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/67/2014

Vs,

Warnakulasuriya Prabath Ranil Fernando

Accused

And Now Between

Warnakulasuriya Prabath Ranil Fernando

Accused-Appellant

High Court of Chilaw
Case No. H.C.36/2005

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 : Accused-Appellant absent and unreperesented
Chethiya Goonesekera, DSG for the Respondent

Written submissions ; Appellant – Not filed
Respondent – 27th November 2017
Argued on : 7th February 2018
Judgment on : 13th March 2018

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Judgment

S.Thurairaja PC J

The Accused Appellant (hereinafter sometimes referred to as the Appellant) was indicted before the High Court of Chilaw, for committing offences of trespass and Rape punishable under section 436 and 364 of the Penal Code.

The appellant was arrested by the Police and enlarged on bail. When the Non-Summery inquiry was held at the Magistrate Court, the Appellant was present and represented by his Attorney at Law, after the conclusion of the evidence of important witnesses, the Accused Appellant did not attend the court but represented himself through his Counsel. Case was committed to the High Court and Trial was taken up , the appellant, never surrendered to his bail and contested the case through his Attorney at Law. After a fully contested trial, the Learned Judge of the High Court found, the Appellant guilty and sentenced him accordingly. Being aggrieved with the said conviction and sentence the Appellant preferred an appeal through his Attorney at Law. Several Counsels appeared on his behalf but none submitted any letter of authority from the Appellant. Subsequently all of them informed this Court that they have no 'Proper Instructions' and withdrew from the case. This court issued several notices, summons and warrant through the Registrar and the Police, all of them revealed, that the appellant is not in the country and may be residing in Italy and they are unable to provide the address. This includes the mother of the Appellant.

As I stated above, the Appellant was indicted for trespassing into the home of Pubudhu Visaka Lasanthi Ponnamperuma and raped her on the 18th May 2001. It was revealed that the Appellant known as Nimal, was a Son of her mother's brother. The Prosecution led the evidence of the Prosecutrix, Pubudhu Visaka Lasanthi Ponnamperuma, Pelpola Gunawardane Jayawathie Gunawardana mother of the Prosecutrix, Judicial Medical Officer (JMO) Dr. Mohamed Nizar Rahul Haq, Inspector of Police (IP) Warnakulasuriya Ebert Michal Aubrie and Women Police Inspector (WIP) Jayaweera Arachchige Nimali Wasundara and moved the statutory statements be admitted under section 420 of the Code of Criminal Procedure Act (CCPA). Being convinced with the evidence the Trial Judge had called the defence of the appellant. The attorney at Law who appeared for the appellant moved for a date to get instructions and informed on the next date that he will not be giving evidence or calling witnesses on his behalf.

The grounds of appeal submitted by the Appellant in his Appeal stands as follows;

1. The judgement of the learned High Court Judge is contrary to law.
2. The judgment of the learned High Court Judge is contrary to the facts related to this case.
3. This judgement must be set aside on the basis that the learned High Court Judge by prejudging the case contrary to law that the accused must be convicted.
4. Although the evidence given by the witness No. 01 Ponnamperumage Pubudu Vishaka Lasanthi who gave evidence with regard to rape as mentioned in the indictment, contained discrepancies and changing her evidence from time to time, makes her evidence unreliable and the failure of the learned High Court Judge to give that benefit of the doubt to the accused is illegal.
5. The Learned High Court Judge's Judgment is contrary to the evidential facts adduced in this case. Especially, as a result of the Hon. High Court Judge accepting the evidence that should have been excluded and

excluding the evidence that should have been accepted, has caused great prejudice to the accused Appellant.

6. In this case according to the evidence of the lady who was said to have been abused, according to the answers given by her under cross examination and during the re-examination by the State Counsel and the questions posed by the Hon. Court at that moment itself, (Evidence of 21.03.2011 pages 12, 13, 14), the accused had never been seen by her previously. She has further answered that she came to know the name of the accused only at the Police Station. However, the Police have not made a request from the Magistrate's Court for an identification parade to enable the lady who is said to have been raped to identify the accused appellant. Therefore, as only on the dock identification of the accused who was in the dock by the main witness in this case, is not conclusive evidence that can be made use of to find the accused guilty.

7. In this case, although the lady who is said to have been subjected to sexual abuse, in her evidence in chief had said that she knew him, while answering questions under cross examination, under re-examination by the State Counsel and questions posed at that moment itself by the Hon. Court she has stated that she had not known the accused prior to the incident and based on this incident itself the accused should not have been made guilty for the two charges made in the indictment, had been brought to the attention of the Hon. Court and the learned High Court Judge has not mentioned a judicial opinion with regard to it even by a sentence, and in his judgment on page 25 in two places he states as follows: That is, "not a single contradiction has been marked in the evidence of the complainant" Further, "In relation to this case the attention is drawn to Inoka Gallage 2002 (1) Vs Kamal Addaraarachchi Sri Lanka Law Report 307 and Democratic Socialist Republic of Sri Lanka Vs Dingiribandage Sumanadasa but in the evidence of this victim lady, there

is not anything unnatural and it remains firm, uniform and without any contradictions". There are strong instructions received to the fact that the learned High Court Judge has arrived at the above observations, without observing the above evidence and may be due to certain lapse on the part of the Court. (Per Incuriam).

8. In order to prove that the accused had come to the place of the incident and to prove that he committed the crime, the foot prints of the accused, body hormones inclusive of semen or hair follicles or finger prints related DNA evidence have not been produced by the prosecution.
9. Although the evidence of the witness No. 01 was unsatisfactory to the extent that Hon. Attorney General should have charged her for going out of the way in evidence expected from her, her evidence full of unreliability have been taken as fully reliable at a higher degree is not acceptable at all and this judgment should be set aside. Especially when the nature of this evidence is analyzed as a whole, it is unsafe to act on such an unreliable evidence is apparent here.
10. On the evidence of the prosecution when there arises a reasonable doubt as to the culpability of the appellant, although the action that should have been taken by the Hon. High Judge, is to give that benefit of the doubt to the accused and issued an order acquitting the accused Appellant, instruction has been received that the Hon. Judge by quoting alien reasons and convicting the accused appellant is illegal.
11. The reason that the accused appellant not being personally present before the open Court and his getting married subsequently is censured by the Hon. High Court in the course of his sentencing and finding the accused guilty and imposing a severe sentence based on that has caused great prejudice to the accused.
12. Without prejudice to the averments above, it is humbly declared that in this case which is more than thirteen years old and the sentence imposed

to this accused for the charges in the indictment is excessive and unreasonable.

(Reproduced from the petition of appeal)

One could observe that most of the grounds were elaborated in separate paragraphs, hence we consolidate all grounds and discuss together.

The first ground is the Judgment is contrary to Law. Since the Appellant was not represented at the final stage of this appeal we carefully considered all materials including the Non- Summery inquiry and the trial proceedings. We could not find any illegal steps were taken against the Appellant. In fact, we found that the Magistrate and the trial Judge had given more than adequate time for the appellant to surrender to his bail. The indictment is in order, procedures followed were in-accordance with the Law and the Appellant was given proper and a Fair trial hence we find that the First ground fails in its own merits.

Second ground of appeal is that Contradictions and evidence favourable to the Appellant were not considered fairly. On a careful perusal of the trial proceedings we find that there is not a single material contradiction marked. We also noticed that there are some differences in the evidence of the virtual complainant. When carefully scrutinising the said differences, we find that those are natural variations and not hiding of facts.

Time and again our Courts had followed the dictum of **Justice Thakkar**, delivered in **Bharwada Bhoginbhai Hirjibhai vs State of Gujarat**, 1983 AIR 753, 1983 SCR (3) 280.

"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen;

(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details;

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another;

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder;

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends. On the 'time sense' of individuals which varies from person to person.

(6) ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up, when interrogated later on;

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and

out of nervousness mix up facts; get confused regarding sequence of events or fill up details from imagination on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

It will be unfair, to expect a witness to recall all minute details after a long period of time. In Sri Lanka we expect the witness to reveal the accurate facts to Court to give a JUST decision. It should be mindful that the Court is not a place to test the memory of a Victim. The test applicable will be of an ordinary man test not the super man with extra ordinary memory power.

In the present case, we find that the witness had certain lapses in recalling the incident, in our view those are not material contradiction which goes to the root of the credibility of the evidence of the witness.

Considering all factors, we find that there is no infirmity in the findings of the learned trial Judge. Hence, we find no merit in this ground too.

The Appellant also submitted without prejudice that the Sentence imposed is excessive and unreasonable.

ARIJIT PASAYAT, J. in **State of Punjab vs Ramdev Singh.** 17 [2003] INSC 654, (17 December 2003) held,

"Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical

injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys, as noted by this Court in Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty (AIR 1996 SC 922), the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21 of the Constitution of India, 1950 (in short, the 'Constitution') The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

He further said,

"A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

(Emphasis added)

In the present case, it is revealed that the Prosecutrix after the act of sexual penetration was bleeding profusely and treated at the hospital as an in-patient for about a week. Further it is noted that the victim had suffered not only physically but also psychologically. It also noted that the Accused Appellant had not regretted in any means, not even surrendering to his bail. Therefore, after careful consideration we decided not to interfere with the order of the Learned Trial judge, who had the privilege to observe the witnesses.

We affirm the Conviction and the Sentence.

The High Court is hereby directed, to implement the sentence through relevant Government Agencies with the help of the Interpol and the Foreign Government. Sentence will be implemented from the date the Appellant surrenders to his bail or from the date he is produced before the High Court of Chilaw.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree,

JUDGE OF THE COURT OF APPEAL