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

Hettige Rasanjal Niroshan Damith Perera
Accused-Appellant

Court of Appeal Case No.
CA HCC 44/13

V.

High Court Negombo
Case No. **HC 206/2008**

The Attorney General,
Attorney General's Department,
Colombo 12.
Respondent

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

K. PRIYANTHA FERNANDO, J

COUNSEL : Dr. Ranjith Fernando for the Accused Appellant.

Hiranjan Pieris DSG for the A.G.

ARGUED ON : 07.06.2019

WRITTEN SUBMISSIONS

FILED ON : 01.11.2017 by the Accused Appellant

24.01.2018 & 01.02.2019 by the Respondent

JUDGMENT ON : 02.09.2019

K. PRIYANTHA FERNANDO, J.

01. Accused-Appellant (Appellant) was indicted in the High Court of Negombo for committing the offence of Rape on one Halahakone Mudalige Irangani punishable under section 364 (1) of the Penal Code. After trial, the learned High Court Judge convicted the Appellant and was sentenced to 18 years rigorous imprisonment along with a fine of Rs. 5000/- and also ordered to pay a sum of Rs. 50,000/- as compensation to the victim. Being aggrieved by the said conviction and sentence, Appellant preferred the instant appeal. Grounds of appeal as submitted by the Counsel for the Appellant in his written submissions are:

    1. Prosecution failed to call witnesses to unravel the narrative.
    2. Evidence of the victim was not corroborated.
    3. The learned Trial Judge failed to attach any significance re. infirmity relating to productions.

02. Apart from the above grounds of appeal, counsel for the Appellant raised a preliminary issue stating that, the learned Trial Judge failed to give the jury option to the Appellant as provided in section 195 (e) (e) of the Code of Criminal Procedure Act. In that, counsel submitted that, although jury option was rightly given on 9th September 2009, counsel for the Appellant had informed Court on 15.02.2010 that the Accused wishes to change the option. It is the contention of the counsel for the Appellant that even in changing the

jury option, Court must communicate with the Accused directly, not through the counsel.

03. It is pertinent to note that, I was the High Court Judge when the jury option was first given to the Accused on 09.09.2009. When this matter came up for argument, counsel for the Appellant informed Court that the Appellant has no issue on the jury option given to the Appellant on 09.09.2009 as Court had directly addressed the Accused and option to be tried by a jury was elected by the Accused. Hence, parties had no objection in my partaking on the bench. The second jury option which is in issue had been recorded on 15.02.2010, before my successor learned High Court Judge.

04. On 15.02.2010, when the case was ready for trial by the jury, Counsel for the Accused had informed Court that, although they opted to be tried by a jury on the previous occasion, now they want to opt for a trial before the Judge. On that application, the learned High Court Judge had discharged the jury that was already summoned and re-fixed the case for trial on another date. Thereafter, the case had got postponed on 7 occasions for various reasons and trial had commenced on 12.07.2012. It is the contention of the counsel that on 15.02.2010, it was imperative for the learned Trial Judge to get the jury option from the mouth of the Accused, not from the counsel.

05. Similar issue was discussed in case of ***Dharmasena V. State [1994] 1 Sri L.R. page 212***. In that case Court held:

> *'... Thus it is reasonable to infer that, it is not imperative that the election made by the Accused to be tried by a jury or Judge should be personally conveyed to Court by the Accused himself,*

provided of course that such election is made by the Accused personally.'

06. Court further observed that, whilst such an election will no doubt have to be made personally by the Accused, the decision so made by the Accused may nevertheless be conveyed to Court by his counsel.

07. As I observed, the Appellant after changing his jury option, there had been postponements on 7 occasions. Thereafter, trial also had proceeded on several occasions before the Judge. Appellant on his own had made a dock statement. Then counsel had made final submissions. On none of those occasions the Appellant had informed Court that, he opted to be tried by jury or that the non- jury option conveyed by the counsel was not his decision. Therefore, it is clear that when the counsel for the Appellant informed Court about the change of the option on 15.02.2010, it was the Appellant's option that the counsel conveyed to Court. Hence, the preliminary issue raised by the Counsel for the Appellant should be dismissed forthwith.

08. According to the evidence of the complainant, she had been a married woman with one child, separated from her husband. She had been working in a garment factory. As usual she had come after work by a bus and had been walking towards her house. The Appellant who was known to her had followed her, dragged her to a partly built house, removed her clothes and had raped her. She had escaped from his grip and had run without clothes. On the way she had taken some clothes from a line of a nearby house to cover herself. She had made the complaint to the police on the same night.

09. Counsel for the Appellant submitted that, there was an obligation on the part of the prosecution to call witnesses to unravel the narrative. According to the complainant when she was running along the road without clothes, a three-wheeler had come. Counsel for the Appellant complains that the prosecution failed to call the three-wheeler driver.

10. Prosecution is entitled to decide on the witnesses they call. It is the prerogative of the prosecution. Prosecutor is also the primary Judge of whether or not a witness to the material events is incredible or unworthy of belief when deciding to call the witness or not. Court will only interfere if the prosecutor has gone wrong in principle. (***R. V. Russel Jones 1Cr.App. R. 538***).

11. If prosecution fails to call a witness listed in the indictment, there is an obligation on the part of the prosecution to get the witness down for the defence to call if the defence so requested. However, defence has not made any application to that effect. Defence also could have called the witness listed by the prosecution if they so wished. Hence, I am of the view that no prejudice had been caused to the Appellant by the prosecution not calling the three-wheeler driver to give evidence. Hence, this ground of appeal should fail.

12. Counsel for the Appellant submitted that the evidence of the complainant was not corroborated. He further submitted that, although the Appellant performed the sexual acts for 15 minutes according to the complainant, no injuries had been caused to the vagina. That shows that the sexual act had been consensual, he further submitted.

13. It is settled law that, an Accused can be safely convicted on the uncorroborated testimony of the complainant of a sexual offence, provided Court finds the complainant to be totally reliable and her evidence is trustworthy of credit. (***Premasiri V. The Queen 77 N.L.R. 86***).

14. In case of ***Bhoginbhai Hirjibhai V. State of Gujarat (1983) AIR 753***, Indian Supreme Court held;

> *'In 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 the injury'.*

15. Evidence must not be counted but weighed, and the evidence of a single witness if cogent and impressive could be acted upon by a Court of law. (***Sumanasena V. Attorney General [1999] 3 Sri.L.R. page 137***).

16. The complainant had been a married woman who had also delivered a child. The doctor who examined the complainant testified that sexual intercourse can be forced on such a woman without injuries being caused. Doctor had observed 11 injuries on the body of the complainant. He opined that they are consistent with the history of rape given by the complainant. It is unchallenged evidence that the complainant ran along the road without clothes. Her evidence was that, she managed to escape from the Appellant. She had dragged some clothes from a line in the neighbourhood. Her evidence on that was corroborated by the owner of the clothes. Complainant had promptly made the complaint to the police on the same night. That shows her consistency.

17. The defence taken up by the Appellant was that, he had consensual sex with the complainant. In his statement from the dock Appellant said that, while they were having sex, some people had come after a political rally. The complainant had feared thinking that they were coming towards them and that she had run nude. This position, the reason for the complainant to run nude was never put to the complainant when she testified in Court by the defence. As submitted by the counsel for the Respondent, if it happened the way Appellant had said, complainant need not have run without clothes. She could have run after getting clothed. If this position was put to the complainant, she could have denied that fact. The Accused may not have put this fact that she had to run nude because of the people after the political rally came to the complainant, because he feared the truth might come out. The learned Trial Judge in the circumstances has rightly rejected the above version of the defence.

18. Counsel for the Appellant further submitted that, the productions were not promptly handed over to the Magistrate's Court by the police. There were no records of the dates of handing over. As soon as the complaint was made to the police on the same night, police officers had gone to the crime scene with the complainant. Same night, the complainant had shown the police officers from where she got the clothes from a line to cover herself. Witness from whose line the complainant had taken the clothes had given evidence (PW2). Same night she had identified her clothes when police officers accompanied the complainant to her house. She identified her clothes in Court. Her evidence was unchallenged. Hence, there is no doubt on the identity of the clothes that the complainant was wearing at the time she went

to the police station as those were hanging on the line of PW2. Hence, grounds of appeal No. 02 and 03 are without merit.

19. For the reasons above, conviction and the sentence by the learned High Court Judge is affirmed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL