
**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/ 0120/2020
High Court of Colombo
Case No. HC/6474/2013**

Saruwa Liyanage Sunil

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Sarath Jayamanne, PC with Darshana
Kuruppu, Vineshka Mendis, Prashan
Wickramaratne, Sanjeewa Meegahawatta
for the Appellant.
Shanil Kularatne, SDSG for the
Respondent.**

ARGUED ON : **05/09/2022**

DECIDED ON : **11/10/2022**

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General at the High Court of Colombo for committing an offence under Section 364(2) read with Section 364(2)(e) of the Penal Code as amended on Weerasinghe Pathirana Sadushi Umanga between 23/05/2012 and 02/07/2012.

After the trial, the Appellant was convicted as charged and was sentenced to 15 years of rigorous imprisonment with a fine of Rs.25000/-, in default of which 01-year rigorous imprisonment was imposed. In addition, Rs.250000/- was imposed as compensation payable to the victim with a default sentence of 02 years rigorous imprisonment.

Being aggrieved by the aforesaid conviction and the sentence, the Appellant preferred this appeal to this court.

The Learned President's Counsel for the Appellant informed this court that the Appellant had given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument, he was connected via Zoom from prison.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. The Learned Trial Judge has failed to consider that the video recording of the statement of the complainant has not been corroborated in material particulars by evidence from an independent source as required by Section 163A (5) of the Evidence Ordinance.
2. That the prosecution had followed totally illegal procedure when the evidence of the prosecutrix was led before the court.
3. The Learned Trial Judge had failed to consider that the chief investigating officer had a strong motive to fabricate a case against the Appellant and therefore she was an interested witness.

The Facts of this case *albeit* briefly are as follows.

In this case, the prosecution had led the video evidence of a preliminary interview of the prosecutrix conducted and recorded by the Child Protection Authority at the time of the investigation was played before the Learned Trial Judge in terms of Section 163 (A) of the Evidence (Special Provisions) Act No 32 of 1999. Prior to leading video evidence of the prosecution, the prosecution had led evidence of official witnesses who had taken part in the process of recording of video evidence to establish that the recording had been done after following due process.

In the video evidence, the prosecutrix had said that she had received education up to year 10 at Porambuwa Vidyalaya. She has siblings and her mother was employed at a Tea Factory while her father was employed under a road contractor. On 2nd of June 2012 the Appellant had taken the prosecutrix to a guest house situated on Bangama Road and committed rape on her. Prior to the incident, the Appellant had helped the prosecutrix in numerous ways to continue her education and sport activities. A mobile phone was also gifted to the prosecutrix.

Few days after this incident, she was again taken to the same guest house by the Appellant and committed rape on her. Prior to the video recording she had given a statement to Akuressa Police Station but not revealed these incidents due to fear of the Appellant as the Appellant was the Chairman of the Akuressa Pradeshaya Saba at that time.

The prosecution has placed the video evidence as evidence-in-chief of the prosecutrix and the defence was allowed to cross-examine the witness. Before the defence cross-examine the victim, the State Counsel making an application requested that he asks specific questions which had not been put to the prosecutrix when her statement was video recorded. Permission was granted and the State Counsel instead of asking some peripheral matters had posted lengthy examination-in-chief. During the State Counsel's examination-in-chief, the prosecutrix had claimed that no such incident happened to her from the Appellant. She confirmed the same in her cross-examination too.

In the first ground of appeal, the Learned President's Counsel appearing for the Appellant contended that the Learned Trial Judge has failed to consider that the video recording of the statement of the complainant has not been corroborated in material particulars by evidence from an independent source as required by Section 163A (5) of the Evidence ordinance.

Section 163 A (5) of the Evidence (Special Provisions) Act No.32 of 1999 states:

“(5) Where the child witness, in the course of his direct oral testimony before court, contradicts, either expressly or by necessary implication, any statement previously made by him and disclosed by the video recording, it shall be lawful for the presiding judge, if he considers it safe and just in all the circumstances of the case, to act upon such previous statement as disclosed by video recording, if such previous

statement is corroborated in material particulars by evidence from an independent source.”

The Learned President’s Counsel argued, highlighting the above-mentioned section, that the prosecution had failed to adduce corroborative evidence as required by law as the prosecutrix had gone back on her statement, which had been recorded on the video. Hence the learned President’s Counsel strenuously argued that the prosecution had not proven the case against the Appellant beyond reasonable doubt.

Corroborating evidence is the proof which strengthens or confirms the evidence which already exists. Such independent evidence backs up the testimony of a witness.

In **Director of Public Prosecutions v. Hester** [1972] 3 A.E.R 1056 the House of Lords held that:

“The essence of corroboration evidence is that one creditworthy witness conforms what another creditworthy witness had said. Any risk of the conviction of an innocent person is lessened if conviction is based upon the testimony of more than one acceptable witness... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence with only fill its role if it in itself is completely credible evidence”.

In **Fernando v. The Republic** [1978] 79 (II) NLR 313 Vythialingam, J. held that:

“In our law of evidence corroboration is a term which has a special significance. In the conventional sense as used in our courts it means

other independent evidence which confirms or supports or strengthens the evidence which is required to be corroborated. In the case of certain categories of witnesses, statues or judges, as a matter of prudence and caution require that their evidence should be corroborated before it is accepted and acted upon...

The term, however, may also be used in a more popular sense to denote evidence which renders other evidence more probable. For example, it is in this latter sense that the term is used in Section 157 of the Evidence Ordinance which makes admissible any former statement by a witness relating to the same fact at or about the time when the fact took place or before any authority competent to investigate the fact, in order to corroborate him”.

In **Ariyadasa v. Queen** 70 NLR 3 the court held that:

“The corroboration that Section 157 contemplates is not corroboration in the conventional sense in which the term is used in courts of law but in a sense of consistency in the conduct of a witness tending his testimony more acceptable”.

The Learned President’s Counsel submitted to this Court that the Learned High Court Judge had wrongly concluded that the prosecution had corroborated the evidence of PW1 through the evidence given by PW4, PW18 and PW20. PW4 is the doctor who had examined the victim and issued the Medico Legal Report. PW18 is the probation officer who had submitted a report pertaining to the prosecutrix to the court. PW20 is the psychiatric specialist who had also submitted a report pertaining to the prosecutrix to the court. The relevant portion of the judgment is re-produced below:

එබැවින් 1995 අංක 32 දරණ සාක්ෂි (විශේෂ විධිවිධාන) පනතේ 163(5) උප වගන්තිය අනුව පැ.සා.01 විසින් ජාතික ළමා ආරක්ෂක අධිකාරියේ නිලධාරීන් සමඟ පැවැත් වූ සාකච්ඡාවේ විධියේ පටයේ සඳහන් කරුණු වෛද්‍ය පද්මතිලක, වෛද්‍ය චමරි මුදුලිගේ හා පරිවාස නිලධාරීන්ගේ සාක්ෂිවලින් තහවුරු වී ඇති බවට මම තීරණය කරමි. ඉහතින් මා විසින් විස්තර කරන ලද හේතූන් අනුව මෙම නඩුවේ පැ.සා. 01 වන සඳුම් උමංගා අධිචෝදනා පත්‍රයේ සඳහන් කාලය අතරතුර චූදිත සමඟ අවස්ථා දෙකකදී ලිංගික සංසර්ගයේ යෙදුනේ යැයි කරුණු පැමිණිල්ල සාධාරණ සැකයෙන් තොරව ඔප්පු කර ඇති බවට මම තීරණය කරමි.

(Page 582 of the brief.)

The Learned President’s Counsel submitting several judgments argued that the considering the above-mentioned witnesses as corroborative witnesses by the Learned High Court Judge has caused great injustice to the Appellant. He argued that the leading evidence of PW4, PW18 and PW20 in this case only shows the consistency of the prosecutrix’s evidence.

In **Sana v. Republic of Sri Lanka** [2009] 1 SLR 48 the court held that:

“(1) The corroborative facts and evidence must proceed from someone other than the witness to be corroborated. This means that his previous statements, even when admissible cannot be used to corroborate him, such as proof of a complaint in a sexual case or a previous act of identification is not corroborative of the evidence of die witness, even though by showing consistency, it can to some extent strengthen his credibility.

Where an accused is charged with rape corroboration of the story of the prosecutrix must come from some independent quarter and not from the prosecutrix herself. A complaint made by the prosecutrix to the police in which she implicated the accused cannot be regarded as corroboration of her evidence.

Evidence of a victim in a case of sexual assault cannot be corroborated by a subsequent statement made by her. The Learned Trial judge was

wrong when he concluded that the evidence of the victim had been corroborated by her short history given to the doctor”.

In **King v. Atukorale** 50 N.L.R. 256 Gratiaen, J. held that:

“ The corroboration which should be looked for in cases of this kind is some independent testimony which affects the accused by connecting or tending to connect him with the crime, and it is settle law that although the particulars of a complaint made by a prosecutrix shortly after the alleged offence may be given in evidence against the prisoner “as evidence of the consistency of her conduct with her evidence given at the trial”, “such complaint” cannot be regarded as corroboration in the proper sense in which that word is understood in cases of this kind”.

In **S. Rajaratnam v. The Republic of Sri Lanka** 79(1) N.L.R. 73 Thamotheram,J. held that:

“(1) That the corroborating required where the charge is one of rape is some independent testimony which affects the accused by connecting or tending to connect him with the crime. A statement made by the prosecutrix to her grandmother, after the event cannot constitute the kind of corroboration required”.

Considering the above cited judgments pertaining to “Corroboration” in this case, the Senior Deputy Solicitor General’s position that the evidence given by PW4, PW18 and PW20 corroborates the testimony of the prosecutrix cannot be accepted as the evidence given by PW4, PW18 and PW20 is not corroborative evidence. Although the Learned High Court Judge had correctly observed that the prosecutrix had gone against her video evidence, but misdirected himself by holding that her evidence had been corroborated

by the evidence of PW4, PW18 and PW20. But their evidence only shows the “consistency” of the prosecutrix’s evidence which certainly strengthens her credibility. Therefore, I conclude that this ground of appeal has merit.

In the second ground of appeal, the Learned President’s Counsel contends that the prosecution had followed a totally illegal procedure when the evidence of the prosecutrix was led before the court.

After tendering the video recorded testimony of the prosecutrix and before the cross examination of the defence, the State Counsel made an application to the trial court to lead some evidence in brief which had not been dealt in the video recorded testimony of the prosecutrix. Although the Court had granted permission to lead some evidence briefly, the State Counsel had led lengthy evidence which might have been put in cross examination by the defence. For this the State Counsel did not seek permission from the court under Section 154 of the Evidence Ordinance. Further, nowhere the prosecution had declared that the victim as a hostile witness.

Section 163 A (3) of the Evidence (Special Provisions) Act No. 32 of 1999 states:

“Where a video recording is given in evidence under this section;

- a) the child witness shall be called by the party who tendered the video recording in evidence;
- b) such child witness shall not be examined-in-chief on any matter which in the opinion of the court, has been dealt with in his recorded testimony.

Hence, the procedure adopted by the State Counsel in this case is inappropriate which undoubtedly affect the fair trial which had been mandated in the Constitution.

In **Hattuwan Pedige Sugath Karunaratne v. The Attorney General SC** Appeal 32 of 2020 Aluwihare PC J., held that:

“No doubt the duty of a State Counsel is to present the Prosecution in an effective manner to the best of their ability in furtherance of securing a conviction, if the evidence can support the charge. The Prosecutor, however, is an officer of the court and their role is to assist the court to dispense justice. Thus, it is not for a Prosecutor to ensure a conviction at any cost, but to see that the truth is elicited, and justice is meted out. A Prosecutor is not expected to keep out relevant facts either from the court or from the accused. If the investigation has revealed matters which are favourable to the Accused and the accused is unaware of the existence of such facts, it is the bounden duty of the Prosecutor to make those facts available to the court and to the defence”.

Aluwihare PC J., held that:

“I am mindful of the fact that the judges in criminal courts are burdened with a heavy case load. That, however, does not excuse the trial judge to not to follow the procedural steps stipulated by law or to disregard the need to ensure that the accused is accorded a fair trial, guaranteed by the Constitutional provisions and other laws.

Judges have a duty and are required to control the proceedings adhering to the aforesaid requirements, and to intervene where necessary to ensure the proceedings are conducted in a fair manner to all parties concerned. In this respect the judges need to follow the proceedings closely and should be alive to the events unfolding before him”.

Not considering the guidance enumerated in the above-mentioned judgment by His Lordship occasioned a fair trial failure in this case. Hence, this ground of appeal also has merit.

As the grounds of appeal considered above have merits which certainly disturb the judgment of the Learned High court judge, it is not necessary to address the remaining ground of appeal further.

In this case the prosecution has failed to adduce corroborative evidence in material particulars by evidence from an independent source which is, of course, a statutory requirement under Section 163 A (5) of the Evidence (Special Provisions) Act No.32 of 1999. Further irregular procedure had been followed by the prosecution in violation of Section 163 A (3) (b) of the Evidence (Special Provisions) Act, No.32 of 1999. As these are substantial facts, it certainly affects the root of the case.

Considering all the circumstances discussed above, this court could only come to the conclusion that the prosecution has not proven the case beyond reasonable doubt. Therefore, the Appellant is acquitted from the charge.

The appeal is allowed and the conviction is set aside.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL