

In the Court of Appeal of the Democratic Socialist
Republic of Sri Lanka

CA 126/2001 HC Anuradhapura 17/2000

Nimal Senaratna,

Accused-Appellant

Vs

The Democratic
Socialist Republic of
Sri Lanka

Complainant-Respondent

Before: A W A Salam, J (P/CA) and Sunil Rajapakse, J

Counsel: Srinath Perera P.C with Probodini Kumarawadu for the
Accused-Appellant and Rohantha Abeysuriya, DSG for the State.

Argued on: 21.02.2014 and 25.06.2014.

Decided on : 26.08.2014

A W A Salam, J (P/CA)

This is an appeal by the accused-appellant from his conviction
against grave sexual abuse committed on the 18th day of April
1998 on a girl, in contravention of Section 365 B (2) b of the Penal
Code, as amended by Act No's 22 of 1995 and 29 of 1998.

The accused-appellant was originally indicted for committing an
offence of rape on her, punishable under Section 364 (2) of the Penal

Code as amended by Act No 22 of 1999. Apparently, as there was no evidence against the accused to establish the charge of rape, the prosecution with the leave of Court had amended the count in the indictment to grave sexual abuse, an offence punishable under Section 365 (B) (2) (b) of the Penal Code, as amended by Act No's 22 of 1995 and 29 of 1998. The charge has been amended on 27 August 2001 and the accused-appellant is said to have committed the offence on or about 18 April 1998.

Had the accused-appellant been charged with committing the aforesaid offence under the relevant Section of the Penal Code as amended by Act No 22 of 1995 only, (without making reference to Act No 29 of 1998) he could have, as of right, been able to take up the defence of consent, if he so desired. However, as he was charged with having committed the offence, under the relevant Section of the Penal Code, read with the amended Act No 29 of 1998 AS WELL, he was deprived of taking up the defence of 'consent', as subsequent to coming into operation Act No 29 of 1998, the defence of "consent", is of no relevance.

(The emphasis made here is to signify the prejudice caused to the accused-appellant by making reference to Act No 29/1998 in the amended charge)

Significantly, the amendment to the Penal Code effected by Act No 29 of 1998 came into operation with prospective effect from 4 June

1998. The offence is said to have been committed, on 18 April 1998. This means that he had been charged, found guilty, convicted and sentenced to an offence committed in terms of the Law which had come into operation nearly after one and a half months after the commission of the offence.

By reason of the accused-appellant having been charged under a Law which was not in force at that time, he could have been convicted of the charge only if the amendment to the Penal code made by Act No 29/1998 had come into operation retrospectively when in fact the law did not attract such an effect.

In terms of Article 13 (6) of the Constitution no person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed. Accordingly, if the accused-appellant had not been misled into the belief that the defence of 'consent' was not available to him, he could have taken up the defence of consent.

In the circumstances, the accused appellant had been adversely prejudiced by the incorrect reference made to Act No 29/1998 in the charge. Besides, the learned High Court Judge also had proceeded to convict the accused-appellant, under the misapprehension that Act

No 29 of 1998 was good Law as at 18 April 1998. This undoubtedly has occasioned in a miscarriage of justice.

The learned President's Counsel has contended that the fact which led to the amendment of the charge from the offence of rape to grave sexual abuse by itself self-explanatory as to the contradictory nature of the evidence of the prosecutrix which should be viewed as being favourable to the appeal. Although this argument merits favourable consideration, I find it redundant to delve into that aspect, as the misapprehension regarding the operational date of Act No 29 of 1998 is sufficient to determine this appeal.

Before I part with this appeal, I am inclined to draw attention to an aspect which has passed through my mind on a consideration of Act No 29 of 1998 not being part of our Statute book as at the date of the alleged offence. The consent as a defence in respect of a victim of grave sexual abuse has been excluded only by the introduction of Act No 29 of 1998, i.e with effect from 4 June 1998. In terms of the amendment brought in by the said Act, the act of grave sexual abuse is complete when committed on a victim of under 16 years with or without the consent. (See Section 7 of Act No 29 of 1998 which is renumbered as Section 365 B (1) (aa) of the Penal Code).

This means the prosecution has a burden to exclude "consent" in respect the commission of the offence committed prior to 4th June

1998. On a perusal of the proceedings and the analysis of the evidence by the learned Judge, I am unable to find that the prosecution had discharged such a burden to exclude the consent or in other words to prove beyond all reasonable doubts that the act was done against the consent or without the consent of the victim.

In passing I would like to have it replaced on record that the accused has been convicted and sentenced on 28 November 2001 and the appeal has been taken up for hearing for the first time on 8 September 2003. For whatever reasons it may have been, the appeal has taken almost 11 years to see an end, although it could have been conveniently disposed of at the first date of argument or on a later date of close proximity. Quite fortunately, even without going into the question of exceptional circumstances, the learned High Court Judge has released the accused-appellant on bail pending appeal 2 weeks after his conviction. This misdirection has turned out to be a blessings in disguise as the accused-appellant would have had to otherwise languish in incarceration pending the determination of this appeal for such a long time.

In the circumstances enumerated above I am of the firm view that the accused-appellant should undoubtedly succeed in this appeal. Hence, I allow the appeal and acquit the accused-appellant of the charge levelled against him.

The appeal is allowed and the conviction and sentence set aside.

President/Court of Appeal

Sunil Rajapakse, J

I agree.

Judge of the Court of Appeal.

KRL/-