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.

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

C.A. Case No. HCC/94/19 **Complainant**

High Court of Chilaw

Case No. 52/13 **Vs.**

Pilippuge Manoj Chanaka Fernando

Sinna Karukupane,
Bangadeniya.

Accused

AND NOW BETWEEN

Pilippuge Manoj Chanaka Fernando

Sinna Karukupane,
Bangadeniya.

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 : K.A.Upul Anuradha Wickramaratne with Kasunthika Madhubhashini for the Accused-Appellant

Azard Navavi, DSG for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 05.08.2021 (On behalf of the Accused-Appellant)

05.03.2020 (On behalf of the Respondent)

ARGUED ON : 02.09.2022

DECIDED ON : 29.09.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Chilaw with committing the rape of Jasintha Grace Livera on or about 30.04.2010 which is an offence punishable in terms of section 364(1) of the Penal Code. After trial, the learned High Court Judge found the appellant guilty and sentenced him to 19 years of rigorous imprisonment and a fine of Rs.20,000/-, with a default term of 06 months of rigorous imprisonment. In addition, the appellant was ordered to pay the victim

Rs100,000/- as compensation. This appeal is preferred against the said conviction and sentence.

The facts of the case according to the prosecution could be briefly summarized as follows:
At the time of the offence, the prosecutrix (PW-1) in this case was a 51-year-old woman who had been living with her daughter and son-in-law. The prosecutrix was alone in the house on the day of the incident because her daughter and son-in-law had gone to Bingiriya. The appellant came to her house that day and asked for a box of matches, which she gave him. The appellant had walked out and returned to the house after taking the box of matches. When the appellant returned home, he locked the door and pushed the victim onto a mattress on the floor.

According to the prosecutrix, she resisted the accused-appellant by shouting at him and beating him with a broomstick. However, the accused-appellant forcibly removed her clothes, raped her, and left the house.

Written submissions on behalf of both parties have been filed prior to the hearing. At the hearing, the learned counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions.

Although, several matters have been raised in the written submissions tendered on behalf of the appellant, the learned counsel for the appellant confined his arguments to only one ground at the hearing of the appeal. The said ground is whether the prosecution has failed to prove beyond reasonable doubt the ingredient of lack of consent of the prosecutrix.

The accused-appellant has admitted in his dock statement that he had sexual intercourse with the PW-1 on the day in question. However, his position was that the sexual intercourse was done with the consent of the PW-1. The learned counsel for the appellant contended that she consented to the sexual intercourse after paying Rs.500/-, but then she demanded more money, and when he did not give it, she made this false complaint.

Accordingly, the only issue to be considered in this appeal is whether the sexual intercourse was taken place with or without the consent of PW-1. To substantiate the position that it was done with consent, the learned counsel for the appellant pointed out that a complaint was made to the police two days after the incident and the only explanation given was that she did not have money to go to the police station. Furthermore, the learned counsel contended that the prosecutrix and her daughter, PW-2, took contradictory positions in describing how PW1 disclosed this incident. The learned counsel submitted that the prosecutrix stated that she informed her daughter about the incident soon after she came from Bingiriya with her husband. However, the daughter stated in her evidence that the mother informed her about the incident when she inquired from the mother after observing few marks on the mother's neck. The contention of the learned counsel for the appellant was that this contradiction arose because the sexual intercourse occurred with the consent of the PW-1 and she did not want to tell this to her daughter until she inquired. Also, the learned counsel contended that the position taken up in the dock statement has been put to the PW-1 when she was cross-examined and thus there was no reason to reject the defence version. Therefore, he urged to acquit the appellant as the charge against the appellant has not been proved beyond reasonable doubt.

The learned Deputy Solicitor General for the respondent conceded the fact that there is a discrepancy between PW-1's evidence and PW-2's evidence as to whether PW-1 informed her daughter about the incident immediately after the daughter returned home or she informed about the incident after PW-2 inquired about it. However, the learned Deputy Solicitor General submitted that PW-1 has clearly stated in her evidence that the sexual intercourse was taken place without her consent.

The aforementioned discrepancy between PW-1's evidence and her daughter's evidence, in my view, has a direct impact on determining whether the sexual intercourse occurred with the consent of the prosecutrix. The prosecutrix attempted to show that she has immediately informed her daughter about the rape when they came home from Bingiriya. The relevant questions and answers appear as follows:

ප්‍ර: දුව ගෙදරට ආපු වහාම කිව්වද මෙවැනි සිද්දියක් වුනා කියලා?

උ: ඔව්.

ප්‍ර: මම යෝජනා කරනවා එහෙම සිද්දියක් වුනා කියලා දුව ආපු ගමන් කිව්වේ නැහැ කියලා.

(Page 77 of the appeal brief)

However, the daughter stated that when she noticed some marks on her mother's neck, she inquired, and the mother then described the incident. The following are questions posed to PW-2 and her responses:

ප්‍ර: අම්මා ඔබට ආපු ගමන් විස්තරය කිව්වාද, නැත්නම් ස්වාමිපුරුෂයා ප්‍රශ්න කරනකොට කිව්වාද?

උ: මම අම්මාගේ කටේ ලේ බැහැලා තිබෙනවා දැකලා මම ඇහුවා මොකද වුනේ කියලා?

ප්‍ර: තමුන්ගේ ස්වාමිපුරුෂයා ප්‍රශ්ණ කෙරුවාට පස්සේ අම්මා කිව්වේ කියලා පොලීසියට කිව්වාද?

උ: ඔව්.

ප්‍ර: ඊට පස්සෙනේ අම්මාගෙන් විස්තරය ඇහුවේ?

උ: ඔව්. අම්මාගෙන් විස්තරය ඇහුවා.

(Pages 103 and 104 of the appeal brief)

If the sexual intercourse was taken place with the consent of PW-1 naturally she would not disclose it to others. So, from these two contradictory versions, if the daughter's version is accepted as true, the suspicion arises that PW1 did not inform her daughter about this incident until the daughter inquired because the sexual intercourse took place with the consent of PW1. However, when the daughter saw the marks on the neck and inquired, it is obvious that she could not tell her daughter that she had sexual intercourse with consent. Therefore, this contradiction raises a reasonable doubt whether the sexual intercourse occurred with the consent of the PW1. Also, if that was the case, the credibility of PW1's testimony would also be in question.

On the other hand, the explanation given by PW-1 for the delay in making a complaint to the police is also not satisfactory. The incident occurred on 30.04.2010. A complaint about the incident was made to the Chilaw police station on 02.05.2010. However, she has stated in the following way that she informed her neighbours about the incident soon after it happened.

ප්‍ර: දැන් තමාගෙන් අහන්නේ අහළ පහළ අසල්වාසීන්ට මේ සිද්දිය සම්බන්දයෙන් කිව්වාද කියා?

උ: අහළ පහළ මිනිස්සුන්ට කිව්වා.

ප්‍ර: නම් මොනවාද?

උ: නම් දන්නේ නැහැ.

(Page 81 of the appeal brief)

Therefore, if she really wanted, she could have gone to the police station and made a complaint with the assistance of one of the neighbours to whom she had informed the incident.

The Judicial Medical Officer who examined the prosecutrix has given evidence and stated that there were no external injuries. Although there were no external injuries at the time of examining the prosecutrix, lack of consent could not be excluded. However, the medical evidence does not corroborate the evidence of forcible sexual intercourse.

Apart from that, PW-1 stated that she showed her external injuries to the doctor (page 86 of the appeal brief). However, PW-7, the Judicial Medical Officer stated in his evidence that PW-1 did not show or mentioned about external injuries (page 117 of the appeal brief). Again, PW-1's evidence is contradictory to the Judicial Medical Officer's evidence.

The court can act on the uncorroborated testimony of a prosecutrix if her evidence appears to the Court to be completely satisfactory and there are attending circumstances that make it safe for the Court to act upon her evidence without corroboration, as decided in the Court of Appeal case No.129/2002, Decided on 28th June 2007. In the case at hand, the prosecutrix's evidence has been contradicted by other evidence as mentioned above and thus, it is unsafe to act on that evidence.

When considering the appellant's unsworn statement from the dock, it appears that he has maintained the same position from the beginning of the case. At the end of the cross-examination, defence version has been suggested to the prosecutrix. The appellant stated in

his dock statement that she consented to the sexual act after giving Rs.500/-. However, he stated that thereafter she asked for another Rs.500/-. In cross-examining the PW-1 also, it was suggested on behalf of the appellant that she was given Rs.500/- but she asked for more money from the appellant to consume liquor. The daughter of the prosecutrix admitted in her evidence that her mother was addicted to consuming liquor at the time of the incident. Under such circumstances, there was no reason to reject the defence version.

As stated previously, the only issue in this appeal is whether the sexual intercourse occurred with or without the consent of the PW-1. The main ingredient required to prove the charge of rape is also lack of consent. If the sexual intercourse occurred with the consent of PW1, the charge brought against the appellant fails.

It was held in the case of P.P. Jinadasa V. The Attorney General – C.A.167/ 2009, Decided on 21.11.2011, if the dock statement raises a reasonable doubt in the mind of the Court about the prosecution case, defence must succeed. Considering the aforesaid circumstances in this case, it appears that the defence version of having sexual intercourse with the consent of the PW1 as described by the appellant in his dock statement as well as suggested to PW1 during her cross-examination is plausible. Hence, the defence version raises reasonable doubt about the prosecution case. In addition, as a result of the contradictions that arose between the prosecutrix's evidence and her daughter's evidence as well as the prosecutrix's evidence and the Judicial Medical Officer's evidence, the doubt on the PW1's evidence regarding lack of consent becomes more intense. In these circumstances, I hold that the charge of rape has not been proved beyond a reasonable doubt because the ingredient of lack of consent of the prosecutrix has not been established beyond a reasonable doubt.

Accordingly, the conviction and the sentence dated 28.02.2019 are set aside and the accused-appellant is acquitted of the charge against him.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL