

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

Attorney General

COMPLAINANT

Vs

Visenthi Durage Linton Silva

ACCUSED

CA Case No. 107/2004

HC. (Kalutara) Case No. 43/1999

AND NOW BETWEEN

Visenthi Durage Linton Silva

ACCUSED – APPELLANT

Vs

Attorney General

Attorney General's Department

Colombo 12.

COMPLAINANT – RESPONDENT

BEFORE

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

COUNSEL

: Dr. Ranjith Fernando for the

Accused – Appellant

Haripriya Jayasundera DSG

For the Respondent.

ARGUED ON

: 28th August, 2017

DECIDED ON

: 14th November, 2017

L. Jayasuriya J.

The accused appellant (hereinafter sometimes referred to as the appellant) was indicted in the High Court Kalutara for committing rape on one Latha, which is an offence punishable under Section 364 of the Penal Code.

After trial the appellant was convicted and sentenced to a term of 7 years RI with a fine of Rs. 10,000/= carrying a default term of two years. This appeal is from the said sentence and the conviction.

The story of the prosecution is that Prosecution Witness Latha has been working as a domestic at Nandawathi's household. On the day in question Gnanawathi, who is the sister of said Nandawathi has come to feed their mother who was bed ridden. Latha has gone to the well to get water as usual and the appellant has come from behind and dragged her to a close by shrub jungle and has raped her. Latha testifies that she raised cries and, upon hearing such cries Gnanawathi has come running and has found the appellant committing rape. She has chased behind the appellant armed with a club but has failed to catch him.

The evidence reveals that the victim has previously known the appellant as he was living close by and he used to come to their house to watch television. Gnanawathi has corroborated the evidence of the victim on all material points and testified that when she ran towards the well she saw the appellant on top of the victim. We find that corroboration of this nature happens very rarely in rape cases.

Moreover, the Judicial Medical Officer has observed a tear at 6 o'clock position on her hymen and this finding corroborates the evidence of Latha.

Four grounds of appeal were urged by the counsel for the appellant.

(1) Learned High Court Judge appears to consider evidence led by the prosecution on record necessarily falling within Section 155 of the Evidence Ordinance.

The victim has failed to attend courts but her evidence lead at the Non Summary inquiry had been adopted under Section 33 of the Evidence Ordinance.

On a perusal of evidence lead before the Learned Magistrate on 22.06.1995 it appears that she was subjected to cross examination at length and not a single suggestion has been made to the victim challenging her position where she alleged that she was raped by the appellant. Therefore I hold that her evidence meets the tests of credibility, promptness, probability and consistency and hence the first ground fails.

(2) Failing to consider material contradiction "inter – se" between MC/NS deposition of victim and evidence of purported eye witness to incident.

The counsel for the appellant highlighted the following contradictions inter – se and submitted that extra caution is necessary before accepting victim's MC/NS deposition.

1. (i) Victim says that employer had chased (the accused) with a club in hand.
(ii) Whereas the employer, makes no mention of chasing the accused with a club in hand.
2. Victim states that accused was naked/undressed at the time.
Whereas the employer testifies that the accused was clothed at the time and so was the victim.
3. Victim states that later on the same day went to the police after going home at 7 p.m.
Whereas the employer says that police complaint was made on next day at noon.
4. Victim says she trashed clothing before going home.
Whereas the employer makes no mention of the same.
5. Victim says that she told her employer regarding details of incident.
Whereas the employer says she asked the victim but nothing was mentioned to her by the victim.

The Learned High Court Judge has dealt with contradictions inter – se and held that there is no reason to reject the evidence of the victim and the High Court Judge has given reasons for such finding. We are of the view that the contradictions highlighted do not go to the root of the case and proceed to reject the second ground.

- (3) Erring in law by requiring corroboration of the uncontroverted evidence on oath given by the accused.

The appellant has admitted in answer to court that he met the victim at the well (vide page 118 of the brief) and has stated later in his evidence

that he did not meet the victim near the well but saw the victim at the well while he was at the bus halt.

According to the evidence of Prosecution Witness no. 6 C.I. Wegampitiya, the place where the incident happened can not be seen from the road as the view was blocked from the shrub jungle and his evidence on this aspect has not been challenged by the defence.

It was held in **Hatharinge Somadasa vs the Attorney General CA 112/2001** decided on 19.02.2007 that there are number of tests that have to be applied in evaluating the credibility of a witness such as consistency, contemporaneity, spontaneity, probability and corroboration.

In view of the said judgment the evidence of the appellant fails the tests of consistency and probability. Therefore the trial Judge was correct in holding that the appellant's evidence lacks credibility.

(4) Failure to attach significance to the erroneous procedure followed by the prosecution which is contrary to the law relating to criteria applicable in production of M6/N51 depositions.

On a perusal of evidence it appears that the Non Summary Proceedings have been produced through the court interpreter and marked as P2. The original too was shown to the witness before tendering the document marked P2.

Therefore one can not say that prosecution has not followed the laid down procedure. Learned counsel for the appellant cited **S Stephen and 3 others vs The Queen 66 NLR 264** and submitted that the procedure adopted was illegal.

The legal principle discussed in that case will not apply to the case in hand as the original of the deposition was shown to the witness and the photocopy was marked and produced at the trial. The prosecution has proved that the said deposition came into court from proper custody.

For the foregoing reasons the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL