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

In the matter of an Appeal under and in terms of the Article 138 (1) of the Constitution read with the Section 11(1) of the High Court of the Provinces (Special Provisions) Act no: 19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No: 15 of 979.

Court of Appeal Case No: **HCC / 389/2018**

High Court of Gampaha Case No: **HC 86 /2008**

The Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

Galolu Kankanamalage Nishantha Isurusiri

Accused

AND NOW BETWEEN

Galolu Kankanamalage Nishantha Isurusiri

Accused Appellant

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Palitha Fernando P.C with B.C. Balasuriya for the Accused –

Appellant.

Dishna Warnakula D.S.G for the State.

Argued on: 27.02.2023

Decided on: 29.03.2023

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 12.12.2018 of the High Court of Gampaha. The accused appellant (hereinafter referred to as the appellant) has been indicted for rape under section 364 of the Penal Code, and the appellant had pleaded not guilty to the indictment and upon a full blown trial being concluded the learned High Court Judge had convicted the appellant for the charge in the indictment and he had been convicted for 20 years rigorous imprisonment with a fine and compensation and a default sentence.

Being aggrieved by the said conviction and sentence the instant appeal has been lodged.

The main grounds of appeal had,

1) The learned High Court Judge not being able to observe the demeanor and the deportment of the victim,

2) The learned High Court Judge had not analyzed the evidence the properly,

3) The appellant not being given a fair trial.

The facts of the case are that the victim on the date of offence had been returning home from work and she had been dragged by the appellant in to the woods and had been raped.

It has to be noted that in evidence in chief the victim had been questioned 4 times with regard to the identity of the appellant and in the 5th attempt by the prosecuting counsel only the victim had divulged that it is Isuru, but the date had been given wrongly.

Thereafter she had divulged that she had gone home and had told the mother.

It also has to be noted that her evidence had been concluded not by the judge who finally wrote the judgment but a different judge, and the same Judge had observed at the very beginning that the victim appears to be not in a fit condition to understand the questions that may be put to her and therefore the oath had not been administered to her.

The mother of the victim who had corroborated the victim had said that on the very same day of the incident the victim had come homerunning stating that she had been finished and the mother had observed blood dripping from her legs. Then according to the mother, she had assaulted the daughter to get her to divulge as to who had raped her, the victim had said it is Jayasena Kolluwa. The mother had further said that the appellant had kept a knife to the neck of the daughter before the act of rape which the victim had not divulged.

The learned Presidents Counsel for the appellant submitted that the mother's version is concocted and exaggerated and it is the mother who had got the victim to give evidence against the appellant. The Counsel for the appellant further submitted that the learned judge who concluded the evidence of the lay witnesses had observed the demeanor and deportment of the victim and he is not the judge who finally convicted the appellant which in fact deprived the appellant of a fair trial.

This Court also notes that the learned judge who had finally convicted the appellant had not been able to observe the lay witnesses giving evidence in person which we think would have been useful because this Court observes that the evidence of the victim sometimes appears to be not very natural and wavered. The victim at some points have admitted that she was coached to give evidence. (56p).

The doctor who had examined the victim had been given a very lengthy case history by the victim and the culprit had been identified to be as being the second son of Jayasena.

Another ground urged by the Counsel for the appellant is the lack of accurate and consistent identification of the appellant because according to the prosecution the incident had taken place around 6.30 in the evening and according to the Counsel for the appellant there was no evidence of proper illumination, at the home when the incident is supposed to have taken place.

But the learned Counsel for the respondents urged strenuously that the evidence of the victim was cogent and at the time of the incident the victim had not been suffering from any mental disability. The Counsel for the respondents further averred that as with regard to light the appellant is supposed to have come to the scene on a motor bike and if that is so there is a possibility of the bike of the appellant having the night lamps on. But this submission of the Counsel for the respondent this Court observes to be mere conjecture and there is no evidence to that effect. Therefore, at this point this Court recalls that the victim in her evidence in chief had identified the accused by name only at the fifth attempt by the prosecution which we note to be is not very spontaneous, but being waivered. This is further highlighted by the fact that the victim's identification of the appellant to the mother is slightly different that with the identification given to the doctor.

The evidence of the investigative officers had been that the place of incident had been shown by the victim and she had shown a rubber estate in which the illumination had to be obtained via the torches they had been carrying. Therefore, the available illumination at the time of the incident is not supported by any evidence of the prosecution. The victim and her mother had not been questioned on the illumination at the place of

incident hence the identification of the appellant has to be presumed by surmising and conjecturing which is not in accordance with our legal system.

The learned Judge had not addressed his mind to the state of illumination at the time of the incident. But this Court is unable to understand as to how he had presumed that the appellant was adequately identified.

This Court also notes that the learned High Court Judge had gone in to, too much detail as to why the evidence of the victim should be believed but we note that he was unable to observe the demeanor and the deportment of the lay witnesses which is very important in view of the mental inadequacies of the victim which had been recorded by the learned High Court Judge who heard her evidence.

Hence it is the considered view of this Court that in a case of rape the evidence of the victim is very important, it does not necessarily have to be corroborated by another lay witness but it has to be evidence the Court can rely upon.

But in the instant case we observe that the evidence of the victim is waivered and appears to be very unnatural and, in several instances, she had admitted that she was giving evidence on the instructions of someone else and it had taken much effort on the part of the prosecuting Counsel to get the name of the appellant.

Furthermore, it is very hard to disregard the observation by the learned High Court Judge who had heard the evidence of the victim in totality.

It is well established law that a criminal charge has to be proved beyond reasonable doubt by the prosecution.

But in the instant case the evidence of the victim is not consistent and cogent enough to establish the allegation of rape against the appellant beyond a reasonable doubt. Hence in such a situation the rest of the evidence is only corroborative and not conclusive. As such it is the considered opinion of this Court that the prosecution has failed to prove its case beyond reasonable doubt.

As such the instant appeal is allowed and the conviction and the sentence of the appellant is hereby set aside.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.