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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of
Sri Lanka.
COMPLAINANT

Vs

1. Kankanamlage Jayalath Bandara Jayawardana
2. Sooriya Arachchilage Sampath Jayasiri

ACCUSED

Case No. CA 23/2016

HC (Kuliyapitiya) Case No. HC 27/2012 **AND NOW BETWEEN**

1. Kankanamlage Jayalath Bandara Jayawardana
2. Sooriya Arachchilage Sampath Jayasiri

ACCUSED – APPELLANTS

Vs

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

BEFORE	: Deepali Wijesundera J.
	: Achala Wengappuli J.
COUNSEL	: Amila Palliyage with Sandeepani Wijesooriya and Duminda De Alwis for the Accused – Appellants.
	Dilan Ratnayake D.S.G. for the Respondent.
ARGUED ON	: 16th November, 2018
DECIDED ON	: 28th November, 2018

Deepali Wijesundera J.

The appellants were indicted in the High Court of Kuliyapitiya under section 357 of the Penal Code read with section 32 of the Penal Code, as the first charge and under section 366 of the Penal Code read with section 32 of the Penal Code as the fourth charge. The first appellant was charged under section 364 (1) of the Penal Code (as amended) for committing the offence of rape as the second charge. The second appellant was charged under section 364 (1) for committing rape as the third charge. On conclusion of the trial both appellants were acquitted on the fourth charge and convicted on the first, second and third charges. The first appellant was sentenced to 7 years RI and fine of Rs. 10,000/=

was imposed with a default term of 2 years RI for the first charge and for the second charge 10 years RI with a fine of Rs. 10,000/= with a default term of 2 years was imposed. He was also ordered to pay a sum of Rs. 1,00,000/= as compensation to the victim running a default term of 2 years.

The second appellant was sentenced to 7 years RI with a fine of Rs. 10,000/= running a default term of 2 years for the first charge and for the third charge he was sentenced to 10 years RI with a fine of Rs. 10,000/= running a default term of 2 years RI he was also ordered to pay Rs. 1,00,000/= as compensation to the victim with a default term of 2 years RI. This appeal is from the said conviction and sentence.

The story of the prosecution is on the day of the incident the prosecutrix had been standing on the road side after the bus she was travelling broken down when the appellants have come in a three wheeler and forced her into the three wheeler and taken her to a guest house. She was taken to a guest house in an isolated place and she was taken into room and the appellants after locking the door had taken her clothes off and raped her. The appellants have spent about four hours inside the room with her and she has run to a nearby house and informed the inmates of the house about what happened to her. While she was talking

to them the owner of the guest house had come in a motor cycle and after the inmates informed him about the incident he had taken her in the bike to her house. She has gone to the police station to make a complaint on the following day in the afternoon. She was produced before the Judicial Medical Officer who has given evidence at the trial.

The learned counsel for the appellants argued that the learned High Court Judge failed to consider the element of consent when delivering his findings. According to the evidence of the prosecutrix after she was taken into the guest house she has taken off her rings and put them in her purse on the bed side table (page 82 of the proceedings). She has also said that her National Identity Card was in the purse which was later sent to her house by some person. If the prosecutrix was raped as alleged how come she had all the time to take off her rings and put them into her purse which was on the table? The register of the Hotel was produced and marked as V1 by the investigating officer prosecution witness number 3. According to this witness the names of the appellants and the prosecutrix have been entered in the register. The number of the prosecutrix's National Identity Card was also entered in this register. This casts a serious doubt on the prosecutrix's evidence, if she was taken by force she would not have given her Identity Card to the Hotel neither will the appellant's register their names in the book.

The prosecutrix has given evidence in court to say that her clothes were torn by the appellants and a blouse and a skirt was marked in court and showed the torn places in both items of clothing. The officer who inquired into the incident while giving evidence had said the skirt which was a denim skirt was not torn. Prosecution witness number 5, the WPC who recorded the prosecutrix's statement has testified that she did not bring the clothes to the police station. The argument of the learned counsel that the learned High Court Judge failed to consider the test of probability could be seen by these items of evidence. The learned High Court Judge has failed to apply the terms of probability when analyzing these evidence. The prosecution evidence have not been analysed on question of probability against the medical evidence.

The learned counsel for the appellants argued that the learned High Court Judge has acted contrary to section 165 of the Evidence Ordinance when he encroached the role of the prosecution. We find on perusal of the proceeding the learned High Court Judge who delivered the judgment had taken over the role of the prosecutor on several occasions by which he has denied the appellants a fair trial.

The learned Deputy Solicitor General argued that the learned High Court Judge has correctly analysed the evidence and considered the

contradictions when delivering his findings. He further stated that the learned High Court Judge has carefully evaluated the medical evidence when he came to the conclusion on the ingredient of lack of consent which is needed to prove a charge of rape.

He also stated that the tests of probability, consistency and contemporaneity was applied to the defence evidence, and arrived at the conclusion that the defence evidence was not creditworthy.

The appellant's counsel cited the judgments in **The Queen vs David Perera 66 NLR 553** on the issue of the learned High Court Judge continuously questing the witnesses. In the above case it was held that;

> ***"A Judge is not entitled to put leading questions, the answers to which are calculated to prejudice the accused. Further, he must not ask questions in such manner or in such great number as to encroach upon the functions of a Counsel who appears in the case."***

This is very relevant to the instant case. Where the learned High Court Judge has encroached the functions of the prosecutor.

The appellant's counsel also cited the case of **AG vs Priyantha 2002 SLR Vol 2 page 96** and argued that the medical evidence was contrary to the prosecutrix's evidence and that according to the short history given to the doctor it should be gang rape.

As stated in **Hitihamy Mudiyanselage Nimalchandra vs AG CA 80/2011** delivered on 11.12.2012 *"In a charge of rape if the prosecution evidence reveals that the sexual intercourse was performed with the consent of the victim the accused is entitled to be acquitted. Further if the court feels that there is a reasonable doubt on the question that sexual intercourse was performed with the consent of the victim the accused should be acquitted."*

In the instant case both these elements are present.

In Sunil and another vs AG 1986 I SLR 230 it was held;

> ***"It is very dangerous to act on uncorroborated testimony of a women victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."***

In the instant case the evidence of the prosecutrix was neither corroborated nor convincing. Therefore we find that the learned High Court Judge has failed to properly evaluate the testimony of the witnesses for prosecutrix as well as the defence. He has failed to apply the tests of probability and consistency and misdirected himself and by doing so has erred in law.

For the afore stated reasons we decide to set aside the judgment dated 20/01/2016 of High Court and acquit the appellants.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL