

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

In the matter of an Appeal against an order of the
High Court under Sec. 331 of the Code of Criminal
Procedure Act No: 15 of 1979 and in terms of the
Constitution of the Democratic Socialist Republic of
Sri Lanka

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

Complainant

Vs.

Dapanadurage Sarath,
No: 134/8, Madiyawa Road,
Hadagalle.

Accused.

C.A Case No: 105/2012.

H.C Panadura Case No:2024/2005

And now between

Dapanadurage Sarath,
Remand Prison,
Kalutara.

Accused-Appellant

Vs.

The Hon. Attorney General
Attorney General's Department,

Colombo 12.

Complainant Respondent

BEFORE : **M.M.A. Gaffoor, J &**
K. K. Wickramasinghe, J

COUNSEL : AAL Alan David for the Accused-Appellant.
P C Dappula de Livera A S G for the Attorney General.

ARGUED ON : 3rd November 2016

WRITTEN SUBMISSIONS FILED ON: 09th May 2017

DECIDED ON : 16th June 2017

K. K. WICKRAMASINGHE, J.

The Accused Appellant (herein after referred to as the Appellant) was indicted in the High Court of Panadura on the following charge:-

On or between 11th August 2002 and 10th August 2002 at Polgasowita, within the jurisdiction of this court the accused committed rape on one Dapanadurage Anusha Nilanthi who was under the age of 16 years, which is an offence punishable under section 364 (2)(e) of the Penal Code as amended by Act No.22 of 1995.

The indictment was read over to the Accused Appellant and the trial was commenced before the High Court Judge. After trial the Learned High Court Judge of Panadura found the Appellant guilty of the charge levelled against him. Accordingly the accused appellant was convicted and sentenced to a term of 17 years rigorous imprisonment and a fine of Rs. 25,000/= Further more compensation amounting to Rs. 500,000/= was ordered to be paid to the prosecutrix (victim) and a default sentence of two years rigorous imprisonment was also imposed.

Being aggrieved by the said conviction and sentence, the Accused Appellant made the instant appeal to this court for the vacation of the same.

During the course of the argument counsel for the Accused Appellant raised following grounds of appeal and submitted that the judgement is replete with the following grave misdirections both in facts and in law:-

- (1) The Learned High Court Judge was prejudiced and unjust.
- (2) The evidence of the prosecutrix and other witnesses are with material and fundamental contradictions going to the core of the case.
- (3) The Learned High Court Judge has made fundamental errors in the Judgement.

Following witnesses testified for the prosecution:-

The prosecutrix Anusha Nilanthi, her mother Indrani Kumari, Grandmother, Aunt, Doctor and two police officers.

When the defence case was called, the accused appellant gave a doc statement and did not call any other evidence on his behalf.

The prosecutrix was a very reluctant witness at the beginning of the trial. It is pertinent to note that the accused appellant is the father of the witness and her mother is the wife. Sole bread winner of the family was her father (appellant) and they were under the dominance and hegemony of the appellant. Further in the light of her impending marriage, she was dependant on the appellant for bearing expenses for her wedding. According to available evidence it is noted that the appellant had threatened the witnesses and even in fact assaulted and had used criminal force on the mother of the prosecutrix for testifying against him. Under these circumstances it came to light that the prosecutrix and her mother were under threat and fear and apprehension of testifying against the appellant.

Since the prosecutrix and the mother of her were reluctant witnesses, the learned High Court judge had no other option other than remanding them with a caution in order to free them and separate them from the influence, fear, threat dominance and control of the appellant. There after the truth was revealed by the witnesses.

Facts of the case:-

The prosecutrix has clearly testified that the accused appellant had repeated acts of penile penetration to her vergina against her will. There is no reason for her to make a false allegation against her own father.

According to medical evidence the prosecutrix had a fimbriated hymen and in the circumstances no injuries were likely to be seen.

The mother of the prosecutrix testified stating of her knowledge that the prosecutrix was being subject to sexual abuse by the appellant and in fact she had advised him on several occasions not to do so. However it is noted that since she was economically depending on the appellant she too was subjected for intimidation.

Going through the brief it reveals that she had to lodge complains against the appellant and due to the close contacts that the appellant was having with certain police officers, she had to go to Moratuwa police station instead Katchchathuduwa.

The doc statement was totally different to the position taken by the counsel for the accused appellant during his cross examination of the prosecution witnesses at the stage of the trial.

The counsel for the appellant cited following cases and submitted that corroboration must come from an independent source and not a self-serving source.

(1) Benedict PereraVs Siriwardena 48 NLR 89;

Reference is made in this case to Keuneman J's dictum in **41 NLR 367** which states: "*In the language of Lord Hewart CJ IN Rex Vs Lowell, such complaints are 'not evidence of the facts complained of' but are merely 'matters which may be taken into account.... in considering the consistency and therefore the credibility of the story'...but in the case of an accomplice the rule of practice requires something more than the mere testing of his story.....it is therefore necessary that the Magistrate should have clearly before his mind that he is dealing with the evidence of an accomplice and he must give clear and satisfactory reasons for convincing in the absence of corroboration*".

(2) Dole Vs Romanis Appu 40 NLR 449;

In this case the appellant had been convicted for incest of his 15 year old daughter, Abrams CJ acquitting the accused stated "*....although a conviction is not necessarily bad because it is founded on the uncorroborated evidence of an accomplice there must be the most potent reasons for dispensing with corroboration. Those reasons are not given in this case, nor is there any reason to suppose that they existed.*"

(3) Karunaratne Vs The Queen 68 NLR 257 at 259

Refers to Lord Hewart CJ in White heads case [2(7929) 1KB 99] who sated thus: *"Any such inference as to what the girl told her mother could not amount to corroboration of the girl's story, because it proceeded from the girl herself; it was merely the girls story at second hand. In order that the evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated. A girl cannot corroborate herself, otherwise it is only necessary for her to repeat her story some twenty-five times in order to get twenty- five corroborations of it"*.

(4)Ana Sheriff (1941) 42 NLR 169 at page 173 per Howard CJ;

"Evidence which indicates only that the accused had the opportunity to commit rape, is not acceptable as corroboration; nor is it sufficient that such evidence renders the story of the complainant more plausible than that of the accused"

(5)Kamal Addaraarachchi Vs State 2000 SLR 3V 393, Hector Yapa J. held "Steps taken by the trial judge, to give special treatment to the prosecutrix at the expense of the accused appellant who was entitled to a fair trial cannot be approved. No court should try to molly coddle a witness as has happened in this case-the result would be very dangerous in that the Prosecutrix would not have got the wrong signals to lie in court".

(6)Arthur Feranado (1990) 42 NLR 76 at 80, acquitting the accused Mosely J noted that;

- Contradictory statements in evidence of prosecutrix
- Generally unsatisfactory nature thereof
- Absence of corroboration
- Circumstances in which the girl made the first complaint
- Her failure to complain when the opportunity arose
- Inconclusive nature of medical evidence

When considering evidence of the instant case, it is clear that the Learned High Court Judge has never molly coddled the witnesses in any event. She had only acted with caution. She had no other option than separating and extricates the prosecutrix and her mother from the situation they were encountering. She had taken all those steps in the interest of justice to secure their testimony and reveal truth. If there was a procedure and facilities to keep the witnesses in a safe home before and until the conclusion of the trial it would have been better, but in a country like this resources are limited. Therefore the witnesses had to live with the accused and under his guidance even after committing of the offence. Merely because of all these factors victims have to suffer and it does not serve justice. It is high time to take judicial notice of all

these and take meaningful action in trial courts to safe guard and protect the rights of the victims.

We are mindful of the cases cited by the learned counsel for the appellant, but in the meantime we must see whether all these cases are applicable to this particular case. When considering the facts of this instant case the above mentioned cases cited by the learned counsel are not applicable.

At this juncture, we wish to consider following cases;

(1) Bhoginbhai Hirjibhai Vs State of Gujarat (1983) AIR S.C.753 which stated that *"Corroboration is not a sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on testimony of a victim of sexual assault in the absence of corroboration, as a rule is adding insult to injury....."*

(2) Sunil and others Vs AG 1986(1) S.L.R. Page 230 it is stated that *"It is very dangerous to act on the uncorroborated testimony of a women victim of a sex offence, but if **evidence is convincing** such evidence could be acted on even in the absence of corroboration."*

(3) Piyasena Amaradivakara Vs AG, CA 118/2002 decided on 26.03.2008 *".....When there is a delay in making a statement to law enforcing agencies, additional material collected by hearsay or false material can creep into such statement...." (emphasis added)*, but in this case it is so obvious that the girl has no reason to add material and a cogent explanation given for her delay, stating that she was threatened by the appellant even after the incident.

(4) Bandara vs State (221) 2 SLR 63 it was held that *"if there is valid reason or explanation for the delay and if the trial judge is satisfied with the reasons and explanations given, no trial judge would apply the test of spontaneity and contemporaneity and reject the testimony of a witness in such circumstances"* In this instant case, the victim was schooling at the time of the incident. She had given a birth to a child of this Appellant. She had revealed this incident only after the child birth. On oath she had categorically stated that she did not reveal the incident earlier due to sheer fear.

(5) Radhu Vs State of Madhya Pradesh (2007) 12 SC 57, Indian Supreme Court has observed that *"the court should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case"*.

Counsel for the appellant attempt to convince court that the appellant was falsely implicated but in this instant case, prosecution has amply demonstrated that it was not a false allegation.

Further, an Indian Supreme Court case **Banti Vs State of Madhya Pradesh (2004) 1 SCC 414**, it was held that *"It is true the evidence of the defence witness is not to be ignored by the courts. Like any other witness, his evidence has to be tested on the touchstone of reliability, credibility and trustworthiness, particularly when he attempts to resile from and speak against records and in derogation of his earlier conduct and behaviour. If after doing so, the Court finds it to be untruthful; there is no legal bar in deserting it"*, but when perusing judgement of the instant case, it is evident that the Learned High Court Judge has adequately considered the defence evidence and the trial had not ignored the same as submitted by the counsel for the appellant.

When considering the victim's age and background, the omissions pertaining to her statements are reasonably justified.

The Learned High Court judge who had the opportunity of watching her giving evidence had observed her credibility and she was satisfied that the prosecutrix was a credible witness.

Therefore when considering the above circumstances of the case, it is abundantly clear that omissions and delays on the part of the prosecutrix have been adequately explained. Medical evidence explains the version of the prosecutrix. The cases cited by the counsel for the appellant has no bearing on the facts of this case. Therefore we have no reason to interfere with the findings of the Learned High Court Judge and thereby we affirm the conviction and the sentence.

Hereby the Appeal is dismissed.

Judge of the Court of Appeal

M.M.A. Gaffoor, J

I Agree

Judge of the Court of Appeal