

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

In the matter of an appeal in terms of the  
Section 331 of the Code of Criminal  
Procedure Act No.15 of 1979 and in terms  
of Article 138 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.CA 120/11  
High Court Colombo Case No.331/2006

Kuruppuge Mudiyansele Ranbanda  
Galagodegedara  
Madawela,  
Udukinda

**Accused-Appellant.**

Vs.

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

**Respondent.**

**C.A.No.120/2011**

**H.C.Colombo No.331/2006**

**Before** : M.M.A.Gaffoor,J. and  
K.K.Wickremasinghe,J.

**Counsel** : Dr. Ranjit Fernando for the Accused-Appellant.  
Rohantha Abeysuriya S.D.S.G. for the Respondent.

**Argued on** : 13.07.2016

**Written submissions  
filed on** : 16.01.2017 by the Accused-Appellant  
23.02.2017 by the Respondent.

**Decided on** : 15.06.2017.

**M.M.A.Gaffoor,J.**

Heard both counsel in support of their respective cases. Accused-appellant was indicted on two counts. The first count for being committing House Trespass with the intention of committing rape punishable under Section 437 of the Penal Code and the second count for being that in the cause of the same transaction the offence of rape was committed on Bamunu Arachchi Pathiranalage Nadawathi which is punishable under Section 364 (1) of the Penal Code as amended by the Act No.22 of 1995.

After the indictment was read accused pleaded not guilty and the accused-appellant opted for a non-jury trial. The prosecution to prove the case, led the evidence of several witnesses including Judicial Medical Officer and the Investigation Officers evidence.

After the conclusion of the prosecution case accused opted to give a dock statement denying his involvement. After the prosecution and the defense submissions the learned High Court Judge fixed the case for judgment.

Before the judgment was delivered the learned High Court Judge amended the indictment to be read as “Criminal Trespass” under Section 433 of the Penal Code.

After trial, the learned High Court Judge found the accused guilty of both charges leveled against him.

The learned High Court Judge convicted and sentenced the accused to a fine of Rs.1,000/- with a default term of 1 month for the 1<sup>st</sup> charge with regard to count 1 and to a term of 10 years rigorous imprisonment with a fine of Rs.5,000/ and a

default term of 4 months for the 2<sup>nd</sup> charge. He was further ordered to pay a sum of Rs.25,000/ as compensation to the victim with a default term of 1 year rigorous imprisonment with regard to count 2.

The medical evidence led at the trial lend support to the case of the prosecution.

Not a single contradiction was marked and proved by the defense. In fact, only one question has been put to the prosecutrix by way of cross examination. The delay on the part of the victim with regard to non disclosure of the act of rape to the police has been sufficiently explained by her.

After amending the indictment, it was read over to the accused and he pleaded not guilty. The accused had not opted for a fresh trial

With regard to amending the indictment there are several decided cases by the Superior Court of this country where they have held that amending an indictment ought to be allowed as long as such alteration cause no material prejudice to the accused.

In the case of **The King Vs. Aron Appuhamy (51NLR 358)** and **John Perera Vs. Weerasinghe (53 NLR 158)** it was held that amendment of a charge or indictment should be allowed if it would have the effect of convicting the guilty or securing the acquittal of the innocent. But it should not be allowed if it would cause substantial injustice or prejudice to the accused.

I note that, in this case, the only alteration done was changing the count on “House Trespass” punishable under Section 437 of the Penal Code in to “Criminal Trespass” punishable under Section 433 of the Penal Code.

However, when this court peruses the brief this court finds that the main offence “offence of rape” has not been changed. The only amendment is that the incident took place outside the house. This Court comes to the conclusion that, the amendment made by the learned High Court Judge does not prejudice the rights of the accused-appellant.

Counsel for the accused-appellant argued that, it is unsafe in law to find him guilty of the charges leveled against him in the absence of independent corroboration.

When this Court peruses the case record we find that the prosecutrix story is well corroborated by the medical Evidence led at the trial. The Judicial Medical Officer who testified at the trial clearly states that evidence of force penetration is present. Even when this Court peruse the Medico legal Report marked as “P1” at the trial, and the evidence given by the Judicial Medical Officer we note that there are seventeen injuries on the body of the prosecutrix including neck, hip, lumber region, breasts, forearm, palm and thighs. The counsel for the Accused had not even attempted to cross examine and challenge the report of the Judicial Medical Officer.

Further, Judicial Medical Officer has categorically stated that there were wounds in her hymen that were caused 3 to 5 days ago.

ප්‍ර - වෛද්‍යතුමා විසින් පවසන ලද කහනා පටලයේ තිබූණ සුවවූ තුවාල කොපමණ කාලයකට පෙර සුව වූ තුවාලද?

උ - එය දවස් 3,5 ත් අතර කාලයකට පමණ පෙර ඉරීමක් වෙලා සුව වෙලා තිබෙනවා ඒ නිසා මෙම තුවාල දින 3,5 ත් පමණ කාලයකට කලින් සිදුවූ තුවාල ලෙස සැලකිය හැකියි.

According to the prosecutrix the incident happened when she went out of her house to answer a call of nature. After the incident she explains as to why she was

unable to make a prompt statement to the police. The delay of two days also has been explained by her in her evidence.

In the case of **Bandara Vs. State (2001) 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.”

Further this court takes into account that the prosecutrix had been admitted to the Uva Paranagama Hospital and has been transferred to Badulla Hospital on the 15<sup>th</sup>. She had been discharged from the hospital only on the 25<sup>th</sup> of December 2004.

Counsel for the accused- appellant takes up the position that prosecutrix had not stated that she was raped at the 1<sup>st</sup> given opportunity. In the first complaint she lodged with the Uva Paranagama Police on 14<sup>th</sup> December 2004 she had not stated anything about a rape incident.

In her 2<sup>nd</sup> statement, on the 15<sup>th</sup> of December 2004, while she was admitted to Uva Paranagama Hospital she had not stated that she was raped.

When perusing the brief this Court finds that, she had first revealed the incident, when she was examined by the doctors in Badulla Hospital for the preparation of Medico Legal Report. There she has categorically stated that she did not reveal the incident to the police due to sheer fear and embarrassment. This court when perusing her evidence given at the trial and the injuries on her body, her age, marital status and social background, the omissions pertaining to her statements are reasonably justified accepts the explanation given by her.

Considering the fact of the case this court is of the view that the prosecution had proved its case beyond reasonable grounds. The counsel for the accused had not challenged the evidence of the prosecutrix at the trial. Our courts have held, in number of authorities that if evidence is not challenged it is presumed to be accepted. In this case if the same principle is applied this court has no choice but to accept the prosecution evidence.

The learned High Court Judge had considered the dock statement given by accused, and rejected the same. When this court considers the evidence in this case we are of the view that accused should have offered an explanation on oath as there is over whelming evidence against him as decided by our Superior Courts.

Since accused had only stated that he is innocent, (74) this court is of the view that the learned High Court Judge had very correctly rejected the dock statement of the accused considering the evidence against him.

Considering the facts of this case we affirm the conviction and sentence of the learned High Court Judge.

Appeal dismissed.

**JUDGE OF THE CORUT OF APPEAL**

**K.Wickremasignhe,J.**

I agree.

**JUDGE OF THE CORUT OF APPEAL**