

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

Udugama Withanage Jagath Presanna

**ACCUSED-APPELLANT**

C.A. 06/2013

(H.C. Gampaha 114/2006)

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

**RESPONDENT**

**BEFORE:** Anil Gooneratne J. &  
Malinie Gunaratne J.

**COUNSEL:** D. Ethugala for the Accused-Appellant

Shanaka Wijesinghe D.S.G. for the Respondent

**ARGUED ON:** 26.06.2014

**DECIDED ON:** 15.07.2014

**GOONERATNE J.**

The Accused-Appellant was indicted in the High Court of Gampaha for committing rape of a girl named A. Eresha Krishni Jayawardena who was below 16 years of age, an offence punishable under Section 364(2)(g) of the Penal Code as amended by Act No. 22 of 1996 during the period 01.01.2002 to 31.07.2002.

The prosecutrix was raped when she was only 13 years old. When she gave evidence in the High Court she was married with a child, 6 months old, and the prosecutrix was 20 years old. The evidence and the prosecution version reveal that the prosecutrix had been raped on two occasions by the Accused who was her brother-in-law. (elder sister's husband). The 1<sup>st</sup> act was in January 2002, when there were no occupants in the house other than the Accused. The prosecutrix was staying with her sister and on the day in question sister had left the house to take her child to school. In fact the victim had been schooling from the house of her sister. Victim's parents were staying elsewhere on that day. She was not feeling well and was asleep when she was

woken up by the Accused. The Accused had initially made certain advances towards the prosecutrix, under protest. By a gradual process the prosecutrix had been dragged from another place in the house, when she left the room due to advances by the Accused. She was dragged, threatened at knife point, and clothes removed by force by the Accused. Thereafter he committed rape on the prosecutrix, The evidence reveal that the victim had not complained to any one, due to fear. The act of rape had been described by the prosecutrix as far as she could remember and in her own way of explaining. She was also in pain.

The second act was somewhere in July. However the Accused having threatened the victim, had also raped and assaulted her prior to forcing her to indulge the sexual activity. The evidence reveal that the Accused had threatened the victim with death at various stages and performed the act of rape. In this instance the sister of the prosecutrix had at some point of time, arrived at the house and the Accused was caught in the act. Having notice what was taking place the sister attacked the Accused with a broom stick.

It is only after the 2<sup>nd</sup> incident that the proper complaints were made to the police. The prosecutrix was examined and produced before the J.M.O, who had also called for a Government Analyst Report. I would refer to the

Judicial Medical Officer's report produced as P2 which opinion would be relevant in the context of this case. It states.

#### **Opinion**

- This person shows conclusive evidence of vaginal penetration (previously sustained)
- Out of the two healed hymenal tears, the one at 6–7 O'clock position may be older than the one at 5 O'clock position.
- The initial vaginal penetration could have been occurred during the time period stated in the history (i.e about seven months back) and vaginal penetration had occurred thereafter as well.

Penetrations could have taken place thereafter without causing injuries to the vulvo-vaginal structures. Therefore, absence of fresh or recent injuries in the vulvo-vaginal structure does not exclude the possibility of recent sexual intercourse and is compatible with the given history.

- The rag, found at 5-7 O'clock position of the hymen is a normal appearance of the hymen.

I find that all necessary available evidence had been placed before the High Court, to enable the trial Judge to return a verdict of guilt. The Accused had initially absconded but later on having issued warrants, Accused had been arrested. At the beginning trial held in absentia since the Accused had been absconding. However court had later on permitted the Accused to take part in the trial and inter partes trial held. At the hearing of this appeal the learned counsel for the Accused-Appellant referred to the dock statement

of the Accused and attempted to implicate another young person with whom the prosecutrix had some association. Learned Counsel also referred to the medical evidence to demonstrate that penetration had not taken place. This court is not impressed with the submissions of the learned counsel for the defence. Learned Deputy Solicitor General supported the judgment of the trial Judge.

This court having considered all the facts and circumstances see no legal basis to interfere with the findings of the learned High Court Judge. As such we affirm the conviction and sentence of the High Court and we proceed to dismiss this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL