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

Kahapola Arachchige Milroy
Lasantha Fernando alias Gamini

Accused-Appellant

**C.A. Appeal No. 249/2010**
**H.C. Panadura No. 1969/2005**

Vs.

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

Respondnet

Before : **SISIRA DE ABREW, J &**
**P.W.D.C. JAYATHILAKA, J**

Counsel : Upali de Almaida with R.J.U. de Almaida for the Accused-Appellant

Haripriya Jayasundara S.S.C. for the State.

Argued & Decided on : 04.03.2013.

**Sisira de Abrew, J,**

Heard both counsel in support of their respective cases.

The accused-appellant in this case was convicted for raping namely Vatuthanthirige Nalika Rasikani Alwis and was sentenced

to a term of 12 years rigorous imprisonment, to pay a fine of Rs. 10,000/- carrying a default sentence of 6 month simple imprisonment and to pay a sum of Rs. 200,000/- as compensation to the victim carrying a default of 2 years rigorous imprisonment. Being aggrieved by said conviction and sentence, the accused-appellant has appealed to this court.

Facts of this case may be briefly summarized as follows:

The accused-appellant has committed sexual intercourse on the victim. She, soon after the commission of the act of rape, did not complain to the elders in the family. She made a belated complaint to the police. She divulged the incident to the elders in the family after she became pregnant. The accused-appellant too gave evidence under oath and denied the charge.

Before the commencement of the trial, the accused-appellant made an application to the learned trial Judge to subject himself and the child to a D.N.A. test. Learned trial Judge, on the said application, made an order to the effect that she would order a D.N.A. test if the necessity arises after the evidence of the victim and the J.M.O. The victim in giving evidence admitted that apart from the accused-appellant, she did not have sexual

intercourse with any body. In our opinion with this answer of the victim there was a duty on the part of the learned trial Judge to allow the application of the accused-appellant regarding the D.N.A. test. We note that the victim had given birth to a child. Thus with the above answer of the victim the learned trial Judge should have ordered the D.N.A. test requested by the accused-appellant.

The accused-appellant who made the application for a D.N.A test, went up the extent of saying that he would plead guilty to the charge if the D.N.A. test is positive. In a case of rape if the victim who has delivered a baby as a result of the alleged sexual intercourse that she claims to have had with the accused says that she did not have sexual intercourse with any other person except the accused and if the accused who denies the charge makes an application to the trial Judge to subject himself and the baby to a DNA test, the conviction without allowing the application of the accused is unreasonable.

I would like to give reasons to the above conclusion. If the DNA test is negative, then the story of the victim that she did not have sexual intercourse with any other person except the accused and that she delivered a baby as a result of the sexual intercourse that that she had with the accused becomes false.

Then the accused cannot be convicted of the charge. He should be acquitted. Under the said circumstances if the accused is convicted without allowing his application, he is being convicted without utilizing the opportunity of testing the veracity of the story of the victim. Therefore in a situation of this nature, it becomes the duty of the learned trial Judge to allow the application of the accused. When we consider all these matters, we feel that it is unsafe to allow the conviction to stand. Therefore we set aside the conviction and the sentence imposed on the accused-appellant. We therefor order a retrial. We direct that the trial be taken up before a different judge.

*Retrial ordered.*

**JUDGE OF THE COURT OF APPEAL**

**P.W.D.C. Jayathilaka,J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**

/mds