

C.A 129/2013

**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 section
331 of the Code of Criminal Procedure
Act No. 15 of 979 as amended.

Wijethunga Mudiyanseelage Heen Banda

Accused-Appellant

C.A. Case No:-129/2013

H.C. Kurunegala Case No:-134/2010

V.

Attorney-General

Attorney Generals Department,

Colombo 12.

Respondent

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

K.K.Wickremasinghe, J.

Counsel:-Dr. Ranjith Fernanando for the Accused-Appellant

M.C.Dileepa Peeris S.S.C. for the Respondent

Argued On:-23.03.2015

Written Submissions:-25.05.2015/23.06.2015

Decided On:-07.10.2015

H.N.J.Perera, J.

The accused-Appellant in this case was indicted before the High Court of Kurunegala for kidnapping and raping a girl named Sandhaya Sunjeevani Kumari on 05.06.2008 offences punishable under section 354 and 365 B (2) B of the Penal Code as amended by Act No. 22 of 1995. After trial the accused-appellant was convicted for both counts and was sentenced to 3 Years R.I. and to a fine of Rs.5000/-on the first count and to 7 Years R.I and to a fine of Rs.5000/- on the second count. The accused-appellant was also ordered to pay Rs 100,000/- as compensation to the victim.

Learned Counsel for the accused-appellant urged four grounds of appeal as militating against the maintenance of the conviction.

1. The delay in complaining the incident to police.
2. The consistency and probability in the victim's version
3. The Medical evidence does not corroborate the victim's stance
4. The delay in pronouncing the judgment.

According to the prosecution the victim was a 15 years old girl. The victim having returned home from school went on her peddle bike in search of her mother. The victim's mother had gone to the paddy field, whilst riding the accused-appellant who is well known to her, blocked her road way at a junction. Case for the prosecution was that the accused-appellant dragged the victim along ground, her mouth gagged with hand and taken to a shrub area removed all her clothing. The accused-appellant also removed his clothes and inserted his penis into her vagina

until it was painful, lay on top of her for about five minutes and got up. Thereafter she too got up took the bicycle and went home. Her mother was not at home and she bathed and washed her clothes.

The evidence led in this case indicate the she complained about the incident to her mother and it was conveyed to the father after he came back home. A complaint was made to the Galigamuwa police Station two days after the incident on 07.06 2008. In this case the parents of the victim had initially complained to the Village Peace Committee. The said Committee had advised them to complain the alleged incident to the police. In this case an explanation had being elicited from the victim regarding the delay in making the complaint of rape.

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

“Just because the witness is belated witness court ought not to reject his testimony on that score alone, court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the court could act on the evidence of a belated witness.”

In this case the victim and her mother had given a plausible reason for the delay in making a complaint to the police therefore it is not a ground to reject the evidence of the victim as alleged by the Counsel for the Accused-appellant.

In this case the victim had clearly stated that the accused-appellant dragged her along the ground. She had also said that it was a jungle like area with thorny bushes around. She was naked at the time she was raped by the accused-appellant. She also stated that she fell down and although she was not able to give the exact distance had stated that the accused-appellant dragged her along the ground some distance.

The Doctor A.H.Sunil Piyasena who examined the victim did not find any injuries in her vagina. According to the Doctor there was no injuries to

be seen on her body. She was examined by the said Doctor on 08.06.2008 at 9.15 am at the Kurunegala General Hospital. The prosecutrix had stated to the said Doctor who examined her that the accused-appellant dragged her into the jungle, and while she was on the ground lifted her frock, pulled down her panty half way down and inserted his penis into her vagina. The short history given to Doctor does not appear to be compatible with her testimony in the High Court. The Doctor has stated to court that there were no external injuries found in the prosecutrix. The said witness failed to find any injuries pertaining the sexual intercourse complained of. For the above reasons I hold that the medical evidence does not support the evidence of the prosecutrix that she has been raped. Thus the case depends only on the evidence of the prosecutrix.

In Gurcharan Singh Vs State of Haryana AIR 1972 S.C. 2661 the Indian Supreme Court held thus:-

“As a rule of prudence, however, a 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 it was 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 ! S.L.R230 it was held that:-

“Corroboration is only required 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 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.

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."

Here. In the instant case the Doctor's evidence does not corroborate the evidence of the prosecutrix. The case for the prosecution is that the accused-appellant dragged the prosecutrix some distance. According to her own evidence, this was a jungle. She has stated that there were thorny bushes around the place. According to the police the incident had taken place in a shrub jungle. It was at a place about 100 meters away from where the bicycle was found. The accused-appellant had, in fact dragged the prosecutrix for about 100 meters into the jungle. The grass at this place was crushed. If the prosecutrix was raped on a surface of this nature after removing her clothes, one has to expect injuries on the posterior side of her body. Apart from that according to her evidence she had fallen on the ground and the accused-appellant had dragged her along the ground. She had in fact struggled with the accused-appellant when she was on the ground and when he was on top of her body. But no injuries what so ever had been observed by the Doctor who examined her. No injuries were observed in any part of her body by the Doctor who examined her on 08.06.2008 at 9.15 a.m. According to the prosecutrix this incident had taken place on the 05.06.2008 at about 2.30 p.m. The prosecutrix evidence in my view does not satisfy the test of probability.

According to the police witness the victim had been dragged for about 100 meters in to the jungle from the road. The prosecutrix's bicycle had fallen by the side of the road. There is no evidence to show that the accused even tried to hide the bicycle or did hide the bicycle. Therefore

the bicycle would have been lying on the ground on the road until the prosecutrix took it and came back home in the bicycle. This road is being used by the people in the neighborhood. This incident is said have taken place around 2.30 p.m. It is highly unlikely for anyone to leave the bicycle on the road for other persons to observe it. Anyone would have noticed the bicycle and that would have raised the suspicion as to the whereabouts of the owner of the bicycle.

I hold that the evidence of the prosecutrix is not credible. And it is not safe to act on her evidence. For the above reasons, I hold that the evidence of the prosecutrix is not reliable and could be believed. I, therefore, hold that it is unsafe to allow the conviction to stand. I, therefore, set aside the conviction and the sentence and acquit the accused-appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

k.k.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL