

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

M. Prageeth Athurupana.

**Accused-Appellant.**

Vs.

The Hon. Attorney-General.

**Respondent.**

**CA NO.126/2009**

**HIGH COURT OF ANURADHAPURA CASE NO. 215/2001**

**BEFORE:** Sisira J De Abrew J. (Acting P/CA) &  
P.W.D.C. Jayathilake, J.

**COUNSEL:** Amila Palliyage for the Accused-Appellant.  
Thusith Mudalige SSC for the Respondent.

**ARGUED &**

**DECIDED ON:** 06.02.2014.

**Sisira J De Abrew J. (Acting P/CA)**

Accused-Appellant produced by the Prison Authorities is present in Court.

Heard both Counsel in support of their respective cases.

The accused-appellant in this case was convicted for raping a woman named Chandani Amarasena and was sentenced to a term of 10 years rigorous imprisonment, to pay a fine of Rs.10,000/= carrying a default sentence of 6 months rigorous imprisonment and to pay a sum of Rs.200,000/= as compensation to the victim carrying a default sentence of 2 years rigorous imprisonment. Being aggrieved by the said conviction and the sentence he has appealed to this Court. Facts of this case as narrated by prosecution witnesses may be briefly summarized as follows:-

On the day of the incident around 1.30 p.m. when the prosecutrix was all alone at home, the accused-appellant came and blindfolded her with a piece of cloth. Thereafter, the accused-appellant took her on his shoulders for a distance which had been described by the prosecutrix as 4 k.m. But according to the police officer, it was 500 meters. Thereafter, the accused-appellant put her on the ground using force, raised her frock, removed her

knickers and raped. According to the prosecutrix, at this time the accused removed his trouser and his underwear. He was armed with a knife at the time of the incident. According to the prosecutrix, she was raped on a shrub jungle where thorny bushes were found. She says that she sustained injuries in her legs. Further, she says that this was her first sexual intercourse. Accused denied the incident in his evidence and said that on the day of the alleged incident by the prosecutrix he was working in a paddy field close to the prosecutrix's house. After working in the paddy field for some time the accused who felt thirsty went to a nearby well which was also close to the prosecutrix house. After drinking water from the well he went back to his paddy field. Little later he again went to the said well and drank some water.

Lionel Goonethilake, who was listed as a prosecution witness was called by the accused-appellant to give evidence. According to Lionel Goonethilake's evidence the accused-appellant on the day of the incident alleged by the prosecutrix was working in the paddy field. Lionel Goonethilake too was working in the same paddy field. Lionel Goonethilake in his evidence says that accused went to fetch water to the nearby well on two occasions. According to the police officer's evidence the accused was arrested

while he was working in the paddy field. According to the charge the prosecutrix was under 16 years of age. The fact that she was under 16 years of age could not be proved by the prosecution. However, learned trial Judge, when he wrote the judgment amended the charge, bringing the charge under Section 364(1) of the Penal Code. He was originally charged under Section 364(2)(e) of the Penal Code. It has to be noted that when the learned trial Judge amended the charge no opportunity was given to the defence Counsel to cross-examine the prosecutrix whether or not she consented to the sexual intercourse. If he was charged under Section 364(2) ( e ) of the Penal Code the question of consent does not arise. But if the accused was charged under Section 364(1) of the Penal Code, the question of consent must be considered. To prove a charge under Section 364(1) of the Penal Code, prosecution must prove following ingredients beyond reasonable doubt.

1. Sexual intercourse was committed on the woman.
2. Sexual intercourse was committed on the woman by the accused-appellant.
3. Sexual intercourse was committed on the woman without her consent or against her will.

Since the accused-appellant has been convicted on a charge under Section 364(1) of the Penal Code, the prosecution must prove the 3<sup>rd</sup> ingredient. If there is a reasonable doubt on the 3<sup>rd</sup> ingredient the accused-appellant should be acquitted. Since the prosecution must prove that the sexual intercourse was committed on the woman without her consent or against her will, it is necessary to consider whether there was any reasonable doubt on the question of consent. Prosecutrix says that this was her first sexual intercourse. According to the doctor, she was examined on the same day (14<sup>th</sup> of May 1999). Although the prosecutrix says that this was her first sexual intercourse, doctor says that he found old tears in her hymen. Therefore, her evidence that this was her first sexual intercourse becomes false. According to her, she sustained an abrasion on her legs. But doctor did not find any abrasions on her legs. Doctor only found a nail mark on her breast. Thus her evidence that she sustained injuries on her legs becomes false. She claims that she was raped on a land where there were thorny bushes. If this evidence is true, there should be injuries on her buttocks and legs. But the doctor says that there were no injuries on her legs and buttocks. Then her evidence becomes false. When we consider the above matters, it is difficult to conclude that she was subjected to sexual intercourse on 14<sup>th</sup> of May 1999 as alleged

by her. We come to the said conclusion especially when we consider the medical evidence. Thus, there is a reasonable doubt on the 1<sup>st</sup> ingredient of the charge. As I pointed out earlier she has given false evidence. Assuming without conceding that the accused-appellant committed sexual intercourse on her, was it committed without her consent or against her will? When I consider this matter I must not forget her evidence that she was carried on his shoulder for four kilo meters. According to the Police Officer this distance was 500 meters. Assuming without conceding that it was 500 meters, can he carry her this distance on his shoulder without her consent? I think not. Therefore it appears that she had consented to the journey. When we consider all these matters we hold the view that the prosecution has not proved its case beyond reasonable doubt. Learned trial judge has unfortunately failed to consider the above matters and proceeded to convict the accused-appellant. In a rape case if the woman has given false evidence on a vital point, it is dangerous to act on her evidence even if her evidence is corroborated.

For the above reasons, we decide to interfere with the learned trial judge's conclusion. We hold that the prosecution has not proved its case beyond reasonable doubt. We therefore set-

aside the conviction and the sentence imposed on the accused-appellant and acquit him of the charge with which he was convicted. The accused-appellant is present produced by the Prison Authorities. Registrar of this Court is directed to send a copy of this judgment to the Prison Authorities without delay. Since we set-aside the conviction and the sentence we set-aside the committal signed by the learned trial judge. Prison Authorities will have no authority to keep the accused-appellant in their custody once they receive a copy of this judgment. It is not necessary for the Prison Authorities to produce the accused appellant in the relevant High Court and get an order of release.

*Appeal allowed. Accused acquitted.*

**ACTING PRESIDENT OF THE COURT OF APPEAL.**

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

I agree.

**JUDGE OF THE COURT OF APPEAL.**

Mm/-.