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

In the matter of an application under Section 331 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.

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

Court of Appeal Case No.
HCC/200/2019

High Court of Anuradhapura
Case No. 45/2016

Complainant

Vs.

Wasala Ariyarathnage Rohana
Herath Alias Rohana Mama

Accused

AND NOW BETWEEN

Wasala Ariyarathnage Rohana
Herath Alias Rohana Mama

Accused –Appellant

Vs.

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

Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**

WICKUM A. KALUARACHCHI, J

COUNSEL : Upali Jayamanne with Wathsala Nawinna for the Accused-Appellant

Maheshika Silva, SSC for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 21.05.2021 (On behalf of the Accused-Appellant)

30.06.2021 (On behalf of the Respondent)

ARGUED ON : 18.02.2022

DECIDED ON : 16.03.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was charged for committing the Rape and Grave Sexual Abuse on or about 29.07.2013, offences punishable under Sections 364(1) and 365 B(2)(a) of the Penal Code. The trial commenced in the High Court of Anuradhpura without a Jury and after the trial, the learned High Court Judge convicted the accused-appellant for both counts and was sentenced to a term of 15 years rigorous imprisonment. This appeal is from the said conviction and sentence.

At the hearing of this appeal, the learned Counsel for the appellant and the learned Senior State Counsel for the respondent made oral submissions. Both parties have tendered their written submissions, prior to the hearing. The learned Counsel for the appellant advanced his arguments on two grounds.

I. The discrepancy in the date of the offence has not been considered.

II. The learned trial judge is erred in appreciating uncorroborated evidence while admitting the prosecutrix is not a reliable witness.

In the course of the High Court trial, the date of the offence mentioned in the indictment had been amended twice. The second amendment refers to the date mentioned in the original indictment. Accordingly, the trial proceeded on the basis that the offences were committed on or about 29th July 2013.

PW 1 is the victim of this incident. When the evidence was led, the prosecuting counsel suggested the date of the incident as 31.07.2013 to PW 1. In cross-examination, PW 1 has stated that the incident took place on 29.07.2013. She had stated the date of the incident as 31.07.2013 to the Judicial Medical Officer. When the PW 3 gave evidence, the prosecuting counsel suggested the date of the incident as 29.06.2013 to him. The date of the incident according to the indictment is 29.07.2013.

In the aforesaid context, the contention of the learned counsel for the appellant that two different dates cannot be suggested to two witnesses as the date of the incident is correct. In addition, both dates suggested by the prosecuting counsel are not the date mentioned in the indictment. In the circumstances, it is apparent that there is confusion in respect of the date of the offence. This court has to see whether the ambiguity of the date has had an effect on proving charges.

Before dealing with the issue of ambiguity on the date of the offence, it is necessary to consider whether the offences of rape and grave sexual abuse took place. Judicial Medical Officer explained by going through his medico-legal report that there were several injuries on the body of the victim. He further explained that some of these injuries could have been occurred due to her resistance. In addition, the doctor had explained an injury in the rectum.

Therefore, PW 1's evidence and other evidence adduced in respect of rape and grave sexual abuse have been strongly corroborated by the medical evidence. The learned High Court Judge has evaluated the relevant evidence and correctly found that the PW 1 has been raped and sexually abused. What the appellant denies is his involvement in the offences.

The issue of the date of the offence also needs to be considered in determining whether the accused committed these offences. PW 1 says that the appellant committed these offences. According to the prosecution evidence, when there was a function on 29.07.2013, at the house of PW 3, there was a fight between him and his siblings. PW 1 has escaped the fight and sought refuge at a banana plantation near that house. At that time, the appellant pulled her by her hand, dragged her to the garbage lake and committed acts of rape and grave sexual abuse.

PW 1 has clearly stated to the police that this incident happened on the day in which a function was held in PW 3's house. The victim explained why she was hiding at a banana plantation. When she was there, she has requested the appellant for his phone to give a call. While handing over the phone, she testified that the appellant had pulled her by her hand and dragged her closer to the garbage lake. In this case, the appellant has also given evidence. He also said that PW 1 requested a phone from him. Appellant says further, that he threw the phone at her but denies the allegation against him. Anyhow, it is evident from the said items of evidence, that the appellant knew very well the date the victim and other prosecution witnesses speak about. PW 1 says, at the time she requested the phone from the appellant, he committed these offences. Therefore, it is clear that the accused-appellant has not been misled because of the ambiguity regarding the date. Also, it is apparent that the appellant had understood the prosecution version, the

allegation against him and that is why he gave evidence in order to establish his defence referring the incident of requesting the phone.

In the case of R. v. Dossi - 13 Cr.App.R. 158 cited in *Archbold Criminal Pleading Evidence and Practice 2019, Paragraph 1-223 at page 83*; it was held as follows:

"A date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the incitement. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided that there is no prejudice below) where it is clear on the evidence that if the offence was committed at all, it was committed on the day other than that specified".

In the instant action, it is clear on the evidence that the offence was committed on the day that the prosecutrix requested the mobile phone from the appellant to give a call. In considering the decision of the aforesaid judicial authority, the relevant facts of the case and the aforesaid circumstances, I hold that discrepancy on the date of the offence had no effect on proving the case beyond a reasonable doubt.

Although some other date had been suggested to the PW 1 by the prosecuting counsel, in cross-examination, PW 1 has stated the date mentioned in the indictment as the date of the incident. (Page 49 of the appeal brief) She stated that the incident took place on 29.07.2013 evening. She made the complaint to the police on 02.08.2013. Since the victim is from a farming family in a rural area, it is not unusual, a delay of two or three days in complaining to the police by someone in such a situation. This slight delay has no effect on the reliability of the prosecution case.

The learned counsel for the appellant did not contend on any contradiction or omission other than the evidence pertaining to the illegal affair between PW 1 and PW 3. In addition, the learned counsel contended that the posture in which she was allegedly held at the time of the offence is highly impossible. The learned counsel pointed out that she has said that vaginal penetration was done by the appellant through her backside and the accused-appellant did not change her position at any time. The learned counsel pointed out further that she said that she was lying on her back facing upwards when the appellant raped her and he contended that the offence could not be committed when she was in that position. However, it is my view that it is only a mistake in describing the position she was in at that time. Although she said that she was on her face upwards, she explained that her face was downwards by answering the very next question. The relevant questions and answers are as follows:

ප්‍ර: මොන පැත්තටද ඔබව බිම පෙරලුවේ ?

උ: උඩුබැලි අතට.

ප්‍ර: එතකොට ඔබේ මුහුණ මොන පැත්තටද තිබුනේ?

උ: මුහුණ තිබුනේ යට පැත්තට.

(Page 37 of the brief)

When she was facing downwards, vaginal penetration could be performed through her backside and there is no improbability on that.

The next matter to be considered is the contention of the learned counsel for the appellant regarding the application of the maxim *"falsus in uno falsus in omnibus*". The learned counsel for the appellant contended that the learned high court judge has erred in relying upon the evidence of the prosecutrix and PW 3, when the learned judge himself has admitted that the prosecutrix and PW 3 have given evidence concealing the illegal affair they were having with each other. The learned counsel contended further that when the court decides that a witness is not truthful or reliable and has given false evidence, it is

immaterial whether the fact on which the evidence given is relevant to the particular case or not and the witness is not reliable.

It is to be noted that the learned High Court Judge has not decided that the witness PW 1 or PW 3 is not truthful or not reliable. What the learned Judge decided was that they gave false evidence only with regard to their illegal affair. The learned High Court Judge decided further that the evidence regarding the illegal affair could be separated from the evidence relating to the offences pertaining to this case.

In the case of State of Uttar Pradesh (Appellant) Vs. M. K. Anthony, (Respondent) - Criminal Appeal No. 19 of 1976, Decided on- 6-11-1984 and reported in 1985 CRI. L. J. 493 - AIR 1985 Supreme Court 48; it was held that "*Even honest and truthful witnesses may differ in some details unrelated to the main incident because the power of observation, retention and reproduction differ with individuals*". It was observed further in the said Judgment that "*Cross-examination is an unequal duel between a rustic and refined lawyer*".

In the instant action also, the PW 1 and PW 3 have given false evidence to conceal their illegal affair. It is natural to conceal an illegal affair because, in a country like Sri Lanka, many people are reluctant to expose an illegal relationship in public.

In the case of Samaraweera V. Attorney General – (1990) 1 Sri L.R 256, it was held that *falsus in uno falsus in omnibus* is not an absolute rule which has to be applied without exception. It was held as follows:

"*The maxim falsus in uno falsus in omnibus could not be applied in such circumstances. Further, all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between*

different witnesses. ***In any event, this maxim is not an absolute rule which has to be applied without exception in every case*** *where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true".* (Emphasis added)

In the instant action, it is quite clear that false evidence regarding the illegal affair could be safely separated from the evidence regarding the incidents relating to the charges. Thus, there is no reason to reject the said evidence of prosecution that were corroborated by each other.

The learned counsel for the appellant also attempted to formulate an argument that they tried to hide the illicit relationship between them because if it came to light, the position of the appellant that she made this false complaint due to a financial dispute between the appellant and the PW 3 would be confirmed.

By that time, PW 3 had not married PW 1. In villages, raping a girl is a serious matter and a girl raped would face severe hardships and problems in the village. In such a situation, it is very difficult to believe that due to a financial dispute between the appellant and PW 3, false propaganda was spread that she had been raped. The other vital matter is that if the allegation of rape is false, there can be no medical evidence that there were injuries that could have been caused by rape. Therefore, the learned High Court Judge is correct in not accepting the unbelievable defence presented from the dock and deciding that the appellant has committed the offences of Rape and Grave Sexual Abuse.

For the foregoing reasons, I hold that both charges leveled against the appellant have been proved beyond a reasonable doubt. Accordingly, the decision of the learned High Court Judge to convict the accused-appellant for the 1st and 2nd counts is correct. I see no reason to interfere with the sentence passed by the learned High Court Judge because the sentence is lawful and correct in principle.

For the foregoing reasons, I uphold the conviction and the sentence imposed on the appellant and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL