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 Article 138(1) of the Constitution read together with the Section 11(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of

Sri Lanka.

Complainant

CA Appeal HCC Case No. 13/23 Vs.

High Court Hambantota

Case No: HC 52/2015 Imbulpitiya Gamage Anura Alias Podi

(Presently in Prison)

Accused

And Now in Between

Imbulpitiya Gamage Anura Alias Podi

(Presently in Prison)

Accused – Appellant

Vs.

Hon. Attorney General

Complainant- Respondent

Before : Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel : Gamini Perera with Manjula Nimesh, Kumara De Silva and Aruni De Silva Instructed by Vijitha Salpitikorala.

Chethiya Gunasekara, ASG with Jayalakshi De Silva, SC for the State.

Argued on : 04.12.2023

Decided on : 10.01.2024

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 20.10.2022 by the High Court of Hambantota.

The accused appellant (hereinafter referred to as the appellant) has been indicted for rape under the provisions of the Penal Code.

The appellant on being convicted of the said charge has lodged the instant appeal.

The main ground of appeal raised by the appellant was that there was no rape but sexual intercourse with consent.

The version of the prosecution is that the victim being a married woman with a child had been living separately from the husband and on the day of the incident the child had been sick and the husband had taken the child to the doctor and has kept the child at his place and the victim had to go and collect the child in the night.

The victim on returning from the husband's place with the child had been accompanied with a known party and she had met the appellant and as he had been on a motor bicycle had given a lift to the sick child and the other person who had been with the victim. The appellant had dropped the child at the victims' parents place with whom the victim had been living had come back for the appellant. The victim says that the appellant had offered her also a lift and with reluctance she had got on to the bicycle and the appellant without her consent had taken her to the jungle and had raped her twice.

She further says that the father of the victim had been looking for her and when she came back the farther had assaulted the appellant with a club.

The victim had told the sister and had immediately had complained to the police at 2.30 am on the same day.

The police had given evidence and had said that the victim at the time of the complaint had looked disshelleved and that her upper lip had been injured.

The next day she had been produced before a medico legal person and to him also she had said the same as the history on admission. The doctor in evidence had said that the injury on the upper lip is a bite mark and could be due to force or otherwise.

The victim had been lengthily cross-examined by the Counsel for the defense and it had been suggested to the victim that the appellant has had an affaire with her and that the sexual intercourse on the day of the incident took place with consent and that when they came out of the jungle the father of the victim had assaulted the appellant.

The appellant upon the conclusion of the story for the prosecution had said the same thing in evidence that he had a very intimate

relationship with the victim and on the day of the incident that it was the victim who had refused to get down from the bicycle and that she who suggested that they go somewhere and that then only they selected a lonely plot of the jungle and then they had sexual intercourse with consent but the victim had been wanting to go quickly and as such they came out early and on their return the farther of the victim had and assaulted the appellant with a club.

The appellant has been very lengthily cross-examined and he had stood the test of cross-examination very well.

The trial judge upon concluding the evidence of both sides had analyzed the evidence of the prosecution and had concluded that although the evidence of the victim had contradictions and omissions that it has not gone to the root of the case.

But we note that the victim had been the sole witness for the entire incident, and also, we find that soon after the incident the father of the victim acting in a very violent manner which leaves us wondering whether that sparked the victim to lodge a complaint in the police.

On the other had we find that the trial judge had considered the evidence of the victim but has failed to observe that the appellant has stood the test of cross-examination sans any contradiction or omission.

It has been held in the cases of**, Gurcharan Singh vs State of Haryana AIR 1972 SC 2661 that "as a rule of prudence Court normally looks for some corroboration on her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape has not been falsely implicated".**

In the case of Premasiri vs The Queen 77NLR 86 it has been held that "in a charge of rape it is proper for a jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such nature is sufficient to convince the jury that she is speaking the truth."

In the instant matter we have the evidence of the appellant who completely cuts across the case for the prosecution because he says

that the entire incident took place with the consent of the victim which is the core of the whole case, and the evidence of the appellant is uncontradicted.

But the evidence of the victim is uncorroborated and is with contradictions and omissions.

At this point we consider the submissions made by the Counsel for the respondent who said that a mother would not leave a sick child to go and see the paramour. But in the instant matter we find that the mother had not left the child all alone but with the grand parents with whom the child had been living all along and since the separation of the parents. Therefore, the victim had not left the child all alone in the house.

The charge submitted against the appellant is one of rape and for which the prosecution must prove beyond a reasonable doubt that the consent of the victim was never present during the entirety of the case for the prosecution.

But the evidence of the appellant and the victims being not corroborated by any other witness raises a serious doubt with regard to the consent of the victim in the instant case.

The appellant has taken the same stand of consent right along the case and as such his position is not an afterthought.

But we find the trial judge had failed to consider the improbabilities in the case for the prosecution but had whole heartedly and blindly believed the evidence of the victim which had denied a fair trial to the appellant.

Therefore, we are unable to agree with the submissions of the Counsel for the respondents and we are compelled to conclude that the evidence of the appellant had created a serious doubt in the case for the prosecution.

As such the instant appeal is allowed and the sentence and the conviction entered by the trial judge is hereby set aside.

JUDGE OF THE COURT OF APPEAL

Hon. Justice B. Sasi Mahendran

I agree.

JUDGE OF THE COURT OF APPEAL