bIN 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 No:
CA/HCC/0278/2019
High Court of Gampaha
Case No: HC/18/2015

Mudannayake Appuhamilage Priyantha Mudannayake

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Dr.Ranjith Fernando with Nalin Dissanayake, PC, Vishva Rajapaksha, and Champika Monarawila for the Appellant.**
Rajindra Jayaratna, SC for the Respondent.

ARGUED ON : **09/11/2022**

DECIDED ON : **14/12/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Gampaha on two counts of Statuary Rape punishable under Section 364(2) (e) of the Penal Code as amended against Mudannayake Appuhamilage Hashini Nuwanthika between the period of 01/08/2013 and 30/09/2013.

After the trial the Appellant was convicted as charged only on the 1st count and he was sentenced to 14 years RI and a fine of Rs.10000/-. In default of which 06 months RI was imposed. In addition, the Learned High Court Judge had specified a sum of Rs.500000/- to be paid as compensation to the victim in default of which a sentence of 02 years RI was imposed.

The Appellant was acquitted from the second count by the Learned Trial Judge.

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

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19

pandemic. At the time of the hearing, he was connected via Zoom technology from prison.

The Counsel for the Appellant placed following grounds of appeal for adjudication:

a. The learned trial judge has failed to observe the Section properly before giving the verdict.
b. Failure on the part of the Court to consider evidence which negatives the occurrence of the offence.
c. Failure on the part of the Court to observe the evidence which confirms the reason for animosity and the institution of the complaint.
d. Failure to observe the good character of the Appellant.

The prosecutrix who encountered this unpleasant incident was a 12-year-old school girl. The Appellant was her relative who lived next door. The prosecutrix was usually alone at home after school as both her parents were employed at that time. She had a brother who was not at home when the offence was committed on her.

On the day of the incident, when she was alone at home after school, the Appellant had entered her house and had requested the prosecutrix to open the door. As the Appellant is her relation and lived next door, she had opened the door without hesitation. Suddenly, the Appellant had dragged the victim to her room, made her lie on the bed, removed her undergarment, touched her breasts, spread her legs, slept over her body and forcibly inserted his penis in to her vagina. She had felt pain at that time. After the act, the Appellant had threatened the victim against divulging the incident to anybody and had left the house. According to the prosecutrix the Appellant had raped her on another occasion as well. Due to fear, she had not divulged these incidents to anybody. Unable to bear this agony, the victim had told

the incident to her sister first, who in return had conveyed the same to her mother.

PW2, the mother of the victim had noticed the depressed mood of the victim, but had only been made aware of the incident by her elder daughter. When the mother had questioned the victim, she had told her mother what had happened to her. Initially, PW2 had brought up the incident to the notice of the Appellant's wife which had culminated in a fight. Thereafter, a police complaint had been lodged by PW2 and the victim.

PW4, Dr.Sunil Angampulige had examined the victim and submitted the Medico-Legal Report. In his report although no injury was found on the victim's hymen the observations in the medical report had not excluded the possibility of sexual intercourse. He had come to this conclusion as the examination has revealed that the prosecutrix had an extending type of hymen and therefore, it was observed that a there was a possibility of sexual intercourse having taken place even if there was no damage to or tear of the hymen. The JMO had referred the prosecutrix to a psychiatric and according to the report, the prosecutrix had a relatively lower level of intelligence.

After the conclusion of the prosecution case, the Learned High Court Judge had called for the defence. The Appellant had given evidence and had called three witnesses in support of his case.

Although the Appellant advanced four grounds of appeal, he did not proceed to canvass the first ground of appeal at the hearing. Hence, this Appeal commences with the consideration of the second ground of appeal.

In the second ground of appeal, the Appellant contends that the Court failed to consider evidence which negatives the occurrence of the offence.

Since the victim was a small girl when she encountered this unpleasant ordeal, she had not revealed the incident to anybody due to fear of the Appellant. She had first divulged the incident to her elder sister after about three months of the incident. By this time PW2 also had noted her new

pensive mood. Further the prosecutrix was a person with a lower level of intelligence.

The Learned Counsel strenuously argued that the medical evidence given with regard to the effect that there were no injuries to the hymen and also the fact that the judicial medical officer had taken up the possibility of this alleged rape taking place, by stating that he is not 100 percent certain as to the rape being committed, creates a reasonable doubt with regard to the whole prosecution story.

PW4, JMO in his evidence stated that although there were no injuries found during the physical examination and that her hymen was intact, considering the time lapse between the crime and the examination and the fact that the prosecutrix had an extending type of hymen, there was the possibility of a vaginal penetration.

Explanation (i) to Section 363 of the Penal Code as amended states that 'penetration is sufficient' to constitute sexual intercourse. This means that it is not necessary to prove that the sexual intercourse lasted longer or that the man ejaculated.

In this case the prosecutrix was consistent in her evidence about the happenings of the incident. She had vividly explained how she was raped by the Appellant on the very first day. She had given evidence before the High Court for more than 4 years after the incident. The Learned High Court Judge accurately analysed the evidence before he accepted the that of the victim as true and cogent. Hence this ground of appeal has no merit.

In the third ground of appeal the Counsel for the Appellant contended that failure on the part of the Court to observe the evidence which confirmed the reason for animosity and the complaint made.

During the argument the Counsel for the Appellant took up the stance that a long-standing boundary dispute between these two families had instigated the prosecutrix's family to make a false complaint against the Appellant.

As submitted by the Learned State Counsel, the prosecutrix had admitted that prior to this incident the two families were in good terms and both the families had visited each other. But this had changed and the two families were no longer on talking terms but both this and the boundary dispute had arisen only after this alleged complaint of rape against the Appellant.

The Appellant in his evidence had first cited that the boundary dispute was on going for 1.5-2.5 years, and he had changed it to a period of 7-8 years thereafter. This position was not corroborated by any of the defence witness brought by the Appellant. The Grama Sevaka confirmed a complaint was never made to her regarding a boundary dispute by either party. She had not even visited the disputed site. The police also confirmed that a complaint was never made to them either. The prosecutrix's brother who was called by the defence also corroborated her sister's position that the boundary dispute was arose only after the crime was reported. Until such time the two families had been on good terms.

In **State of Punjab v. Gurmit Singh [1996] 2 SCC 384** it was held that:

> *"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour…."*

Hence, it is submitted that it is inconceivable for the prosecutrix or her mother to have fabricated a complaint of this nature which would compromise the well-being and the future of the prosecutrix and her dignity and reputation. Hence, this ground of appeal too has no merit.

In the final ground of appeal, the Appellant contended that the Trial Judge had failed to observe the good character of the Appellant.

The fact that the person charged is of good character is always relevant in criminal proceedings. However, the fact that he has a bad character is generally irrelevant.

Professor G.L.Peiris in his book **" Recent Trends in the Commonwealth Law of Evidence"** at page 311 states as follows:

> "Where the evidence, viewed as whole, admits some degree of doubt, this doubt may be reinforced by evidence of good character which, to that extent, could facilitate an acquittal in marginal cases."

The Learned High Court Judge in his judgment had considered the defence witnesses to come to his conclusion. The defence witness under whom the Appellant was working as a driver gave evidence and had told the court that the appellant is a trustworthy person and that he would have never suspected of any incident of this nature implicating him while he was working under him. This defence witness's evidence had been considered by the Learned High Court Judge and he has given reasons in his judgment and as to why he had rejected his evidence. The relevant paragraph of the judgment is re-produced below:

(Page 204 of the brief.)

එමෙන්ම චූදිත තවදුරටත් උත්සාහ ගෙන ඇත්තේ මෙම ප්‍රියංගනී ආයතනයේ ඔහු ඉතාමත් විශ්වාසීය රියදුරෙකු ලෙස සේවය කරන බවත් එම හිමිකරුගේ කුඩා දරුවන් පාසලට සහ පන්තිවලට ගෙන යාමේ කටයුතු ද එම දරුවන් අතර කුඩා ගැහැණු දරුවන් ද සිටින බවත් විශ්වාසවන්තව එම දරුවන් තමන්ට භාර දී ඇති බවටත් පෙන්වීමටයි. ඒ අනුව එම හෝටලයේ හිමිකරු ද සාක්ෂි දෙමින් චූදිතගේ චරිතය පිළිබඳව ඔහුට පැමිණිලි ලැබී නොතිබුණු බවට ප්‍රකාශ කර ඇත. චූදිත රියදුරෙකු ලෙස කටයුතු කිරීමත් රැකියාව කරන ස්ථානයේ හිමිකරුගේ දරුවන් නිදෙනා පාසලට සුරක්ෂිතව රැගෙන යන බවටත් ඒ අතර කුඩා ගැහැණු දරුවන් සිටින බවටත් සඳහන් කිරීම නිසාම චූදිත මෙවැනි ආකාරයේ වරදකට පෙළඹේ යයි කිසිදු විටෙක එමගින් අනුමිතියක් ගොඩ නැගෙන්නේ නැත. ඔහු තම රැකියාව ආරක්ෂා කර ගැනීම සඳහා ඔහු නිසි ලෙස විනයානුකූලව හැසිරිය යුතු බව අමුතු කරුණක් නොවේ. එසේ හෙයින් එවැන්නෙකු මෙලෙස තම රැකියා ක්ෂේත්‍රය තුල කටයුතු කළ පමණින්ම ඔහු මෙවැනි ආකාරයේ ක්‍රියාවක් නොකරන්නට ඇතැයි අනුමිතියකට එළඹීමට එය ප්‍රමාණවත් වන්නේ නැත.

As this is not a marginal case as described above, and due to the aforesaid reasons, I conclude that this ground of appeal also is also sans any merit.

The learned High Court Judge in the judgment had considered all the evidence adduced by the prosecution and the defence and had given reasons as to why he acted on the evidence adduced by the prosecution. He has accurately analysed all the evidence presented by both parties with correct perspective and arrived at the correct finding.

Hence, I am of the view that the prosecution had proved the 1st count against the Appellant beyond reasonable doubt. Hence, I affirm the conviction and sentence imposed on him with regard to the 1st count. I further order the sentence imposed on the 1st count to be operative from the date of conviction namely 11/09/2019.

The appeal is, therefore, dismissed.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL