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

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

Court of Appeal Case No.
CA/HCC/ 0130/2018
High Court of Monaragala
Case No. HC/49/2017

Jayawardena Kankanamlage Wijepala

ACCUSED-APPELLANT

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Neranjan Jayasinghe for the Appellant.** **Riyaz Bary, SSC for the Respondent.**
ARGUED ON	:	**08/03/2022**
DECIDED ON	:	**31/03/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General in the High Court of Monaragala for committing an offence under Section 364(2) of the Penal Code as amended on Ekanayakage Shanika Udayangani between 01/03/2010 and 01/08/2010.

After the trial the Appellant was convicted as charged and was sentenced to 15 years of rigorous imprisonment with a fine of Rs.10000/-, in default of which simple imprisonment for 01 year was imposed. In addition, Rs.200000/- was imposed as compensation payable to the victim with a default sentence of 02 years simple imprisonment.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom from prison.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. Date of the offence had not been proved by the prosecution.
2. Prosecution witnesses fail the test of probability and credibility.
3. Rejection of the case for the defence on unreasonable grounds.

The Facts of this case *albeit* **briefly are as follows.**

The prosecutrix in this case was living with her father. According to the prosecutrix, the incident happened in the month of March, 2010. On the date of incident, after school the victim came home changed her clothes to go to her aunt's house. When she came home nobody was at home. At that

time the Appellant had arrived and requested the air pump. As the Appellant is a well-known person who lives in very close proximity to her house, the victim went into her wattle and daub house to bring the air pump. At that time the Appellant had surreptitiously entered the victim's house, caught the victim by her hand and had sexual intercourse pinning her against a trestle (messa). At that time the Appellant had removed her skirt and raised her under skirt and inserted his penis into her vagina and remained that way for about 05 -10 minutes. At that time the Appellant had pinned her hands to the back of her body. She did not divulge this incident to anybody due to the threat made to her by the Appellant. The incident has come to light when the wife of the Appellant had mentioned this to the victim's father. She was 14 years old at the time of the incident.

In the cross examination it was suggested that she has had an affair with a person called Kiri Mama and that he had given a letter to her requesting her not to divulge about the affair to his wife. It was suggested further that the victim had falsely implicated the Appellant in this case as the Appellant and his wife had inquired about this from the victim after assaulting her. Even though the defence suggested that they could produce the said letter, it was not tendered to court. The prosecutrix had vehemently denied the suggestion put forward by the defence.

According to PW02, the father of the prosecutrix, when he had become aware that the wife of the Appellant had assaulted her daughter he had inquired from her daughter about the reason for the assault. After much persuasion the victim had disclosed the incident to her father. He further said that the reluctant attitude taken by the victim is due to the threat made to her by the Appellant. First, he had lodged a complaint with the Gramasewaka of the area and then had proceeded to lodge a formal complaint at the Tanamalwila Police Station on 20.08.2010.

Tanamalwila Police had conducted the investigation and arrested the Appellant and produced him before the court.

PW6 the JMO who had examined the victim confirmed that the victim had been subjected to vaginal penetration which corroborated the history narrated to him by her.

Being satisfied that there is a case to be answered, the Learned High Court Judge had called for the defence and explained the rights of the Appellant. Having chosen the right to make a statement from the dock, the Appellant had made a short dock statement on 21/02/2018. In his dock statement he had admitted that the victim is a frequent visitor to his house. On the day of the incident the victim had come running from the direction of Panikiriya's house. As there was a rumour that the victim was having an affair with Panikiriya, his wife had halted the victim and questioned her. At that time his wife had noticed that the victim was holding something in her hand. When she checked what it was, it had turned out to be a letter. When inquired, the victim had told his wife that Panikiriya had given the letter to her. At that time his wife had assaulted her and threatened that she would intimate this to her father. Thereafter, was not aware of what had happened but was arrested on the allegation of having raped the victim.

Justice Dheeraratne in **Sunil and Another v. The Attorney General** [1986] 1 Sri. L. R. 230 held that:

> "*Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of witness requiring corroboration is not credible his testimony should be rejected and the accused be acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.*
>
> *It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."*

In **Bhoginbhai Hirjibhai v. State of Gujarat** [1983] AIR 753 Indian Supreme Court stated that:

> *"refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury."*

Guided by above mentioned judgments related to burden of proof in a rape case, I am going to consider the appeal grounds advanced by the Appellant in this case.

In his first ground of appeal, the Appellant contends that the date of the offence had not been proved by the prosecution.

The victim was 14 years old when she was raped by the Appellant. She has given evidence without any contradiction. As it was a painful trauma that she had undergone at a tender age, nobody can be expected to disclose all the facts accurately. In this case the victim had disclosed the month and the year of the incident very correctly. The particular year and the month fall within the period mentioned in the indictment. Hence there is no prejudice caused to the Appellant. As this was a direct indictment case, the victim had given evidence after 6 years since the date of offence. Further the Appellant had admitted that the victim is a frequent visitor to his house.

In **Bhoginbhai Hirjibhai v. State of Gujarat** (supra) the court held further:

> *"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."*
>
> *"It is unrealistic to expect a witness to be a human tape recorder."*

In **R. v. Dossai** 13 Cr.App.R. 158 the court held that:

> *"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 indictment. 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."

As the Appellant had been given sufficient notice regarding the period under which he had been indicted and led plausible evidence through witnesses regarding the period, I conclude that this has not caused any prejudice or failure of justice as the Appellant had raised a totally different issue in the trial. Hence, this appeal ground has no merit.

In the second ground of appeal the Appellant contends that the prosecution witnesses fail the test of probability and credibility.

In this case the incident had happened when the victim was 14 years old and when she gave evidence before the High Court, she was 21 years of age, married with one child.

According to the victim, when she went inside the house to bring the inflator the Appellant held her from her back and closed her mouth when she tried to shout. Thereafter, the Appellant held her against the trestle (messa) where her father used to sleep and committed the said offence. Even though PW6, the doctor had written in the history given by the victim the incident happened on a bed, the victim without contradicting her evidence maintained that the incident had happened against the trestle. Trestle is a framework consisting of a horizontal beam supported by two pairs of slopping legs, used in pairs to support a flat surface such as a table top.

Further, PW6 had mentioned in the history of the Medico Legal Examination form that the victim had said that the incident had happened in the month of May, 2010. But when victim gave evidence, her position was that the incident had happened in the month of March, 2010.

The admissibility of the recorded history in the Medico-Legal Report as evidence in criminal trials has been discussed in several decided cases.

In **Gamini Dolawatte V. Attorney General** [1988] 1 Sri. L. R 221 held that:

> "*While a Medico-Legal Report is admissible in evidence under Section 414(1) of the Code of Criminal Procedure Act, hearsay evidence by way of the case history embodied in such a report is not admissible as such history is information is not ascertained by the Doctor from his own examination of the injured".*

Hence, when considering the fact that PW6 had entered in the Medico Legal Report Form that the incident happened on a bed in the month of May in 2010, I conclude that these items of evidence will not undervalue the evidence given by the victim in this case.

In this case, the victim had clearly given evidence why she lodged her complaint after 05 months of the incident. The Learned High Court Judge very correctly analysed before she accepted the evidence of the victim as true and cogent. Hence, it is incorrect to argue that the Learned High Court Judge had not considered the delay in making the complaint to the police by the victim.

In the case of **Wickremasuriya v.Dedoleena and others** 1996 [2] SLR 95 Jayasuriya J held that;

> *"A judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate"*

His Lordship further held that;

> *"If the contradiction is not of that character the Court ought to accept the evidence of witnesses whose Evidence is otherwise cogent having regard to the Test of Probability and Improbability and having regard to*

his demeanour and deportment manifested by witnesses. Trivial contradictions which do not touch the core of a party's case should not be given much significance, especially when the probabilities factor echoes in favour of the version narrated by an applicant"

In **Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 His Lordship held that;

"In considering the question as to whether evidence given by the witness should be accepted or not, the court has, no doubt, to examine whether the witness is an interested witness and to enquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is - whether there is a ring of truth surrounding his testimony."

In this case the victim had given evidence without any contradiction or omission in the trial. As the evidence of the victim passed the test of probability and credibility, I conclude that this appeal ground also has no merit.

The final ground advanced by the Appellant is that the rejection of the case for the defence on unreasonable grounds.

The Learned High Court Judge in her judgement very extensively considered the defence position advanced in this case. She has given reasons as to why she is rejecting the defence's version and accepting the prosecution's version. There are no any unreasonable grounds on which the Learned High Court Judge had rejected the defence. The sole reason for the acceptance of the prosecution case is that the prosecution case has passed all the tests without any doubt or ambiguity. Hence, I conclude that this ground is also devoid of any merits.

Rape is generally regarded as one of the gravest forms of sexual offences. It violates and degrades a fellow human being. The physical and emotional trauma of the victim are likely to be severe.

In this case a child was raped. Society cannot condone any form of sexual assault on children. The courts have a positive obligation under the law to protect them from sexual abuse. Hence sexual offenders must be dealt with severely.

On perusal of the judgement of the trial judge, I am of the view that the appeal grounds advanced by the Appellant are devoid of any merit and I see no reason to interfere with the judgment dated 19/03/2018.

Therefore, the conviction and the sentence are affirmed and the appeal is dismissed.

The Learned High Court Judge of Monaragala is hereby directed to issue notice on the Appellant to appear before the High Court, as he is on bail pending appeal, and to comply with this judgement.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

JUDGE OF THE COURT OF APPEAL