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

1. P. N. W. Indika Kumara Ariyadasa
2. P. D. Nishantha Kumara

ACCUSED-APPELLANTS

C.A 92/2011
A – B
H.C. Ratnapura 214/2007

Vs.

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

COMPLAINANT-RESPONDNET

BEFORE: Anil Gooneratne J. &
Sunil Rajapaksa J.

COUNSEL: Nalin Ladduwahetti P.C., with Chathura Amaratunge
For the Accused-Appellant

Madhawa Tennakoon S.S.C. for the Complainant-Respondent

ARGUED ON: 29.08.2014 & 22.09.2014

DECIDED ON: 31.10.2014

GOONERATNE J.

Two Accused-Appellants were indicted in the High Court of Ratnapura under 3 counts for offences committed on 10.12.2000. Count No. (1) against both Accused relates to Kidnapping of a girl under 16 years of age called Nadeeka Damayanthi from lawful custody of Wijesooriya Aratchilage Sweenitha (mother of victim). Count No. (2) is a charge of rape of the above named Nadeeka Damayanthi an offence punishable under Section 364(2)(e) of the Penal Code as amended, against the 1st Accused-Appellant. The 3rd count is against the 2nd Accused for aiding and abetting the 1st Accused to commit rape, on the above named person an offence punishable under Section 102 read with Section 364 (2)(e) of the Penal Code as amended.

Both Accused-Appellants were convicted and sentenced to 2 years rigorous imprisonment and a fine of Rs. 5000 which carries a default sentence of 6 months R.I., on count No. (1). On count No. (2) the 1st Accused-Appellant was sentenced to 10 years rigorous imprisonment and a fine of Rs. 10000 which carries a default sentence of 2 years R.I. and compensation in a sum of

Rs. 10000/-, which had a default sentence of 2 years R.I. The 2nd Accused was sentenced on count No. (3) with the same sentence but the default sentence on the fine was 1 years R.I. and compensation to be paid in a sum of Rs. 50,000/- which carries a default sentence of 2 years R.I.

The trial in the High Court was held on or about January 2011, which is about 11 years after the incident and by that time the prosecutrix was 25 years old serving the Sri Lanka Army as a soldier. It was her evidence that she was residing with her parents in a village called 'Malwala' and on the day of the incident she left home all alone in the morning to a place called 'Galaboda' to attend a tuition class. She could not attend the class since it was not held on that day being a Poya day, which she came to know when she arrived at 'Galabada'. It is her evidence that she visited a friend of her sister. Thereafter she left the friend's place to return home and was waiting for a bus when she saw a three wheeler and inquired from the 1st Accused about a bus to get home but he had replied in the negative and volunteered to drop her, but she refused such request but he had used force and taken her in the three wheeler. Evidence suggest that the victim was molested and raped by the 1st Accused-Appellant and thereafter for the second time she was taken in the

three wheeler a short distance away closer to a lonely area, and near a 'Ambalama' she was held to the wall and raped by the 1st Accused for the second time whilst the 2nd Accused was holding on to her and thereby aiding and abetting the 1st Accused to commit rape. In the examination-in-chief this court observes that the incident of rape had been described by the prosecutrix several times in the way she was probed by the prosecuting counsel and court. Thereafter she had managed to escape and met a person called 'Nanda Mama' when she was shouting for help. Evidence reveal that the said Nanda Mama took her to the Wewalwatta police post. It is at that point that she came to know the names of the two Accused as within a short while both Accused had arrived at the police post but the police had not taken the trouble to take them into custody. It was when her parents arrived at the police post she was taken by them to hospital and thereafter examined and statements were recorded. It is a dock identification that was relied upon by the prosecution.

The learned President's Counsel who appeared for the Accused-Appellant vehemently argued and urged inter alia the following points in favour of his clients.

(a) Several contradictions and omissions marked and suggested in the evidence of the prosecutrix and taken all together and not in isolation would casts doubts about the prosecution version, and that court should not rely on such highly unreliable evidence of the prosecutrix. Trial Judge failed to correctly analyse inconsistencies.

(b) Medical evidence does not support the prosecution version. No external injuries and refer to the evidence at folio 130/131 of the brief.

(c) Alleged rape in a standing position is highly improbable

(d) Absence of evidence as to what happened in the police post at Wewalwatte.

(e) Trial Judge analyse the defence case initially, which is improper.

(f) Misdirection of trial Judge of 'Ellanborough principle.

(g) Misdirection on burden of proof.

(h) No identification parade held.

Learned Senior State Counsel supported the Judgment of the trial Judge, and explained to this court that the trial Judge had considered all the contradictions and inconsistencies in the prosecution case. He agrees with the trial Judge's views on same that such inconsistencies are trivial in nature and cannot harm the prosecution case. It was also submitted that even though the trial Judge at folios (194) & (195) is critical of police investigations, it is only a reference to a lapse on the part of the Police Department, which does not seriously affect the prosecution case. Learned Senior State Counsel drew the

attention of this court to the position of one Munasinghe the former boy friend of the prosecutrix to demonstrate by the evidence at folios 96 and 92/93, to rule out the possibility of implicating Munasinghe and to establish that he would never had any opportunity to have any kind of intimacy on the day in question with the prosecutrix. Reference was made to the dock statement of the two Accused which indicate their presence at Wewalwatte junction, and that they saw the prosecutrix. 2nd Accused states he saw the prosecutrix talking to Nandasiri and that he handed her over to police post. There is no specific denial of the incident. The witness called by the defences 'Nandasiri' never made any statement to the police. Learned Senior State Counsel drew the attention of court to the items of evidence at folios 44/45 & 47/48 which gives a description of the alleged offence of rape and the methods of identity being established in the way the prosecutrix explains. Further the material at folios 62/63 provides further details of identity. It was the position of the learned Senior State Counsel that there was no necessity to hold an identification parade in view of the evidence that transpired in court.

The trial Judge's approach to this case in the way the Judgment is written may give rise to some comments. It is his view to consider the defence position when analyzing the evidence lead at the trial. It is stated that the defence rejects the incident altogether and the trial Judge observes as follows: ..... මෙහිදී චිත්තිය සම්පූර්ණ වසයෙන්ම තමන්ගේ තර්කය පදනම් කරගෙන ඇත්තේ චිත්තිය මගින් ලකුණු කරන ලද පරස්පර විරෝධතාවයන් මතය. The trial Judge proceeds to state that two main factors need to be decided:

(a) Was the act of rape committed on witness No. (1)?
(b) Can the court act on the evidence of witness No. (1) and consider it to be credible in view of the several contradictions?

Based on the reply to above (1) & (2) can court rely on the defence case? I find that the trial Judge has first considered the medical evidence and thereafter given his mind to the several contradictions. This seems to be a somewhat a awkward procedure . What should be considered initially is to ascertain whether the prosecution has proved its case beyond reasonable doubt. Then the defence case need to be considered and decide whether it has created or capable of creating a reasonable doubt in the prosecution case. I would like to expand on this principle some more but a case before court

should not give rise to a class of jurisprudence or a lesson on burden of proof. In Jayaratne Vs. Queen 72 NLR 313(PC) considers this position in the following way also. A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the court adduced by the prosecution or by the defence in its totality without compartmentalizing, and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the Accused guilty of the charge or not guilty.

However the trial Judge in whatever direction or stance taken by him, had considered the medical evidence and the testimonial trustworthiness of the prosecutrix in the light of the contradictions marked in evidence. By a contradiction or an omission court cannot on that account alone test the testimonial trustworthiness or decide whether the witness is a credible witness. This is a decision to be taken solely on the evidence that transpires in court. The truth of the case or the version of the witness is truthful or not is normally decided on evidence of fact and may be, observe the demeanor and deportment of the witness, to a point, and examine the totality of evidence of a witness. This is the yard stick to be adopted as the Judge, counsel on either side or jury cannot and could not have seen or heard the act committed and the words uttered, at the scene of the crime.

The question in appeal is to consider whether the Judgment of the trial court is right or wrong and whether it contains misdirection and lapses which would prejudice the Accused case and resulted in a failure of justice.

It is stated in the judgment as contained therein (3rd para from the beginning) that the 1st Accused raped the prosecutrix at a place where the prosecutrix was to attend a tuition class and the Accused had by force made the prosecutrix to get into a three wheeler and thereafter committed the act of rape. The evidence and the prosecution version has already been narrated as above in this Judgment. This court observes that the witness No. (1) who was the victim gave evidence after 11 years from the date of incident. The act of rape and use of force and the abuse had been described by the witness in the examination-in-chief not only once but on several instances depending on the question put to her. No doubt the very first initial questions by the State Counsel resulted in some bare answers of the act. But by a gradual process and with more and more probing many details had been elicited, of the act of rape and abuse itself and the circumstances that led to such an act. Court has to accept all this from the witness who was below 16 years of age when she

suffered such a mental trauma subsequent to such an act of rape. Evidence in examination of witness has transpired by a gradual process, and as observed above testified after eleven years.

The contradictions could be summarized as follows:

V1 - doubt about stating she was raped. What was stated in the statement was she was confronted with a problem. කරදරයක් වූ බවයි.

V2 - persons who travelled in the three wheeler was got down by the police – the question of Accused coming to the police.

V3 - On questioning of incident by the police Accused denied – when the Accused came they were sent away. At this point the trial Judge is critical about the investigation done by the police.

V4 - Narration of the incident to Wewalwatta police post.

V5 - About victim's friend.

V6 - Class not held on Polya day.

V7 - One Nirmala called the victim to come to her house.

V8 - About boarding the bus from Wewalwatte junction, proceeded to friend's house at Wewalwatte.

V9 - About morning meal.

V10 - Talking to a friend at 6.00 p.m and boarded a Balagoda bus to come to Wewalwatte.

V11 - Awaiting a bus to come to Malwala.

We note that the trial Judge has considered the above contradiction and omissions and expressed his views on same to be not so material and which does not go to the root of the case. The explanation on same by the trial Judge cannot be faulted. Further this court does not wish to interfere with primary facts, as stated by the learned High Court Judge, on same.

The findings of primary facts should not be disturbed 1993 (1) SLR 119: Questions of fact the Appellate Court will not over rule unless it is a perverse decision *20 NLR 332; 1947 (1) AER 583-4, per Jayasuriya J. in Best Footwear (Pvt.) Ltd., and two others Vs. Aboosally (1997) 2 SLR at 138 ...*

Per Jayasuriya J:

"In evaluating the evidence of a witness a court or tribunal is not entitled to reject testimony and arrive at an adverse finding in regard to testimonial trustworthiness and credibility on the mere proof of contradiction or the existence of a discrepancy. The deciding authority must weigh and evaluate the discrepancy and ascertain whether the discrepancy does go to the root of the matter and shake the basic version of the witness. If it does not, such discrepancies cannot be given too much importance ... Before arriving at an adverse finding in regard to testimonial trustworthiness the judge must carefully give his mind to the contradictions marked and consider whether they are material or not and the witness should be given an opportunity of explaining those contradictions that matter... Witnesses should not be disbelieved on account of trivial discrepancies and omissions and the Court should look at the entirety and totality of the material placed before it in ascertaining whether the contradiction is weighty or is trivial"

There is also medical evidence led, as considered by the trial Judge to the effect that sexual intercourse cannot be ruled out. Evidence of the prosecutrix in its entirety would suggest the testimonial trustworthiness of the witness. Trial Judge has expressed views of demeanor of the witness. This is a matter to be left in the hands of the trial Judge and the Appellate Court cannot comment otherwise. Identity is proved in several ways apart from the dock identification. The names of the Accused-Appellants were made known at the police post, as she was taken to that point immediately after the incident. Witness stood very firmly in evidence as regards the sexual act and as to who, and how it occurred. When evidence was led the names of the Accused naturally transpired with the dock identification. Police evidence reveal that the two Accused surrendered to the police on 12.12.2000. The evidence of the mother of the victim also support and corroborate the prosecution version to a very great extent. I wish to observe that the law relating to identification does not shut out evidence of dock identification. Trial Judge of course should examine the circumstances under which the identification came to be established. The witness in her own way provided details of identity even 11 years after the incident. The several points urged by the learned President's Counsel cannot have a bearing on the prosecution case, although the

procedure adopted by the learned High Court Judge gives an opportunity to comment and even make adverse remarks. That alone would not suffice unless a reasonable doubt could be demonstrated, in the prosecution version.

The two Accused made dock statements. They do not specifically reject the incident but state both were chatting to each other at the Wewalwatte three wheel park. The 2nd Accused stated that Nandasiri came and wanted a hire to proceed to 'Malwala'. Whilst proceeding it was made to realize that the victim informed that her mother is not at home and as such handed over to Wewalwatte police.

The above statement no doubt appear to be very simple, but a serious crime of this nature would require some details and an explanation.

The evidence of the witness called by the defence is one Nandasiri. He merely refer to an incident without describing same which occurred at about 6.30/7.00 p.m. He gives the distant between places in the vicinity and where he lives. He went to his brother's boutique to help him and saw a girl in front or near the co-operative at about 6.30/7.00 p.m. (Wewalwatte junction). He questioned her, and found she was waiting to board a bus, to go home and since there were no busses volunteer to take her in a trishaw, driven by the 2nd

Accused (කුමාර). He spoke to the 2nd Accused and arranged a hire. He and the girl (prosecutrix) got on to the trishaw, and this is what he had to say මම ඒ ගැහැණු ළමයට කිව්වා ත්‍රිවිල් එකෙන් ගෙදර යං කියලා කිව්වාට පස්සේ අපි ආවා. එතකොට තමයි අයියගේ කඩේ හම්බ වෙන්නේ එතන ඉඳලා මීටර 3,4 වගේ දුර තියෙන්නේ මල්වල පැත්තට. එතනට ඇවිල්ලා මම බුලත් විඩක් ගන්න මම අයියාගේ කඩේට ගියා. ඒ ගියාට පස්සේ ඇවිල්ලා ත්‍රිවිල් එකට නැංගම කිව්වා ගෙදර ගියාට හයර් එක දෙන්න වෙන්නේ නැහැ, අම්මයි, තාත්තයි කතරගම ගිහිල්ලා කිව්වා. Thereafter he states he had nothing else to do but drop her at the Wewalwatte police post and gave her to the police and went away with the 2nd Accused. It must be noted that there is no reference to the 1st Accused-Appellant in this witness's examination-in-chief. In cross-examination witness admits that he did not give a statement to the police. In cross-examination it is the witness's version that there was no person called Indika, (1st Accused), and he never saw 1st Accused, but he is known to the 1st Accused. Witness in cross-examination states he does not know anything about the incident.

The trial Judge's assessment of the defence case cannot be faulted and I would in a gist give the main points considered in the Judgment, as regards the defence case.

(a) No explanation by the Accused party

(b) No evidence to consider or create a doubt in the version of prosecution witness No. (1).

(c) Defence witness not made a statement to the police. If he wanted to, had the opportunity to do so.

(d) Accused not involved, had not been established.

(e) Bias witness.

(f) Defence witness does not properly explain whether he is the person who met prosecution witness No. (1).

(g) Evaded the question as to why he could not take another female in the trishaw since he had to accompany a girl. (pg. 202).

We have no reason to interfere with (a) to (g) above. Trial Judge has Considered the defence case. There are no significant items of evidence demonstrated in the entire defence case which casts doubts in the prosecution case. Nor even suspicious circumstances projected by the defence case, to enable the trial Judge to give his mind to the Accused version.

In all the above facts and circumstances we see no reason to interfere with the Judgment of the trial Judge, notwithstanding the observations made by this court in this Judgment. The prosecutrix even after a long lapse of time provided details in a convincing manner as regards the act of rape by the Accused party. The several contradictions and omissions taken

in isolation or in its entirety does not give rise to doubts or get to the root of the case. The suggested inconsistencies cannot be given much importance. As such we affirm the conviction and sentence. This appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL