

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

Court of Appeal Case No:
CA-171/2011

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

High Court Kandy Case No.
183/2005

Aluthgamage Sarath Upathissa

ACCUSED-APPELLANT

VS

Hon. Attorney General
Attorney General's Department
Colombo 12

COMPLAINANT-RESPONDENT

BEFORE : M. M. A. GAFFOOR, J
K. K. WICKREMASINGHE, J

COUNSEL : Tenny Fernando for the Accused-
Appellant
Dappula De Livera Solicitor General for the
Respondent

ARGUED ON : 28.06.2018

WRITTEN SUBMISSIONS : 11.07.2018 (by both Parties)

DECIDED ON : 12.11.2018

M. M. A. GAFFOOR, J

Heard both Counsel in support of their respective cases. The Accused-Appellant (hereinafter referred to as the “Accused”) in this case was indicted in the High Court of Kandy for the following counts:-

1. For committing rape on Tikkalage Gedera Dilrukshi Kumari Thilakarathne under Section 364(1) of the Penal Code;
2. Causing grievous hurt to Thelkara Gedera Leelawathi under Section 316 of the Penal Code;
3. Robbing a gold bracelet worth of Rs.6000/- under Section 380 of the Penal Code.

After the indictment was read, the Accused pleaded not guilty and opted for a non-jury trial. To prove the prosecution case, prosecution led the evidence of several witnesses including the victim, Thelkara Gedera Leelawathi, U. Kanthilatha Rajapaksha, District Medical Officer (DMO)-Gajanayake, Judicial Medical Officer (JMO)-Seneviratna and several Investigating Police Officers.

In giving evidence, the Prosecutrix stated that the incident occurred on the 14th April 2018 night, at time of the incident she was 20 years of age, and was living with her grandmother’s house as her mother had gone abroad for employment.

According to Prosecutrix, on the day of the incident they had gone to sleep in the room and few minutes later she heard someone throwing stones at their window. Then the Prosecutrix and her grandmother had woken up and both of them had come back to their sitting room. The Prosecutrix also stated that someone broke the door and entered their house flashing a torch. Through the torch light which was flashed by the intruder, the Prosecutrix had clearly identified him as Sarath (the Accused) who is from the same village and known to her previously for several years.

Therefore, we have come to a conclusion that there is no issue with regard to the identification of the Accused.

Prosecutrix further goes on to say that, Sarath, slapped and kicked her grandmother and then carried her away. After taking her, he had put the Prosecutrix down on the ground and mounted on top of her and committed rape on her. Prosecutrix says she shouted for help and her Aunt Kanathilatha Rajapaksha had come running and then the Accused had run away taking her gold bracelet.

The following day Prosecutrix had been taken to the Kuruduwatta Hospital first and then taken to the Gampola Hospital where she had been examined by the DMO on 17th April 2004. According to the DMO he had noted four injuries on the body and two tears in the hymen. We observe that the Prosecutrix had clearly stated that she was raped by Sarath in the history given to the DMO. We also take in to consideration that DMO is a professional and impartial witness. Thus, it is observed that Prosecutrix had told the DMO that she was raped by Sarath, and the DMO had clearly mentioned the name of the Accused in the MLR. DMO while giving evidence stated that he noted the above injuries on the body of the Prosecutrix.

Grandmother of the Prosecutrix Leelawathi, giving evidence corroborates the version of the Prosecutrix with regard to the incident. Leelawathi had also identified the Accused as Sarath with the aid of the torch light and says she was assaulted by Sarath. Leelawathi also stated on her evidence that the Prosecutrix came after about 15 minutes, and the witness Kanthilatha had also been there. Dilrukshi (the Prosecutrix) had told them that "Sarath finished her" (Page-196). She also stated that the Prosecutrix told her that Sarath, the Accused took her bracelet.

According to witness Kanthilatha, she had woken up on hearing the cries of the Prosecutrix. Witness had run out of her house and had met Leelawathi coming towards her house. Kanthilatha had noted Leelawathi bleeding from her mouth. Leelawathi had told her that Sarath jumped in to their house,

assaulted her and took Dilrukshi away (page-225). Kanthilatha proceeded forward and had stopped as she had seen someone coming towards her. She had met Dilrukshi. Dilrukshi had told her that Sarath had raped her (Page-227).

JMO, Kandy had also been called to give evidence with regard to the injuries that he examined on the body of Leelawathi. According to the MLR, JMO had noted two injuries where the JMO had classified one injury as a fracture.

After being informed of the incident through the hospital Police Post, Gampola Police had investigated in to the matter. When the Police visited the house of the Prosecutrix they have observed the broken door. Thus we come to the conclusion that the version of the Prosecutrix is corroborated by the Police Officers' investigation.

After conclusion of the prosecution case, the Accused opted to give evidence on Oath. For the defence Accused and his mother had been called to give evidence. Accused gave evidence denying his involvement. The Accused said on the day of the incident he was at his sister's house in Polonnaruwa (Accused taken up an *alibi*), and after his father called him and informed him about the incident he had come back. However, there are contradictions interse and perse, the accused had said that he was in Polonnaruwa on the questionable day. Even though, there is a material contradiction perse that he stated in his statement that he was with one Nissanka and Jayathilaka on the questionable day and he went to Polonnaruwa on 14th April 2004. Further this *alibi* position had never been suggested to any of the prosecution witnesses. In several decisions it had been held that absence of cross examination of prosecution witnesses of certain facts leads to interference of admission of the fact.

In the Indian Supreme Court decision of *Motilal vs. State of Madhya Pradesh (1990) (CLJ NOC 125 MP)* it was observed that,

“Absence of cross examination of Prosecution Witnesses of certain facts leads to interference of admission of the fact.”

Furthermore, that principle is echoed in *Pilippu Mandige Nalaka Krishantha Kumara Thisera vs A.G*, (CA 87/2005 decided on 17-05-2007) and is line with the approach adopted by Indian Courts as well as evidenced by the decisions in *Sarwan Singh vs. State of Punjab (2002) (AIR SC 111)* where it was held that,

“It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted....”

(Also see: *AEG Carapiet v. AY Derderian, AIR 1961 Calcutta 359 - P.B. Mukherjee, J*)

Thus, we have come to the conclusion that the defence taken up by the Accused in his evidence is an afterthought and we reject the same.

After the prosecution and the defence submissions the Learned High Court Judge fixed the case for judgment.

After trial, the Learned High Court Judge found the Accused guilty of all the charges levelled against him.

The Learned High Court Judge convicted and sentenced the Accused on 12.10.2011.

Before the sentence was passed the Learned High Court Judge gave the option of making submissions with regard to the sentence. After considering the submissions, the Learned High Court Judge, imposed a term of 20 years Rigorous Imprisonment and Compensation of Rs.200,000/- and a default

term of two years for the 1st Count, 7 years Rigorous Imprisonment for the 2nd charge and 10 years Rigorous Imprisonment for the 3rd charge.

When this matter came up for argument before this Court, the learned Counsel for the Accused took up several defects in the High Court Trial.

Accordingly, the 1st defect was that there was no proper identification of the Accused. We wish to place on record that the Prosecutrix had clearly identified the Accused when he came in to the house; she had also mentioned the name of the accused to Kanthilatha. Further, Prosecutrix had told the DMO who examined her which is recorded in the MLR. Prosecutrix had mentioned the name of the Accused in her Police Statement. What more can a Court of law could expect from a Prosecutrix who had been taken out by force in the night and raped. We see no defect in the identification of the Accused.

The 2nd defect was the credibility of the witness. When we peruse the record we find that the witness had sufficiently explained the incident. Even under cross examination, the Prosecutrix had given evidence to the satisfaction of this Court. No person is expected have a photographic memory. The Prosecutrix had given evidence after 4 years. Minor discrepancies which do not go to the root of the case have to be disregarded. Therefore, we see no merit in this argument of the Accused Counsel for the Accused.

Whilst contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance. (*Vide, Boghi Bhai vs. State of Gujarat, AIR 1983 SC 753*)

In the Indian Supreme Court Case of *Radhu vs. State of Madhya Pradesh Appeal (crl.) 624 Ofn 2005*, it was held that.

“The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary.”

Justice S. Tilakawardane, J. in *A.G vs. Sandanam Pitchai Mary Theresa (SC Appeal 79/2008, SC minutes dated 06.05.2010)* has observed that.

“Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance.” (Page at 07)

It was further held in the case that,

“Appellate courts are generally slow to interfere with the decisions of inferior courts on questions of fact or oral testimony. The Privy Council has stated that appellate court should not ordinarily interfere with the trial courts opinion as to the credibility of a witness as the trial judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility and whether after careful thought or with reckless glibness; and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross examination.” (Page at 11)

(Vide, *Valarshak Seth Apcar v. Standard Coal Company Limited AIR (1943) PC 159*)

When we peruse the case record, the prosecution in this case had proved the guilt of the Accused beyond reasonable doubt. The Trial judge had evaluated the prosecution evidence and arrived at the correct decision by convicting the Accused under the Section 364(1), 316 and 380 of the Penal Code. The totality of the evidence proved nothing beyond the guilt of the Accused. The Trial Judge had correctly taken in to consideration the seriousness of the Crime committed by the Accused who had raped a young girl.

When we consider the sentence imposed by the Learned High Court Judge, this Court is of the view that the sentence is excessive. Therefore, we direct the sentence to run concurrently.

Further, the Trial Judge had not imposed fines on all three counts. Therefore, we impose Rs.10,000/- for each count and a default term of six months for each count.

The Registrar is directed to issue a copy of this Order to the Learned High Court Judge of Kandy.

Subject to the above variations and directions, we dismissed the Appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. K. WICKREMASINGHE, J

I agree

JUDGE OF THE COURT OF APPEAL