IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal made in terms of Section 333(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No. CA/HCC/130/2019

Weragoda Vidana Ralalage Supun Lakmal

Accused

High Court of Galle Case No. 4364/2016

AND NOW

Weragoda Vidana Ralalage Supun Lakmal

Accused – Appellant

V.

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

Complainant – Respondent

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

SAMPATH B. ABAYAKOON, J

COUNSEL	:	Neranjan Jayasinghe for the Accused – Appellant A. Navavi, DSG for the Complainant - Respondent.
ARGUED ON	:	04.03.2021
WRITTEN SUBMISSIONS		
FILED ON	:	17.01.2020 by the Accused-Appellant. 02.03.2021 by the Complainant - Respondent.
JUDGMENT ON	:	31.03.2021

K. PRIYANTHA FERNANDO, J.

1. The accused-appellant (hereinafter referred to as the appellant) was indicted in the High Court of Galle for one count of rape punishable in terms of section 364(1) of the Penal Code. After the trial, the appellant was convicted and was sentenced to 10 years rigorous imprisonment, a fine of Rs. 5000/- with a default sentence of 6 months simple imprisonment. In addition, the appellant was ordered to pay the victim Rs. 450,000/- as compensation, with a default sentence of another 6 months simple imprisonment.

2. Being aggrieved by the conviction and the sentence, the appellant preferred the instant appeal on the following grounds;

    1) The learned Trial Judge has failed to consider the fact that the complaint is belated.
    2) The learned Trial Judge has failed to consider the vital contradictions in the testimony of the prosecutrix.
    3) The learned Trial Judge has failed to apply the test of probability and improbability to the version of the prosecutrix.
    4) The learned Trial Judge has wrongly applied the principles of law relating to dock statements and has failed to offer appropriate prominence and due consideration of the dock statement in accordance with the established legal principles.

Facts in brief.

3. As per the evidence of the alleged victim (PW1), on the day of the alleged incident, her husband had gone out to a party at about 7pm. She had gone to sleep at about 8.30 pm with her two children aged 4 years and one year. She had heard a noise from the direction of the kitchen. When she woke up and sat up on the bed, she had seen someone with his face covered with a piece of cloth. That person had come inside through the kitchen door and walked towards her. When the cloth that was covering his face was lowered, she had identified that intruder as the appellant by the name of 'Patty', who was her husband's friend. When she shouted, the appellant had threatened to kill her husband.

4. The appellant had pressed her to the wall holding her neck. When she fell down, the appellant had removed her clothes and had raped her. While the appellant was raping her, she had been wearing a T-shirt. Although nothing had happened to the T-shirt, her upper back (according to the Medico Legal Report this was identified as the back side of her chest) had got injured while she was struggling on the floor to escape. The appellant had left after ejaculating and had threatened that he would kill both her and her husband.

5. Her husband had come home by about 1 am. She had not told her husband about the incident due to the fear that the appellant would kill her husband. However, after about 4 days she had told her husband, thinking that the appellant would come again.

6. The appellant, from the initial stages of the evidence of PW1, had taken up the position that he had sexual intercourse with PW1 with consent. In his statement from the dock, he had said that he had an affair with PW1. On the day in question, he had gone to a party with the husband of PW1 (Thanuja). Thanuja had got drunk there. He had come to the house of PW1 on her invitation and had sex with her with consent. It was the statement of the appellant that PW1 kept the door open for him as she does on other days.

7. To find an accused guilty of rape, the prosecution has to prove beyond reasonable doubt that the accused had sexual intercourse with the victim, and that it was without her consent or against her will. In the instant case the appellant admittedly had sexual intercourse with PW1. Therefore, the remaining element that the prosecution has to prove beyond reasonable doubt is that the sexual intercourse the appellant admittedly had with PW1 was against her will or without her consent, as PW1 had been above 16 years of age at the time the incident occurred. It is incumbent upon the prosecution to prove beyond reasonable doubt the absence of consent to sexual intercourse.

8. All four grounds of appeal will be discussed together as they relate to the evidence.

9. It is the contention of the learned Counsel for the appellant that the learned High Court Judge has failed to consider the delay by PW1 to make the complaint to the police in the proper perspective. In that, it is submitted that PW1 initially did not tell her husband as the sexual intercourse was consensual. She was compelled to complain to the husband as the injuries she received were seen by the husband. Counsel further submitted that according to the evidence of the medical officer who examined PW1, the injuries PW1 had received could have happened while she was having consensual sex on a unevenly tiled floor. It is further submitted that if PW1 protested or screamed as she testified, her mother-in-law who lived just 10 feet away would have heard the noise.

10. Learned Deputy Solicitor General appearing for the respondent submitted that the medical officer who examined PW1 had opined that the history given by PW1 is compatible with the injuries received by PW1. Learned High Court Judge has considered all the evidence recorded and the dock statement made by the appellant in arriving at his conclusion, it is submitted.

11. I bear in mind that in sexual offences, like in other offences, no corroboration of the evidence of the prosecutrix is required to find an accused guilty, provided that the Court finds the prosecutrix is credible and trustworthy.

12. It is now a well settled principle of law that a conviction can be founded on the testimony of the prosecutrix alone, unless there are compelling reasons for seeking corroboration. Courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable ***(State of Himachal Pradesh V. Asha Ram AIR [2006] SC 381: [2006] SCC(Cri)296).***

13. In the instant case, PW1 has made the complaint to the police after a delay of 4 days. She had not even told her husband for four days. Delay in making the complaint can be justified if it is explained to the satisfaction of the Court. The reason for the delay in making a complaint to the police or informing her husband according to PW1 was that she feared the appellant doing some harm to her husband. According to PW1, later she decided to tell her husband after 4 days, as she thought that the appellant would come again.

14. It is the contention of the appellant that PW1 was compelled to make a false complaint to the husband, as her husband inquired as to how she received her injuries.

15. In her examination in chief, she said that no one asked about her injuries, but she on her own showed them to her husband (page 45 of the brief). In cross examination, again she confirmed that her husband questioned her only after she told him about the incident (page 65 of the brief). However, answering further cross examination PW1 admitted that although her husband inquired from her after seeing the injuries, she initially did not tell him (page 66 of the brief). She admitted that in her evidence, only after she was cross examined on her statement made to the police. The unacceptable explanation for the delay in informing the husband and making the complaint to the police affects her credibility.

16. The husband of PW1 would have been the best person to explain this issue, as he is the person to whom the most recent complaint was made, although it was made after 4 days. However, he was not called as a witness.

17. In the case of ***Sumanasena V. Attorney General [1999] 3Sri LR*** it was held;

"Just because a witness is a belated witness, Court ought not to reject his testimony on that score alone. Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness."

18. The learned Trial Judge has failed consider the issue of the delay in making the complaint that affects the credibility of PW1. There is a clear reasonable doubt created as to whether PW1 was compelled to make a false complaint that the appellant raped her when in fact it was consensual sex between the appellant and PW1. It was the position taken by the appellant right throughout the case.

19. It was the evidence of PW1 that the back door could be opened from outside by removing the latch by inserting a hand through a gap between the door and the raft. In that case the intruder should know that it could be opened from outside. It was the evidence of the appellant from the dock that the door was kept open for him to enter, by PW1. The house of the mother-in-law who lives with her daughter is just 10 feet away from PW1's house. It was confirmed by the police officer who inspected the scene. There had been no parapet wall in between the two houses. If PW1 screamed and was raped for about half an hour as she

testified, her mother-in-law and sister-in-law who live 10 feet away would have heard. In her evidence PW1 admitted that they may have heard (page 59 of the brief). However, none of them were called as witnesses.

20. The medical officer who examined PW1 had opined that the injuries received by PW1 were compatible with the history given by PW1. However, the same medical officer in cross examination had opined that the same injuries could also be sustained when having consensual sex on a rough surface.

21. The learned High Court Judge in his judgment has rejected the statement made by the appellant from the dock on the basis that the same position was not taken before by the appellant and he only suggested that he had an affair with PW1. The position taken up by the appellant right throughout had been that he had sexual intercourse with the appellant with her consent. It was not taken for the first time by the appellant in his statement in the dock.

22. In the above premise, I am of the considered view that the prosecution has failed to prove beyond reasonable doubt, the absence of consent by PW1 to sexual intercourse with the appellant. Hence, the conviction and the sentence of the appellant by the High Court are set aside. Appellant is acquitted of the charge.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL