

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

In the matter of an appeal from the High
Court in terms of section 331 of the
Criminal Procedure Code Act No. 15 of
1979 as amended.

Court of Appeal case no. CA(High Court)/194/2014
High Court of Monaragala case No. HC/23/2014

The Democratic Socialist Republic of Sri
Lanka

Complainant

Vs.

Jahaluge Tilak Shantha Dissanayake

Accused

AND NOW BETWEEN

Jahaluge Tilak Shantha Dissanayake

Accused Appellant

Vs.

Hon. Attorney General

Respondent

Before : L.T.B. Dehideniya J.
: K.K.Wickramasinghe J.

Counsel : Nayantha Wijesundara for the Accused Appellant.
: Kapila Waidyarathne ASG for the Respondent.

Argued on : 15.05.2017

Decided on : 07.07.2017

L.T.B. Dehideniya J.

The Accused Appellant (Accused) was indicted in the High Court of Monaragala on a charge of rape punishable under section 365 of the Penal Code.

The victim was a 75 years old at the time of the incident and was 80 years when she gave evidence in the High Court. According to the prosecutrix while she was sleeping in the night, on the day of the incident, she heard a noise from the roof. She lit the torch light and directed towards the roof and saw that the Accused coming down from the roof after removing tiles. She has scolded the Accused accusing that he was the person who was stealing the things from her house on previous occasions too. Thereafter she has opened the front door and tried to get out of the house but the Accused has dragged her in to the house and put her to the bed and raped her. During the incident of rape she has struggled with the Accused and at one time she fell down to the ground but Accused overpowered her and committed the rape.

The Accused do not deny the fact that he entered in to the house of the victim through the roof. In fact the learned Counsel for the Accused suggested in the cross examination that the Accused has come in to the house through the roof. Therefore the first part of the incident, that is, the

Accused entering in to the house of the victim is not in dispute. In this setup the Accused cannot challenge the identity. On the other hand the Accused is a relative and the victim has identified him with the help of the torch light. Even after the sexual act, ha has spent some time in the house eating mango. The prosecutrix had ample time to identify the Accused.

The Counsel for the Accused appellant argues that the evidence of the victim was not corroborated on material points and therefore it is not safe to convict the Accused. As I stated earlier the Accused admitted or not denied entering in to the house of the victim through the roof in the night. The victim was staying alone in the house and that fact is also not denied. The evidence of the victim on the incident was not contradicted on any point.

The Counsel questions about the injuries. His contention is that if such an incident took place, she should have suffered more injuries. The victim is an old lady of 75 years of age. The resistance that a lady of that age can offer to a young man of 25 years cannot be very high. She does not say that she was dragged through the floor, what she says is that she was dragged to the bed. In these circumstances, the victim having only two injuries cannot be considered in favour of the Accused.

The Counsel for the Accused submits that the Accused tried to get out from the house and the prosecutrix struggled to prevent the escape of the Accused and the injuries inflicted at that time. This suggestion is not probable. The victim, as I said earlier, being is an old and feeble woman it is not probable that she will try to prevent the escape of the Accused. Especially in a situation where she was all alone in that house and there is no house nearby. The police testified to the fact that there is no house nearby. The Doctor testified that those injuries could have been inflicted due to a fall. The witness testified that she fell from the bed.

The contention of the Counsel for the Accused is that there was no rape or any sexual harassment took place, but only the Accused entered in to the house. He further submits that the prosecutrix has made a false complaint to the police against the Accused because she believed that the Accused was the person who was stealing her things and further he was making adverse comments regarding her relationship with the person called Pareekshaka. I don't see any reason for the victim to be annoyed on making comments regarding the said relationship because she being a lady deserted by her husband long time ago and being admitted that she has a relationship with the said Pareekshaka, the said relationship looks like an open secret. It is not very probable that in the Sri Lankan society, a lady of this age will make a false complaint of rape just to take revenge or to prevent the Accused from coming to her house. Therefore the defense assertion that the rape is a fabrication is not probable.

The victim said in evidence that she went to the Priyantha's shop after the incident and told him what happened and requested him to telephone her daughter in law. The daughter in law has come there with her son and thereafter they have gone to the police post. Though the said Priyantha was listed as a witness, prosecution was unable to call him to give evidence because he has left the country during the trial, but the daughter in law was called to give evidence.

The daughter in law of the victim Gamage Sujatha Pushpakanthi testified to the fact that she received a telephone call in the night of the date of incident and came to the Priyantha's shop. According this witness, her mother was crying when she came. The victim has divulged the tragic incident to the daughter. She has gone to the police post with the mother to complaint about the incident. Without any delay the victim has complaint to the closest person and to the police.

The Doctor has said that the two injuries found in her body are compatible with a fall. The witness said that she fell down to the ground from the bed. She being a mother of several children there is a possibility that her genital parts not be injured in a sexual intercourse. The Counsel argues that there should be more injuries but it depends on how much resistance that she can offer. As I said earlier she is old lady of 75 years at the time if the incident.

During the Police investigations it was found that there were foot prints on the wall suggesting that a person has come through the roof. The Accused admitted that he came in to the house through the roof.

The Counsel for the Accused argues that there is no corroboration. In the case of *The King V. Atukorale* 50 NLR 256 it has been held that where an Accused is charged with rape, corroboration of the story of the prosecutrix must come from some independent quarter and not from the prosecutrix herself. A complaint made by the prosecutrix to the Police in which she implicated the Accused cannot be regarded as corroboration of her evidence. In the instant case the prosecutrix complained to her daughter and thereafter to the police. It is a complaint made without delay but not corroboration. Her evidence, as I said earlier, was without any infirmities and contradictions or omissions. A material part of the incident, which is entering in to the house through the roof in the night, was not denied. The defense of the Accused that the prosecutrix tried to prevent his escape is not probable. Under these circumstances, the Court can rely on the evidence of the prosecutrix. In the case of *Inoka Gallage V. Kamal Addararachchi* and another [2002] 1 Sri L R. 307 it has been held that;

Corroboration is not a sine qua non for a conviction in a rape case. It is only a rule of prudence. If the evidence of the victim does not suffer from basic infirmity and the probability factor does not render it

unworthy of credence, as a general rule there is no reason to insist on corroboration. But, in a trial without a jury there must be an indication in the judgment that the judge had this rule in mind.

The Counsel argue that the police has failed to produce the cloths that the victim and the Accused were wearing and the bed sheets for forensic analysis and not submitting the Accused for a medical examination. Counsel's argument is that this failure has to be considered under section 114 * of the Evidence Ordinance as non production of the evidence that could have produced in favour of the Accused. I do not agree with this argument. If the police had the analysis report and failed to produce that evidence, it can be considered as not producing the evidence unfavorable to the prosecution. In this instance it is a failure in the part of the investigation. The investigation officers would have gathered the forensic evidence by doing a proper investigation. Not tendering the evidence which was not available, cannot be considered under section 114.

I see no reason to interfere with the finding of the learned High Court Judge.

I affirm the conviction and the sentence. Appeal dismissed.

Judge of the Court of Appeal

K.K.Wickramasinghe J.

I agree.

Judge of the Court of Appeal