

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

Mallawathanthrige Ajith Paulet Perera

Accused-Appellant

Vs.

C.A. 24/2010

High Court of Chilaw Case No HC 05/04.

The Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

Before : Sisira J. De Abrew, J. &

' P.W.D.C. Jayathilaka, J.

Counsel : Dulinda Weerasuriya, P.C. with Dharshana Edirisuriya for  
the accused-appellant

Chethiya Goonesekera, S.S.C. for the A.G.

Argued &

Decided on : 27.06.2013.

Sisira J. De Abrew, J.

Heard both counsel in support of their respective cases.

The accused-appellant in this case was convicted for raping a girl named S.G. Swarna Malkanthi and was sentenced to a term of 12 years rigorous imprisonment, to pay a fine of Rs. 10,000 carrying a default sentence of 6 months simple imprisonment and to pay a sum of Rs. 100,000/- as compensation to the victim carrying a default <sup>sentence of</sup> 2 years rigorous imprisonment. Being aggrieved by the said conviction and the sentence the accused-appellant has appealed to this Court. Facts of this case may be briefly summarized as follows. Malkanthi, the alleged victim, was working in the house of the mother-in-law of the accused. Mother of Malkanthi says that she was given to the mother-in-law of the accused-appellant for the purpose of adopting her. But according to the evidence, it appears that she has been working in this house as a domestic servant. According to the evidence of Malkanthi on a day (either in the month of December 1999 or January 2000. She does not give an exact date) the accused-appellant came to the house of his mother-in-law (old lady) and raped her. The accused-appellant and his wife with their 2 and 1/2 year old child used to come to

the house of the old lady and leave the child with the old lady. The accused-appellant thereafter goes to his work place and the wife of the accused-appellant goes to work in the batik factory which was located in the compound of the old lady. The distance between the old lady's house and the batik factory is about 10 feet. After the said incident of rape one day in the month of February 2000 the accused-appellant again made an improper suggestion (to have sexual intercourse with him) and attempted to drag her to a room. As she could not bear up this suggestion, she poured kerosene oil on her body and set herself ablaze. The old lady of the house came and doused the fire and the people who were working in the batik factory especially one Hemamali came to the place and took her to the hospital. The accused-appellant in his evidence given under oath denied the story. Hemamali who was working in the batik factory says that on hearing the burning incident she came to the house of the old lady and saw Malkanthi who was having burning injuries. Malkanthi admitted to Hemamali that when she was trying to light the stove, by an accident, she caught fire. (Vide page 130 of the brief). The question that arises is if she set herself ablaze as she could not bear up the suggestion made by the accused-appellant as to why she did not divulge this incident to Hemamali who came

for her rescue. This question remains un-answered. It has to be noted here Malkanthi admitted to Hemamali that she caught fire by an accident. This was the first reaction of Malkanthi to the people who were present at the scene.

According to Hemamali, on the day that Malkanthi suffered burn injuries the wife of the accused-appellant was present in the batik factory. The question that arises is, when the wife of the accused-appellant is present 10 feet away from the house of the old lady, whether he would force Malkanthi to have sexual intercourse with him. The learned Senior State Counsel is also unable to answer this question. Will a person try to commit sexual intercourse on a woman without her consent when his wife <sup>is</sup> ~~was~~ present 10 feet away? I think not.

According to the evidence led at the trial, 2 and ½ year old child of the ~~accused-appellant~~ <sup>was</sup> kept in the old lady's house. The wife of the accused-appellant too was present in the batik factory which was 10 feet away from the old lady's house. Thus, it is possible for the mother of the child to visit the old lady's house in short intervals. The question that arises is whether the accused-appellant would make suggestions to Malkanthi to have sexual

intercourse with him, when it was possible for the accused's wife to visit this house. This question too remains unanswered. The learned trial Judge had not considered these matters in her judgment.

The prosecutrix, in her evidence, was trying to maintain that at the time of the rape incident, the batik factory was not in existence. But the Grama Sevaka of the area stated that the batik factory was functioning during the month of December 1999. Defence has marked a contradiction to point out that she, in her statement made to the police, had admitted the existence of the batik factory before Christmas in 1999. Why was she trying to hide the existence of the batik factory? Is it because that it was within her knowledge that her story would be rendered unacceptable if she admitted the existence of the batik factory. This question has not been considered by the learned trial Judge. Malkanthi, at one stage, admitted that the incident of rape took place prior to Christmas in 1999. She has admitted in evidence that she went home on the Christmas day and that she came back after Christmas. According to Malkanthi after the incident of rape she had been threatened with death by the accused. The question that arises is whether she would come back to the old lady's house if the incident of rape was true especially to face sexual intercourse against her will. I think not. This

question too has not been considered by the learned trial Judge. This question remains unanswered.

She did not divulge the incident of rape when she went home on the Christmas day to any person in the family. She divulged the incident of rape only after she was admitted to the hospital after she received burn injuries. Thus, it is clear that the story of rape had come up only in the hospital when she was receiving treatment for her burn injuries. She has told the doctor that she was raped by the accused-appellant on two occasions. But in her evidence she has admitted that she was raped by the accused-appellant only once. This contradiction too has not been adequately considered by the learned trial Judge. According to the Medico Legal Report there were three old tears in her hymen. According to the doctor these tears could have taken place on any day prior to two weeks of the examination by the doctor. Thus, it cannot be said that the medical evidence corroborates her evidence. But according to the Medico Legal Report she had fresh burn injuries. As I pointed earlier she has admitted to Hemamali that she received burn injuries as a result of an accident. Thus, having fresh injuries on her body does not corroborate the incident of rape. When I consider all these matters, I hold the view that the prosecution story does not pass the test of

probability. In a case of rape it is dangerous to convict an accused person on uncorroborated evidence of the woman. But Court can convict if the Court is convinced that she speaks the truth. The evidence of the prosecutrix in this case was not corroborated by any independent evidence. Further I have held that the story of the prosecutrix did not pass the test of probability. Therefore, it is dangerous to permit the conviction to stand. When I consider all these matters, I am of the opinion that it is unsafe to permit conviction to stand. I therefore, set aside the conviction and the sentence and acquit the accused-appellant of the charge of rape. I allow the appeal.

It is not necessary for the Prison Authorities to produce the accused-appellant in the High Court to get an order of release. When the Superintendent of Prison receives this judgment, he is at liberty to release the accused-appellant.

*Appeal allowed.*

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilaka,J.

JUDGE OF THE COURT OF APPEAL

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