166/14

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 as amended.

Vithanage Palitha

Accused-Appellant

C.A.Case No:- 166/14

H.C. Gampaha Case No:-23/2012

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

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

K.K.Wickremasinghe, J.

Counsel:-Kamal Suneth Perera for the Accused-Appellant

Kapila Waidyaratne P.C , A.S.G with H.Jayanetti S.C for the Respondent

Argued On:-24.07.2015

Written Submissions:-14.08.2015/31.08.2015

Decided On:-26.01.2016

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Negombo for committing the offence of rape on Madolu Arachchige Pubudini Hansika Sewwandi , a girl under 16 years of age on 16.07 2007 punishable under section 364(2) of the Penal Code and also on two other counts for committing Grave sexual Abuse on her, in terms of section 365(b) 2 (b)of the Penal Code as amended by Act No. 29 of 1998.

After trial the accused-appellant was found guilty as charged and was sentenced to 12 years R.I with a fine of Rs.10,000/-and in default a term of 6 months and also was ordered to pay Rs.100,000/- as compensation to the victim and ordered a default term of 2 years R.I on count 1 , and 7 years R.I and a fine of Rs.10,000/-with a default term of six months on each of the other two counts.

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 two grounds of appeal as militating against the maintenance of the conviction.

(A) The Judge had already made an adverse inference against the accused-appellant prior to the judgment , by;
  (1) Remanding the accused-appellant soon after the examination-in-chief of the victim.
  (2) Refusing the defence request to make an application under section 200 of the Code of Criminal Procedure Act, upon the completion of the prosecution case.

(B) That the identity of the accused-appellant has not been proved beyond reasonable doubt and the accused-appellant was implicated on the mistaken identity.

The case for the prosecution was that the victim was 12 years old at the time of the incident and she lived with her parents and her younger sister in their house which was situated on a by road in the Hanwella- Malwana main road, The house where the victim lived had been initially planned for two stories and only the ground floor had been completed at the time of the incident. There had been a slab instead of a roof.

It was the evidence of the victim that on the night of the day of the incident, she watched T.V and attended to her school work. Thereafter she has gone to sleep around 11. P.m and by that time her parents had already been asleep. The victim had slept with her younger sister in a separate room. There had been a beam of a light to the room, emanating from a bulb in the adjacent house.

According to the evidence given by the victim she had suddenly awakened by a strike on the head. At that instance she had seen the accused-appellant with the aid of the light coming into the room. According to her, the accused-appellant had not covered his face and was wearing a shirt and a short trouser and was armed with a knife. When she tried to scream the accused-appellant showed the knife and threatened to kill her sister and dragged her out of the room and took her out of the house through the back door.

At that point the prosecutrix had struggled with the accused-appellant and had held the blade of the knife which had caused injuries to her palms. The prosecutrix has further stated that at the entrance to the garden the accused-appellant had pushed her on to the ground and had lifted her frock, kissed her thighs and her belly. After a while the accused-appellant had grabbed her by her hair and taken her along the main road to an entrance of a nearby boutique. At that place the accused-appellant has asked whether her head is aching as he was grabbing her from her hair. The prosecutrix has further testified that at that time a motor cycle

had come from the direction of Malwana where her house was situated and has gone pass them. The accused-appellant being alarmed and keeping silent for few minutes had questioned her whether it was her father who went pass in the motor cycle. Thereafter she was taken to a near by coconut estate about 200 meters away and there the accused-appellant had lifted her frock and had sucked her genitalia for about five minutes and also engaged in sexual intercourse. It was her evidence that the accused-appellant thereafter tried to engage in anal intercourse but had not been able to penetrate or insert his male organ. Thereafter the accused-appellant had forced her to have oral sex and ejaculated in her mouth.

Thereafter the accused-appellant had released her and the victim had gone home and had entered the house from the rear door and had seen her younger sister asleep. According to the prosecutrix she had washed her genetalia and had consumed kerosene in order to commit suicide. She had vomited and as she feared that the accused-appellant might return she had called out for her mother who was asleep. The prosecutrix had to call her mother several times as she was fast asleep. When her mother woke up she had told her about the incident. No sooner the mother of the victim heard that the victim was subjected to rape and abuse and also observing the visible injuries had instantly run outside the house and screamed for help and the neighbours had gathered and the prosecutrix had remained inside the house. Thereafter the victim and her parents had gone and made a complaint at the Dompe police station. After recording her and her mother's statement the police had come to the house of the victim .When the police team had arrived at the house of the victim, there had been a large crowd gathered in and around the victim's house. WIP Ramanayake had testified that she observed wet patches of kerosene in the kitchen. She had taken the victim along with her mother, on the path on which the victim claimed the accused-

appellant had forcibly taken her. At that time the victim had pointed at the accused-appellant who had been standing near his lorry which was parked on the road. Accordingly the accused-appellant had been arrested immediately thereafter. In the instant case the victim's mother's evidence is very much consistent with the evidence of the victim. It appears that the learned trial Judge never had any doubts about the credibility of the witnesses Hansika Sewwandi, the victim and P Chamila Dilrukshi, her mother. The mother of the victim has testified that the victim showed her the accused-appellant who was in the compound at that time.The accused-appellant has come to the house of the victim at that time and the victim had shown him to the mother. She has stated that she felt scared to inform the police about the accused-appellant.

It is to be noted that the victim had identified the accused-appellant within few hours after the incident. The victim has stated in her evidence that she has not spoken to the accused-appellant prior to the date of the incident. But she has stated that she knew the house where the accused-appellant stayed but does not know whether in fact he lived in that house but has seen him in the said house. She also has stated that she knew the wife of the accused-appellant too. In cross examination she has stated that she mentioned the above facts to the police. The victim had identified the accused-appellant without any hesitation. The evidence of the victim indicates that she had the opportunity of clearly seeing the accused-appellant's face the night the incident took place. In fact the accused-appellant had threatened her and also had spoken to her several times during the course of the incident. She was able to clearly see the face of the person who raped her and abused her that night. The accused-appellant had spoken to her when a motor cycle had passed by and had questioned her about the person who drew the motor cycle. The accused-appellant had spent a considerable time with the victim and she was clearly able to see his face and also was in a position to identify him

if seen again. Within few hours of the incident she was able to identify the accused-appellant as the person who raped her and abused her that night. It was not just a fleeting glance that she had of the accused-appellant that night. She spent considerable time with him. When one consider her evidence the chances of her making a mistake of the identity of the person who raped and abused her that night as the accused-appellant is very remote.

The evidence led before court shows that there was ample light for the victim to identify the accused-appellant. The learned High Court Judge in his judgment had very carefully considered the lighting available at the scene and also has considered whether there was sufficient time for the victim to identify the accused-appellant. The learned trial Judge had concluded that there was sufficient light and time for the victim to identify the accused-appellant. The evidence led before court shows that the accused-appellant has spent a considerable time in the company of the victim. He had at the beginning threatened her and later had spoken to her face to face. The evidence further shows that the accused-appellant had not tried to hide his identity from the victim. She was able to clearly see the face of the accused-appellant and was compelled to spend a considerable time with the accused-appellant. The accused-appellant had taken the victim forcibly to an entrance of a boutique and thereafter to an estate close by. All this while the victim was able to see the face of the accused-appellant and nothing prevented her from seeing the person who committed the said criminal acts on her. The victim has seen the accused-appellant near his house prior to the incident and also knew the wife of the accused-appellant too.

The evidence led in this case does not disclose any reason for falsely implicating this accused-appellant for this crime. After coming home from the police station and on seeing the accused-appellant the victim had not hesitated to show and identify the accused-appellant as the

person who raped and committed grave sexual abuse on her to her mother and to the police. And the said identification had been done within few hours from the said incident. The victim's evidence had been very positive with this regard and she did not have any doubts about the identity of the accused-appellant as the person who committed rape and grave sexual abuse on her that night. I hold that the identification of the accused-appellant has been established beyond reasonable doubt.

The victim has stated in cross examination that she scratched the accused-appellant but not certain what part of the accused-appellant's body she scratched. The police officer has not observed any visible injuries on the body of the accused-appellant. The accused-appellant had been produced before the doctor. The prosecution has not marked and produced the said medical certificate of the accused-appellant in this case. There is no evidence to show that there was any injuries or scratched marks on the body of the accused-appellant. If there was any injuries on the accused-appellant that would have helped the prosecution to lead additional evidence to prove that the accused-appellant too sustained injuries during the incident. Therefore the failure of the prosecution to mark the medical report of the accused-appellant cannot be said to have prejudice the case for the accused-appellant. The victim in this case was only 12 years old at the time of the incident. She could not remember what part of the body of the accused-appellant she scratched at the time. The accused-appellant was wearing clothes too. The fact that there was no evidence to show that the accused-appellant did not have any injuries is not a ground to disbelieve the evidence given by the prosecutrix that the accused-appellant raped her.

It was also contended by the Counsel for the accused-appellant that the trial Judge has drawn an adverse inference on the accused-appellant in refusing an application by him in terms of section 200 of the Code of Criminal Procedure Act. In Harold Janson V. Attorney General 2015 Bar

Association Law Reports at page 159, Justice Salam held that it would be suffice for a Judge to state that "there are grounds for proceeding with the trial or similar expression for an order under section 200. In the instant case the learned trial Judge Has stated that the entire evidence had been led before him and that according to the evidence already lead he decides to call for the defence. Here too, in short, the learned trial Judge has in similar expression has stated that in fact he has considered the evidence led so far before him and that he is of the view that there is sufficient evidence to call for the defence. In this case the proceedings of 22.05.2014 indicates that the Counsel for the accused-appellant has made an application to court to make submissions under section 200 of the C.C.P.A. The order made by the learned trial judge on 22.05 2014 clearly shows that by that time the learned trial Judge has considered all the evidence led before him in court and was of the view that there are grounds for proceeding with the trial and thus, he has call upon the accused-appellant for his defence. Therefore it is very clear that the trial Judge has not prevented the Counsel for the accused-appellant from making an application under section 200 but was of the view that there is no reason to grant a date for that purpose as he has already made up his mind to call for the defence after considering the evidence led before him in the case. We see no merit in the argument put forward by the Counsel for the accused-appellant with this regard.

It was further submitted by the Counsel for the accused-appellant that the learned trial Judge on the request of the State Counsel has decided to cancel the bail and remand the accused-appellant until next trial date (for 21 days) though the defence objected. It was the position of the defence that the learned trial Judge has drawn an adverse inference on the accused-appellant in remanding him during trial. It was contended by the Counsel for the Respondent that the learned trial Judge committed the accused-appellant to remand only up to the conclusion

of the victim's evidence. Thereafter the accused-appellant was released on previous bail conditions after the conclusion of the victim's evidence. It is very clear that the court has fixed the case for trial on day to day basis. In the case of Jury trial the accused is kept in remand until the conclusion of the trial. This is done to prevent the case been postponed for the want of appearance of the accused and also for the purpose of concluding the case without any unnecessary postponement or delay.

The procedure adopted by the learned trial Judge in this case cannot be said to be illegal. This court cannot accept the position that it has caused any prejudice to the accused in this case. The learned trial Judge has after recording the evidence of the victim has released the accused-appellant on previous bail conditions after the evidence of the prosecutrix had been led on 23 .04.2014. Therefore this court is of the opinion that the submission made by the Counsel for the accused-appellant that the learned trial Judge was prejudiced or biased is baseless.

The crucial issue that arose for determination by the learned trial Judge in the instant case was whether this girl Hansika Sewwandi had been raped and subjected to sexual abuse on 16.07.2007 by the accused-appellant as alleged by the prosecutrix. Medical expert Dr. Wijewickrema has testified to court what he observed when he examined Hansika Sewwandi on 18.07.2007 at 10.30a.m.He had observed 7 superficial cut injuries on the palms of the victim and two cut injuries on the right thigh.

Dr. Wijewickrema expressed the opinion that the above injuries and their pattern were consistent with the victim's version of grabbing the knife from the blade. He has also observed a fresh hymeneal tear at 6 o'clock position. He was of the opinion that there are medical evidence of recent vaginal penetration.

It was contended by the Counsel for the accused-appellant that according to the victim's evidence the perpetrator did not commit the act described in the 2nd count, because the victim did not allow to do it.

The Dr. Wijewickrema has not ruled out anal penetration due to the absence of an injury on the anus or on the sphincter of the victim. The victim in her evidence has stated that the accused-appellant failed to insert his penis into her anus or beyond the sphincter. It is very clear from the evidence given by the victim that the accused-appellant had tried twice to insert his penis into the anus of the victim. But as the victim has resisted the accused-appellant has failed to do so. Therefore the evidence clearly establish the fact that although the accused-appellant had attempted twice to insert his penis into the anus of the prosecutrix he has failed to do so. It was the contention of the Counsel for the Respondent that the prosecution has proved the actus reus of the accused-appellant with regard to the 2nd count of the indictment. Considering all these matters I hold that there is sufficient evidence to convict the accused-appellant to count2 of the indictment and that there is no reason for this court to interfere with the said conclusion arrived by the learned trial Judge.

Even though the defence has extensively cross examined the prosecutrix and the other witnesses in this case, no significant omission or contradiction had been brought to the notice of Court to cast a doubt in the prosecution story.

In Mohamed Niyas Naufer & Others V. Attorney Geneal S.C.Appeal 01/2006 decided on 08.12.2006 Shirani Thilakawardene, J held that:-

"When faced with contradictions in a witness's testimonial, the court must bear in mind the nature and significance of the contradictions, viewed in the light of the whole of the evidence given by the witness."

It was further held in that case that too greater significance cannot be attached to minor discrepancies or contradictions as by and large a witness cannot be expected to possess a photographic memory and to recall the exact details of an incident. In the instant casre the victim was 12 years of age at the time of the incident and 19 years at the time she gave evidence in court.

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

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 look 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 prosecutrix has very clearly identified the accused-appellant as the person who dragged her out from the house that night and as the person who had raped her and committed grave sexual abuse on her. The medical evidence too clearly establish the fact that she was raped that night. The victim had been able to identify and show the accused-appellant as the person who committed rape and sexual abuse on her within few hours after the incident. The victim's mother too corroborate the evidence of the prosecutrix as to the identification of the accused-appellant within few hours soon after the incident. There was no delay in making the complaint to the police about the said incident. The accused-appellant too has been arrested immediately thereafter.

A court of appeal will not lightly disturb the findings of a trial Judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong. The Privy Council V. Fradd V. Brown & Company Ltd.

20 N.L.R 282.

In King V. Musthapha Lebbe 44 N.L.R 505 the court held thus:-

"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."

On perusal and consideration of the trial Judge's judgment and the totality of the evidence led in this case we are of the considered view that he had come to a right decision in finding the accused-appellant guilty of the charges.

In my opinion the prosecution has proved the case beyond reasonable doubt. For the above reasons, I refuse to interfere with the judgment of the learned trial Judge and affirm the conviction and the sentence. I dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL