

C.A.12/2012

**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.

K.A. Don Lakshman Sanjeewa

Accused-Appellant

C.A.Case No:- 12/2012

H.C.Kegalle Case No:-2480/06

V.

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

Respondent

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

K.K.Wickremasinghe, J.

Counsel:-Indica Mallawarachchi for the Accused-Appellant

H.I.Peiris S.S.C for the Respondent

Argued On:-11.03.2015

Written Submissions:-06.05.2015

Decided On:-05.10.2015

H.N.J.Perera,J.

The accused-appellant was indicted before the High Court of Kegalle for committing rape on a girl under the age of 18 on or about the 19th August 2003, an offence punishable in terms of section 364 (2)(e) of the Penal Code as amended by Act No. 22 of 1995.

After trial the accused-appellant was found guilty as charged and was sentenced to a term of 10 years rigorous imprisonment and ordered to pay compensation of Rs. 25,000/- to the victim and ordered a default term of 2 ½ years simple imprisonment. Being aggrieved by the aforesaid conviction and sentence the accused-appellant had preferred this appeal to this court. Learned Counsel for the accused-appellant urged three grounds of appeal as militating against the maintenance of the conviction.

(1) Learned trial Judge's finding with regard to the absence of consent on the part of the prosecutrix is flawed.

(2) Learned trial Judge misdirected herself in law on the burden of proof relating to the defence of consent thereby causing serious prejudice to the accused-appellant.

(3) Learned trial Judge flawed on the question of corroboration.

The case for the prosecution was that on 29.08.2003 at about 4.pm the prosecutrix had gone to a boutique which was situated approximately one kilo meter away from her house to buy some provisions and the accused-appellant who had been at the boutique compound had inquire from the prosecutrix as to whether he could accompany her to which question the prosecutrix had been noncommittal. It was the prosecutrix's position that the accused-appellant was not known to her but she had seen him at a funeral house on one occasion. She further

stated that when she proceeded to walk home the accused-appellant had carried her at which point she had raised cries. The accused-appellant had thereafter asked her whether she could stay for a while which prompted the victim to say that her father would come in search for her. The victim has further testified that she had engaged in a conversation with the accused-appellant for about 15 minutes and had intimated to him that her father would come in search of her.

It is the position of the prosecutrix that the accused-appellant had thereafter thrown the provisions which she was carrying and carried her through the shrub jungle where there was a dense growth of Manna shrubs and having placed her on the ground committed the act of rape. Victim has further testified that whilst they were in the shrub jungle there was a pelting of stones and subsequently Manju Aiya who was at the boutique and his dog had arrived at the scene. It was her evidence that at the time the said Manju Aiya arrived at the scene the act of rape committed by the accused-appellant was over and upon seeing him she had sought his help which prompted him to assault the accused-appellant who had thereafter fled from the scene. Thereafter Manju Aiya had accompanied her half way home.

The prosecutrix has testified that the accused-appellant had raped her twice and after committing rape the accused-appellant had dressed her underwear and buttoned her blouse. It was the evidence of the prosecutrix that upon returning home she had informed her mother and subsequently her parents hired a private van and had proceeded to the police station. On the way to the police station it was her evidence that the accused-appellant who was standing on the road upon seeing the van had signaled the van to stop and when he got into the van she informed the mother that it was the accused-appellant who raped her. Victim has testified that her mother had assaulted the accused-appellant and inquired from him as to why he committed the act at which point the

accused-appellant had stated that he was not aware that the victim was her daughter and that it was at the instance of Manju that he had done so. The accused-appellant was thereafter handed over to the police by the complainant party.

The evidence led in this case clearly shows that the prosecutrix did not know the accused-appellant before the date of the incident. There is no evidence to show that they were known to each other prior to the date of the incident. The prosecutrix had stated to court that she had seen him only once at a funeral house. She had stated that the accused-appellant inquired from her with whom she lives, the distance in which her house situated, whether her father would come in search of her etc. This evidence clearly establish the fact that the accused-appellant did not know the prosecutrix before the date of the incident and when he saw her at the boutique he had tried to help to carry the goods she had bought from the boutique and had followed her thereafter. It is clear that she had disclosed this incident to her mother immediately after the incident. The parent had hired a vehicle and had taken her to the police station to make a complaint about this incident and on the way the accused-appellant too had got into the said vehicle and was apprehended.

In *Sumanasena V. Attorney General* [1999] 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.

The Judge has come to such a favourable finding in favour of witness Samantha as regards her testimonial trustworthiness and credibility. The learned trial Judge has also very clearly stated that the evidence of the prosecutrix is supported by the evidence adduced at the trial emanating from other witnesses.

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. Attorney General 1986 1 S.L.R 230 it was held that corroboration is otherwise required or afforded if the witness requiring corroboration is otherwise credible. However in Gurcharan Singh V. State of Haryana A.I.R 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.”

The learned trial Judge has in this case come to a clear conclusion that the evidence given by the prosecutrix is credible. He has also proceeded to see whether the other evidence led in this corroborate the evidence of the prosecutrix. Witness D.W Nandawathi, the mother of the prosecutrix has testified that the daughter returned home from the boutique in tears and had intimated to her that she had been raped in a shrub jungle. The said witness has corroborated the evidence of the prosecutrix with regard to the accused-appellant signaling the van to be stopped and further that stating that the prosecutrix identified the accused-appellant as the person who raped her and that she assaulted the accused-appellant and took him to the police station and handed him over.

Witness R.P. Dayanath Ranasinghe Inspector of Police has stated that he recorded the statement of the mother of the prosecutrix and the accused-appellant was handed over to the police by the mother of the prosecutrix. He has further stated that he noticed abrasions near the elbow of the right hand of the prosecutrix and that the prosecutrix was

not in a mental condition make a statement and that she was referred to the Doctor.

The history given to the Medical Officer U.Ajith Kumara Thennakoon is consistent with the evidence given by the prosecutrix at the trial. The Doctor had stated that he examined the victim on 30.08.2003 at 2.45 p.m at the Avissawella Base Hospital. He had stated that at that time of examination he found the prosecutrix was very distressed and emotional. The under pant, light blue colour alleged to have been worn by the prosecutrix during the assault had two tears and mud stains. Brazier had tears in both breast cups. This observation made by the doctor in my view clearly indicate that there was no consent on the part of the prosecutrix as alleged by the accused-appellant in this case.

He had noticed the following injuries on the body of the victim.

- (1) A suction bite irregular 3x2 cm reddish over the left breast.
- (2) A nail scratch abrasion dried with scab cured 0.2 cm on the middle of the upper front of the chest.
- (3) A linear abrasion dried with scab 2 cm long on the middle of the lower back.
- (4) A linear abrasion 2 cm with a scab over inner aspect of the middle of the right thigh.
- (5) A linear abrasion with scab 5 cm long horizontally placed in the back of right upper leg.
- (6) A contusion 1x1 cm irregular at the back of the left ankle.
- (7) An abrasion 1 cm on the back of the right ankle.
- (8) A group of linear abrasions 1-10 cm with scattered over the medial aspect of the right lower leg.

(9) A linear abrasion with scab 1 cm long on the medial shoulder of the right hand.

The doctor also has stated that he found no injuries in the hymen. A recent abrasion 3 cm long at the posterior forchette with contact bleeding. In conclusion he had stated that findings are consistent with the given history of intentional violence. And that the vaginal findings also consistent with a pattern of injuries seen in recent intra labial penetration. The medical officer has testified that the said injuries are compatible with the act having taken place in a shrub jungle. In my opinion the medical evidence does support the evidence of the victim. Therefore I find that the learned trial Judge has come to a correct conclusion that the medical evidence does corroborate the evidence of the prosecutrix in this case. I am of the opinion that the learned trial judge has correctly dismissed the element of consent on the part of the prosecutrix.

It is to be noted that to the mother of the victim the accused-appellant had merely said that he did not know that the prosecutrix was her daughter. He also has said that it was at the instance of Manju that he had done so. He has not stated that he did so with the consent of the prosecutrix. In my opinion the failure of the prosecution to summon the said Manjula as a witness is not a reason to disbelieve the evidence given by the prosecutrix in this case. The evidence given by the prosecutrix in this case is cogent and could be believed and acted upon. Our law does not require the prosecution to call a number of witnesses to prove a charge against an accused. Evidence given by one witness is sufficient. It is the quality of the evidence given by the said witness that matters.

This court cannot agree with the contention of the Counsel for the accused-appellant that the conduct of both the prosecutrix and the accused-appellant before the act, during the act and subsequent to the

act is not consistent with an act of rape but demonstrate a willingness on the part of the prosecutrix.

It was further submitted by the Counsel for the accused-appellant that the learned trial Judge has arrived at a judicial finding that in the light of the corroborative evidence led by the prosecution, the dock statement cannot be believed. Firstly it is to be observed that the accused-appellant in his dock statement had merely made a single statement stating that that the said incident happened with her consent (prosecutrix's). 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. An accused person if he decides to exercise his rights and decides to make a dock statement he is duty bound to make a clear statement and give a clear explanation to the evidence that had been led against him by the prosecution. In this case the accused-appellant has merely stated that it happened with the consent of the prosecutrix. He has merely repeated the position that has been taken on his behalf at the trial. He has said nothing new for the court to consider on his behalf. He could have clarified so many issues. He has done nothing. In fact he had said nothing for the trial judge to consider on his behalf. He had said nothing for the trial judge to consider, analyse and see whether his evidence creates a reasonable doubt in the prosecution case. The dock statement is not credible nor does it create any reasonable doubt in the prosecution case. Therefore I cannot agree that any prejudice had been caused to the accused-appellant as contended by the Counsel for the accused-appellant. Therefore. I find that when the evidence for the prosecution and the dock statement taken in the totality the learned trial Judge cannot be faulted for rejecting the dock statement and deciding

that the evidence of accused-appellant was not capable of creating a reasonable doubt in the prosecution 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 we 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 31.01.2012 of the learned High Court Judge of Kegalle.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

k.k.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL