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

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

Democratic Socialist Republic of Sri Lanka

Complainant

C.A. Case No: **CA 378/2017**

Vs.

H.C. Anuradhapura Case No: **HC 162/2012**

Gunawardenage Chandimal Gunawardena

Accused

AND NOW BETWEEN

Gunawardenage Chandimal Gunawardena

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	AAL Neranjan Jayasinghe for the Accused-Appellant Sudarshana De Silva, DSG for the Complainant-Respondent
ARGUED ON	:	04.06.2019
WRITTEN SUBMISSIONS	:	The Accused-Appellant – On 05.07.2019 The Complainant-Respondent– On 08.08.2019
DECIDED ON	:	03.09.2019

K.K.WICKREMASINGHE, J.

The Accused-Appellant has filed this appeal seeking to set aside the judgment of the Learned High Court Judge of Anuradhapura dated 12.12.2017 in case No. HC 162/2012.

Facts of the case:

The Accused-Appellant (hereinafter referred to as the 'appellant') was indicted in the High Court of Anuradhapura on two counts as follows;

1. For committing Statutory Rape, an offence punishable under section 364(2) of the Penal Code as amended by Act No. 22 of 1995
2. For committing house-trespass, an offence punishable under section 443 of the Penal Code.

At the conclusion of the trial, he was convicted of both counts and sentenced as follows;

1. Count 01 – A term of 10 years Rigorous Imprisonment and a fine of Rs. 500/= with a default term of 03 months simple imprisonment. A compensation of Rs. 50,000/= to be paid to the victim with a default term of 01 year Rigorous Imprisonment.
2. Count 02 – A term of 01 year Rigorous Imprisonment and a fine of Rs.500/= with a default term of 03 months simple imprisonment.

Further, the Learned High Court Judge ordered the terms of imprisonment to run concurrently and default sentences to run consecutively.

Being aggrieved by the said judgment, the appellant preferred this appeal.

Following grounds of appeal were settled as grounds of appeal on behalf of the appellant at the argument;

1. Evidence of the prosecutrix creates a reasonable doubt as to whether the appellant committed the offences
2. No reasonable explanation given regarding the belated complaint
3. The prosecution had failed to prove the date of offence
4. Dock statement of the accused appellant had been rejected on wrong principles of law.

Summary of the incident as per the evidence of the prosecution witnesses as follows;

The prosecution case was mainly based on the evidence of the victim (hereinafter referred to as the 'PW 01' and/or 'the prosecutrix') who was less than 16 years of age (at the time of the incident), her mother and father. According the PW 01, the accused-appellant (hereinafter referred to as the 'appellant') is a known police officer whom had come to their house to settle disputes. On the day of the incident, the appellant had called the prosecutrix in the night and asked her to come out of

the house. Accordingly, she had gone out and the appellant had taken her near a well. Thereafter, the appellant had removed the t-shirt worn by the prosecutrix and had asked her to lie down on a bunt near there. The appellant had sexual intercourse with her. The prosecutrix had testified that although she resisted, she could not get away (Page 58 & 59 of the appeal brief). After the incident, she had run to the house and the appellant had followed her. The prosecutrix further testified that her mother and father had tried to catch the appellant, but he had pushed them away and run.

The mother of the prosecutrix (hereinafter referred to as the 'PW 02') had testified that, on the date of the incident, she was sleeping with her husband and son in one room and the prosecutrix with sleeping with her younger sister in another room. In the night, PW 02 had heard the door of the house being opened and she assumed that it was the prosecutrix going out to urinate which was her usual beheviour. The PW 02, after waiting for about 15 minutes anticipating for the daughter to call her, had gone near the room of the prosecutrix. The prosecutrix had prevented PW 02 from entering the room. However, the PW 02 had forcibly entered the room and seen a male person inside the said room. He was facing the wall and she had also seen that the trouser of the said male had been lowered. Her position is that she did not identify the person who was inside the room (Vide pages 133,137,139 and 140)

The PW 03 is the father of the victim. He too had testified and given a similar version of evidence as the PW 02. The PW 03 testified that he failed to identify the person who entered the house, on the date of the incident and he further testified that the appellant was a known person to him. Both PW 01 and PW 03 testified that they tried to catch the appellant, but failed.

The JMO, who examined the prosecutrix had stated that at the time of examination on 06.12.2011, there were observations consistent with penetration to the vagina.

I observe that the prosecutrix had made several statements with regard to the incident. As per the evidence of PW 07 (who recorded two statements from the prosecutrix), the first statement was made to the Police Station, Thambuttegama on 01.12.2011, when mother of PW 01 made a complaint to the Police Station about the stubborn behavior of PW 01. The second statement was recorded at the Headquarters of the Salvation Army, Colombo on 21.01.2012. As per the PW 04 (probation officer), the prosecutrix had made a statement to her on 02.12.2011.

As per the PW 08, the prosecutrix had made another statement to the PW 08, on 17.05.2012.

Now I wish to consider the grounds of appeal submitted on behalf of the appellant.

I will first consider the 3rd ground of appeal, in which the Learned Counsel for the appellant contended that the indictment does not disclose a specific and precise date of the alleged offence rather than referring to a massive period in between of 01st of January 2011 to 30th November 2011.

In reply to the above contention, the Learned DSG for the complainant-respondent (hereinafter referred to as the 'respondent') submitted that there is evidence to establish that the offence was committed during the period given in the indictment. The prosecutrix had stated that she was a grade 10 student when the incident happened and was 15 years old when the complaint was made (Page 61 & 63 of the appeal brief). Further, she had stated that this incident happened in 2011 (Page 71 of the appeal brief). The Learned DSG submitted that the Learned High Court Judge had considered this aspect in page 13 of the judgment.

I observe that as per section 165 of the Code of Criminal Procedure Act No. 15 of 1979 as amended, it is mandatory to specify the date of offence in a charge, in order to comply with the guidelines of a fair trial.

In the case of **K.K. Dayarathne alias Chuti mama V. The Attorney General [CA/188/2015 – decided on 22.09.2017]**, it was observed that,

"In the case of ***Attorney General Vs. Viraj Aponso and Others S.C. 24/2008,*** *the Supreme court had given a guideline for a fair trial. Reading the guidelines, it is clear that it is the responsibility of the prosecutor to inform the time, place and the offence clearly to the person who is charged. It is fundamental for the accused appellant to formulate his defence.*

In this case if the accused wants to take up a defence of alibi he cannot do so because there is no date or time given. That takes the prosecution for not fulfilling the fundamental obligation namely fair trial. In ***R.H.M.S. Premathunga alias Ananda Vs. Attorney General CA 01/2013*** *decided on 31/01/2014 where Sisira J. de Abrew, J held,*

"... Is to give sufficient opportunity to the accused to answer the charge and ensure a fair trial"..."

In light of above, it is understood that the prosecution has a responsibility to inform an accused about particulars of the charge against him such as the date, place and the offence which are material to the accused. However, I observe that the State Counsel, in the instant case, had not put much effort to confirm about the date of the offence. The State Counsel had asked about the date of birth of the PW 01 and the grade in which she was studying at the time of the incident. The other material details mentioned by the Learned DSG, such as the year of the incident and the age of the PW 01 at the time of the incident were elicited only during the cross-examination by the defence Counsel. I do not think that the State Counsel can evade the duty cast upon him/her to notify the accused about specific dates of offence which is very material to formulate a defence. I think, at least the State Counsel should have extracted the year of the incident from the prosecutrix.

There can be instances where sexual offences committed on small children continuously where the child may not be able to mention the exact date of the incident. Also, small children may not be able to remember the exact date of

offence and in such instances, it is permitted to mention a period of time in the charge.

However, in the instant case, the prosecutrix was with her parents on the date of offence and at least the parents should have been able to mention the exact time period. In the absence of such evidence, I answer the contention of the Learned Counsel for the appellant in affirmative.

I wish to consider 1st and 2nd grounds of appeal at this juncture, which argues about the credibility of prosecution evidence, especially PW 01. The Learned Counsel for the appellant brought the attention of this Court to several contradictions in the case for the prosecution.

One such question is, the prosecutrix testified that she ran to her home after getting released from the appellant, after the rape incident near the well and the PW 02 and PW 03 (mother and father of the prosecutrix) struggled with the appellant to catch him (Page 60 – 62 of the brief). However, contrary to the above version of the prosecutrix, the PW 02 testified that she went to the room of the prosecutrix and saw the appellant being inside the room of the prosecutrix. Thereafter, the PW 02 struggled to catch the appellant after calling the PW 03 (Pages 132 – 141 brief). Further, the PW 02 in her evidence testified that at the time when she was struggling with the person who was in the room of the prosecutrix, she could not see who that person was (Page 140 of the brief). Also in the pages 163,164,168 and 170 of the brief, PW 02 had testified that she could not identify the person with whom the prosecutrix was engaged in a sexual activity.

I am well aware that corroboration is not mandatory in sexual offences. However, the Courts have held in numerous occasions that the Trial Judge can act on a sole testimony of a prosecutrix only if her evidence is cogent, credible and consistent. The Learned DSG for the respondent submitted several case law including the following cases;

1. **Sunil and others V. Attorney Genera̤l [1986] 1 Sri LR 230.**
2. **King V. Gunarathne 14 C.L.R 174.**
3. **State of Uttar Pradesh V. M. K. Anthony [AIR 1985 SC 48; (1985) Cri. L.J. 493]**
4. **Karunasena V. The Republic of Sri Lanka [1975] 78 NLR 63**

In the case of **Yodhasinghegedara Chandrasoma V. Attorney General (CA 87/2008 - Decided On 15.07.2015),** it was held that,

> *"Learned Counsel submitted that the evidence of Dr. Gajanayake who examined the victim and the evidence of Sumanawathi, mother of the victim cannot be considered as corroboration and in the absence of any other evidence to corroborate the victim, it is unsafe to act only on the uncorroborated testimony of the victim.*
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> *In the case of* ***Gurcharen Sing Vs. State of Haryana AIR (1972) SC 2661*** *Indian Supreme Court held thus; as a rule of prudence however, 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 on her has not been falsely implicated.*
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> *In contrary the Indian Supreme Court in* ***Bhoginbhai Harjibhoie Vs. State of Gujarat (1983) AIR SC 753*** *held "in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to the injury."*
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> ***When there is strong uncontradicted evidence and in the absence of any strong reason for falsely implicating the accused, in such a situation our courts preferred to follow the later****..."* (Emphasis added)

In the case of **Premasiri V. Attorney General (2006) 3 Sri L.R 106**, Justice E. Basnayake observed that,

> *"The learned counsel complained that the accused was convicted on uncorroborated evidence. There is no rule that there must in every case, be corroboration before a conviction can be allowed to stand. (Gour on Penal Law of India 11th Edition page 2657 quoting Raghobgr Singhe vs. State(2); Rameshwar, Kalyan Singh vs. State of Rajasthan(3). It is well settled law that a conviction for the offence of rape can be based on the sole testimony of the prosecutrix if it is reliable, unimpeachable and there is no infirmity.* ***(Bhola Ram vs. State of Madhya Pradesh (4)****. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particular. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation.* ***State of Punjab vs. Gurmit Singhe(5)****.*
>
> *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. (Schindra Nath Biswas vs. State(6). In* ***Sunil and another vs. the Attorney - General*** *Dheeraratne J. with H. A. G. De Silva and Ramanathan JJ agreeing held that* ***"if the evidence of the complainant is so convincing, they could act on that evidence alone, even in the absence of her evidence being corroborated".*** (Emphasis added)

In the case of **King V. Athukorala [50 NLR 256]**, it was held that,

> *"When an accused is charged with rape, corroboration of the story of the prosecutrix must come from some independent quarter and not from the prosecutrix herself. A complaint made by the prosecutrix to the Police in which she implicated the accused cannot be regarded as corroboration of her evidence".*

In the case of **Radhu V. State of Madya Pradesh [Case No: Appeal (crl.) 624 of 2005**, Indian Supreme Court observed that,

> *"The court should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case".*

In light of above, it is understood that the Court has to be extremely cautious in determining whether the evidence of the prosecutrix is trustworthy and reliable. I observe that, in the instant case, both the PW 02 and PW 03 had failed to identify the appellant even being eye witnesses.

It is noteworthy that it was transpired in the cross examination of the PW 01, she did not mention about the appellant when she was making a statement on 02.12.2011, while being in the probationary authority. The prosecutrix had mentioned about some other persons i.e. Suranga, Rasika, Wasana and Samantha and they were arrested by the Police. Accordingly, the Learned Counsel for the appellant contended that, not even a single word about the instant appellant was mentioned by the prosecutrix in the above said statement, when she got the opportunity for the second time in making a statement.

The Learned DSG for the respondent submitted that the prosecutrix had given reasons for her belated complaint. The PW 01 testified that she was told by a police officer, that she would be given an opportunity to enter a higher school and will be put in to probation, if she did not mention the name of the appellant when her initial statement was recorded (Page 77 of the appeal brief).

Further, the procecutrix made a statement to the police for the third time on 21.01.2012, while being in the Salvation Army, and she again mentioned that fact that she was sexually abused by the aforementioned four persons whose names were given in the first and the second statements to the police.

It is imperative to note that under cross –examination with regard to the above same statement made on 21.01.2012, it was mentioned that the mother of the prosecutrix intervened to the statement at the time of recording the same and introduced about the appellant in that statement (Page 82 of the brief).

Further, I observe that, the PW 02 testified and accepted in her evidence that she deliberately uttered falsehood in saying that it was the instant appellant who was in the room of the prosecutrix as well as the appellant came to their house on the alleged date of incident. This was marked a contradiction as 'V8' (Pages 171 – 173 of the brief).

I observe that the JMO testified that he examined the prosecutrix on 06.12.2011 after recording a short history. In the said short history she had not mentioned about the appellant, but about the previously mentioned four names of male persons. The JMO had testified that the prosecutrix gave the history of the alleged incident to him freely and at ease without any threats and influences by the prison officers who produced her as it was only the JMO and his nurse who were inside the room while inspecting the prosecutrix.

Considering above, I am of the view that there are some serious doubts in the case for the prosecution. Since PW 01 did not appear to be a credible witness, the Court

must have look for corroboration from other witnesses. Further, the prosecution has failed to explain the belated complaint sufficiently. After perusing the proceedings, I am convinced that the prosecution witnesses are not sufficiently corroborated and therefore, I answer the grounds of appeal 01 and 02 in affirmative.

The Learned Counsel for the appellant contended that the Learned High Court Judge had failed to evaluate the dock statement and he had failed to give proper reasons to reject the dock statement. The appellant in his dock statement admitted going to the house of prosecutrix to settle a dispute between her mother and grandfather. He had given his telephone number to them. The appellant denied the commission of alleged offence and took up the position that one ASP was trying to frame him for a false allegation. I observe that the Learned High Court Judge was of the view that the appellant could have called for telephone records and prove that he did not take telephone calls to the prosecutrix on that particular day. However, I think it was unreasonable to cast a burden on the appellant, especially given that fact that the prosecution had failed to prove the exact date of offence and therefore, the appellant is unable to call such records properly.

In the case of **State of Uttar Pradesh V. M. K. Anthony [AIR 1985 SC 48; (1985) Cri. L.J. 493],** it was held that,

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor*

discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole..."

After perusing the evidence of the trial, I am of the view that the evidence of the prosecution lacks consistency and there are some serious short comings in the evidence of the witnesses. Therefore, I do not think it is safe to act on such evidence of the prosecution to convict the appellant. I set aside the convictions and the sentences imposed on the appellant by the Learned High Court Judge of Anuradhapura. I acquit the appellant from both counts.

The appeal is hereby allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. K.K. Dayarathne alias Chuti mama V. The Attorney General [CA/188/2015]
2. Yodhasinghegedara Chandrasoma V. Attorney General [CA 87/2008]
3. Premasiri V. Attorney General (2006) 3 Sri L.R 106
4. King V. Athukorala [50 NLR 256]
5. Radhu V. State of Madya Pradesh [Case No: Appeal (crl.) 624 of 2005
6. State of Uttar Pradesh V. M. K. Anthony [AIR 1985 SC 48; (1985) Cri. L.J. 493]