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/0066/2020

High Court of Chilaw Case No:

HC/23/2018

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Samarappulige Neville Titus Fernando

ACCUSED

AND NOW BETWEEN

Samarappulige Neville Titus Fernando

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department
Colombo 12

RESPONDENT

Before : Sampath B Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anil Silva, P.C. with Nandana Perera and Mark Anton for Accused Appellant

: Anoopa De Silva, D.S.G. for the Respondent

Argued on : 09-05-2022

Written Submissions : 12-07-2021 (By the 1st Accused-Appellant)

: 13-10-2021 (By the Respondent)

Decided on : 27-06-2022

<u>Sampath B Abayakoon, J.</u>

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Chilaw.

The appellant was indicted before the High Court of Chilaw for committing the rape on one Nirosha Subashini Fernando on 15th July 2013, an offence punishable in terms of section 364(1) of the Penal Code as amended by Penal Code (Amendment) Act number 22 of 1995.

He was also charged for causing simple hurt to the above-mentioned Nirosha at the same time and at the same transaction, an offence punishable in terms of section 314 of the Penal Code.

After the trial, he was found guilty as charged by the learned High Court Judge and was sentenced to 20 years rigorous imprisonment on count one, and a period of 01-year rigorous imprisonment on count two. He was imposed a fine of Rs. 50,000/- on count one and in default 08 months rigorous imprisonment,

while a fine of Rs. 1000/- on count two, and in default 01-month rigorous imprisonment.

In addition, he was also ordered to pay compensation in a sum of Rs.700000/- to the victim of the crime, and in default 24-month rigorous imprisonment was ordered.

Facts in brief: -

The husband of PW-01 (the prosecutrix) was overseas during the time relevant to the incident. The appellant and the prosecutrix have developed a close relationship after the appellant helped her over some other matter faced by her. According to the evidence of the prosecutrix, she has distanced herself from the appellant after realizing that he is making unwanted advances towards her. This has angered the appellant. On the day of the incident, she has gone to attend the church service in Seeduwa church. The church service had concluded by around 10-10.30 a.m., and at the time of the incident, she was travelling in a bus plying towards Makadura in order to reach her home. The bus was full with passengers, including those who are from her village. When the bus stopped at Thoppuwa junction, the appellant has got into the bus. After coming near where she was seated, he has taken the handbag which was on her lap and has started to pull her out of the seat shouting that "this is my woman and no one should intervene." Feeling ashamed since there were people known to her, the prosecutrix has submitted due to the force extended on her by the appellant and had got down from the bus. Dragging her by holding by the hand, the appellant has crossed the road and had asked one Madawa to bring the three- wheeler. After forcing her into the three-wheeler despite her resistance, she has been taken towards Chilaw. It was her evidence that it was Madawa who was driving the three-wheeler at that time, and she had no way of escaping the appellant although she attempted, as she was severely assaulted and forcibly held. The appellant appeared to be under the influence of liquor at

that time. She was then taken to a place what looked like a guest house which was by the side of the main road.

It was her evidence that she informed the person who was in charge of the guest house that she is being taken forcibly but he did not help her. The appellant then forced her to a room against her will and she was in a confused state of mind due to what happened to her. Although she pleaded with the appellant to let her go, he did not relent and she was assaulted while inside the room too. Between the assaults, the appellant has had forcible intercourse with the prosecutrix three times, and it was only after he was fully satisfied, he let her go around 4.30 in the evening was the version of events by her. It was her position that she agreed to go back with him to her house because she was not in a situation to travel in a bus as she had a swollen face due the injuries she suffered during her ordeal. Immediately after she was dropped off near her mother's shop, the prosecutrix has informed her mother what happened to her, and lodged a complaint with the Wennappuwa police on the same day, namely, 05-07-2013.

During the cross examination, the prosecutrix has explained in detail what led to the building up of a close relationship with the appellant, which happened because he helped her to recover her wedding ring given to another person. She has admitted that she received gifts from the appellant including the mobile phone she was using at the time of the incident and even receiving money from the appellant.

I find that her evidence was suggestive of a relationship more than that of a close friendship with the appellant. It was the position of the appellant that they developed an illicit affair, and as a result they used to have consensual sex at various places and the incident complaint of is also one of such acts and it was not rape as claimed, which the prosecutrix had denied. Although the prosecutrix has stated in her evidence-in-chief that it was one Madawa who was driving the three-wheeler when she was taken to the guest house, under

cross examination, she has stated that she is not in a position to exactly remember that fact.

The owner of the guest house mentioned by the prosecutrix in her evidence (PW-02), has given evidence in this case. It was his evidence that on the day of the incident, the appellant came with a female and obtained a room from him. He has stated that both of them spoke to him and the female showed no resistance or informed him that she is being forcibly taken. It was also his evidence that the three-wheeler in which they came was driven by the appellant, and the money for the room was paid by the female.

It is clear from the evidence of the witness that during his evidence-in-chief or cross examination by the defence or even at the stage of the re-examination, no application has been made by the prosecution to treat the witness as a witness adverse to the prosecution. However, it appears that at the conclusion of the evidence of PW-02, the learned High Court Judge has commenced questioning the witness on the basis that he was lying on certain matters. (Page 152 of the appeal brief). This has led to an application by the learned State Counsel who prosecuted the matter to initiate proceedings against the witness on the basis that he has given false evidence in the Court. As a result, PW-02 has been remanded on 03-07-2019 and he has been released on bail only on 01-08-2019, that was after the conclusion of the defence evidence. He has been released on Rs 15000/- cash bail and on a Rs. 100000/- surety bail and the surety were to be a close relative of the witness. In addition, he has been barred from changing his residential address without informing the court.

It needs to be emphasized that the procedure adopted by the Learned High Court Judge to remand the PW-02 was highly unwarranted. Although it appears that the application by the prosecuting State Counsel was in connivance, I am unable to find a reasonable basis to initiate proceedings against PW-02 for giving false evidence. His evidence, although it may be somewhat different to what he has stated to police when he made the police

statement, it does not mean that he has given false evidence. There was no application by the prosecuting State Counsel to treat the witness in that manner when he gave evidence, subjected to cross examination and re-examination. It was only after the questioning of the witness by the Learned High Court Judge the need to charge the witness for giving false evidence has been mooted before the Court.

Although the PW-02 has been granted bail on 01-08-2019 the case record does not indicate whether the witness was in fact charged for giving false evidence. I find that since it was an application on behalf of the Hon. Attorney-General, it is the duty of the Attorney-General to decide whether to charge the witness or not, without leaving him in limbo for so long.

With the above comments, I would now turn my attention to the rest of the evidence led in this action. The fact that the prosecutrix made a statement to police while warded at the Marawila Base Hospital on 06-07-2013 to WPC 1702 Kanchana, and the fact that the said police officer has observed several injuries on the prosecutrix are admitted facts under Section 420 of the Criminal Procedure Code. The police officer has observed a bluish swelling near the right eye of the prosecutrix and several abrasions on her right cheek and neck. She has also observed another abrasion in the lower part of the right hand.

The Judicial Medical Officer (JMO) who examined the prosecutrix after she was admitted to the hospital has given evidence in this case, and has marked this Medico-Legal Report as P-02. He has examined the prosecutrix on 07-08-2013. After recording the history narrated by the prosecutrix, he has observed several injuries on her. He has found an abrasion placed over the right side of the cheek, swelling of the per orbital area of the left eye, abrasion placed over anterior aspect of the neck, another abrasion placed over anterior aspect of lower part of the right hand and abrasion over posterior aspect of the upper part of the elbow.

Upon vaginal examination, he has observed that there were no hymenal tissues due to prolonged sexual exposure which can be expected from a married woman. He has also observed evidence of a few contusions measuring 0.5/0.8 cm. with intact bleeding around the entry of the vaginal opening, the rest of the area adjacent to vaginal opening has shown markedly reddish disclouration.

