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

In the matter of an Appeal under and in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

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

Complainant

Court of Appeal Case No. HCC/388/19

High Court of Rathnapura Case No. 229/17

Vs.

Kaluwa Manannalage Nihal Ranjit Kumara Ananda

Accused

AND NOW BETWEEN

Kaluwa Manannalage Nihal Ranjit Kumara Ananda

Accused-Appellant

Vs.

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

Complainant-Respondent

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

WICKUM A. KALUARACHCHI, J

COUNSEL : Nalin Ladduwahetty, PC with Kavithri Ubeysekera

Ayesha Jinasena, ASG, PC with Priyani Abeygunawardena, SC for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 31.03.2021 (On behalf of the Accused-Appellant)

08.06.2021 (On behalf of the Respondent)

ARGUED ON : 03.06.2022

DECIDED ON : 25.07.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Rathnapura for committing an offence on or about 24.09.2014 punishable under Section 364(1) of the Penal Code. After the trial, the learned High Court Judge convicted and sentenced the appellant. This is an appeal against the said conviction and sentence.

The facts of the case may be briefly summarized as follows:
The prosecutrix had known the accused-appellant since she was a child. The prosecutrix admitted that she had an affair with the accused-appellant prior to her marriage. The affair had to be stopped because her parents refused to consent. The accused-appellant was living with the prosecutrix's cousin at the time of the incident. The

prosecutrix stated that the accused-appellant was a frequent visitor to her home. However, she said that even after her marriage, other villagers also came to her house to chew beetle or drink tea. After derogatory posters (කැලෑ පත්තර) were pasted throughout the village, she asked everyone, including the accused-appellant, not to come to her house while her husband is not at home.

The victim was 35 years old at the time of the incident. On the day in question, the accused, dressed in a sarong and a shirt, arrived in front of her house carrying a knife between 8 a.m. and 9 a.m., while the prosecutrix was alone at home. He asked for water, and when she told him to get it from the tap in the back, the appellant went to the back of the prosecutrix's house, entered through the kitchen door, and went to the sitting room. The appellant then dragged her to a room and raped her on the floor.

Written submissions on behalf of both parties have been filed prior to the hearing. At the hearing, the learned President's Counsel for the appellant and the learned Additional Solicitor General for the respondent made oral submissions.

Although the written submissions were filed in respect of several matters, the learned President's Counsel for the appellant confined his arguments to two grounds. The first ground is that the learned High Court Judge has not properly considered the issue of lack of consent. The position taken up in the appeal was that the sexual intercourse was taken place with the consent of PW1. The second ground is that the sentence is grossly excessive.

The sexual intercourse between the prosecutrix (PW1) and the appellant is clearly admitted by the appellant, according to the first

ground of appeal. In substantiating the appellant's position, the learned President's Counsel pointed out that the first person she met after the incident was PW2, Sunny Wickramanayake. She told him she had thrown acid on Kumara but not that he had raped her. The learned President's Counsel went on to say that the first person she told about the rape was her husband, but he was never called as a witness or even listed as a witness. Accordingly, the learned President's Counsel asserted that no rape occurred.

Furthermore, the learned President's Counsel pointed out that, according to her neighbor, PW2, the appellant meets her three or four times a week. The learned President's Counsel added that although the prosecutrix was dragged to a room and raped, she did not scream or flee. Not only that, after the act, the learned President's Counsel submitted that they have spoken about some other matters. Therefore, he contended that the appellant had not raped her but she wanted to end her relationship with the appellant.

Undisputedly, the issue of whether the sexual intercourse took place with or without the consent of the PW1 is a question of fact. The learned Additional Solicitor General contended that the findings of the trial Judge in respect of facts should not be lightly disturbed by the Appellate Court. Considering the several decisions of House of Lords, Privy Council, and our Apex Courts, it was decided in De Silva and Others V. Seneviratne and Another – (1981) 2 Sri L.R. 7 that "Where the findings on questions of fact are based upon the credibility of witnesses on the footing of the Trial Judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the Appellate Court that the trial Judge has failed to make full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest considerations that it would be

justified in doing so". Also, in the cases of King V. Gunaratne – 14 Ceylon Law Recorder 174, Fradd V. Brown & Company – 20 NLR 282 at 283, Oliver Dayananda Kalansuriya *alias* Raja V. Republic of Sri Lanka – CA 28/2009, decided on 13.02.2013, it was held that "the testimonial trustworthiness of witnesses is a matter for a trial Judge and a considered findings of the trial Judge will not be disturbed by an Appellate Court lightly".

Further, the learned Additional Solicitor General contended that different people behave differently in situations like this. So, the fact that she did not yell does not imply that the sexual intercourse was done with her consent. I agree with the learned Additional Solicitor General's argument that it is unreasonable and incorrect to expect all women who have been raped to shout and if not, to determine that sexual intercourse took place with the consent of that woman. Apart from that, when PW1 was asked why she did not shout she said "සැකයක් ඇති වුනේ නැති නිසා ගරු උතුමාණනි. පොඩි කාලේ ඉඳන් දන්න හදුනන කෙනෙක් නිසා සැකයක් ඇති වුනේ නැහැ. ඒ කියන්නේ නිතරම යනවා එනවා. මගේ පුංචි අම්මාගේ දුවත් එක්ක එයා සම්බන්දයක් තියෙන්නේ. ඉතිං අපට ඒ වගේ කරදරයක් ඒ තැනැත්තා ඇති කරයි කියලා හිතුවේ නෑ ගරු උතුමාණනි." (Page 109 of the appeal brief). Her explanation could be believed as she knew the appellant very well from her childhood. In addition, she also stated that "මම පුළුවන් තරම් දැගලුවා ස්වාමීනි, අයින් කරන්න හැදුවා බැරි වුනා, මම හපා කෑවා. (Page 57 of the appeal brief). This is the behaviour of the prosecutrix in this case. Some other woman would react in some other way. Hence, there is no reasonable doubt as to whether PW1 had consented for the sexual intercourse for the reason of not shouting at the time of the incident.

The other points raised by the learned President's Counsel that the incident of rape was not informed to PW2, her husband was not called in evidence, and she spoke with the appellant after the incident, are correct. However, as submitted by the learned Additional Solicitor

General, the PW1's behavior may differ from that of a woman raped by a total stranger because the appellant was a person who frequently visited PW1's home.

As contended by the learned President's Counsel, there could be some sort of connection between the PW1 and the appellant. Even though they had sexual intercourse previously with each other's consent, it is immaterial in this case. The issue in this case is whether the appellant had sexual intercourse with PW1 without her consent on the day specified in the charge. Since the appellant asserted that he had sexual intercourse with PW1 with her consent, the only issue to be resolved is whether the sexual intercourse occurred with or without PW1's consent.

It should be noted that when the PW1 testified that the appellant had sexual intercourse without her consent on the day in question, no single question was asked in cross-examination to infer that sexual intercourse occurred with the consent of the PW1. At least, no single suggestion has been made on behalf of the appellant that sexual intercourse occurred with the consent of the PW1. The learned President's Counsel also admitted that the PW1's evidence of lack of consent was never challenged.

However, the learned President's Counsel for the appellant contended that irrespective of the defense version, the prosecution must prove beyond reasonable doubt that the sexual intercourse occurred without PW1's consent, as the lack of consent is an ingredient of the charge of rape.

I agree with the contention that the ingredients of the charge have to be proved beyond reasonable doubt by the prosecution disregarding the defence version. As decided in Kamal Addaraarachchi V. State – (2000) 3 Sri L. R. 393 that "it is a grave error for a trial Judge to direct

himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution". However, in the instant action, no such wrong evaluation has been made.

In this case, disregarding the dock statement or the defence version for a moment, the appellant never challenged the PW1's evidence that sexual intercourse occurred without her consent. The Indian judgment of Sarvan Singh v. State of Punjab (2002 AIR SC (iii) 3652) pages 3655 and 3656, was cited in the case of Ratnayake Mudiyanselage Premachandra v. The Hon. Attorney General C.A Case No. 79/2011, decided on 04.04.2017 as follows:

" It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted."

In the case of Himachal Pradesh v. Thakur Dass (1983) 2 Cri. L. J. 1694 at 1701 V.D Misra CJ held that *"whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.* Similarly, in Motilal v. State of Madhya Pradesh (1990) Criminal Law Journal NOC 125 MP it was held that *"Absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact."*

For the reason of not challenging the PW1's evidence regarding the lack of consent by the appellant, it has to be inferred that the defence has admitted the lack of consent according to the decisions of the aforesaid judicial authorities.

In addition, although the appellant made a general statement in his dock statement that everything happened with the consent of both of us, when speaking about this particular day in question, he said when

I finished chewing the betel nut, she threw away acid that was in a jug. Accordingly, the appellant's dock statement was a total denial. He did not speak about sexual intercourse with consent. Therefore, this is not an instance where the Judgment was entered in favour of the prosecution considering the weakness of the defence version. In any case, it should be noted that the learned President's Counsel did not challenge the decision of the learned High Court Judge to reject the defense version. His contention was that the learned High Court Judge had not carefully considered the lack of consent. However, it appears that the lack of consent has not been established in this case for the reasons stated above.

In addition, there is unchallenged evidence from a retired officer in charge of the Rathnapura Child and Women Bureau that the frock that PW1 was wearing at the time of the incident was handed over to her and the waist area was torn. The frock has most probably been torn off as a result of her resistance. This is also proof that the sexual intercourse was done without the consent of PW1.

Furthermore, it is clear from the patient's history in the medico-legal report marked P3 that PW1 told the doctor the same story he told in court. She was examined by a doctor on the same day as the incident occurred. The doctor who prepared the medico-legal report testified in court and stated that the injuries he examined were consistent with her history. The doctor has expressed his expert opinion with reasoning and stated that the sexual intercourse occurred without the consent of the PW1. In addition, the complaint about this incident has been made without any delay. All of these facts strengthen the prosecution case.

To summarize the reasons stated above, the appellant admitted sexual intercourse in appeal and took up the defence of consent. The appellant, on the other hand, has never challenged the PW1's evidence

of lack of consent. The lack of consent has been corroborated by the doctor's expert opinion. The appellant did not raise the defence of lack of consent in the High Court. Due to the position taken in the appeal, the defence of total denial taken up in the High Court would completely fail. For these reasons, and for the reasons stated in the Judgment of the learned High Court Judge, I hold that the conviction is correct in law.

Now, I proceed to consider the second ground of appeal. The learned counsel for the appellant contended that the sentence is excessive because PW1 threw acid on the appellant and the said case against the PW1 was settled with the understanding that this case would also be settled. The learned Additional Solicitor General objected to the sentence being reduced, stating the gravity of the offence.

The learned High Court Judge imposed 15 years of rigorous imprisonment, a fine of Rs.25000/- and Rs.200,000/- as compensation. There had been no previous convictions for the accused-appellant. It is correct that the charge of rape is not compoundable. However, with or without knowing the nature of the charge, it transpires from the evidence that PW1 was acquitted from the case of throwing acid on the understanding that the case against the appellant for rape would not be pursued. The following is PW1's evidence regarding this agreement which appears on pages 115 and 116:

ප්‍ර: දැන් මේ විත්තිකාරයට ඇසිඩ් ගැහුවා කියලා පල්ලෙහා උසාවියේ නඩුවක් තිබුණාද?

උ: එසේය ස්වාමීනි.

ප්‍ර: ඒකට මොකද වුනේ?

උ: ඒ නඩුවයි මේ නඩුවයි දෙකම අයින් කර ගන්නවා කියලා කිව්වා නිසා ඒ ගොල්ලෝ ඒ නඩුව අයින් කර ගත්තා.

ප්‍ර: තමන් ඒ නඩුවේ කවුද?

උ: වැරදිකරු.

ප්‍ර: තමන්ට ඒ අධිකරණයෙන් දඬුවම් කලාද?

උ: නැහැ උතුමාණනි.

ප්‍ර: මොකක්ද වුනේ ඒ නඩුවෙන් තමන්ට?

උ: නිදොස් කළා උතුමාණනි.

According to her own admission of the PW1, she was guilty of the offence of throwing acid at the appellant. Because of the agreement between her and the appellant, she was acquitted from the said case and as a result of the said agreement, she did not get any punishment. Therefore, the said agreement must necessarily be a reason to reduce the sentence of the appellant in this case, although this rape case cannot be settled. The learned High Court Judge has not considered the said aspect in sentencing.

No doubt that any kind of rape is a grave crime. However, when PW1's evidence is considered, the nature of rape does not seem so brutal because according to PW1, the appellant stayed at her home after the incident, he requested beetle to chew and water to drink from her, exchanged some words with her, and thereafter she threw acid on him.

Rape is an offence punishable by a minimum of seven years' imprisonment and a maximum of twenty years' imprisonment. The sentence imposed by the learned High Court Judge is 8 years longer than the minimum sentence and only 5 years less than the maximum sentence. Considering the aforesaid circumstances, I hold that 13 years' rigorous imprisonment is sufficient for the offence. Therefore, 15 years' imprisonment is set aside and the accused-appellant is sentenced to 13 years' rigorous imprisonment. Considering the fact, that the appellant was in incarceration from the date of the sentence imposed by the learned High Court Judge, I direct that the term of 13 years' imprisonment to have commenced from the date of conviction, namely 20.11.2019. The fine, compensation and default sentences imposed by the learned High Court Judge remain unchanged.

The appeal is partly allowed only with regard to the sentence.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL