

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

In the matter of an appeal under and
in terms of the Section 331 of the
Code of Criminal Procedure Act.

The State

COMPLAINANT

Vs

1. Vinoda Hewage Buddika Eranda
2. Kirinda Gamage Deeleep
Prasanna

ACCUSED

Case No. CA 175/2009

HC (Matara) Case No. HC 222/2007 AND NOW BETWEEN

1. Vinoda Hewage Buddika Eranda
2. Kirinda Gamage Deeleep
Prasanna

ACCUSED – APPELLANTS

Vs

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

COMPLAINANT – RESPONDENT

BEFORE

: Deepali Wijesundera J.

: Achala Wengappuli J.

COUNSEL

: Tirantha Walaliyadda P.C. for the
1st Accused – Appellant

Anuja Premaratne P.C. with

Naushalya Rajapaksha for the

2nd Accused – Appellant

Anoopa De Silva S.S.C. for the

Attorney - General

ARGUED ON

: 16th October, 2018

DECIDED ON

: 26th October, 2018

Deepali Wijesundera J.

The appellants were indicted in the High Court of Matara under Section 357 read with Section 32 of the Penal Code for abduction of Nadeeka Roshani as the 1st charge and under Section 364 (2) (b) read with Section 364 (2) of the Penal Code for gang rape. They were also charged for robbery under Section 380 read with Section 32 of the Penal Code. After trial the first appellant was convicted for the 1st and 2nd charges and sentenced to 10 years RI with a fine of Rs. 1,00,000/= with a default term of 2 years for the 1st charge and for the 2nd charge he was convicted for 20 years RI with a fine of Rs. 1,00,000/= running a default

term of 2 years. Second appellant was convicted for the 1st charge and the same sentence was imposed to him too. For the 3rd charge the second appellant was convicted and a jail term of 20 years RI was imposed with a fine of Rs. 1,00,000/= running a default terms of 2 years. The jail terms imposed are to be run consecutively. This appeal was filed against the said conviction and sentences.

The story of the prosecution is that the victim Nadeeka who was a trainee nurse at the time of the incident, has taken a room in a restaurant where there had been only two other rooms with her boyfriend on a Friday evening and spent the night together. Early in the morning somebody had knocked on the door and her boyfriend Ajith has opened the door and three people with their faces covered had come and started assaulting Ajith. The prosecutrix had screamed and run out of the room. First and second appellants had dragged her out of the restaurant and while doing so the first appellant had assaulted her. According to Nadeeka the first and second appellants along with another person had taken her on a bicycle to a shrub jungle passing a main road. She has stated that she was put on the bar of the first appellant's cycle while the other two came along side by side in their cycles. The prosecutrix has said she did not shout or try to escape out of fear for her life. After taking her to a jungle the first and second appellants have raped her and the third had listened to her pleas and not done anything to her. After that they have brought

her to the roadside and left her there and she has found her way back to the restaurant. Ajith and a police team had been at the restaurant when she arrived there. After that she was taken to the Matara police station and subsequently she was taken to the Matara Hospital. The Judicial Medical Officer had spoken to her and she has narrated the story to him. She was not examined by the Doctor at that time due to menstrual bleeding and was told that he will examine her on the next day. According to evidence the prosecutrix had left the hospital the next morning prior to her being examined. The Judicial Medical Officer did not get an opportunity to examine the victim. The prosecutrix while giving evidence has explained that she left the hospital to attend an examination the following day which she could not afford to miss. There is no medical evidence to corroborate the prosecutrix's evidence. She was not examined by the Judicial Medical Officer.

The date on which the prosecutrix was to sit for the exam there has been no examination held at the Nurses College, Galle. This was admitted by both parties and recorded in page 396 of the brief under section 420 of the Criminal Procedure Code Act. This shows that the prosecutrix had deliberately lied to court after avoiding a medical examination.

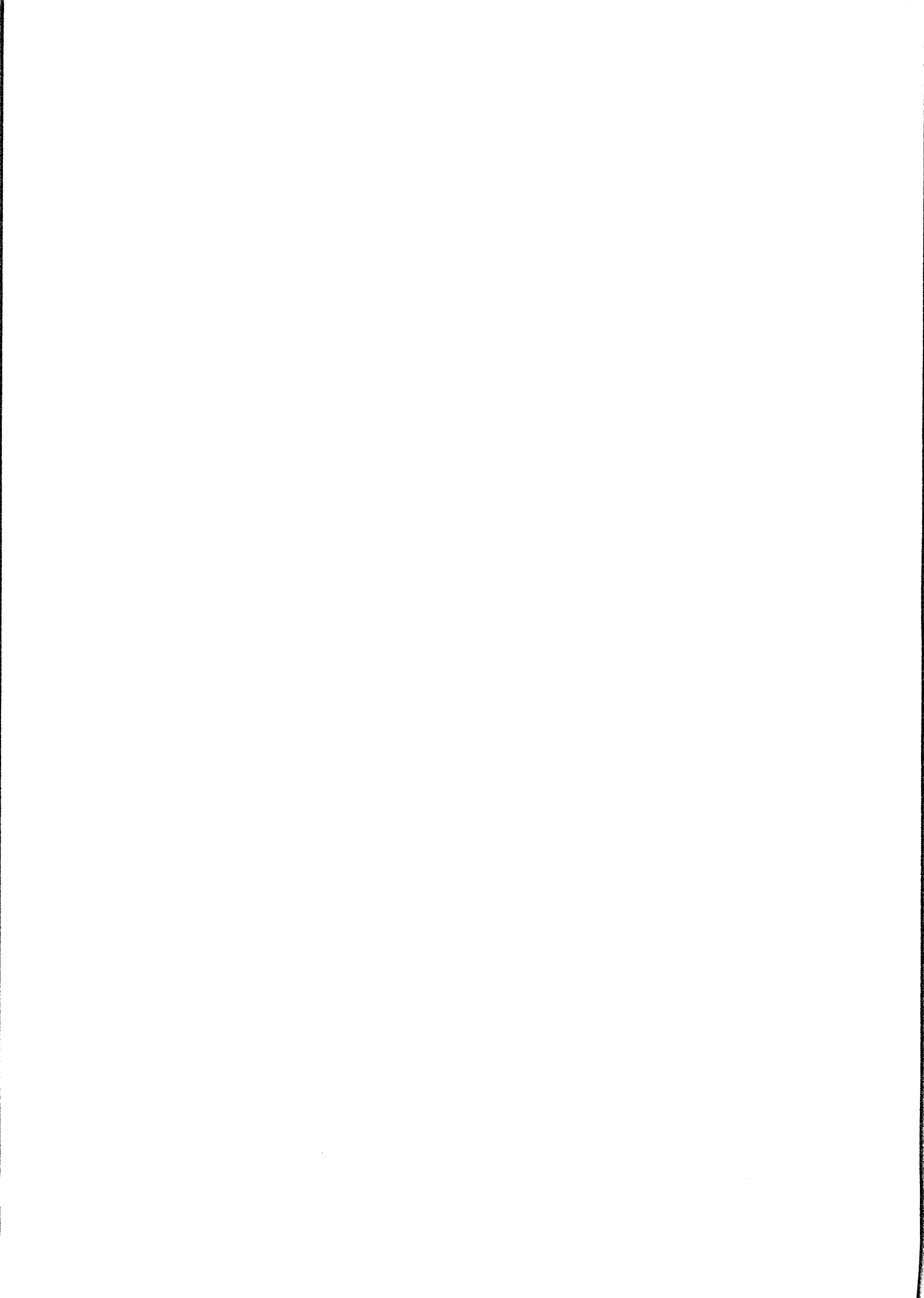
The Judicial Medical Officer's evidence did not corroborate the evidence of the prosecutrix as stated by the learned High Court Judge in his judgment (vide page 523 of the brief). The High Court should not act on the uncorroborated evidence of a prosecutrix and should act with extreme caution in such a situation.

It has been held in **Sunil and another vs AG SLLR 1986 1 SLR 230** thus;

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

The burden of proving absence of consent on the part of the complainant where the charge is one of rape or abduction is always on the prosecution and never shifts."

In the instant case the prosecutrix had deliberately avoided the medical examination by leaving the hospital without informing the Judicial Medical Officer. She was not examined by the Judicial Medical Officer consequently. The excuse she gave for leaving the hospital was later discovered to be false. Therefore the learned High Court Judge as stated above should have acted with caution.



(d) evidence of accomplices or co-conspirators who have given evidence under a conditional pardon could be accepted and acted upon provided their evidence has been carefully and cautiously considered and found to be convincing.

The partner of the prosecutrix Ajith who is alleged to have been assaulted severely was not called as a witness, there is evidence to say weapons were use, no weapon has been produced. Corroboration is not sine qua non for a conviction in a rape case it is only a rule of prudence. Since the evidence of the victim suffer from basic infirmities and the victim is unreliable her evidence has to be corroborated by independent evidence. The prosecution has failed to produce evidence objectively.

We are of the view that the evidence of the prosecutrix is not reliable to be acted upon. In view of this finding the consideration of common intention does not arise.

The learned High Court Judge has failed to consider the omissions by the prosecutrix and not put sufficient weight on these issues which denies a fair trial to the appellants. The learned High Court Judge has said she was a victim of Tsunami which has no bearing on the instant

case. The prosecutrix herself while giving evidence has stated she had a strong mind and she wanted to stay alive.

For the afore stated reasons we decide to set aside the judgment dated .08/06/2009 and allow the appeal.

Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL