**IN THE COURT OF APPEAL OF THE DEMOCRETIC 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.*

**Court of Appeal No:**

CA/HCC/0162/2018

**High Court of Anuradhapura**
**Case No:** HC/15/2014

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

Ranhotige Suresh Shelton Jayasundara alias Sameera

**ACCUSED**

**AND NOW BETWEEN**

Ranhotige Suresh Shelton Jayasundara alias Sameera

**ACCUSED-APPELLANT**

**Vs.**

The Attorney General

Attorney General's Department

Colombo 12

**RESPONDENT**

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|---|---|
| Before | : Sampath B Abayakoon, J. |
| | : P. Kumararatnam, J. |
| Counsel | : Asela Serasinghe for Accused Appellant |
| | : R. Bary S.S.C. for the Respondent |
| Argued on | : 18-01-2022 |
| Written Submissions | : 30-04-2019 (By the Accused-Appellant) |
| | : 12-07-2021 (By the Respondent) |
| Decided on | : 25-02-2022 |

**Sampath B Abayakoon, J.**

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence imposed on him by the learned High Court judge of Anuradhapura, where he was sentenced for a term of nine years rigorous imprisonment and a fine.

The appellant was indicted before the High Court of Anuradhapura for committing the offence of rape of one Rasika Udayangani on 28th June 2012, an offence punishable in terms of section 364(1) of the Penal Code as amended.

After trial, he was found guilty as charged and was sentenced as above. In addition, he was also ordered to pay a compensation of rupees 100000/- to the victim, in default an additional sentence of one-year rigorous imprisonment was also imposed.

**Facts in brief:**

The prosecutrix (PW-01) has obtained the services of the appellant who was a Kapu Mahaththaya (a person who performs rituals) to perform a ritual in order to bring back her boyfriend who was making attempts to avoid and leave her. It is evident that she was in real desperation as she has had sexual intercourse

with him on his promise that he will marry her. As arranged previously, the appellant has come to her brother's house where the prosecutrix also lived at around 9.00pm. on 27-06-2012 and had performed the ritual. Upon hearing that PW-01 has failed to follow the instructions given by him, the appellant has returned to the house the next day (28-06-2012) informing that he has to perform further rituals to make the situation right.

After telling the members of the household, including the sister-in-law and the neighbour who was present, to leave the house and to go to the back garden, and keep the doors and the windows open, he has informed PW-01 that some oil needs to be applied to her female organ, for which the prosecutrix has agreed. Lowering her under garments the appellant has performed the mentioned act and the prosecutrix has felt dizzy as a result. Thereafter, the appellant has made the prosecutrix to lie down on the floor of the house where they were. Through dizziness she has seen that the appellant lowering his trouser and climbing on her and without giving weight to the body the appellant has forced his male organ into the vagina of the prosecutrix. It was the evidence of the prosecutrix that she shouted through fear and called for the sister who was outside, but no sound came out from her. It was stated that before those who were outside came in, she cleaned the bloodstain that was on the floor. The appellant has then asked the neighbour who was present to bring a king-coconut for further rituals, but has left after applying some water on the face of the prosecutrix.

Soon after he left, the prosecutrix has informed her sister-in-law (PW-02) as to what happened, but they have decided not to complain to the police immediately as arrangements have been made for an alms-giving in the house for the next day, which no one wanted to disrupt. There is no dispute that the complaint in this regard to the police has been made on 30th June 2012.

Under cross examination, the prosecutrix has explained her reasons for not informing the sister-in-law that she was raped by the appellant while the

appellant was still present in the house stating that because of the reputation the appellant had as a Kapu Mahaththaya who can do evil things, she had no courage to do so, but informed of what happened no sooner he left the house. She has also admitted that she was not a virgin at that time because of the previous sexual relationship she had with her boyfriend. She has also explained that although she felt dizzy at the time, she could see and understand what the appellant was doing and what happened to her.

The stand of the appellant had been that this was a false complaint against him because of the prosecutrix's failure to pay him his fees for the performance of the ritual which led to a verbal confrontation with the brother of the prosecutrix.

Confirming the position of the prosecutrix the sister-in-law (PW-02) has stated that no sooner the appellant left, she was informed of what happened, but waited till the alms-giving is over to make a complaint to the police. It was her evidence that rupees 7500/- was paid to the appellant and there was no dispute as to the payments as alleged, and that there was no reason for her sister to fabricate a story against the appellant.

PW-10 was the Judicial Medical Officer (JMO) who examined the prosecutrix on 30-06-2012 at 4.30 pm. in the teaching hospital Anuradhapura. His report has been marked as P-01 at the trial. When examining her genital area, he has observed a fresh healing deep posterior hymeneal tear at 6 O' clock position and was of the opinion that it was a result of recent sexual penetration. He was firm in his opinion that this type of an injury occurs when a female is in a sleeping position facing upwards and a male person inserting a penis from top of her, considering the place of injury to the hymen of the prosecutrix.

Under cross examination, the JMO has stated that in the space where the short history given by the patient needs to be mentioned in P-01, what was written was a short summary in his words in English and not the exact words spoken by the prosecutrix.

After the closure of the prosecution case and when the appellant was called upon for his defence, he has chosen to give evidence upon oath. He has admitted that he went to the house of the prosecutrix on the 27th night to perform a ritual and has stated that although he was promised a sum of rupees 7500/- for his services, he was paid only a sum of rupees 500/- with a promise to pay the balance later.

It was his evidence that he went to the house of the prosecutrix for a second time at her request since it was informed to him by her that she has not followed the instructions given by him on the previous day, and admits that he went there at around 3.00-3.30 pm. on the day in question. It was his position that he only performed a ritual on that occasion too and when wanted the balance of the agreed amount be paid to him, the brother of the prosecutrix who was drunk started scolding him in filth and also attempted to assault him. It was his stance that a false complaint of this nature was made against him due the mentioned dispute that arose with regard to the payment he demanded.

At the hearing of the appeal the learned Counsel for the appellant urged the following main grounds of appeal for the consideration of the Court.

(1) The prosecutrix was not a credible witness hence, her evidence should not have been relied on by the learned trial judge.

(2) The prosecution has failed to prove the penile penetration.

(3) Medial evidence was not conclusive and leading of medical evidence before the prosecutrix gave evidence has caused prejudice to the appellant.

(4) Infirmities in the judgment.

**1st Ground of Appeal:**

Although the learned Counsel for the appellant took pain to argue that the evidence of the prosecutrix was not credible, I find no reasons to agree. One has to understand the desperation of the prosecutrix who was 27 years of age and had lost her virginity because of her association with her boyfriend, which is cherished in our society. It is clear that in order to bring him back to her, the prosecutrix and her family members have decided to seek the help of the appellant.

He, being a Kapu Mahaththaya, who obviously had the ability to convince people as to his abilities to perform rituals and with a reputation, it is clear that the prosecutrix and her family members had faith in him. I am unable to believe that such a person will not be paid the amount he demanded for the ritual and any member of the family of the prosecutrix will dare to get into an argument as alleged by the appellant with him over the payment, given his reputation.

When the appellant came to the house for the second time the brother of the prosecutrix had not been there. It is very much apparent that because of the respect and the fear the appellant commanded, the prosecutrix and her family members had believed him when he said that an additional ritual needs to be performed.

It was the contention of the learned Counsel that the evidence that the appellant asked the doors of the house to be kept open when he committed the act as alleged, is not probable as no one would do such an act for anyone to see. However, the evidence is that all the inmates of the house were sent to the back garden of the house and anyone in the front side of the house and the road cannot see what was happening inside due to its location.

It is quite possible that the prosecutrix had allowed the appellant to apply oil on the vagina of her under the circumstances mentioned above. And her saying that she felt dizzy after it can be possible due to the fear factor.

Although she has felt dizzy it is clear that she was in a position to see and understand what was happening to her. She has given evidence as to how the appellant inserted his penis into her vagina. Her being unable to originate any sound, although she has shouted for help can also be explained under the circumstances. Her cleaning the floor of any blood before others could come to the place where she and the appellant were and her not telling the sister what happened while the appellant was still in the house are very much possible scenarios in my view. Being the villagers that they are, waiting till the pre-arranged alms giving is over before going to the police also can be understandable.

Delay is a subjective factor which may vary according to circumstances. It was held in the case of **D. Tikiribanda Vs. Hon Attorney General 2010 BLR 92** that;

> *"If delay of making a statement is explainable, the evidence of a witness should not be rejected on that ground alone."*

In **Sumanasena Vs. Attorney General (1999) 3 SLR 138**, it was held that;

> *"Just because the witness is a belated witness, the 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."*

I find that the learned High Court Judge has well considered the reasons for the prosecutrix to wait till the morning of the 30th to make her police complaint and had satisfied himself that it is not material given the circumstances, which need no further scrutiny from this Court.

I am of the view that when taken as a whole, the evidence of the prosecutrix is highly probable which has not created any doubt as to her evidence that she is telling the truth as to what she had to face at the hands of the appellant. I view her as a credible and trustworthy witness.

For the reasons adduced as above, I find no merit in the first ground of appeal.

**2nd ground of appeal: -**

The prosecutrix has given clear evidence as to what happened to her after the appellant applied some oil on her vaginal area and after she felt dizzy. The appellant has asked the prosecutrix to lie down and she has seen the appellant lowering his trouser and coming on top of her, and has felt the forceful insertion of his penis into her vagina. She has even described how it was done by the appellant without giving weight to her body. The JMO (PW-10) has confirmed that there had been recent penile penetration of the vagina of the prosecutrix and had been firm in his opinion that it has happened without consent, given the position of the hymeneal tear he observed on the prosecutrix. Hence, I find no merit in the argument that the prosecution has failed to prove penile penetration.

**3rd ground of appeal:** -

It was the contention of the learned Counsel for the appellant that the prosecution has commenced the leading of the evidence of this action by calling the JMO, and it has caused prejudice to the appellant. The basis for this argument is that had he been called after the leading of the evidence of the prosecutrix, the appellant could have been able to cross examine the JMO based on the evidence of the prosecutrix.

It appears from the case record that as the JMO was present to give evidence on the day it was first taken for trial, following the usual practice of obtaining the evidence of official witnesses whenever they are available to give evidence, the evidence of the JMO has been recorded. Although it would have been better

if the evidence of the JMO was called after the evidence of the prosecutrix, I am unable to agree that it has caused any prejudice to the appellant. The JMO has been cross examined by the defence with a clear understanding of the medical evidence of the JMO and his opinions expressed. Given the fact that he was not an eyewitness to the incident and was only giving evidence based on his examination of the prosecutrix two days after the alleged incident, I see no basis to conclude that his answers would have been different had the PW-01 gave her evidence before him.

It would have been a different scenario had the learned High Court Judge has also considered the evidence of the JMO before he considered the evidence of the prosecutrix. It is clear from the judgment that the learned trial judge has considered the evidence of the JMO only after being satisfied that the prosecutrix is speaking the truth and after considering the other evidence, in order to find whether the medical evidence is consistent with the version of events as narrated by the prosecutrix.

In the case of **D.Tikiribanda Vs. Hon Attorney General (supra)** it was held:

> *"When the medical report is consistent with the version of a sexually harassed victim it can be taken as evidence consistent and thus from to some extent corroboration and is admissible under section 157 of the Evidence Ordinance (although that may not be corroboration in the strict sense)."*

Hence, I find no merit in the mentioned ground of appeal either.

**4th ground of appeal: -**

The last ground of appeal pursued by the learned Counsel was that due to several infirmities of the judgment of the learned High Court Judge, the judgment cannot be termed a considered judgment, and it has caused prejudice to the appellant. He cited the instant where it has been stated that it was the prosecutrix who gave evidence first, whereas it was the PW-10 the

JMO. Another point taken was that the learned trial judge has failed to consider the evidence of PW-06 at all, in the judgment. It was also the position of the learned Counsel that the learned trial judge has shifted the burden of proof to the appellant when he stated at page 8 of the judgment (Page 226 of the brief) that the appellant has failed to call evidence to prove the statements made by him in giving evidence.

It is true that it was not the prosecutrix but the JMO who has given evidence first in this action. However, the learned trial judge has rightfully not considered his evidence first, but the evidence of the prosecutrix and the other relevant witnesses. I am unable to find any basis to conclude that this has caused any prejudice to the appellant. PW-06 was the WPC 3835 of Rajanganaya Police who recorded the first complaint of the prosecutrix on the 30th of June 2012 and took charge of the frock she was wearing at the time of the incident and the t-shirt she has used to clean the bloodstains on the floor as productions. She has also accompanied the Officer in Charge (OIC) of the Rajanganaya Police for the investigations and has produced the prosecutrix before the JMO.

I find that none of these facts are disputed facts. It has been an admitted fact that the complaint was made on the 30th. Although some productions have been taken in, they have not been marked through the prosecutrix at the trial, which makes them of no value, although the learned trial judge has commented about the t-shirt mentioned by OIC when he gave evidence.

It is correct to say that the learned trial judge has commented that appellant has failed to call additional evidence to substantiate his position, other than his evidence. However, when taken as a whole, it is clear that the learned trial judge has analyzed the evidence of the prosecution not based on the failures of the defence, but on the evidence adduced by the prosecution to come to a firm finding that the prosecution has proved the case beyond reasonable doubt. I find that at no point he has shifted the burden to the appellant.

It is settled law that for the mentioned infirmities to be considered relevant, they must cause prejudice to the appellant which amounts to a denial of a fair trial to him.

The proviso of Article 138 of the Constitution reads as follows;

> **"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

In **Mannar Mannan Vs. The Republic of Sri Lanka (1990) 1 SLR 280**, it was held:

> The enacting part of sub-section (1) of section 334 mandates the Court to allow the appeal where-
>
> (a) The verdict is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) There is a wrong decision on any question of law; or
>
> (c) There is a miscarriage of justice on any ground.
>
> The proviso vests the discretion in the Court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant for the view that the Court is precluded from applying the proviso in any particular category of wrong decision or misdirection on questions of law as for instance, the burden of proof.
>
> There is no hard and fast rule that the proviso is inapplicable where there is non-direction amounting to misdirection in regard to the burden of proof. What is important is that each case falls to be decided on the consideration of;

(a) The nature and intent of the non-direction amounting to a misdirection on the burden of proof

(b) All facts and circumstances of the case, the quality of evidence adduced and the weight to be attached to it.

The above mentioned is a case where the trial at the High Court was before a jury, and decided on appeal under section 334 of the Code of Criminal Procedure Act, which has similar provisions in Article 138 of the Constitution in the section itself. I find that the principles discussed in the said appeal are of equal relevance to a determination of an appeal under the provisions of section 335 of the Code of Criminal Procedure Act of a trial held without a jury before the High Court, in view of the Proviso to Article 138 of the Constitution.

I find that the mentioned infirmities in the judgment have not caused a substantial prejudice to the rights of the appellant and had occasioned a failure of justice to him.

For the aforementioned reasons, I find no merit in the appeal. The appeal therefore is dismissed and the conviction and the sentence imposed on the appellant affirmed.

However, considering the time taken for the conclusion of the appeal, which was not due to any fault of the appellant, the sentence is ordered to run from the date of the conviction, namely, 31-07-2018.

Judge of the Court of Appeal

**P Kumararatnam, J.**

I agree.

Judge of the Court of Appeal