In his evidence, he has clearly expressed his opinion that the injuries he observed on the face of the prosecutrix are compatible with assault. Expressing his opinion as to the injuries he observed in the vaginal area of the prosecutrix he has given evidence with clear reasoning that those injuries are suggestive of forcible penetration of the vagina. He has been very clear that such injuries cannot happen if the sexual intercourse was consensual.

After leading the evidence of the relevant police officers who conducted investigations into the incident, the prosecution has closed its case marking exhibits P-01 to P-03. After the considering the evidence, the learned High Court Judge has decided to call for a defence from the appellant. The appellant has given evidence under Oath in this matter, and has also called witnesses on his behalf. In his evidence he has admitted that after meeting the prosecutrix and helped her to recover a wedding ring from another person they developed a close relationship. It was his position that the said relationship turned into an illicit affair and as a result, he and the prosecutrix used to have regular sexual relationships at various places. At that time the appellant was a married person with two children. It was also his position that his wife came to know about the relationship few months after. He has given several gifts to her including a mobile phone and money.

It was his position that on the day of the incident, he went in search of the prosecutrix. He has gone from bus to bus in search of her and she was found seated in a bus with another person with whom she had a relationship previously. After seeing that, and when he asked her to get down from the bus, she willingly got down from the bus was his evidence. The appellant says that

he crossed the road along with the prosecutrix while holding her handbag in his hand and started scolding her which resulted in a cross talk between the two. He admits having assaulted her near the bus stand, and says that when he was assaulting the prosecutrix it was she who suggested that they should go to another place to sort out the matters. Accordingly, it was his evidence that he went to the guest house mentioned by the prosecutrix and after obtaining a room, they had consensual sexual intercourse several times on that day.

It was his position that he never raped her. The appellant has claimed that after the sexual encounter, he dropped off the appellant near her mother's shop and went away. He has also admitted that it was in the three-wheeler belonging to one Madawa, he and the prosecutrix went to the guest house.

The appellant had called one Chaminda Neville to give evidence on his behalf who was a relative of him. It was his evidence that he came to know through the wife of the appellant that he and the prosecutrix was having an illicit relationship. He has stated that on one day he saw the prosecutrix and the appellant travelling in a three-wheeler towards Kochchikade. It was the appellant who was driving the three-wheeler. This has happened three days before the appellant was arrested.

The earlier mentioned Madawa has been called as a witness for the appellant. It was his evidence that he is a three-wheeler driver by profession and known to the appellant. One day at the request of the appellant, he has gone with him to look for his girlfriend and the appellant searched for his girlfriend in the buses parked at the bus stand and got down with a female from a bus. After crossing the road, he has asked him to bring the three-wheeler and after taking over the three-wheeler from him and giving some money he was asked to leave. It was his evidence that he is unaware of anything else.

After the conclusion of the defence evidence and after hearing the submissions of the parties, the learned High Court Judge has pronounced her judgement on 31-07-2020.

The learned High Court Judge found the appellant guilty on both counts preferred against him and he was sentenced as mentioned before.

The Grounds of Appeal

At the hearing of the appeal, the learned President's Counsel formulated the following grounds of appeal for the consideration of the Court.

(1) The prosecution failed to prove the case beyond reasonable doubt against the appellant and hence, the conviction is bad in law.

(2) The learned High Court Judge rejected the defence evidence unreasonably.

(3) The learned High Court Judge failed to consider matters favourable to the appellant in the judgment.

It was the contention of the learned President's Counsel that there was sufficient evidence before the learned High Court Judge to come to a finding that a reasonable doubt has been created as to the story of the prosecutrix. It was his position that the defence of the appellant was that he and the prosecutrix had a love affair, and used to have regular consensual sex and this incident was one such encounter. Citing the evidence of the guest house owner where he has said that he did not observe any unusual behaviour from the female who accompanied the appellant and he was not informed that she is being forcibly taken which was contrary to the version of events as stated by the appellant, and also the evidence of Madawa who was the three-wheeler driver mentioned by the prosecutrix, it was his argument that a clear doubt has been created as to the truthfulness of the evidence of the prosecutrix.

Bringing to the notice of the Court that the prosecutrix has admitted the friendship between the two and the fact that she received various gifts and favours from the appellant, it was the contention of the learned President's Counsel that, these important facts that were in favour of the appellant has not been considered by the learned High Court Judge in the judgment.

He was also critical of the way the learned High Court Judge has acted in relation to the PW-02 and the way his evidence has been rejected, which were evidence in favour of the appellant's defence of consent. It was his argument that the learned High Court Judge has rejected the evidence in favour of the appellant on unreasonable grounds, which amounts to a denial of a fair trial for him.

In the judgment the learned High Court Judge has shifted the burden of proof to the appellant, which a trial judge cannot do, is another matter urged by the learned President's Counsel at the hearing of this appeal.

It was the position of the learned Deputy Solicitor General (DSG) on behalf of the respondent that this is a clear case where the unwilling prosecutrix was assaulted and made to submit to the will of the appellant. Pointing to the evidence of the Judicial Medical Officer (JMO), it was her contention that the evidence of the JMO amply supports the version of events by the prosecutrix. It was her position that the evidence of the prosecutrix was cogent as to the material events, although she may have faulted in her evidence in relation to the way she was taken to the guest house in the three-wheeler. Admitting that there are flaws in the judgement in the way the learned High Court Judge has analyzed the evidence, it was the contention of the learned DSG that it has not caused any material prejudice to the appellant. It was her position that even if considered in the correct perspective, there is ample evidence to establish that the prosecution has proved the case against the appellant beyond reasonable doubt.

Under the circumstance, it was the view of learned DSG that the Court should consider the proviso of the Article 138 of the Constitution of the Republic as relevant in this regard.

Consideration of the Grounds of Appeal

As the grounds of appeal urged are interrelated, I will now proceed on to consider the said grounds together, rather than separately.

The main contention of the learned President's Counsel was that the prosecution failed to prove the case beyond reasonable doubt in view of the defence of consent taken by the appellant, and the learned High Court Judge failed to give due consideration to that fact in her judgment.

In this matter the fact that the incident happened on the 5th of July 2013 was not a disputed fact. The fact that the appellant came looking for the prosecutrix and she was forced out of a bus and that she was assaulted in front of others and taken to the other side of the road are admitted facts by the appellant. Although he has attempted to portray a much less confrontational picture as to what happened inside the bus and at the bus stand on that day, when considering the evidence of the prosecutrix in its totality and the evidence of the appellant, it becomes very much clear that the appellant has created a situation where the prosecutrix was forced to submit to him. This may be so due to the previous relationship they had and due to feelings of shame of being subjected to this kind of harassment in front of the public.

The behaviour of the appellant provides ample evidence to believe that even if they had a relationship as claimed by the appellant, that had come to an end well before the date of this incident. If it was not so, and if the prosecutrix was a willing participant, there was no need for the appellant to go looking for her, assault, force her out of a bus and to take her in a three-wheeler to the place where the sexual assault took place.

As pointed out correctly by the learned DSG, in the case of **Inoka Gallage Vs. Kamal Addararachchi and another (2002) 1 SLR 307,** it was held that;

> *"… consent to sexual intercourse on the part of the woman is a good defence to a charge of rape unless the woman is unable to consent or decent by reason of;*
>
> *(a) Extreme youth*
>
> *(b) Unconsciousness*
>
> *(c) Idiocy or imbecility (consent obtained by force)*
>
> *Consent on the part of the woman as a defence to an allegation of rape requires voluntary participation. A woman is said to consent when she freely agrees to submit herself. It is always a voluntary and conscious acceptance of what is proposed to be done by another and occurred in by the former. There is a difference between consent and submission to sexual intercourse. Every consent involves submission, but the converse does not follow and a mere act of submission does not involve consent."*

In the case of **Rao Harnarian Vs. The State of Punjab 1958 AIR 123, Trek Chand, J.** referred to the distinction between passive submission and consent in the following manner;

> *"A mere fact of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in when volitional faculty is either clouded by fear vitiated by duress cannot be deemed to be consent as understood in law. Consent on the part of a woman as a defence to an allegation of rape requires voluntary participation, not only after the exercise intelligence based on knowledge of the significance moral quality of choice between resistance and assent. Submission of her body under the influence of fear or terror is no consent. When the Court is confronted with a situation where the victim says that the act was done without her*

consent and the accused takes up the position that it was done with her consent, then consent becomes a matter of inference to be made from evidence of previous or contemporaneous acts and conduct and other attendant circumstances."

This is a matter where there is no need to look for corroboration as to the actual sexual intercourse between the prosecutrix and the appellant as it was and admitted fact by the appellant. What needs to be looked at is whether there is merit in the appellant's contention that the sexual intercourse was consensual, if so, which needs to be considered in favour of the appellant.

The evidence of the JMO abundantly supports the evidence of the prosecutrix as to the assaults she was subjected to. The JMO has observed injuries to the vagina of the prosecutrix and was firm in his opinion that if it was consensual sex as claimed by the appellant, such injuries cannot occur.

As observed correctly by the learned High Court judge, the prosecutrix has been prompt in her actions soon after she was released from the clutches of the appellant. She has informed her mother what happened and had promptly complained to the police and had got admitted to the hospital. If it was a consensual encounter, that would not be the normal behaviour of the prosecutrix.

It was held in the case of **State of Punjab Vs. Gurmeet Singh and others (1996) 2 SCC 384** that;

"The Court must, whilst 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 it involved in the commission of rape on her."

I find that in the judgment, the learned High Court Judge has well considered the evidence of the prosecutrix and that of the JMO, having in her mind that the defence of the appellant was consent. The learned High Court Judge has

decided not to act on the evidence of PW-02 who was the owner of the guest house on the basis that he has given false evidence. However, I am in no position to agree with the contention that the learned High Court Judge has failed to consider evidence favourable to the appellant in the process of rejecting the evidence of PW-02 which has resulted in a denial of a fair trial to him. To consider the evidence of PW-02 as relevant, the evidence needs to be material in that context. I find that even if considered, the evidence of PW-02 where he says that he did not observe any resistance by the female who came and she did not complain to him as correct, I am of the view that it does not create any doubt in the evidence of the prosecutrix, given the admitted facts in this case. Similarly, the discrepancies in the evidence of the prosecutrix as to who was driving the three-wheeler when she was taken to the guest house has not created any doubt in the credibility of the evidence of the prosecutrix when considering the evidence in its totality and the facts admitted by the appellant in his evidence.

It was a misdirection by the learned High Court Judge to conclude that the appellant has failed to substantiate his defence by calling additional evidence.

It is trite law that in a criminal action, an accused person has to prove nothing. He is only expected to create a reasonable doubt about the prosecution evidence and if necessary, to give a reasonable explanation with regard to any incriminating evidence against him.

It was held in the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148,** that;

(1) As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies the Court or at least creates a reasonable doubt as to his guilt.

(2) As the trial judge was a trained judge who should have been aware that the burden of proof was on the prosecution to prove its case beyond reasonable doubt if a reasonable doubt was created in his mind as to the guilt of the accused, he would have given the benefit of that doubt to the accused and acquitted him.

However, I am of the view that what needs to be looked at in this instance is whether the above misdirection has resulted in any material prejudice to the appellant and thereby caused a miscarriage of justice in view of the Article 138 of the Constitution, which confers the appellate jurisdiction to the Court of Appeal from the Courts of first instance.

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."**

Similarly, Section 436 of the Code of Criminal Procedure Act No 15 of 1979 which deals with the same subject reads as follows;

> **436. Subject to the provisions hereinbefore contained any judgment passed by a Court of Competent jurisdiction shall not be reversed or altered on appeal or revision on account-**
>
> > **(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this code; or**
> >
> > **(b) of the want of any sanction required by section 135,**
>
> **Unless such error, omission, irregularity, or want has occasioned a failure of justice.**

In the case of **Lafeer Vs. Queen 74 NLR 246,** H.N.G.Fernando, C.J. stated;

> *"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."*

It is clear from the relevant statutory provisions as well as the case law, that the law has been well settled in this regard.

In the appeal under consideration, it cannot be said that the learned High Court Judge has failed to consider the defence of consent taken up by the appellant. I find that the learned trial judge has well considered the evidence to find whether there is a basis to conclude that the defence of the appellant has created a doubt in the prosecution evidence. It is only after being satisfied that the prosecution has proved the case beyond reasonable doubt, and not on the weaknesses of the defence evidence, that the appellant has been found guilty. Under the circumstances, I am of the view that there cannot be a different outcome to the judgment of the learned trial judge even if the evidence of the guest house owner was considered and the learned trial judge did not expect the appellant to substantiate his evidence. I find that it would not have created a reasonable doubt or a reasonable explanation as to the evidence against the appellant.

At this juncture, I would like to comment that it was the same learned High Court Judge who has heard the evidence in its entirety, and who had the benefit of seeing and observing the demeanor of the witnesses when pronouncing the judgment.

In the case of **De Silva and Others Vs. The Attorney General (2010) 2 SLR 169** it was held that;

> *"Credibility is a question of fact, not law. Appeal Court Judges repeatedly stress the importance of trial judge's observation of demeanor of witnesses in deciding questions of fact. The acceptance or rejection of evidence is therefore is a question of fact for the trial judge, since he or she is in the best position to hear and observe witnesses. In such a situation the appellate Courts will be slow to interfere with the findings of a trial judge unless such evidence could be shown to be totally inconsistent or perverse and lacking credibility. Evidence must be weighed and not counted."*

In the case of **Chaminda Vs. The Republic (2009) 1 SLR 144,** it was held:

> *"An appellate Court will not lightly disturb the findings of a trial judge who has come to a favourable finding with regard to the testimonial trustworthiness of a witness whose demeanor and deportment had been observed by a trial judge. Findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal."*

I am of the view that the mentioned misdirection of law and the irregularities has no merit as they have not prejudiced the substantial rights of the appellant or occasioned a failure of justice.

For the reasons aforementioned, I find no merit in the grounds of appeal urged, and any other reason to interfere with the conviction of the appellant by the learned High Court Judge for the charges preferred against him. Therefore, the appeal against the conviction is dismissed.

However, I find that the learned High Court Judge has failed to consider mitigatory circumstances pleaded on behalf of the appellant, which should have been considered before sentencing him for the maximum possible period of imprisonment in relation to the first count for which he was found guilty.

Therefore, I set aside the period of twenty years rigorous imprisonment imposed on the appellant on count one, as it was not warranted given the facts and the circumstances and the fact that he has had no previous convictions.

Accordingly, I sentence him for a period of 15 years rigorous imprisonment on count one, to run concurrently to the sentence of imprisonment ordered on count two. The fine and the default sentence imposed on count one, and the sentence imposed on count two shall remain the same. The compensation ordered to be paid to the prosecutrix and the default sentence shall also remain the same.

Subjected to the variance as stated above on the sentence on count one, the appeal against the sentence is also dismissed.

Having considered the fact that the appellant has been in incarceration from the date of the conviction, namely, 31-07-2020, the sentence is ordered to be considered effective from 31-07-2020.

Judge of the Court of Appeal

P. Kumarraratnam, J.

I agree.

Judge of the Court of Appeal