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

In the matter of an Appeal made under section 331 of the Code of Criminal Procedure Act No. 15 of 1979 being an appeal against the conviction and sentence imposed by the High Court of Anuradhapura.

Rathnayaka Ralalage Chaminda Rathnayaka

ACCUSED APPELLANT

Case No. CA 89 of 2017

HC (Anuradhapura) Case No. 161/2012

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

BEFORE : Deepali Wijesundera J.

Achala Wengappuli J.

COUNSEL : Dr. Ranjit Fernando for the Accused Appellant

Priyantha Nawana, P.C., A.S.G. with Ms. Randima Fernando S.C. for the Attorney General

ARGUED ON : 15th March 2018

DECIDED ON : 28th March 2018

Achala Wengappuli J.

The accused appellant was indicted for committing offences under Sections 354 and 364(2)(e) of the Penal Code as amended, on one *Godamini Vithanage Pumie Shashikala,* an under aged person. After trial, he was convicted on both counts and was imposed sentences of 3 years and 12 years of rigorous imprisonment respectively on the said two counts to run concurrently. He was also ordered to pay Rs. 250,000.00 as compensation with a default sentence of one year RI.

The accused appellant has preferred this appeal against his conviction and sentence.

Learned Counsel for the accused appellant, at the hearing of his appeal, submitted that;

i. the trial Court was in error when it failed to consider the evidence of the prosecutrix as infirm and unreliable,

ii. the trial Court was in error when it considered the medical evidence as evidence of corroboration.

It is contended by the accused appellant, in support of his first ground of appeal, that the prosecutrix complained of the alleged act only after a three year delay and she has lied on oath as her claim of complaining to her aunt, soon after the incident, is negated by the relevant witness. It is also contended that the medical evidence did

not support the version of events as presented by the prosecutrix and, in addition, when her conduct is taken into account in the light of these factors made it unreliable.

Learned President's Counsel for the Respondent, pointed out that the trial Court has opted to believe *Shashikala's* claim of complaining to her aunt, soon after the incident. He contended that owing to the nature of the relationship of her aunt to the accused appellant, it is probable that her aunt was reluctant to complain the incident to the authorities. He further added that *Shashikala* has made use of the opportunity to lodge a formal complaint to the authorities, when such opportunity presented itself for the first time after three years since the incident, when she was accompanied to the Police by her parents.

The case presented by the prosecution was that *Shashikala* was related to the accused appellant and was asked by him to deliver a radio set to a nearby house, when she was on her way to a nearby boutique. The house was not occupied by anyone, but *Shashikala* has seen the accused appellant in that house prior to this incident. She complied with the request of the accused appellant. When she entered the house, the accused appellant, who was already in the house has grabbed her and has had sexual intercourse with her forcibly, after pushing her on to a sofa.

Upon returning home, *Shashikala* disclosed the incident to her aunt, with whom she lived for some time, as her parents had a troubled relationship. Her aunt *Priyanthi,* has then told *Shashikala* that she would inform her mother and further instructed her not to disclose it to anyone else. However, her aunt *Priyanthi,* in her evidence has denied this claim and said that she came to know about the incident only at the Police Station, when *Shashikala* was brought to it by her parents, when she attempted to run away from their home that very morning.

Learned High Court Judge, having accepted the sequence of events as narrated by *Shashikala* as credible and truthful evidence, opted not to rely on the denial of *Priyanthi* on the basis that it is apparent that she has attempted to shield the accused appellant from this allegation.

The evidence led before the trial Court by the prosecution revealed that *Shashikala* is *Priyanthi's s* sister's daughter while the accused appellant is her husband's sister's son. The accused appellant too was under her care at some point of time as his mother, her sister, has decided to terminate her marriage with the father of the accused appellant. *Shashikala's* father, who usually under the influence of alcohol, would beat her severely even if someone were to follow her in the village. Her parents had a troubled relationship and as already noted was under the care of her aunt, at the time of the incident.

It is also revealed that *Shashikala* is a stubborn child and would act on her own against the advice of elders, even though she was yet a minor.

There was also evidence led by the prosecution, that *Shashikala's* grandfather has seen her and the accused appellant in a compromising position. It is not clear whether this incident took place before or after the complained act of sexual intercourse. It could well be that it happened after the incident of alleged rape as *Shashikala* has admitted in her evidence that she was in a relationship with the accused appellant for some time, subsequent to the complained act. Although this incident was seen by her grandfather, no further action was pursued as there was no "damage".

These items of evidence are a clear indication of the attitude of the elders, in relation to the complaint made by *Shashikala.*

Her mother, in her evidence also related an incident where a Police constable has made an attempt to ravish *Shashikala* and when she complained it to Police she was chased out with threatening utterances of obscenities. In these circumstances, it is reasonable to infer that all these factors could well have influenced the concerned parties to adopt the approach that they eventually did, to the complaint of *Shashikala,* in relation to this incident.

Shashikala was born on 14th February 1996 and she was about 12 years and 7 months of age when the complained incident took place. She lived in Tract No. 4 of *Rajanganaya* of *Tambuttegama* Police area and the place of the incident, as shown by *Shashikala,* is located about 17 km from the Police Station.

When these factors are considered against the claim of *Shashikala* that she did complain of the incident to her aunt soon after but there was no further action by her aunt, I am inclined to agree with the submissions of the learned President's Counsel for the Respondent that although three years have elapsed when the incident was formally reported to Police, the long delay is explained and justified.

It is unreasonable to expect a young girl, who was brought up in a village setting, to be bold enough to go directly to the Police, when she reported her horrifying experience to her elder who failed to take any action owing to her close relationship to the accused appellant. The parties lived in a village community and her aunt's reluctance to initiate official investigation could be understood as it is a probable and natural reaction owing to considerations of societal repercussions. *Priyanthi* has treated *Shashikala* with kindness by providing her a refuge when she could no longer stay with her parents. It is probable that *Priyanthi* opted to safeguard futures of both *Shashikala* and accused appellant by simply allowing the incident to forget over the passage of time. Therefore, the trial Court's finding on the reliability of *Priyanthi's* denial of informing the incident by *Shashikala* could not be faulted.

In CA 115/2006 (Court of Appeal minutes of 28.07.2011), Ranjith Silva J quoted ***Samarakoon v Republic of Sri Lanka*** (2004) 2 Sri L.R. 209 which in turn cited and ***Paulin de Croose v The Queen*** 71 NLR 169, where it was held by Fernando J that;

> *"Just because the statement of a witness is belated the Court is not entitled to reject such statement .... If the reasons for the delay adduced by the witness are justifiable and probable the trial judge is entitled to act on the evidence of the witness who had made a belated statement."*

Viewed in this context, it is my considered view that there is no delay in reporting the incident by *Shashikala* to another as she did report it to her aunt soon after. The delay is therefore confined to her making a formal complaint. In view of the foregoing, it is further held that her delay in making a formal complaint to Police is sufficiently explained and justified.

Whether the prosecutrix has told her aunt about the act of the accused appellant soon after the incident is clearly a question of fact. It is clear that the learned trial Judge, having observed the demeanour and deportment of the prosecutrix, has opted to accept her evidence as truthful and reliable, after evaluating it with the already established tests in assessing testimonial trustworthiness of a witness.

A question of fact or a primary fact; which has been decided by a trial Court, which had the priceless advantage of observing the witness, should not ordinarily be disturbed by an appellate Court, unless it could be termed as a perverse finding.

In the judgment of ***Fradd v Brown & Co. Ltd.,*** 20 NLR 282, it was held;

> *"... immense importance attaches, not only to the demeanour of the witnesses, but also in the course of the trial and the general impression left on the mind of the Judge present, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance."*

The judgment of ***De Silva and Others v Seneviratne and Another*** (1981) 2 Sri L.R. 7 is also an instance where the Court of Appeal considered the question as to the circumstances under which an appellate Court should interfere with findings of facts made by a trial Court. After referring to a long line of authorities on the point, it held that;

> *"On an examination of the principles laid down by the authorities referred to above, it seems to me: that, where the trial judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration, and will be reversed only if it appears to the appellate Court that the trial judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving viva voce evidence, and the appellate Court is convinced by the plainest consideration that it would be justified in doing so that, where the findings of fact are based upon the trial judge's evaluation of facts, the appellate Court is then in as good a position as the trial judge to evaluate such facts, and no sanctity attaches to such findings of fact of the trial judge: that, if on either of these grounds, it appears to the appellate Court that such findings of fact should be reversed, then the appellate Court "ought not to shrink from that task"*

Perusal of the proceedings reveal that it was the same trial Judge who has recorded the evidence of the prosecutrix and delivered the judgment by which the accused appellant was found guilty. As the issue of credibility of the prosecutrix has been decided in her favour, her claim of complaining to aunt too was also accepted by the trial Court as a truthful and reliable item of evidence. In the light of the above considerations, I am unable to term this finding of fact by the trial Court as a perverse finding.

The other complaint of the accused appellant that the trial Court was in error when it considered the medical evidence as evidence of corroboration is apparently based on the learned High Court Judge's observation in his judgment that *Shashikala's* evidence is *"further confirmed/corroborated"* by the medical evidence.

This observation is made by the trial Court when it referred to the evidence of the medical witness, who said that he saw an old healed tear in the 6 o'clock position in the hymen, when he examined the prosecutrix. The trial Court has utilised this item of evidence supporting the prosecution claim that there was vaginal penetration at some point of time. Learned Counsel for the accused appellant submitted that when the prosecutrix has admitted having had sexual relations subsequent to the incident, the fact that there was a tear in the hymen does not add credence to her claim. More importantly, corroboration should be by an item of evidence that connects the accused appellant to the alleged count of rape. Since the medical evidence could not be considered as such in these circumstances, the learned trial Judge's reliance on this item of evidence as "corroboration" is contrary to applicable law.

In ***Rajaratnam v Republic of Sri Lanka*** 79(I) NLR 73, the then Supreme Court quoted the following passage from the judgment of ***King v Athukorale*** 50 NLR 256, reproducing it with the observation that *"The law in regard to the need of corroboration in rape cases is well settled."*

> *"The corroboration which should be looked for in cases of this kind is some independent testimony which affects the accused by connecting or tending to connect him with the crime, and it is settled law that although the particulars of a complaint made by a prosecutrix shortly after the alleged offence may be given against the person ' as evidence of the consistency of her conduct with her evidence given at the trial,' such complaint ' cannot be regarded as corroboration in the proper sense in which that word is understood in cases of rape and it is misdirection to refer to it as such' such*

evidence is not corroboration because it lacks the essential quality of coming from an independent quarter."

As noted earlier on in this judgment, the trial Court utilised the medical evidence to arrive at a finding that it is not inconsistent with the prosecution version. It clearly found that the sequence of events, as narrated by the prosecutrix in her evidence, is consistent with the history given to the medical officer at the time of her examination. These findings are in line with the law as laid down in the judgements of ***King v Athukorale*** (ibid) and ***Perera v AG*** (2012) 1 Sri L.R. 69.

In addition, the trial Court has also utilised the observations made by the medical witness after examining genitalia of the prosecutrix as it was observed that she had an old hymeneal tear at 6 o'clock position as an item of evidence which corroborated the assertion of penile penetration.

Learned trial Judge was mindful of the evidentiary value of each of these items of evidence. He correctly used the short history given by the prosecutrix, only to evaluate the consistency of her evidence and not as an item of corroboration. He then used the medical evidence of hymeneal tear as an item of evidence which tends to corroborate her evidence. In this instance an under aged unmarried girl claimed penile penetration of her vagina. She also claimed she felt pain in her lower abdomen and also felt blood from her vagina. The medical evidence could obviously provide corroboration for such a claim, as there was evidence of hymeneal injury and it came from an independent source. I am in agreement with the learned trial judge.

In ***Perera v AG*** (ibid) there was evidence that the accused and the rape victim had gonorrhoea. Justifying an inference drawn that she may have contracted the venereal decease from the accused himself, Court of Appeal has held that *"... This evidence if not corroborative should at least show consistency of the evidence of the victim."*

In these circumstances, it could reasonably be concluded that the appeal of the accused appellant is without merit.

The accused appellant, in his submissions, did not address this Court on the sentences imposed on him. I am of the view that the sentences imposed on the accused appellant are legally correct, reasonable and appropriate under the circumstances.

Therefore, the conviction of the accused appellant on the two counts and the sentences imposed on him upon his conviction of them are affirmed by this Court. Accordingly the appeal of the accused appellant is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL