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 Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0248/18

High Court of Puttalam

Case No: HC/33/2017

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Warnakulasuriyage Ranjith Kumara

ACCUSED

AND NOW BETWEEN

Warnakulasuriyage Ranjith Kumara

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : R. Arsecularatne, P.C. with P. Gamage for the Accused Appellant

: Riyaz Bary, DSG for the Respondent

Argued on : 15-06-2022

Written Submissions : 29-09-2020 (By the Accused-Appellant)

: 15-03-2021, 06-11-2019 (By the Respondent)

Decided on : 29-07-2022

Sampath B Abayakoon, J.

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 Puttalam.

The appellant was indicted before the High Court of Puttalam for committing the offence of incest on a minor, who was below sixteen years of age at the time of the offence and was his sister's daughter, on 09th June 2009, an offence punishable in terms of section 364(3) of the Penal Code as amended, and described in section 364A(1) of the Penal Code (Amendment) Act number 22 of 1995.

After trial, the appellant was found guilty as charged by the learned High Court Judge and he was sentenced to a period of 15 years rigorous imprisonment and for a fine of Rs. 25000/-. In default, he was sentenced to a period of one-year rigorous imprisonment.

He was also ordered to pay a sum of Rs. 100000/- as compensation to PW-01 who was the victim of the offence. In default he was sentenced to a period of three-month rigorous imprisonment.

The facts in brief: -

At the time relevant to this incident the PW-01, (hereinafter sometimes referred to as the victim) and her younger brother who is six years younger to her was living with their maternal grandmother. Their mother has left them and was in another relationship. Their father who was the person who looked after them had died due to an accident three months prior to the incident faced by the PW-01. The appellant was the victim PW-01's grandmother's son from another marriage and thereby the stepbrother of the mother of the victim. The victim was fourteen years of age at the time where she faced the incident. She had another sister elder to her, but she was living with a relative from his father's side.

The three months alms giving was arranged for the 9th of June 2009, which was the date of this incident as well. Due to the animosities the relatives of the father had with the relatives from her mother's side, the elder sister had not participated in the arms giving.

It was the evidence of the victim that the arrangement was to present the alms at the temple as the grandmother could not afford to arrange it at their house.

The appellant who was living elsewhere had come to the house of the victim to assist in the alms giving arranged for her father.

The victim who has gone to a friend's place, which she identifies as Samarajeeva auntie's place in order to bring some coconuts for the alms giving on the previous day, has spent the night there and had returned to her house around 6.30 in the morning. Her grandmother was not at home as she has gone to get some medicine. While at home, the appellant has come and had

asked the victim to boil some water to prepare tea and has sent her brother to the boutique to get some buns.

While the victim was preparing to boil water in the kitchen, the appellant has come and carried the victim to the room of the house. Although the victim has raised cries, it was to no avail as there were no other houses nearby. It was the evidence of the victim that after forcibly taking her to the room, the appellant lifted her above the ground, held her against a wall, lifted her and the appellant's cloths and inserted his penis into her vagina against her will. It was her evidence that while he was attempting to insert the penis by pressing it against her vagina, due to her struggling, the sarong the appellant was wearing at that time and kept above his waist got loosened and fell to the ground. She has used that distraction of the appellant to escape his clutches and run away from the house. She has then gone to the house of a neighbour whom she has identified as Sujeewa aunt. She has informed her what had happened to her at the hands of the appellant and had attempted to call her elder sister but it has failed. While she was there, the appellant has come in search of her, but when asked, the landlady of the house has informed the appellant that she did not come. She has testified that she did not tell the grandmother what happened because she thought that she will not be believed since the appellant was her son, but attempted to contact her sister instead. On the following day, after contacting the sister, she has gone to Anamaduwa town, met her and had informed what happened to her. The sister, after taking her initially to the aunt's house where she was living at that time, has taken the victim to Anamaduwa police on 10-06-2009 where she has lodged a complaint in this regard. She has been admitted to the hospital thereafter by the police.

The evidence led in this action reveals that after the incident, she was placed in the care of a Children's Home in Kurunegala as there was no one to care for her. She has lived there until she got married in the year 2009.

At the time of giving evidence before the High Court on 23-05-2018, she was 23 years of age, and was living with her husband in Mawanella area.

The fact that the PW-01 was born on 01-01-1995 was an admitted fact in terms of section 420 of the Code of Criminal Procedure Act.

When PW-01 was subjected to the test of cross examination, the learned Counsel who represented the appellant at the trial has brought to the notice of the Court several instances in relation to the statement made by her to the police, which he has termed as omissions, and a contradiction has also been marked as V-01.

The stand of the appellant has been that he was falsely implicated in the crime due to the animosities family members of the victim's father had and also in order to leave the house after the death of the father at the instigation of her sister. The victim has given very specific clear answers to the allegations raised stating that because of this incident she was forced to live in a Children's Home for several years and she has no reason to cause damage to her self-respect by making a false complaint against her uncle.

In support of her evidence, the aunt mentioned by the victim as Sujeewa has been called to give evidence. She has confirmed that the victim came to her house in an agitated state and crying and informed her that her uncle raped her. It was her evidence that the victim made several attempts to contact her elder sister but failed. She has also confirmed that while the victim was at her house, the appellant came looking for her and she told him that she did not come, and the victim left her home later. Under cross examination, she has admitted several parts of the statement made by her to the police as what she said to the police. It is noteworthy to mention that she had told the police in her statement that it was on the 9th of June 2009 at around 8.45 in the morning, the victim came to her house.

PW-07, the Judicial Medical Officer (JMO) who examined the victim after she was admitted to the Chilaw hospital has given evidence and marked his Judicial Medical Report as P-02. The short history given by the victim as to what happened to her was in conformity with the evidence of the victim before the trial Court. The victim has informed the JMO that her uncle called Ranjith inserted his penis into her vagina.

In his general examination of the victim, he has observed her to be of average built and intelligence, with well developed breasts. Upon the vaginal examination, he has found normal labia and contused vestibule. He has observed healed mucosal tears in the vestibule around the lower part of the hymen and contused hymen and a deep cleft at 8, 0' clock position. There were contractions of the vagina during the examination due to pain.

He has expressed the opinion that there was medical evidence of healing injuries of the introitous, hymen and vagina due to recent penetrating sex.

When called for a defence at the conclusion of the prosecution evidence, the appellant has made a lengthy statement from the dock and has narrated the way he has helped the family after the death of the father of PW-01. He has admitted that he was at the house of his mother on the day of the incident, but has claimed that the PW-01 came to the house at around 8.30 in the morning after being away from the house for about two days. He has claimed that he is totally innocent of the alleged crime and has stated that he is unaware as to why such an allegation was made against him, but has claimed that it was the aunt and the elder sister of PW-01 who were instrumental in making a complaint against him.

The appellant has called several witnesses to testify on his behalf, including the brother of the victim. Damayanthi is another neighbour who lived close to the house of the victim. She has testified that she saw the victim at around 8.30 a.m. on the day of the alms giving walking towards her house from the

direction of Anamaduwa. It was her evidence that the victim came to her house at about 8.40 a.m. for the purpose of washing her clothes and wanted to take a call to her sister using her phone, but could not as her sister's phone did not respond. It was also her evidence that afterwards she also went to the house of Sriyani, who was her neighbour and attempted to take a call but could not.

Defence witness Brian Nilantha was a person well known to the appellant and a person lived near the house of the victim. It was his evidence that the appellant who is a resident of Polgahawela, was in Anamaduwa for the alms giving, and came to his house around 6.30 in the morning to wash himself as his mother's house had no water or proper toilet facilities. It has been his position that the appellant left his house after having some tea in that morning.

The appellant has also called the brother of the victim to give evidence on his behalf. He was 22 years of age at the time he gave evidence in the High Court on 17-07-2018, and was living with the appellant and his grandmother at that time. Although his sister who was the victim of this incident has stated that her brother is six years younger to her, it appears that he was about 12 years of age at that time. He has stated that his sister came to the house on the day of the alms giving at around 8.30 in the morning and his grandmother left the house around 6.00 in the morning in order to get medicine. He has claimed that his uncle who is the appellant went to the house of the earlier mentioned witness in the morning and returned only after 8.30 in the morning. He has also stated that he went to purchase buns at around 6.30 in the morning and returned in about 10 minutes time and his sister came home only after he returned from the boutique. He has wowed for the innocence of his uncle claiming that he has been falsely accused due to the animosities the sisters of his father had with him.

The Grounds of Appeal: -

At the hearing of the appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

(1) The evidence led in the action does not establish the offence of rape.

(2) The learned High Court Judge failed to examine whether the evidence of the prosecutrix and the medical evidence has established penetration into the vaginal passage.

(3) In any event the sentence is excessive.

It was the contention of the learned Counsel for the appellant that the evidence of the prosecutrix in itself shows that it was not penile penetration but only an attempt. He was of the view that medical evidence is also supportive of the fact that there was no penetration into the vagina of the prosecutrix, hence, if at all, the offence can only be sexual harassment in terms of section 345 of the Penal Code. He contended further, that the sentence was too excessive given the facts and the circumstances.

It was the view of the learned Deputy Solicitor General (DSG) on behalf of the Attorney General that it was not the evidence of the victim that it was a total penetration. Pointing to the explanation of the word penetration as provided for in the Penal Code, it was the contention of the learned DSG that the evidence of the JMO has well established that there was penetration into the hymen and vagina of the victim. It was his position that given the cogent and trustworthy evidence of the victim and the other witnesses called to prove the case, the submissions with regard to the evidence of the victim has no basis. He brought to the notice of the Court that the learned High Court Judge has imposed the minimum mandatory sentence that can be imposed for an accused who was found guilty in terms of section 364(3) of the Penal Code.

Consideration of the Grounds of Appeal

As the 1st and the 2nd grounds of appeal revolve around the fact that the prosecution failed to prove penetration, therefore, failed to prove the offence of rape, I will now proceed to consider both the grounds together.

According to the description of the offence of rape as provided in section 363 of the Penal Code;

> **A man is said to commit "rape" who has sexual intercourse with a woman under the circumstances falling under any of the descriptions mentioned as sub sections (a) to (e) in the section.**

The explanation of the section reads as follows;

> **(i) Penetration is sufficient to constitute sexual intercourse necessary to the offence of rape;**
>
> **(ii) Evidence of resistance such as physical injuries to the body in not essential to prove that sexual intercourse took place without consent.**

The meaning of sexual intercourse, among other meanings, includes; Sexual contact between individuals involving penetration, especially the insertion of a man's erect penis into a woman's vagina.

Vaginal penetration occurs when the penis, other body part, or object enters the vulva, or between the labia majora, which is the outermost part of the female genital organ.

In the case of **Perera Vs. The Attorney General (2012) 1 SLR 69,** Ranjith Silva, J. held:

> *"The slightest penetration of the penis within the vulva, such as the minimal passage of glans between the labia with or without the emission of semen or rapture of Hymen constitutes rape. There need not be a*

completed act of intercourse. Rape can be committed even when there is inability produce penile erection. Rape can occur without any injury and as such negative evidence does not exclude rape."

The contention of the learned Counsel for the appellant that the prosecution has failed to prove the offence of rape appears to be based on the evidence of the victim where she has stated while stating that the appellant inserted his male organ into her female organ, that he could not put it inside as she struggled with him and escaped.

In order to understand what she was telling the Court as to the ordeal she had to face, one needs to read her evidence as a whole without compartmentalizing parts of it in its isolation. It is clear that what she was saying in her evidence was that the appellant, although he pressed his penis against her vagina, he could not fully insert it into her vagina because she managed to escape from his clutches.

The evidence of the JMO, who was the expert witness relied on by the prosecution in order to prove the charge against the appellant amply supports the version of events by the victim. The statement given by the victim to the doctor is consistent with her evidence. In the Judicial Medical Report marked P-02, the JMO under the heading Vaginal Examination, has noted his observations and had come to a conclusion that there was evidence of recent penetrating sex.

In giving his evidence before the High Court, the JMO has given a firm professional opinion based on his examination of the victim in the following manner;

"යෝනි මාර්ග විවරයේ භාහිර කොටසේ ඒ තැලීම් වල වර්ණය සහ පරීක්ෂා කිරීමේ දී රෝගියාට දැනුණු වේදනාව අනුව ඇයගේ ශරීරයේ ඇති වූ ස්වාභාවික ප්‍රතික්‍රියාව එමෙන්ම කන්‍යාපටලයේ තැලීම් ස්වාභාවය සහ ශ්ලේෂ්මල පටලයේ ඉරීම් තුවාල සලකා බැලූ විට එය

මෑත කාලයේ දී දින කීපයකට ප්‍රථම ඇති වූ ප්‍රවිශ්ඨගත ලිංගික ක්‍රියාවක් හේතුවෙන් සිදු වූ බවට ප්‍රකාශ කළහැකියි."

Based on the evidence of the victim and that of the JMO, I find that the prosecution has proved the penile penetration with certainty, hence, no basis for the considered grounds of appeal.

The 3rd Ground of Appeal: -

I find no basis whatsoever for the contention that the punishment imposed by the learned High Court Judge was excessive.

The judgment cited by the learned Counsel in this regard, namely, the judgment in the case of The **Attorney General Vs. Ranasinghe and Others (1993) 2 SLR 81** was a case decided before the Penal Code (Amendment) Act No 22 of 1995 came into being, under which the charge against the appellant has been framed. Under the amendment, a minimum mandatory punishment was introduced under various classifications of the offence of rape.

The minimum mandatory punishment for the offence of rape in terms of section 364(3), which was the punishable section against the appellant, prescribes a minimum mandatory sentence of not less than fifteen years and not exceeding twenty years of rigorous imprisonment for a person who commits rape, in addition to a fine.

Since the learned High Court Judge has imposed the minimum mandatory sentence on the appellant in this instance, I find no merit in the considered ground of appeal either.

It needs to be noted that the evidence of the victim who was a minor at the time of the incident was cogent and trustworthy as to what happened to her on that fateful day. The evidence of (PW-02), to whom the victim had gone and informed what happened to her, and the evidence of the JMO are very much consistent with the version of events by the victim. The evidence of the JMO

has clearly established that there had been recent penetrating sex as described by the victim. The omissions referred to are, if they can be termed as omissions if at all, are not material omissions. When it comes to the contradiction V-01, it is the same. It is abundantly clear that the witnesses, including PW-02, have forgotten some of the minute details of the events due to the passage of time, which has not created any doubt on the evidence of the prosecution.

It was held in the Court of Appeal Case of **D. Tikiribanda Vs. The Attorney General-decided on 06-10-2009** reported in **Bar Association Law Reports 2010 (B.L.R.) 92** that;

> *"Mostly the victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible (withdrawal symptom). The offenders should not be allowed to capitalized or take mean advantage of these natural inherent weaknesses of small children."*

The appellant has failed to crate any doubt as to the evidence of the prosecution or to offer a reasonable explanation of the incriminating evidence against him which would have created a reasonable doubt of the prosecution evidence. The evidence of the brother of the victim in support of his uncle can be expected as he has been under his influence since the incident. The differences in the times given by the witnesses cannot be considered that the victim is not telling the truth about the incident she had to face. In fact, I find that the witnesses called on behalf of the appellant has provided supportive evidence on some of the material points of the evidence of the victim and that of PW-02.

It was the same learned High Court Judge who has heard the evidence and pronounced the judgment in this matter. It is trite law that an appellate forum is slow and will not interfere on such situations, unless the conclusions reached by a trial judge who had the benefit of observing the demeanor and

deportment of the witnesses are perverse, and not according to the law, which has created a denial of justice to an accused.

In the case of **Fradd Vs. Brown and Co. Ltd. 20 NLR, 282** it was held:

> *"Immense importance attaches, not only to the demeanour of the witnesses, but also in the course of the trial and the general impression left on the mind of the judge present, who saw and noted everything that took place in regard to what was said by one or other witness. It is rear that a decision of a judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any judge of a Court of Appeal, who can only learn from paper or from narrative from those who were present."*

It is clear from the judgment under consideration that the learned High Court Judge was well possessed of the relevant law and the facts when he found the appellant guilty as charged with sound reasoning. The appeal therefore is dismissed as it is devoid of merit. The conviction and the sentence affirmed.

However, considering the fact that the appellant has been in incarceration from the date of the conviction on 05-09-2018, the sentence shall be considered to have commenced from the date of the conviction.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal