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

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

Court of Appeal Case No. CA HCC 116/15

High Court Kuliyapitiya
Case No. 43/2011

R.D. Chandana Garusinghe,
Prisons, Welikada.
Accused

AND

R.D. Chandana Garusinghe,
Prisons, Welikada.
Accused-Appellant

V.

Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

COUNSEL	:	U.R. De Silva PC with Kasun Liyanage and Savithri Fernando for the Accused Appellant. Chethiya Goonasekara DSG for the A.G.
ARGUED ON	:	06.06.2019
WRITTEN SUBMISSIONS		
FILED ON	:	14.09.2017 by the Accused Appellant. 08.11.2017 by the Respondent.
JUDGMENT ON	:	30.08.2019

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted in the High Court of Kuliyapitiya on one count of Rape punishable under section 364 (1) of the Penal Code. After trial, the Appellant was convicted and was sentenced to 12 years rigorous imprisonment and a fine of Rs. 25,000/-. Appellant was also ordered to pay a sum of Rs. 150,000/- with a default sentence of 2 years rigorous imprisonment. Being aggrieved by the said conviction and the sentence, the Appellant preferred the instant appeal on the following grounds. Grounds of appeal as submitted in the petition of appeal are;

1. That the learned High Court Judge has failed to consider the facts and the law submitted in the case.
2. That the learned Trial Judge has not considered the legal principles on the defence of consent in a case of rape.
3. That the learned Trial Judge has analyzed the short comings of the defence without considering the probability in the version of the prosecutrix.
4. That the learned Trial Judge instead of analyzing the defects in the prosecution case, has narrated the evidence for the prosecution and analyzed the same in such a manner that the defence has to prove their case beyond reasonable doubt.
5. That the learned trial Judge had erred, when he found medical evidence as corroborative evidence when the defence of consent was taken by the Appellant.

02. I have carefully considered the evidence adduced at the trial, judgment of the learned Trial Judge, and the submissions made by counsel for the Appellant and the Respondent.

03. Prosecution relies on the evidence of the prosecutrix who is the sole eye witness. The evidence of the prosecutrix (PW1) was that, the Appellant's house had been about 300 meters away from her house. She had been a divorcee and was 22 years old. She used to borrow books on economics from the Appellant. On the day of the incident, when she was going to a class passing the Appellant's house, the Appellant had asked her to return a

book that she had already borrowed from him. When she went to return the book, the Appellant had dragged her into his house from the back door, assaulted her, and had raped her. As she was having her menses that day, blood had spilt on the mat that was on the bed. Appellant had raped her twice. Appellant also had threatened to kill her if she revealed the incident to anyone. She had got dressed and gone home. Without telling her father about the incident, she had gone to her mother who was in the market near the bus stand, and had told her. Thereafter, she had gone to the police station with her father, and had made a complaint. She was also examined by a doctor. It was also evident that the Appellant was a graduate in economics and was a member of Pradeshiya Sabha.

04. The defence taken by the Appellant right throughout the case was that, he had consensual sex with PW1.

05. Learned President's Counsel for the Appellant submitted that, it is unsafe to convict on a charge of rape on the uncorroborated evidence of the alleged victim. That is not the law as it is. If the evidence of the alleged victim is cogent, acceptable, and if the victim is found to be trustworthy, then Court can act upon her evidence without corroboration. A victim in a case of rape cannot be treated as an accomplice to the crime. If her evidence is not acceptable or doubtful, then the Accused is entitled to get acquitted.

06. Sexual offences are often committed in isolation, not in public. Hence, seldom you get eye witnesses to the crime other than the victim. In case of ***Sunil and Another V. AG 1986 1 Sri L.R 230,*** Court said:

> *'It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence, but if her evidence is convincing, such evidence can be acted on even in the absence of corroboration.'*

07. In case of ***Bharwada Bhoginbhai Hirjibhai V. State of Gujarat [1983] AIR 753, [1983] SCR (3) 280***, Indian Supreme Court observed:

> *'Corroboration is not a sine-quo-non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Viewing the evidence of the girl or the woman who complains of rape or sexual molestation with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion, is to justify the charge of male chauvinism in a male dominant society.'*

08. This observation is relevant to the Sri Lankan context as well. In the above premise, it is clear that an accused in a case of rape can be convicted on the uncorroborated testimony of the victim, provided her evidence is cogent acceptable, and if the Court is convinced that she is telling the truth.

09. It is the contention of the counsel for the Appellant that, according to the medical evidence adduced at the trial, there had been no injuries suggestive

of a recent sexual intercourse visible in the vagina. If there was any recent sexual intercourse, therefore, was more likely to have occasioned with physical and mental preparedness.

10. The Medical Officer (PW5) who examined PW1 clearly had stated that, there can be instances where vaginal lubricating fluids can be produced even without physical or mental preparedness for sexual intercourse. He said that, at the time of menstruation it can happen. (Pages 161 – 164 of the appeal brief). He further said that, chances of getting injuries when having sexual intercourse during menstruation is less. It is evident and not in dispute that, PW1 was having her menses at the time when the accused had penetrative sexual intercourse with her. Therefore, the absence of injuries in her vagina alone, cannot be taken as PW1 had consensual sexual intercourse with the accused.

11. Counsel for the Appellant further submitted that, although PW1 said that she was assaulted on her face by the Appellant, doctor who examined did not observe any injuries. PW5 in his evidence said that, PW1 complained of pain on the left side of the face and when he examined she felt pain. (Page 160 of the brief). History given to the doctor by the PW1 shows that she had been consistent in her evidence.

12. Act of resistance for sexual intercourse defers from person to person. Some may physically resist, struggle, or even bite. Some may scream. Some may

silently suffer after showing the disapproval, because they do not want to show the public what had happened. It is common knowledge that, in our society, most of the time the victim woman is also partly blamed by the society. Even after the act of sexual assault, women think twice before a complaint is made, due to the social stigma that the woman would have to undergo. Merely because she did not scream, she did not bite the accused, or she did not run without clothes to the road looking for help, one cannot say that she consented to the sexual intercourse. Court will have to take all the evidence before taking into consideration when deciding whether the complainant consented or not.

13. Counsel for the Appellant invited the Court to consider the omission that, PW1 had not told to the police that she told the Appellant that she would send the book through her father. PW1 had made the complaint to the police the same day without any delay. The police officer who recorded the complaint said that, PW1 came to the police station with the father. However, she had not recorded the statement of the father, the same day. Like when answering the questions put to her in cross examination in Court, PW1 cannot be expected to tell every minute detail in the statement to the police. Also, the above omission does not go to the root of the case and would not affect the credibility of PW1.

14. The learned Trial judge has given good and sufficient reasons as to why the contradiction marked as V1 would not affect the credibility of PW1.

Evidence of the PW1, Father (PW3) and Mother (PW2) makes it clear as to how the matter was reported to police. Hence, the contradiction marked V2 from the evidence of PW3, would have no adverse effect to the case for the prosecution.

15. Counsel for the Appellant has submitted that, the father of the PW1 would have played havoc, if he found that his only daughter was raped. As an ordinary villager, his calm behavior negates the possibility of forced sexual intercourse, he submitted. This argument is untenable. The Appellant was a Pradeshiya Sabha member of the area. PW3 who is the father of the victim is an ordinary villager. In today's context, it is quite natural that an ordinary villager cannot go and fight with a political figure of the area. Mother and Father of the PW1 had correctly decided that, PW1 should immediately go and make the complaint to the police which was the more sensible decision other than going to the Appellant's house and fighting with him.

16. Counsel for the Appellant further submitted that, when a woman visits a man who lives alone in a house several times, the inference that can be drawn is that she consented to sexual intercourse. Counsel also submitted that, PW1 had gone to the Appellant's house from the back yard, when in fact she could have gone from the front gate. PW1 had clearly explained as to why she had to visit the Appellant. Undisputedly, she had been borrowing books from the Appellant. Evidence of the sister of the Appellant who testified on behalf of the defence clearly shows that, the Appellant being a

politician had built a room behind the house to meet general public who come to visit him. All the people from the village who come to get help from him, come to the room behind the house. That was the evidence produced by the defence. Therefore, it is nothing unusual for the PW1 to go behind the main house to meet the Accused. Submission that the PW1 went from the backside of the house because she consented to sexual intercourse, is untenable.

17. It is also the contention of the counsel for the Appellant that the productions including the mat was identified by the PW1, as it had been frequently used, that suggests consensual sexual intercourse. It is evident that those productions were taken into police custody in the presence of PW1. Police have gone to investigate the crime scene with PW1, where police had taken the productions. Therefore, PW1 could have easily remembered the identity of the productions.

18. It is the contention of the Appellant that, the learned Trial judge has rejected the defence erroneously. In that, Counsel submitted that, the learned Trial Judge has rejected the dock statement on the basis that the motive of the PW1 that was mentioned in the dock statement was not put to the PW1 when she gave evidence. Further, it is submitted that the evidence of the sister of the Appellant to the effect that she had demanded the PW1 not to visit the Appellant, was not challenged.

19. These were never put to the PW1 by the defence in cross examination when she gave evidence. If these were put to her, she could have had the opportunity to explain, admit or deny. This issue was discussed in so many decided cases by Superior Courts.

20. In case of ***Sarwan Singh V. State of Panjab AIR SC (iii) 3652 at 3656,*** Indian Supreme Court held:

> " *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.*"

This was sighted with approval in case of ***Bobby Mathew V. State of Karnataka [2004] 3 Cri L.J. page 3003***. This was followed in case *of* ***M. Gunasiri alias Jinasiri and Others V. Republic of Sri Lanka CA 166/2013, 04.03.2009,*** by his Lordship Sisira de Abrew J.

21. In case of ***Maddumage Indrajith Fernando V. Hon Attorney General CA 59/2004, 31.01.2007,*** His Lordship Justice Ranjith Silva said:

> *"The accused in his dock statement had stated that the deceased hurled filth at him. This was not suggested to the eye witness. When he gave evidence, and the eye witness had no opportunity to refute or admit such allegations. Therefore, it is not in the mouth of the accused to take up a position which was not put to the prosecution witness. Had the counsel for the accused done so, the*

witness could have denied that fact. The accused did not put that to the witness because he feared the truth. If that was the position of the accused, then the prosecution was deprived of eliciting evidence to prove that the accused was making a baseless proposition."

22. In the instant case, the Appellant failed to put to PW1 that there was an issue between the Appellant and PW1 that day about a marriage proposal to the Appellant. In the above premise, the learned Trial Judge was entitled to reject that evidence of the Appellant on that issue. The learned Trial Judge also has given good and sufficient reasons for rejecting the evidence of the defence.

23. As I mentioned before, the PW1 has made the complaint to the police the same day. Complaint being recent also shows that, the PW1 had been consistent, which enhances her credibility.

24. As an alternative ground of appeal, counsel submitted that, the learned Trial Judge has failed to comply with the mandatory provision stipulate under section 195 (e) (e) of the Code of Criminal Procedure Act. On perusing the Court record of the High Court, it is obvious that the Accused had opted a non-jury trial. On 29.09.2011, the day the indictment was served on the Appellant, the learned Trial Judge in the journal entry in his own handwriting has said that, the Accused informed that he does not need a jury trial. Again on 03.06.2015, when the succeeding Judge continued with the case, the Accused had opted to a non-jury trial. Counsel had appeared for

the Appellant on both occasions. Therefore, this alternative ground of appeal is baseless.

25. For the aforementioned reasons, I find that the grounds of appeal urged by the Appellant, are void of merit and should be dismissed. I affirm the conviction and sentence imposed on the Appellant by the learned High Court Judge.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL