

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal under and
in terms of Section 331 of the Code of
Criminal Procedure Act No.15/1979
(as amended) read with Article 138
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

C.A.No.187/2018

H.C. Aunradhapura No.113/2014

Susantha Kumara Janakasiri

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Charamara Nanayakkarawasam with H.
Damunupola for the Accused-Appellant.
R. Bary S.S.C. for the respondent

ARGUED ON : 03rd September, 2019

DECIDED ON : 27th September, 2019

ACHALA WENGAPPULI,

The accused-appellant was indicted by the Hon. Attorney General for committing the offence of grave sexual abuse on *Jayage Nirosha Jayaratne* at *Horowpatana*, on or about 21.11.2011. After a full trial before the High Court of *Anuradhapura*, the accused-appellant was found guilty to the said offence and, on that account, was imposed a sentence of seven-year term of imprisonment. In addition, the accused-appellant was to pay a fine of Rs. 10,000.00 which carried a three-month term of imprisonment in default. The accused-appellant was to compensate the prosecutrix with a payment of Rs. 50,000.00 and a six-month term of imprisonment was imposed in default.

Being aggrieved by the said conviction and sentence, the accused-appellant sought to challenge their validity on the basis that the trial Court had fallen into error when it failed to consider that:

- a. It was a consensual act,
- b. there was no independent corroboration of her evidence, and
- c. the Ellenborough principle does not arise, in view of the evidence presented by the prosecution.

The prosecution case is entirely based on the evidence of the prosecutrix's version of events and, to a limited extent, on the medical evidence in relation to the abrasions noted on her elbow. It is her evidence that she is a mother of a 9-year-old physically challenged girl child. *Nirosha's* husband had left her in 2010 and since then she lived with her grandmother. The land on which they lived had no fence and was surrounded by shrubs. Closest to her house was the house of one *Premadasa*, but it was abandoned for some time. There was no electricity and usually they went to sleep by 7.30 p.m.

On the day of the incident, she had slept inside the house with her child and at about 8.00 p.m. she went out to the front compound to answer a call of nature. She had her electric torch with her and had squatted about 15 feet away from the entrance to her house. She then heard someone approaching her from behind. The intruder had then held a piece of cloth against her mouth and dragged her to a "tractor shed" on *Premadas's* land. She identified the accused-appellant as he is a known person from the same area. He had held her against a post of the shed and indicated his

desire to have sexual relations with her. She had struggled with him when he put her down on floor. She was threatened with death. The accused-appellant attempted to penetrate her but only managed to have intercrural sex. Then she heard her child crying and grandmother's calling for her. With this window of opportunity, she managed to run back to her house.

She narrated the whole incident to her grandmother and also to her mother who advised her to report to Police on the next morning which she did. She was produced before a medical officer on 22.11.2011 at 11.45 a.m., who noted fresh abrasions on her right elbow and also noted wetness in the groin area, which he suspected as seminal fluid.

The accused-appellant, in his statement from the dock, stated that in that evening he met *Nirosha* who requested him to find her husband and a job in return of a " *ඔරු උදව්වක්* ". He agreed. He had gone to see her after dark. She came out of the house and walked to a place away from the house. However, she was not in favour of vaginal intercourse. Then they engaged in intercrural sex. She had left him when her child woke up and cried.

The contention of the accused-appellant on the failure of the trial Court to consider the issue of consent is based on his position that was put to *Nirosha* and taken up in his statement, that it was on her request that he performed the sexual act in return of his undertaking to secure her a place of employment in Colombo. The suggestion by the accused-appellant that they had a prior relationship was denied by *Nirosha* by replying that it's a lie.

In rejecting the accused-appellant's claim of consensual intercrural intercourse, the trial Court had considered the relative probabilities of the conflicting versions of the sequence of events each of them have described before it and ruled that his position did not create any reasonable doubt in its mind, and thereby effectively rejecting the claim of consent. The trial Court had relied on the evidence that she had abrasions, the fact that her dress was soiled and she had complained to her grandmother and then to her own mother who directed her to lodge a complaint to the authorities without delay, in arriving at the conclusion that the evidence of *Nirosha* is probable and therefore credible and truthful.

This Court finds no error in arriving at the said conclusion by the trial Court. The accused-appellant was not consistent with his position during his cross examination of *Nirosha* and his statement from the dock.

During cross examination, the accused-appellant suggested to *Nirosha* that they had a clandestine relationship. She denied it. Then it was suggested to her that she requested the appellant to make an arrangement to secure an employment for her, a few days prior to that particular evening and she would return the favour in any form. She denied this suggestion as well. However, the accused-appellant, in his statement, brings the prior meeting on to the same evening. Then he adds that she wanted him to search for her husband in addition to securing her an employment. He was specific that she herself offered " *ඔරු උදව්වක්* " in return. However, the accused-appellant when making his statement from the dock did not suggest her of the particular nature of help offered by *Nirosha*. Similarly, although he stated in the dock statement that *Nirosha*

invited him to come to her house that evening, he failed to suggest that position during his cross examination of her.

In support of his contention, the accused-appellant sought to challenge the probability of the version of events as spoken to by the prosecutrix. He relied on the words used by grandmother when she questioned *Nirosha* upon her return to the house as to where she was (“*ഞാൻ കൈതൊടേ ദിക്കേ*”). This was due to the fact her child started crying, in the absence of her mother. The accused-appellant sought to impress upon this Court the wording used by the grandmother is indicative of the fact that *Nirosha* was away from her child for some time surreptitiously, in support of his suggestion to her that she was away from home voluntarily, in order to fulfill her part of the offer in return of the favour she expected from the accused-appellant.

Applying the test of probability on the evidence of the prosecutrix, if this was a consensual act as the accused-appellant claims, she could have offered any explanation justifying her going out of the house in the night, when her grandmother enquired where she had been. She did not have a compelling reason to admit having any sexual relations with anyone as her grandmother did not see and know who she was with at that point of time. Even if she had to admit the consensual sexual act, she could have easily said she could not identify the person who forced his carnal desire on her. Being a married woman and a mother, she could have easily implicated the accused for committing rape, instead of grave sexual abuse. There is no valid explanation as to why the prosecutrix had given the appellant such a “concession” by implicating him for an offence which is comparatively of a lesser criminality, if that is not what exactly happened. Only three of them

knew that she was out of the house. No outsider had witnessed that she was with the accused-appellant that night. Hence, she was not under any compulsion to disclose the identity of the person with whom she had consensual sexual relations, in the absence of any witnesses or an allegation of wrong doing.

This Court therefore is of the view that the trial Court had rightly concluded that the sexual act is not a consensual one. This determination on a question of fact by a trial Court is well supported by the evidence presented by the prosecution.

It has been consistently held by this Court that, in proof of an allegation of rape, the rule of prudence that there should be some corroboration, is not an absolute one. The authority relied upon by the accused-appellant, *Ajith v Attorney General* (2009) 1 Sri L.R. 23 itself is indicative of this view. Unlike in that particular instance, in the instant appeal, *Nirosha's* evidence does not contradict the medical observations. In the contrary, it supports her claim that she sustained an injury when she was held against the unplastered brick column.

Thirdly the contention by the accused-appellant that the trial Court had erroneously applied *Ellenborough* principle, should be examined. It must be observed that the trial Court had considered the unacceptability of the position taken up by the appellant and therefore has held that he did not offer a valid explanation to the allegation of grave sexual abuse. The legality of the applicability of *Ellenborough* dictum by the trial Court is questionable in relation to the instant appeal. However, that had not caused any prejudice to his right to a fair trial or had occasioned a failure

of justice. The trial Court had clear, truthful and reliable evidence of *Nirosha* and had medical evidence which is not inconsistent with her version but supportive of it in order to convict the accused-appellant.

The three grounds of appeal that have been relied upon by the accused-appellant are without any merit. In the circumstances, the conviction and sentence imposed on the accused-appellant by the trial Court are hereby affirmed.

Appeal of the accused-appellant is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL