

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

In the matter of an appeal under and in
terms of Section 331 of the Criminal
Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic
Socialist Republic of Sri Lanka.

Complainant

Court of Appeal
Case No. CA/13/2015

Vs,

Warnakulasuriya Lakshman Thisera alias
Jayakody Don Lakshman Appuhamy

Accused

And Now Between

Warnakulasuriya Lakshman Thisera alias
Jayakody Don Lakshman Appuhamy

Accused-Appellant

High Court of Chilaw
Case No. HC / 71/ 2006

Vs,

The Attorney General of the Democratic
Socialist Republic of Sri Lanka
Complainant-Respondent

Before : S. Devika de L. Tennekoon, J &
S. Thurairaja PC, J

Counsel : Upul Anuradha for the Accused-Appellant
Lakmali Karunanayake SSC for the Complainant-Respondent

Judgment on : 21st February 2018

Judgment

S. Thurairaja PC. J

The Accused Appellant (Hereinafter sometimes referred to as Appellant) was originally indicted before the High Court of Chilaw for committing an offence of Grave Sexual Abuse punishable under section 365B (2) b of the Penal Code. After the trial, he was found guilty and sentenced to 8 years rigorous imprisonment, fine of Rs. 7500/- in default 6 months simple imprisonment and a compensation of Rs. 75000/- to the Prosecutrix, in default 6 months simple imprisonment. Being aggrieved with the said conviction and sentence, the Appellant had preferred an appeal to the Court of Appeal and submitted following grounds of appeal:

- 1) Prosecution has failed to prove the ingredients of the charge in the indictment beyond reasonable doubt.
- 2) Learned High Court Judge has failed to properly evaluate the items of evidence of prosecution witnesses favourable to the Accused Appellant
- 3) Failure on the part of the learned High Court Judge to consider a vital omission spotlighted and two vital contradictions marked by the defence on the evidence of

PW 01 has occasioned a substantial miscarriage of Justice which amounts to the denial of fair trial to the Accused.

- 4) Learned High Court Judge has erred in law by using parts of the evidence of the accused to strengthen the weak prosecution case.

The Appellant submits that the ingredients of the offence is not proved. Section 365 B states as follows;

Section 365B provides for Grave Sexual offence

1) *Grave sexual abuse is committed any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person, being an act, which does not amount to rape under section 363, in circumstances falling under any of the following descriptions, that is to say-*

(a) without the consent of the other person ;

(aa) with or without the consent of the other person when the other person is under sixteen years of age;"

(b) with the consent of the other person while such other person was in lawful or unlawful detention or where that consent has been obtained, by use of force, or intimidation or threat of detention or by putting such other person in fear of death or hurt;

(c) with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or was in a state of intoxication induced by alcohol of drugs.

(2) Whoever-

(a) commits grave sexual abuse shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined

by court to the person in respect of whom the offence was committed for the injuries caused to such person;

(b) Commits grave sexual abuse on any person under eighteen years of age, shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;

It will be appropriate to discuss the facts of the case before we proceed further. The Virtual complainant was 18 years old at the time of the incident. She was married and mother of a child of 1 year and 9 months. On the day of the incident she was alone at home the Appellant came there and asked for a glass of water, when she brought it the appellant forcibly removed her clothes, laid her on the floor and got on top of her. She claims that the appellant rubbed his Penis on her thighs and ejaculated. She was reluctant to complain to her husband hence she informed it to her Mother in Law after about three days. It was brought to the notice of her husband and subsequently a complaint was lodged at the Police Station of Dankotuwa. They conducted an inquiry and the matter was referred to the Hon. Attorney General which resulted in an indictment before the High Court of Chilaw.

The first ground of appeal is that the ingredient of the Charge is not proved, before we proceed further it will be appropriate to refer the relevant legal provision in the Code of Criminal Procedure Act (CCPA)

Section 165 states as follows;

165 Particulars as to time, place and person.

(1) The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in

respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed.

Prosecution led the evidence of 6 witnesses namely PW01 Rathugamage Iresha Sandamali, (Virtual Complainant) PW02 Marasinghe Gamaralage Dhanushka Sanjeewa,(Husband of the Complainant) PW03 Marasinghe Gamaralage Chandra Gnanawathie, (Mother of the Complainant) PW04 Bemina Hennadige Ruchira Peiris,(Judicial Medical Officer), PW05 Ratnayake Mudiyansele Priyantha Ratnayake, (Police investigator)and PW06 Ranathunga Mudalige Somwathie.(Police Investigator) When the defence called the Appellant and his wife Ekanayake Mudiyansele Chandra Malani gave evidence.

The time period stated in the charge is 1st of August 2002 to 21st February 2003. The prosecutrix says different dates/period regarding the incident. Anyhow she is certain that this incident had happened after the funeral of her mother. Which date she claims as 29th September 2002, if so the appellant claims that the charge sheet commences the period from 1st August almost two months which is not relevant to the period was forced on the Appellant to answer.

The prosecutrix submits that this incident happened at her home, on a morning hour of the day. Unfortunately, she gives different dates/periods. One occasion she said in the examination in Chief that this incident happened in October 2002, after while she said that this happened three months after her mother's demise. (That will take us to a date three month from 29th September, i.e. December 2002), In the Cross examination she claims she cannot remember the date, after a while she said it was 1 ½ months after her mother's funeral. (that will be Mid November 2002), After that she said it was after alms giving, she gave two dates of alms giving one is 15th Day and the other one was after

three months. Subsequently said 25 days after her mother's death. When reading the evidence of the Prosecutrix it reveals she is not certain of the date of the incident (offence). She is certain about the date of her mother's demise, but unable to give the date of this incident. Will this violate the requirements stated in section 165 of the CCPA. If the complainant is child or with any other deficiencies we may consider it in favour of the virtual complainant but in this case, she was above 18 years, married and had a child of 1 year 9 months. Further when she gave evidence she was about 26 years old. There is no reasonable explanation offered by neither the virtual complainant nor the prosecution for these discrepancies.

The Appellant submits that she had made contradictory statement regarding the incident which goes to the root of proving the charge. She had told that there was penetration but gave evidence to the effect that there is no penetration but a sexual body contact (intra-crural sex)

Marasinghe Gamaralage Dhanushka Sanjeewa, husband of the Prosecutrix gave evidence and said that his wife had told him that she was raped by the appellant by inserting his penis in to her vagina.

IP Ratnayake was the OIC of the Police Station of Dankotuwa, he told Court that the Prosecutrix lodged a complaint to the effect that she had been raped by the Appellant. WPC Somawathie who recorded her complaint at the Police Station also corroborate that she was told by the Complainant of an incident of Rape.

JMO Dr. Peiris gave evidence and submits that the Prosecutrix had told him that she was subject a sexual intercourse by the appellant. He also recorded in the short history column of the MLR.

Considering all the above materials it is evident that the Complainant had revealed two different stances. One may argue both are the same, it is not so. Penal code distinguishes Rape and Grave Sexual Abuse as two distinct offences. Both may be based on a sexual act, but two different definition provided in the penal code.

Since the Prosecutrix gives contradictory evidence, her credibility becomes questionable. Can a court rely on this contradictory evidence and find the appellant guilty.

In *Pantis vs. The Attorney General*, 1998 (2) Sri L.R. 148 Wijeratne J held;

1. The Judge should have avoided using such language as the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies Court or at least is sufficient to create a reasonable doubt as to his guilt,

2. As the trial Judge was a trained Judge who would have been aware that the burden of proof was on the prosecution to prove its case beyond reasonable doubt if a reasonable doubt was created in his mind as to the guilt of the accused he would have given the benefit of that doubt to the accused and acquitted him.

The other grounds of appeal also make us to reconsider the acceptability of the conviction especially the way the witness for the defence was rejected.

After carefully considering all submissions, evidence and all other materials we are of the view that the prosecution had not proved the case beyond reasonable doubt, hence we find the conviction cannot be accepted. Therefore, we quash the conviction and acquit the appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree,

JUDGE OF THE COURT OF APPEAL