence may be, that fact alone would not suffice to assume that the charge against the appellant has been proved, as the duty to prove the ingredients of the charge remains with the prosecution.

In the case of **Narender Kumar Vs. State of Delhi (NCT of Delhi, AIR 2012 SC 2281,** it was held:

> *"Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of the defence. However great the suspicion against the accused and however strong the morel belief and conviction of the Court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for the offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt."*

Having considered the above, it is my considered view that the mere fact that the accused offered the alleged female in exchange of money to have sexual intercourse as a prostitute would not suffice to prove the charge of procuration as envisaged in section 360A(1).

As considered and stated in the **SC Appeal 154/2014**, in order to establish a charge under section 360A(1) it becomes necessary to prove that the alleged procured female became a prostitute, and that it was as a consequence of her being procured by the accused-appellant to become a prostitute.

I am unable to find any evidence in the appeal under consideration to determine as such, other than, if the version of events as stated by the prosecution witnesses are to be believed, that the appellant engaged in offering the services of females as prostitutes by accepting money.

As considered above, I am of the view that such evidence is insufficient to establish a charge in terms of section 360A(1) of the Penal code.

Accordingly, I set aside the conviction and the sentence of the appellant as it cannot be allowed to stand, and acquit her of the charge preferred.

Appeal allowed.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal