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

In the matter of an appeal 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.

The Democratic Socialist
Republic of Sri Lanka

Complainant

Court of Appeal Case
No. HCC/260/19

High Court of Chilaw
Case No. 53/2017

Vs.

Warnakulasuriya Antony Janaka
Fernando

Accused

AND NOW BETWEEN

Warnakulasuriya Antony Janaka
Fernando

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 : Migara Kodituwakku for the Accused-Appellant.
R. Bary, DSG for the Respondent.

WRITTEN SUBMISSIONS
TENDERED ON : 03.07.2020 (On behalf of the Accused-Appellant)
21.08.2020 (On behalf of the Respondent)

ARGUED ON : 06.10.2022

DECIDED ON : 01.11.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted before the High Court of Chilaw on two counts. The first count was committing House trespassing with the intention of sexually abusing Warnakulasooriya Sathmi Sara on or about 07.05.2010 an offence punishable under section 436 of the Penal Code. The second count was committing the rape of the said victim in the course of the same transaction an offence punishable under Sections 364(2)(e) of the Penal Code.

After trial, the learned High Court Judge convicted the accused-appellant for both counts. Accordingly, he was sentenced to 10 years rigorous imprisonment and a fine of Rs. 20,000/- for the first count with a default sentence of 6 months rigorous imprisonment and was sentenced to 20 years rigorous imprisonment and a fine of Rs. 20,000/- for the second count with a default sentence of 6 months rigorous imprisonment. The accused-appellant was also ordered to pay Rs. 500,000/- compensation to the victim with a default sentence of 2 years rigorous imprisonment. This appeal has been preferred against the said convictions and sentences.

At the hearing of this appeal, the learned Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions. Both parties have tendered their written submissions, prior to the hearing.

In brief, the prosecution case is as follows:

The victim was a 13 years old girl at the time of the incident. She was 22 years old at the time of giving evidence before the High Court. On the day in question, around 9.30 p.m., she was sleeping in her room. She suddenly woke up and observed the accused-appellant who is a known person residing closer to her residence, seated on her bed next to her. She got frightened, then the appellant offered her a cup of water. After drinking the water, she fell fast asleep. She claims that she couldn't remember what happened afterwards. She woke up again to a sound of a phone ringing. At the same time, her mother too knocked on the room door. The appellant was naked inside the room. She was also naked and as she got out of bed, he ran away. However, the prosecutrix has explained the sexual acts performed by the appellant and stated that the appellant would have engaged in the aforementioned sexual acts for nearly 15 minutes. She has also stated that she struggled to escape but failed.

The accused-appellant denies the allegations brought against him. In his unsworn statement from the dock, the appellant stated that there was a previous enmity between the victim's family and him in respect of a television remote control device. He and the victim's family were not on good terms after the incident, and in retaliation, the appellant stated that he was implicated for this offence that he did not commit. The same defence has been suggested to PW-1 in cross-examination. PW-1 admitted in cross-examination that she scolded the appellant when there was a quarrel while watching television.

The learned counsel for the appellant has stated 13 grounds of appeal in his written submissions. However, having heard the submissions made by the learned counsel for both parties, it is apparent that there is one main ground of appeal to be considered. That is, whether the prosecution has proved the two charges beyond a reasonable doubt. In respect of the said ground, the learned counsel for the appellant advanced his arguments on the basis that the prosecutrix, PW-1 is not a credible witness and thus the charges cannot be proved based on her testimony.

The learned counsel for the appellant contended that the prosecutrix could not state the date, month, or at least the year, the offence was committed when giving evidence and therefore the prosecution has not proved that the appellant raped her on or about the date specified in the charge. There is no dispute that she couldn't state the date of the offence. When PW-1 was unable to state the date of the offence in her evidence, the learned state counsel suggested not only the date of the offence but also the dates that PW-1 made complaints to the police.

Normally, failing to remember the date of the offense in a child abuse or statutory rape case would not be a reason to cast reasonable doubt

on the prosecution case because the victims in those cases are under sixteen years, and it cannot be expected of a child faced with such adversity to remember those dates precisely. Besides that, the prosecutrix's inability to state the date of the offense would not prejudice the accused if it was the only occasion she was raped. The case at hand is different. PW-1 has stated that even before this incident, she has been raped about six occasions by some other persons in the village. Therefore, it is important for the prosecution that the date on which the appellant raped her be stated in the prosecutrix's evidence in this case. However, only on that factor, the charges would not fail if it was apparent from the other evidence of the case that the appellant raped her on the day specified in the charge.

Another important matter to be considered is that, according to PW-1, she made a complaint to the police on 08.05.2010, the very next day the alleged rape occurred. Her mother PW-2 also made a statement to the police on the same day. In cross-examination, it was demonstrated that neither PW-1 nor PW-2 had stated in their statements made on 08.05.2010 that the appellant raped PW-1 on the previous day. PW-5, the woman sub-inspector of police who recorded the statements, also stated that no incident of rape was disclosed by the statements of PW-1 or PW-2 made on 08.05.2010.

The learned Deputy Solicitor General contended that since PW-1 was mentally sub-normal, she may not have mentioned about this rape in the statement made the next day. According to the medical report marked P-1, PW-1 did not have features suggestive of a major psychiatric disorder and she had only a mild learning disability. In the circumstances, the question arises as to whether her mild learning disability would prevent her from informing the police about the rape that occurred the day before.

Be that as it may, in the circumstances where the prosecutrix was unable to state the date of the offence relating to this case, the learned State Counsel appeared in the High Court suggested that the second statement in which it was disclosed for the first time that the appellant had raped PW-1 on 07.05.2010 was made on 21.06.2010. So, the alleged rape by the appellant has been disclosed 45 days after the incident. The 45 day-delay in making a complaint is not the issue in this case. A 45-day delay would not be an issue in a rape case if the delay could be explained in an acceptable manner, because in rape cases where the girl is under 16 years, there could be various reasons why she or her parents are reluctant to make a complaint to the police. In fact, in the instant action, there is no issue of delay in making a complaint to the police. Without any delay, a complaint had been made to the police the very next day after the incident. The issue here is that there was no mention of rape or any other act committed by the appellant on the previous day. If the alleged rape was committed on 07.05.2010, a reasonable doubt arises as to why nothing was mentioned about the rape in the complaint made on 08.05.2010, the very next day and it was disclosed after 45 days by making another statement.

Apart from that, the other main issue to be considered is the PW-1's credibility. It is to be noted that her mother PW-2 has stated that she saw the appellant naked in the room with her daughter and thereafter he went away. However, PW-2 has stated that she did not know whether something had happened to her daughter because she had not seen anything else. It was transpired in cross-examination that in PW-2's statement to the police on 08.05.2010 also, she had not mentioned any incident that occurred the previous day.

Therefore, the incidents relating to the charges based on the complaint made by PW-1 after 45 days of the alleged incident have to be proved on PW-1's evidence. The doctor who examined PW-1 after the incident

testified and formed his opinion that there is evidence of recent and previous vaginal penetration and that the penetration could have occurred on 07.05.2010. However, in proving charges against the accused-appellant, it should be proved that the accused-appellant had raped her on or about 07.05.2010. Since this is a charge of statutory rape, PW-1's consent is immaterial, and proving the act of sexual penetration by the appellant is sufficient to prove the second charge of statutory rape.

The medical evidence supports to come to the conclusion that sexual intercourse with PW-1 could have occurred on 07.05.2010. However, in the case of Ajith v. Attorney General – (2009) 1 Sri L.R. 23 it was held that "If the prosecutrix in a rape case is not a reliable or believable witness, the evidence seeking to corroborate her story cannot strengthen her evidence. Court should seek corroborative evidence only if the prosecutrix is a reliable witness." Anyhow, proving the occurrence of sexual intercourse is not sufficient to prove the charge of rape, but it should also be proved that the appellant himself committed the rape.

At this stage, I wish to consider other judicial authorities where it was observed the manner in which prosecutrix's evidence should be assessed in deciding a charge of rape. It was held in Sunil and another v. The Attorney General-(1986) 1 Sri L.R 230 that "it is very dangerous to act on the uncorroborated testimony of a women victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration".

In the Court of Appeal Case No. 129/2002 (H.C. Mathara No. 146/99) decided on 28th June 2007 it was held "Court can, however act on uncorroborated testimony of a prosecutrix if her evidence appears to the court to be completely satisfactory and there are attending circumstances which make it safe for the Court to act upon her evidence

without corroboration. If I may put it in another way that is if her evidence is capable of convincing the Court that she is speaking the truth, Court can act on such testimony without corroboration."

Premasiri V. the Queen – 77 NLR 85, it was held that in a charge of rape, "it is proper for a Jury to convict on uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the Jury that she is speaking the truth".

As stated previously, apart from the medical evidence, there is no other evidence to corroborate PW-1's testimony. However, the medical evidence does not support determining who committed the rape. That has to be decided on uncorroborated evidence of PW-1. It is to be noted that there is no any obstacle to prove a rape charge on uncorroborated evidence of the prosecutrix, if her evidence is cogent, as decided in the aforesaid cases.

In considering the decisions of aforesaid judicial authorities, it is apparent that in the instant action, PW-1's evidence should be credible and cogent to prove the charges. The learned High Court Judge accepted her evidence as credible and convicted the appellant for both counts. The main argument of the learned counsel for the appellant was that PW-1 repeatedly stated in her evidence that she fell fast asleep after drinking the glass of water offered by the appellant and she could not remember what had happened and only when the mobile phone rang and her mother came, she woke up. Therefore, he contended that under any circumstances, she was unable to explain the sexual acts committed by the appellant that had been committed during her sleep. Explaining all sexual acts in detail while saying that she fell fast asleep after consuming water is improbable, false evidence, he contended. Since it is apparent from this evidence that PW-1 is not a credible witness, the learned counsel contended that the convictions are erred in law.

The reply of the learned Deputy Solicitor General was that PW-1 has not given false evidence but there may be an exaggeration. The argument of the learned DSG was that the explanation of the sexual acts is only an exaggeration and does not affect the credibility of PW-1. Therefore, he contended that PW-1's evidence which was corroborated by the medical evidence was sufficient to prove the charges beyond a reasonable doubt.

On the day in question, around 9.30 p.m., she was sleeping in her room. She suddenly woke up and observed the accused seated on her bed next to her. She got frightened, and the accused offered her a cup of water to drink. She had fallen fast asleep after drinking water. In her testimony, PW-1 stated in the following manner that she couldn't remember what happened afterwards:

"මම නිදාගෙන සිටියේ. ඊට පස්සේ මම ඇහැරිලා බලද්දී ඇන්ටනී කියන කෙනා කාමරයේ සිටියා. පස්සේ මම බය වුනා. එයා මට වතුර එකක් දුන්නා බොන්න කියා. ඊට පස්සේ කිසි දෙයක් මතක නැහැ. ඊට පස්සේ එයාගේ ෆෝන් එකට කෝල් එකක් ඇවිල්ලා අපේ අම්මා ඇවිල්ලා දොරට ගහද්දි තමයි මට ඇහැරුනේ."

(Page 148 of the appeal brief)

PW-1 stated the same thing repeatedly in her testimony, and the relevant evidence can be found on pages 85, 151, and 152 of the appeal brief.

On page 152, the question posed and the answer given by the PW-1 are as follows:

ප්‍ර: සත්මී වතුර බීමට අමතරව ඇන්තනීගෙන් වෙන මොනවා හරි සිද්දියක් රෑ සිදු වුනාද කියන්න?

උ: මම වතුර බිව්වාට පස්සේ නින්ද ගියා. මම කිසි දෙයක් දන්නේ නැහැ.

PW-1 specifically stated that she could not remember anything after falling asleep. According to her evidence, after consuming water, she did not know what had happened, and when she woke up, she saw

some white substance on her thigh. Therefore, if the appellant had raped her, it should have been committed during her sleep.

However, very strangely, PW-1 has described all the sexual acts committed by the appellant in the following manner:

ප්‍ර: තමාගේ ශරීරයේ මොකක් හරි කොටසකට ඒ වූ කරන එක ස්පර්ශ කලාද?

උ: එහෙමයි.

ප්‍ර: මොකටද?

උ: මම වූ දාන එකට.

ප්‍ර: ඇන්තනීගේ වූ දාන එකෙන් තමාගේ වූ දාන එකට මොකක්ද සිදු කලේ කියන්න.

උ: එයා ඇඟ උඩ නැගලා එයා ඉස්සි ඉස්සී මේවා කළා.

(Page 156 of the appeal brief)

On page 157 of the appeal brief also, PW-1 described the sexual acts in detail, stating that the appellant inserted his penis into her vagina and moved in and out three or four times. He had squeezed her mouth with his hand and removed his penis just as she was about to scream from pain. Furthermore, she stated that the appellant was with him for about 15 minutes and that she struggled but could not escape during that time. It's obvious that the prosecutrix, who was fast asleep at that time, couldn't feel the pain, couldn't tell how many times he inserted the penis, couldn't tell how long he was with her, and couldn't struggle to escape.

Again, on page 158 of the appeal brief, PW-1 has described further details regarding the sexual act in the following manner:

ප්‍ර: තමා කිව්වා ඇන්තනීගේ පුරුෂ ලිංගය තමාගේ වූ දාන එකට ඇතුල් කළා කියලා?

උ: එහෙමයි.

ප්‍ර: කී පාරක් ඒ විධියට සිදු කලාද?

උ: දෙපාරක් විතර.

ප්‍ර: ඒ දෙපාරම තමාට රිදුනාද?

උ: එහෙමයි.

ප්‍ර: ඊට පස්සේ මොකද සිද්ද වුනේ?

උ: ඊට පස්සේ එය එලියට අරගෙන කකුල් දෙකේ මැද කළා.

ප්‍ර: ඇන්තනී මොකක්ද එලියට ගත්තා කියන්නේ?

උ: පුරුෂ ලිංගය.

It is evident that if her version of falling fast asleep after drinking water is accepted, she could not describe all of the sexual acts allegedly committed by the appellant. If her evidence regarding sexual acts is to be believed, her story of falling fast asleep after drinking water becomes false. So, this is an improbability as well as a major discrepancy in PW-1's evidence.

In the case of The Queen V.V.P. Julis and two others – 65 NLR 505, the following observations were made: "*Falsus in uno, falsus in omnibus* or *Falsum in uno falsum in omnibus*, both forms are in use, (he who speaks falsely on one point will speak falsely upon all) is a well-known maxim. In applying this maxim, it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment, must be distinguished from deliberate falsehood".

It was also observed in the said case that "The maxim *falsus in uno, falsus in omnibus*, is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. But when such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true should not be resolved in his favour unless there is some compelling reason for doing so".

Exaggeration must be distinguished from deliberate falsehood, according to the decision of the aforementioned judicial authority. The only issue now is whether PW-1's description of sexual acts is only an exaggeration, as the learned DSG claims. According to the "Oxford dictionary", the meaning of "exaggeration" is that "a statement that represents something as better or worse than it really is. According to the "Cambridge dictionary" the meaning of "exaggeration" is that "to make something seem larger, more important, better or worse than it really is". So, it is apparent that in the instant action, PW-1 should see or feel something to exaggerate in respect of the sexual acts. PW-1 could not explain any sexual act committed by the appellant or feel anything because she was fast asleep and could not remember or was unaware of what had occurred according to her own evidence. She could have exaggerated the sexual acts only if she was in a position to see and remember the sexual acts committed by the appellant. When she categorically stated that she could not remember anything after drinking water and falling fast asleep, according to her own evidence she was incapable to explain any sexual act occurred. Therefore, this is certainly not an exaggeration but a serious improbability that directly affects the credibility of the witness.

In such circumstances, her credibility cannot be considered as divisible and accept one of the versions because if she could explain the sexual acts, her entire story of falling fast asleep and being unable to remember anything would become improbable, and if she fell asleep as she repeatedly stated, she was unable to explain these sexual acts. In the Indian case of Gurcharan Singh, V. State of Haryana - 1994 (2) Criminal Law Journal - page 1710, it was held that "Where the material witnesses make inconsistent statements in their evidence on material particulars, the evidence of such witnesses becomes unreliable and unworthy of credence, thus making the prosecution case highly doubtful." PW-1's

evidence is not only improbable but also inconsistent as explained above. It is vital to be noted that the inconsistency and improbability have been occurred on the most important incidents in proving charges of this case.

Therefore, I regret that I am unable to agree with the contention of the learned DSG that the sexual acts she described were only an exaggeration and those items of evidence do not affect the credibility of PW-1. The said major inconsistencies as well as the significant improbabilities have a direct impact on the credibility of PW-1's evidence. Hence, her evidence cannot be considered as convincing and the credibility of the prosecutrix is in question for the reasons explained above. As stated in the aforesaid Court of Appeal Case No. 129/2002, the prosecutrix's evidence should be completely satisfactory to act upon but PW-1's evidence in this case, cannot be considered as satisfactory evidence. In these circumstances, I am of the view that it is unsafe to act upon the prosecutrix's evidence in this case. Hence, I hold that the learned High Court Judge's conclusion that the charge of statutory rape has been proved beyond a reasonable doubt is erroneous.

For the foregoing reasons, I hold that the second count of statutory rape has not been proved beyond a reasonable doubt. The first count against the appellant in terms of section 436 of the Penal Code is house trespass in order to commit any offence punishable with imprisonment for 10 years or more. The first count has been brought against the appellant for house-trespass in order to commit the offence of rape. Since the second charge of statutory rape fails, the first charge also necessarily fails. Hence, I hold that the learned High Court judge's decision to convict the accused-appellant for counts one and two is bad in law.

Accordingly, the judgment dated 16.10.2019, convictions, and sentences are set aside. The accused-appellant is acquitted of the first and second charges 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