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 (Badulla)
Case No:188/2003

Democratic Socialist Republic of Sri Lanka

Complainant

CA 241/09

Vs

Saman Upulsena

Accused

And

Saman Upulsena

Accused Appellant

Vs

Democratic Socialist Republic of Sri Lanka

Complainant Respondent

BEFORE	:	A.W.A.SALAM, J (P/CA) P.W.D.C. JAYATHILAKE, J
COUNSEL	:	Rienzie Arsekularathne P.C with T. Koralage for the Accused Appellant. Vijith Malalgoda P.C, A.S.G. for the Respondent
Argued On	:	05.06.2014 & 09.06.2014
Decided On	:	19.06.2014

P.W.D.C. Jayathilake J.

Wegama Punyasara Thero alias Gamhewayalage Samantha Upulsena, the Accused Appellant has been charged with raping Aththanayake Mudiyanselage Swarnamali Aththanayake a girl less than 16 years of age on 28.03.1988, under Sec. 364(2) e of the Penal Code. He has been convicted after trial and sentenced to 10 years Rigorous Imprisonment and a fine of Rs: 7500.00, carrying a default sentence of 2 years simple imprisonment.

Further it has been ordered to pay Rs: 2, 50000.00 as compensation to the victim girl, carrying a default sentence of 4 years Rigorous Imprisonment. Being aggrieved by the said conviction and the sentence, the Accused Appellant has made this appeal.

Swarnamali who was a 10 year old school girl by 28.03.1998 which was the date of the incident referred to in the charge, had gone to the temple where the Accused Appellant was residing to learn Mathematics from the Accused Appellant. She had gone with her two younger sisters. The time was 2.00' O clock in the afternoon. Then the Accused Appellant taught Maths to all three girls. After some time, Accused Appellant asked Swarnamali to go to his room to teach a Maths paper which was difficult to her. Then she was asked to sit on the bed and the door was made ajar. Thereafter, Accused Appellant raised the frock and got on her body. Swarnamali had felt as if her female organ was thrust with something pointed. The Medical Officer who had examined Swarnamali 3 days after the incident, namely 01.04.1998 had expressed his opinion that suggestive penetration into vagina was present. The doctor had observed fresh hymen tears and a contusion in vestibule.

The learned President's Counsel appeared for the Accused Appellant has raised several points in his arguments in two different aspects, namely technical and defacto.

The trial of this case had commenced on 17.02.2005 before the High Court Judge of Provincial High Court of Uwa. Evidence of the prosecution case had been closed on 16.03.2006. When the learned trial judge had decided to call for the defence an application was made by the Defence Counsel for an adjournment for a long date for calling defence evidence. Accordingly further trial was postponed for 23.05.2006. The Accused Appellant made a dock statement and defence case was closed on the said date. The further trial had been proceeded on 29.05.2006 and 28.06.2006 for the addresses of the prosecuting counsel and the Defence Counsel. While the Defence Counsel was on her feet on 27.09.2006, following two postponements namely 24.07.2006 and 04.09.2006 making submission the learned State Counsel appearing for the prosecution had intervened and made an application to re-call the Medical Officer to lead further evidence. There had been an argument over the said application and, the trial judge having listened to submissions by both parties for several days had reserved his order on the said matter for 20.10.2006.

The reason submitted by the learned state counsel to make the application was getting the doubt cleared caused by the evidence of the Medical Officer and the medical reports with regard to the identity of the culprit. According to the medical report marked as P1 Swarnamali has stated to the doctor

that she was "Sexually assaulted by Munisera Hamuduruwo". The Medical officer in his evidence has stated that according to the short history given by Swarnamali, it was Munisara Thero who did the sexual act. He further explains that as he is a Tamil national, he may have written the name Munisara as Munisera. He stressed that it could have in no way been recorded as Munisera if the victim girl had said, Punyasara.

It is highly surprising that the learned trial judge who reserved the order in the 1st instance had postponed it 07 times within a span of one year. Finally what he says delivering the order is that it seems to be unnecessary to re-call the Medical Officer as he has to re-iterate his position taken in his evidence with regard to the name given in the case history at the time of Medical Examination.

After the pronouncement of this order, the case has been re-fixed for the defence address. This step has been postponed 5 times up to 10.01.2008 with giving reasons and without giving reasons for the postponement. By 10.01.2008 the trial judge who heard the case had been transferred and therefore the succeeding judge had directed to take steps to get his predecessor appointed to conclude the case. Even though the appointment had been made by 11.02.2008 the trial judge had failed to conclude the trial until 29.08.2008. By 29.08.2008 a new jurisdiction had been established

creating a separate High Court zone for Monaragala and the incident of this case had taken place within the territorial jurisdiction of the said zone. An objection arose regarding the matter whether this case could be heard in High Court of Badulla. The trial judge had overruled the said objection by the order appearing on page 215 of the original record. Finally the judgment has been reserved for 24.07.2009 subsequent to the filing of written submission by the Defence Counsel. The judgment was delivered on 07.12.2009 following two postponements.

The learned counsel for the Accused Appellant submitted that a fatal irregularity had taken place by the intolerable delay in pronouncing the judgment. It is obvious that the cause of the delay of the pronouncement of the judgment was being indifferent to the legal principle that a judgment of a case is to be delivered without delay and within a reasonable time from the conclusion of the trial.

The learned Additional Solicitor General appeared for the Respondent submitted the law relating to the evolution of the legal state in connection with sec. 203 of the Code of Criminal Procedure Act. There is a series of cases where the principle laid down in Sec. 203 has been discussed. It had been the accepted rule that Judges should state their findings as to guilt or innocence of the accused immediately at the conclusion of the trial.[1] This

strict rule has been made lenient by judicial interpretations as well as legislations in the past several decades, firstly by making the relevant legal provision a mere directive not a mandatory requirement[2] and secondly by widely interpreting the restriction time clause as reasonable time.[3] Later it has been decided that this procedural obligation that has been imposed upon the court and its non compliance would not affect the individuals rights unless such non compliance occasioned a failure of justice.[4]

This principle is based on the fact that one usually develops the tendency of forgetting matters with passage of time, not only the facts of the case but demeanor and deportment of the witnesses as well. A judge may refresh his memory of the facts of a case by the perusal of the proceedings of the trial in drawing conclusions. But there is an axiom in the sphere of law that justice is not only to be done, but it should appear to be done. Trial judge should not waste the valuable time of the court by entertaining obnoxious applications of the parties. Judge should be the master of the court and must control proceedings, so that proceedings should lead to fulfillment of justice. The learned trial judge in this case has not only violated the principle laid down in Sec. 203 of the Code of Criminal procedure Code Act, but also flouted the said axiom.

Swarnamali in her evidence categorically says that her under skirt and knickers were not lifted or removed at the time of the alleged sexual act. She explains that something was pressed against her urinating organ over the under skirt and knickers. It seems that the prosecuting counsel had tactfully avoided questioning the Medical Officer whether it was possible to insert a male organ into female organ when the female organ was covered with knickers and under skirt. The Defence Counsel may have cautiously refrained from interrogating the same. I believe that it was the prosecution that was at a disadvantage by not getting the above matter clarified through the Medical Officer. The doubt arising from the possibility of a male organ being inserted into a female organ when the female is clad in knickers and under skirt is intensifying by the statement made to the police by Swarnamali in her 1st Complaint that the Accused pressed his urinating organ between her legs.

It is evident that two complaints have been made to the police. The first was in the evening of the day of the incident. Most of the things stated by Swarnamali in court are absent in the first complaint. The second complaint has been made by Swarnamali's mother on April 2nd, after the medical examination.

A police sergeant, who is said to have done the investigations, had given evidence for the prosecution case. But certain important points have not been divulged in his evidence. It is not clear when he had gone for investigation, when Accused Appellant was arrested whether the second complaint was made after the arrest, of the Accused Appellant, and whether the Accused Appellant's room and the bed were examined.

The inevitable inference stemming from the concealment of certain important points is that the points left unsaid are disadvantages to the party that conceals them.

The learned trial judge appears to have acted with utmost belief in what the victim girl has said in her evidence in the trial court. Throughout the judgment he has emphasized several items of her evidence to highlight the prosecution case. Those items are the very points which are absent in the first complaint made just after the alleged incident. The trial judge has never focused any attention on the evidence of the investigating officer, who had told court that victim girl has not stated those items of evidence in her complaint made to the police.

In fact there are several instances that learned trial judge had intervened to help the victim girl when she was cross examine by the Defence Counsel. When the Defence Counsel questioned her, "Do you know that the police

have recorded what you have stated". Her answer was "Yes". At that time the judge had asked 'Do you know what the police officer has recorded? ' She had answered "No". Again the judge had asked, "Were you questioned?". She had answered, Can't remember".

Once when the Defence Counsel asking the girl about the omission that Accused Appellant thrust something pointed into her female organ, judge had asked her, " Did you stated in the lower court that your female organ was thrust? ". Then the girl had answered "Yes". Obviously the trial Judge has shown by his verbal behavior that he was in favour of the prosecution throughout the trial. We emphasize here that the Judge must observe the golden precept of independence to appear to anyone that the Court is impartial.

A crime is always an unpleasant and ugly thing. Usually civilized people don't tolerate crimes. But to convict an accused for a crime allegation must be established beyond reasonable doubt.

In my opinion a severe doubt is caused as to whether the penetration which is the main ingredient of the charge of rape has taken place at the time of the alleged incident.

The inordinate delay that had occurred in the pronouncement of the judgment violating the legal principle laid down in the Sec. 203 of the Code

of Criminal Procedure Act which undoubtedly results in the failure of justice and the failure of the prosecution to establish the charge of rape in our opinion should be taken in to account as being favorable to the Accused Appellant. Accordingly we set aside the conviction and the sentence and acquit the Accused Appellant.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

A.W.A.SALAM, J (P/CA)

I agree.

PRESIDENT OF THE COURT OF APPEAL

1. Venacy V.Velam 1, NLR 124
2. Dharmasena V. State 79 (1) NLR 101
3. Viswalingam V. Liyanage (1983) 1 SLR 203
4. Anura Shantha V. Attorney General 1999 1 SLR 299