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, read with Article138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 57-2020

High Court of Matara
Case No: HC 89/2015

Vs.

1) Dediyagala Gamacharige Danusiri

Accused

And Now Between

1) Dediyagala Gamacharige Danusiri

Accused-Appellant

Vs.

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Tenny Fernando

for the Accused-Appellant

Shanil Kularathne, SDSG

for the Respondent

ARGUED ON : 22/03/2022

DECIDED ON : 26/05/2022

R. Gurusinghe, J.

The appellant was indicted in the High Court of Matara on a charge of rape under section 364 of the Penal Code.

The appellant was convicted and sentenced to fifteen years of rigorous imprisonment and a fine of Rs. 5,000/=, with a default term. In addition, the appellant was ordered to pay a sum of Rs. 100,000/= as compensation and in default of which, six months Simple Imprisonment.

Being aggrieved by the said conviction and sentences, the appellant appealed to this court. The grounds of appeal set forth on behalf of the appellant are as follows:

1. The learned High Court Judge completely misdirected himself of the general principles of analyzing the evidence given in the trial. Therefore, his conclusion is bad in law, and conviction is bad in law.

2. The learned High Court Judge misdirected himself by failure to judicially evaluate the evidence and assist the evidence according to section 283 of the Criminal Procedure Code, and thereby the conviction is bad in law

3. The learned High Court Judge completely misdirected the concept of corroboration of evidence, when considering the prosecution case, and thereby, his conclusion is bad in law.

4. The learned High Court Judge misdirected himself by failing to consider the defence evidence in a proper context, according to established law. Therefore, his conclusion is bad in law, causing a miscarriage of justice.

5. The learned High Court Judge erred in law by dis-regarding defence evidence without substantial reasons given, and thereby, this judgment is bad in law.

The prosecution called the prosecutrix (PW1), Judicial Medical Officer (PW4), Ariyawathi (PW 2), police investigator (PW8) and the Court Registrar.

The appellant gave evidence under oath, and the appellant's wife also gave evidence on behalf of the defence. The appellant also called the doctor who examined him. The appellant took up a plea of alibi.

PW1 testified that on the 22nd of October 2011, around 8.00 pm, while she was watching TV, someone had suddenly covered her face with a cloth and carried her and put her on a bed, and raped her. When the perpetrator tried to rape her, she had twisted the rapist's testicles. However, the perpetrator had gone ahead and raped PW1 after tying her hands. After that, he untied her hands and asked her for Rs. 5,000/=. She had said that she did not have money.

The perpetrator had then left through a window. PW1 also left through a window and had come to the house of PW2. Then PW2, with the assistance of her sons, took PW1 to the police station.

The police arrested the appellant on the same night at around 11.30 p.m. The evidence of PW1 is that she identified the perpetrator by his voice. However, when considering the evidence of PW1, the fact that she had the opportunity to be familiar with the voice of the appellant is not consistent.

On Page 64 of the appeal brief, in evidence in chief, she has stated as follows:

ප්‍ර: සාක්ෂිකාරිය මේ මේ පුද්ගලයා ඒ අවස්ථාවේ හඳුනා ගත්තද?

උ: **ඔව්. කටහඬින් හඳුනා ගත්තා. කලින් මට කෝල් එකක් දිලා කතාවක් කිව්වා.**

ප්‍ර: කටහඬින් කවුරු හැටියටද හඳුනා ගත්තේ?

උ: **මට කෝල් කල පුද්ගලයා ලෙසට.**

Then the state the counsel repeated the question.

ප්‍ර: කවුරු හැටියටද හඳුනා ගත්තේ?

උ: **ධනසිරී කෝල් එකක් දුන්නේ.**

This is the first time in her evidence that PW1spoke about the identity of the perpetrator. The evidence of PW1 was that she identified the appellant as the perpetrator, but she did not say that she had identified him because of the familiarity with his voice. Instead, she thought that the person who telephoned her is the appellant, from his indecent words spoken via a telephone call in May or June.

On page 67, evidence in chief, she stated as follows:

ප්‍ර: **දැන් සාක්ෂිකාරිය කිව්වා නේ සාක්ෂිකාරියගේ නිවසට ඇවිල්ලා සාක්ෂිකාරිය කාමරයට අරන් ගිහිල්ලා ඔය සාක්ෂිකාරිය කියපු 1%'යාව සිදුකරපු පුද්ගලයාව කටහඬින් හඳුනා ගත්තා කියලා?**

උ: **ඔව්. මම කටහඬින් හඳුනා ගත්තා. ඒ කටහඬින් එයා කියලා හිතුවා.**

This answer shows that PW1 was not very firm about whether it was the appellant.

On page 72, PW1 refers to what she had told to PW2.

ප්‍ර: **සාක්ෂිකාරිය ඒ වේලාවේ මොනවද අක්කට කිව්වේ?**

උ: **හොරු පැනලා මම දුෂණය කලා කිව්වා.**

ප්‍ර: **කවුරු කලා කියලාද කිව්වේ?**

උ: **එහෙම කව්ද කලේ කියලා විස්තරයක් මම කිව්වේ නැහැ.**

If PW1 was so confident that it was the appellant who raped her, there was no reason for her to refrain from telling it to PW2, as PW2 is also a woman, a very close relative, and an associate of PW1. As per the evidence of PW2, she had immediately taken PW1 to the police station by a three-wheeler. PW1 had not told her who the perpetrator was.

On Page 75, she answered to court as follows:

ප්‍ර: **පොලිසියට කිව්වාද කව්ද ඒ දේ කලේ කියා** (this is regarding the rape)

උ: **කව්ද කියලා ඇහුවා. ඉතින් මම කිව්වා මට කෝල් එකක් දීලා තිබෙනවා. මම විතරයි ඉන්නේ. මම කිව්වා මම කටහඬින් හැඳුනුවා. කව්ද කියා දන්නෙ නැහැ කියලා.**

ප්‍ර: **කව්ද කියලා කිව්වාද?**

උ: **කිව්වා**

ප්‍ර: **එතකොට ධර්මසිරිව කටහඬින් හඳුනා ගත්තයි කියලාද කිව්වේ?**

උ: **ඔව්. කටහඬින් හඳුනා ගත්තා. මට කෝල් එකක් දුන්නා නේ එයයි.**

ප්‍ර: **කිව්වාද ඒ කෝල් එක භින්දා හඳුනා ගත්තා කියලා?**

උ: **ඔව්.**

Thus PW1 had thought that the person who made an indecent proposal to her over the phone must be the man who raped her. Eventhough, she stated that she was able to identify the perpetrator because of the telephone call, she had not stated the same in her statement to the police. The attention of the Court was drawn to that omission by the defence.

The evidence of PW1, as to whether she had the opportunity to be familiar with the voice of the appellant is contradictory.

On page 81, PW1 answered to court as follows:

ප්‍ර: **දැන් මම අහපු ප්‍රශ්ණයට උත්තර දෙන්න?**
දැන් මේ වෙලා තිබෙන සිද්ධියට පෙර, මේ විත්තිකාරයත් එක්ක කීදවසක් කථාබස් කරලා තිබෙනවාද?

උ: **මගදී හමුවුනාම කථා කරලා තිබෙනවා. කොහෙද යන්නේ කියලා ඇහුවාම දොඩලා**
තිබෙනවා. දවස් තුනක් මම ;%'විල් එකේ ගිහින් තිබෙනවා. දවස් දෙකක් ගෙදරට සල්ලි ගිහින් දීලා තිබෙනවා.

ප්‍ර: **දැන් මේ සිද්ධියට පෙර කොච්චර කාලයකට ඉස්සරවෙලාද අර දුරකථන පණිවුඩයක් දුන්නයි කියලා කව්වා නේ?**

උ: **ඒ ජුනි මාසයේ**

ප්‍ර: **එතකොට ඒ හැරෙන්න වෙන සම්බන්ධතාවයක් මෙම විත්තිකරුත් එක්ක තිබුනේ නැහැ**

උ: **නැහැ**

With the commencement of the cross-examination, PW1 had clearly admitted that she was not there when the appellant fixed the grills to the windows of her house. Her position was that on that particular day she went to sell cinnamon and PW2 and her son was there to look after the work. All the grills were fixed on the same day. As such, PW1 did not have the opportunity to speak to the appellant on that day.

On the other hand, certain items including a part of the bedsheet which contained certain patches suspected to be semen were produced to the court by the police. However, the prosecution was not able to produce any scientific evidence against the appellant as the report of the DNA test set out the results that the DNA of the appellant was not found on the bedsheet.

E R S R Coomaraswamy, in his book "The Law of Evidence" volume 1, page 257, states as follows:

"Identification of accused by voice

Some witnesses purport to identify a person by his voice. It is not safe to rely on such identification and the liability to error is great.This is particularly for when

the identification was at night. But when the accused was intimately known to the witnesses who identify him by his voice and gait, the Supreme Court of India declined to hold that identification was unsafe. In South Africa, voice identification parades have been held with dubious results."

The case law on voice identification emphasises that voice identification is more difficult than visual identification. Therefore, identification by voice has to be carefully considered and extremely cautious when basing a conviction on voice identification evidence.

In the case of *C. A. 18/2009,Marasinghe Arachilage Karunaratne and another vs Attorney General decided on 4.10.2012. H M J Perera J. (as he was then)* stated as follows:

"The counsel for the accused-appellants had brought to the notice of this court several judgments relating to voice identification. Davies Vs The Crown [2004] EWCA 2521, Rohan Taylor and Others Vs R SCCA No50- 53/1991, R Vs Hersey [1998] Crim L.R.281, R Vs Gummerson and Steadman [1999] Crim L.R. 680, R Vs Roberts [2000] Crim L.R.183. 1n all these cases it had been extensively considered and clearly laid down as to how a court should consider evidence of voice identification. The prosecution has to prove beyond reasonable doubt that it was the voice of 1st accused and nobody else. There cannot be doubt, and the evidence had to be very convincing and reliable. I am of the view that the purported voice identification by the said witness is wholly unsafe, unreliable and unsatisfactory. Having considered the unsatisfactory nature of the evidence of these witnesses I am of the view that the evidence led at the trial, in this case, is not sufficient to establish the identity of the accused to the required standard, that is beyond reasonable doubt".

In the case *Hattangalage Ariyadasa vs Attorney General CA 68/2011, decided on 21.02.2013,* voice identification evidence was accepted. In that case, the witness was a sister-in-law of the accused. The witness, her sister and the

accused brother-in-law lived in the same land. Therefore, the witness was very familiar with the voice of the accused. In that case, Sisira de Abrew J. quoted the following from the Indian case of *Kirpal Singh vs the State of Uthur Pradesh 1965 AIR, 712.*

"It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognising is not familiar with the person recognised may be somewhat risky in a criminal trial. But the appellant was intimately known to Rakkha Singh and for more than a fortnight before the date of the offence he had met the appellant on several occasions in connection with the dispute about the sugarcane crop. Rakkha Singh bad heard the appellant and his brothers calling Karam Singh to come out of the hut and had also heard the appellant, as a prelude to the shooting referring to the dispute about sugarcane. In the examination, in-chief Rakkha Singh has deposed as if he had seen the actual assault by the appellant, but in cross-examination he stated that he had not seen the face of the assailant of Karam Singh. He asserted however that he was able to recognize the appellant and his two brothers from their 'gait and voice'. It cannot be said that identification of the assailant by Rakkha Singh, from what he heard and observed was so improbable that we would be justified in disagreeing with the opinion of the Court which saw the witness and formed its opinion as to his credibility and of the High Court which considered the evidence against the appellant and accepted the testimony."

In this case, as per the evidence of PW1, the appellant was not a person intimately known to PW1. PW1 did not have sufficient opportunity to be familiar with the voice of the appellant. The purported identification of the appellant by PW1 is therefore not safe and reliable. I am of the view that the identity of the perpetrator is not established beyond reasonable doubt by cogent and affirmative evidence.

The appellant was arrested within three to four hours of the alleged incident. PW1 stated that she had twisted the testicles of the perpetrator. PW1 had indicated to the police that the perpetrator was under the influence of liquor. The police should have produced the appellant before a doctor and examined his genitals to verify whether there was any evidence of twisting and whether there was the smell of liquor. Instead, the police had assaulted him. The medico-legal report (MLR) proved the evidence of the appellant that the police assaulted him and produced VI. The evidence of the doctor who prepared the (MLR) gave evidence and confirmed the fact that the appellant had injuries, as stated in his report. The genitalia was normal. The medical report was taken when the appellant was sent before the doctor by the prison authorities soon after he was remanded. The appellant gave evidence from the witness box under oath and was subjected to cross-examination. The appellant totally denied the allegation. The appellant's position was that he was arrested around 11.30 p.m. by the police on that particular day. He came home after work around 7.30 pm before 8.00 p.m. His wife and three children were there at home at that time. He had taken dinner around 9.30 p.m.and went to sleep around 10.30 p.m. The police called him out around 11.45 p.m.and arrested him. In his police statement, the appellant's position was that he had come home around 7.30 pm and not left the house. His version in the High Court is the same. The police recorded a statement from the appellant's wife on the 29thof November 2011, when the appellant was in remand custody. The appellant's wife gave evidence in court and stated that her husband came around 7.30 p.m.on the 22nd of October 2011 and had not left the house. The evidence of the appellant and his wife are, therefore, substantially the same and not materially contradicted.

The analysis of the prosecution evidence by the learned High Court Judge contains only one sentence, whereas the analysis of the defence evidence contains two sentences which shows that the learned High Court Judge had failed to evaluate and analyse the evidence sufficiently. He has neither given

adequate reasons for the acceptance of the evidence of the prosecution nor the rejection of the defence evidence.

For the reasons set out above, I am of the view that the prosecution has failed to establish the case against the appellant beyond reasonable doubt.

Therefore, the Judgment and the sentence of the learned High Court Judge dated 20th October 2020 is set aside.

The appellant is acquitted. The appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal