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

In the matter of an appeal in terms of the Section 331 of the code of Criminal Procedure Act No: 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:
CA 73/2017

Vs.

Matara High Court Case No:
76/2014

Manikkam Navaratnam

Accused

AND NOW BETWEEN

Manikkam Navaratnam

Accused-Appellant

Vs.

The Democratic Socialist Republic of Sri Lanka

Complainant- Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	Razik Zarook, PC with AAL Rohana Deshapriya and AAL Chanakya Liyanage for the Accused-Appellant Rohantha Abeysuriya, SDSG for the Complainant-Respondent
ARGUED ON	:	24.01.2020
WRITTEN SUBMISSIONS	:	The Accused-Appellant – On 08.11.2017 The Complainant-Respondent– On 14.12.2017
DECIDED ON	:	28.07.2020

K.K.WICKREMASINGHE, J.

The Accused-Appellant has filed this appeal seeking to set aside the judgment of the Learned High Court Judge of Matara dated 15.03.2017 in case No. HC 76/2014.

Facts of the case:

The Accused-Appellant (hereinafter referred to as the 'Appellant') was indicted in the High Court of Matara for committing Rape on or about 10.12.2012, on one Perumal Sriyani (under 18 years of age), an offence punishable under Section 364(2)(e) of the Penal Code as amended by Act No. 22 of 1995.

The accused appellant pleaded not guilty and he was tried before the Judge without a Jury. After closing of the case for the Prosecution, the Accused Appellant made a dock statement denying commit of the said offence of Rape. At the conclusion of the trial, Learned High Court Judge of Matara had

delivered the Judgment on 15.03.2017, convicting the Appellant. Accordingly, the following sentence had been imposed on the appellant;

i. A term of 12 years rigorous imprisonment,
ii. A fine of Rs. 5000/= with a default sentence of 03 months simple imprisonment, and
iii. A compensation of Rs. 100,000/= to be paid to the Prosecutrix with a default sentence of 01 year simple imprisonment.

Being aggrieved by the said Judgment, the Appellant has preferred this Appeal.

According to the Prosecution case, the victim was a newly-wed living with her husband in a line housing scheme. On 10th of December 2012, the accused-appellant, a poosari, had been brought by the victim's husband and a neighboring aunt to attend the victim as she had been possessed by an evil influence (දිෂ්ටියක්). At around 12.00 pm (mid night) on the 10th of December 2012, the Accused-Appellant had taken the victim to a place near her residence and had threatened to harm the husband of the victim and had forced the victim to engage in sexual intercourse with the Accused-Appellant and thereby raped the victim (who was 16 years and 5 months old). Furthermore, the Accused-Appellant threatened the prosecutrix by stating he would kill her husband if she divulged the rape.

The accused appellant had accompanied the prosecutrix back home. She had not divulged about the incident to her husband due to fear of the Accused-Appellant's threat. After the appellant left her, she had been crying and when inquired narrated the incident to her husband.

Grounds of Appeal:

The following grounds of appeal were raised as grounds of appeal on behalf of the Appellant;

i. The Learned Trial Judge has erred in law by failing to evaluate the vital omissions and the contradiction 'V1' marked by the Defense in the evidence of the Prosecutrix PW 1.

ii. The Learned Trial Judge has not taken into consideration that the evidence of Prosecutrix (PW 1) has failed the test of spontaneity, credibility, probability and consistency.

iii. The Learned Trial Judge has failed to consider that the Assistant Judicial Medical Officer has examined the Prosecutrix 10 days after the incident and that his evidence does not corroborate but contradict the evidence of the Prosecutrix.

iv. The Learned Trial Judge has not given due consideration to the fact that the prosecution has relied on a belated complaint.

Legal Analysis:

i. The Grounds of Appeal one and two will be analyzed together as they basically address the credibility of the witness.

The Counsel for the Accused Appellant evaluated that there were several contradictions and omissions, but those are not vital and do not go to the root of the case.

In the case of **A.K.K. Rasika Amarasinghe V. Officer-in-Charge, Special Investigation Unit and another [S.C. Appeal 140/2010 – decided on 18.07.2018]**, it was held that,

"We note that learned Magistrate who heard the case has considered all the above contradictions and the learned High Court Judge has also considered the said contradictions. We note that the learned Magistrate who heard the case has convicted the Accused. Therefore the learned Magistrate who saw the deportment and demeanor of the witnesses has the opportunity to assess the evidence. In this regard I would like to consider a judgment of the Privy Counsil reported in 20 NLR page 282 Fradd V. Brown & Co. Ltd. wherein the Privy Counsil held as follows:-

"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."

In Alwis V. Piyasena Fernado [1993] 1 SLR 119 His Lordship Justice G. P.S. de Silva, Chief Justice made the following observation; "it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal"

When I consider the above judicial literature and the contradiction that had been brought to the notice of this Court, ***I hold that the contradictions submitted by learned President's Counsel are not vital and they do not go to the root of the case****..."*

In the case of **Attorney General V. Sandanam Pitchi Mary Theresa [S.C. Appeal No: 79/2008 – Decided on 06.05.2010]**, it was held that,

"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance (Vide, Boghi Bhai Hirji Bhai v. State of Gujarat, AIR 1983 SC 753).

Witnesses should not be disbelieved on account of trifling discrepancies and omissions (Vide, Dashiraj v. the State AIR (1964) Tri. 54). When contradictions are marked, the judge should direct his attention to whether they are material or not and the witness should be given the opportunity of explaining that matter (Vide, State of UP v. Anthony AIR 1985 SC 48; A.G. v. Visuvalingam 47 NLR 286)..... The judge has a duty to probe into whether the discrepancy occurred due to a lack of observation or defective memory or a dishonest motive (Vide, Colin Thom'e J in Bandaranaike v. Jagathsena 1984 2 Sri LLR 397).

In State of UP v. Anthony the Indian Supreme Court stated that 'while appreciating the evidence of a witness, the approach must be whether the evidence...read as a whole appears to have a ring of truth'. The Court went on to elaborate further that 'Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole'..."

In the case of **Bhoghinbhai Hirjibhai V. State of Gujarat (AIR) 1983 SC 753,** it was held that,

> *"Over much importance cannot be attached to minor discrepancies. The reasons are obvious: -* ***(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 videotape is replayed on the mental screen; (2) ordinarily it 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) the powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another, (4)By and large people cannot accurately recall a conversation and reproduce them very words used by them or heard by them. They can only recall the main purport of the conversation.* ***It is unrealistic to expect a witness to be a human tape recorder;*** *(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the 'time-sense' of individuals which varies from person to person. (6)* ***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, (7) 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 moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him-perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities- factor" echoes in favour of the version narrated by the witnesses."

These decisions suggest that a Judge should be very considerate to distinguish deliberate falsehood and genuine errors of the witnesses. It is possible that there could be errors of memory. As it is already decided by Courts, there is also a possibility for a witness who comes to Court for the first time to be distracted by the atmosphere of the Court and make slightly different testimonies than of the original incident out of confusion. Further, it should not be forgotten the fact that the prosecutrix being a young Tamil woman by the time of this incident, language barriers might have stood against her in presenting her version of the incident, as it was correctly pointed out by the Learned High Court Judge. This does not by any means suggest that Court should disregard blatant lies told by a witness who deliberately try to mislead Court. In the instant case, it is clear that the witness is truthful and few omissions do not seem to be deliberately made, nor do they cast any doubt in the case for the prosecution.

Considering above, I am of the view that the Learned High Court Judge was correct in concluding that the aforesaid minor discrepancies were not adequate to shake the credibility of the prosecutrix's evidence since such discrepancies were not gone to the root of prosecution case.

ii. The Learned Trial Judge has failed to consider that the Assistant Judicial Medical Officer has examined the Prosecutrix 10 days after the incident and that his evidence does not corroborate but contradict the evidence of the Prosecutrix.

I am well aware that our law, as it stands today, does not require corroboration from a prosecutrix in a sexual offence. However, it is settled law that the Trial Judge will act on a sole testimony of a prosecutrix only if her evidence is cogent, credible and consistent. In this instant case, the Prosecutrix was produced before the JMO only after 10 days. Then the JMO has mentioned that the hymen of the prosecutrix even had been torn and would have taken 8 to 10 days to heal and further mentioned that there was a possibility of the alleged incident taken place within that period of time.

Therefore it is clear that the evidence of the JMO has even corroborated version of the prosecutrix. Thereby the above mentioned ground of appeal fails.

In the case of **Bhoghinbhai Hirjibhai V. State of Gujarat (supra),** it was held that,

> *"...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."*

In **Sumanasena V. Attorney General (1999) 3 Sri L.R 137**, it was held that,

> *"Evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law..."*

In **Premasiri V. The Queen [77 N.L.R 86]** it was held that,

> *"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 character as to convince the jury that she is speaking the truth."*

In light of above, it is understood that law does not prevent a Judge from entering a conviction on a sole testimony of a victim, if the Judge is completely satisfied that the victim is speaking the truth and the testimony of the victim is reliable.

In the case of **State of Uttar Pradesh V. M. K. Anthony [AIR 1985 SC 48; (1985) Cri. L.J. 493],** it was held that,

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole..."*

In the case of **Premasiri V. Attorney General (2006) 3 Sri L.R 106**, Justice E. Basnayake observed that,

> *"The learned counsel complained that the accused was convicted on uncorroborated evidence. There is no rule that there must in every case, be corroboration before a conviction can be allowed to stand. (Gour on Penal Law of India 11th Edition page 2657 quoting Raghobgr Singhe vs. State; Rameshwar, Kalyan Singh vs. State of Rajasthan. It is well settled law that a conviction for the offence of rape can be based on the sole testimony of the prosecutrix if it is reliable, unimpeachable and there is no infirmity. (**Bhola Ram vs. State of Madhya Pradesh**). If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particular. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. **State of Punjab vs. Gurmit Singhe**.*
>
> *The rule is not that corroboration is essential before there can be a conviction in a case of rape, but the necessity of corroboration as a matter of prudence, except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge. (Schindra Nath Biswas vs. State. In **Sunil and another vs. the Attorney - General** Dheeraratne J. with H. A. G. De Silva and Ramanathan JJ agreeing held that **"if the evidence of the complainant is so convincing, they could act on that evidence alone, even in the absence of her evidence being corroborated".***

In the case of **Lokesh Mishra V. State of New Delhi [CRL. A. 768/2010 – decided on 12.03.2014],** it was held that,

> *"In any case of rape, the evidence of the prosecutrix is of utmost importance. As per the settled legal position the conviction of perpetrator of the crime can be based even on uncorroborated testimony of the prosecutrix. The prime reason for attaching such an importance to the testimony of the prosecutirx is that a girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant to falsely implicate or even to admit any incident, which is likely to reflect on her chastity or to put at risk her own image, dignity and prestige in the society..."*

In the case of **Sunil and another V. The Attorney General (1986) 1 Sri L.R 230**, it was held that,

> *"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..."*

Thus, it is understood that evidence given by one witness is sufficient if the Judge can be satisfied about the quality of such evidence.

During the course of the argument the Counsel for the Accused-Appellant's contention was that there is a contradiction with regard to what she stated to the JMO and her evidence at the trial. The JMO has noted down as history where she had mentioned "කරදර කරන්න හැදුවා". When the Doctor was questioned further by the counsel for the Prosecution, the JMO has very well explained the contradiction as to how the victims of such nature generally explain such incidents to Doctors when they are questioned as to what happened.

The proceedings dated 04.10.2016, before the High Court Judge of Matara in case No. 76/14, is reproduced bellow.

ප්‍ර : වෛද්‍යතුමනි, ඇයට වෙච්ච ස්ත්‍රී දූෂණයක් සම්බන්ධයෙන් ඔබට දැනුම් දීමක් කලාද ?

උ : ඔව්. ඇය කිව්වා මට කරදර කරන්න හැදුවා කියලා.

ප්‍ර : ස්ත්‍රී දූෂණයක් සම්බන්ධයෙන් දැනුම් දීමක් කළාද ?

උ : ඔව්. බොහෝ විට ස්ත්‍රී දූෂණයක් හැදින්වීමක් කරන්නේ හුගක් අය ඒ විදියට තමයි.

.....

උ : එහෙමයි. ඇයට හොඳින් වැඩුනු ස්ත්‍රී ලිංගික අවයව තිබුනා. ඒ වගේම සුව වී ගිය කන්‍යාපටලයේ ඉරීමක් තිබුනා, ඔරලෝසු මුහුනතේ අංක 6 ස්ථානගතව. ඇයගේ කන්‍යාපටලයේ සිදුරේ විශ්කම්භය මිලි මීටර් 12 ක් පමණ වුනා. (Pg.105 of the Appeal Brief)

At the trial, when the JMO was questioned as to whether the victim was raped, the JMO has answered "Yes". Therefore it is obvious that the Doctor understood her history and convinced that she mentioned that she was raped.

Unlike at the trial, the witness was not questioned by the JMO and he being a male, the victim would have been even more reluctant to divulge in detail to the Doctor.

The victim was a newly married very young lady of just 16 years and 5 months old. This is a case where the modesty of a victim is affected and most of such witnesses are reluctant to explain to everybody where the witness was unaware whether it was necessary to explain the act in detail as in the trial.

As Judges, we have to consider the social behavior of victimized witnesses. Evidence of such witnesses cannot be treated equally as trained witnesses. Due to social stigma, most of such witnesses are reluctant witnesses. This is a case where it affects the modesty of the victim. One cannot blatantly reject or accept such evidence. It should be carefully analyzed. When doing that, it is abundantly clear that the prosecutor in this case is a genuine witness.

In the case of **Bhoghinbhai Hirjibhai V. State of Gujarat (supra),** it was held that,

"*A girl or a woman in the tradition bound non- permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the Society including by her own family members, relatives, friends and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.....And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.*"

iii. The Learned Trial Judge has not given due consideration to the fact that the prosecution has relied on a belated complaint.

The Prosecutrix made the complaint on the following day, on the 12.12.2012. She was raped on 10.12.2012 at 12 midnight (dawn of 11.12.2012). She had mentioned (as of page 60) that she had to wait for her Master (කොන්දොස්තර මහත්තයා) to get money in order to go to the Police Station. Therefore she had given a reasonable explanation.

In the case of **Karnel Singh V. The State of M.P [1995 AIR 2472, 1995 SCC (5) 518]**, it was held that,

"*...Taking advantage of the prosecutrix being alone in their company the appellant picked her up and took her inside the machine room, laid her on a pile of sand, removed her saree and petticoat, and had sexual intercourse with her against her wish. After he had satisfied his lust, he called his*

companion but before the latter could have her, she ran away and narrated the incident to Multanabai and then went in search of her husband, a rickshaw puller. After narrating the incident to him, both of them went to the police station and lodged the complaint, Exhibit P.1, at about 4.10 p.m. It was said that there was considerable delay and sufficient time for tutoring and therefore her evidence could not be belivered. There is no merit in this contention. The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. ***Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathize with her.*** *Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false. The possibility of tutoring is ruled out because the evidence does not show that her husband knew the appellant and his companion before the incident..."* (Emphasis added)

The Learned High Court Judge has effectively addressed about the said delay in his judgment.

In the case of **Bandara V. State (2001) 2 SLR 63,** it was held that,

"If there is a valid reason or explanation for the delay and if the trial Judge is satisfied with the reasons and explanations given, no trial judge would apply the test of spontaneity and contemporaneity and reject the testimony of a witness in such circumstances."

It is settled law that, where a complaint is lodged belatedly, a Court can act on evidence of the prosecutrix, if the complainant gives a plausible explanation about such delay.

In the case of **Don Shamantha Jude Anthony Jayamaha V. Attorney General [CA 303/2006 and C.A.L.A. 321/06],** it was held that,

> *"...Finally having considered the case for the prosecution as well as the dock statement it is only then the learned Judge can decide whether or not the dock statement is sufficient to create a doubt in the case for the prosecution. One cannot isolate or disregard the prosecution case completely and consider only the dock statement in deciding whether the dock statement is sufficient to create a doubt provided it is so obvious that the dock statement is only a bear denial or is irrational or palpably false, in which case it could be rejected without even considering the evidence for the prosecution...*
>
> *Failure to evaluate a dock statement in the proper perspective shall not ipso facto vitiate a conviction if the dock statement is*
> *a) A bear denial*
> *b) Palpably false and unbelievable.*
>
> ***In Simonge Ekanayake Vs The Attorney General C.A.129/2005 C.Anuradapura142/200*** *it was held that even though the Trial Judge has not considered the dock statement, if no miscarriage of justice had taken place due to the lapse of the Trial Judge and there is material to say that the dock statement is palpably false then the findings of the original court should not be overturned..."*

Thus, I see no reason to give any weight to the dock statement of the Accused, as it is a bear denial that the accused has done in this case.

In the case of **The King V. Athukorala [50 NLR 256]**, it was held that,

"When 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".

Further, in the case of **Chaminda V. Republic of Sri Lanka (2009) 1 SLR 144**, it was held that,

"Court of Appeal will not lightly disturb the findings of a judge who had come to a favourable finding with regard to the testimonial trustworthiness of a witness whose demeanour and deportment had been observed by the trial judge. This view is supported by the judicial decision in Alwis Vs. Piyasena Fernando(1993) 1 SLR 119 wherein G.P.S. de Silva CJ remarked thus: "It is well established that findings of primary facts by a trial judge who hears and sees witness are not to be lightly disturbed on appeal." ..."

It is trite law that the appellate Court will not interfere with the findings of the Trial Judge who in fact has a better opportunity of observing the demeanour and deportment of witnesses, unless it is proved that the Trial Judge was misdirected.

I observe that, in the instant case, the Learned High Court Judge has made a well-reasoned judgment evaluating all the evidence placed before him and I see no reason to interfere with the same. Therefore, I affirm the conviction and the sentence imposed on the appellant, dated 15.03.2017, by the Learned High Court Judge of Matara.

The appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL