C.A.155/2014

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.

Polwaththegedera Widanalage

Rohana Peiris

Accused-Appellant

C.A.Case No:-155/2014

H.C. Chilaw Case No:-90/2004

V.

The Attorney General

Attorney General's Department,

Colombo 12.

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

K.K.Wickremasinghe, J.

Counsel:-Neranjan Jayasinghe for the Accused-Appellant

Shanaka Wijesinghe D.S.G. for the Respondent

Argued On:-06.07.2015

Written Submissions:15.07.2015/13.08.2015-

Decided On:-09.10.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Chilaw under section 364(1) of the Penal Code for committing an offence of rape on Suriya Hetti Adikari Mudiyanselage Sureka Nilanthi on or about the 26.02.2000 at Aththanganaya, Chilaw. After trial the learned High Court Judge convicted the accused and sentenced him to 10 years rigorous imprisonment and imposed a fine of Rs.7500/-carrying a default sentence of 6 months simple imprisonment and further he was ordered to pay compensation of a sum of Rs.25,000/- carrying a default sentence of 6 months simple imprisonment. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

According to prosecution the prosecutrix was a married woman. Her husband was an army officer and who came home once in two weeks and the prosectrix lived alone with her four year old child at home. The prosecutrix sold liquor in the house and the friends of her husband came to her house and they used to consume liquor at her place when the husband was not at home.

According to the prosecutrix she was sleeping in the night with her four year old child on the bed and she woke up due to a flash light of a torch and she saw a person covering his face below the mouth level from a handkerchief. Her version is that she struggled but did not scream and the accused-appellant put pressure on her neck from the bed sheet. When she was struggling the torch fell down and she says she identified the accused-appellant from the voice and from the rest of the body which was not covered. She did not make any attempt to hit him or bite

him or even did not attempt to wake up the child who was sleeping close by on the bed. She further states that the accused-appellant told her that he was having a knife and because of that she did not scream but did not see a knife. According to her the husband came home 5 days after the incident. On the same day she told him about the incident and went to the police station to make a complaint on the same day.

It was contended on behalf of the accused-appellant that this incident had taken place with the consent of the prosecutrix. It was also the position of the accused-appellant that since the husband has questioned her about the accused-appellant she made this false allegation. It was further submitted that the prosecutrix's evidence cannot be believed and highly unreliable and not corroborated by any other evidence and that the prosecution has failed to prove the charge against the accused-appellant beyond reasonable doubt.

In this case according to the prosecution the incident had taken place on or about the 26th February 2000. The complaint to the police had been made on 12.03.2000. The Doctor R.M.S.Kusumsiri Rathnayake had examined the prosecutrix at the general Hospital Chilaw on 13.03.2000. The prosecutrix had stated to the Doctor that a person known to her had raped her on 26.02.2000. The Doctor did not find any injuries in her vagina since she is a married woman with a child. But stated penetration is still possible without any injuries been caused to the vagina. The prosecutrix was examined by the Doctor after about 15 days from the date of the incident. In any case in my view the medical evidence does not support the evidence of the prosecutrix. Thus, the case depends only on the evidence of 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 320 it was held that:-

"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.

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."

I shall now consider whether the victim in the present case has given truthful evidence. The victim was a married woman with a child of four years old at the time of the incident. Her husband was employed as an army officer and came home once in two weeks. Unlike other innocent women the evidence in this case disclose that she sold liquor in the house and that the friends of her husband came to consume liquor at her place when the husband was not there. According to the prosecutrix the accused-appellant came to her house with two other friends both of them are known to her one being Nalaka spent about half an hour and went.

According to the evidence of the prosecutrix she did not tell about this incident to anyone, not even to her parents who was living about ¼ mile from her place. She did not inform the brother of her husband who lived

close to her house although she was in good terms with them. She has failed to give any reason for not doing so.

According to the prosecutrix she had met the witness Nalaka about three days after the incident and had told him to give a message to the accused-appellant to see her at her house. She has stated that she wanted to ask the accused-appellant as to why he has done a thing like that to her. She also has stated that the accused promised to give her a gold chain of five soverigns and she would be able to see him if she comes to the boutique the next day. Witness Nalaka Devasiri too testified that he met the prosecutrix after about three days from the day he visited her house with the accused-appellant. He had stated that the prosecutrix inquired about the accused-appellant from him. He also stated that he informed the husband of the prosecutrix that the prosecutrix was always inquiring about the accused-appellant from him. In fact this witness has said that the prosecutrix inquired about the accused-appellant three days after the said visit with the accused-appellant to her house and again about a month later. Witness Nalaka had questioned the prosecutrix as to why she is searching for the accused-appellant so much, to which she has not replied. It was contended by the Counsel for the accused-appellant that the said incident had taken place with the consent of the prosecutrix and since the husband has come to know from the witness Nalaka that she had inquired about the accused-appellant several times and had questioned her about it she made this false allegation against the accused-appellant.

The said incident had taken place on 26.02.2000. The complaint to the police was made only on 12.03.2000. The complaint was made belatedly because she was waiting for her husband to come home. The prosecution has not called the husband of the prosecutrix or listed him as a witness. No plausible explanation has been given as to why the prosecutrix did not inform about this incident immediately to the brother

of her husband who was living close by. The prosecutrix had also not informed her parents who was living about a ¼ of a mile away from her residence about the incident. In fact the prosecutrix had failed to give any plausible reason for not making a prompt complaint to the police.

The evidence of the witness Nalaka clearly shows that the prosecutrix had tried to contact the accused-appellant through him. This had clearly aroused the suspicion of the witness Nalaka who in turn had inform about it to the husband of the prosecutrix. The conduct of the prosecutrix in trying to contact the person who had raped her is rather strange. It is clearly seen from the evidence of the prosecutrix that she has not tried to inform anybody about this incident although she had ample opportunity to do. She could have informed this incident to her parents or the brother-in-law who was living close to her residence and could have made a prompt complaint about this incident to the police. But instead she had tried to contact the accused-appellant and waited a long time until her husband had questioned her about the accused-appellant to inform about this incident to him. Her evidence in my view does not satisfy the test of probability.

I am of the view that an accused-appellant in a charge of rape can be convicted on the uncorroborated evidence of the prosecutrix only when her evidence is of such a character as to convince the court that she is speaking the truth.

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.

The evidence of the prosecutrix is not corroborated by any other evidence. Is not cogent and impressive. I therefore hold that the story of the proseutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. For these reasons I hold

that there is a very serious doubt in the truth of the prosecutrix's story that sexual intercourse was performed against her will. To establish a charge of rape, the prosecution must prove that the accused-appellant committed sexual intercourse on the prosecutrix and that the said intercourse was performed without her consent. There is a reasonable doubt that it was performed without her consent. Therefore the court has to conclude that the charge of rape has not been proved beyond reasonable doubt. The accused-appellant is, then, entitled to be acquitted.

I have earlier pointed out that the story of the prosecutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. Further I have pointed out that the prosecutrix was not a credible witness. Therefore the court should reject her evidence and acquit the accused-appellant. For the above reasons, I hold that the prosecution has not proved its charge beyond reasonable doubt. I therefore set aside the conviction and the sentence and acquit the accused-appellant of the charge with which he was convicted.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

k.k.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL