

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

In the matter of an Appeal
Against an order of the High
Court under Sec. 331 of the
Code of Criminal Procedure
Act No. 15 of 1979 and in terms of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

The Hon. Attorney General

Attorney General's Department,
Colombo 12.

Complainant

Vs

Athucorala Arachchige Karunarathna,
No 368/01, Hapugala, Section
700, Kumburugala, Sevanagala

Accused

C. A. Case No. : 92 /2013

H. C. Tangalle Case No. : 21/2004

And now between

Athucorala Arachchige Karunarathna,

Remand Prisons
Tangalle

Accused-Appellant

Vs

The Hon. Attorney General

Attorney General's Department,
Colombo 12.

Complainant Respondent

BEFORE : P. R. Walgama, J &
K. K. Wickramasinghe, J

COUNSEL : AAL Sheron Serasinghe for the Accused-Appellant.
Rohantha Abeysuriya DSG for the Attorney General.

ARGUED ON : 25th October 2016

DECIDED ON : 2nd June 2017

WRITTEN SUBMISSIONS FILED ON: 02/12/2016 AND 17/01/2017

K. K. WICKRAMASINGHE, J.

The Accused Appellant (herein after referred to as the Appellant) was indicted in the High Court of Tangalle on the following charge:-

On or between 1st of December 1994 to 21st February 2000 in Middeniya, within the jurisdiction of this court the accused committed rape on one Imali Nadeeka Samarawickrema who was under the age of 16 years an offence punishable under section 364 (2)(e) of the Penal Code as amended by Act No.22 of 1995.

The instant appeal is arising in pursuant to the conviction and the sentence imposed on the Accused-Appellant.

The indictment was read over to the Accused Appellant and the trial was commenced before the high court judge. After trial the Learned High Court Judge of Tangalle found the Appellant guilty of the charge levelled against him. Accordingly, on 02nd May 2013 accused appellant was convicted and sentenced to a term of 12 years rigorous imprisonment and a fine of Rs. 10,000.00 with a default sentence of 12 months imprisonment was imposed. Furthermore

compensation amounting to Rs. 100,000 was ordered to be paid to the prosecutrix (victim) and a default sentence of two years imprisonment was also imposed.

Being aggrieved by the said conviction and sentence the Accused Appellant, made the instant appeal to this court for the vacation of the same.

During the course of the argument counsel for the Accused Appellant raised following grounds of Appeal:-

- (1) The Learned High Court Judge failed to consider that the evidence of the prosecutrix does not inspire credence and her story is highly improbable.
- (2) The Learned High Court Judge has misdirected himself by shifting the burden of proof on the accused appellant to discredit the prosecution case.
- (3) The Learned High Court Judge has not considered the evidence of defence properly and it is a violation of right to a fair trial.
- (4) That under section 165 of the CPC only criminal breach of trust cases that a period can be stated.

Facts of the case:-

The prosecutrix was living with her grandmother, the accused and his wife. During the period of the incident wife of the accused was pregnant and sometimes she was not at home. This same offence had been committed by the appellant several times. Several nights, when all the other inmates of the house were sleeping the appellant had gone near the prosecutrix and committed rape.

According to the evidence of the prosecutrix (PW1) Samarawickrema Naduungoda Gamage Imali Nadeeka , the first incident of rape had taken place on the 1st December 1999. On that particular day the wife of the appellant was out of the house. She had gone to the "chena". The victim (prosecutrix) her grandmother and the appellant were in the house. She was sleeping in the living room with her grandmother on two separate mats while the appellant was sleeping in the room. When she was a sleep she felt that someone was next to her. She got scared, the appellant had shown a knife, threatened her and committed rape after lifting her night dress. The appellant was wearing a sarong and the victim had recalled the accused removing the sarong. According to her, this was repeated on another day. The appellant had threatened the victim asking her not to utter a word about the incident and she was scared to divulge this incident to anyone.

On the following day, while she was sleeping in their room with the wife of the appellant on the floor. The appellant was sleeping on the bed. At about 2 a.m. the appellant gone near the prosecutrix and he got caught to his wife. Following day morning the wife of the appellant had inquired the prosecutrix whether the same type of incidents taken place even before.

The victim had told her about previous incidents. Then the wife of the appellant (accused) had tried to burn the books and the school uniforms of the victim and the victim had gone to her mother's house due to fear.

According to the victim, accused's wife had sent a letter through the grandmother asking the victim to save the accused appellant. In the same letter accused's wife had asked the victim to tear the letter after reading it. Thus the victim had torn the letter. However, the victim's mother had found the torn pieces of paper and she had put them together and read the letter.

On the following day, both the victim and the mother has gone to the police station.

She had stated that she was born on the 13th of November 1984 and that she had attended school till grade 10. Further she had mentioned that her father and mother were not legally married.

Defence has suggested to the victim, that she was having a love affair with the brother of the wife of the accused and she got caught to the accused once she was hugging him. Victim had denied the suggestion. Further suggested, that she went to have a bathe from the katuwana rityaya well. Victim had cried and denied the same.

Defence has suggested that this incident was a result of the victim's affair with the accused's wife's brother.

The learned counsel for the appellant brought following contradictions to the notice of court and tried to challenge the trustworthiness of the prosecutrix.

V1- She had stated that the accused slept on the bed in the same room but on the previous time she had stated that the accused slept on the floor in the living room.

V2- She has stated that she did not say that the accused was thinking the next morning and that is why she told the wife of the accused about the accused but that she told the incident to her because the accused's wife had questioned her.

During the re-examination she had stated that the first time he threatened her by putting the bed sheet in to her mouth and that he used a knife to threaten her the second time.

V3- She has stated that she did not say that she got to know that the accused came to her mat only after accused's wife told her.

PW5- Dr. Supeksha Mithra Lorensuhewa (pg-85- 97 of the brief) testified that she was working at the District Hospital of Kariyamadiththa in the year 2000. The victim had been admitted to the hospital on the 21st of February 2000 and was examined by her on the 18th of February 2000 at the hospital.

She has further stated that the victim gave a short history explaining that she was raped twice and when the accused came to her for the third time, he got caught to his wife and he ran away. Doctor had also stated that the nature of the victim's hymen (medical evidence) supports the short history given by her. However, the doctor has stated that it is not possible for her to confirm the clock face details of the wound or the time of the rape.

Evidence of PW2 - Athukorala Gamage Somawathie (mother of the victim) (pg-165- 178 of the brief)) reveals that at the time she was giving evidence she was legally married to a person named Nishantha Kumara. However prior to that marriage she had been living with another person named A.A.Piyasenam (father of the victim). She had lived with him for 10 years. After 8 years he had left her and the children. Since then she has been living with her parents while the victim (her first child) has been living with the mother of the husband who left her. She has further stated that the mother of that husband did not allow witness and the victim to maintain a healthy relationship.

However, on the 20th of February 2000, victim had come to her house with her bag and books. She had been crying and had told her that "Thapal Bappa" troubles her on the mat and that his wife had seen it and asked her to leave.

On the same day at about 10.45 the wife of the accused had gone to PW2's house and had told that she saw the accused on the mat where the victim was sleeping. She has stated that she went to the police but since the OIC was not there she went again on the 23rd.

PW 4- Metta Thantrige Sisira OIC (pg-181- 189 of the brief) who was the OIC of the Middeniya police station in the year 2000 testified that, on 21st February 2000 he had received a complaint about the incident at about 12.30. Then he has directed the child to the hospital and sent two officers to the crime scene. He has stated that the accused was not at home at the time they went to arrest him. However, on the 23rd of May 2000 the accused had surrendered himself to the police.

PW 3- Sarath Dayawansa Kumanayake (pg-191-193 of the brief) has stated that he conducted the investigations about the incident and he has produced the victim to a medical examination under 15/2000. Further he had not been able to find the accused when they went to his house. Thus they had left a message with his wife asking him to come to the police station.

According to **section 436 of the Code of Criminal Procedure Act No. 15 of 1979** "*Subject to the provisions herein before contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account -*

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice."

According to section.456A of the Code of Criminal Procedure Act No. 15 of 1979 "*the failure to comply with any provision of this code shall not affect or be deemed to have affected the validity of any complaint, committal or indictment or the admissibility of any evidence unless such failure has occasioned a substantial miscarriage of justice "*.

In the case of **Banwari Vs. State of U.P., AIR 1962 SCI198**, it was held that "*omission to read over and explain the charges does not vitiate the trial if no prejudice is caused.*"

According to the case of **Naval Kishore Singh Vs. State of Bihar, AIR 2004 SC 4421**}, "the Indian Supreme Court refused to consider plea especially when the accused was not able to show that he was in any way prejudiced by such irregular procedure."

Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka states:

".....Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice".

The above mentioned provision of the Constitution and legal provisions clearly demonstrate that any failure to adhere legal provisions can be considered only if such failure prejudice the substantial rights of the Parties or occasion a failure of justice.

In the case of **Elal Jayantha Vs Officer-in-charge, Police station Panadura 1986, 1 SLR 334**, it was held that "*Although the correct procedure had not been followed yet no substantial prejudice had not been caused nor a failure of justice occasioned. Further four years had elapsed and sending the case back would cause hardship*".

In **Naval Kishore Singh Vs. State of Bihar AIR 2004 SC 4421**, the Supreme Court of India held that, "*In the instant case , the appellant had not raised any contention in the high court that he was seriously prejudiced by the way in which section 313 question was done. Supreme Court refused to consider plea especially when the appellant was not able to show that he was in anyway prejudiced by such irregular procedure*".

It is pertinent to note that in the **Bhoginbhai Hirjibhai Vs State of Gujarat (1983) AIR S.C.753** stated that "*Corroboration is not a sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on testimony of a victim of sexual assault in the absence of corroboration, as a rule is adding insult to injury.....*"

Further in the case of **Sunil and others Vs AG 1986(1) S.L.R. Page 230** it is stated that "*It is very dangerous to act on the uncorroborated testimony of a women victim of a sex offence, but if evidence is convincing such evidence could be acted on even in the absence of corroboration.*"

Counsel for the Appellant submitted the case of **Piyasena Amaradivakara Vs AG, CA 118/2002 decided on 26.03.2008** "*.....When there is a delay in making a statement to law enforcing agencies, additional material collected by hearsay or false material can creep into such statement....*" (emphasis added), but in this case it is so obvious that the girl has no reason to

add material and a cogent explanation given for her delay, stating that she was threatened by the appellant even after the incident.

Further in the case of **Bandara vs State (221) 2 SLR 63** it was held that "if there is valid reason or explanation for the delay and if the trial judge is satisfied with the reasons and explanations given, no trial judge would apply the test of spontaneity and contemporaneity and reject the testimony of a witness in such circumstances" In this instant case, the victim was schooling at the time of the incident. She had given a birth to a child of this Appellant. She had revealed this incident only after the child birth. On oath she had categorically stated that she did not reveal the incident earlier due to sheer fear.

As cited by counsel for the appellant in the case of, **Radhu Vs State of Madhya Pradesh (2007) 12 SC 57**, Indian Supreme Court has observed that "*the court should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case*". He tried to convince court that the appellant was falsely implicated but in this instant case, prosecution has amply demonstrated that the culprit is the victim's uncle and not anyone else.

Further, counsel for the accused appellant citing the Indian Supreme Court case **Banti Vs State of Madhya Pradesh (2004) 1 SCC 414** where it was held that "*It is true the evidence of the defence witness is not to be ignored by the courts. Like any other witness, his evidence has to be tested on the touchstone of reliability, credibility and trustworthiness, particularly when he attempts to resile from and speak against records and in derogation of his earlier conduct and behaviour. If after doing so, the Court finds it to be untruthful; there is no legal bar in deserting it*"

When perusing judgement of the instant case, it is evident that the learned high court judge has adequately considered the defence evidence and he had not ignored the same as submitted by the counsel for the appellant.

When considering her age marital status and background, the omissions pertaining to her statements are reasonably justified.

The Learned High Court judge who had the opportunity of watching her giving evidence had observed her credibility and he was satisfied that she was a credible witness.

Therefore when considering the above it is abundantly clear that omissions and delays on the part of the prosecutrix have been adequately explained. Medical evidence corroborates the version of the prosecutrix. The cases cited by the counsel for the appellant has no bearing on the facts of this case. Therefore we have no reason to interfere with the finding of the learned High Court Judge and thereby we affirm the conviction and the sentence.

Hereby the Appeal is dismissed.

Judge of the Court of Appeal

P.R.Walgama, J

I Agree

Judge of the Court of Appeal