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

In matter of an Appeal in terms of Article 154(ශ) of the Constitution of the Democratic Socialist Republic of Sri Lanka and Section 331of the Code of Criminal Procedure Act No.15/1979.

C.A.No.285/2017

H.C. Kegalle No.2906/2009

Dodangoda Kumarage Ranjan Dias Kumara.

Accused-Appellant

Vs.

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

Complainant-Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.(ACTING P/CA)**

ACHALA WENGAPPULI J.

COUNSEL : Thishya Weragoda for the Accused-Appellant.

Lakmali Karunanayake S.S.C. for the respondent

ARGUED ON : 22nd October 2018

DECIDED ON : 28 th January, 2019

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ACHALA WENGAPPULI J.

The Accused-Appellant (hereinafter referred to as the "Appellant") was indicted before the High Court of Kegalle upon an allegation of committing rape on a 23-year-old woman, *Dodawatte Vidanelage Sujani Priyanganie,* on 07.11.2005, an offence punishable under Section 364(1) of the Penal Code, as amended.

Upon his election to be tried without a jury, the trial commenced and proceeded the Appellant before the trial Judge who finally convicted him for the offence of rape and sentenced him to a ten-year term of imprisonment. He was ordered to pay a fine of Rs. 5,000.00 and in default a three months imprisonment was imposed. In addition, the Appellant

was ordered to pay Rs. 100,000.00 as compensation to the Prosecutrix with a default term of one year of imprisonment. The sentences of imprisonments were ordered to run consecutively by the trial Court.

Being aggrieved by the said conviction and sentence, the Appellant sought to challenge its validity on the basis that the trial Court had failed to evaluate the evidence placed before it properly and thereby reaching an erroneous conclusion as to his guilt. This ground of appeal was founded on the evidence in relation to the injuries that were noted on the genitalia of the Prosecutrix. The Appellant contends that medical evidence does not support an hour-long sexual act, as she claims to have taken place. It is also contended by the Appellant that the medical evidence does not support her claim of penetration and the civil action initiated by the Prosecutrix claiming damages was decided in his favour by the Civil Appellate High Court.

The evidence presented by the prosecution through *Priyanganie* revealed that she used to leave home at about 5.45 a.m. to work and had to traverse through a lonely pathway passing *Ketawala Handiya* to reach the main road to catch the 6.15 bus. On 7th November 2007, she was on her way to work and the Appellant, who is a fellow villager and therefore a well-known person, has dragged her near the stream and had sexually penetrated her. Although she raised cries, there were no houses in the vicinity. After the act of sexual aggression, the Appellant had threatened her to go to work.

However, the Prosecutrix had reached the closest house and told *Premalatha* of the incident. *Premalatha,* in her evidence stated that the prosecutrix complained that the Appellant "කරදර කරන්න හැදුව" after dragging her away. She also noted that *Priyanganie* was crying and was carrying her foot ware in her hand with dishevelled hair. *Premalatha* did not press the Prosecutrix for details of the incident and comforted her with a cup of tea. She was thereafter sent home in the company of her younger sister who happens to pass that way. *Premalatha's* husband stated that *Priyanganie* called out his name at about 6.00 a.m. when they were in their sleep and when ventured out to enquire, have seen the Prosecutrix who thereafter said something to his wife.

The Prosecutrix had, upon reaching her home at about 10.00 a.m., told her mother of the incident. She has told her mother that " රන්ජන් කුපාඩි වැඩක් කරා" initially and then added that she was raped by the Appellant. After hearing her daughter's complaint of rape, she had taken a knife to attack the Appellant.

Yatiyantota Police station received the 1st information about this incident from the Prosecutrix who was accompanied to it by her mother at 1.50 p.m. on 07.11.2005. Thereafter, she was produced before the Judicial Medical Officer for examination. The investigators, upon scene inspection have observed that the incident had taken place on a bank of a stream that runs along a foot path that leads to a stony pathway, which connects with the main road at the distance of about one kilometre from the place of the

incident. There were no houses noted by the Police in the vicinity of the place pointed out by the Prosecutrix.

Medical examination of the genitalia of the Prosecutrix by the Consultant JMO on 08.11.2005 revealed that she has a fimbriated hymen. She also had fresh laceration on her left labia minora and another laceration around it. No spermatozoa were identified in the specimen taken from her genitalia. The medical expert was of the opinion that the pressing of a penis on the labia minora against the underlying pelvic bone could have resulted in the injuries that were observed on the Prosecutrix and it supports vaginal penetration, but not beyond the hymen.

The Appellant, during his cross examination, has suggested to the Prosecutrix that she had tried to start an affair with him and since he did not show any interest in her, this allegation was foisted on him. He reiterated this position in his short statement from the dock.

In its judgment, the trial Court had considered the evidence of the prosecution and of the Appellant. The trial Court was of the view that the evidence of the Prosecutrix is of such a character that convinced it that she speaks the truth, and therefore it need not be corroborated. The trial Court quoted the judgment of ***Sumanadasa v Republic of Sri Lanka*** CA 147 of 2005 in support of its decision. It had meticulously considered the evidence to decide whether the vital element of penetration has been proved by the

prosecution on this evidence, in the light of the judgments of CA No. 88/2002, CA No. 299/2008 and CA No. 138/2003, where it has been collectively held that to constitute the offence of rape; the minimal degree of penetration should be by placing and pressing a penis between labia. To prove penetration no penile erection is necessary and negative evidence of penetration does not exclude rape. The trial Court then concluded that the prosecution did prove all element of the offence of rape, including that of penetration, beyond reasonable doubt.

The trial Court, having had the distinct advantage of observing the Prosecutrix at the witness box and considering her evidence applying the tests of spontaneity, consistency and probability arrived at the conclusion that her evidence is both truthful and reliable. The trial Court had considered the inconsistencies that had been marked off her evidence as V1 and V2 in relation to the mud patches on her dress and the condition of her hair and correctly decided that those refers to insignificant details and therefore had no bearing as to her testimonial trustworthiness. It was mindful of the fact that she was giving evidence after 10 years since the incident.

The complaint by the Appellant that her claim of sexual penetration that lasted about an hour is an improbable one when considered in the light of the medical evidence should be considered in the light of the available evidence.

The mere reference to an hour in answer to the question about the duration of the act of insertion of penis by the Prosecutrix gave rise to this complaint by the Appellant. The Consultant JMO has noted signs of depression when he examined the Prosecutrix in the following morning. This claim by the Prosecutrix could be understood considering the helpless situation she was in and time durations in those circumstances could not be relied upon as accurate estimations. Her fear, pain, helplessness and desperate struggle to get away from the Appellant's act of sexual aggression could certainly have obscured her ability for proper estimation of time. We are of the view that this factor alone is not sufficient to taint her evidence as an unreliable account of events and therefore this particular fact certainly does not justify an inference that she is not telling the truth.

In determining the effect of the evidence placed before it by the Appellant the trial Court had observed that it did not raise a reasonable doubt about the prosecution. Judging by the probabilities as to the claim of the Appellant in an Asian cultural setting, as highlighted by the judgment of ***Hirjibhai v State of Gujarat*** (1983) AIR SC 753, we concur with the view held by the trial Court in rejecting his evidence.

In the circumstances, we hold that there is no merit in the appeal of the Appellant and therefore his appeal ought to be dismissed.

We affirm the conviction and the sentence imposed by the trial Court as it is appropriate in the circumstances and legal. 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