

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

In the matter of an Appeal under
Section 331 of the Code of
Criminal Procedure Act No. 15 of
1979.

C.A. No. 109/2017
H.C. Tangalle No. 04/2005

Kodikarage Chaminda Indunil
" Accused-Appellant

Vs.

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

Respondent

BEFORE : DEEPALI WIJESUNDERA, J. &
ACHALA WENGAPPULI, J.

COUNSEL : S.T. de Zoysa for the Accused-Appellant
A.R.H. Bary SSC for the Respondent.

ARGUED ON : 22nd June, 2018

DECIDED ON : 13th July, 2018

ACHALA WENGAPPULI, J.

The accused-appellant was indicted before the High Court of Tangalle for committing rape on *Jeewani Inoka Kodippiliarachchi* on 25th February 2001. He opted for a trial without a jury and after trial was convicted as charged. He was imposed a sentence of 7 year term of imprisonment and a fine of Rs. 5,000.00. In default of the fine, he was further imposed a six months term of imprisonment.

Being aggrieved by the said conviction and sentence, the accused-appellant sought to challenge its validity on several grounds of appeal. One such ground of appeal is that the trial Court has failed to consider his defence of consent. In support of this ground of appeal, learned Counsel for the accused-appellant invited attention of this Court to the evidence led by the prosecution.

The complainant was not available to give evidence before the High Court and after an inquiry, her deposition was tendered under Section 33 of the Evidence Ordinance, upon an order of the trial Court.

Her husband, the medical officer who examined the complainant and the investigating officer gave evidence for the prosecution and after

the defence was called, the accused-appellant and his witness gave evidence.

Learned Counsel for the accused-appellant referred to the evidence of her husband who admitted that although he was married to her for three months when this incident was reported, he did not know that she was carrying a pregnancy of 7 weeks. He admitted since their marriage she has left him twice to live with two other men. In 2003 she left him for the third time with yet another man and never heard about her whereabouts since then. He is not a witness to the incident and was only told by his wife upon his return from Sunday fair about the incident. He further admitted that they opted not to complain to the Police as the accused-appellant is a close relative.

However, they complained to Police of rape on the following day. What prompted for them to lodge a complaint against the accused-appellant was an incident of assault on the complainant by him. According to the witness, on the following day after the incident, his wife went to the garment factory where she was employed at that time. The accused-appellant was also employed there as a supervisor. During lunch interval, the accused-appellant has assaulted the complainant and also has threatened to assault the witness as well.

In her deposition, the complainant has stated that the accused-appellant came to her house when her husband was away and had then committed rape on her forcibly. She raised cries for ten minutes but no one came to her rescue. She saw a fellow villager called *Hinni Ukkun* near her window and then told the accused-appellant to go away. Thereafter, the accused-appellant was seen seated by the wayside.

The accused-appellant, in his evidence stated that he went to her house and she invited him to follow her to the only room the house had. She laid herself on the bed and the accused-appellant returned to close the front door. Then he saw *Ukkun* (*Liyanage Sunil*) coming to that house. He came up to the front door and spoke to the accused-appellant. Seeing *Ukkun*, the complainant got up from the bed.

He called *Liyanage Sunil* in support of his evidence. According to this witness, he has gone to the complainant's house to ask her husband to accompany him to their farm. He saw the accused-appellant trying to shut the main door and that arose suspicion in him. He also saw the complainant coming out of a room.

Learned High Court Judge, in dealing with the evidence in relation to the element of lack of consent, rejected the position of the accused-appellant, purely on the basis that he has failed to suggest it to the prosecution witnesses. And then she used it as an instance where the

accused has lied in Court and held that it has corroborated the prosecution version.

It is unfortunate that the trial Court did not note that the complainant did not give evidence before it and only her deposition was tendered before it. Only she could provide an answer to the suggestion on the issue whether there was consent or not. Her husband merely narrated what he was told by the complainant upon his return from the Sunday fair. Others are official witnesses.

On the other hand, there are no contradictions or omissions marked off the evidence of either the accused-appellant or his witness. The trial Court rejected the evidence of *Sunil* solely upon his admission that he lied to Police when he made his statement to them as the parties are related.

Considering the evidence placed before the trial Court, it is our considered opinion that the rejection of the accused-appellant's evidence purely on his failure to put the issue of consensual intercourse to the complainant's husband is an instance of misapplication of the test of consistency. It is clear that the cross examination of the complainant's husband by the accused-appellant was mainly focussed on the issue of consent as it was clearly shown that the complainant was of "generally immoral character" as per Section 155(d) of the Evidence Ordinance.

After due consideration of the evidence presented before the trial Court, it is our view that the evidence led by the accused-appellant is more than sufficient to raise a reasonable doubt as to the element of lack of consent and therefore is entitled to its benefit.

In view of this finding, consideration of other grounds of appeal raised by the accused-appellant does not arise.

Therefore, we allow the appeal of the accused-appellant by setting aside his conviction and sentence.

Appeal of the accused appellant is allowed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL