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

In the matter of an Appeal made under 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 Case No.

CA/HCC/0186/2018

High Court of Anuradhapura
Case No. HC/91/2013

Rathnapalage Lional Bandara

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P.Kumararatnam,J.

COUNSEL : **Indica Mallawarachchi for the Appellant.**
Janaka Bandara, DSG for the Respondents.

ARGUED ON : **27/07/2022**

DECIDED ON : **05/08/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Anuradhapura on the following charge namely, committing the offence of rape on Senaviratnage Srimani Senaviratna on or before the 04th November 2011, within the jurisdiction of the court which is an offence punishable under Section 364(1) of the Penal Code.

After a non-jury trial, the Appellant was convicted as charged and was sentenced to ten years RI and a fine of Rs.1000/-. In default 03 months simple imprisonment was imposed. Further, a sum of Rs.50,000/- compensation was ordered with a default term of 3 months simple imprisonment.

Being aggrieved by the aforesaid conviction and the 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 restrictions in place. Also, at the time of argument the Appellant was connected via zoom platform from prison.

The Counsel for the Appellant advanced the following grounds of appeal:

1. The prosecution has failed to establish beyond reasonable doubt that sexual intercourse took place without the consent of the prosecutrix.
2. The learned trial Judge has grievously erred in law by shifting the burden of proof to the Appellant thereby reversing the presumption of innocence and occasioned in a deprivation of a fair trial.

In this case the prosecutrix had been married for three and half months but had ceased living together with her spouse. At the time of the incident, she was living with her mother and her elder brother. On the day of the incident, she was alone at home as her mother and the brother had left to engage in Chena cultivation. Around noon, when the prosecutrix was collecting her clothes to go for a bath at Mannakettiya Tank, she had heard the sound of a motor-bike outside her house. Before she could come out of her room to check who it was, the Appellant who was well known to her was standing at the entrance to the room in which the prosecutrix was standing. Although the prosecutrix had testified that she knew the Appellant very well and he had visited her home on previous occasions she had denied having any relationship with him. The Appellant had first adjusted the curtains of the windows in the room and invited her to have sex with him. The victim had refused the request and had attempted to exit the room. Then the Appellant had forcibly covered her mouth with one of her sister's dresses, thrust her on the bed, removed her under garment, raised her dress up to her chest level and committed the act of rape on the prosecutrix.

PW2 who was living in the neighbouring house had rushed to the room upon hearing the cries of the prosecutrix and had seen the Appellant lying on top of the prosecutrix and had observed that the prosecutrix was without her

undergarment. Also, she had observed that the trouser of the Appellant had been dropped down. After seeing PW2, the Appellant had tried to flee the scene but PW2 had been able to prevent him by wrenching away his motor bike keys and keeping it in her custody till the arrival of her father and her sister-in-law. Then her sister-in-law had made a phone call to the Appellant's mother and handed over the keys of the bike to the appellant only in front of his mother.

The complaint was lodged on the following day after the arrival of the prosecutrix's mother and the brother.

After the closer of the prosecution case, the defence was called and the Appellant made a dock statement denying the incident but admitted that he used to visit the prosecutrix whenever he came home on holidays and that due to this he had developed an affair with the prosecutrix.

In the 1st ground of appeal advanced the Appellant contented that the prosecution has failed to establish beyond reasonable doubt that sexual intercourse took place without the consent of the prosecutrix.

Professor G. L. Peiris in his book **"Offences under the Penal Code of Sri Lanka"** at page 222 states:

> "It is a fundamental principle that, where the woman's consent is an issue, a conviction of rape will be upheld only in circumstances where the prosecution has succeeded in establishing absence of consent beyond a reasonable doubt. If proof of this element is lacking, the cause of the prosecution is necessarily incomplete. Consequently, no burden devolves on the defence in these circumstances. Any departure from this position culminates in a miscarriage of justice".

PW1 in her evidence at page 42 of the brief stated as follows:

ප්‍ර : ලයනල් දොරකඩ ළඟට ඇවිත් හිටියා ?

උ : ඔව්. ඇවිල්ලා දොර රෙද්ද හැදුවා.

ප්‍ර : දොර රෙද්ද හැදුවේ ඇයි ?

උ : එයා මා එක්ක ඉන්න ඕන හන්දා.

ප්‍ර : දොර රෙද්ද හැදුවා කියලා අදහස් කරේ ඒ වෙලාවේ දොරේ රෙද්ද කොහොමද තිබුණේ ?

උ : ටිකක් අරහෙන් මෙහෙන් ඇත් වෙලා තිබුණා.

උ : ඔව්.

The prosecutrix's position was that she was forcibly raped by the Appellant on the date of the incident. In her evidence she had stated that the Appellant had adjusted the curtain and had requested her to have sex with him after coming into her room. Although she had stated that she was about to leave the room upon hearing the sound of a motor bike the Appellant had arrived first and had thereby blocked the entrance of the room. But when the Appellant had started to adjust the curtains in the room the prosecutrix had not taken any endeavour to escape from the room.

PW1 under cross-examination at pages 59-60 of the brief stated as follows:

ප්‍ර : ඊට පස්සේ පොලිසියට ගිහින් මේ ප්‍රකාශය තමුන්ද කරේ අයියද කරේ ?

උ : අපේ අයියා.

ප්‍ර : අයිය තමා පොලිසියට ප්‍රකාශය කරේ ?

උ : ඔව්.

ප්‍ර : ඊට පස්සේ තමුන්ට පොලිසියේ මහත්තයා කිව්වද අත්සන් කරන්න කියල ?

උ : අත්සන් කරා.

ප්‍ර : තමුන් අත්සන් කරාද ?

උ : ඔව්.

Further during cross-examination, the prosecutrix had stated that the statement was given to police by her brother and she had only signed thereafter. This position was further aggravated by the evidence given under cross-examination by the prosecutrix. The said portion of evidence is mentioned below.

PW1 under cross examination at page 71 of the brief stated as follows:

ප්‍ර : ප්‍රභාෂිණී ඇවිත් මේක දැනගත්ත නිසා තමයි තමා මේ සම්බන්ධයෙන් පොලිසියට පැමිණිල්ලක් කලේ ?

උ : ඔව්. පැමිණිල්ලක් කලා.

ප්‍ර : තමා සහෝදරයාගේ වුවමනාව මත පොලිසියට පැමිණිල්ලක් කිරීමට කටයුතු කලේ?

උ : ඔව්.

Considering evidence extracted from the prosecutrix's cross-examination, it is quite clear that the complaint was lodged due to the insistence of her brother and also the incident had been witnessed by PW2, Prabashini. These positions had been very well confirmed by the prosecution in the evidence given by PW1 in her re-examination.

In the re-examination PW1 at page 73 stated as follows:

ප්‍ර : විත්තියේ නීතිඥ මහතා යෝජනා කලා තමා පොලිසියට ගිහින් සිද්ධිය කීවේ ප්‍රභාෂිණී අක්කා දැක්ක නිසා කියලා ?

උ : ඔව්.

ප්‍ර : පොලිසියට යන්න හේතු වුනේ ප්‍රභාෂිණී ලයනල් තමාගේ ඇඟ උඩ ඉන්නවා දැක්ක නිසාද නැත්නම් එහෙම සිද්ධියක් වුන නිසාද ?

උ : දැක්ක හින්දා.

ප්‍ර : ප්‍රභාෂිණී ලයනල් තමාගේ ඇඟ උඩ ඉන්නවා දැක්ක සිද්ධිය ගැනද ?

උ : ඔව්.

Hence, the evidence given by the prosecutrix confirms that she lodged the complaint not only due to the insistence of her brother but also as the incident was witnessed by PW2 Prabashini.

In the case of **Premasiri v. Attorney General** (2006) 3 Sri.L.R. 106, Justice E. Basnayake observed that,

> *"The learned counsel complained that the accused was convicted on uncorroborated evidence. There is no rule that there must in every case, be corroboration before a conviction can be allowed to stand. (Gour on Penal Law of India 11th Edition page 2567 quoting Raghobgr Singhe vs. State (2); Rameshwar, Kalyan Singh vs. State of Rajasthan (3). It is well settled law that a conviction for the offence of rape can be based on the sole testimony of the prosecutrix if it is reliable, unimpeachable and there is no infirmity. (**Bhola Ram vs. State of Madhya Pradesh (4)**). If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particular. The testimony of the prosecutrix must be appreciated in the background of*

the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. ***State of Punjab vs. Gurmit Singhe (5)****.*

The rule is not that corroboration is essential before there can be a conviction in a case of rape, but the necessity of the corroboration as a matter of prudence, except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge. (Schindra Nath Biswas vs. State (6)). In ***Sunil and another vs. the Attorney General*** *Dheeraratne J with H. A. G. De Silva and Ramanathan JJ agreeing held that* ***"if the evidence of the complainant is so convincing, they could act on that evidence alone, even in the absence of her evidence being corroborated"****. (Emphasis added)."*

In the case of **State of Andra Pradesh v. Garigula Satya Vani Murthy** AIR 1997 SC 1588, it was held that:

"…the courts are expected to show great responsibility while trying an accused on a charge of rape. They must deal with such cases with utmost sensitivity."

When an accused is facing a serious criminal charge it is essential that every point in favour of the accused, though it may seem trivial, should be placed before the judge. It may well be that all such matters, if so, placed before the judge may create a reasonable doubt, the benefit of which should accrue to the accused.

In this case the learned High Court judge had not considered the evidence favourable to the Appellant. He had only considered the evidence given by the prosecutrix and arrived at the conclusion that the evidence given by the prosecutrix is convincing and reliable and therefore, the prosecution had

proved the case beyond reasonable doubt. But considering the portions of evidence mentioned above and the judgements cited, I conclude it is not safe to rely on the evidence given by the prosecutrix as it is tainted with doubt and ambiguity.

