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

In the matter of an appeal under and in terms of the Section 331 of the Code of Criminal Procedure Act, No. 15/1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

CA. No. 05/2017

Vs.

High Court of Polonnaruwa

Case No. 46/2009

Wehigala Kumbure Gedara Vijitha Senadheera

Accused

And Now Between

Wehigala Kumbure Gedara Vijitha Senadheera

Accused-Appellant

Vs.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant-Respondent

C.A. No. 05/2017 H.C. Polonnaruwa No. 46/2009

BEFORE : N. Bandula Karunarathna J.

R. Gurusinghe, J.

COUNSEL : Widura Ranawaka with Menaka Warnapura and Sudath Perera for the Accused-Appellant.

Suharshi Herath SCC., for AG.

ARGUED ON : 25.01.2021

DECIDED ON : 24.02.2021

R. Gurusinghe J.

The Accused-Appellant was tried before the High Court of Polonnaruwa on a charge of rape of a woman who was mentally retarded, punishable under section 364(2)(f) of the Penal Code.

After trial the Accused-Appellant was convicted and sentenced to a term of 20 years rigorous imprisonment and to a fine of a sum of Rs. 10,000/- and ordered to pay a sum of Rs.200,000/- to the PW1 as compensation.

The main ground of appeal argued for the Appellant before this Court is that there was no sufficient evidence to establish that there had been penetration.

Prosecution witness No.04 stated that the brother of the prosecutrix, Jinadasa had informed him that his sister, the prosecutrix was dragged by force to the jungle by the accused. Jinadasa had informed the incident immediately to the prosecution witness number 2 and 4. The prosecution

witness number 4 had gone to the place which Jinadasa had shown. When they had gone near the jungle, they had heard a cry which PW4 said to be of the prosecutrix. As the accused had a knife, they did not go further. The prosecution witness number 4 stated that he had clearly identified the accused. The incident happened during the daytime. The accused was on top of another. PW4 stated that he had identified the other person by her voice. PW2 informed the incident to the son of the prosecutrix PW3.

The prosecution witness number 11 also rushed to the house of the prosecutrix. PW11, Nilmini, daughter-in-law of the prosecutrix giving evidence stated that she had seen the accused coming from the jungle. Accused has asked her whether she had seen Susantha there. PW11 replied that she did not see him. The Accused went to the place where his motorcycle was parked and took it and left. Immediately after that she saw the prosecutrix coming towards the house covered with blood. Her hair and the clothes were in disarray. The prosecutrix was then taken to the hospital. The clothes that the prosecutrix was wearing at that time were produced in evidence marked P3, P4 and P5.

According to the evidence of the Doctor PW6 who examined the prosecutrix less than six hours of the incident, the prosecutrix had several injuries. There was a contusion above the left brow, a laceration on left side of lower lip, a contusion around both nipples of breasts, a contusion at the vaginal opening. The report also states that sexual assault present. Sexual penetration cannot be excluded.

The prosecutrix was a mentally retarded 55 years old person. The brother of the prosecutrix, Jinadasa is also a mentally retarded man. Both of

them were listed as witnesses for the prosecution. The prosecutrix was called as a witness; however, she could not answer to the questions rationally.

Immediately after the accused had dragged the prosecutrix by force to the jungle Jinadasa informed to PW2 and PW4 of the incident. PW4 had gone to the place within few minutes. He saw that accused was on top of another. He identified the prosecutrix by her voice.

There was no suggestion that the person under the accused was somebody other than the prosecutrix. Witness No. 11 also had seen the accused coming from the jungle near the prosecutrix's house. Immediately after he left, the prosecutrix also came covered with blood and disarrayed hair and clothes. She had several injuries. All this evidence direct to the conclusion that the accused had raped the prosecutrix.

In the appeal the main ground of the Accused-Appellant is that the prosecution had failed to prove that there was penetration. As the prosecutrix was mentally retarded, she was not able to give evidence in regard to the incident. However, as stated earlier, there were other witnesses including an eye witness.

The Judicial Medical Officer PW6, giving evidence stated that there was a contusion at the opening of vulva. The doctor says this could happen when one tried to access forcibly.

In this regard in the case of Perera Vs. Attorney General 2012 (1) Sri LR 69, Justice Ranjith Silva quoted the following passage with approval.

"The slightest penetration of the penis within the vulva, such as minimal passage of glans between the labia with or without emission of semen or rupture of hymen constitute rape.

There need not be a completed act of intercourse. Rape can be committed even when there is an inability to produce penile erection. Rape can be occurred without any injury and as such negative evidence does not exclude Rape."
(Vide 308 of the Book entitled The Essential Forensic Medicine and Toxicology by Dr. K.S. Narayan Reddy)

In this case, there was a contusion at the opening valve. This is evidence for penetration. Quoting a passage from judgment of CA 88/2002, Counsel for the Appellant argued that the Judicial Medical Officer had not mentioned about labia.

The relevant passage of that judgment is thus:

"In a case of rape, one has to prove penetration. Penetration can be minimum and placing penis between the labia majora or labia minora could be sufficient".

Since there was no reference to labia majora or labia minora, it was argued that there was no penetration. The above case refers to minimum penetration. In this case, there was injury at vaginal opening; that is beyond labia. Therefore, the argument of the Appellant that there was no penetration cannot be accepted.

In view of the above findings, we see no reason to interfere with the verdict of the trial Judge.

The accused was sentenced to 20 years rigorous imprisonment. This is the maximum sentence prescribed for the offence by law. The accused has no previous convictions. He is 36 years old, married and having two children receiving education. Wife of the Appellant according to them is without employment. Having regard to the above term of imprisonment for 20 years is considerably excessive.

The sentence imposed on the Accused-Appellant is reduced to 12 years rigorous imprisonment.

We direct that the sentence is deemed to have been served from the date of the conviction, namely 17/01/2017. We make no change to the rest of the sentence.

Subject to the variation of the term of imprisonment appeal of the Accused -Appellant is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J

I agree.

Judge of the Court of Appeal