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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with section 14 of the Judicature Act No. 02 of 1978

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

Complainant

C.A. Case No. HCC-39-40/21

High Court of Embilipitiya

Case No. 16/2019

Vs.

1. Haththotuwa Gamage Chinthaka.
2. Malaweera Arachchige Manoj Priyankara alias Ruwan alias Suranga.

Accused

AND NOW BETWEEN

1. Haththotuwa Gamage Chinthaka.
2. Malaweera Arachchige Manoj Priyankara alias Ruwan alias Suranga.

Accused - Appellants

Vs.

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

Complainant- Respondent

BEFORE : K. PRIYANTHA FERNANDO, J (P/CA)
WICKUM A. KALUARACHCHI, J

COUNSEL : Indica Mallawaratchy for the 1st Accused-Appellant
Saumya Hettiarachchi for the 2nd Accused-appellant

Sudharshana De silva, DSG for the Respondent.

WRITTEN SUBMISSIONS
TENDERED ON : 04.03.2022 (On behalf of the 1st Accused-Appellant)
08.11.2022 (On behalf of the 2nd Accused-Appellant)
18.11.2022 (On behalf of the Respondent)

ARGUED ON : 22.11.2022

DECIDED ON : 14.12.2022

WICKUM A. KALUARACHCHI, J.

The first and second accused-appellants were indicted in the High Court of Embilipitiya on the following counts.

I. On or about 02.08.2015, in Ulliduwawa Kollonna, committed the offence of abduction of the Pathiranage Jayanthilatha, an offence punishable in terms of Section 357 of the Penal Code read with Section 32.

II. The first accused, in the course of the same transaction, committed gang rape on the said Pathiranage Jayanthilatha and thereby committed an offence punishable in terms of Section 364(2) of the Penal Code.

III. The second accused, in the course of the same transaction, aided and abetted the first accused to commit gang rape and thereby committed an offence punishable under Section 364(2) of the Penal Code.

After trial, the learned High Court Judge found the accused-appellants guilty for the charges against them. Accordingly, both of them were sentenced to a term of 2 years of rigorous imprisonment and a fine of Rs.5,000/-, carrying a default term of 6 months of simple imprisonment for the first count. The first accused was sentenced to a term of 12 years of rigorous imprisonment and a fine of Rs.10,000/-, carrying a default term of 6 months of simple imprisonment for the second count. The second accused was also sentenced to a term of 12 years of rigorous imprisonment and a fine of Rs.10,000/-, carries a default term of 6 months of simple imprisonment for the third count. Both accused were ordered to pay a sum of Rs.150,000/- each as compensation to the victim, which carrying a default term of 1-year simple imprisonment. This appeal is preferred against the said convictions and sentences.

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

According to the prosecution, the following are the facts of the case, briefly:

The prosecutrix (PW-1) in this case was a 43-year-old married woman who lived with her husband at the time of the offence. On the day of the

incident, between 1.30 a.m. and 2.00 a.m., she was returning home from her niece's puberty ceremony, which was about a 10-minute walk from her house. She went to the ceremony with her husband, but she returned home alone. According to PW-1, the first and second accused followed her while she was returning, and the second accused held her by the waist and the first accused dragged her to a nearby tea plot, then they raped her.

At the hearing, the learned counsel for the 1st appellant as well as the learned counsel for the 2nd appellant advanced their arguments on the following three grounds:

I. The 1st and 2nd appellants have not been properly identified.
II. PW-1, the prosecutrix is not a credible witness.
III. The learned High Court Judge has not considered the burden of proof in a proper perspective.

The learned Deputy Solicitor General for the respondent contended that although there were minor flaws in the prosecution evidence, all three charges against the accused-appellants have been proved beyond a reasonable doubt.

After the prosecution case, the 1st accused-appellant as well as the 2nd accused-appellant gave evidence and presented the defence version. The learned High Court Judge has decided that the defence version cannot be accepted, because the position taken up by the defence has not been suggested to the prosecution witnesses. The failure to suggest the defence version to the prosecution witnesses is a reason not to accept the defence version. The said finding of the learned High Court Judge is correct. However, the learned High Court Judge has stated in her judgment that when the test of probability is applied, the prosecution version is more probable than the defence version. One of the arguments of the learned counsel for the 1st appellant was that the standard considered by the learned trial Judge regarding the burden of

proof is incorrect. I agree that there is merit in that argument because, when it is stated that the prosecution version is more probable, it implies that there is some sort of probability in the defence version as well. If there is some probability in the defence version, that would create reasonable doubt on the prosecution case. In such a situation, the accused is entitled to be acquitted. As decided in P.P. Jinadasa V. The Attorney General – C.A. 17/2009, not the defence evidence, but even an unsworn statement from the dock is sufficient for the defence to succeed, if it raises a reasonable doubt in the mind of the Court about the prosecution case.

Therefore, an unacceptable defence version does not relieve the prosecution duty to prove the charges beyond a reasonable doubt. It was held in Karunadasa V. OIC Motor Traffic Division, Police Station, Nittambuwa – (1987) 1 Sri L.R. 155, that "The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed by the law and his guilt must be established beyond a reasonable doubt." Also, it was held in Kamal Addaraarachchi V. State – (2000) 3 Sri L. R. 393 that "It is an imperative requirement in a criminal case that the prosecution case must be convincing no matter how weak the defence is before a court is entitled to convict an accused. what the court has done in this case is to bolster up a weak case for the prosecution by referring to the weakness in the defence case- that cannot be permitted: the prosecution must establish its case beyond reasonable doubt."

Therefore, in the instant action, it has to be considered whether the prosecution has adduced evidence to prove the charges against the appellants beyond a reasonable doubt. The main argument advanced by both learned counsel for the appellants was that the appellants' identities had not been established. Before considering the other issues,

I wish to deal with the issue of identity because if the appellants have not been properly identified, all three charges against them would fail. Undisputedly, only the prosecutrix has given evidence about the incident. Accordingly, the identities of the appellants also have to be established by the evidence of the prosecutrix. In her evidence, PW-1 has stated that the 2nd accused had held her by her waist and the 1st accused dragged her to a nearby tea plot. Thereafter, she stated that they raped her. However, apart from the aforesaid acts done by the 1st and 2nd appellants before raping her, she has not stated specifically what sexual act has been done by the 1st appellant and what sexual act has been done by the 2nd appellant. Furthermore, at the time of the rape, she did not claim to have identified the appellants visually as the perpetrators. In re-examination, she was asked "දූෂණය කරන අවස්ථාවේදී ඒ කලේ මේ දෙන්නමයි කියලා හඳුනා ගත්තේ කොහොමද? Her answer was, "by their voices" (කටහඬින්) (Page 107 of the appeal brief). Therefore, at no occasion, she visually identified the appellants.

Even though she stated that the aforesaid acts of holding her by the waist and dragging her to a nearby tea plot were done by the 2nd and 1st appellants, when she was questioned, she categorically stated that she identified the appellants by their voices. (The said items of evidence are found at pages 61, 95, and 107 of the appeal brief) In addition, she stated that there was no light and that it was extremely dark (pages 94 and 95 of the appeal brief). That evidence makes it clearer that visual identification was not possible. Therefore, it is apparent that there was no visual identification in this case but only voice identification.

According to PW-1, an incident occurred during the puberty ceremony between her and the appellants. The learned Deputy Solicitor General raised the argument that the subsequent act of following her and raping her was a continuation of the previous incident in the puberty ceremony, and thus she had no difficulty in identifying the appellants. I regret that I am unable to agree with that argument because she stated

that she did not see these two appellants coming when she left the house where the puberty ceremony was held. (දෙන්නා දන්නවා ස්වාමීනි. මම හඳුනනවා, මගේ පිටුපස්සෙන් එලවනවා මම දැක්කා සත්‍යයි. ඇයි මල්ලී මගේ පිටිපස්සෙන් එළවන්නේ කියලා මම ඇහුවා. **නිවසින් පිටත් වෙනකොට මම මේ විත්තිකරුවෝ දෙන්නා එනවා දැක්කේ නැහැ.** – Page 60 of the appeal brief). Therefore, it is apparent that the subsequent act was not a continuation of the previous act. As such, their identification at the puberty ceremony does not help to establish their involvement in the events pertaining to the charges.

In perusing the judgment, it is clear that the main reason for accepting the voice identification evidence by the learned High Court Judge is that the defence has not challenged the said evidence. Firstly, it is to be noted that according to PW-1, the 1st appellant has not uttered even a single word. So, it is evident that the 1st appellant could not be identified by voice. Therefore, the necessity did not arise for the 1st appellant to challenge voice identification. Anyhow, when the PW-1 was cross-examined on behalf of the 1st appellant as well as the 2nd appellant, she was questioned about the way that she identified the appellants while suggesting that the appellants had been wrongly implicated for the offence committed by someone else. So, the voice identification has in fact been challenged on behalf of both appellants. Apart from that, it is to be noted that it is a fundamental duty of the prosecution to prove the identities of the accused beyond a reasonable doubt in proving the charges against the accused. Hence, the learned trial Judge's decision to accept the voice identification evidence for the reason of not challenging the said evidence is incorrect. When the prosecution evidence regarding the facts of the incidents relating to the case is not challenged by the accused, it leads to the inference of admission of that fact. Unlike the other incidents of a case, I am of the view that identification of the accused in a criminal case must be proved beyond a reasonable doubt by the prosecution, whether the evidence regarding the identification is challenged or not. Anyhow, this issue

does not arise in the case at hand because the voice identification evidence, in this case, has been challenged on behalf of the appellants.

The learned Deputy Solicitor General contended further that the medical evidence and the evidence of the police witnesses corroborate the evidence of the prosecutrix. That corroborative evidence may help to establish that a rape or a gang rape had occurred. However, the medical evidence or the evidence of police witnesses would not corroborate the prosecutrix's evidence regarding the appellants' identities.

Also, the learned DSG contended that there was no reason for PW-1 to falsely implicate the appellants to this incident. That could be correct. The issue of this case is not whether she falsely implicated the appellants in this incident. The issue is whether PW-1's voice identification is reliable.

In the circumstances, it is to be considered whether the appellants were identified beyond a reasonable doubt by PW-1 by their voices. As stated previously, the 1st appellant had not uttered a single word according to PW-1's evidence. Even at a later stage, while doing some sexual act or subsequently, PW-1 has not stated that the 1st appellant uttered anything. She stated about only the words uttered by the 2nd appellant (page 95 of the appeal brief) and said she identified both appellants by their voices. Hence, it is evident that under any circumstances, the 1st appellant could not be identified by his voice because he did not utter even a word according to her evidence. Therefore, 1st appellant's involvement regarding any of the acts pertaining to the charges has not been proved. Therefore, the 1st and 2nd counts against the 1st appellant fail.

Against the 2nd accused-appellant, the first and third charges have been brought. When PW-1 stated in her evidence that both appellants raped

her, the following portion of her statement to the police had been marked as a contradiction (V-3): "චින්තක එක්ක ආව සුරංග නොහොත් රුවන් යන අය මට කරදර කළා කියන්න මම දන්නේ නැහැ" (Page 96 of the appeal brief). Maybe because of this statement, the 2nd appellant had not been charged for committing the rape. The 3rd charge against the 2nd accused for committing the gang rape, punishable under Section 364(2) has been brought on the basis that he has aided and abetted the 1st accused in committing the rape because according to Explanation-1 to Section 364 of the Penal Code *"Where the offence of rape is committed by one or more person in a group of persons, each person in such group committing or abetting the commission of such offence is deemed to have committed gang rape."*

However, in the case at hand, it has already been decided that the 1st appellant cannot be convicted for the offence of rape or gang rape as he has not been identified. Therefore, the 3rd charge brought against the 2nd appellant for aiding and abetting the 1st appellant to commit rape also necessarily fails.

Now, only the 1st charge against the 2nd appellant has to be considered. PW-1 stated that the 2nd appellant uttered the words "අක්කේ කෑ ගහන්න එපා, කියන්න එපා" (Page 61 of the appeal brief) when they came behind her. It is not clear why he stated "Don't shout, don't tell" while he was going behind her. Anyhow, PW-1 stated that she identified the 2nd appellant by hearing those words.

At this stage, it is important to consider the legal position regarding voice identification. In considering the substance of the line of judicial authorities in respect of voice identification, it is clear that the court can act upon voice identification evidence, but stringent precautions should be taken in accepting voice identification evidence.

In the case of Mohan @ Mohan Singh V. State of U.P. High Court of Judicature at Allahabad - Criminal Appeal No. - 871 of 1996, decided

on 27 May 2020 that "The evidence led by the prosecution must be cogent, positive, affirmative and assertive and must establish beyond all reasonable doubts that the witness had ability to identify voice and additionally there was sufficient opportunity for the witness to identify the assailant by voice only."

It was held in the case of Pratap Singh V. State of M.P- in Criminal Appeal No.00601 of 2004, decided on 17.5.2017; that Accurate voice identification is much more difficult than visual identification. The Courts have to be extremely cautious in basing conviction purely on the evidence of voice identification. The ability of the individual to identify voice in general and the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a listener, must be established beyond all reasonable doubts by cogent, positive, affirmative and assertive evidence.

Also, in Rohan Taylor and Others V. R- SCCA Nos. 50-53/1991, it was held that "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent, there must, we think, be evidence of the degree of familiarity the witness had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used as to make recognition of that voice safe on which to act…"

Evidence reveals in this case that the appellants were known people to PW-1. According to PW-1, the 2nd appellant uttered about five words. Therefore, it has to be considered whether these words were sufficient to recognize his voice. Also, PW-1's evidence must be cogent, positive, and affirmative to accept her voice identification evidence.

Now, I have to consider whether PW-1's evidence is cogent. PW-1's husband has given evidence in this case as the 2nd witness for the

prosecution. Regarding PW-1's return from the puberty ceremony, her husband PW-2 stated that when he returned home, he saw PW-1 had fallen on the ground outside the house. PW-1 has given totally contradictory evidence regarding this matter. She stated that her husband, PW-2, was at home when she returned home. Furthermore, she has never stated that she fell outside the house. When considering the evidence of these two witnesses, it is difficult to ascertain whether PW-1's evidence should be believed, PW-2's evidence should be believed, or both witnesses' evidence should be disbelieved on this point.

When PW-1 stated in her evidence that both appellants raped her, she was questioned whether she has stated to the police "I don't know whether the person called Suranga alias Ruwan who came with Chinthaka harassed me". She had denied saying so and the said portion stated to the police has been marked as a contradiction at page 96 of the appeal brief as mentioned before. In considering this vital contradiction, her credibility is called into question when she claims during her testimony in the High Court that the 2nd appellant also raped her.

Apart from that, when she was suggested that "if she had sexual intercourse, it was with *Amith Priyantha"*, she has not denied the suggestion. Her answer was "මේ දෙන්නා තමයි මාව ඇදගෙන ගියේ. ඇදගෙන ගිහිල්ලා එහෙම කලාද දන්නේ නැහැ" (Page 103 of the appeal brief). Again, when she was suggested that she made a false complaint to protect *Amith Priyantha,* she replied "මේ දෙදෙනා තමයි ඇදගෙන ගියේ. මට දිව්රන්න පුළුවන්. මේ දෙන්නාටත් කරන්න දුන්නාද දන්නේ නැහැ" (Page 106 of the appeal brief). She cannot be considered a credible witness when she stated in one instance of her evidence like this and stated with certainty in another instance that both appellants raped her. Furthermore, her statement "don't know whether these two were also allowed to do" implies that another person or people were involved in this incident. These answers,

on the other hand, demonstrate that she was not sure as to who raped her, although she stated that both appellants raped her.

Already, this court has decided that the 1st and 2nd counts against the 1st appellant and the 3rd count against the 2nd appellant have not been proved. Only the 1st count against the 2nd appellant remains to be considered. As the aforesaid items of evidence of PW-1 create doubt about her credibility, her evidence cannot be considered as cogent evidence. Hence, I am of the view that it is unsafe to convict the 2nd appellant for the 1st count on the voice identification evidence of PW-1. Therefore, I hold that the 1st charge against the 2nd appellant has also not been proved beyond a reasonable doubt.

For the foregoing reasons, I hold that the learned High Court Judge's decision to convict the appellants for the charges against them is bad in law. Therefore, I quash the convictions of both appellants. The judgment dated 28.04.2021 and the sentences of imprisonment, fines imposed, on the 1st and 2nd appellants, and the order made on compensation are set aside. The 1st accused-appellant is acquitted of charges one and two. The 2nd accused-appellant is acquitted of charges one and three.

The appeals of the 1st and 2nd appellants are allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL