

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

In the matter of an Appeal in terms of Section 331
of the Code of Criminal Procedure Act No. 15 of
1979.

Court of Appeal Case No
CA-HCC-219/20
HC of Batticaloa Case No:
HCB/3088/17

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Thureiretinam Balkumar alias Thureirathnam
Balkumar

Accused

AND NOW BETWEEN

Thureiretinam Balkumar alias Thureirathnam
Balkumar

Accused-Appellant

Vs.

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

Complainant-Respondent

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

Counsel: Arunandam, PC with Thambiraja Dayamduraja for the Accused-
 Appellant
 Jayalakshi De Silva, SSC for the Respondent.

Written 29.09.2022 (by the Accused-Appellant)

Submissions: 30.10.2023 (by the Respondent)

On

Argued On: 08.11.2023

Decided On: 07.12.2023

Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as ‘the Accused’) was indicted in the High Court of Batticaloa on the following grounds,

Count 1;

For the abduction of Kandaiah Thanganayagi, a girl under the age of 16 years, from the lawful custody of Kathirkamar Kandaiah on or about 13.09.2011 in Pondukalchenai an offence punishable under section 354 of the Penal Code.

Count 2 ;

For the committing the offense of rape on the said Kandaiah Thanganayagi, an offence punishable under section 364 (2) (e) of the Penal Code.

After the trial, the Learned High Court Judge convicted the Accused on both counts and sentenced him

- i. On 1st count 2 years of Rigorous Imprisonment suspended from that date for a period of 10 years.
- ii. On 2nd count 10 years of Rigorous Imprisonment, a fine of Rs.5000, and an order to pay a compensation of Rs.50,000.

Being aggrieved by the said judgment this Appeal was preferred by the Accused.

The following grounds of Appeal were urged by the counsel for the Accused.

1. The Learned High Court Judge erred in law in allowing the prosecution to ask leading questions to the detriment of the appellant contrary to the principle upheld in the judgment in S.C. Appeal 118/17 decided on 09.11.2018.
2. The Learned High Court Judge erred in law in failing to consider that the prosecutrix was admonished and warned by the prosecution that if false evidence is given, she will receive punishment.
3. That the Learned High Court Judge failed to consider the infirmities of the prosecution case as required by the judgments in the cases Wijepala v. The Attorney-General [2001 1 SLR 46]

The facts and circumstances giving rise to this Appeal are that:

According to the prosecutrix, PW 01 testified that while she was returning from school, she and her sister and two friends stopped near a mango tree to pluck mangoes, while they were plucking the Accused approached them and threatened them that he would inform them to the police. Thereafter the sister and one of the friends ran away. PW01 and her friend Dilakshana (PW11) remained. The Accused dragged her into the jungle, where she fainted.

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Q: what took place after that?

A: I don't know what happened thereafter, I lost consciousness and fell; after

that when I got up and looked, my frock had been raised; the Accused held my hand

and lifted me; he asked me to go home; thereafter, when I went home it must have been 5:30 or 6 o'clock”

Later we observed that the witness was warned by the prosecution that she would be punished if she gave false evidence.

Thereafter prosecution has asked the following questions.

On pages 75 to 76 of the translated Appeal brief

Q: Did you narrate everything that took place in the said statement?

A: Yes.

Q: Witness, are you telling the Court regarding the particular incident?

A: Yes

Q: Witness, do you know that, you ought not to give false evidence in Court?

A : Yes.

Q : Even with that knowledge, do you know what the punishment would be if you give false evidence?

A: I don't know.

Q: Witness, we are conducting this Case, having sent out all those who were seated in this

Court, wasting the valuable time of the Court witness, you have to tell regarding the incident which took place; if not, you should go away saying you do not wish to give evidence in this regard; you can do only one of the two; you cannot testify here, the way you wish to testify; witness, now tell what transpired?

A: All that I am saying is appropriate.

Thereafter Prosecutrix came up with the story about the rape. Learned counsel for the Accused brought to the notice that the rape story came up because of a leading question asked by the prosecution counsel which was allowed by the High Court Judge.

I'm of the view these questions are leading questions and as it matters go to the root of the case. The questions put forward by the prosecution to the witness prompted the witnesses to answer what the prosecution wanted to prove that the Accused had penetrated his male organ into her vagina.

For the said purpose I will reproduce the questions put forward by the prosecution and answers by the witness.

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Q: Witness, what happened to the underclothes you had been wearing at that time?

A: The underskirt I was wearing had been raised up along with the frock; the panty had been pulled down.

.....

Q: Witness, did the Accused touch you, after he dragged you inside, from the road?

A: yes

Q: Witness, which part of your body, did he touch?

A: After having dragged me by my hand, he asked me to lie down; I did not obey him; he pushed me; no sooner I fell, I felt faintish.....

.....

Q: Witness, when you woke, did you stand up or were you lying down on the ground?

A: I was lying down.

.....

Q : Witness, was there blood on any part of your body?

A : Yes.

Q : Witness, which part of your body was bleeding?

A : When I passed urine, there was blood.

Q : Witness, apart from blood in the part of your body from where you urinate, did you observe anything else?

A : No.

.....

Q : witness, inside what, did thus Accused keep his male organ?

A: He kept it in my vagina.

Q : Witness, for how long did the Accused keep his male organ inside your vagina and do it in that manner?

A : I don't know; it would have been for ½ of an hour approximately.

Q : Witness, at that juncture, didn't you try to push off this Accused and escape?

A : I pushed him; it was then he lifted me and asked me to go home; my mother and father had come in search of me.

Learned counsel for the Accused has referred, **Junaiden Mohamed Haaris and others v. Attorney General, SC Appeal 118/17, Decided on 09.11.2018, where Justice Aluwihare** has discussed the impact on the leading questions.

“According to Vasudevan the utterance had been made by the deceased 2nd accused to the accused-appellant. At this point, the prosecution had posed a question:

“කවද මැරුවා කීවේ?”

To which witness Vasudevan had responded by stating “උමා දෙව්”.

In my view, this question is clearly a leading question, as it suggests that the name of the deceased was referred to by the 2nd accused in the course of the alleged conversation.

.....

I also wish to state that the manner in which the prosecution has led evidence in this case by the prosecution is not desirable. Vasudevan is a belated witness by a considerable time gap and who had also had some displeasure with the accused-appellant. In this context

the prosecution ought to have allowed the witness to testify freely without prompting or leading, so that the credibility of the witness could have been properly evaluated. Immediately after witness Vasudevan had referred to the purported conversation, the Learned State Counsel had shot the question “කවද මරුවා කීවේ?” Suggesting that the name of the deceased transpired during the conversation which was not the case. The Learned State Counsel should never have asked this question and on the other hand ought not to have been permitted by the Learned High Court Judge as up to that point of his evidence, Vasudevan had not referred to the identity of the dead person.

In response to this question, Vasudevan answered “Uma-Devi”.

The manner of questioning not only diminishes the evidentiary value of the testimony but also tarnishes the testimonial trustworthiness of the witness, as one could reasonably expect the witness to have come out with the name “Uma-Devi” on his own, if that name was referred to in the conversation between Salam and the accused-appellant.

.....

Here again, I observe that the manner in which this witness had been questioned by

Up to this point of questioning, the witness had never said that both the accused applicant and the deceased 2nd accused had approached him to pawn an item of jewelry.

The question (referred to above) suggests to the witness that both of them (Salam and the accused-appellant) in fact had come to his shop to pawn jewelry.

Thus, the manner of questioning referred to above has thereby substantially diminished the probative value of the testimony. “

With the above observation by Justice Aluwihare about leading questions, when we consider the question put forward by the prosecution, soon after prosecutrix said that she couldn't remember anything as she was unconscious. What the Court can gather is that the prosecution wants the witness to say to the Court that the Accused has inserted his male organ into the vagina to prove the charge of rape, by doing so the question arise whether she was a trustworthy witness.

We are mindful of the words uttered by **Justice Sisira Abrew in Dingiribandage Sumanadasa v. The Republic of Sri Lanka, CA No'147/2005, Decided on 18.07.2008 (Appellate Court Judgment(Unreported) 2008 (Volume II) Cri.)**

"I hold that the medical evidence does not support the evidence of the prosecutrix. Thus the case depends only on the evidence of the prosecutrix. Can an accused person in a case of rape be convicted on uncorroborated evidence of the victim? In this connection I would like to consider certain judicial decisions.

In Bhoginbhai Hirjibhai Vs. State of Gujarat (2983) AIR S.C. 753 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 injury".

However, in *Gurcharan Singh vs. State of Haryana AIR 1972 S.C. 2661* the Indian Supreme Court held thus;

" As a rule of prudence, however, Court normally looks for some corroboration on 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".

In *King vs. Athukorale 50 NLR 256* Justice Gratiaen states thus:-

"Where an accused is charged with rape, corroboration of the story of the prosecutrix must come from some independent quarter and not from the prosecutrix herself. A complaint made by the prosecutrix to the Police in which she implicated the accused cannot be regarded as corroboration of her evidence".

In *Premasiri vs. The Queen 77 NLR page 86* Court of Criminal Appeal held; *"In a charge of rape it is proper for a jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the jury that she is speaking the truth "*

In *Sunil and another vs. The Attorney General 1986 I SLR 230* Court of Appeal held thus;

"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 his 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.

It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."

Considering all this judicial literature, I hold the view that an accused person in a charge of rape can be convicted on the uncorroborated evidence of the victim only when her evidence is of such a character as to convince the Court that she is speaking the truth. If the evidence of the victim is not credible, it is not proper for the Court to convict the accused even if her evidence is corroborated by independent evidence."

In the instance case, we hold that her evidence could not be considered to find the Accused guilty of rape charge.

There is another reason to disbelieve her evidence is that according to prosecution evidence Dr.Rahuman who examined the prosecutrix stated that he had not seen any injuries in the genital area, or her body. He categorically stated that :

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Q : Will there be bleeding when the surface of the body is injured?

A: Yes, even when there is an abrasion, when you look immediately, there would be a slight bleeding, in the least.

Q : When you examined the victim, was there any trace of bleeding in her genitals?

A : No.

On the other hand, the prosecutrix has stated that there has been bleeding in her body.

For the said reasons We hold that the prosecution has failed to prove the charge of rape beyond reasonable doubt. Therefore, we acquit the Accused from the second Count.

Now we consider the 1st Count, the charge of Abduction.

According to the prosecutrix she has stated that the accused had forcefully taken her to the jungle. This was collaborated by witness Dilakshana (PW11), according to her 13.05.2019 on the day of her question she, the prosecutrix, and other two people came back from school, while they were plucking mangoes, the accused came there and took the prosecutrix to the jungle. When PW01 shouted he covered her mouth. It should be noted that this evidence was not challenged by the accused either in cross-examination or when she gave evidence.

The Sister of the prosecutrix namely, Kandaih Jothy (PW03) who gave evidence on 13.01.2019 while returning from school her elder sister, herself, and two other friends while plucking the mangoes Accused came and pulled the elder sister by the hand and took her away.

Considering this evidence, we hold that, the Learned High Court Judge had correctly come to the conclusion regarding the abduction. Therefore, we affirm the conviction for the 1st count and affirm the sentence. It should be noted that Learned High Court Judge has suspended the sentence for a period of 10 years from the date of conviction. That is 21.09.2020. This Court suspend the sentence from this date for the period of 10 years.

This appeal is partly allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL