

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal made under the
Constitution of the Democratic Socialist
Republic of Sri Lanka and under Section
431 of the Criminal Procedure Code.

Mohomed Nimo Siyod Ameen

Alias Nimo

ACCUSED APPELLANT

Colombo HC 2954/2006

CA 110/2010

Vs

Democratic Socialists Republic of Sri
Lanka

RESPONDENT

BEFORE

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

COUNSEL

: Anil Silva PC with Sahan Kulatunga

For the Accused Appellant

: Shanaka Wijesinghe DSG

For the AG

ARGUED ON

: 07th October, 2016

DECIDED ON

: 20th October, 2016

Deepali Wijesundera J.

The accused appellant in this case was convicted for raping a girl named Anusha Janaki and was sentenced to seven years R1 and a fine of Rs. 20,000/= and was also ordered to pay Rs. 75,000/= as compensation to the victim.

The facts of the case may be briefly summarized as follows,

The victim Anusha Janaki was employed at the accused appellant's restaurant at Mount Lavinia as a waitress. She has come to work there seven or eight months prior to the said incident. On the days she had to work late the accused who was her employer used to drop her off at the boarding place. On the day the alleged incident took place (04/07/1998) the accused appellant had taken her in a three wheeler to her boarding house around 9 in the night and on the way has gone to a house to collect some parcels and asked her to get off and help him carry some parcels from the said house. The victim has gone inside the house and into a room behind the accused. The act of rape was committed inside this room. The victim Anusha Janaki had gone back for work to the same restaurant after this day and has worked till the 20th of that month. Thereafter she has gone home to Akuressa after staying in the boarding for one month. She had fallen ill and the mother has taken her to a doctor

who found out that she was pregnant. After the mother threatened Anusha Janaki she has told the mother that the boss raped her. The mother has taken her to the police and made a complaint and later she was examined by the Judicial Medical Officer. This statement was made over four months (on 20/11/1998) after the incident.

The learned counsel for the appellant argued the grounds of appeal as follows to mitigate against the maintenance of the conviction;

1. *Credibility of the prosecutrix's evidence*
2. *Test of promptness and*
3. *Test of consistency and*
4. *Absence of corroboration*

On the credibility of the victim's evidence the appellant states that the tests of spontaneity, promptness, consistency and probability were not adequately addressed. The learned counsel for the respondent stated that the victim Anusha Janaki's evidence was corroborated by the Judicial Medical Officer's evidence.

On the test of spontaneity the appellant's counsel submitted that the statement to the police was made over four months after the incident and that even to her mother after the doctor disclosed she was pregnant she did not specifically state that she was raped and that the victim did

not spontaneously state she was raped by the accused appellant. The respondent stated in reply that the test of spontaneity in a rape case should be applied given the circumstances of the case. The girl is from a poor home and a very young girl who had come to the city to work and the shame of the incident was too much to bear and she kept it a secret until she was found to be pregnant.

The accused appellant's counsel state on the test of consistency the victim has stated to the police that the incident took place in a house at Mount Lavinia next to the Lions Club Hotel whereas when she was examined by the Judicial Medical Officer she has told that she was raped at a restaurant in Ratmalana. The learned counsel for the respondent argued that this disparity is explained by the police officer who went in search of the place by stating that there are countless number of restaurant and house used as restaurants down the Hotel road in Mount Lavinia.

The victim Anusha Janaki in evidence has stated that she did not go for work at the restaurant for three days after the incident. To contradict this position the Attendance Register maintained at the Peaking Palace was marked and produced as V1. According to which Anusha Janaki has signed the register on the 5th, 6th and 7th of July and

she has admitted to court that the signature was hers. Therefore her testimony in court that she did not go for work for three days after the incident is not true.

In **Ajith vs Attorney General 2009 1 SLR 23** and **Sunil and Another vs The Attorney General** the importance of corroboration in a rape case has been discussed. It was held in the above cases, that corroboration is only required or afforded if the witness requiring corroboration is otherwise credible and if the witness requiring corroboration is not credible his testimony should be rejected. The respondent argued that there are many authorities in Sri Lanka which states that in rape and sexual harassment cases it is not necessary to look for corroboration. In the instant case the evidence of the Judicial Medical Officer was brought in to corroborate the evidence of Anusha Janaki.

The issue in the instant case is not of corroboration but that of the lack of spontaneity and promptness in the evidence of the prosecution. The victim Anusha Janaki told court that she did not go to work for 3 days after the incident but later when V1 was produced she admitted that she has signed the attendance register on those three days and that it was her signature which appeared on the register. The complaint was made

to the police only after she found she was pregnant. This casts a shadow on her evidence. If she was raped on the 04th of July being a girl of such tender years would she go back to work for her assailant on the following day and keep quiet about the whole episode for months?

When giving evidence Anusha Janaki has said on the day of the incident she was taken into a house by the appellant and when she entered the house there was a man and a woman in the house and that after entering the room the accused closed and locked the door.

In cross examination she says that,

ප්‍ර: ඒ කාමරයේ දොරක් තිබුණද කියල තමුන්ට මතකද?

උ: එව්වර මතකයක් නෑ.

ප්‍ර: කාමරය ඇතුළට ගියාට පස්සෙ නිමෝ දොරට අගුල් දැමීමාද කියලා තමුන් දන්නේ නෑ?

උ: එව්වර මතකයක් නැහැ දොර ලොක් කලාද කියලා මතක නැහැ.

Earlier she has stated;

ප්‍ර: ඔහු දොර වැහුවේ කොහොමද?

උ: මගේ පස්සෙන් ඇවිල්ලා දොර ලොක් කලා.
ඇතුළෙන් තමයි ලොක් කළේ.

When she was asked why she did not tell the mother about the incident she has said that she was threatened by the accused appellant. If so why did she go back to the same place for work after the incident? It is hard to believe that a girl of such young age after been raped goes back to the rapist to work and keeps silent for months till the mother finds out she's pregnant! There was no spontaneous or prompt complaint. And the evidence of the victim is not consistent. She has given different answers when cross examined, on the incident and the delayed complaint was explained by saying she was threatened by the accused appellant. If so why did she go back to the same place to work after the incident and continued to do so? I therefore hold that the story of the victim that sexual intercourse was performed without her consent does not satisfy the test of probability.

To establish a charge of rape it must be established that the accused committed the offence on the woman and that the said act was performed without her consent. If there is a reasonable doubt in one of the above ingredients the charge should fail. The evidence show that there is a reasonable doubt in the second ingredient. The learned High Court Judge has failed to analyse the evidence applying the tests of probability, reasonableness and promptness. Therefore this 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. In a charge of rape if the evidence of the prosecutrix does not satisfy the test of probability the court should reject her evidence and acquit the accused appellant.

Appeal allowed. Judgment of the High Court dated 02/06/2010 is set aside. Accused appellant is acquitted.

JUDGE OF THE COURT OF APPEAL

L.U. Jayasuriya J.

I agree.

JUDGE OF THE COURT OF APPEAL