

C.A.09/2013

**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 Criminal Procedure Code  
Act No.15 of 1979 as amended.

(1)Jinapalage Sumathipala

(2)K.Anura Dissanayake

(3)W.M.Sunil Weerasinghe Bandara

(4)Sirimanalage Wasantha Kumara

**Accused-Appellants**

**C.A.Case No:-09/2013**

**H.C Anuradhapura Case No:-59/2007**

**V.**

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

**Respondent**

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

**K.K.Wickremasinghe, J.**

**Counsel:-Anuja Premaratna for the Accused-Appellants**

Shanil Kularatne S.S.C for the Respondent

**Argued On:-07.07.2015**

**Written Submissions:-21.08.2015**

**Decided On:-09.11.2015**

**H.N.J.Perera, J.**

The accused-appellants were indicted before the High Court of Anuradhapura for committing the offence of Gang rape on Ranhamige Kamalawathi on 22.11.1998 punishable under section 364 2 (g) of the Penal Code. After trial the accused-appellants were convicted and each was sentenced to a term of 12 years R.I with a fine of Rs. 25,000/-carrying a default sentence of 6 months and each accused-appellant was ordered to pay compensation on a sum of Rs.50,000/- carrying a sentence of 1 year. Being aggrieved by the said conviction and sentence the accused-appellants had preferred this appeal to this court. Learned Counsel for the accused-appellants urged five grounds of appeal as militating against the maintenance of the conviction.

- (1) That the charge was not read out to the accused-appellants and therefore that the totality of this appeal is a missed trial which has to be sent back for re-trial.
- (2) That the Learned High Court Judge has misdirected himself on the burden of proof which invariably clouded his thinking, which in turn was prejudicial to the appellants.
- (3) The Learned High Court Judge failed to appreciate that a charge of rape cannot be maintained where the evidence of the prosecutrix is not corroborated by some independent and reliable evidence.
- (4) The Learned High Court Judge misdirected himself in considering the medical evidence and totally misinterpreted the medical evidence.

(5) That the Learned Trial Judge failed to consider and give due weightage to the fact that the identity of the accused was not in accordance with law.

As regards the first ground of appeal it is to be noted that the accused-appellants in their Petition of Appeal in paragraph three, had very categorically stated that the said case was taken up for trial before the High Court after they had pleaded not guilty to the said charges. In the case of *Martin Appu V. The King* 52 N.L.R 119 it was held that the Court of Criminal Appeal may take into consideration statements made by the appellant in his notice of appeal although such statements refer to matters outside the evidence given at the trial. In considering the accused-appellants appeal, therefore, this court cannot ignore the effect of the aforesaid admission.

According to the prosecution the prosecutrix with the other two witnesses namely Jayaratne had been travelling in the three wheeler belonging to the witness Sampath on 22.11 1998 from Anuradhapura town towards Rathnamali Pilgrims Rest at about 7.30 p.m and was stopped near the Army check point near the Siddhalepa Hospital. The witness Jayaratna and the three wheel driver Sampath was ordered to get off the vehicle and were made to kneel down. According to the prosecutrix she was not allowed to get off the vehicle and the army officers assaulted both the witness Jayaratne and the three wheel driver Sampath. Thereafter the other two witnesses were chased away and the prosecutrix was made to come out of the three wheeler and was taken towards the back yard of the army bunker and was raped by the four accused-appellants.

It has been clearly established that the first complaint about this incident has been made by the other two witnesses to the Army police /military police. The witness Major Ajith Lansakkara had testified to the effect that

he was the First Lieutenant attached to Anuradhapura Army camp. The first complaint about an incident of kidnapping had been made to the army police and he was informed by sergeant Gamini about it over the phone. The said message had been received by the army on the night of 22.11.1998. According to the said witness Major Ajith Lansakkara he had accordingly informed about the incident to his superior Officer and was instructed to proceed to the said bunker and to make necessary investigations. He has accordingly arrived at the said bunker situated near the Siddhalepa hospital and found the four suspects to be drunk and he produced them before the doctor and kept them in custody till the following day morning. This witness further testified that on the following day morning the three witnesses arrived and that they identified the four accused and he recorded the statements and produced the four accused at the police station. The witness Sampath and Jayaratna both had corroborated the prosecutrix's evidence and state that they were all travelling in the said three wheeler when they were stopped by the Army personnel near the army bunker near Siddhalepa Hospital. Both had testified to the effect that they were ordered to step out of the said vehicle and was asked to kneel down and was assaulted by the four accused-appellants.

In the instant case the prosecution story to that extent is admitted by the accused-appellants in their dock statements made to the court. It was there position that the driver of the three wheeler did not stop the vehicle when he was asked to, and the said two witnesses were made to kneel down before them for some time. The four accused-appellants denied taking the prosecutrix behind the bunker and raping her.

I.P Thennakoon had testified that in 1998 he served at the Anuradhapura police station and that he received a complaint by First Lieutenant Lansakkara on 23.11.1998 at about 2.30 p.m. and that the prosecutrix too arrived at the police station and that he proceeded to record her

statement and also visited and inspected the place where the incident had taken place and the prosecutrix has been hospitalized thereafter.

The main issue in this case is that whether the prosecutrix was raped by the accused-appellants as alleged by her on the night of 22.11.1998.

There is no eye witnesses to prove the alleged acts of rape said to have been committed by the accused-appellants. The prosecutrix has stated in her evidence that all four accused-appellants raped her that night. In her testimony she has stated that all her clothes were removed and the accused-appellants committed the said offence on her on the ground.

Our law does not require the prosecution to call a number of witnesses to prove a case against an accused. Evidence given by one witness is sufficient. It is the quality of the evidence given by the said witness that matters.

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.

Thus the court could have acted on the evidence of the victim provided the trial Judge was convinced that she was giving cogent, inspiring and truthful testimony in court.

In *Bhoginbhai Hirjibhai V. State of Gujarat* (1983) AIR S.C 753 Indian Supreme Court stated thus:-

“In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury.”

However in *Gurcharan Singh V. State of Haryana* AIR 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.”

In Premasiri V. The Queen 77 N.L.R 85 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 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 that :-

“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.”

Therefore it is very clear that an accused person facing a charge of sexual offence can be convicted on the uncorroborated evidence of the victim when her evidence is of such character as to convince the court that she is speaking the truth.

The prosecutrix had clearly testified that the 3<sup>rd</sup> and the 4<sup>th</sup> accused-appellants did not allow her to alight from the vehicle and thereafter the 1<sup>st</sup> accused-appellant who she referred to as Corporal dragged her from her hands towards the Malwathu Oya and the 2<sup>nd</sup> accused-appellant too accompanied them. The 1<sup>st</sup> accused-appellant ordered her to remove her clothes but she did not do so and thereafter he removed all her clothes by force. She has stated that he thereafter gave her clothes to the 2<sup>nd</sup> accused-appellant and told him to keep her clothes and the 2<sup>nd</sup> accused-appellant tried to hide her clothes. She testified that the 1<sup>st</sup> accused-appellant put her on the ground on the grass and inserted his male organ inside her female organ. It was her position that the 2<sup>nd</sup>

accused-appellant watched when she was raped by the 1<sup>st</sup> accused-appellant and thereafter the 2<sup>nd</sup> accused-appellant too raped her the same way. She has further stated that the 2<sup>nd</sup> accused-appellant raped her and whistled and the 3<sup>rd</sup> and the 4<sup>th</sup> accused-appellants too arrived and proceeded to rape her in the same manner. She further testified that she informed them that she was pregnant but they said that they don't have sisters and continued to rape her. She further stated that at that point some officers from the Army arrived and the 1<sup>st</sup> accused threw the clothes on to her body and threatened her not come beyond that point.

The prosecutrix had very clearly stated that the all four accused-appellants raped her. She had stated that she was able to identify them as there was light around that place. She has further stated that the army officers who came took all the accused-appellants with them and on the next day morning when she went into the army camp to make a statement she saw the accused-appellants and identified them.

In the instant case the prosecution had clearly established that the three wheel driver Sampath and Jayaratne had made a prompt complaint to the army and accordingly almost immediately after the said complaint the 1 to 4 accused-appellants had been taken into custody by the witness Major Ajith Lansakkara. The witness Major Lansakkara had testified that at that time he was serving as a First lieutenant attached to Army camp Anuradhapura and was in charge of disciplinary matters and that upon receiving the said information on the instructions of his superior officer he had proceeded to the bunker near the Siddhalepa Hospital and apprehended the four accused-appellants who was on duty that night. He found them to be drunk and therefore produced them before the doctor and kept them in custody till the following morning. The following morning the prosecutrix and the other two witnesses had arrived at the camp and he proceeded to record their statements and later produced the accused-appellants at the Anuradhapura police station. There is no

doubt what so ever that the 1 to 4 accused-appellants had been on duty at the bunker near the Siddhalepa Hospital on the day of the incident and that they were taken into custody by the witness Major Lansakkara soon after the incident on the very same day. In fact the prosecutrix has stated that the Army personnel arrived after about half an hour and that they were taken to the army camp soon thereafter.

It is to be noted that the first information was to the effect that the officers at the said check point had kidnapped a woman. The witness Jayaratna has very clearly stated that he was assaulted by the army officers at the check point and was made to kneel down. He also had clearly identified the four accused-appellants and further had stated that he had seen them before in the town. He has further testified that he was assaulted and chased away by the said four accused-appellants and that he noticed then taking the prosecutrix behind the bunker.

In the instant case therefore there is no doubt that the said four accused-appellants were on duty at the said army bunker on the said day and that the prosecutrix and the other two witness who was travelling in a three wheeler was stopped by the accused-appellants and the two witnesses Sampath and Jayaratne was assaulted and made to kneel down on the said day. The prosecutrix's story is corroborated by the said two witness to that extent. Thereafter a complaint had been made by the said two witnesses to the Army and the witness Major Ajith Lansakkara had arrived at the scene and taken the four accused-appellants in to custody and taken back to the Army camp. The accused-appellants too had made dock statements and had admitted the fact that the prosecutrix with the other two witnesses arrived in a three wheeler and that they were stopped and the men were made to kneel down near the bunker. It was the accused-appellants position that the prosecutrix went towards the playground. It was the position of the accused-appellant that a false



allegation has been made against them to the effect that they have raped the prosecutrix over this incident.

An accused facing a charge of sexual offence can be convicted on the uncorroborated evidence of the victim when her evidence is of such character as to convince the court that she is speaking the truth.

Here in the instant case the Doctor's evidence does not corroborate the evidence of the prosecutrix. The case for the prosecution was that the accused-appellants raped her when she was lying on the ground. And the prosecutrix was raped when she was fully naked. If the prosecutrix was raped on a surface of this nature after removing her clothes, Apart from that one has to expect injuries on the posterior side of her body. Apart from that according to her evidence the 1<sup>st</sup> accused-appellant had bit her. This is not a case where one person has raped the victim but the allegation is that she was raped by four Army personnel. In fact she admitted that she gave evidence before the magistrate's court and stated that she was dragged in to the jungle behind the Buddu Ge and that she was put on the ground and raped. But no injuries what so ever had been observed by the J.M.O. Anuradhapura Dr. H. Karunathilake who examined her. No injuries were observed in any part of her body by the Dr. Karunathilake who examined her on the following day at about 8.30 p.m. The Doctor states that the prosecutrix was 20 weeks pregnant and no injuries were found either in her vaginal area or any other part of her body. He also categorically states that there would have been injuries in the genital area if there was any resistance on her part, but that there was no injuries found. The Dr. Karunathilake also had stated that there was no sperms found in her vaginal area and that there was no evidence of penetration. This too raises a serious doubt in the truthfulness of the victim's evidence. The prosecutrix evidence in my view does not satisfy the test of probability.

It is very clear from the evidence given by the prosecutrix that she was not interested in making a prompt complaint to the police. She has clearly stated that the witness Sampath made a complaint to the police that night but that she did not go with him to the police but avoided going to the police. Therefore it is very clear that she was fully aware that the said witness Sampath went to make a complaint. But she has categorically stated that she avoided going to the police station to make a complaint. The witness Sampath has said that they were assaulted and chased away by the four accused-appellants and he did not see the prosecutrix at that time. Again she has stated that she saw a vehicle coming and saw some army officers taking the four accused-appellants with them. Hereto the prosecutrix did not come forward to complain to the witness Major Ajith Lansakkara about her being raped by the four accused-appellants. Witness Jayaratna had stated that on the following day morning witness Sampath and the prosecutrix came and met him and they all went to the Army camp thereafter. The evidence led in this case indicate that on the following day morning the prosecutrix had gone to the army camp with the other two witnesses and made a statement to the army and also to the police thereafter. It is therefore very clear from the evidence led by the prosecution in this case that the prosecutrix did not make a prompt complaint to the army or to the police and that she in fact admitted that she avoided going to the police to make complaint with the witness Sampath. She also failed to make a complaint at the very next opportunity she got when the witness Major Ajith Lansakkara came to investigate the matter on the night of 22<sup>nd</sup> November. The prosecutrix has not stated as to what she did that night after the four accused-appellants were taken into custody by the witness Major Ajith Lankassara. She has not stated clearly whether she met the witness Sampath later that night or where she stayed during the night. The prosecutrix later admitted that she was a married woman with

two children residing at Eppawala and on the day of the incident came to Anuradhapura to go to the Clinique on the next day. She also admitted that she was not legally married to Sampath. Witness Sampath has referred to the prosecutrix as a prostitute. When we consider the above material we are of the opinion that victim is not a credible witness and it is not safe to act on the evidence of the victim.

The function of an appellate court in dealing with a judgment mainly on the facts from court which saw and heard witnesses has been specified as follows by Macdonell C.J. in the King V. Guneratne 14 Ceylon Law Recorder 174:-

“I have to apply these tests as they seem to be, which a court of appeal must apply to an appeal coming to it on questions of fact:-

- (1) Was the verdict of the Judge unreasonably against the weight of the evidence,
- (2) Was there misdirection either on the law or the evidence;
- (3) Has the court of trial drawn the wrong inferences from the matters in evidence.

Similarly Wijewardena, J. stated in Martin Fernando V. Inspector of police, Minuwangoda 46 N.L.R 210, that:-

“An appellate court is not absolved from duty of testing the evidence extrinsically as well as intrinsically” although “the decision of a magistrate on questions of fact based on demeanour and credibility of witnesses carries great weight “where “a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt.”

For the above reasons, we hold that the evidence given by the prosecutrix is not convincing and that it is unsafe to convict on the uncorroborated evidence of the prosecutrix. We therefore hold that it is

unsafe to allow the conviction to stand. For the reason stated above we are of the opinion that the prosecution has failed to prove the case beyond reasonable doubt. We, therefore, set aside the conviction and sentence and acquit the accused-appellants.

Appeal allowed.

**JUDGE OF THE COURT OF APPEAL**

**K.K.Wickremasinghe, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**