

201/2013

**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 sec. 331
Of the Code of Criminal Procedure Act
No. 15 of 1979 as amended.

Kiriporuwage Kamal Rohitha

Premachandra

Accused-Appellant

C.A. Case No:201/2013

H.C.Gampaha Case No:-64/12

V.

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

Respondent

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

K.K.Wickremasinghe ,J.

Counsel:-Asanka Dissanayake for the Accused-Appellant

Jayantha Jayasuriya A.S.G., P.C for the Respondent

Argued On:-29.04.2015/20.05.2015

Written Submissions:-04.06.2015/10.07.2015

Decided On:-06.08.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Gampaha for kidnapping a girl under 16 years of age namely Samaraweera Arachchige Rashmi Prabodha from her lawful guardianship of her mother Jayasinghe Mudiyansele Manjula Dushanthi an offence punishable under section 354 of the Penal Code and for raping the aforesaid S.A.Rashmi Prabodha an offence punishable under section 364(3) of the Penal Code read with section 364A(i) of the Penal Code.

After trial the accused-appellant was found guilty as charged and was sentenced to 6 months R.I and fine of Rs.2500/-in default of which 3 months simple imprisonment for the first count and to ten years R.I and in addition to a fine of Rs.7500/- in default of which 9 months simple imprisonment for the second count.

Being aggrieved of the aforesaid conviction and sentence the accused-appellant had preferred this appeal to this court. Learned Counsel for the accused-appellant urged 7 grounds of appeal as militating against the maintenance of the conviction.

(1)The Learned trial Judge has seriously misdirected herself in amending the second count against the accused just before the pronouncement of the judgment.

(2)Learned trial Judge has failed to consider that sections 114(F) of the Evidence Ordinance operates against the prosecution as the prosecution has failed summon witness No. 1 mother of the victim and the virtual complainant who was a listed and available witness throughout the trial.

(3)The Learned Trial Judge has failed to address her mind to the items of evidence favourable to the accused-appellant thereby denying him of a fair trial.

(4)The Learned trail Judge has failed to address her mind to the legal principle that the corroboration is only required or afforded if the witness requiring corroboration is otherwise credible.

(5)The Learned trial Judge has failed to consider the subsequent conduct of the accused-appellant.

(6)The Learned trial Judge has failed to analyse and evaluate the dock statement made by the accused-appellant.

(7)The Learned trial Judge has failed to evaluate and analyse the evidence properly and to consider the burden of proof cast upon the prosecution and the standard of proof in a criminal case.

The case for the prosecution was that the victim Rashmi Probodha 14 years and seven months old when the alleged incident took place. According to her the accused-appellant was living with her mother as her father was in prison. During this time the victim has treated the accused-appellant as a father and called him uncle. According to her testimony on the day of the incident at about 10 p.m the accused-appellant had taken the victim away from home after assaulting her mother. The mother had fallen unconscious due to assault. According to her the accused-appellant had been after liquor and had dragged her to the cave in the rubber Estate and raped her. She had further stated that the accused-appellant first put her on a bed sheet on the floor of the cave but it got moved aside and that she was raped by the accused-appellant on the floor of the said cave. The following day morning at about 7 a.m the accused-appellant had taken her back home and she did not find her mother at home and came to know that her mother had gone to the

police station to make a complaint. The fact that the mother of the victim was not at home the following day morning and that she had gone to the police station to make a complaint was corroborated by the evidence of the W.P.C Rathnathilaka who confirms that the mother of the victim lodged a complaint around 8.15 a.m against the accused-appellant of kidnapping the victim. The victim further confirms that she was later taken to the police station thereafter and to the doctor who examined her on the following day.

Dr.Sujeewa R.Wickremaarachchi who examined the victim within 48 hours of the incident testified explaining the nature and cause of injuries on the victim. The said witness has stated that the prosecutrix was admitted to Gampaha hospital on 17.02 2012 at about 6.15 p.m and was examined by him on 2012.02.18 at about 2 pm. The medical legal report was marked P2. The witness in his evidence has stated that the prosecutrix in her short history, stated that sexual intercourse took place around 9.30 p.m on 16.02.2012.

He has stated that he examined the victim and found multiple linear abrasions (about 15 in number) distributed in an area of 15cm X 10cm, placed on back of her trunk in its lower 1/3. Size vary from 0.5cm to 2cm.

Linear abrasion, 2cm placed on midline of the back of the trunk 20cm below the root of the neck.

Linear abrasion, 2cm placed on front aspect of right forearm 3cm above the wrist joint.

Linear abrasion, 2cm placed on back aspect of right forearm 6cm above the wrist joint.

Linear abrasion, 4cm placed on front aspect of left forearm 13cm above the wrist joint.

The victim had stated that she was raped on a rough floor and that the injuries tallied with her story that she was raped on a rough surface. The victim in her short history has narrated how she was abused by the accused-appellant. The doctor in his report as well as in his evidence has categorically stated that there are medical evidence of recent vaginal penetration and the external injuries found on the body of the victim are compatible with the given history.

The crucial issue that arose for determination by the learned trial Judge in the instant case was whether this girl Rashmi Prabodha had been subjected to rape on 16.02.2012 by the accused-appellant as alleged by the prosecutrix. Medical expert Dr w.S.R.Wickremaarachchi has testified to court what he observed when he examined Rashmi Prabodha on 18.02.2012. At that time he was aware of the history narrated to him by Rashmi Prabodha, to the effect that she was raped by the accused-appellant on 16.02.2012. Considering all these matters I hold that the medical evidence does support the evidence of the prosecutrix that she was raped by the accused-appellant. We are of the opinion that the trial Judge has acted correctly when she came to the conclusion that the medical evidence was supportive of the sexual act having taken place on 16.02.2012 in the manner testified by the prosecutrix.

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 a character as to convince the Jury that she is speaking the truth.”

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

“Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected

and the accused-appellant acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible."

In *Sumanasena V. Attorney General* [1999] 3 Sri.LR 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."

The trial Judge has come to such a favourable finding in favour of the witness Rashmi Prabodha as regards her testimonial trustworthiness and credibility. The fact that she was dragged by the accused-appellant to the cave and was raped on a rough surface is very clearly supported by the evidence of the doctor who examined her. The medical evidence clearly established the fact she was dragged and raped in a cave as narrated by the prosecutrix.

The fact that she was taken forcibly or kidnapped by the accused-appellant after assaulting the mother is also confirmed by the evidence given by the witness WPC Rathnathilaka who confirms the fact that the mother of the victim lodged a complaint around 8.15 am against the accused-appellant on the kidnapping of the victim. There is clear evidence in this case that the accused-appellant had taken the victim away from her residence forcibly without the consent of her mother. According to victim the following morning around 7.am the accused-appellant had taken the victim back home. At that time the victim had come to know that her mother had gone to the police station to make a complaint.

It is very clear from the evidence of the prosecutrix that on the very next day morning the police had come in search of her. The mother had made a prompt complaint to the police about the accused-appellant

kidnapping her daughter and the police had proceeded to investigate into the said complaint immediately. The victim's statement had been recorded soon thereafter. And she had been admitted to the Gampaha Base Hospital. The prosecutrix had further admitted the fact that she accompanied the police officers to the scene of the crime. It is very clear that the mother of the victim had only made the complaint against the accused-appellant for kidnapping her daughter. She was unaware of the fact that the daughter had been raped by the accused-appellant thereafter. Although the mother's evidence had not been led by the prosecution there is ample evidence in this case to show that the mother had made a prompt complaint to the police against the accused of kidnapping her daughter and that the police had visited the residence of the prosecutrix and had immediately recorded the statement of the prosecutrix. The accused-appellant too had been arrested the very same day.

The history given to the Medical Officer by the prosecutrix is consistent with the evidence given by her at the trial. He has stated that the observations made by him are compatible with the history given by the prosecutrix. The evidence of the prosecutrix in my view does satisfy the test of probability.

The accused-appellant made a dock statement and admitted that the prosecutrix was with him the whole of the night on 6.02.2012. He had stated that the prosecutrix followed him and pleaded with him to come back home. The above position taken up by the accused-appellant in his dock statement was never suggested to the prosecutrix when she was cross examined on behalf of the accused-appellant. The fact that the prosecutrix had left with the accused-appellant willingly is contradicted by the evidence led in this case by the prosecution in that the mother of the prosecutrix had made a complaint to the police alleging that the accused-appellant had kidnapped her daughter. The police had acted on

this complaint and thereafter found out from the prosecutrix that in fact the accused-appellant had raped the prosecutrix the night before.

On perusal of the judgment of the learned trial Judge it is very clear that the trial Judge had considered all the material evidence that had been led before her at the trial by both parties.

It is settled law that an unsworn statement must be treated as evidence. Queen V. Kularatne 71 N.L.R 529. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt. The evidence given by the accused-appellant too had been considered by the learned trial Judge though not in detail. It is my view that the learned trial Judge has correctly rejected the dock statement of the accused-appellant. The dock statement is not credible nor does it create any reasonable doubt on the prosecution case. I cannot agree with the submissions made by the Counsel for the accused-appellant that the failure of the prosecution to lead the evidence of the mother of the prosecutrix had caused any prejudice to the accused-appellant in this case.

In King V. Musthapha Lebbe 44 N.L.R 505 Court of Criminal Appeal held that:-

“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.”

In conclusion for reasons stated above I hold that the accused-appellant had failed to satisfy this court on any ground urged on his behalf that a miscarriage of justice had occurred. Therefore I dismiss the appeal of the

accused-appellant and affirm the conviction and sentence dated 10.12.2013 of the learned High Court Judge of Gampaha.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL