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

In the matter of a petition of appeal in terms of section 331 (1) of the code of criminal Procedure Act No 15 of 1979

High Court (Colombo)

Case No: 234 /2005

Democratic Socialist Republic of Sri Lanka

Democratic Socialist Republic of Sri Lanka

Complainant

Vs:-

CA 234/2011

Suppaiya Rajendran

Accused

And Now

Suppaiya Rajendran

Accused Appellant

Vs:-

The Hon Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

BEFORE	:	Anil Guneratne, J P.W.D.C. Jayathilake, J
COUNSEL	:	Rienzie Arsecularatne P.C.with Nimeshika Patabendige for the Accused Appellant Hiranjan Peiris S.S.C. for the Respondent
Argued On	:	13.03.2014 & 19.03.2014
Decided On	:	04.04.2014

P.W.D.C. Jayathilake J.

I have had the privilege of perusing the judgment of my brother judge. I, in no way hesitate to agree with the conclusion of setting aside the conviction of the Accused Appellant and allow the appeal. I am arriving at the same conclusion, but on different grounds. Therefore I am writing this judgment in order to state the premises through which I came to the said conclusion.

Perumal Wasantham was a 19 year old girl from Bandarawela. She was brought to the Accused Appellant's residence as a domestic servant by one Priyantha Kumara who was an employee of the Accused Appellant. The Accused Appellant was a businessman living with his wife and children in a two storied house situated in Bambalapitiya. Accused Appellant's family was occupying the upstairs of the house while his parents were living downstairs.

Wasantham came to Accused Appellant's place on 4th April 1999. Earlier she had worked at two other houses in Dehiwala and Battaramulla, for short periods. It is said that too much of hard work and low wages were the reasons for her to leave the said places. Once she came to the Accused Appellant's place the Accused Appellant's wife told her about the work to be done in the household.

At a certain time Accused Appellant gave her some toiletries and at another time he showed her a picture of a half naked woman. Neither the Accused Appellant nor Wasantham said anything about the picture to each other. On the same or the following night the Accused Appellant came to

Wasantham's room while she was sleeping. He stroked her body and removed her clothes. Then he got on her body and inserted his male organ into her female organ and had sex with her. The Accused Appellant closed her mouth with his hand but she refrain from screaming on her own thinking that there would be a trouble as the Accused Appellant's wife was in the bed room close to Wasantham's. The Accused Appellant did the same thing to her on the following day too but Wasantham could not remember what the time was. However after two nights at Accused Appellant's place Wasantham decided to go home, that was on the 6th morning. She did not want tell the Accused Appellant's wife about the behavior of the Accused Appellant nor did she want to make a complaint to the police.

What she wanted was to go home and tell her mother about this. Having found the bus fair by begging from people Wasantham went to the Pettah bus stand and waited there as a bus bound for Badulla was not available. While she was waiting Army personnel took her into the custody and handed over to the police as she did not possess an identity card. Then only Wasantham had to reveal to the police the incident that took place at the Accused Appellant's place. After the Accused Appellant was arrested and remanded over the charge of raping Wasantham, Wasantham came with her father and Priyantha Kumara and accepted Rs:20,000.00 from the Accused Appellant's family members and gave a letter to them to say that the allegation made against the Accused Appellant was false. Further in that letter she has apologized for her wrong deed.

Wasantham had no doubt about the person who had sex with her in that night although the light was switched off. "It was he" and "there were no other males in that house" says Wasantham. Wasantham was sure that

there were two occasions within the said short period Accused Appellant had sex with her. Therefore I do not think Wasantham had made a mistake of identity about the person who had sex with her and falsely put the blame on Accused Appellant nor do I suppose that Wasantham leveled entirely an imaginary allegation against the Accused Appellant.

Wasantham says that she was a virgin up to the time that the Accused Appellant had sex with her but according to the evidence she has given, there was no resistance from her to the act of the Accused Appellant. Her evidence before the trial court with regard to the resistance and screaming was contradicting with evidence given by her at the Magistrate Court in non summary proceedings. The contradiction marked as V 1 is "I did nothing and just waited".

The offence of rape is having sexual intercourse with a woman against her will and without her consent. Obtaining the consent by seduce does not come within the scope of the offence of rape. The consent obtained by threatening or intimidation does not exclude from criminal liability.

What has to be considered here is whether the Accused Appellant has had sexual intercourse with Wasantham against her will and without her consent and again if it was with her consent whether the consent has been taken forcibly.

Showing nude photos cannot be considered as an act within the above stated wrongful persuasion. It is obvious that Wasantham wanted to protect herself and the Accused Appellant from Accused Appellant's wife and the other inmates of the house at the time of her having sexual intercourse with the Accused Appellant. There is no evidence before us whatsoever of any

shocked or frustrated behavior of Wasantham even though it was her first sexual intercourse according to her. Instead, what we can observe is her waiting silently till the same act again took place. Even after the second incident, she expressed her need to go home only after attending to some domestic chores.

Can a woman who co-operates with a man in sexual act subsequently say that it took place against her will, after getting the feeling that she should not have done it? Obviously it is not the law in force.

> *"Even where absence of consent by the victim is not part of the statutory definition of an offence, the presence of consent ordinarily furnishes the basis of a general exception from criminal liability, subject to closely defined limitations. In these cases, the presence of consent by the victim, like all other pleas giving rise to a general or special exception, has to be averred and proved by the accused on a preponderance of probability. However clause ii of the definition of rape envisages a materially different situation, since the absence of consent is a feature of the definition and, like all essential elements of the offence, is required to be proved by the prosecution beyond a reasonable doubt. In this situation then it is for the prosecution to establish absence of consent, and not for the defense to show the presence of consent."*

Offences under the Penal Code, Prof.G L Peiris

It has been decided in 1945 in King Vs. Balakiriya (46 NLR 83)

"that there was a misdirection of law as it places burden of proving that he has intercourse with the consent of the complainant on the Accused"

Howerd CJ in his judgment has stated that

"In a case of rape the burden on the prosecution is to prove first of all that the Accuse has had sexual intercourse with the complainant, and, secondly, when the complainant is over the age of consent, that such intercourse took place without her consent"

The King Vs Ariyarathna (47 NLR 236) is a case decided in 1946 where it was held that

"In a prosecution for rape it does not follow necessarily that because the accused's defense was that he had no connection with the woman the question of absence of consent was therefore irrelevant"

Lalani, a girl working in Katunayake, boarded a Colombo bound bus at Bodagama, her home town in Tanamalvila to come to Colombo. The driver of the bus requested her to come and sit on a small seat behind the driver's seat as the bus was crowded and no vacant seats were available. She got in through the driver's door, occupied the said seat and continued to be on the seat until the bus reached Colombo. Lalani and the driver were having friendly chat from Udawalawa to Colombo. When the passengers were getting down off at Pettah, Lalani couldn't get down as the driver didn't open the driver's door of the bus. After all the other passengers had got down, the bus was driven to Bastian Mawatha in Pettah and stopped. The driver dragged Lalani to the rear seat of the bus and started fondling her breast. Thereafter he put a mat on the floor between two sets of seats and

pushed her to the mat. Whilst she was lying on the mat he pulled her pair of jeans, ties short and panty and raped her.

The said driver was charged for raping Lalani and was convicted in the trial court. His Lordship Justice Sisira de Abrew in his judgment in the criminal court of appeal (Savinda Vs. Republic of Srilanka,2010 1 SLR 32) has stated as follows,

> *"To establish a charge of rape, the prosecution must establish the following ingredients.*
>
> 1. *The Appellant committed sexual intercourse on the woman*
> 2. *The said intercourse was performed without her consent.*
>
> *If there is a reasonable doubt in one of the ingredients the charge should fail."*

It has been decided that when there is a serious doubt about the fact whether the woman was willing partner to the sexual intercourse, the accused should be entitled to the benefit of doubt.

Wasantham was wearing a frock or a night dress and knickers at the time that Accused Appellant approached her. What did she do whilst Accused Appellant was removing her clothes? There is no evidence about any kind of resistance. In Medical Officers testimony we don't find any evidence whatsoever as to a rape except the fact that she had indulged in sexual intercourse prior to the date, 09th of April when Wasantham was examined.

When considering all these facts as a whole there exist a reasonable doubt whether the alleged sexual act occurred with the consent of Wasantham.

The irresistible inference resulting from that is that prosecution has failed to prove the case beyond a reasonable doubt. Therefore I am of the view that the conviction of the Accused Appellant cannot stand. Base on the above I set aside the conviction and acquit the Accused Appellant.

Conviction set aside.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

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

Suppiah Rajendran

ACCUSED-APPELLANT

Vs.

C.A 234/2011
H.C. Colombo 2345/2005

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

RESPONDENT

BEFORE: Anil Gooneratne J. &
P.W.D.C. Jayathilake J.

COUNSEL: Rienzie Arsecularatne P.C. with Nimeshika Patabendige for the Accused-Appellant

Hiranjan Peiris S.S.C. for the Respondent

ARGUED ON: 13.03.2014 & 19.03.2014

DECIDED ON: 04.04.2014

GOONERATNE J.

The Accused-Appellant was convicted on a charge of rape and sentenced to 7 years rigorous imprisonment and a fine of Rs. 5000/- and in default of payment of fine, a default sentence of 3 months rigorous imprisonment was imposed. Compensation was also ordered, payable to the prosecutrix in a sum of Rs. 100,000/- and in default of same 1 year rigorous imprisonment.

The case of the prosecution was that the prosecutrix was employed as a domestic servant in the residence of the Accused-Appellant on or about 4.4.1999 and served in the household only for about 2 ½ days from 4.4.1999. Prosectrix was 19 years old as at the date of incident. She and the Accused are of Tamil origin. Prosecutrix had been introduced as a domestic servant by witness No.2 Priyantha Kumar who was employed under the Accused-Appellant for some time. It all began from the point the Accused on the very day she found employment (4.4.1999), had shown some semi nude photographs to her. The incident of rape took place on the very day she was

employed (within a few hours of the prosecutrix assuming domestic work in the house). The premises was a two storied house. Accused was married with a child and the wife and child occupied a room upstairs which was few yards or feet away from the room given to the prosecutrix. The parents of the wife occupied the ground floor. The alleged incident of rape was on two days according to the prosecutrix i.e 4th & 5th April 1999. The act had been committed at night and as the wife was occupying a room in close proximity to the place of incident, the Accused had prevented the prosecutrix shouting or making any noise by placing his hand on her mouth to prevent any kind of noise. The act of rape was committed according to the prosecutrix on two days.

The prosecutrix left the house on 6th April and she managed to get to the Pettah bus halt. She was taken into custody by the Army at Pettah (during the period of the northern war) and it so happened at that time in Colombo city had heavy security. She did not have her identity card since it has been taken over by the Accused's wife. As such Army handed over the prosecutrix to the Bambalapitiya Police, where she disclosed the alleged incident to the police and based on her complaint, the Accused had been arrested, and remanded.

The learned President's Counsel for the Accused-Appellant referred to several lapses, contradictions and inconsistencies and weaknesses in the prosecution case. He commenced his submissions by inviting this court to the indictment which refer to two dates. Viz. 4th & 5th of April 1999. He suggested that learned High Court Judges findings on this aspect was not clear and a doubt arose as to when the alleged offence was committed? It was the position of the defence that referring to the evidence in chief the prosecutrix was unable to state as to when the incident occurred i.e whether it was the 1st day or the 2nd day (victim stayed in the house only for 2 days). The answer at pg. 62 suggest that she was not sure whether it was the 1st or the 2nd day. The items of evidence on this point is as follows: එදා රාත්‍රියේ ද ඊළඟ දවසේ ද කියා මට මතක නෑ. ඊළඟ දවසේ වෙන්න ඕනේ. It was also suggested that there was no proper evidence of penetration and referred to the evidence of pgs. 65/66 of the brief.

The other matter which is an all important question is the identity of the perpetrator of the crime or of the alleged incident. It was suggested that evidence of the victim was that, incident of rape happened in the night and it was dark without any lights in a place in close proximity to the bedroom of the Accused and wife. Victim's evidence was that she was not sure whether the

place of incident or the room had a door. The learned President's Counsel also referred to the medical evidence. The report refer to healed tear of hymen. The age of the injury or period of injury in doubt.

In the evidence led from the Medical Officer it suggest 3 days prior to the 9th. It is also stated one week or 10 days prior to the 9th (day of examination of victim). President's Counsel emphasized that the inherent probability of the prosecution case had not been considered by the trial judge. There was also suggestion of demanding money by the victim's father to consent to bail. In this connection letter P1 & P2 would be relevant. Attention of this court was drawn to the evidence of the Accused wife. The dock statement made by the Accused also reviewed in relation to the High Court Judge's views and reasoning on same.

Learned Senior State Counsel in support of the case for the prosecution referred to the dock identification of the Accused by the victim and also referred to the evidence of the prosecutrix as regards the alleged incident of rape. (Pgs. 63 & 66). He also thought it fit to remind this court that the victim gave evidence in the High Court after 10 years from the date of incident and in this way attempted to demonstrate that there could be a few lapses and it is nothing but human, for a person to forget certain aspects of the

case. It was the position of the learned Senior State Counsel that the incident of rape is corroborated by the medical evidence, and emphasized that the 3 or 4 days prior to examination of victim would establish the date of incident. Some emphasis was also made by learned Senior State Counsel to the evidence at pgs. 78, 79 & 80 which refer to letter P1 and receipt P2 to demonstrate that the Accused party prevailed upon the prosecutrix to issue such letter and receipt.

This court having considered all the facts and circumstances and the entirety of the evidence led at the trial, it appears that certain vital elements and aspects of the case gives rise to substantial doubts of the prosecution case and the trial judge has failed to consider same. This is a very serious offence not only against the prosecutrix but in general against the society. As such, the case of rape should not be improbable and doubtful. Both the identity of Accused and the place of incident in this case are matters that need to be primarily considered.

The victim had the opportunity to see the Accused and fathom who he is only within a few hours of her arrival in the house or from the time she was brought to the house or place of business by the person called Kumara an employee of the Accused. The episode begins with the showing of

photographs as described above which the prosecution failed to produce as documentary evidence. Assuming that there is no necessity to produce the photograph and court is called upon to act on oral evidence, still a doubt surface in view of the peculiar circumstances of the case. I would connect above with the following items of evidence.

(a) Alleged incident took place at night and there was no light at all. No acceptable details of identity of accused elicited by the prosecution.

(b) Place of incident in very close proximity to the bedroom of the Accused and his wife. The room of the prosecutrix where the offence was committed had no door.

(c) Wife and child present in the room and no evidence placed before court to suggest that none other occupied the premises more particularly upstairs at the time of alleged incident. In other words can such an act of rape be committed when others are found in and around the place of incident? There is no proof or evidence of wild and or unacceptable behavior or conduct of Accused prior to incident or thereafter. Was the Accused conduct so unnatural? What sort of evidence led to prove such behavior in the past of the Accused? Had the Accused suffered spells of insanity?

(d) Prosecution relies only on a dock identification (after 10 years). The prosecution has not led evidence to exclude the presence of any other from the place of incident to decide whether an opportunity was available to the Accused to commit rape.

(e) Failure of prosecutrix to complain of such an act to any person other than those law enforcement authority, within a short space of time.

(f) inconsistent and uncertain evidence of prosecutrix as to the date of incident i.e whether it was the 4th or 5th. Medical evidence does not support the view of the prosecution on this aspect.

(g) The contradiction (pg. 109) marked as vi and omission at pg. 110. This relates to the victim not resisting when the Accused committed the act. Omission as regards Accused closing her mouth to prevent any noise, emanating from her.

When I consider the items of evidence and facts referred to in (a) to (g) above from the point of showing a photograph as stated above a reasonable doubt as to accused guilt arise and it is safer that the conviction should not be allowed to stand. In Arthur Fernando Case (1940) 42 NLR 76 at p. 80 Moseley J. said, allowing the Accused's appeal on issues of fact: "In view of the contradictory statements which occur in the evidence of the prosecutrix and the generally unsatisfactory, nature thereof, the absence of corroboration, the circumstances in which the girl made her first complaint and her failure to complain when the opportunity arose, and the in elusive nature of the medical evidence, the majority of the court feels that it may properly be said that the verdict cannot be supported, having regard to the evidence.

My views are further fortified on perusing a judgment of the Hon. President of this court in CA 30/2008 H.C. Kurunegala 152/2006 decided on 17.1.2014 as regards (c) above. Per Sisira de Abrew J. "whether the Accused-Appellant would commit the act of sexual intercourse on the victim, when his wife was within a distance of 100 feet. According to the victim at the time, the Accused-Appellant's child was also in the kitchen. I am unable to believe the contention that the Accused-Appellant would commit an act of sexual intercourse on a girl without her consent where the wife was within a distance of 100 feet. Evidence of the victim does not satisfy the test of probability".

In the case in hand the distance is even shorter than the above decided case. It being within the same premises in close proximity to the bed room of the husband and wife.

Apart from all the above lapses I am compelled to observe that the learned High Court Judge had not clearly expressed views on the two suggested dates of rape. Trial Judge has erred as regards the medical evidence by concluding that it is only 3 days old. The medical officer has extended the dates and expressed the view that extension of dates are also possible The inherent probabilities of the case and lapses not identified and explained by the learned High Court Judge and a misdirection made as regards the dock statement of

Accused. The alternative suggestion of trial judge is not acceptable in law i.e Accused could have given evidence on oath..

විත්තිය කැඳවූ අවස්ථාවේ, දී සිද්ධිය සම්බන්ධයෙන් මෙම සාක්ෂි කූඩුවට නැග දිවුරුම් දී කරුණු ඉදිරිපත් කිරීමට ඇති තරම් අවස්ථාව තිබුණු නමුත් එවැනි දෙයක් සිදු කිරීමට විත්තිකරු තෝරාගෙන නොමැත.

In Sugathadasa Vs. The Republic of Sri Lanka 78 NLR 495..

The accused appellant who was charged with murder did not give evidence in his own defence from the witness box. Instead the accused made an unsworn statement from the dock. The trial judge in his charge to the jury stated that "it is your duty to consider what the accused has stated in that statement from the dock and consider whether you can believe what the accused stated in that unsworn statement. If you believe what the accused stated in his statement from the dock, then you have no alternative but to acquit the accused, but you will bear in mind the submissions made by the State Counsel in his address to you on that matter which was that in considering whether you can believe what the accused said from the dock when he had a right to give evidence he chose not to give evidence from the witness box on affirmation and the State Counsel asked you to consider why it is that the accused when he had such a right to give evidence chose not to give evidence but chose to make an unsworn statement"

Held, (1) Under S. 213 (2) of the Administration of Justice Law the prosecution may comment upon the failure of the accused to give evidence and the jury in determining whether the accused is guilty of the offence charged may draw such inferences from such failure as appear proper. Before the A.J.L. it was settled law that an unsworn statement from the dock was evidence in the case. It was of course not of the same

cogency as evidence given form the witness box as the accused was not under an oath or affirmation and as he was not subject to cross-examination. But it has been pointed out that the A.J.L. has not shown any intention to abolish the right of the accused to make an unsworn statement from the dock. Hence there has been no change in the law relating to a statement from the dock.

(ii) the word "Evidence" in S. 213 (2) must be read as including a statement from the dock. There was therefore no failure to give evidence and it was wrong for the State Counsel to have commented on this basis. It was wrong for the judge to have left it open to the jury to draw an inference against the accused for his failure to get into the witness box and to give evidence on oath or affirmation.

75 NLR 174..

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 of much value having regard to the fact that it is not on oath and not subject to cross-examination."

Per Curiam – "While it was necessary to point out to the Jury the infirmities attaching to a statement from the dock, the only material in this case on behalf of the accused being that statement, it was the duty of the trial Judge to leave the considerations of that statement, entirely to the Jury untrammeled by an expression of opinion by him."

It is not necessary to consider all the grounds urged by learned President's Counsel for the Accused-Appellant, as for the reasons stated above

the conviction cannot be allowed to stand. I therefore set aside the conviction and acquit the Accused.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL