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

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

C.A.No.81/2017
H.C. Monaragala No.22/2016

Herath Mudiyanselage Kumara Chandana

Accused-Appellant

Vs.

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

Respondent

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BEFORE : DEEPALI WIJESUNDERA, J.

ACHALA WENGAPPULI J.

COUNSEL : Shanaka Ranasinghe P.C.with Niroshan Mihindukulasuriya,and Sandamali Peiris for the Accused-Appellant.

Anoopa de Silva S.S.C. for the respondent

ARGUED ON : 17.09.2018

DECIDED ON : 09th November, 2018

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ACHALA WENGAPPULI J.

The Accused-Appellant (hereinafter referred to as the "Appellant") invokes the appellate jurisdiction of this Court seeking to set aside his conviction and sentence imposed by the High Court of *Monaragala* pronounced on 18.05.2018.

The indictment presented by the Hon. Attorney General against the Appellant contains two counts. The 1st count is in relation to committing house trespass on or about 31st May 2014, in order to commit an offence punishable for ten years or more while the 2nd count refers to committing rape on *Konara Mudiyanselage Sudu Bandi* in the same course of transaction, an offence punishable under section 364(1) of the Penal Code as amended.

Upon the election of the Appellant to be tried without a jury, the trial was conducted before a Judge of the High Court. The prosecution called the prosecutrix who claimed that she is 102 years old at the time of giving evidence before the High Court and one of her sons. In addition, the prosecution called the investigating officers and the Consultant Judicial Medical Officer who had examined the prosecutrix at the *Monaragala* Hospital after 2 days from the date of incident.

At the close of the prosecution case, the trial Court decided that the Appellant had a case to answer and called for his defence. The Appellant made a dock statement denying any involvement with the incident and claimed an *alibi* stating that he was at his home with his wife and their children who are twins.

The trial Court, with the delivery of the impugned judgment found the Appellant guilty on both counts and imposed a sentence of imprisonment of 7 years on each count to run concurrently. He was imposed a fine of Rs. 5000.00 in respect of the first count and was further ordered to pay Rs. 10,000.00 as compensation to the prosecutrix in respect of the 2nd count with a default term of six months.

Being aggrieved by the said conviction and sentence, the Appellant seeks to challenge its validity on the following grounds of appeal:-

a. the trial Court has erroneously concluded that the evidence in relation to the identity of the Appellant is sufficient to convict him,
b. the trial Court has failed to consider the dock statement of the Appellant
c. the trial Court has failed to consider that the prosecution has failed to call a vital witness.

In order to properly appreciate these grounds of appeal, it is necessary to refer to the case presented by the prosecution *albeit* summarily.

The prosecutrix was living alone in her mud hut with a tiled roof while one of her sons PW2, lived across the road in his house. On the day of the incident, she had her dinner before dusk and had gone to sleep. She heard a noise from the direction of her son's house. Then she heard someone calling her son out by his name "U.B.". She told that person, U.B. is not there and she would not open the door even to her child after dark. Then the intruder had kicked open her door and entered her house. As he

entered, the intruder blew out the bottle lamp and turned the table upside down several times.

The prosecutrix had then called out her son, and the intruder had gagged her by pressing a towel into her mouth. He told her that he came to commit rape and not to call out others. She pleaded with him not to kill her. The intruder had then removed her cloths and committed rape on her. She pointed out her groin area as the area of her body where the intruder had molested. She then told Court that the person who is married to her granddaughter was that intruder and he had sexually molested her that night. She later identified the Appellant in Court by walking up to the dock as her eye sight was poor.

She further stated in evidence that the Appellant started vomiting after the act. She used that window of opportunity to crawl through the door on to the veranda of her house. Her son had then walked in at that point of time. He saw the Appellant and asked her whether she identified him. When she said she did not, she was told that it was "*Nandana*" her granddaughter's husband.

In his evidence, the Consultant JMO stated to Court that during the medical examination of the prosecutrix, he noted 10 external injuries and a fracture of a bone. The expert witness expressed his opinion that there was medical evidence of recent vaginal penetration based on his observations of her genitalia.

The Appellant was arrested by the Police from his house on the 01.06.2014 at 8.10 p.m.

At the hearing of the appeal, learned President's Counsel for the Appellant submitted that the prosecutrix had failed to mention the name of the Appellant in her statement to Police and also to the medical officer in the short history. He also referred to the evidence that she did not identify the intruder at the time of the commission of the sexual act and also in Court. In relation to the name of the intruder, PW2 "U.B." who rushed to the Proecutrix's house identified him as *"Nandana"* whereas according to learned President's Counsel, the Appellant is *"Chandana"*. Therefore, he contended that the evidence led by the prosecution had failed to establish the identity of the Appellant beyond a reasonable doubt and therefore the trial Court was in error when it decided to convict him on that evidence.

Learned Senior State Counsel for the Respondent, in her reply referred to the places in the evidence of the Prosecutrix where she clearly referred to identity of the Appellant. She also drew our attention to the answer of the prosecutrix when she was asked the question whether she identified as to who the intruder was. The prosecutrix had repeatedly answered that she did identify him.

