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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979

Court of Appeal case No.
CA/HCC/0167/2020
High Court of Kalutara
Case No. HC 891/2014

The Democratic Socialist Republic of Sri Lanka

Vs.

1. Thuppahige Don Nissanka alias Udaya
2. Madawalamaddumage Don Ruwan Pushpakumara
3. Dimunguwacharige Samantha alias Petiya
4. Karanapathi Appuhamilage Chaminda Buddhika
5. Delkandura Arachchige Upul Dickson Silva

ACCUSED

AND NOW BETWEEN

1. Madawalamaddumage Don Ruwan Pushpakumara
2. Dimunguwacharige Samantha alias Petiya

3. Karanapathi Appuhamilage
Chaminda Buddhika

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL : **Neranjan Jayasinghe with Imansi Senarath and Randunu Heellage for the Appellants.**
Harippriya Jayasundara, PC, SASG for the Respondent.

ARGUED ON : **27/06/2025**

DECIDED ON : **04/08/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) with the 1st Accused and the 5th Accused were indicted by the Attorney General in the High Court of Kalutara on the following charges, namely;

I. Between 25th February 2007 and 17th March 2007, within the jurisdiction of this court the 1st accused together with the 2nd ,3rd 4th and 5th accused as a gang raped Kurudukarage Sandiya Nilanthi an offence punishable under section 364(2) of the Penal Code as amended by the Act No. 22 of 1995.

II. At the same time, place and during the course of the same transaction the 2nd accused together with the 1st, 3rd, 4th and 5th accused as a gang raped Kurudukarage Sandiya Nilanthi an offence punishable under section 364(2) of the Penal Code as amended by the Act No. 22 of 1995.

III. At the same time, place and during the course of the same transaction the 3rd accused together with the 1st, 2nd, 4th and 5th accused as a gang raped Kurudukarage Sandiya Nilanthi an offence punishable under section 364(2) of the Penal Code as amended by the Act No. 22 of 1995.

IV. At the same time, place and during the course of the same transaction the 4th accused together with the 1st, 2nd 3rd, and 5th accused as a gang raped Kurudukarage Sandiya Nilanthi an offence punishable under section 364(2) of the Penal Code as amended by the Act No. 22 of 1995.

V. At the same time, place and during the course of the same transaction the 5th accused together with the 1st, 2nd 3rd, and 4th accused as a gang raped Kurudukarage Sandiya Nilanthi an

offence punishable under section 364(2) of the Penal Code as amended by the Act No. 22 of 1995.

During the pendency of the trial the 1st Accused passed away and the trial proceeded against the other Accused only.

After the trial the Appellants were convicted under their respective charges and each of them was sentenced to 18 years of rigorous imprisonment with a fine of Rs.10,000/-, in default of which 06 months simple imprisonment was imposed. Additionally, each of them was ordered to pay a compensation of Rs.150,000/- to the prosecutrix with a default sentence of 1-year simple imprisonment.

The 5th Accused was acquitted from the charge.

Being aggrieved by the aforesaid conviction and sentence, the Appellants preferred this appeal to this court.

The Learned Counsels for the Appellants informed this court that the Appellants have given consent to argue this matter in their absence. During the argument they were connected vis zoom from prison.

The Counsel for the Appellants preferred following grounds of appeal:

1. The prosecution has failed to prove the charge of rape.
2. The learned High Court Judge had failed to take into consideration that the evidence of PW1 and PW2 fails the test of credibility.
3. The learned High Court Judge had rejected the evidence of the Appellants on unreasonable grounds.
4. Alternatively, the sentence imposed is excessive.

In this case the prosecutrix is a married woman with three children. On the day of the incident, at about 10.00 p.m. when PW1 entered the house after a wash wearing a towel only, the 1st Appellant entered the house and held her. At that

time, the victim had fallen unconscious and thereafter she did not know what had happened to her. According to PW1, her husband PW2 was at home seated on a chair in the living room. When she regained consciousness, she was in the room naked sans the towel on her body. She clearly stated that she only saw the 1st Appellant holding her.

According to PW2, the husband of the victim, he had seen the 1st Accused and the Appellants entering the house when PW1 stepped inside the house after a wash wearing only a towel. PW2 had observed the 1st Appellant to be armed with a sword. After dropping the sword, the 1st Appellant had dragged the victim in to the room. When the 1st Appellant came out of the room, the 2nd and 3rd Appellants and the 1st Accused went inside the room one after the other. PW2 had not seen what happened inside the room. When PW2 entered the room after the intruders had left the house, he had found the victim lying on the floor naked. When PW1 regained conscious, she had told him that she could feel wetness in her lower part of the body.

According to medical evidence, the JMO could not find any injuries in the vagina of the victim as she is a married woman and had given birth to three children. Further, the complaint was lodged three weeks after the alleged incident.

As the 1st and 2nd grounds of appeal advanced by the Appellants are interconnected, both grounds will be considered together in this judgment.

In a criminal trial, as continuously stated by the Appellate Court the burden of proving a case entirely rests on the hands of the prosecution and this responsibility never shifts to the defence unless the defence takes up a plea to a general or special exception under the Penal Code.

In **H. M. Mahinda Herath v. The Attorney General** CA/21/2003 in Appellate Court Judgments (Unreported) 2005 at page 35-39 the court held that:

> *"Where it was held that in a criminal case burden is always on the prosecution to prove the charge levelled against the accused beyond reasonable doubt. The trial judge must always bear in mind that the*

accused is presumed to be innocent until the charge against the accused is proved beyond reasonable grounds".

During the trial it transpired that on 28.03.2007 the prosecutrix had informed the learned Magistrate that she never made a complaint willingly to the police against the Appellants as no offence had been committed by the Appellants. The relevant portion of the evidence is re-produced below:

Page 191 of the brief.

ප්‍ර : 2007 මාර්තු 29 වන දින කරුණු දැක්වීමක් විත්තිය සහ පැමිණිල්ල විසින් මෙම නඩු වාතර්ාව අනුව 16 වන පිටුවේ කර තිබෙනවා ?

උ : එහෙමයි. විත්තිය වෙනුවෙන් කරුණු දක්වයි කියලත් සටහනක් තිබෙනවා. ඊළඟට පැමිණිල්ලෙන් කියා සිටින්නේ කියලත් සටහනක් තිබෙනවා.

ප්‍ර : ඊට පසුව ගරු මහේස්ත්‍රාත්තුමා අත්සන් තබා තිබෙනවා 17 වන පිටුවේ උඩ. එහි මෙහෙම තිබෙනවාද, පැමිණිලිකාරියගෙන් විමසීමක් කරනු ලදුව එබඳු පැමිණිල්ලක් තමා විසින් නොකළ බවත්, එබඳු පැමිණිල්ලක් තමා විසින් නොකළ බවත්, මෙම විත්තිකරුවන්ගෙන් තමාට එබඳු සිදුවීමක් සිදු නොවූ බවත්, තමාගේ ස්වාමී පුරුෂයා විසින් එකී පැමිණිල්ල කර ඇති බවත් දන්වා සිටී කියලා ?

උ : එහෙමයි. එහෙම සටහන් වෙලා තිබෙනවා.

She had further testified that she never wanted to make a complaint to the police but due to a money transaction dispute her husband, PW2 had made-up the complaint against the Appellants. She also stated that PW2 is not mentally sound and he used to tell whatever come to his mouth. The relevant portion is re-produced below:

Page 97 of the brief.

ප්‍ර : තමුන්ට කිසිම අවශ්‍යතාවයක් තිබුනේ නැහැ, පොලිසියට ගොස් පැමිණිලි කරන්න, මහත්තයායි ගියේ ?

උ : මගේ මහත්තයා මානසික ලෙඩෙක්.

ප්‍ර : තමුන් කියන විදිහට පොලිසියට ගියේ නැහැ, කිව්වා. තමුන් කියන විදියට මෙවැනි සිද්ධියක් ගැන කියන්න අවශ්‍යතාවයක් තිබුනේ නැහැ, මුදල් ප්‍රශ්නයක් මත මහත්තයා පැමිණිලි කලේ ?

උ : මහත්තයා තමයි පැමිණිලි කලේ.

ප්‍ර : නැතිව තමුන්ගේ ස්වේච්ඡාවෙන් පැමැණිලි කලේ නැහැ ?

උ : ගියේ නැහැ.

The learned Counsel also stressed that the prosecution had failed to prove penetration as evidence given by PW1, PW2 and the medical evidence did not support that the victim had penile penetration. But the learned High Court Judge had presumed penile penetration under Section 114 of the Evidence Ordinance. The relevant portion of the judgment is re-produced below:

Page 519 of the brief.

පසුපස එකා බැගින් කාන්තාව රඳවා ගෙන සිට කාමරයට යෑම සහ ඒ වහාම ඉන්පසුව කාන්තාව නිරුවත්ව යටි බඩේ තෙත සහිතව බිම වැතිරී සිටීම සාක්ෂි ආඥා පනතේ 114 වගන්තිය යටතේ වන ප්‍රතිපාදන ප්‍රකාරව ලිංගික ප්‍රවේශය සිදු වූ බව නිගමනය කළ හැක.

As the evidence given by PW1, the victim clearly contradicts the evidence given by PW2, the learned High Court Judge should not have presumed penetration under Section 114 of the Evidence Ordinance.

In this case PW2 is the complainant and had given evidence how the incident had taken place. The prosecution had called PW1 to corroborate his evidence. But PW1 had provided contradictory evidence which certainly affect the core of the case.

Justice Dheeraratne in **Sunil and others v. Attorney General** [1986] 1 S.L.R 230 held that:

> "*Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used*

as a process of inducing belief in such evidence where such evidence is not credible.

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 the absence of corroboration."

In **Premasiri v. Attorney General** [2006] 3 Sri.L.R held that:

"The rule is not that corroboration is essential before there can be a conviction in a case of rape but the necessity of corroboration as a matter of prudence except where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge".

Although, initially, PW1 had stated that she made the complaint to police after two weeks from the date of incident, but she had gone on to say that she lodged her complaint after two days of the incident. In the Magistrate Court she had stated that she lodged her complaint after three weeks of the incident. But PW2, who made the first complaint to the police had taken up the position that they made their complaint to the police upon the expiry of three months. This clearly attacks the credibility of the evidence given by PW1 and PW2.

In this case, the evidence presented is circumstantial. But considering the evidence presented, it is not sufficient to confirm an inescapable inference that there was penile penetration.

Although the learned High Court Judge had stated that the prosecutrix's evidence has been well corroborated by the other evidence, when analysing the evidence presented by the prosecution the conclusion reached by the trial judge is not tenable.

Therefore, in this case the 1st and 2nd appeal grounds which are raised by the Appellants have merits.

When this Court invited the Senior Additional Solicitor General to express her views with regard to the evidence given by PW1 and PW2, in keeping with the highest tradition of the Attorney General's Department, she humbly submitted that she leaves the matter to be decided by this Court.

When analysing the entirety of the evidence presented, I am of the view that the prosecution has failed to prove the charges against the Appellants beyond a reasonable doubt. Hence, I set aside the conviction and the sentence imposed on the Appellants and acquit them from this case.

The appeal is allowed.

The Registrar is directed to send this judgment to the High Court of Kalutara along with the original case record.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL