

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

**LANKA**

**Court of Appeal Case No: - CA-HCC-0091-22**

**High Court of Hambantota Case No: - HC/03/2014**

Hon. Attorney General

**COMPLAINANT**

**Vs.**

Ramasingha Vidana Pathiranaage Sugath Kumara  
Alias Tharanga

**ACCUSED**

**AND NOW BETWEEN**

Ramasingha Vidana Pathiranaage Sugath Kumara  
Alias Tharanga

**ACCUSED-APPELLANT**

**Vs.**

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

**COMPLAINANT-RESPONDENT**

**Before : - Menaka Wijesundera, J  
B. Sasi Mahendran, J**

**Counsel : - Neranjan Jayasinghe with Harshana Ananda and Lahiru**

Widushanka for the Accused-Appellant.

Dishna Warnakula, D.S.G. for the State.

Written : - 28.11.2022 by the Accused-Appellant  
Submissions on 30.01.2023 by the Respondent.

Argued on : - 05.09.2023

Decided on : - 06.10.2023

**Menaka Wijesundera, J**

The instant appeal has been lodged to set aside the judgment dated 18.03.2023 of the High Court of Hambantota.

The accused appellant has been indicted in the High Court for gang rape with another unknown to the prosecution and at the end of the trial the learned High Court Judge had found the appellant guilty for the charge in the indictment.

The appellant being aggrieved by the said judgment had lodged the instant appeal.

At the very outset the Counsel for the appellant stated that he is only contesting the sentence but as submissions progressed, he said that he is challenging the conviction as well on the basis of the prosecution story being highly improbable.

The version of the prosecution is that on 26<sup>th</sup> of October 2010 the victim who had been married and with an infant child had been at home and their home had been built with Cadjans and it has had only one compound and, in that compound, there had been only one single bed.

On the day of the incident the husband of the victim had gone to have a drink with the appellant and another friend and later when the victim had been at home, she had heard somebody entering the house and the bottle lamp had been burning. With the light from the bottle lamp and the moon light streaming from the little opening in the wall which had

served as a window she had been able to identify the appellant who had come the previous day to collect a fishing net and who had also been known to her husband.

The appellant had entered the house and had said that he was Tharanga and had blown off the bottle lamp and had raped her. In the process the little infant child who had been sleeping on the single bed on which this sexual act had been going on, had woken up and the appellant is supposed to have thrown the child and had committed rape on the victim. The child had remained passive after the initial resistance. Thereafter the appellant had left and the other person had also come in and has done the same thing and she names him as Indika, but the prosecution had failed to name him as an accused in the indictment.

Thereafter when the husband came, she had told him the story and he had gone and confronted the appellant and the other person whom she names and they had tried to settle the matter by offering money. But they had proceeded to the police station and a complaint had been lodged.

She had been lengthily cross examined. In the cross examination it had transpired that although she had spoken of a knife being shown to her by the appellant and threatening with it in her evidence in the Magistrates Court, she had not said so and an omission had been brought to the notice of Court.

Her husband also had given evidence and he had corroborated the victim and he too had named the appellant and the name of the other person who is supposed to have raped the victim.

The doctor who gave evidence had said that in the history that she had mentioned two names and have said that they both raped her .But he had not seen any tell-tale marks of any type on her body.

At the conclusion of the prosecution case the appellant had made a statement from the dock denying the entire allegation.

**The main ground of appeal raised by the Counsel for the appellant is the improbability of the story for the prosecution.**

Upon perusal of the evidence, we see that the entire incident of rape by the appellant had taken place on a single bed while the infant child had been sleeping. The victim also had said at one point that the appellant had thrown the child when the child cried once, and if that is so, the child should have sustained injuries and the child would be yelling and strangely the victim had not said so in her evidence. Furthermore, it is very hard to believe that this type of an act can take place on a single bed with a child sleeping on the side unless there was no resistance from either party. In the instant matter the victim says that she resisted the appellant touching her and kissing her on the lips which means that there would have been some type of movement on the bed to which a child would always react especially when it is the mother who happens to be on the bed.

Therefore, we too see that the story narrated by the victim happens to be highly improbable and we also note that although the victim has spoken to about two persons by the name the indictment speaks of a person unknown to the prosecution along with the appellant committed the act which also shows that the prosecution was not very sure of the story narrated by the victim.

**Mr. Justice Mackeena in the article “ discretion “ in the Irish Jurist Vol 1X 1 at 10 had said as follows,**

**“When I have done best to separate the truth from the false by these more or less objective tests, I say which story seems to be truer, .I decide the case as the law requires in favor of the defendant”.**

**The Indian Supreme Court has held in the case of State of Utra Pradesh vs Anthony AIR 1985 SC 48 Supra para 10 that “while appreciating the evidence of a witness the approach must be whether the evidence ....read as a whole appears to have a wring of truth. Once that impression is formed it is undoubtedly necessary for the Court to scrutinize the evidence more particularly in keeping with the deficiencies and infirmities.....”**

Hence in the instant matter we find the narration of facts by the victim seems to be highly improbable and it only indicates an act which had taken place with the consent of the victim and not the other way about.

We also note that the victim has omitted to say some vital things in her evidence at the Magistrates Court which goes to the root of the case.

**It has been held in the case of Karunadasa vs OIC Motor Traffic Division Police Station Nittambuwa 1 SLR 155 by Perera J that “ It is an imperative requirement in a criminal case that the prosecution must be convincing, no matter how weak the defense is , before the Court is entitled to convict on it. It is necessary to bear in mind that the burden is on the prosecution to prove the guilt of the accused.”**

As such we find the story of the prosecution to be highly improbable and it is further substantiated by the fact that although the victim mentions the names of two culprits the Attorney General has decided to indict only one which again creates a reasonable doubt in the case for the prosecution. It is well settled law that when an allegation is made in criminal law that it is the prosecution which has to prove its case beyond reasonable doubt, if not the benefit of the doubt has to be given to the accused.

As such as we find the narration of the victim to be highly improbable, we are of the view that the said benefit of the doubt should be given to the appellant.

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**

**B. Sasi Mahendran, J**

I agree

**JUDGE OF THE COURT OF APPEAL**