

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

In the matter of an appeal under and in  
terms of Section 331 of the Criminal  
Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka.

Complainant

Court of Appeal  
Case No. CA/ 185 / 2007

Vs,

Kurundukarage Chandana Gunawardane

Accused

And Now Between

Kurundukarage Chandana Gunawardane

Accused-Appellant

High Court of Batticaloa  
Case No. HCB / 2437 / 2006

Vs,

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka

Complainant-Respondent

Before : S. Devika de L. Tennekoon, J &  
S. Thurairaja PC, J

Counsel : Neranjan Jayasinghe, AAL, for the Accused-Appellant  
Y. D. Kodagoda PC, ASG for the Complainant-Respondent

Argued on : 25<sup>th</sup> January 2018

Judgment on : 27<sup>th</sup> February 2018

## Judgment

### **S.Thurairaja PC J**

The Accused Appellant (hereinafter sometimes referred to as the appellant) was originally indicted by the Hon. Attorney General before the High Court of Batticaloa for abduction and Rape of a girl who was less than 16 years of age punishable under section 354 and 364(2) of the Penal Code respectively. After the trial the Learned Trial Judge found the Appellant not guilty to the charge of Rape and convicted him for the charge of Abduction. Accordingly, the appellant was imposed 4 years Rigorous Imprisonment. Being aggrieved with said order and the sentence the appellant preferred an appeal to the Court of Appeal and submitted following grounds of appeal.

1. Date of offence was not proved.
2. Prosecutrix evidence was rejected for one charge and accepted for another charge.
3. Dock Statement rejected without any reason.

The Prosecution called six witnesses to give evidence. 1. Rosali Udayakumar (virtual Complainant), 2. Elizabeth Udayakumar (mother of the Prosecutrix), 3. Dr. Mohamed Mustafa Abdul Rahman (Called to produce and explain the Meidco Legal Report of Dr. Umakanthan), 4. WPS. 5076 Rajaramani Sudakaran (Who recorded the 1<sup>st</sup> Complaint and statements.), 5.WIP. Kankanam Gamage Shyamalie Dharshika (OIC), 6. John Kandasamy (Court interpreter).

The Prosecution case is that, the accused appellant was attached to the Sri Lanka Army as a driver, developed an affair with the virtual complainant, who was less than 14 years old. He had abducted her and indulged in sexual intercourse. The offences which are punishable under section 354 and 364(2) of the Penal Code. The Appellant defended the charge and submitted that he did not commit this offence.

Perusing the evidence of the Virtual Complainant, she says that she had an affair with the Appellant, on the 18<sup>th</sup> August 2003 she requested the appellant to take her away.

She was taken to Colombo initially and spent a night at a Lodge, she claims that they were involved in sexual intercourse, there she was bleeding from her vagina. Thereafter they had gone to Kegalle to the house of the Appellant. The prosecutrix was introduced to the wife of the accused as sister of another soldier/ abandon girl from terrorist group. She had spent about three days there and taken to Jayasinghe's place, who was a friend of the appellant. There they stayed for about 10 days. On three nights she claims she had sex with the appellant. Thereafter, they returned to Batticaloa. Where the Police arrested them.

She was subjected to a medical examination and she had told the Doctor that she did not have any sexual intercourse with the appellant. The JMO who examined the Prosecutrix had found no injuries on the complainant especially Hyman, and it was intact. The VOG examined her and opined that penetration is unlikely.

She was subject to cross examination and several vital contradictory positions were elicited. She had told the Police that she didn't have any sexual intercourse but intracural sex.

The learned Trial Judge after analysing the evidence of the Prosecutrix rejected the same and found the appellant not guilty. On a perusal we too agree with the said decision.

The Counsel for the Appellant submits that the date of the 1<sup>st</sup> offence was not properly proved. When the complainant gave evidence, she couldn't elicit the date, it was the Prosecutor who had suggested the date. Subsequently she contradicted the period, on one occasion she said she was at Jayasinghe's place for 6 days, 10 days a month and so on. Now the question before us is that the complainant was not sure of the date and her evidence was rejected by the learned Trial Judge on the 2<sup>nd</sup> count and accepted for the 1<sup>st</sup> count. The Learned High Court Judge had not explained why he is doing so.

The Counsel for the Appellant submits it could have been clearly corroborated by calling Jayasinghe who alleged to had the custody of the complainant for more than 6 days. It is not necessary to call certain number of witnesses to prove a fact but when an evidence is rejected for one count accepting for another count in the same indictment need to be after corroboration.

The appellant submits that he made a Dock Statement and the trial Judge did not consider the defence hence he did not get a fair trial. We perused the Judgment delivered by the High Court and it is evident that the learned Judge had not considered the Dock Statement.

Time and again our courts had decided the acceptance of the Dock Statement, but in this case, we find the non-consideration violates the right of the Appellant.

After carefully considering the Submissions, Evidence and the Judgment we are of the view that the conviction cannot be accepted, therefore we find that the case against the appellant is not proved beyond reasonable doubt, hence we uphold the grounds of appeal and find the accused appellant not guilty. Appeal allowed and the accused appellant is acquitted.

Appeal Allowed.

**JUDGE OF THE COURT OF APPEAL**

**S. Devika de L. Tennekoon, J**

I agree,

**JUDGE OF THE COURT OF APPEAL**