

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIS REPUBLIC OF
SRI LANKA**

**In the matter of an application for Appeal
under section 331 (1) of the Criminal
Procedure Code Act No 15 of 1979.**

Attorney General

Attorney General's Department

Colombo 12.

COMPLAINANT

CA/246/2009

HC-KURUNEGALA HC 220/04

1. Pallawa Lekamlage Gayan Sanjeewa alias Asanka

Wewellawela,

Bopitiya.

2. Pallawa Lekamlage Gayan alias Chaminda

Pahathmulle,

Labbala.

3. Balayalage Ranjith alias Upali,

Watawela,

Bopitiya.

RESPONDENTS

And,

1. Pallawa Lekamlage Gayan Sanjeewa alias Asanka

Wewellawela,

Bopitiya.

2. Pallawa Lekamlage Gayan alias Chaminda

Pahathmulle,

Labbala.

3. Balayalage Ranjith alias Upali,
Watawela,
Bopitiya.

RESPONDENTS- APPELLANTS

Vs,

Attorney General

Attorney General's Department

Colombo 12.

COMPLAINANT – RESPONDENT

**Before : Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J**

Counsel: Suranga Bandara for the 1st Accused-Appellant,
Dr Rajith Fernando with Samantha Rajapakshe for the 2nd Accused-Appellant,
Indika Mallawarachchi for the 3rd Accused-Appellant,
Shanaka Wijesinghe DSG for the Respondent

Argued On : 25.05.2015, 10.06.2015
Written Submission On : 18.06.2015
Ordered On : 01.09.2015

Order

Vijith K. Malalgoda PC J (P/CA)

Three Accused- Appellants were indicated before the High Court of Kurunegala for committing the offence of gang rape on Wijelath Pedige Devika Priyadarshani an offence punishable under 362 (2) of the Penal Code as amended by **Act No. 22 of 1995.**

After trial, all three Accused were found guilty by the Learned Trial Judge and imposed a sentence of 15 years rigorous imprisonment with fine of Rs.5000/- and Rs.50, 000 compensation with default terms of six months and one year respectively Prosecution in this case has mainly relied on the evidence of the prosecutrix Devika Priyadharshani. In addition to her evidence her mother Kusumawathy, Judicial Medical officer Dr. Senanayake, Sub –Inspector Lincon and few other police officers who assisted the investigation, were summoned as witnesses for the prosecution.

The main argument raised by all three counsels before this court was that it is unsafe to act upon the uncorroborated evidence of the prosecutrix.

However the Learned Deputy Solicitor General who represented the Attorney General was confident that the evidence of the prosecutrix alone is sufficient to find the three accused guilty, when considering very strong nature of the evidence given by her.

According to the evidence of the prosecutrix Devika Priyadharshani who was a 13 years old adopted child of witness Pathirennahalage Kusumawathy and her husband Pedris Appuhamy, her mother Kusumawathi had found an employment as a house maid in Hettipola and before she left for Hettipola, she kept the victim in the house of one Pathma Ranjani. But the victim decided to come back to her house and stayed with her father. The house they lived did not have any doors and the room she occupied was divided from her father's room from a half wall and covered up to the roof using polythene sheets. As a habit her father took alcohol every evening before goes to bed.

On the day in question her father came drunk and went to bed. She went to sleep in her room around 10.00 pm. After same time she got up after hearing the noise of some dogs, but again she went to sleep. At that time a bottle lamp was burning in her room. Few minutes later she got up after hearing some sound and thereafter she saw the three accused namely Asanka, Upali and Chaminda coming to her room with the aid of the light of the bottle lamp. Asanka (1A) had a razor with him and he threatened her not to shout and when the other two were holding her from the legs and hands Asanka got on to her body and raped

her. Others took turns and had committed the same act to her whilst the other accused took turn in holding legs and hands.

In examination in chief she took up the position that the bottle lamp was burning right through out. She further stated that she did not inform this to anybody due to fear until one Pushpa inquired from her regarding this incident. Pushpa is the wife of 2nd Accused. However the Learned Counsel for the Accused –Appellants have challenged the evidence of the prosecutrix by drawing the attention of several contradictions marked during her evidence.

The counsel drew the attention of court to the following contradictions which were marked during the evidence of the Prosecutrix,

2 ටී 8 " මම අසංකව දකිනවාක් එක්කම ඔහු කටින් පිබලා ලාම්පුව නිවුවා."

2 ටී 6 " මේ අවස්ථාවේ හමුදාවේ හිටි අසංක යන අය මගේ ඇඳ ලහ හිටියා."

2 ටී 10 " කලුවරේ ජායාව හඳුනා ගත්තා."

Whilst drawing the attention to the above contradictions, it was submitted by the counsel that, the evidence of the prosecutrix is contradictory with her police statement on the question of identity. The counsel argued that, if the bottle lamp was blew off by Asanka and then, the prosecutrix could not have indentified the others without the help of a burning bottle lamp. The fact that she saw all three suspects and identified them at once, was also challenged using 2 ටී 6 and submitted that the witness could only identify Asanka at that time and submitted that the poor light condition was confirmed by 2 ටී 10.

It was further argued that there was no sufficient light which was sufficient for a person to identify another at that time, and therefore it is unsafe to act on the evidence of the prosecutrix even with regard to the identity of Asanka.

Learned Deputy Solicitor General whilst challenging the above argument rested his argument mainly on three points.

Learned Deputy Solicitor General took up the position that three accused –appellants are person from the same village and in fact Prosecutrix had stayed in the house of the 2nd Accused's mother in law (page 100) she had further admitted that she had an affair with one Saman who is the brother of the 2nd accused. During this period the 2nd Accused was married to one Pushpa and it is Pushpa who inquired from the prosecutrix about this incident. It was further revealed that he 3rd Accused is the brother of Pushpa. When the prosecutrix was asked as to how she identified the three Accused, she answered the said question as follow (page 67).

ප්‍ර: අද දින අධිකරණයේ සිටින වූදිකයන්මයි එදිනක් ආවේ කියා දේවිකා හඳුනා ගත්තද?

උ: ඔව්.

ප්‍ර: කොහොමද හඳුනා ගත්තේ?

උ: ලාම්පු එළියෙන් දැක්කා ඒ අයගේ ඡායා තමයි තිබුනේ.

ප්‍ර: ඒ සිද්ධියට කලින් වික්තිකරුවන් තුන් දෙනා හඳුනානවද?

උ: ඔව්.

ප්‍ර: කොහොමද හඳුනා ගත්තේ?

උ: අපේ ගමේ ඉන්න අය.

ප්‍ර: ඔවුන් කලින් හමුවී කතා කර තිබුනද?

උ: ඔය්ට කලින් ගමේදී හමුවී කතා කර තිබුනා.

He further argued that the prosecutrix was not depending solely on the identification by the burning bottle lamp but also depending on voice identification.

In support of his contention the Learned Deputy Solicitor General referred to the following evidence (page 95)

ප්‍ර: තමන් වුදිකයන් සියලු දෙනාම හඳුනා ගත්තේ කුප්පි ලාම්පු එලියෙන් බව කීවා?

උ: එහෙමයි ස්වාමිනි.

ප්‍ර: එය හොඳට විශ්වාසයි?

උ: ඔව්, කටහඬින් සහ කුප්පි ලාම්පු එලියෙන්.

ප්‍ර: කුප්පි ලාම්පු එලියෙන්

උ: එහෙමයි ස්වාමිනි.

The prosecutrix is a thirteen years old village girl. Her house did not have separate rooms except for few half walls. There was no electricity in this house. We have to analyse her evidence having in mind those circumstances.

In the case of *Machli Singh V. State of Punjab AIR 1983 SC 957*. Supreme Court of India held that “The Villagers living in villages where electricity has not reached as yet get accustomed to seeing things in the light shed by the lantern. Their eye sight gets conditioned and become accustomed to the situation. Their powers of seeing are therefore not diminished by the circumstances that the incident is witnessed in the light shed by the lantern and not electric light.”

In the case of *Kalika Tiwari V. State of Bihar AIR 1997 SC 2186* Supreme Court of India held “where the only source of light at place of occurrence which was village where dacoit in question took place where an earthen lamp, the identification of Accused even in such light would not be problem for villagers especially when many of dacoits were direct relations of complainant. The visibility capacity of urban people who are acclimatized to fluorescent lights or in candescent lamps is not the standard to be applied

to villagers whose optical potency is attuned to country-made lamps. Their visibility is conditioned to such lights and hence it would be quite possible for them to identify men and matters in such light.

In the present case the three accused were people known to the prosecutrix. She admits to have spoken to them previously, and had stayed in a house with the mother-in-law of the 2nd accused.

In the land mark case on identification *Regina V. Turnbull and another 1977 (1) QB 224 at 228* the question of visual identification in Criminal cases was discussed as follows; Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in anyway, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused.....

In the present case, according to the prosecutrix the three accused were known to her previously but the same principles discussed in the Turnbull case will apply to her identification as well, except for having an identification parade.

Prosecutrix evidence before the High Court was that she could identify all three accused with the aid of burning bottle lamp. The accused -appellants challenged the above evidence making "8". If 8 is accepted she could only identify the 1st accused before the 1st Accused blew off the bottle lamp. However the prosecutrix speaks of her being raped by all the suspects taking turn. If that is accepted, all three accused have stayed with her for a considerable time. According to the prosecutrix the house she lived did not have doors and the walls were half walls, all three suspects were known to her very well. When considering all these factors, along with the background from which the prosecutrix is coming from specially in the light of the two Indian decisions I have discussed above, it is safe to conclude that the prosecutrix had positively identified all three suspects in this case.

The prosecutrix had further referred to the fact that their voices too had helped her to identify the suspects will strengthen her identification, under the circumstances of the present case,

In the case of *Kirpal Singh V. T State Uttar Pradesh AIR (1965) 712* the Indian Supreme Court held thus “It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variation in the overtones when the person recognizing is not familiar with the person recognized may be somewhat risky in a criminal trial. But **where the accused is intimately known to the witness and for more than a fortnight before the date of the offence he had met the accused on several occasions in connection with the dispute, it cannot be said that the identification of the assailant by the witness from what he heard and observed** was so improbable that the Supreme Court would be justified in disagreeing with the opinion of the court which saw the witness and formed its opinion as to his credibility and of High Court which considered the evidence against the appellant and accepted the testimony” (emphasis added)

I see no reason to disbelieve the prosecutrix when she said that the voices of the accused too have helped her to identify the accused when considering the relationship she had with all three accused.

In response to the Arguments by the counsel for the Accused- Appellants with regard to the credibility of the evidence of the prosecutrix based on the several contradictions including the three main contradictions placed by the counsel, as 2, 6, 8, Learned Deputy Solicitor General, requested court to Act under section 110 (4) of the Code of Criminal Procedure Act No 15 of 1979 and to peruse the statement of the prosecutrix and consider whether, the contradictions which are produced by the Accused –Appellants warrants rejection of the evidence of the prosecutrix.

Section 110(4) of the Code of Criminal Procedure Act 15 of 1979 [Section 122 (3) of the earlier code] deals with the power of a Criminal Court to send for statement recorded in a case under inquiry or trial in such court and to use such statements or information “not as evidence in the case, but to aid it in such inquiry or trial.’

In *Keerthi Bandara V. Attorney General 2002 (4) Sri LR 245 at 251* the use of the above provision was discussed as follows;

“Thus when defence contends that, there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial judge who should peruse the Information Book and decide on that issue. When the matter again raised before the Court of appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not.....”

When looking at the police statement of the prosecution I observe that, the prosecutrix had relied upon the light emanating from the bottle lamp and the voice of the accused in the order to identify them. This court is not going to consider the above as substantial evidence in the case but it will certainly assist this court to evaluate the above contradictions.

The main argument of the counsel for the accused-Appellants by drawing the attention of court to the said contradictions were, to attack the identification made by the prosecutrix, but when looking at the evidence of the prosecutrix, to which I have already referred to in my judgment I prefer to conclude that the said contradictions are not sufficient to reject the evidence of the prosecutrix.

Counsel for the Accused – Appellants has further argued that it is unsafe to act on the uncorroborated evidence of the prosecutrix.

In a rape case courts have looked for corroboration only if the evidence of the prosecutrix is not convincing. As I have pointed out before, the prosecutrix had given convicting evidence before the High Court.

In the case of *Premasiri V. Attorney General 20006 (3) Sri LR 106 at 110* Eric Basnayake (J) held; “there is no rule that there must be in every case, be corroboration before a conviction can be allowed to stand. It is well settled Law that a conviction for the offence of rape can be based on the sole testimony of the

prosecutrix if it is reliable, unimpeachable and there is no infirmity. If the evidence of the prosecutrix inspires confidence it must be relied upon without seeking corroboration of her statement in material particulars.

Learned counsel for Accused –Appellants further submitted that the delay in making the complaint will aggravate the weakness in this case. The Prosecutrix was 13 years old adopted girl who lived only with the adopted father when the alleged offence took place. Her father was a drunkard. Her adopted mother was employed as a domestic servant in a different village. She was threatened by the Accused when they raped her. Until Pushpa, the wife of the 2nd Accused and sister of the 3rd Accused inquired from her, she did not inform the incident to anybody. When all these circumstances are taken together we have no reason to disbelieve her. It was not even suggested to her that there is a reason for her to implicate the accused. If the girl was not questioned by Pushpa she wouldn't have complained against the accused at all.

In such a situation it is wrong to conclude that the delay in making the complaint in the present case will affect the prosecution case.

For the reasons adduced above I see no reason to interfere with the findings of the Learned High Court Judge in convicting all three accused for committing gang rape on the prosecutrix Wijelath Pedige Devika Priyadharshani. I therefore affirm the conviction and sentence imposed by the Learned High Court Judge of Kurunegala on 13.10.2009.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. MADAWALA,

I agree,

JUDGE OF THE CUORT OF APPEAL

Appeal Dismissed