

**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
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

Court of Appeal No:

CA/HCC/0338/2019

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Kuliyaipitiya

Case No: HC/87/2017

Ratnayaka Mudiyanseelage Ajith Prasanna

ACCUSED

AND NOW BETWEEN

Ratnayaka Mudiyanseelage Ajith Prasanna

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Anil Silva, P.C. with Amaan Bandara for the Accused-Appellant
: Dishna Warnakula, D.S.G. for the Complainant-Respondent
Argued on : 05-02-2024
Written Submissions : 11-01-2021 (By the Accused-Appellant)
: 26-03-2021 (By the Complainant-Respondent)
Decided on : 15-05-2024

Sampath B. Abayakoon, J.

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

The appellant was indicted before the High Court of Kuliyaipitiya, for committing house trespass by night into the house of the female mentioned in the indictment on 30-07-2017, at a place called Gaikala within the jurisdiction of the High Court of Kuliyaipitiya and thereby committing an offence punishable in terms of section 433 of the Penal Code.

He was also indicted for committing the offence of rape on the same female mentioned earlier, at the same time and at the same transaction, and thereby committing an offence punishable in terms of section 364(1) as amended by Amendment Act No.22 of 1995 of the Penal Code.

After trial without a jury, the learned High Court Judge of Kuliyaipitiya of his judgment dated 02-10-2019, found the appellant guilty for both the counts preferred against him.

Hearing the mitigatory, as well as the aggravating circumstances, the learned High Court Judge sentenced the appellant for 3 months simple imprisonment for count 01, and he was ordered to pay a fine of Rs.100/-, with a default sentence of one-month simple imprisonment.

In relation to count 02, the appellant was sentenced for a period of 15 years rigorous imprisonment and was ordered to pay a fine of Rs.25,000/-, with a default sentence of six months simple imprisonment.

In addition to the above sentence, he was ordered to pay Rs.250,000/- as compensation to the victim of this incident, namely PW-01. He was ordered to serve two years simple imprisonment in default.

After having considered his previous conviction record, and acting in terms of section 5(1) of the Prevention of Crimes Ordinance, the learned High Court Judge has ordered the appellant to be under police supervision for a period of 4 years after he is released from the prison.

The facts in brief

The prosecutrix (PW-01) was alone in her house when this incident occurred. Her husband has passed away sometime before this incident and of her two sons, eldest son has been working overseas. The younger son has returned a week prior to this incident from an overseas job. This incident has occurred on 30-07-2012 around 12-12.30 in the night.

On that day, her son has gone to attend a funeral. While she was in sleep, somebody has come and wanted her to open the door. The person has identified himself as Sohane Kade Ajith. When she looked outside from the window, she has seen a person sitting on a motorbike parked on the road and the other person whom she identified as Ajith calling her to open the door.

In this process, he has threatened to smash the house if she did not open the door. When she refused, he has come around the house to the back door and had kicked the door. Since it was an old door, which had no lock but a wooden cross-bar placed across it, the door had got opened when it was kicked.

The appellant whom she identified as Ajith has entered the house from the back door and has held the prosecutrix by her neck and forced her to go into a room of the house. It was her evidence that after forcing her onto the bed in the room, he lifted her nightdress, partially removed his trouser and had forcible sexual intercourse with her. She has stated that the incident lasted for about one and half hours. It appears from the line of examination by the Prosecuting State Counsel that, several questions have been put to the prosecutrix on the basis that the incident lasted for about one and half hours.

The Prosecuting State Counsel has put another question asking her whether she felt some smell when she was raped, for which she has replied that she cannot say, but there was a cigarette smell.

The witness has stated that the appellant closed her mouth with his hand which prevented her from shouting, but ultimately she was able to shout because of the pain she suffered.

After committing the act of forcible intercourse with her, the appellant has left, stating, although he is leaving now, he is going to come back.

Thereafter, through fear, the prosecutrix has gone to the house of her neighbour who lived about 15 feet away from her house and stayed with the female who occupied that house until her son returned. After going there, she has not directly divulged the rape incident to her, but has stated Ajith, meaning the appellant, forced her into the house and she feels pain and let her sleep in the house. She has explained as to why she did not divulge the incident of rape to her neighbor stating that she feared if she divulged it, she may not be allowed to stay in that house.

After about 15 minutes of going into the house of the neighbour, her son has returned and called for her. Thereafter, she has gone to her house and had informed the son of the rape committed on her by the appellant.

The son had got down a motorbike from a friend and had taken her to the Katupotha police, and from there, she has been admitted to Kuliyaipitiya hospital, where she has been examined by a doctor.

Under cross-examination, she has admitted that she was in the habit of selling liquor in her house to earn a living after the death of her husband. She has stated that, she knew the appellant before, and although the appellant has not come to her house previously, he came in front of her house one day and inquired whether the person called Chandana who supplies liquor to her to sell was present and left.

She has denied that she told in the police statement that the appellant was a person known to her and had talked to her previously. This has been marked as a contradiction marked V-01. She has been specific that the other person she saw did not come to her house. She has also stated that she feared for her life and that is why she could not resist the appellant when he committed rape on her. However, she has stated, that from the moment the appellant forced her onto the bed she pleaded with him to let her go, pleading that she may die. It had been her stand that the appellant did not let her go, but forcibly committed rape on her.

It appears that the learned Counsel who represented the appellant at the trial had questioned the prosecutrix on the basis that the incident went on for one and half hours.

The witness has stated that before she went to the neighbour's house, she washed her vaginal area. She has not disputed what she told the police in her statement was that, her son came while she was crying and waiting in the living area of her house around 2.00 p.m. in that night. It has been her position that

she knew nothing about a cigarette packet, but her son told her that he found a cigarette packet inside the house.

It has been suggested to her that, she is lying and she had sexual intercourse with the appellant with the consent for over one and half hours, and it was only after her son came and questioned her about the cigarette packet found in the house, she concocted an incident of rape falsely against the appellant.

She has denied that she had consensual sex with the appellant, stating that her husband died 16 years ago and she has never done such a thing after her husband's death. She has also denied that she went to the police and complained, only because her son and his friend Chandana forced her to do so, stating that she complained because of what happened to her.

The neighbour to whose house the prosecutrix has gone after the incident, has given evidence at the trial. She has stated that while she was sleeping, around 12.00 in the night, the prosecutrix came running into her house, she appeared to be scared of something, and informed her that, Ajith squeezed her neck. She had wanted her to be allowed to sleep in the house. About 15 minutes afterwards, her son had come and accompanied the prosecutrix to her house.

According to the evidence of the Judicial Medical Officer (JMO) who examined the victim, although he has not observed any injuries on her, he has observed tenderness in her neck and lower abdominal area, which means, she has expressed pain when touching the above areas. The JMO has not observed any injuries on her vaginal area and has expressed the opinion that because she was a married woman, such injuries cannot be expected.

The short history given to the JMO by the prosecutrix was consistent with her version of events as narrated in her evidence before the Court. The JMO has expressed the opinion that although there were no injuries to her vagina, he cannot exclude vaginal penetration due to the reasons mentioned earlier.

The son of the prosecutrix who came home after the incident has stated that after going to a funeral house where he waited for 2-3 hours, he returned home around 12 midnight. While in the funeral house, he has come to know about an incident similar to the incident faced by the prosecutrix, which has been told to him be a person who came to the funeral house accompanied by the appellant. He has never imagined that it had happened to his mother. When he returned home, his mother had not been at home and when he called for her, she has come from the next-door neighbour's house and has informed that the appellant held her by the neck and committed rape on her. Since she was in pain, he has taken steps to borrow a motorbike from his friend and admit her to Kuliyaipitiya hospital. He had come to know that his mother has given a statement to the police thereafter.

He has admitted that he returned to the country few days before this incident after working overseas, and his mother used to sell liquor obtained from one Chandana, at her house.

He has stated that, while at the funeral house he heard the appellant inquiring from Kakkana, with whom he came to the funeral house, about a packet of cigarettes. He has overheard the said Kakkana saying that, it was given to you and should be with you. After returning home, he has seen a cigarette packet on the doorframe and had asked his mother about that.

Under cross-examination, he has denied that what he said in his police statement was that, when he came home, the mother was seated in the living area of the house and was crying. That contradiction has been marked as V-03.

The police officer who had conducted an investigation into this matter had observed that the back door of the house could be opened in the manner stated by the prosecutrix in her evidence.

After the conclusion of the prosecution case and when the appellant was called upon for his defence, he has decided to make a statement from the dock.

He has claimed that the prosecutrix had an illicit affair with him over a long period of time and after her son returned from overseas, he had come to know about the affair he had with prosecutrix. It had been his position that it was the son who had taken her to the police station and made a complaint against him of a rape. He has claimed that he never raped her, but everything happened with her consent.

The Grounds of Appeal

At the hearing for this appeal, the learned President's Counsel urged the following grounds of appeal for the consideration of the Court.

1. The prosecution had not proved the case beyond reasonable doubt.
2. Matters favorable to the accused pertaining to his defence have not been taken into consideration by the learned High Court Judge.
3. The dock statement of the accused has not been properly evaluated by the learned High Court Judge.

The Consideration of the Grounds of Appeal

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

The learned President's Counsel relied heavily on the evidence where the prosecutrix has stated that this incident went on for about one and half hours, to argue that such an incident cannot take place for such a long period if there was no consent on the part of the prosecutrix. He was of the view that, when taken together with the dock statement of the appellant where he has stated that everything happened with consent, an invariable doubt arises as to the version of events as stated by the prosecutrix.

It is quite obvious from the evidence of the prosecutrix, she has stated that the incident went on for about one and half hours, not by looking at a clock or having known about a specific time, but because it happened over a period of time which she thought that took about one and half hours.

It should be understood that for a female who faces an unexpected situation of this kind, while alone in her own home, in the dead of the night, even 5 minutes may feel like a long period. I am of the view that, one and half hours mentioned by the prosecutrix does not mean that it actually happened over such a period, but it was how she has explained the situation faced by her.

Although the learned President's Counsel invited the Court to consider this aspect together with the dock statement of the appellant, arguing that it creates a doubt, I have no basis to agree.

The stand taken up by the appellant, had not been an admission that he engaged in sexual intercourse with the prosecutrix on the night where it has been alleged that he raped her. His defence has been that he had an affair with the prosecutrix over a long period of time and when her son came to know about it, it was he who took the prosecutrix to the police and made a complaint of rape.

Another point raised by the learned President's Counsel to argue that there is a doubt about the truthfulness of the incident, was the cigarette packet found by the son of the prosecutrix at her house. It was argued that because prosecutrix could not give an explanation to him for the cigarette packet found in the house by the son, a false allegation of rape was made against the appellant.

However, the evidence clearly shows that, when the appellant came into the house, he was in the company of another person who did not come into the house but waited outside on the motorbike which they came. The victim has stated that when the rape was committed on her, she felt a cigarette smell emanating from the appellant.

There is nothing to suggest that the cigarette packet was found by the son before he took his mother to the hospital.

When taken as a whole, the only inference that can be drawn is that the son has found it later after he took his mother to the hospital. This shows that there was

no opportunity to concoct a story against the appellant because of the discovery of the cigarette packet.

It was also argued that in the light of the consent defence taken up by the appellant, the reasons for the prosecutrix to not open the door when the appellant tried to come into the house could be explained, contending that she may not have opened the door as there was another person outside of the house.

The evidence of the prosecutrix had been that, she refused to open the door but the appellant came to the back door and forcibly opened it. She has stated that when the appellant kicked the door, the cross bar of the door fell off and it got opened. The evidence of the investigating officer had been to the effect that, the back door of the house can be opened from outside by removing the cross bar through a gap of the door, which sufficiently corroborates the evidence of the prosecutrix, that it was the appellant who forced open the door.

I am not in a position to agree that these pieces of evidence could have been considered in favor of the appellant, whereas, there was no basis to consider them in such a manner.

The victim has well explained as to why she did not tell her next-door neighbour that the appellant committed rape on her, when she went to her house after the incident. She has explained stating that she thought if she divulges the incident of rape, her neighbor would get scared, and she may not allow her to stay in the house, which in my view is a plausible reasoning under the circumstances she would have been facing at that time.

Her neighbour has given evidence in this case and has confirmed that when the prosecutrix came running to her house at that night, she looked scared, and requested her to allow her to stay with her.

The only discrepancy that needs consideration of the evidence is the contradiction in relation to where the prosecutrix was, when her son came home on that day.

Although the prosecutrix as well as her son has stated that, when he came, the prosecutrix was in the house of their neighbor and she came home after the son called for her, it appears that in their police statements, what they have stated had been that when the son came, she was in her own house seated in the living area and crying. However, when considering the evidence of the neighbour who has no reason to utter an untruth, it is clear that the prosecutrix has gone to her house after the incident and had waited until her son came home.

Although, what had been stated to the police by the prosecutrix and her son was somewhat different to that, I am unable to conclude that as a major contradiction which goes into the core of the evidence when considering that fact together with the evidence of the neighbor.

It is well settled law that, no witness can be expected to have a photographic memory of what happened in a given scenario. I am of the view that, especially, in an incident of rape of this nature, some discrepancies should be expected, and should not be considered relevant, unless those discrepancies create a reasonable doubt as to the version of events.

In the case of **Mahathun and Others Vs. The Attorney General (2015) 1 SLR 74** it was held:

- (1) When faced with contradictions in a witness testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness.
- (2) Too great a significance cannot be attached to minor discrepancies, or contradictions.
- (3) What is important is whether the witness is telling the truth on the material matters concerned with the event.
- (4) Where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors.

- (5) The Court of Appeal will not lightly disturb the findings of a trial judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong.

In the case of **State of U.P. Vs. M. K. Anthony, AIR 1985 SC 48**, it was held:

“While appreciating the evidence of a witness the approach must be whether the evidence of a 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, drawbacks 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 tender 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.”

It was contended further that, although the learned trial judge has considered the defence of the appellant diligently, the learned High Court Judge has failed to give the same attention to the prosecution’s version of events, which favoured the appellant.

However, I am not in a position to agree with such a contention. Although it was argued on the basis that the defence taken up by the appellant was consent, I am unable to find any evidence amounting to the appellant admitting having sexual intercourse with the prosecutrix on the day of the incident. For a person to take up a defence of consent, he must first admit that sexual intercourse took place on the day and at the time and at the place where the prosecutrix alleges that the appellant had sexual intercourse with her against her will, and to take up the defence that it happened with consent.

When the prosecutrix was cross-examined, it had been suggested to her that she had consensual sex for over one and half hours with the appellant and after her son came home and questioned about a cigarette packet found in the house, she concocted a story against the appellant, which the prosecutrix has denied.

It appears that the time of one and half hours and the questions relating to the cigarette packet, has been gathered out of the evidence the prosecutrix to make this suggestion, rather than as a basis for a defence of consent in this regard.

I find that it may be the very reason why, when the appellant was called upon for his defence, he has not taken such a position in his dock statement. The position taken up the appellant in his dock statement had been that he had a long-standing affair with the prosecutrix, a suggestion that has not been put to her when she gave evidence.

The dock statement of the appellant mainly revolves on the basis that, the son of the prosecutrix who came to the country after working overseas, came to know about the affair he had with the prosecutrix, and it was the son who has taken her to the police and forced her to make a complaint like this.

If that was his position, the relevant person to whom that should have been suggested was the son (PW-03), when he gave evidence at the trial. Other than asking about a cigarette packet found in the house, no suggestion had been put to the son stating that it was he who instigated this complaint, after he found out about the appellant's affair with his mother.

It is well settled law that, if an accused person is taking up a stand against the evidence placed before the Court, it should be within his prerogative to put across that position to the relevant witnesses and confront them, so that the witnesses can respond to his stand.

In the case of **Sarwan Singh Vs State of Punjab 2002 AIR Supreme Court iii 3652 at 36755,3656**, it was observed;

“It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted.” This case was cited with approval in the case of **Boby Mathew Vs State of Karnataka 2004 3 Cri. L. J.3003**

His Lordship Sisira de Abrew, J. stated in **Pilippu Mandige Nalaka Krishantha Kumara Thisera Vs A.G CA 87/2005 decided on 17-05-2007** that;

“....I hold that whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness.”

I find that, the learned High Court Judge in his analysis of the appellant's statement, has well considered the above matter and has come to a correct finding to when the dock statement was rejected on the basis that the defence taken up by the appellant was inconsistent and has not created any doubt as to the evidence of the prosecution, or has not provided a reasonable explanation as to the allegation of rape against him.

In a criminal matter, it is necessary for a trial judge to consider the evidence placed before it in its totality, be it the evidence of the prosecution, or that of the defence, and come to a firm finding as to whether the prosecution has proved the case against the accused beyond reasonable doubt or not.

In the Privy Council judgement in **Jayasena Vs. Queen 72 NLR 313 (PC)** it was held:

“A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself

whether a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty.”

I find that the learned High Court Judge has come to his findings after considering the totality of the evidence in its correct perspective, which needs no interference from this Court.

Accordingly, I find no merit in the grounds of appeal urged on behalf of the appellant. The appeal is dismissed for want of merit.

However, having considered the fact that the appellant has been in incarceration from his date of conviction on 31-10-2019, it is ordered that his sentence shall deem to have commenced from 31-10-2019.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal