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

An application for an appeal under and in terms of Section 331 of the Criminal Procedure Code No. 15 of 1979

Court of Appeal Case No: CA /HCC/98/2019
High Court Nuwara Eliya Case No: HC/26/2009

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

Complainant

Vs.

1. Jayasinghe Aarachchilage Sanath Anandasiri
2. Welathanthrige Krishantha Nuwan Kumara

Accused

And Now Between

Welathanthrige Krishantha Nuwan Kumara

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Saliya Pieris PC with Susil Wanigapura AAL and Chan Godakumura AAL for the 2nd accused-appellant

Maheshika Silva DSG for the complainant-respondent

Written Submissions: By the accused-appellant on 01.11.2019

By the complainant-respondent 11.02.2020

Argued on : 25.05.2022, 24.05.2022 and 03.09.2022

Decided on : **26.09.2022.**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Nuwara Eliya, dated 06.06.2019, by which, the 2nd accused-appellant, who is before this Court, was convicted and sentenced to death for having murdered Karuppan Sellaiya (the deceased), committing the offence of rape against Subramaniam Maheshwari and committing grieves hurt on Sellaiya Muttaiya and Sannasi Lechchami, under section 317 of the Penal Code.

After the trial, the 2nd accused-appellant was given 20 years of rigorous imprisonment and Rs. 42,000/- fine and in default 18 months simple imprisonment. Another Rs. 950,000/- as compensation for the victims in default of nine and a half years of simple imprisonment.

The 1st accused person was acquitted and discharged from the case.

There were 5 charges in the indictment. They are as follows;

(a) Count 1

that on or about 30.10.2000, they committed the offence of murder by causing the death of Karuppan Sellaiya which is an offence punishable under section 296 of the Penal Code.

(b) Count 2

on the date referred to in count number 1 above, and in the course of the same transaction, the 1st accused person named in the indictment was charged for committing the rape of Arumugam Mariamma, within the jurisdiction of High Court Nuwara Eliya at Mahaweligama under and in terms of section 364(1) of penal code as amended by Act No.22 of 1995.

(c) Count 3

on the date referred to in count number 1 above, and in the course of the same transaction, the 2nd accused person named in the indictment was charged for committing the rape of Subramaniam Maheshwari, within the jurisdiction of High Court Nuwara Eliya at Mahaweligama under and in terms of section 364(1) of penal code as amended by Act No.22 of 1995.

(d) Count 4

that at the same date, time and place set out in count 1 and during the same transaction they committed the offence of voluntarily causing grieves to hurt Sellaiya Muttaiya by voluntarily cutting him with a knife and a sword which is an offence punishable under section 317 of the penal code.

(e) Count 5

that at the same date, time and place set out in count 1 and during the same transaction they committed the offence of voluntarily causing grieves hurt to Sannasi Lechchami by voluntarily cutting him with a knife and a sword which is an offence punishable under section 317 of the penal code.

At the trial, 11 witnesses gave evidence on behalf of the prosecution namely;

Atapattu Mudiyanselage Nanda Kumara Atapattu (PW 01)

Sannasi Lechchami (PW 02)

Arumugam Mariamma (PW 04),

Subramaniam Krishnaweni (PW 07)

Dr. Ashoka Bandara Seneviratne (PW 14)

Dr. Mohamed Hussain Mohamed Nazeem (PW 16)

Dr. Dissanayaka Mudyanselage Manel Keerthi Bandara Dissanayake (PW 15)

Police Inspector Dudley Himalo Dissanayake Lal Udugamage (PW 11)

Sub Inspector Samarakoon Mudiyanselage Gamini Samarakoon (PW 10)

Methiwalla Hewage Seela Subodhi (PW 23)

Upon the conclusion of the Prosecution Case after the Learned High Court Judge had explained the rights of the accused person, the 1st and the 2nd accused-appellants made Dock Statements and called the two witnesses. The 1st accused person called his wife to give evidence and the 2nd accused-appellant called his mother to give evidence claiming *an alibi* and then closed the defence case.

After the trial, the Learned Trial Judge found the 1st accused person not guilty and he was acquitted. The 2nd accused-appellant was guilty 1st, 3rd, 4th and 5th counts in the indictment. The learned Trial Judge *inter alia* imposed the Death Sentence on the 2nd accused-appellant. The 2nd accused-appellant preferred this appeal against the said conviction and sentences.

The grounds of appeal are as follows;

(i.) The Learned Trial Judge has convicted the Appellant for all charges relying on uncorroborated and inconsistent evidence.

(ii.) The identity of the appellant has not been proved beyond reasonable doubt and the appellant was indicted on the mistaken identity.

(iii.) There are no grounds to adopt the evidence of PW 5.

(iv.) The Learned Trial Judge has failed to consider the law and legal principle relating to common intention.

(v.) The learned Trial Judge has failed to offer appropriate prominence and due consideration to the defence witness by established legal principles.

According to the witnesses at about 8:30 pm on 30.10.2000 two persons who covered their faces had come to the bungalow where they resided and caused injuries to Sannasi Lechchami (PW 2) and Sellaiya Muttaiya (PW 3) and attacked the deceased. Then they have taken Arumugam Mariamma (PW 4) and Subramaniyam Maheshwari (PW 5) to the tea estate nearby and raped them.

At the trial, PW 5 has not given evidence as the prosecution could not find the whereabouts of PW 5 and after an inquiry, her evidence which was given at the non-summary inquiry has been adopted under section 33 of the Evidence Ordinance.

It was argued by the learned President's Counsel for the 2nd accused-appellant that the Trial Judge has convicted the appellant of all the charges relying on uncorroborated and inconsistent evidence. The learned Trial Judge has stated in the judgment that the appellant failed to challenge the testimony of PW 5 and relied on her evidence in convicting the appellant. There are several infirmities in her evidence, which the learned Trial Judge has ignored in evaluating her evidence. At the trial, PW 5 has not given evidence and her evidence was adopted under section 33 of the Evidence Ordinance. When evaluating such evidence, the learned Trial Judge should be cautious as such evidence is not subject to cross-examination at the High Court.

It is my view that the learned Trial Judge has not given due consideration to the fact that such evidence has infirmities including the fact that the learned High Court Judge was deprived of observing the demeanour and deportment of the said witness. Therefore, such evidence should be corroborated by other evidence. However, PW 5 contradicts the testimony of PW 4, on several material points and medical evidence of PW 14 contradicts the version of PW 5. Before adopting the evidence of PW 5 under section 33 of the Evidence Ordinance, it was incumbent on the learned High Court Judge that he should satisfy himself that the witness's presence cannot be ensured. Leading evidence to the effect that she cannot be found to give evidence is not sufficient when she is a crucial witness and the conviction is based on her testimony.

It is important to note that PW 4 who has testified regarding the rape has failed the test of credibility while she was giving evidence in the High Court although she had given evidence in the non-summary Inquiry. PW 5 was present in courts at the initial stages of the trial and that shows PW 5 was avoiding the trial, may be, she was afraid of facing the cross-examination.

According to the testimony of PW 4, the absconding witness PW 5 was taken into the tea estate by the 1st accused person (Vide page 136).

Page 136 of the appeal brief is as follows;

"ප්‍ර : මහේශ්වරීව ඇදගෙන ගියේ කවුද?

ඌ : 1 වන විත්තිකරු.”

According to PW 5, she was taken by the 2nd Accused

Page 330 of the appeal brief is as follows;

> “මාව සහ මගේ අක්කාව අද විත්තිකූඩුවේ සිටින විත්තිකරු අනික් අය ඇදගෙන ගියා. මගේ අතින් අල්ලාගෙන ගියේ මේ විත්තිකරු.”

The 1st accused was not present at the non-summary inquiry according to page 191 of the appeal brief and therefore, it is clear that PW 5 is referring to the 2nd accused-appellant. When considering the evidence of PW 5 she was taken to the jungle nearby and raped on the ground. She was fully naked and she struggled on the ground with the appellant. Moreover, she states that the appellant bit her face. The police officer PW 11 who did the investigation of the crime scene had stated that she has been raped in the tea bushes. Thus, if she was struggling naked on the ground with the accused under the tea bushes and if the accused bit her face there is a high likelihood of there being abrasions on her back and bite marks on her face because she was examined by the doctor only after two days. However, according to the doctor (PW 14) who examined PW 5, there were no injuries on her body.

Page 188 of the appeal brief is as follows;

ප්‍ර : ඒ අනුව ඇයගේ කිසිම තුවාලයක් සොයා ගත්තේ නැහැ?

ඌ : තිබුණේ නැහැ.

ප්‍ර : ඒ අනුව සීරීම් තුවාලයක්වත් අඩු වශයෙන් සොයා ගත්තේ නැහැද?

ඌ : කිසිම තුවාලයක් තිබුණේ නැහැ.

Although injuries are not necessary to prove the act of rape, in the present case the statement given by PW 5 at the non-summary is not consistent with the medical evidence. The presence of an old hymnal tear was found which suggests that she suffered another incident of sexual assault about one year back. There is no conclusive medical evidence to establish the rape. According to the indictment the incident happened on or about 30.10.2000 and PW 5 says that the incident happened on 29.11.2000. She specifically states that she remembered the day of the incident.

In Gurcharan Singh V. State of Haryana AIR 1972 S.0 2661 the Indian Supreme Court held;

> “As a rule of prudence, however, a court normally looks for some corroboration on her testimony to satisfy its conscience that she is telling the truth and that the person accused of rape on her, has not been falsely implicated."

In Sunil and another V. The Attorney General 1986 (1) SLR 230 it was held that:

> "Corroboration is only required if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence

where such evidence is not credible. It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."

The learned Trial Judge has stated that the evidence of PW 4 is not challenged. However, in my view PW 4 is not a creditworthy witness on the following grounds;

- At the trial, she stated that she was raped by both of the accused persons. It was reflected on pages 165 and 171 of the appeal brief. However, according to her police statement, she was raped by only one person and the defence marked it as an omission. Importantly, even the learned Trial Judge has stated in the judgment that there is a doubt about the testimony of PW 4 regarding the rape.

- According to the medical evidence she has been subjected to sexual assault previously to the present incident as there were old tears in her hymen and PW 4 had stated to the doctor that she was also previously sexually assaulted. This evidence was reflected on pages 182 and 188 of the appeal brief. At the trial, she categorically denied that she was subject to sexual assault before the incident.

- At the trial, PW 4 states that she identified both the accused persons at the identification parade. However, only the 2nd accused-appellant was produced for the identification parade. The learned President's Counsel argued that in the said circumstances, it is unsafe to act on the evidence of PW 4 as her evidence is unreliable and inconsistent.

- The learned Trial Judge has stated that the evidence of PW 2 is not challenged by the contradictions marked in her evidence. She fails to identify the appellant. The learned Trial Judge has commented on her testimony and stated that she has not stated the name of the 2nd accused-appellant in the police statement and therefore it is an omission that goes to the root of this matter.

This was reflected on page 447 of the appeal brief as follows;

> "... නිවස තුළට පැමිණි පුද්ගලයාගේ නම සනත් බව ඇය දැන සිටියේ නම් ඒ බව ප්‍රකාශයේ සඳහන් නොකිරීම 01 විත්තිකරුව, පැ.සා 02 විසින් හඳුනා ගැනීම පිළිබඳව නඩුවේ හරයට ගමන් ගන්නා වූ ඌණතාවයක් ලෙස සලකමි."

Therefore, her evidence cannot be held against the appellant as she has failed to identify the persons who came in the night. The learned President's Counsel for the accused-appellant argued that the identity of the accused-appellant has not been proved beyond reasonable doubt and the 2nd accused-appellant was implicated in a mistaken identity. As stated above PW 2 and PW 4 have failed to identify the appellant. All the other witnesses did not see who came to the house.

According to PW 5, the appellant was covering his face when he entered their house and he uncovered his face when he was raping PW 5. The incident happened at about 9:00 pm and she recognized him from the moonlight. The learned Trial Judge has relied on the

identification of PW 5 and stated that the defence has failed to challenge that evidence. This was reflected on page 448 of the appeal brief.

The learned Trial Judge has not considered the guidelines laid by in R V Turnbull F19771 OB 224 for identification in difficult circumstances. These circumstances are as follows;

- Where the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken. The Judge should be cautious before convicting the accused in reliance on the correctness of the identification. The Judge should consider this.
- Caution is required to avoid the risk of injustice;
- An honest witness may be wrong even if they are convinced, they are right;
- A convincing witness may still be wrong;
- More than one witness may be wrong;
- A witness who recognizes the defendant, even when the witness knows the defendant very well, may be wrong.

The learned Trial Judge should put caution into practice by carefully examining the surrounding circumstances of the evidence of identification, in particular:

- The time during which the witness was with person, he said that the accused (defendant) was under observation; in particular, the time during which the witness could see the person's face;
- The distance between the witness and the person was observed;
- The state of the light;
- Whether there was any interference with the observation (such as either a physical obstruction or any other thing going on at the same time);
- Whether the witness had ever seen the accused person before and if so, how many times and in what circumstances (i.e. whether the witness had any reason to be able to recognize the accused);
- The length of time between the original observation of the person said to be the accused person (usually at the time of the incident) and the identification by the witness of the accused person at the police station.

There is a reasonable doubt that arises whether the moonlight was sufficient to identify the appellant. Any weaknesses in the identification evidence must be taken into consideration. However, despite the weaknesses of the testimony of the PW 5 the learned Trial Judge solely relied on her evidence to convict the appellant.

The learned Trial Judge has failed to consider the law and legal principles relating to Common Intention. The appellant was charged with murder and for committing the offence of grievous hurt based on section 32 of the Penal Code based on common intention. All the witnesses stated that the 1st accused person was the one who attacked the deceased and the other two injured.

Section 32 of the Penal Code reads as follows:

> "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

In King v. Asappu 50 NLR 324; where the question of common intention arises the Jury must direct that:

(i.) The case of each accused must be considered separately.

(ii.) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed

(iii.) the common intention must not be confused with the same or similar intention entertained independently of each other.

(iv.) There must be evidence, either direct or circumstantial, of pre-arrangement or some other evidence of common intention.

(v.) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.

At a crime scene, it is not sufficient to convict a person based on common intention. In a case of a common intention, the only inescapable and irresistible inference should be that the appellant shared the common murderous intention with the person who committed the murder and/or grievous hurt. If the circumstances are capable of any other inferences there cannot be a conviction based on common murderous intention.

The most important evidence is given by PW 4 in this regard. According to her, the 1st accused person has told the appellant to cut the persons who were here and the appellant had categorically refused.

Page 131 of the appeal brief is as follows;

> අනික් පුද්ගලයා 01 වන විත්තිකරු විසින් තාත්තාට කොටන කොට අපි ළඟට ඇවිත් හිටියා. 01 වන විත්තිකරු කියල සඳහන් කල විත්තිකරු නැවත කිව්වා සියලු දෙනාවම කෑලි කෑලිවලට කපන්න කියල. ඒ අවස්ථාවේදී එපා කියල ඒ තැනැත්තා (අනික් පුද්ගලයා) හිට ගෙන හිටියා.

This evidence demonstrates that the appellant did not share the common murderous intention and common intention to cause grievous hurt. Thus, it is clear that the appellant cannot be convicted for murder and causing grievous hurt based on common intention.

The learned Trial Judge has not stated in the judgment that he is convicting the appellant based on common intention. Learned High Court Judge has stated in the judgment that the appellant has committed this crime with another person this was shown on page 451 of the appeal brief.

The learned Trial Judge has failed to offer appropriate prominence and due consideration to the defence witness by the established legal principles. The 2nd appellant has given a dock statement and denied the allegations levelled against him and he has also been called by his mother to give evidence on his behalf. According to his mother's evidence, the appellant was at his house at the time of this incident. This evidence was not challenged by the prosecution. The learned Trial Judge neither accepted nor rejected the evidence of the appellant and failed to give due consideration to the defence witness. He has not given reasons to reject the dock statement or the defence witness.

The learned Trial Judge has stated that since there is a strong case against the 2nd appellant, he has failed to challenge the prosecution witnesses. The burden of proof in a criminal case lies on the prosecution and not on the defence and the learned Trial Judge cannot shift the burden of proof to the appellant.

In CA 10-11/2010- decided on 07.02.2014, Held that "defence witnesses are entitled to equal treatment with those of the prosecution and Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses."

It was held in Wimalaratne Silva and Another vs. Attorney General - SLR - 103, Vol 1 of 2008 [2008] LKCA 6; (2008) 1 SLR 103 (11 November 2008) as follows;

> "It is the paramount duty of the court to act well within the bounds of admissible evidence and not to act on mere conjecture and surmise and where the prosecution has failed to establish the charge beyond a reasonable doubt, the benefit of the doubt should always be given to the Accused person".

The learned counsel for the respondents submits that PW 5 could not be found to give evidence in court and hence her statement during the non-summary proceeding has been adopted. The accused party has highlighted that the Judge cannot merely state that the prosecution witness could not be found and adopt her statement during the non-summary inquiry. The Learned Trial Judge has observed that both summons and a warrant have been issued on PW 5 and she could not be found. The relevant witness had been called to court to give evidence. PW 5 has handed over her children to Santhi Lechchami and has not returned for ten years.

The witnesses have not heard about PW 5 or her husband for 10 years. The Learned Trial Judge has therefore satisfied himself that PW 5 cannot be found. Her statement has been adopted under Section 33 of the evidence ordinance and has been given due consideration. The appellant has pointed out that the Judge has not been able to observe the demeanour and deportment of the witness. This fact should not be given a lot of weight because it was

practically not possible to find the witness and bring her before the Court to observe her behaviour.

The appellant has pointed out that there is confusion as to who dragged who and went to rape them. PW 4 and PW 5 have stated different persons. However, it should be noted that the witnesses have stated that they were able to identify the accused from the moonlight. it is practically possible they confused the two due to the insufficient light available and due to the fear that they were facing as they were dragged.

Therefore, the learned Deputy Solicitor General who appeared for the respondent argued that this confusion should not be considered and it does not affect the case of the prosecution.

The doctor who examined PW 4 and PW 5 stated that PW 5 had no injuries on her body even though she has stated that she was struggling naked on the ground and the appellant bit her body. PW 14 examined PW 5 on 2nd November, whereas the incident took place on the 30th of October. It is after three days that PW 5 was examined, and that is sufficient time for the wounds to heal and disappear from the body. It is highly probable for the bite not to leave a wound on the face and even if there was a wound it can disappear also as a minor scratch wound and heal within three days.

The learned counsel for the respondent submits that it should be noted that the presence of injuries is not required to prove the offence of rape. PW 5 states that the incident occurred on 29.09.2000. She specifically states it as the ninth month. PW 2 states the incident occurred on a different date. PW 4 states the incident occurred on the 31st of October. It should be noted that different witnesses' state different dates, and it should not be given much attention. The witnesses are giving evidence after ten years of the incident and it is natural for them to forget the exact date.

The Trial Judge has pointed out the contradiction in PW 4 stating that both the appellants have raped her, and concluded that the first accused was not involved in the crime and it is the second accused-appellant who has committed the crime.

The identity of the appellant has not been proved beyond reasonable doubt and the appellant was indicted on the mistaken identity.

Learned Counsel for the respondent argued that there is no doubt about the identity of the appellant. PW 2 has stated that she knows the second accused-appellant as a person who works in a lorry and she has also stated that the first accused person worked at the police station. It has also been stated that they were able to identify the accused inside the house with the aid of the torch the accused had with them. Even if the identification of the accused by PW 4 and PW 5 can be challenged as they say they identified them with the moonlight, the identification with the use of the torchlight could be challenged.

The Learned Trial Judge has failed to consider the law and legal principle relating to common intention. The learned High Court Judge has based his judgment on the fact that the appellant committed the crimes while the first accused person did not commit any crime. It has been pointed out by evidence that the first accused was merely standing and observing along with

the witnesses while the appellant was committing the crime. I do not agree with the said argument. There is no common intention on part of the first accused who was merely standing. If he needs to be found guilty, he should have been engaged in the offences.

The learned Trial Judge has failed to offer appropriate prominence and due consideration to the defence witness by established legal principles. The Trial Judge has not considered the evidence of the defence witnesses and decided to reject them as well as the dock statements. If the Trial Judge does not believe a dock statement, he has the right to reject it.

In the circumstances, it is our view that the prosecution has not proved the case beyond reasonable doubt and therefore we are unable to affirm the conviction against the accused-appellant.

Owing to the above circumstances, this Court is of the view that the learned Trial Judge has lamentably failed in evaluating the entirety of the evidence that was before him and therefore, the conviction and the sentence of the 2nd accused-appellant is quashed.

Accused-appellant is acquitted and discharged from all charges of the indictment.

Appeal allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal