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

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Punchihewage Sampath Kumara alias Bindu

Court of Appeal Case No. HCC 217/2018

Accused

High Court of Embilipitiya Case No. HC 85/2014

AND NOW BETWEEN

Punchihewage Sampath Kumara alias Bindu

Accused Appellant

V.

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

Complainant Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

COUNSEL : Dharshan Weerasekera for the Accused Appellant.

Chethiya Goonesekera DSG for the Respondent.

ARGUED ON : 31.01.2020

WRITTEN SUBMISSIONS

FILED ON : 17.07.2019, 03.09.2019 & 26.02.2020 by the Accused Appellant.

25.07.2019 by the Respondent.

JUDGMENT ON : 10.03.2020

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted in the High Court of Embilipitiya on one count of rape, punishable in terms of section 364(1) of the Penal Code. After trial, the learned High Court Judge convicted the Appellant for the said offence and sentenced him to a term of 10 years rigorous imprisonment and a fine of Rs. 5, 000/- (in default of payment 3 months simple imprisonment) was also imposed on. In addition, the Appellant was also ordered to pay Rs. 150,000/- as compensation to the victim, in default of payment, further term of simple imprisonment for 12 months was also ordered.

02. The Appellant preferred the instant appeal against the conviction on the basis that the prosecution has failed to prove beyond reasonable doubt that the sexual intercourse the Appellant had had with the complainant, was without her consent. Grounds of appeal as submitted by the learned counsel for the Appellant are as follows;

    1. Failure to consider the suspicious subsequent conduct of the prosecutrix.

    2. Failure to consider serious infirmities in the prosecutrix's statement.

    3. Failure to consider the ambiguous nature of the medico- legal evidence.

4. Failure to give proper weight to the Appellant's dock statement where he had said that he was having an affair with the prosecutrix. (prosecution has failed to refute or contest any of the material elements of the Appellant's statement.)

03. In summary, the contention of the Appellant is that, the prosecution had failed to prove the absence of consent of the complainant to the act of sexual intercourse beyond reasonable doubt.

04. Prosecution mainly relied upon the evidence of the complainant (PW1). According to her testimony, on the day of the alleged incident she had been at home with her children. Husband had been away at about 9 p.m. The Appellant who was a known person in the village had come and called out her husband's name. When she said that her husband is not at home, Appellant had gone towards the neighbour's house. Appellant had told her that he came to ask for a cigar.

05. When she was asleep, she had felt someone sitting near her. She had felt that it was not her husband. It had been the Appellant. She had shouted the name "Akila, Akila" who happened to be her son. Appellant had asked her not to shout and that he wanted to talk to her and had dragged her out. Appellant had inquired from her as to what she had told Kanthi's husband about the affair the Appellant was having with Kanthi. The prosecutrix had got scared that her husband might come and had wanted the Appellant to leave. Appellant had requested for a glass of water. When she gave Appellant a glass of water, he had held her, dragged her into the house, threatened her not to shout, removed her clothes by force and had raped her. She said that he raped her like a mad man. She said, "*පිස්සෙක් වගේ මට කරදර කළා. මම එපා එපා කියද්දී කරදර කළා.*" (page 65 of the brief). She had stated that she was shivering in fear.

06. Later when her husband came home, she had not related the incident to her husband as she was scared that he would kill the Appellant and that the children would be left destitute. The following morning, she had wanted to commit suicide and wanted to buy a bottle of poison. On the way she had met her mother, and upon seeing her mother she had not been able to control her tears. Upon being questioned as to the reason for her crying, she had told the mother about the incident of rape. After her father came home, they had gone and reported the matter to the police.

07. It is an admitted fact that the Appellant had sexual intercourse with the complainant (PW1) on 19.04.2011 at about 9.30 p.m. Therefore, the remaining element of the offence of rape that the prosecution was required to prove beyond reasonable doubt in the instant case was, that the Appellant had had sexual intercourse referred to above, without the consent of the complainant. All four grounds of Appeal will be discussed together as they all of them are interwoven with the issue of consent.

08. It is the contention of the learned counsel for the Appellant that the story of the prosecutrix is improbable. In that, he submitted that the PW1 failed to inform the incident to her husband when he returned home that night. Instead, she had disclosed it to the mother only in the morning.

09. Prosecutrix in her evidence explained as to why she had not told her husband about the incident in the night when he came home. She had been worried that her husband would harm the Appellant and that would cause more trouble by her children becoming destitute. This explanation was given by the prosecutrix in her evidence in examination in chief and that assertion was never questioned or challenged by the defence in cross examination. She probably may have silently suffered the whole night and the mental trauma may have been too much for her that she was driven to the thought of committing suicide, as a peasant village woman, this cannot be said improbable.

10. Learned counsel for the Appellant further submitted that although the neighbor heard prosecutrix shouting 'Akila Akila', the neighbor had not heard any other noise. The evidence of the prosecutrix was that when she shouted for the son to hear, the Appellant threatened her with a knife not to shout. Therefore, there could not have been any further noises for the neighbor to hear. The neighbor (PW3) had testified that, after the Appellant left her house, she heard the complainant shouting 'Akila Akila'. This is consistent with the evidence of the prosecutrix that she shouted for her son.

11. The portion of her evidence, that she was threatened with a knife was not challenged by the defence in cross examination. The absence of consent can happen by reason of lack of agreement and as well as by force, threat of force, or by even fear of force. It can even be unwilling submission due to fear of serious consequences.

12. The complainant had been consistent in her evidence. Although she had been cross examined at length, the defence had failed to establish a single contradiction between her evidence in court and the statement she had made to the police or even vis-a-vis the history given to the medical officer who examined her. There does not appear to be any contradictions *inter se* or *per se* in her evidence. The two omissions brought to the notice of the court in her statement to the police do not go to the root of the matter and would have no effect to her credibility.

13. The learned Trial Judge found the prosecutrix to be a credible witness and her evidence is worthy of credit. It was the same Trial Judge who heard the evidence of the prosecutrix as well as the other witnesses including the unsworn statement of the Appellant from the dock, that delivered the judgment. Thus, the Trial Judge had had the benefit of observing the demeanor of the witnesses. Therefore, it was the Trial Judge who had the opportunity to assess the demeanor and deportment in evaluation of the credibility of the complainant.

14. In case of ***Fradd V. Brown & company Ltd. (20 N.L.R. Page 282)*** Privy Council held;

> *"It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity, so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance...."*

15. Hence, Appellate Court will be slow in interfering with the findings of the learned Trial Judge on facts, unless there are compelling reasons to do so.

16. Learned counsel for the Appellant contended that the evidence of the complainant was not corroborated by other evidence. There is nothing to prevent the Court to act upon the evidence of a single eye witness, if in the opinion of Court such evidence is cogent and reliable. Evidence of a sole eye witness has to be given careful consideration. If the evidence of the sole eye witness is found to be credible, court can convict an Accused on the testimony

of the single eye witness. However, if the court finds that his evidence is doubtful, then it is unsafe to record a conviction based on the testimony of such a solitary eye witness.

17. No particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eye witness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and is in tune with probabilities and inspires implicit confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eye witness, it should be wholly reliable. (***Joseph V. State of Kerala, [2003] 1 SCC 465***).

18. In terms of section 134 of the Evidence Ordinance, no particular number of witnesses shall in any case be required for the proof of any fact.

19. There is no hard and fast rule that the evidence of a victim in a sexual offence has to be corroborated by other witnesses.

20. Indian Supreme Court in the case of ***Bhoginbhai Hirjibhai V. State of Gujarat [1983] AIR SC 753*** said;

> *"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 the injury."*

21. In case of ***Thambarasa Sabaratnam V. A.G. CA 127/2012***, after discussing a series of cases said;

> *"Therefore, it is clear that an accused person facing a charge of sexual offence can be convicted on the uncorroborated evidence of the victim when her evidence is of such character as to convince the court that she is speaking the truth."*

22. However, in the instant case PW3, the neighbor of the complainant testified to the fact that she heard the prosecutrix calling her son's name. Further, the prosecutrix had testified that her clothes were forcibly removed by the Appellant. Court had observed that the clothes alleged to have been worn by the prosecutrix were torn and that the fastener of the brassier

was broken. Therefore, I find that the conclusion of the High Court Judge that evidence of prosecutrix was consistent and credible, cannot be faulted.

23. Counsel for the Appellant also submitted that the nature of the medical evidence was ambiguous. Therefore, the reasoning of the learned Trial Judge was erroneous.

24. The Medical Officer (PW8) who examined the prosecutrix in his evidence has said that he observed a fresh tear in the posterior vaginal wall. He has further said that it would have been possible for such a tear to occur when forcible sexual intercourse takes place. However, in cross examination he has said that such a tear could also occur when two persons have sexual intercourse with consent, when there are no vaginal secretions. The learned Trial Judge in her judgment has clearly considered both aspects in page 9 of her judgment, and concluded that it was possible for the injury to have been caused as a result of sexual intercourse without her consent.

25. The offence of rape is defined in section 363 of the Penal Code. Explanation 2 to the section 363 provides;

> (ii) *Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.*

Hence, it is not imperative for the prosecution to prove any physical injuries on the body of the prosecutrix to prove lack of consent.

26. As I referred to earlier, it was open for the learned Trial Judge to find the evidence of the prosecutrix to be credible. Hence, on her evidence it was open for the Trial Judge to come to the conclusion that the vaginal tear occurred because of the sexual intercourse that the Appellant had had with the Appellant without the consent of the prosecutrix.

27. Although the Appellant has not preferred this as a ground of appeal, at the argument stage and in his written submissions, learned counsel for the Appellant contended that the prosecution has failed to call the complainant's father Ananda to refute the version of the defence. Further, counsel submitted that the prosecution should have called the husband of the complainant.

28. In case of ***R. V. Russel Jones [1995] 1 Cr. App. R. 538,*** the Court discussed at length, the issue of witnesses the prosecution chooses not to call. In *Russel* (supra) court observed that the prosecution enjoys a discretion whether to call, or tender, any witness they require to attend, but the discretion is not unfettered. The discretion must be exercised in the interest of justice. Prosecutor must direct his mind to his overall duty of fairness.

29. Court also observed that the prosecutor is the primary judge of whether or not a witness for the material events is incredible, or unworthy of belief.

30. Courts in England have also held that in that the event the prosecution is reluctant to call a particular witness, the defence may call such witness if they so wish. (***R.V. Thompson [1876] 13 COX 181, R. V. Oliva 49 Cr. App. R 298***)

31. This principle was also adopted in Sri Lanka in several cases by this court. In case of ***Sinnathamby Ganeshan and another V. Republic of Sri Lanka C. A. Appeal No. 57-58/2003,*** referred to what was held in case of ***Walimunige John V. The State 76 N.L.R 488***;

> *"The prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross examination Further it is not incumbent on the trial judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114(f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all."*
>
> *"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative that is withheld by the prosecution and the failure to call such a witness constitutes a vital missing link in the prosecution case and where a reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be mere repetition of the narrative."*

32. The above principle which was laid down in the case of ***Walimunige John*** was also followed in ***Kumara de Silva V. A.G. [2010] 2 S.L.R. 169 and Ajith Fernando alias Konda Ajith and others V. A.G. [2004] 1 S.L.R. 288.***

33. In the instant case Ananda, the father of the complainant was not even listed as a witness in the indictment. The defence has not even requested the court to order the prosecution to call Ananda as a witness. It was also open for the defence to call the witness if they so wished.

34. The husband of the complainant was not called as a witness for the prosecution. Even in his unsworn statement from the dock, the Appellant has taken up the position that the husband of the complainant was not at home when he had sexual intercourse with the complainant. Hence, prosecution not calling Ananda and complainant's husband has not created any doubt in the prosecution's case.

35. It is the contention of the learned counsel for the Appellant that the learned High Court Judge has not given proper weight to the Appellant's unsworn statement from the dock.

36. It would be pertinent at this juncture to refer to the legal position with regard to the unsworn statements from the dock by Accused persons and the history of the right of the Accused to make such statements.

37. As elaborated by Professor G.L. Peiris in his article ***"UNSWORN STATEMENTS BY ACCUSED PERSONS: TRENDS IN THE COMMONWEALTH"*** published in 1981, in the early days English Law did not permit a defendant in criminal proceedings the right to give evidence in his own defence. The law of England at that time was exposed to the criticism that exclusion of sworn testimony by the Accused gravely hampered a blameless Accused in vindicating his innocence. Thus, the position in England was changed by Section 1 of the Criminal Evidence Act of 1898 which rendered an Accused a competent witness for the defence in all criminal cases. Furthermore, Section 1(h) of the said Act embodied the express proviso that, *"Nothing in this Act shall affect...any right of the person charged, to make a statement without being sworn"*. Thus, it appears that proviso to Section 1 of the Criminal Evidence Act No. 1898 is what allowed an Accused, when called up for defence, to make an unsworn statement from the dock.

38. In Sri Lanka, Section 120(6) of the Evidence Ordinance provides, that an Accused can be a competent witness in his own behalf and may give evidence in the same manner and with the like effect and consequences as any other witness. Hence, even before the Criminal Evidence

Act of England in 1898 provided for the right to an Accused to give sworn evidence, Evidence Ordinance in Sri Lanka provided that right in 1895. The Evidence Ordinance however is silent as to the right of an Accused to make an unsworn statement, nor is there any other statutory provision recognizing that right.

39. Section 100 of the Evidence Ordinance provided that recourse was to be had to English Law in the case of a ***Casus Omissus***. Accordingly, making use of Section 100, Sri Lankan Courts applied the approach taken by the English Law of Evidence at the time, and recognized the right of an Accused to make an unsworn statement from the dock in the case of ***King V. Vallayan Sittambaram [1918] 20 N.L.R. 257***, where His Lordship Bertram C.J. stated;

> *"...There is no provision on this subject one way or the other in the Code, and this is, therefore, another point on which we may have recourse to English procedure. The rules of English procedure are plain. The prisoner may still if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box, and on this analogy he has the same right in Ceylon...."*

It was subsequently held that a prisoner may, if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box.

40. Nevertheless, Sri Lankan Courts have continued to place evidentiary value in dock statements, as seen in cases such as ***Queen V. Buddharakkita Thero [1962] 63 N.L.R. 433*** and ***Queen V. Kularatne [1968] 71 N.L.R. 529*** where it was held that while jurors must be informed that such a statement must be looked upon as evidence, subject however to the infirmities that the Accused statement is not made under oath and not subjected to cross examination. In ***'Kularatne'***, Court further held that;

> *"But the jury must also be directed that,*
>
> *(a) If they believe the unsworn statement it must be acted upon,*
> *(b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and*
> *(c) That it should not be used against another Accused."*

41. However, criticisms have been made that since a statement made from the dock is not under oath and the truth of the contents of the statement cannot be tested by cross examination, such a statement has *"...little evidentiary value compared with sworn testimony upon which the accused can be cross examined..."* (***R. V. Zware [1946] T.P.D.1***). This uncertainty surrounding the evidentiary value of dock statements (when compared to the sworn testimony of an Accused) has led to the abolition of the right of the Accused to make an unsworn statement in the United Kingdom by Section 72 of the Criminal Justice Act 1982. Other commonwealth countries that followed the English approach in bringing the right of an Accused to make an unsworn statement, such as South Africa (Criminal Procedure Act 1977) and South Australia (Section 18 of the Evidence Act 1929) abolished the same even before the United Kingdom.

42. As stated above, Sri Lanka brought the right of an Accused to make an unsworn statement from English law on the basis of a ***Casus Omissus***. United Kingdom has abolished that right for the reasons stated before. Yet, Sri Lanka still maintains the same right to an Accused, although such unsworn statement is mostly artificial and the truth of it cannot be tested by cross examination.

43. However, until and unless this is explicitly taken out of our law by the legislature, or is revisited by the Superior Courts, we are bound to follow the same legal principle which gives such right to an Accused as stated in cases *'**Vallayan**'*, *'**Buddharakkitha Thero**'* and ***'Kularatne'.***

44. In case of ***Punchi Rala V. The Queen*** **75 N.L.R. 174**, it was held that, where at a trial before the Supreme Court, the Accused makes a statement from the dock, the Judge would be misdirecting the jury, if he tells them that they should consider the statement of the Accused but that it is not much value having regard to the fact that it is not on oath and not subject to cross examination.

45. In case of ***Don Shamantha Jude Anthony Jayamaha V. Hon. Attorney General C.A. 303/2006 (11.07.2012)*** held;

"Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because it

needs to be considered in the totality of the evidence that is in the light of the evidence for the prosecution as well as the defence".

46. In the instant case the learned High Court Judge at page 8 of her judgment (page 163 of the brief), has discussed the version of the Appellant that he had an illicit affair with the complainant, and has given reasons for rejecting the version of the Appellant. In her judgment, the learned High Court Judge has analyzed all the evidence adduced at the trial including the position taken by the Appellant in his dock statement and has rightly concluded that the Appellant had had sexual intercourse with the complainant, without her consent.

47. In the above premise, I find that the grounds of appeal urged by the Appellant are without merit. For the reasons stated above, I find no reason to interfere with the judgment of the learned High Court Judge. Hence the conviction of the Appellant of the charge is affirmed. The sentence imposed on the Appellant is neither wrong in principle, nor against the law. Hence, the sentence imposed on the Appellant is also affirmed.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL