

**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 in
the Democratic Socialist Republic of Sri
Lanka.

C.A.No.21/12

Hon. Attorney General

H.C. Puttalam 75/02

Attorney General's Department

Colombo 12.

Complainant

Vs.

Andi Budugae Derik Niroshan Fernando,

Paththayama,

Madurankuliya.

Accused

And

Andi Budugae Derik Niroshan Fernando,

Paththayama,

Madurankuliya.

Accused – Appellant

Vs

Attorney General,

Attorney General's Department,

Colombo 12.

Complainant – Respondent

BEFORE

: P.W.D.C. JAYATHILAKE, J

W.M.M.M. GUNARATNE, J

ROHINI WALGAMA, J

COUNSEL

: Dulindra Weerasuriya P.C with

Ruvindu Walikala for the Accused

Appellant.

Chethiya Goonesekara D.S.G for
the Respondent.

ARGUEDON : 11.05.2015, 11.06.2015

DECIDEDON : 16.07.2015

P.W.D.C. Jayathilake, J

Sriya SumuduKumari was nine years in 1999. She was living with her mother, step father and two brothers. Her step father was Derik Niroshan. Mary Jasintha Fernando was her mother's mother, whom Sumudu Kumari called Mahamma. One day Jasintha came to know that Sumudu Kumari and Derik

Niroshan had been seen coming out a room in their house. Suspecting that Derik Niroshan committed something wrong to Sumudu Kumari, Jasintha had made a complaint to the police. In investigating the said complaint, police recorded a statement from Sumudu Kumari and produced her to a Judicial Medical Officer for a medical examination. The Judicial Medical Officer has examined her on 29.09.1999.

As the short history given by the patient, namely, Sriya Sumudu Kumari, Judicial Medical Officer has stated its history of a rape by a relative brother, namely, Indika. The incident had taken place about 5 days prior to the date of medical examination. Judicial Medical Officer had observed reddish, swollen vulva and hymen tear in five o'clock position on hymen wall. The Judicial Medical Officer in her evidence has stated that Sumudu Kumari had not mentioned any other name connected to the incident of rape. She has expressed her opinion that the sexual intercourse had taken place about four or five days prior to her examination.

Ardibaduge Derik Niroshan Fernando was indicted for committing rape on Sriya Sumudu Kumari Fernando who was under 16 years of age during the period from 01.01.1999 to 25.09.1999 punishable under Sec.364 (2) e of the Penal Code as amended by Act No 22 of 1995. He was convicted after trial and sentenced to five years' rigorous imprisonment with a fine of Rs.25000/=

carrying a default sentence of six months imprisonment. He was ordered to pay Rs. one hundred thousand (Rs. 100000/=) to the victim as compensation carrying a default sentence of six months imprisonment. Being dissatisfied with the conviction and the sentence, the Accused Appellant has preferred this appeal to this court.

In the first instance it must be noted that the sentence passed by the learned trial judge is, at first glance, illegal as the minimum sentence according to the statute is 10 years rigorous imprisonment and the learned judge has not stated under which legal basis that she reduced it to 5 years.

Sumudu Kumari in her evidence given at the trial has stated that her step father Derik Niroshan raped her several times on several days. She states that one day he took her to a boutique room next to their home and raped her. After the said incident another day he did the same thing after taking her to a jungle. According to her, another similar incident had taken place at a place called Kivula. Once she has mentioned the first incident was seen by a brother called Roshan. Sumudu Kumari says she did not divulge these incidents to anyone because her step father asked her not to tell anyone.

The learned trial judge in her judgment states that when there is clear evidence that 9 year old witness No.1 has been raped by the accused the accused should have produced evidence in rebuttal but he has failed to submit

any defence in his dock statement. The 'clear evidence', mentioned there by the trial judge is only the evidence of victim girl. There is no other iota of evidence that corroborates the evidence of the victim.

The learned president's counsel who appeared for the Appellant contended that corroboration of the evidence of the prosecutrix is essential unless the evidence of the prosecutrix is so convincing to act upon without corroboration.

He has cited the following decided cases in support of his argument. Sunil Vs AG¹, King Vs Marthalis², King Vs Ana Sherief³, The King Vs Bruke⁴, Sena Vs Republic of Sri Lanka⁵, S. Rajarathnam Vs Republic of Sri Lanka⁶, Ajith Vs AG⁷.

In Sunil Vs AG, it has been held that it is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence, but her evidence is convincing, such evidence could be acted on even in the absence of corroboration. In the instant case the victim girl has given evidence when she was 16 years old about the series of incidents she faced at the age of 9 years. She has stated that the Accused Appellant inserted his male organ into her female organ and had sex on several occasions.

Can't this evidence be considered to be convincing?

It could have been so considered, if not for the medical evidence which contradicts the victim's evidence. Firstly, the victim girl has not mentioned a word about any kind of sexual act which involves the Accused Appellant.

Secondly, the Medical Officer has observed that the physical signs that indicate the committal of sexual intercourse had taken place 4,5 days prior to her medical examination. The Medical Officer has not been questioned whether any sign of a committal of sexual intercourse prior to the sexual intercourse she has referred to in her medical report had been noticed.

The learned President's Counsel argues that the evidence of the prosecutrix has created a reasonable doubt about her evidence leaving aside the fact that it being a convincing evidence to act upon without corroboration.

The learned Deputy Solicitor General submitted that the Medical Officer who had conducted the medical examination was an inexperienced one. Therefore, any better medical opinion could not have been expected. It seems that the Medical Officer has clearly expressed her opinion according to the evidence that she had observed. On the other hand, the Medical Officer has not been questioned about any previous incident other than the incident she has mentioned in the report.

I hold that it is unsafe to act upon uncorroborated evidence of a rape victim when her evidence is inconsistent with the medical evidence. Accordingly, my opinion is that there is no sufficient evidence in this case to convict the Accused Appellant for the rape charge. Therefore, I set aside the conviction and the sentence and acquit the Accused Appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

W.M.M.M. GUNARATNE, J

I agree

JUDGE OF THE COURT OF APPEAL

ROHINI WALGAMA, J

I agree

JUDGE OF THE COURT OF APPEAL

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1. 1986 (1) SLR 230
 2. 43 NLR 560
 3. 42 NLR 169
 4. 43 NLR 465
 5. 2009 (1) SLR 48
 6. 71(1) NLR 73
 7. 2009 (1) SLR 23