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

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No.15 of 1979 as amended.

Thambarasa Sabaratnam

Accused-Appellant

C.A.Case No:-127/2012

H.C.Batticaloa Case No:-2632/09

V

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

Respondent

Before:- H.N.J.Perera, J. &

K.K.Wickremasinghe, J.

Counsel:-N.Dilham Dehlan for the Accused-Appellant

Haripriya Jayasundera D.S.G for the Respondent

Argued On:-27.02.2015/02.03.2015

Written Submissions:-21.04.2015/06.05.2015

Decided On:-03.08.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Batticoloa or committing grave sexual abuse on one Dharmarasa Kajalani on 08.07.2006 an offence punishable under section 365 B (2) (b) of the Penal Code as amended by Act No.22 of 1995 and No.29 of 1998.After trial the accused-appellant was convicted and sentenced by the learned trial Judge to 7 Years R.I and further imposed affine of Rs.5000/- with a default term of six months simple imprisonment on 28.06.2012. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

The facts pertaining to this case and the background to the incident may be set out briefly as follows.

The victim Kajalani was only 10 years at the time of the incident and was studying in grade 4.The accused-appellant was her stepfather and on the day in question Kajalani had returned home from school and has been awaiting the arrival of her mother who had gone for a Meeting. At that time only she and the accused-appellant had been at home. It was her evidence that the accused-appellant entered the room and made her lie down; then undressed her and got on top of her and pressed the accused-appellant's male organ on her female genetalia. It was her evidence that the accused-appellant did the said act for about ten minutes and it pained as he pressed his male organ on her female

genetalia. She further stated that she was naked when the mother walked into the house and it was the mother who put her clothes on. She further stated that she informed the mother about the incident and the mother scolded the accused-appellant.

The mother of the prosecutrix who is also the wife of the accused-appellant went back on her evidence at the trial and was treated as an adverse witness by the prosecution. It is to be noted that at the commencement of her evidence, the victim was reluctant to come out with the alleged incident. In fact she had stated that her mother went to the police to make a complaint against the accused-appellant as he had assaulted her. But later upon being questioned by the prosecution, she has explained to court that the accused-appellant's relatives prevailed over her not to give evidence against him. The reluctance on the part of the victim to come out with the true incident at the beginning of her evidence was explained by her to court. The victim had been subject to cross examination and the learned trial Judge had the benefit of the demeanour and deportment of the witness before her and the learned trial Judge has been impressed by the witness's testimonial trustworthiness and has accepted her evidence as creditworthy and truthful. Even under cross examination the witness has been consistent with her evidence wherein she had described the act committed by the accused-appellant.

The history given to the Judicial Medical Officer M.M.A.Rahuman by the prosecutrix is consistent with the evidence given by her at the trial. The J.M.O. had stated that he examined the victim on 11.07.2006 at 10.am in the office of the Batticaloa Teaching Hospital. In his evidence he had stated that the victim had said that she was subjected to sexual abuse by her mother's second husband on 08.02.2006 at about 1 p.m. The J.M.O has not observed any injuries on her female organ. However in his P2 report as well as in his evidence he had stated that non-penetrative sex

cannot be excluded. He has further stated in his evidence that a psychiatrist report was called for (P2a) and it confirmed that the said victim was mentally affected as a result of this incident. For the above reasons, I hold that the medical evidence does support the evidence of the victim.

In this case no contradictions and omissions have been proved or marked by the defence. Had there been any material contradictions, inconsistencies or omissions in the evidence of the victim, certainly those would have been marked and proved as contradictions or omissions having regard to her statement to police. In this case there is a total failure to mark such contradictions and omissions and the only logical conclusion that can be arrived at is that her evidence given at the trial court is consistent with her version given in the police statement.

Apart from a bare suggestion made by the defence that the victim made a false allegation to the police defence did not challenge the evidence of the victim on material points pertaining to the act of grave sexual abuse. Nor did the defence suggest to the victim any reason for making a false allegation against the accused-appellant who was her stepfather. Although the accused-appellant took up a plea of alibi in his evidence, it was never put to the prosecutrix in cross examination.

Our law does not require the prosecution to call a number of witnesses to prove a case against an accused. Evidence given by one witness is sufficient. It is the quality of the evidence given by the said witness that matters.

In Sumanasena V. Attorney General [1999] 3 Sri.L.R 137 it was held that:-

"Evidence must not be counted but weighed and the evidence of a single witness if cogent and impressive could be acted upon by a court of law."

Thus the court could have acted on the evidence of the victim provided the trial Judge was convinced that she was giving cogent, inspiring and truthful testimony in court.

In Bhoginbhai Hirjibhai V. State of Gujarat (1983) AIR S.C 753 Indian Supreme Court stated thus:-

"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury."

However in Gurcharan Singh V. State of Haryana AIR 1972 S.C 2661 the Indian Supreme Court held:-

"As a rule of prudence, however, court normally looks for some corroboration on her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated."

In Premasiri V. The Queen 77 N.L.R 86 Court of Criminal Appeal held:-

"In a charge of rape it is proper for a Jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such character as to convince the Jury that she is speaking the truth."

In Sunil and another V. The Attorney General 1986 1 SLR 230it was held that:-

"It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."

Therefore It is very clear that an accused person facing a charge of sexual offence can be convicted on the uncorroborated evidence of the victim when her evidence is of such character as to convince the court that she is speaking the truth. Although the accused-appellant took up a plea of

alibi in his evidence, it was never put to the prosecutrix in cross-examination.

On perusal of the judgment of the learned trial Judge it is also clearly seen that she has given good reasons why the accused-appellant's alibi is disbelieved by her. For the first time in his evidence the accused-appellant has taken up a plea of alibi and stated that he was working at a Mill at a place called Attampalam. The witness K.Sivagnanasundaram who was summoned by the accused-appellant to testify to the effect that the accused-appellant was working at the Mill on the date of the incident, in cross-examination had clearly admitted that he cannot say with certainty whether the accused-appellant was on leave at or about the time the alleged incident took place as there was no Register or Records maintained at the Mill. The trial Judge in her judgment specifically gives reasons why the accused-appellants evidence is disbelieved by her.

In the written submissions tendered to court the Counsel for the accused-appellant sought to raise certain substantial questions of law which were not raised at the original court or at the stage of argument before this court. In this case it is contended on behalf of the accused-appellant that the evidence of the wife of the accused-appellant has been recorded in breach of section 120 (2) of the Evidence Ordinance. It is contended that the evidence of the wife of the accused-appellant has been adduced in breach of section 120 (2) of the Evidence Ordinance and therefore the said evidence is inadmissible in law and as such a conviction based on such evidence cannot be sustained.

The proviso to section 334(1) of the Code of Criminal Procedure Act states:-

'Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the

appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

In the case of Mannar Mannan V. The Republic of Sri Lanka 1987 (2) S.L.R94 it was held that the purpose of the proviso is to prevent appeals being allowed on the basis of technicality, regardless of whether prejudice has been caused or not to an accused person.

Although the learned trial Judge had committed this error one must consider whether the rest of the evidence establishes the charge against the accused-appellant. The court of appeal in terms of proviso to section 334 of the Code of Criminal procedure Act has a power to sustain a conviction. In this connection I rely on a judgment of the court of appeal in The King V. Musthapha Lebbe 44 N.L.R 505 wherein the court held thus:-

"The Court of Criminal Appeal will not interfere with the verdict of a Jury unless it has a real doubt as to the guilt of the accused or is of the opinion that on the whole it is safer that the conviction should not be allowed to stand."

Further in M.H.M Lafeer V. The Queen 74 N.L.R 246 His Lordship Justice H.N.G.Fernando held thus:-

"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and un contradicted evidence that a Jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."

In my opinion the prosecution has proved the case beyond reasonable doubt. For the above reasons, I refuse to interfere with the judgment of

the learned trial Judge and affirm the conviction and sentence. I dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL