

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

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

Plaintiff

V.

**Court of Appeal Case No.**  
**CA-HCC- 136/2015**

**High Court of Badulla No.**  
**33/2011**

1. Ganesham Weerasami alias Dilliya
2. Chandramurthi Punyaraja alias Kuttiya
3. Pichchamuththu Wijekumar alias Kukku
4. Ganesham Kanakalingam alias Ikiya
5. Adi Nilawendran alias Appan

Accused

AND NOW

1. Ganesham Weerasami alias Dilliya
2. Chandramurthi Punyaraja alias Kuttiya
3. Pichchamuththu Wijekumar alias Kukku
4. Ganesham Kanakalingam alias Ikiya
5. Adi Nilawendran alias Appan

Accused Appellants

V.

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

Respondent

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

**COUNSEL** : Nayantha Wijesundara for the Accused  
Appellants.  
  
H. I. Peiris DSG for the Respondent.

**ARGUED ON** : 25.07.2019

**WRITTEN SUBMISSIONS**

**FILED ON** : 28.11.2017 by the 1<sup>st</sup> to 3<sup>rd</sup> Accused  
Appellants.  
  
28.11.2017 by the 4<sup>th</sup> and 5<sup>th</sup> Accused  
Appellants.  
  
28.08.2018 & 08.01.2019 by the  
Respondent.

**JUDGMENT ON** : 17.10.2019

**K. PRIYANTHA FERNANDO, J.**

01. 1<sup>st</sup> to 5<sup>th</sup> Accused Appellants (Appellants) were indicted in the High Court of Badulla on the following counts;

Count No. 1: Against all 5 Appellants, offence punishable under Section 315 of the Penal Code.

Count No. 2: Against all 5 Appellants, offence punishable under Section 357 of the Penal Code.

Counts No. 3, 4, 5, 6, 7: Against 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants respectively, offence punishable under Section 364 (2) of the Penal Code.

02. After trial the learned High Court Judge convicted all Accused Appellants for a lesser offence punishable under section 314 of the Penal Code on count No.1 and convicted all Appellants on count No.2. On count No.3, 1<sup>st</sup> Appellant was convicted for a lesser offence punishable under section 365 b (2) a of the Penal Code. 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants were convicted on counts 4, 5, 6 and 7 respectively. All appellants were sentenced accordingly.

03. Being aggrieved by the said conviction and sentences, the Appellants preferred the instant appeal. At the argument the following four grounds of appeal were urged by the counsel for the Appellants.

1. The learned Trial Judge failed to evaluate the medical evidence properly.

2. The learned Trial Judge failed to evaluate the dock statements of the Appellants properly.
3. The learned Trial Judge failed to evaluate the contradiction marked as V7.
4. The learned Trial Judge failed to consider the possibility of a false allegation against the Appellants.

04. Main witness the prosecution relied on is the alleged victim of rape Kandaiah Manjula. At the time of the incident she had been about 19 years of age and at the time she gave evidence she had been 26. According to her evidence she had been living in the line room with her brother, sister, sister in law and their children. There had been about fourteen-line houses and the line house of the 2<sup>nd</sup> Appellant had been the 3<sup>rd</sup> from their house. All 5 Appellants had come around 9.30 pm asking for her brother. As her brother had not been at home at that time, the Appellants had gone back and had come again after some time. They had been carrying weapons like knives and axes.

05. As they all came inside the house, they had assaulted her sister. Then, according to her, she was assaulted on her head with a knife. Then she had felt dizzy. She was then dragged to the line house of the 2<sup>nd</sup> Appellant. Her hands were tied and a piece of cloth was put in her mouth to prevent her from shouting. All five Appellants had sexually assaulted her taking turns. She could not remember the order the Appellants sexually assaulted her when they took turns. 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants had raped her and 1<sup>st</sup> Appellant had sexually assaulted her. After raping her, the 2<sup>nd</sup> Appellant had dropped her home. She had made a complaint to the police the same night.

06. Grounds of appeal 1 to 4 will be considered together. Counsel for the Appellant submitted that the injuries observed by the Medical Officer are consistent with a fight. The contention of the counsel for the Appellants is that in their dock statements, Appellants admitted that there was a fight between the families. No fresh injuries were observed in the vagina. No semen in the vagina was observed by the doctor, although the Complainant was examined by the doctor the following day. Counsel further submitted that the Complainant lied in Court about her previous sexual behavior.
07. Counsel for the Respondent submitted that the learned Trial Judge has rightly laid down the position of the dock statements. Further it was submitted that according to the Medical Officer, the injuries he observed on the Complainant is consistent with the history given by her.
08. Complainant had been consistent when she related the short history to the doctor (PW3) who examined her. PW3 had observed 5 injuries on the Complainant. There had been an old healed rupture in the hymen that was consistent with sexual intercourse that had occurred some time ago. PW3 gave clear evidence that the other 5 injuries he observed are fresh ones and injuries No. 4 and 5 can cause by pressing with hands. As her hymen was already ruptured, intercourse by 5 men without her consent could happen without injuries to the vagina being caused, provided she let them do it due to fear, PW3 testified.
09. The evidence of the Complainant was clear and consistent. She had made the complaint to the police the same night without delay. She also had told the doctor who examined her the following day. Her evidence was that she was dazed after she was hit on the head. It is natural that she could not have

been in a state to struggle with the Appellants due to her injury to her head. Physical resistance may have been limited due to her injuries.

10. Complainant said in her evidence, the sexual acts performed on her by each Appellant. She testified that she could not remember the numerical order of the Appellants who sexually assaulted her. Her evidence was recorded in Court after a lapse of about 7 years. As stated in case of *Bharwada Bhoginbhai Hirjibhai V. State of Gujarat 1983 AIR 753*, a witness cannot be expected to possess a photographic memory and recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
11. The Appellants have made very short dock statements merely denying the charge and admitting that there was a quarrel. The learned Trial Judge in page 17 of his Judgment has analyzed the dock statements of the Appellants. PW2 gave clear evidence that the 1<sup>st</sup> to 4<sup>th</sup> Appellants took the Complainant to 2<sup>nd</sup> Appellant's house. When she heard the Complainant screaming, she had come out of her house. She had not gone to help the Complainant due to fear.
12. Complainant in her evidence has denied that she had sexual intercourse with anybody prior to this incident. However, the medical evidence proved otherwise. It is quite natural for a young unmarried girl in our culture to be reluctant to expose her sexual activities, more so sexual intercourse. In the circumstances, denying having previous sexual intercourse with any man, under cross examination, would not in any way affect her credibility.
13. In case of *Samaraweera V. Attorney General [1990] 1 Sri L.R at page 260*, referring to the maxim *falsus in uno falsus in omnibus* Court said;

*'Where however the maxim set out above is applicable it must be borne in mind that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood.'*

14. The learned Trial Judge has sufficiently reasoned out as to why this would not affect the credibility of the Complainant at pages 24 and 25 of his Judgment.

Hence, the learned Trial Judge has rightly accepted the evidence of the Complainant, rejecting the defence.

15. Counsel for the Appellant submitted that the contradiction marked as V7 in the evidence of the Complainant was not considered by the Trial Judge. V7 contradiction refers to the sexual act done by the 1<sup>st</sup> Appellant. Counsel for the Appellants in the High Court has cross examined the Complainant at length on the sexual acts performed by each of the Appellants and also on her previous sexual activities. Learned High Court Judge has recorded that the Complainant was feeling faintish in Court. (Page 70 of the brief)

16. Question No. 7 from the top of page 71 of the brief which led to contradiction V7 that was put to the Complainant in cross examination is clearly unfair and misleading.

ජරා ඔබ මූලික සාක්ෂි ලබා දෙන කොට කිව්වා වූ කරන එකට නියලා තද කරලා උස් පහත් වුනේ නැති බව?

උ: ඔව්.

ප්‍ර: ඔබ කිව්වා නැගලා එයාගේ වූ කරන එක මගේ වූ කරන එකට කියලා  
තදකරලා උස් පහත් වුන බව?

උ: මම කිව්වේ නැහැ.

17. Upon that questioning V7 contradiction was marked. It is clear that what was put to her as she said in examination in chief was not what she said in Court (page 57 of the brief). What she said in examination in chief on the acts committed by 1<sup>st</sup> Appellant was;

ප්‍රකමුත්ගේ ඇඟ උඩට නැග්ගාද?

උ: ඔව්.

ප්‍රභූ මොකක්ද කළේ ?

උ: එයා ඇතුළට දැමීමේ නෑ ඇඟ උඩට නැගලා විතරයි හිටියේ.

ප්‍රභූ මුත්රා කරන එක දැමීමේ නැද්ද?

උ: නැහැ.

ප්‍රභූ ඇඟ උඩ නැග්ගා විතරයි?

උ: ඔව්.

18. Therefore, it is clear that the questions put to her had been misleading and unfair. It is for the Trial Judge to decide whether the evidence of the witness read as a whole appears to have a ring of truth.

In case of *Dharmasiri V. Republic of Sri Lanka* [2010] 2 Sri L.R. 241  
Court said;



*'Credibility of a witness is mainly a matter for the Trial Judge. Court of Appeal will not lightly disturb the findings of Trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness...'*

19. The learned High Court Judge in his Judgment has carefully considered the evidence adduced before him and given good and sufficient reasons to accept the evidence of the Complainant as credible. I have no reason to interfere with the findings of the learned Trial Judge. I find no merit in all grounds of appeal urged by the Appellants and all grounds of appeal should necessarily fail.

Convictions and the sentences imposed on the Appellants by the learned High Court Judge are affirmed.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**K.K. WICKREMASINGHE, J**

I agree.

**JUDGE OF THE COURT OF APPEAL**