The complaint about the Appellant's name should be addressed first. As per the indictment, the Appellant's name is *Herath Mudiyanselage Thushara Nandana* and not *Chandana* as claimed by the Appellant in his petition of appeal. No such issue was raised at the trial. The prosecutrix was clear in her evidence that the Appellant was identified by her son as *"Nandana"* who is also her granddaughter's husband.

The prosecutrix has used a particular dialect in describing the incident. Considering her age, the generation she belonged to and the mannerisms of the isolated rural community in which she lived her life, her use of unusual and peculiar words and the context in which she uses them had to be given due weightage by the trial Court. One such glaring example of the peculiar manner of her expression could be found in page 43 where following question and answer could be found.

" ප්‍ර: ඒ කව්ද කියලා අම්මා හඳුනාගත්තාද?

උ : නැවෙද. "

It is clear that, although her answer seemed in the negative, in fact it is a positive answer confirming identity. A similar expression that could be found in the term "නැතුව" or " නැත්නම්" used certain other parts of the country. When one takes that particular word only it apparently reflects a negative answer in the typed script. But it is apparently common expression used by members of public which could be equated to the phrase in English "Why not?"

The trial Court had sufficiently dealt with this aspect in its judgment when considering the credibility of this item of evidence.

Learned President's Counsel for the Appellant highlighted in his submission that the Prosecutrix has failed to mention the name of the Appellant either to the Police or to the Consultant JMO who interviewed her soon after the incident. It was his contention, if there was proper identification of the Appellant then it is reasonable to expect that she mentions his name when the opportunity presented to do so.

This is a valid complaint on behalf of the Appellant which is in support of his ground of appeal on identity. However, the evidence revealed another aspect. Prosecution witness No. 7, *Ukku Banda* (known as U.B. to villagers) in his evidence stated that he learnt about this incident through the principal of the village school. He had then visited the prosecutrix on the 1st of June 2014 in the evening. When he enquired from the prosecutrix, she implicated the Appellant referring to his as *"Nandana"* who is married to *"Doni"* as the person who had molested her. It was this witness who provided first information to the Police over this incident. The witness further testified to the effect that the Prosecutrix had referred to the Appellant as he is the person who is married to her granddaughter.

This obviously is the first opportunity for the prosecutrix to implicate the name of the Appellant after the initial identification that was done soon after the incident. As already noted, it is evident from the manner in which the prosecutrix had answered the questions put to her by Counsel that one would experience difficulty in following a sequence in her narration of events. This is to be expected of a woman whose language skills and the ability of expressing her experience through words are obviously not the best, considering her underprivileged social back ground.

However, what is important here to note is the fact that she did implicate the Appellant when her son visited her on the following evening. There is no allegation or even a hint of fabrication. Therefore, it is safe to determine that the allegation made against the Appellant has consistently been made by the prosecu

trix. The police officer who recorded her statement may not have probed sufficiently enough to elicit this important information from the prosecutrix. The Consultant JMO is not expected to record a detailed "statement" off the prosecutrix, and as such the failure to mention the name of the Appellant could sufficiently be understood. Accordingly, we agree with the determination of the trial Court that this issue could not affect the credibility of the prosecution's case.

It is evident from the judgment of the trial Court that it was mindful of the challenge mounted by the Appellant as to the evidence of identity in connecting him to the alleged act of rape. It had clearly referred to the question of identity and, having considered the evidence presented by the prosecution, concluded that there was clear and reliable evidence as to the identity of the Appellant. The trial Court then concluded that the prosecution has proved the identity of the Appellant beyond a reasonable doubt.

When the evidence presented by the prosecution is considered in its entirety, the conclusion reached by the trial Court on the question of identity of the Appellant, could well be justified.

Learned President's Counsel also addressed this Court on the issue that the trial Court had failed to properly consider the dock statement made by the Appellant.

Upon perusal of the judgment of the trial Court, it is revealed that the dock statement made by the Appellant had been reproduced in the judgment in verbatim. Thereafter, it had considered the contents of the dock statement and concluded that it should be rejected. It is noted that the

Appellant claimed that he was with his family that evening. In effect, he claimed an *alibi*. However, the prosecutrix in her evidence clearly stated that the Appellant's wife had already gone back to her house taking their children with her when this incident took place. There was no challenge mounted by the Appellant over this assertion of fact during his cross examination of the prosecutrix. No suggestion was put to her that he was elsewhere. It would have been better if the trial Court was more descriptive enough in describing its reasons for rejecting the dock statement of the Appellant. In view of the above unchallenged factual assertion by the prosecutrix, we are of the view that the trial Court had correctly rejected the *alibi* taken up by the Appellant in his dock statement which is clearly an afterthought.

It is our considered opinion that the appeal of the Appellant is devoid of merit. We affirm the conviction and sentence imposed by the trial Court on the Appellant.

The appeal of the Appellant is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL