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.

Court of Appeal Case No: CA 69/17
HC Kurunagala Case No: HC 52/2014

Habib Mohammed Maharufdeen

ACCUSED-APPELLANT

Vs

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

RESPONDENT

Before:	**N. Bandula Karunarathna J.**
	&
	R. Gurusinghe J.
Counsel:	Shavindra Fernando PC with Umayangani Wijayasuriya for the accused-appellant
	R. Barry SSC for the complainant-respondent
Written Submissions:	By the accused-appellant on 01.11.2017
	By the complainant-respondent on 04.12.2017
Argued on:	15.02.2021
Decided on:	28.07.2021

N. Bandula Karunarathna J.

The accused-appellant, herein after referred to as the "appellant", was indicted in the High Court of Kurunegala on the following charges;

1. that he committed the offence of grave sexual abuse of Jainool Abdeen Fathima Sassna by inserting his finger into the female organ of the said Jainool Abdeen Fathima Sassna which is an offence punishable under section 365(b) 2(b) of the Penal Code as amended by Act No 22 of 1995, Act No 29 of 1996 and Act No. 16 of 2006.

2. that he committed the offence of rape of Jainool Abdeen Fathima Sassna (a female under 16 Years of age) which is an offence punishable under section 364(2)(e) of the Penal Code as amended by Act No 22 of 1995.

At the conclusion of the trial, the learned Trial Judge found the accused-appellant guilty of both offences and proceeded to impose seven years of rigorous imprisonment and a fine of Rs 50,000/- coupled with a default sentence of rigorous imprisonment for two years, on the accused-appellant in respect of count one of the indictment.

The learned Judge of the High Court proceeded to impose ten years of rigorous imprisonment and a fine of Rs. 50,000/- coupled with a default sentence of rigorous imprisonment for two years, on the accused-appellant in respect of count 2 of the indictment.

The learned Judge of the High Court further ordered the jail terms of seven years' rigorous imprisonment and ten years' rigorous imprisonment imposed on the accused-appellant, to run concurrently.

The accused-appellant preferred this appeal against the said conviction and sentence.

Grounds of appeal are the following.

(a) The learned Judge of the High Court had failed to appreciate serious contradictions related to the time at which the alleged offences had taken place.

(b) The prosecutrix was not corroborated by any of the prosecution witnesses.

(c) The learned Judge of the High Court failed to apply legal principles related to corroboration.

(d) The learned High Court judge had disregarded grave inconsistencies related to sexual acts committed as narrated by the prosecutrix.

(e) The learned Judge of the High Court had erroneously come to the conclusion that the defence taken by the accused was not put to the prosecution witness.

(f) The learned High Court judge had failed to give the benefit of the doubt arising from the testimony of the accused-appellant, first defense-witness: Mohammed Thaheer and eleventh prosecution-witness: Police Sergeant Shantha Kumara.

At the trial, the prosecutrix testified to the effect that, her birthday was on 23.09.2000. In 2011 she was studying in year seven. She has known the accused-appellant since school-going days. The accused-appellant had a shop on the road which led to her school and she would go to the accused-appellant's shop to buy food, whenever she could not take her breakfast from home to school on days, when her mother was not well. She would not go to the accused-appellant's shop in the afternoons. The accused-appellant had misbehaved with her and he had threatened her not to tell her parents. She further testified to the effect that, after those incidents she had stopped going to the accused-appellant's shop.

The accused-appellant had further threatened the prosecutrix by saying that her father and mother will be killed in the event she did not do what she was asked to do, when misbehaving. The incidents had taken place when the prosecutrix was studying in year seven. When she would go to the accused-appellant's shop the accused-appellant had been in the habit of talking to the prosecutrix by asking her whether her father had brought the stuff he needed. The accused-appellant had given water to the prosecutrix once when she was inside the accused-appellant's shop and she had felt faintish thereafter. She had been seated for a while and had gone home.

On being threatened by the accused-appellant that her mother and father would be killed unless she did what she was asked to do, the prosecutrix had at the request of the accused-appellant gone to a room that was located at the rear side of the accused-appellant's shop. The accused-appellant had thereafter removed her purdah whilst she was inside this small room. The accused-appellant had thereafter embraced her. As a customer had come all of a sudden, the accused-appellant had left her behind in the small room and had proceeded to the shop. The accused-appellant had thereafter asked the prosecutrix to go home.

The accused-appellant had thereafter on the second day, namely, the day subsequent to the day on which the prosecutrix had fainted, had caressed her body and her private parts, having removed her underwear and white trouser she was wearing to school. She had been in a standing position at that point. There had been another incident on the third day. Namely, the day

subsequent to the day the accused-appellant had caressed the prosecutrix. She had been on her way to school on that day dressed in her school attire.

The prosecutrix had gone to the accused-appellant's shop on her way to school and the accused-appellant had asked her to remove the purdah that she had been wearing at that point of time. The accused-appellant had thereafter removed the purdah. The accused-appellant was clad in a sarong and a shirt at that time and he had removed his shirt first and then removed her clothes and had caressed her chest area and her private parts whilst embracing her.

The accused thereafter placed his male organ on her female organ and had pressed same whilst she was lying on the floor of the small room. The prosecutrix had then started crying out aloud asking him to stop. She had felt pain in her female organ whilst the accused-appellant pressed his male organ against her female organ. He had thereafter penetrated his male organ into the female organ of the prosecutrix. The accused-appellant had been on top of the body of the prosecutrix for a period of ten minutes, when he placed his male organ on her female organ and the prosecutrix had been looking upwards crying at that point of time. Someone had come to the shop thereafter and on hearing that the accused-appellant had left her behind. She had thereafter got dressed and gone home.

When she returned home, her mother had been there and as she had been threatened by the accused-appellant that her mother would be killed in the event she narrates the incident to her, the prosecutrix had refrained from narrating the incident to her mother on that day. The prosecutrix had narrated the incident to her mother two months later when the prosecutrix had told her mother one day that she couldn’t go to school any more as the accused-appellant would harass her. On the very same day, she narrated the incident to her mother, she had gone to the police station in Gokaralla with her mother and had lodged a complaint there.

Thereafter, the prosecutrix had shown the place of incident to the police. The police had produced the prosecutrix to a doctor. Then she had narrated the incident to the doctor. The three incidents had taken place within the course of one month. The prosecutrix categorically took up the position that she had not engaged in sexual intercourse with another male previously. On being questioned by the learned State Counsel as to whether she was having a boyfriend the prosecutrix said that she did not have a boyfriend.

At the trial, the mother of the prosecutrix, Carder Mohammed Siththi Nadeeja had testified to the effect that: she knew the accused-appellant as he was from her village. She had remembered the time in which the prosecutrix had narrated the incident to her to be June in 2011. On being suggested as to whether she would admit that she had given a statement to the police on 15.06.2011, she admitted so. Her daughter, the prosecutrix had informed her that she did not

want to go to school. she couldn't go passing the shop of the accused-appellant to go to school, as she was being harassed by the accused-appellant always. The witness had made inquiries from the prosecutrix the reason for same and the prosecutrix had informed her that the accused-appellant would misbehave with her. On being informed of same, she had taken the prosecutrix to the General hospital in Kurunegala, and she had thereafter given a statement to the police.

On being questioned as to whether she threatened her daughter or influenced her daughter to lodge a false complaint to the police against the accused-appellant, the witness categorically took up the position that she did not influence her daughter the prosecutrix to lodge a false complaint to the police against the accused-appellant. The witness further testified to the effect that, the statement of her daughter, the prosecutrix, had been recorded by the police subsequent to the witness being directed to go to a side. The prosecutrix had been produced before the Judicial Medical Officer; (JMO);(PW3) on 14.06.2011 at 10 a.m. He had examined the prosecutrix when she was warded at Kurunegala Teaching Hospital.

The prosecutrix had narrated the incident to the JMO in Tamil whilst another doctor by the name of Uwaais had translated the narration to the JMO. In the said narration, the prosecutrix had informed the Judicial Medical Officer (PW3) that, ten days previously, the owner of the *ulundu-wade shop* had taken her to the hotel, removed her underwear and had inserted his finger in to her female organ twice. He had furthermore attempted to insert his male organ into the female organ of the prosecutrix. On being questioned as to whether it appeared that the prosecutrix had made the said narration under the influence of the mother, the JMO took up the position that the prosecutrix did not appear to be under any influence from the mother. When the Judicial Medical Officer had questioned the mother, the mother had informed him that the prosecutrix had not gone to school on 10.06.2011 and it was thereafter that she had come to know about the incident.

Upon examining the female organ of the prosecutrix the JMO had observed a tear in the hymen in the area between the 3 o' clock and 6 o' clock position of a clock. The JMO had furthermore observed the hymeneal tear to be a large one. The prosecutrix was not having any external injuries. On being questioned as to whether the tear in the hymen of the prosecutrix was natural, the JMO categorically answered same by stating that the tear had taken place owing to an insertion of an external object. The reason which resulted in the hymeneal tear to be a large one, the JMO had opined, did owe to the fact that the prosecutrix had not yet attained age and therefore the hymen was very thin, which resulted large tears to take place upon the insertion of an external object to the female organ. The JMO clarified the external object to be a male organ having taken in to consideration the area in which the tear had taken place with reference to the positions in the clock. On being questioned whether the tear could be caused by a finger

or a male organ the JMO opined to the effect that the tear could take place either way. He had further testified to the effect that his observation is consistent with the short history given to him by the prosecutrix. Having testified same on being questioned as to whether the prosecutrix had been subjected to the act repeatedly the JMO had opined to the effect that there could have been either one or repeated acts.

Police Sergeant 28873 Shantha Kumara (PW 11) who had assisted the chief investigator; IP Weerarathne testified to the effect that the chief investigator had passed away from a fatal accident and also that as he assisted the IP with the investigations and was present at the time the notes of observations were made by the IP, he was in a position to testify on behalf of the late IP Weerarathne. The witness testified that the first complaint had been lodged on 11.06.2011 at 12.20 hrs. from Carder Midin Nadeeja. The IP had testified about his observations of the place of incident. There had been three shops in one line with a single roof. The prosecutrix had pointed the shop in the middle as the place of the incident.

It was the contention of the counsel for the appellant that, in her examination-in-chief, the prosecutrix testified as to the time period during which the alleged offences took place. She testified that on three occasions the appellant committed sexual offences on her and she informed her mother two months after the incident. She further testified that the three sexual offences took place during a period of one month. She further testified that the three incidents had taken place within a space of five days.

According to the prosecutrix, she had informed her mother two months after the last sexual act. According to the Judicial Medical Officer (PW3), he had examined the prosecutrix on 14.06.2011 at 10am. As to the medical history obtained from the victim, the boutique keeper of a kiosk had inserted his finger to her vagina twice and also attempted to insert his penis to her vagina, ten days before. As per medical history narrated by the prosecutrix, no penetration had taken place but only an attempt to penetrate. The JMO (PW3) testified that the sexual act had taken place ten days prior to the medical examination.

As per the JMO, the injury is of recent origin, which could have taken place ten days prior to the medical examination. In the circumstances, the accused-appellant argues that the evidence of the prosecutrix is not corroborated by the medical evidence in so far as the time at which the sexual act took place. While the medical evidence exonerates the appellant it also opens up a possibility of the involvement of a third person, other than the appellant.

The learned counsel for the appellant says that the trial Judge however did not address his mind to this glaring inconsistency between the version of the prosecutrix and the testimony of the JMO

and failed to give the benefit of the doubt to the accused. The prosecutrix was not corroborated by any of the prosecution witnesses.

It was the contention of the counsel for the appellant that, the version of the prosecutrix was not corroborated by the Judicial Medical Officer (PW3). As per the prosecutrix, the incident had taken place two months prior to informing her mother (PW2) Sitti Kadija on 10.06.2011, according to PW3, the injury could have taken place ten days prior to his medical examination on 14.06.2011. According to Sitti Kadija, the prosecutrix narrated the alleged incident ten to fifteen days after it had occurred. The version of the prosecutrix that the incident had taken place two months previously is not corroborated by PW2(her mother) or Judicial Medical Officer (PW3).

It was the contention of the counsel for the appellant that, the learned Judge of the High Court failed to apply the legal principles related to corroboration. In the instant case the prosecution had called PW2 as a corroborative witness. Admittedly, she is the mother of the prosecutrix. It is trite law that where a witness is an interested witness, the trial Judge should proceed cautiously. While on facts, testimony of PW2 (mother of the prosecutrix) does not corroborate the story of PW1; the prosecutrix. The learned Judge of the High Court acted upon it without considering the legal principles applicable to the evaluation of evidence of an interested witness as enunciated by Justice Shiranee Thilakawardena in AG vs Sandanam Pitchi Marry Theresa; 2011 (2) SLR 291.

The appellant argues that the learned Judge of the High Court had disregarded the grave inconsistencies related to the sexual acts committed as narrated by the prosecutrix. It was the contention of the counsel for the appellant that, PW 1 testified that she was made to lie on the ground and the accused had inserted his penis into her vagina.

Learned President's Counsel for the appellant says that the evidence could be contrasted with the statement given to the police by PW 1 on 15.06.2011 at 13.25 hours at the Kurunegala Teaching Hospital. The prosecutrix contradicts herself on this vital position. In court she took up the position that she was made to lie on the ground and then the offence was committed. In her statement to the police the prosecutrix took up the position that the offence was committed in an upright position, by pressing her back against the wall. The learned Judge of the High Court however disregarded this vital contradiction.

At the trial, the prosecutrix took up the position that three sexual offences were committed on her on three separate occasions within a period of five days. On the first occasion the accused had kissed her. On the second occasion the accused had kissed her and had given some water to drink. Then she had fainted. On the third occasion the accused made her lie down on the floor and had inserted his penis to her vagina. That was the only occasion the accused inserted his penis into the vagina. Thus, the prosecutrix never testified with regard to the alleged sexual act

mentioned in the first count, that was “inserting a finger into the vagina”, an offence punishable under section 365 B (2)(b) of the Penal Code. Hence the learned counsel for the appellant says that the first count should necessarily fail.

As per the Judicial Medical Officer (PW3) the enlargement of the hymeneal cavity could have taken place due to natural causes. He also testified that it could also take place due to the insertion of a penis or a finger. Thus, the Judicial Medical Officer was not conclusive that the disruption of the hymen was exclusively due to a sexual act. In the instant case, as per the Judicial Medical Officer, the disruption of the hymen of the prosecutrix could be attributed to, natural causes or inserting a finger or inserting a penis. In the circumstances, one hypothesis namely, natural causes are totally consistent with the innocence of the accused and the learned Counsel for the appellant argues that he should be given the benefit of the doubt. But in the instant case, the learned Judge of the High Court used the other hypothesis to buttress the story of the prosecutrix and this could be considered as a very serious misdirection of law.

Due to the infirmities in her testimony and contradiction with her first statement to the police, the learned Counsel for the appellant says that, a grave doubt would create with regard to the story of the prosecutrix. But the learned High Court judge failed to give the benefit of the doubt to the appellant. He further says that the learned Judge of the High Court had erroneously come to the conclusion that the defence taken by the accused was not put to the prosecution witness. It was the contention of the counsel for the appellant that, immediately upon his arrest the accused did take up this stand in his statement to the police. The mother of the prosecutrix (PW2) had admitted that she met the wife of the accused. She also admitted that she had given a letter to the mosque. Immediately upon receiving the complaint she did not rush to the police, but there had been some dialogue with the accused and the mosque. Counsel for the appellant says that, this confirms the stand taken by the accused. furthermore, defence witness: Mohammed Lebbe Thaheer corroborates this position.

Considering the totality of the evidence given by the accused, second prosecution witness, defence witness: Mohammed Lebbe Thaheer and the statement made by the accused to the police, immediately upon his arrest, it was proved that the mother of the prosecutrix (PW2) did coerce the accused. Alternatively, a reasonable doubt is created whether PW2 did coerce the accused. It is trite law that where an accused is not taking a special or general defence, he does not have to prove his position but the learned counsel for the appellant argues that creating a reasonable doubt would suffice to bring home an acquittal. Unfortunately, the learned Judge of the High Court had failed to address his mind to this legal principle and thereby failed to give the resulting benefit of the doubt to the accused.

The contention of the learned President's Counsel for the appellant was that, the learned Judge of the High Court had failed to give the benefit of the doubt arising from the testimony of the accused, defense witness: Mohammed Thaheer and the eleventh prosecution witness: Police Sergeant Shantha Kumara. The position of the accused was that any unusual happening in his boutique could be observed by the neighboring boutique and the salon, hence, it is not practically possible to commit the offences alleged by the prosecutrix. The position of the accused was confirmed by defense-witness: Mohammed Thaheer. He could observe happenings in the adjoining boutique of the accused. He further testified that the prosecutrix never came alone to the boutique. Most importantly, the accused's position was confirmed by Police Sergeant Shantha Kumara (PW 11).

It was held in Kethsiri v AG 2014; (1) SLR 38, that,

'courts in evaluating evidence should not look at the evidence of the accused person with a scant eye. Defence witnesses are entitled to equal treatment with those of the prosecution and Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses. There is no reason to reject the accused –appellant's evidence. This means that the evidence of the accused was capable of creating a reasonable doubt in the prosecution case. Evidence of main prosecution witness creates a reasonable doubt in his own evidence and corroborates the position taken up by the accused-appellant.'

The learned President's Counsel says that, the learned Trial Judge had misdirected himself with regard to the legal principle that an accused taking up a non-statutory defence (general or special) does not require to prove his point but mere raising of a doubt would suffice to bring home an acquittal. The counsel for the accused-appellant argues that in the aforementioned circumstances, there are grave infirmities in the evidence of the main witness of the prosecution's case, PW1; the prosecutrix. There is no corroboration of the evidence of the prosecutrix either by the JMO; PW3 or her own mother; PW2. The accused's version is corroborated by defense-witness: Mohammed Thaheer, eleventh prosecution witness, Police Sergeant Shantha Kumara and PW2. The medical testimony also favors the accused. The learned Judge of the High Court had failed to give the benefit of the infirmities related to the prosecution witnesses.

It is to be noted that the learned Judge of the High Court had clearly appreciated the inconsistencies related to the time at which the alleged offences had taken place. The learned Trial Judge had deemed it fit to disregard the said inconsistencies, having taken in to consideration the fact that the incident had taken place whilst the victim was at a tender age and it is accordingly unfair to expect the prosecutrix to remember the exact time, date, month and the whole episode.

It is the position of the respondent that the learned Judge of the High Court arrived at this observation based on the dicta in Bharwada Bhoginbhai Hirjibhai vs State of Gujarat 1983 AIRHC 753. In that case it was held that;

> " In regard to exact time of an incident or the time duration of an occurrence, usually people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person ...."

The respondent further deems it pertinent in this context to draw the attention of this Court to the fact that the prosecutrix was studying in year seven and was also only ten years of age at the time of the incident. The prosecutrix was fifteen years of age when she testified in the High Court of Kurunegala. The prosecutrix was called upon to testify in respect of incidents that had taken place five years ago when she was at the tender age of ten. It is natural for her to forget the exact period of incidents over the passage of time evolving from the tender age of ten to a fifteen-year-old. The demeanor and deportment of the prosecutrix was noted by the trial Judge. The proceedings clearly reflect the fact that the prosecutrix was in a state of shock and feared to testify in court and she was reluctant to explain the incident in court.

The version of the prosecutrix that the incident took place ten days prior to the examination by the JMO should be correct. As the said position came to be narrated to the JMO in the short history to the Medico-Legal Report way back in 2011, when the incident was fresh in the mind of the victim.

It is the position of the respondent that there is no merit for the possibility of the involvement of a third person. The learned State Counsel questioned the prosecutrix as to whether she has a boyfriend where she in response categorically denied same. The victim took up the position that she has not engaged in sexual intercourse prior to the instant matter. There is no necessity to discuss the principles of law relating to corroboration as the prosecutrix is a reliable witness, without a single omission being pointed out and not a single contradiction being marked during the course of the trial. The proceedings relating to the cross examination of the prosecutrix clearly reveals the fact that not a single suggestion had been made to the prosecutrix which reflects the fact that a previous enmity resulted in the prosecutrix to lie, to concoct, to fabricate a false case against the accused-appellant. Not a single suggestion had been made to the mother of the prosecutrix (PW 2) that she entertained an enmity with the accused-appellant, a grudge against the accused-appellant to concoct and fabricate a false complaint against the accused-appellant.

In this context it is important to note the decision in R Vs Dharmasena; 58 NLR 15. In the said case it was held that;

> "…. in a charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated …."

Basnayake CJ was of the view that;

> "…. the principal submission made on behalf of the first appellant was that the learned trial Judge failed to direct the jury that as against him there was in law no corroboration of the evidence of the prosecutrix. We are unable to uphold this submission as in our view the story of the prosecutrix was corroborated in several respects. Our Penal Code does not require that the evidence of the prosecutrix in a charge of rape should be corroborated although it does provide that in the case of charges of procuration under section 360A, no person shall be convicted upon the evidence of one witness, unless such evidence be corroborated in some material particular by evidence implicating the accused."
>
> "Another such provision is to be found in the Maintenance Ordinance. There is no presumption, as in the case of an accomplice that a prosecutrix in a case of rape is unworthy of credit unless she is corroborated in material particulars. Except where corroboration is expressly required by statute, our rule of evidence [Evidence Ordinance, Section 134. William Crocker, 17 Cr. App. R. 45.] is that no particular number of witnesses shall in any case be required for the proof of any fact…"

E. R. S. R. Coomaraswamy, in his treatise, The Law of Evidence, Volume II, book 2, p 625 argues that corroboration is needed;

> "where a witness is neither wholly reliable nor wholly unreliable" and is required in three sets of circumstances:
>
> (i) Where it is expressly required by statue,
>
> (ii) by rule of practice (developed by the Courts) and
>
> (iii) sometimes on the facts and circumstances of the particular case.

In Inoka Gallage Vs Kamal Addararachehi and Another; 2002 (1) SLR 307 it was held;

> ..." corroboration is not a sine qua non for a conviction in a rape case. It is only a rule of prudence. If the evidence of the victim does not suffer from basic infirmity and the probability factor does not render it unworthy of credence, as a general rule there is no

reason to insist on corroboration. But, in a trial without a jury there must be an indication in the judgment that the judge had this rule in mind" ...

It was held in Premasiri vs AG 2006; (3) SLR 106;

> "there is no rule that there must be corroboration in every case, before a conviction can be allowed to stand. It is well settled law that a conviction for the offence of rape can be based on the sole testimony of the prosecutrix, if it is reliable, unimpeachable and there is no infirmity. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. The rule is not that corroboration is essential before there can be a conviction in a case of rape but the necessity of corroboration as a matter of prudence except where the circumstances make it unsafe to dispense with it, must be present in the mind of the judge."

In the case of Imrat Lal v State of Madhya Pradesh; 1987 Cr. LJ 557, Ram Pal Singh J. quoted at page 804 of R. Dayal's Commentary on Sexual Offences with Special Reference to the Law of Rape; edition 1999, that;

> "a conviction of an accused can be based solely on the evidence of the prosecutrix, if her evidence is worthy of credence, the rule of corroboration is not a rule of law. It is only a rule of prudence. Insistence on corroboration is advisable but it is not compulsory in the eye of law. The nature and extent of corroboration necessarily varies with the circumstances of each case and the nature of corroboration too varies from case to case. If the narration of the prosecutrix is natural, the evidence of the prosecutrix inspires confidence in the mind of the judge and the circumstantial and other evidence even slightly supports the case of the prosecutrix then there arises no necessity of any corroboration of her statement"

Therefore, corroboration accordingly is needed only "where a witness is neither wholly reliable nor wholly unreliable" and not otherwise. There is no merit in the argument that, "the prosecutrix was not corroborated by any of the prosecution witnesses" as the necessity to corroborate arises only in an instance where it is established that the prosecutrix is not a reliable witness. The testimony of the prosecutrix amply demonstrates the fact that she is a reliable witness and corroboration accordingly is not a sine qua non. There is absolutely no merit whatsoever in these grounds of appeal.

I would like to add that the appellant is not in a position to quote portions from the statement of the prosecutrix to the police at the appeal stage. This Court is called upon only to evaluate the evidence that was led in the High Court trial. The only instance in which this Court is permitted to peruse Information-Book extracts and read statements is when looking in to the veracity of an omission or a contradiction. This was held in Keerthi Bandara V. Attorney General; 2000 (2) SLR at 245.

The testimony of the prosecutrix makes it apparent that there was not a single reason in existence, which resulted in the prosecutrix to concoct and fabricate a false case against the accused-appellant. The testimony of the prosecutrix was devoid of exaggeration; she was not keen to testify.

The only reason which resulted in the failure of the prosecutrix to testify with regard to the penetration was simply owing to the fact that the prosecutrix was called upon to testify in respect of incidents that had taken place five years ago, when she was in the tender age of ten years and studying in year seven and it is natural for the prosecutrix, not to have a video camera memory and forget certain incidents over the passage of time evolving from the tender age of ten to a fifteen-year-old.

The Judicial Medical Officer attributed the hymeneal tears to have taken place owing to the insertion of an external object by opining to the effect that there is a greater possibility as opposed to that of natural circumstances for the hymeneal tears to have taken place owing to the insertion of an external object which could either be a male organ or a finger.

The Learned High Court judge arrived at the decision having taken in to consideration the dicta in Bobby Mathew Vs State of Karnataka; 2004 (3) Cri. L. J page 30003. It was held that;

> "The failure to put his case in cross-examination indicates that the position taken by the accused is untrue and that makes way for the rejection by the Court of Appeal. The submission made on behalf of the accused-appellant on his case, on the said point the accused declined to avail himself of the opportunity to put that point, his case in cross-examination."

The mere fact that immediately upon his arrest the accused did take up the stand in his statement to the police, the appellant is not in a position to quote portions from his statement to the police at the appeal stage. As this Court is called upon only to evaluate the evidence that was led in the High Court trial. The only instance in which this Court is permitted to peruse Information-Book extracts and read statements is when looking in to the veracity of an omission or a contradiction.

The prosecutrix has clearly testified to the effect that the incident took place inside a room in the accused-appellant's shop. The proceedings relating to the cross-examination clearly reflects the fact that, not a single suggestion had been made to the effect that the prosecutrix had lied by testifying same. It is the firm position of the respondent that, what was happening inside a room in the shop of the accused-appellant cannot be viewed and observed by anyone in the neighboring boutiques.

The Police Sergeant testified to the effect that a person inside the salon could hear any sound made inside the shop of the accused-appellant. He refrained from making reference to the possibility of being able to observe any happenings inside the shop of the accused.

It would appear from the evidence that he prosecutrix is a reliable witness and corroboration of her testimony is not a sine qua non. Not a single contradiction, omission came to be marked and pointed out. The demeanour and deportment of the prosecutrix as observed by the learned Judge of the High Court makes it apparent that she had been in a state of fear when testifying against the accused-appellant given the fact that the accused-appellant is an adult and by the threats levelled against the prosecutrix by the accused-appellant that the father and the mother of the prosecutrix would be killed in the event she testified against the accused-appellant. It is important to note that, there was not a single suggestion that came to be made by the accused-appellant on this testimony of the prosecutrix that she was lying.

It is pertinent to appreciate the fact that the mother of the prosecutrix (PW2) was not a biased or an interested witness for the prosecution. She did not testify in exaggeration. Not a single contradiction or an omission came to be marked or pointed out. The testimony of the doctor corroborated the version of the prosecutrix.

In the present case, there was no eye witness to the incident. The whole case was mainly based on the victim's evidence. As precisely stated by the learned Judge of the High Court by citing several reported judgments in his judgment, the rule is that, it is unsafe to convict on uncorroborated evidence of an alleged victim in a charge of a sexual offence; (Gurcharan Singh v. State of Haryana; AIR 1972 S. C. 266l), but also it has been recognized that if the evidence of the victim is convincing such evidence could be acted on even in the absence of corroboration; (Bharwada Bhoginbhai Hirjibhai vs State Of Gujarat; 1983 AIRHC 753 and Sunil and Another v. The Attorney General; 1986 (1) SLR 230).

In Fradd v. Brown and Company; 20 NLR 282 at 283, it was held that,

> “it is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance".

In the present case, the learned Judge of the High Court has well analyzed all the evidence before him in his judgment and accordingly he has not noticed any untrustworthiness of the victim's testimony. Furthermore, even though we can only come to a decision by going through the proceedings, we also do not see any untrustworthiness of the victim's evidence. In the case of King v. Musthapha Lebbe; 44 NLR. 505 the Court of Appeal held that,

"the court of criminal appeal will not interfere with the verdict of a Jury unless it has a real doubt as to the guilt of the accused or is of the opinion that on the whole it is safer that the conviction should not be allowed to stand".

In the above circumstances it is evident that there is strong and cogent evidence which establishes the fact that the prosecution has proved its case beyond reasonable doubt and also that, it is proper for the learned Trial Judge to arrive at a decision that, the accused-appellant did commit the offence of statutory rape of Jainool Abdul Fathima Sassna.

Considering the above there is no reason to interfere with the findings of the learned Judge of the High Court.

We affirm the conviction and the sentence dated 03.04.2017.

Appeal is dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal