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

In the matter of an appeal under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Hon. Attorney General

Complainant

CA. No. 97/2018

High Court of Kandy

Case No.236/2008

Vs.

M. Balakrishnan alias Appaiya

Accused

And Now Between

M. Balakrishnan alias Appaiya

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.
: R. Gurusinghe, J.

COUNSEL : P. Radhakrishnan for the Accused-Appellant.
Anoopa de Silva SSC., for the Respondent.

ARGUED ON : 08.03.2021

DECIDED ON : 28.10.2021

R. Gurusinghe, J.

The Accused-Appellant was indicted in the High Court of Kandy on a charge of statutory rape under Section 364 (2) (e) of the Penal Code.

The appellant was convicted and sentenced to twelve years of rigorous imprisonment and to a fine of Rs. 15,000/- with a default term of one-year rigorous imprisonment. In addition, the appellant was ordered to pay Rs. 250,000/- to the prosecutrix as compensation and in default of which three years rigorous imprisonment.

In the written submissions of the appellant following grounds of appeal were urged.

1. The evidence is not sufficient to prove the prosecution case.
2. The evidence of the appellant was wrongly rejected.
3. The contradictions and the omissions regarding the evidence of PW1 had not been considered.
4. The medical evidence had not been evaluated.

When this appeal was taken up for hearing, Counsel for the appellant relied mainly on three grounds of appeal.

1. The evidence of the prosecution is not credible.
2. Delay in complaining.
3. When the evidence of the prosecutrix is not reliable, Court cannot rely on circumstantial evidence.

The prosecutrix made a complaint to the Pundalu Oya Police Station on 17th August 2004, where she stated that the appellant had raped her a few months back. At that time, she was fifteen years and four months old. When she gave evidence before Court, she was a twenty-six years old married woman having children. The learned Counsel for the appellant pointed out several differences between the first complaint and the evidence given in the Court by the prosecutrix.

The learned Senior State Counsel objected to this submission on the basis that to use the statement made by the witness to the police, which was not a part of the evidence, at this stage is wrong and contrary to law.

In the judgment of *Punchi Mahaththaya Vs. the State* 76 NLR page 564, a Divisional Bench of the Court of the Appeal (at that time, the Court of Appeal was a Higher Court than the Supreme Court) stated as follows:

"The Criminal Procedure Code [Section 122(3)] which enables such statements to be sent for to aid a Court limits the exercise to course of inquiry or trial. The Court of Criminal Appeal is neither a Court of inquiry nor one of trial. At the stage of the Court of Criminal Appeal (or for that matter, the Supreme Court on appeal) hears an appeal, both inquiry and trial have been concluded. There would therefore appear to be no justification for either the last mentioned two Courts to call for and examine statements that formed no part of the evidence upon which the verdict was returned".

In view of the above authority and in terms of the relevant provisions of the Criminal Procedure Code Act, the Court of Appeal cannot compare the evidence of witnesses with their statements to the police.

No contradiction or omission has been marked in the evidence of the prosecutrix. Now, it is too late to point out contradictions or omissions which were not marked or not drawn the attention of the Trial Court. Therefore, the credibility of the prosecutrix now cannot be assailed by comparing her statement to the police.

The next argument is that the complaint had been made after about five or six months after the incident. There is indeed a delay in complaining. However, the delay has been considered by the learned Trial Judge. The Trial Judge has observed that the prosecutrix was fifteen years old at the time of the incident. Further, he believed the evidence of the prosecutrix that the appellant had threatened her. The trial Judge has considered the evidence and accepted the explanation for the delay as plausible.

The learned High Court has observed that no contradiction or omission has been marked in the evidence of the prosecutrix.

In the case of *the State of Panjab Vs. Gurmit Singh and others* 1996 AIR 1393 the Indian Supreme Court observed as follows:

> "The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is

vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act 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. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice."

Justice V.R. Krishna Iyer in *Inder Singh & Anr. vs. The State (Delhi Administration)* (1978) 4 SCC 161 stated thus: -

"2. Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether, in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish, and guilty man cannot go away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up? Because the Court asks for manufacture to make truth look true? No, we must be realistic."

In *Premasiri Vs. Attorney General* [2006] 3 Sri Lanka Law Report 107, Eric Basnayake J. held thus:

"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 to the mind of the judge. (Schindra Nath Biswas vs. State{B). In Sunil and another vs. the Attorney General Dheeraratne J. with H. A. G. De Silva and Ramanathan JJ agreeing held that "if the evidence of the complainant is so convincing, they could act on that evidence alone, even in the absence of her evidence being corroborated".