In the second ground of appeal the Counsel for the Appellant contended that the learned trial Judge has grievously erred in law by shifting the burden of proof to the Appellant thereby reversing the presumption of innocence which occasioned in the deprivation of a fair trial.

In a criminal trial, as continuously stated by the Appellate Court the burden of proving a case entirely rests on the hands of the prosecution and this responsibility never shifts to the defence unless the defence takes up a plea to a general or special exception of the Penal Code.

In **H. M. Mahinda Herath v. The Attorney General** CA/21/2003 in Appellate Court Judgments (Unreported) 2005 at page 35-39 the court held that:

> *"Where it was held that in a criminal case burden is always on the prosecution to prove the charge levelled against the accused beyond reasonable doubt. The trial judge must always bear in mind that the accused is presumed to be innocent until the charge against the accused is proved beyond reasonable grounds".*

The learned Counsel for the Appellant had cited two paragraphs of the judgment and argued that the learned High Court Judge had reversed the presumption of innocence and thereby denied a fair trial to the Appellant.

The learned High Court Judge in his judgment at Pages 194-195 stated as follows:

ඒ අනුව චූදිත අදාල විත්දින තැනැත්තිය විසින් පවසනු ලබන බලහත්කාරී සිද්ධිය සම්පූර්ණයෙන්ම ප්‍රතික්ෂේප කිරීම එමඟින් ඔහු විසින් කර ඇත. නමුත් විත්තිකූඩුවේ සිට විත්තිකරු කරනු ලබන ප්‍රකාශය ඔහු විසින් තහවුරු කිරීම සඳහා ප්‍රමාණවත් කිසිදු සාක්ෂියක් ඔහු කැඳවා නොමැත.

විශේෂයෙන් මෙහිදී ඔහු විත්තිකූඩුවේ සිට කරන ලද ප්‍රකාශයෙන් කරන ලද වැදගත් හෙළිදරව් කිරීමක් වන වින්දිත තැනැත්තිය සමඟ ඔහු පෙර පැවති සබඩතාවය තහවුරු කිරීම සඳහා කිසිදු සාක්ෂියක් ඔහු ලබා දී නොමැති අතර එය තහවුරු කිරීමටද කිසිදු සාක්ෂියක් කැඳවා නොමැත. ඔහු එවැනි සම්බන්ධතාවයක් පිළිබඳව හරස් ප්‍රශ්න මඟින් හෝ යෝජනා කර නොමැති අතර හරස් ප්‍රශ්න මඟින් ගෙන ඇති ස්ථාවරය එයට සම්පූර්ණයෙන්ම පටහැණි වෙන බව පෙනේ.

විත්තිකරුට විත්තිවාචකයක් ඉදිරිපත් කිරීමට නියම කර ඇතත් ඔහු විත්තිකූඩුවේ සිට ප්‍රකාශයක් පමණක් කිරීමට තීරණය කර ඇති හෙයින්ද ඔහු වෙනුවෙන් කිසිදු සාක්ෂියක් කැඳවා නොමැති හෙයින්ද විත්තියේ සාක්ෂි වැඩිදුරටත් අගය කිරීමක් කල නොහැකිය. මෙහිදී පැමිණිල්ලේ සාක්ෂි මඟින් අදාල බලහත්කාරී ක්‍රියාව සිදුවී සුළු මොහොතකින් චූදිතගේ මවද පැමිණ සිද්ධිය සමථයකට පත් කිරීමට උත්සහ කල බවට පැමිණිල්ලේ ස්ථාවරය අසත්‍ය බව තහවුරු කිරීමට විත්තිකරු කිසිදු සාක්ෂියක් කැඳවා නොමැත.

The two paragraphs of the judgment cited above clearly demonstrates that the learned High Court judge had reversed the burden of proof, which is unknown to the criminal prosecution. As contended by the Counsel for the Appellant this deviation had denied a fair trial to the Appellant.

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring a procedurally equal position during the course of a trial. It would be difficult to identify in advance all of the situations that could constitute violations of the fair trial principle.

Jayant Patel, J. in the case of **Jusabbhai Ayubbhai v. State of Gujarat** CR.MA/623/2012 stated that:

> *".....It is by now recognized principles that justice to one party should not result into injustice to the other side and it will be for the Court to balance the right of both the sides and to uphold the law."*

After careful perusal of the evidence presented in the trial, I am of the view that the evidence presented by the prosecution is tainted with serious

shortcoming and ambiguity. Therefore, it is not safe to act on such evidence of the prosecution against the appellant.

Hence, considering both the Prosecution case as well as the case advanced by the Defence, it is concluded that the grounds of appeal forwarded by the Appellants carry sufficient merit to substantiate awarding the benefit of the doubt to the Appellant.

I, therefore, set aside the conviction and the sentence imposed on the Appellant by the learned High court Judge of Anuradhapura. The Appellant is acquitted from the charge.

The appeal is allowed.

The Registrar is directed to send a copy of this judgment to High Court of Anuradhapura along with the original case record.

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL