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

In the matter of an appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979, read with Article 138 of the constitution of The Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA Case No: 31-34/2018

HC Ampara

Case No: HC 1790/17

MC/DEHI/NS/7411

Vs.

- 1. Warnasinghe Arachchilage Dulip
- 2. Wasala Mudiyanselage Tharinhu Dananjaya
- 3. Wijerathnalage Shantha Pushpa Kumara
- 4. Ulapamage Chamindu Dilshan

#### Accused

#### And Now Between

1. Warnasinghe Arachchilage Dulip

- 2. Wasala Mudiyanselage Tharinhu Dananjaya
- 3. Wijerathnalage Shantha Pushpa Kumara
- 4. Ulapamage Chamindu Dilshan

### **Accused-Appellant**

The Hon. Attorney General,

Attorney General's Department,

Colombo 12

# Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Anil Silva, PC for the Accused – Appellant

Dilan Ratnayake, DSG for AG

ARGUED ON : 20/07/2021

DECIDED ON : 06/08/2021

## R. Gurusinghe, J.

The accused-appellants (appellants) were indicted in the High Court of Ampara for having committed the offences of,

- i. Abduction of the prosecutrix to cause her defilement as punishable under section 357 read with section 32 of the Penal Code under count No. 1;
- ii. Gang rape on the prosecutrix punishable under S.364 (g); read with S.362(2) of the Penal Code in count 2-5 and
- iii. Robbery of a sum of Rs. 3,000/- from the possession of PW2, an offence punishable under Section 380 of the Penal Code.

After the trial by jury, all the appellants were found guilty by the verdict of the jury.

The 1<sup>st</sup> accused-appellant was sentenced to 35 years of rigorous imprisonment for counts 1, 2, and 6. In addition, there was a fine and a default term.

The second, third, and fourth accused-appellants were sentenced to 27 years rigorous imprisonment each and a fine, with default terms.

The impugned Judgement and sentences were challenged before this Court on several grounds.

The prosecution led the evidence of the prosecutrix (PW1), PW2, with whom PW1 had a love affair at that time, and the medical officer who examined PW1. In addition, the prosecution called the police officer who had conducted the investigation.

As per the evidence of the prosecutrix, while she and PW2 were talking inside a three-wheeler parked by the side of the road, the accused had accosted them. The 1st accused had ordered PW2 to get down. Then the 1st appellant had taken away the three-wheeler along with the victim and raped her. The other three accused had held PW3 during that time. After that, the 1st accused had forcibly taken the ID cards of the PW 1 and PW2, the documents relating to the three-wheeler, from the PW 1 and PW2. He photocopied them at Medagama, and set free the PW1 and PW2. While they were on the way home, PW1 had informed PW2 as to what had happened.

They both agreed not to go to the police, as they were frightened to go to the police. PW2 promised that he would marry the prosecutrix.

After about five months later, PW2 informed the prosecutrix and her family that he could not marry her as he was impotent and had other burning issues to attend.

After that, the prosecutrix made a complaint to the police.

The main ground of appeal is that the trial Judge had seriously misdirected the jury. It was also submitted that the verdict of the jury was unreasonable in the circumstance of the case.

The first accused-appellant gave evidence under oath before Court. The prosecution marked several contradictions between his evidence in Court and the statement he had made to the police while the first appellant was under cross-examination. The statement of an accused person can only be used to prove that he made a different statement at a different time. (Proviso to Section 110 (3) of the Criminal Procedure Code Act). It is also subject to the qualification that if the statement as a whole demonstrates that the accused person had committed an offence or that it suggests the inference that he had

committed the offence, then it would come within the prohibition contained in Section 25 of the Evidence Ordinance.

On page 612 of the brief, the 1st accused was cross-examined thus,

පු : තමුන් පොලිසියට මෙහෙම කිව්වද? පස්සේ මම තුීවිල් එකේ හිටිය කොල්ලා බිමට බස්සලා කෙල්ලත් එක්ක මම තුීවිල් එකට ගොඩ වුණා කියලා කිව්වද?

උ : නැත ස්වාමිණි.

පු : තමුන්ට හොඳටම විශ්වාසද ?

උ : එහෙමයි ස්වාමිණි.

පු : කමුන් පොලිසියට කියලා තියනවා නම් පස්සේ මම තුීවිල් එකේ හිටිය කොල්ලා බිමට බස්සලා කෙල්ලත් එක්ක මම තුීවිල් එකට ගොඩ වුණා කියලා තියෙනවා නම් ඒක හරිද? වැරදිද?

උ : වැරදියි.

ඒ අනුව උතුමාණෙනි මේ අවස්ථාවේදී පස්සේ මම තිව්ල් එකේ හිටිය කොල්ලා බිමට බස්සලා කෙල්ලත් එක්ක මම තිව්ල් එකට ගොඩ වුණා. යන කොටස පැ. 16 වශයෙන් පරස්පරතාවයක් වශයෙන් ලකුණු කිරීම සඳහා ගරු අධිකරණයේ අවසර අයැද සිටිනවා.

අවසර දෙමි.

පු : තමුන් එතකොට පොලිසියට කියලා තියෙනවා නම් තරිදුයි, ශාන්තයි, චමිදුයි තුන් දෙනා තුීවිල් එකේ හිටිය කොල්ලත් එක්ක ආපු බයික් එකේ දාලා හේනානිගල පැත්තට යැව්වා කියලා ඒක හරිද වැරදිද ?

උ : මම එහෙම දෙයක් පැවසුවේ නෑ ස්වාමිණි.

උතුමාණෙනි එකී කොටස පැ. 17 වශයෙන් පරස්පරතාවයක් ලෙස ලකුණු කිරීම සඳහා අවසර ඉල්ලා සිටිනවා. අවසර දෙමි.

පු : තමුන් පොලිසියට කියලා තියෙනවා නම් මම ඒ කෙල්ලත් එක්ක හේනානිගල ඇල පාරේ නවරත්නගේ ගල්වල පාරේ මීටර් 60 ක් විතර ඇතුලට ගොස් තීවිල් එක නැවැත්තුවා කියලා ඒක හරිද වැරදිද?

උ : වැරදියි ස්වාමිණි

( ගරු උතුමාණෙනි, එකි කොටස පැ. 18 ලෙස පරස්පරතාවයක් වශයෙන් ලකුණු කර ඉදිරිපත් කිරීම සඳහා ගෞරවයෙන් ඉල්ලා සිටිනවා. )

පු : මං තමුන්ට යෝජනා කරනවා තමුන් පොලිසියට කියලා තියෙනවා කියලා තමුන්ගේ පොලිසියේ කළ පුකාශයේ කියලා තියෙනවා කියලා " මගේ ....(the slang word used for penis is omitted) හොඳට කෙලින් වෙලා තිබ්බේ" කියලා. ඒ ගැන තමුන්ට මොකක්ද කියලා තියෙන්නේ ? ඒක හරිද? වැරදිද ?

උ : පිළිගන්නේ නෑ.

( ගරු උතුමාණෙනි, එකි කොටස පැ. 19 ලෙස පරස්පරතාවයක් වශයෙන් ලකුණු කර ඉදිරිපත් කිරීම සදහා ගෞරවයෙන් ඉල්ලා සිටිනවා. )

It is unbelievable that the learned counsel for the prosecution moved to mark this portion as a contradiction in a rape case.

පු : දැන් තමුන් පොලිසියට මෙහෙම කිව්වද ? " කෙල්ලගෙයි, කොල්ලගෙයි ජාතික හැදුනුම්පත්, දෙක කොල්ලගේ රියදුරු බලපතුය, තුීවිල් එකේ ලයිසන් ඉන්ෂුවරන්ස් මම ගත්තා " කියලා ඔබ පොලිසියට කිව්වද ?

උ : නෑ ස්වාමිණි.

( ගරු උතුමාණෙනි, එකී කොටස පැ. 20 ලෙස පරස්පරතාවයක් වශයෙන් ලකුණු කර ඉදිරිපත් කිරීම සදහා ගෞරවයෙන් ඉල්ලා සිටිනවා. )

පු : එම නම් තමුන් බලන්න මෙහෙම පොලිසියට කිව්වද කියලා ඒක හරිද වැරදිද කියලා " පස්සේ මමයි, තරිදුයි, කෙල්ලයි, ඇයගේ කොල්ලයි මැදගම තියෙන සුපුන් සෙලියුර එකේ මැදගම පාසලේ ගේට්ටුව ලග නීවීල් එක නැවැත්තුවා. " එහෙම කිව්වද ?

උ: නැත ස්වාමිණි.

( ගරු උතුමාණෙනි, එකී කොටස පැ. 21 ලෙස පරස්පරතාවයක් වශයෙන් ලකුණු කර ඉදිරිපත් කිරීම සඳහා ගෞරවයෙන් ඉල්ලා සිටිනවා. )

පු : තමුන් එතකොට මෙහෙම පොලිසියට කිව්වද? " පස්සේ මං තරිදුට කිව්වා මං ගාව තිබ්බ කෙල්ලගේ, කොල්ලගේ හැදුනුම්පත් වල රියදුරු බලපතුය, තුී රෝද රථයේ රක්ෂණ සහතිකය හා ආදායම් බල පතුය දීලා ෆොටෝ කොපි ගහගෙන එන්න කියලා ? "

උ : කිව්වේ නෑ ස්වාමිණි.

( ගරු උතුමාණෙනි, එකී කොටස පැ. 22 ලෙස පරස්පරතාවයක් වශයෙන් ලකුණු කර ඉදිරිපත් කිරීම සදහා ගෞරවයෙන් ඉල්ලා සිටිනවා. )

පු : තමුන් එහෙනම් පොලිසියට මෙහෙම කියලා තියෙනවද " ෆොටෝ කොපි ගෙනල්ලා ඒ කොල්ලවත්, කෙල්ලවත් පොලිසි යන්නේ නැතිව බය කරන්න හිතාගෙන කියලා?

උ : නෑ ස්වාමිණි.

පු : ඒ අනුව එහෙම කියලා තියෙනවා හරිද ? වැරදිද ? පොලිසියට?

උ : එහෙම කියලා නෑ ස්වාමිණි.

පු : ඒක වැරදියි කියලා තියෙනවා නම් ?

උ : වැරදියි.

( ගරු උතුමාණෙනි, එකී කොටස පැ. 23 ලෙස පරස්පරතාවයක් වශයෙන් ලකුණු කර ඉදිරිපත් කිරීම සඳහා ගෞරවයෙන් ඉල්ලා සිටිනවා. ) පු : තමුන් පොලිසියට මෙහෙම කියලා තියෙනවා නම් හරිද වැරදිද ? " පස්සේ මම ෆොටෝ කොපි අරගෙන ඔරිජිනල් බලපතු හා හැදුනුම්පත් කෙල්ලටයි, කොල්ලටයි දූන්නා " එහෙම කියලා තියෙනවාද ?

උ : නැත ස්වාමිණි.

( ගරු උතුමාණෙනි, එකී කොටස පැ. 24 ලෙස පරස්පරතාවයක් වශයෙන් ලකුණු කර ඉදිරිපත් කිරීම සදහා ගෞරවයෙන් ඉල්ලා සිටිනවා. )

පු : තමුන් මෙය පොලිසියට කිව්වද කියලා බලන්න. " එහෙම දීලා අපි කිව්වා අපි සී.අයි.ඩී. එකෙන් බැරි වෙලාවත් මේවා පොලීසියට කියන්න එපා. එහෙ කලොත් බලාගන්නම් කියලා " ?

උ : එහෙම දෙයක් පැවසුවේ නැහැ ස්වාමිණි.

( ගරු උතුමාණෙනි, එකී කොටස පැ. 25 ලෙස පරස්පරතාවයක් වශයෙන් ලකුණු කර ඉදිරිපත් කිරීම සඳහා ගෞරවයෙන් ඉල්ලා සිටිනවා. )

පු : තමුන් පොලිසියට කිව්වද ? මේ විදිහට " ඊට පස්සේ අර එකේ කෙල්ලයි, කොල්ලයි හොඳටම බය කරලා, තොපි ආයෙත් මේ ගැන කාටවත් කිව්වොත් බලාගෙනයි කියලා තර්ජනය කරලා එතනදි තුීවිල් එක දිලා පිටත් කර හැරියා " ?

උ : එහෙම දෙයක් සිදු වුනේ නැහැ ස්වාමිණි.

පු : එහෙම තමුන් පොලිසියට කියලා තියෙනවා නම් ඒක හරිද වැරදිද ?

උ : වැරදියි.

( ගරු උතුමාණෙනි, එකී කොටස පැ. 26 ලෙස පරස්පරතාවයක් වශයෙන් ලකුණු කර ඉදිරිපත් කිරීම සදහා ගෞරවයෙන් ඉල්ලා සිටිනවා. )

The effect of the above evidence clearly suggests that the 1<sup>st</sup> accused-appellant confessed to the police.

Section 25 (1) of the Evidence Ordinance provides that no confession made to a police officer shall be proved as against a person accused of any offence.

In *Obiyas Appuhamy v. Queen* 54 NLR 32, the evidence was led that the accused volunteered a statement to a police officer, who, thereupon, immediately handcuffed the accused and took him to the scene of the offence. It was held that such evidence was inadmissible. It is not solely evidence of the actual terms of a confession that can be obnoxious to section 25 (1) of the Evidence Ordinance, but also any evidence which if accepted would lead to the inference that the accused made a confession to a police officer would be inadmissible.

In deciding, whether a statement made to a police officer is within the meaning of sections 17 and 25 of the Evidence Ordinance Basnayake CJ quoted the following passage from *Anandagoda v. Queen* 64NLR 39 in the case of *The Oueen v Abadda* 66 NLR 397.

"The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts .... It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time or which may emerge in evidence at the trial. But equally, it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added

together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession even although the accused at the same time protests his innocence. .... The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt?"

The Court of Criminal Appeal adopted the same test in *Punchi Banda v The State* 76NLR293

When taking into consideration the contradictions that were marked by the State Counsel as a whole, it gives the impression that the accused made a confession.

We are of the opinion that in the guise of marking contradictions, wholly inadmissible evidence was improperly admitted violating the provisions of section 25 of the Evidence Ordinance. It may have influenced the jury to accept the evidence of PW1 and PW2 and reject the accused-appellants evidence. The learned Trial Judge should have shut out these contradictions as they amounted to a confession.

Furthermore, the Trial Judge has not directed the jury that the contradictions cannot be considered as substantive evidence. The learned Trial Judge should have warned the jury that the contradiction should not be taken as corroborative evidence of PW1 and PW2.

In Babysingho v The Queen 75NLR 451, Sirimanne J stated as follows:

"A statement made by a witness outside Court may always be used for the purposes of contradicting his evidence. Under section 157 of the Evidence Ordinance, such a statement made at or about the time when an incident took place can be used, within the limits (now authoritatively defined) in order to show consistency, and thus corroborate the witness's evidence. The most common example of this is the "First Information" on which investigations by the police were initiated.

But, once a witness denies having made the statements attributed to him, as in this case, the jury must be told that these statements do not form substantive evidence on which they can act. Such statements- if the witnesses to whom they had been made are believed-would tend to show that the person who now denies them is unworthy of credit, but those statements cannot be substituted for his evidence."

The prosecutrix made a complaint to the police after five months after the incident. The explanation for the delay was that PW2 had agreed to marry her, so she did not make a complaint. After about five months later PW2 said that he was not in a position to marry her. This was the reason to complain. There was no direction in this regard. The learned Trial Judge should have directed the jury whether they could accept the explanation for the delay given by the prosecutrix as plausible.

There are substantial contradictions between the evidence of PW1 and PW 2. As the State does not support the verdict, we shall not refer them here.

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The learned Deputy Solicitor General conceded that the conviction could not be

supported considering the Trial Judge's misdirection and non-direction to the

jury. He also pointed out that there was no direction with regard to 'gang rape'

in the charge to the jury. No evidence had been led to show that the second,

third and fourth accused had abetted or had a common intention with the first

accused to do the alleged rape. They were nowhere near the place where the

alleged rape was committed. Therefore, the second, third and fourth accused

could not have been convicted for gang-rape charges.

We must appreciate the learned Deputy Solicitor General who has shown the

great spirit of Attorney Generals Chambers by conceding that the defence

version, in this case, is equally probable. He did not seek a retrial.

For the reasons set out above, the conviction and the sentence are set aside.

The four accused-appellants are acquitted of all charges.

The appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

Judge of the Court of Appeal