In this case, no contradiction or omission had been marked in the evidence of the prosecutrix. There was no animosity between the family of the prosecutrix and the appellant. And there was no motive to implicate the appellant or to concoct a story against him. Even in the evidence of the appellant, nothing has come out as a reason for false implication. Learned High Court Judge has also considered the evidence of the appellant. He has observed that the alleged assault on the appellant was not informed to the Doctor or to the Magistrate. The appellant stated in his evidence that he had informed his lawyer that the police had assaulted him. The learned High Court Judge observed that if this evidence is correct, his lawyer would have brought it to the attention of the Magistrate. The learned High Court Judge has considered and evaluated the evidence of the appellant. Therefore, the ground that the evidence of the appellant was wrongly rejected has no merit.

Another ground of appeal is that the Trial Judge disregarded the medical evidence. This ground was not urged at the hearing. The Doctor had observed that the prosecutrix was pregnant, and the fetus was 25-27 weeks old by then. The Doctor was informed that a known person raped her about five months back. Learned High Court Judge has considered and evaluated the evidence. There was no basis for this ground of appeal.

For the reasons set out above, we affirm the conviction.

The evidence reveals that there was a sort of consensus on the part of the prosecutrix. She says that she knew the appellant from her infancy.

When considering the following evidence, it reveals how the atmosphere was before the incident.

(On page 78 of the appeal brief)

ප්‍ර: ඔය දවසේ තමන් නිවසේ ඉන්න කොට කොහොමද විත්තිකරු තමන්ව දූෂනය කලේ?

උ: අඹ වලට හරි ආසයි.

ප්‍ර: කවුද අඹ වලට ආස?

උ: **අපි හොදට ඉන්න කොට අයියා වගේනේ.** අඹ ගෙඩි ගෙනත් දෙන්න කියන කොට මොනවදෝ දාලා ගෙනත් දීල. ඊට පස්සේ කලන්තයක් වගේ ආවා.

ප්‍ර: ඊට පස්සේ මොකද වුනේ?

උ: ඊට පස්සේ තමයි දූෂණය කරලා තියෙන්නේ.

(On page 80 of the appeal brief)

ප්‍ර: විත්තිකරු කුස්සියට පැමිණියේ ඉදිරි පසින්ද, පිටුපසින්ද?

උ: ඉදිරිපසින්.

ප්‍ර: නිවසේ කුස්සිය පැත්තට ඉස්සරහින් එනවා නම් ගේ ඇතුලෙන් ද එන්න ඕන, පිටින් ඇවිත්ද එන්න ඕන?

උ: එතනටම ඇවිත් දුන්නා.

(On page 81 of the appeal brief)

ප්‍ර: තමන් අඹ කන අවස්ථාවේ විත්තිකරු හිටියාද?

උ: ඔව් හිටියා.

ප්‍ර: ඊට පස්සේ මොනවද විත්තිකරු කලේ?

උ: මම කීවා අඹ කෑවට පස්සේ මොනවත් පේන්නේ නැහැ, ඇස් දෙක **කළුවර** වගේයි.

ප්‍ර: කාටද කිව්වේ?

උ: විත්තිකරුට.

(On page 85 of the appeal brief)

ප්‍ර: අඹ ගෙඩිය කපාද තිබුණේ?

උ: නැහැ.

ප්‍ර: තමා ඒ අඹ ගෙඩිය කෑවද?

උ: ඔව්.

ප්‍ර: අඹ ගෙඩිය කපලද කෑවේ?

උ: නැහැ. හපල කෑවේ.

She had asked the appellant to bring mangos and had eaten a mango alone with the appellant in the kitchen. After the incident, the prosecutrix had burned her bloodstained clothes and concealed the fact from her parents. The incident was revealed only when her mother questioned her after noticing the growing belly. All these facts lead to the inference that the sexual intercourse had been consensual.

In S.C. Reference 03/2008, the Supreme Court stated that even though the woman's consent was immaterial for the offence of rape when she is under the age of 16 years, a woman's consent is relevant for a Court, in the exercise of its discretion in deciding the sentence for such an offence. Further, it was held that the Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion, notwithstanding the minimum mandatory sentence.

The appellant had no previous convictions. The appellant had made an admission regarding the age of the prosecutrix and admitted her birth certificate. Now he is a father of three children and the only person who earns money to support his family.

Considering the above, we reduce the twelve-year jail term to five years and further direct that the sentence is deemed to have been served from the date of conviction, namely, 5th April 2018. The rest of the sentence is not changed.

Subject to the variation of the sentence, the appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal