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

Mohamed Saaly Abdul Asiz

ACCUSED-APPELLANT

C.A. 101/2012

H.C. Kurunegala 295/2006

Vs.

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

COMPLAINANT-RESPONDNET

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Dr. Ranjith Fernando for the Accused-Appellant

Chethiya Goonesekera D.S.G. for the Complainant-Respondent

ARGUED ON: 09.07.2014 & 11.07.2014

DECIDEDON: 05.08.2014

GOONERATNE J.

The Appellant in this case was indicted under two counts in the High Court of Kurunegala. Count (1) is for kidnapping a girl under 16 years of age. Count (2) was in terms of Section 364 (2)(e) for committing rape of a girl below 16 years of age. Appellant was convicted on both counts and sentenced on count No. (1) to 7 years rigorous imprisonment and a fine of Rs.1000/- which carries a default sentence of 6 months rigorous imprisonment. On count No. (2) sentenced to 20 years rigorous imprisonment and a fine of Rs.1000/- which carries a default sentence of 6 months rigorous imprisonment.

When this appeal was taken up for hearing, an application was made by learned counsel for Appellant in terms of Sections 329 and 351 of the Code of Criminal Procedure Act. These sections empowers the Appellate Court to call for further evidence or give a direction in that regard and refer to supplementing powers of this court. On the above basis learned defence counsel invited this court to direct that a DNA test be conducted, since it is the position of learned counsel that the victim gave birth to a child and the paternity would decide the charge based on count No. (2). Learned Deputy Solicitor General who appeared for the Respondent had no objection for such

an application even though such an application had been made in the lower court earlier, without success (vide para 4(i) of Petition of Appeal).

To state very briefly the facts of this case is that on the day in question the victim (witness No. (1)) had gone to a nearby common well and the Accused person who also lives in the vicinity had called her, the victim and told her that his mother wanted to speak to her. Thereafter the victim had gone to the house of the Accused. Once she entered the house the Accused had closed the door and taken the victim to the kitchen and had sex with her by force. The Accused had also threatened the victim and put her under fear of death if the incident was disclosed to her parents. Subsequently to this incident the victim had not complained to any person but in school she had fainted on at least three occasions. Thereafter the parents had taken her to hospital. The hospital authorizes had informed, after examination that the victim was 5 months pregnant. The victim given birth to a child. The position of the Accused-Appellant is a total denial of the incident and that he had been falsely implicated due to reasons suggested by the Accused and a witness who gave evidence on behalf of the Accused at the trial.

This court having considered the medical report and the views expressed by the medical officer that the victim was of low intellect (no

deformity) and had taken some time to learn the basic subjects to that of other children of the same age and to test the truth of the position urged by the Accused party and the time frame suggested in evidence to the date of child birth and the alleged act of rape is mindful of the fact that the suggested DNA test would (if done with necessary consent) divulge the correct position as regards paternity. Learned Deputy Solicitor General too had no objection, for such an application. In any event I would prefer to be guided by the following case law on the subject.

In Vander Hultez Vs. A.G 1988(2) SLR 414...

Application by the prosecution was made to take evidence at the appeal stage to call the Government Analyst to testify whether there was an envelope which contained five packets of heroin whether the seals on the envelope were intact and whether where originally 482 grammes of heroin had been recovered the subsequent finding of only 455 grammes could be attributed to dehydration.

Held:

Although S. 351(b) of the Code of Criminal Procedure Act confers a very wide discretion on the Appeal Court in the matter of taking evidence at the appeal stage, still the Court will not exercise it unless there are exceptional circumstances affecting the interests of justice.

The points on which clarification was being sought could easily have been clarified at the trial stage by the prosecution. There were no special circumstances affecting the interests of justice to justify taking of evidence in appeal.

Having perused the Judgment of this court , C.A 168/2009 decided on 27.10.2011 Judgment of Lecamwasam J. I would also cite the case of Ladd Vs. Marshall...

> Article 139(2) of the constitution and section 351(b) of the Code of Criminal Procedure Act No. 15 of 1979 provide for such a situation. Denning L.J. in Ladd V. Marshall (1954) 3 AFR 745 held thus "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second: evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible".

If parties concerned consent to a DNA test and its results would either way may have an important influence on the final outcome of this case and be of a decisive nature. As pleaded in the Petition of Appeal at an early stage such an application could not be pursued due to lack of consent, but over the years and parties acquiring more maturity may change their minds? On the other hand it is too early for this court to arrive at a conclusion prior to hearing submissions from either party. If additional proof as above, in the context of this case is forthcoming, such an application to conduct a DNA test

should not be considered a bar in the best interest of justice. I have also fortified my views having perused the above Judgment of Justice Lecamwasam.

In all the circumstances of this case we direct the Chief Magistrate, Kurunegala to take all relevant and necessary steps to enable DNA test to be performed, by having first obtained the consent of the persons, Accused, Victim and or the child as advised by medical opinion. The learned Magistrate is directed to comply with this Order expeditiously and report back to this court within 3 months of receipt of this Order. Hon Attorney General will assist the learned Magistrate in the performance of this task. Application allowed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL