

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

In the matter of an application for
Revision in terms of Article 138 of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of
Sri Lanka

Complainant

Vs.

Hettiarachchilage Kamal Kumara

Accused

C.A. Revision Application No:
CA (PHC) APN 64/2015

H.C. Monaragala Case No: **HC 22/2010**

AND NOW BETWEEN

Hettiarachchilage Kamal Kumara
(Currently in Welikada prison)

Accused-Petitioner

Vs.

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

Complainant-Respondent

BEFORE : K. K. Wickremasinghe, J.
Janak De Silva, J

COUNSEL : AAL Tenny C. Fernando for the Accused-Petitioner
Ayesha Jinasena, SDSG for the Complainant-Respondent

ARGUED ON : 07.02.2018, 26.03.2018 & 10.07.2018

WRITTEN SUBMISSIONS : The Accused-Petitioner – On 07.02.2019
The Complainant-Respondents – On 16.10.2018

DECIDED ON : 13.03.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner has filed this revision application seeking to set aside the order of the Learned High Court Judge of Monaragala dated 11.06.2014 in case No. 22/2010.

Facts of the case:

The Accused – petitioner (hereinafter referred to as the ‘petitioner’) was indicted in the High Court of Monaragala for committing Rape on or about 27.12.2005 at Aluthwala, an offence punishable under section 364(1) of the Penal Code as amended by Act No. 22 of 1995. At the conclusion of the trial, the accused was convicted of the offence and was sentenced to a term of 10 years rigorous imprisonment and to a fine of Rs.20,000/= with a default term of 2 years rigorous

imprisonment. Further Rs.100, 000/= was ordered to be paid as compensation to the prosecutrix with a default term of 02 years RI.

Being aggrieved by the said judgment, the petitioner preferred an appeal to this Court and later a request was made for withdrawal of the said appeal. The Learned High Court Judge had allowed the application for withdrawal and accordingly the appeal was withdrawn. The accused had thereafter paid the fine of Rs.20, 000/= but moved for further time to pay the compensation.

The Learned Counsel for the petitioner has contended that the Learned High Court Judge erred in allowing the application for withdrawal of the appeal in a situation where the High Court has no jurisdiction to entertain such an application under the Code of Criminal Procedure Act.

We observe that the Learned High Court Judge had inquired from the petitioner whether he wished to withdraw the appeal and the petitioner had confirmed the said application of withdrawal. However as per section 333(1) of the Code of Criminal Procedure Act No. 15 of 1979 the Judge becomes *functus officio* after accepting an appeal. Therefore proper forum to make an application for withdrawal of an appeal is the Court of Appeal as per section 359 of the Code of Criminal Procedure Act.

Accordingly the Learned ASG for the respondent submitted that the respondent is handicapped in raising a preliminary objection on the belatedness of the instant revision application in view of the illegal procedure followed by the Learned High Court Judge. Therefore we decide to consider the merits of the instant case since the petitioner has explained the reason for the delay to the satisfaction of this Court.

The Learned Counsel for the petitioner has averred following grounds of revision in the petition;

1. The Learned High Court Judge failed to consider the belatedness of the first complaint which clearly indicated that there is a doubt with regard to the allegation made by the prosecutrix to be fabricated and over emphasized.
2. The Learned High Court Judge failed to consider a very material contradiction with regard to conversation between the prosecutrix and Nandawathi in which the prosecutrix informed Nandawathi about the alleged sexual act committed by the petitioner.
3. The Learned High Court Judge failed to consider that uncorroborated testimony of the prosecutrix is not an unblemished testimony that a Court can act upon to convict a person and thereby caused a miscarriage of justice.
4. The Learned High Court Judge erred in law by concluding that the prosecution has proven the case beyond reasonable doubt in the absence of any material evidence and thereby caused a miscarriage of justice.

The Learned Counsel for the petitioner contended that the prosecutrix being a grown up woman, would have mentioned this incident to her family members and taken actions to lodge a complaint as soon as possible. We observe that according to the version of the prosecutrix, the incident took place in the morning on 27.12.2005. As per the evidence of Nandawathi (PW 03), the prosecutrix had left her 'hena' (ହେନା) immediately after the incident and the prosecutrix was frightened and was crying. The prosecutrix had promptly revealed the incident and the identification of the accused to Nandawathi. Thereafter the prosecutrix had informed of the incident to her husband after he returned home and the husband corroborated this fact in his evidence [(Page 49, 50 and 93 of the brief). The

prosecutrix with her husband had complained to the Wellawaya Police on the same day around 7pm.

Accordingly the Learned ASG for the respondent contended that the identification of the perpetrator and the complaint to a third party of the illegal conduct of the accused had been made immediately and it strengthens her credibility.

Furthermore as per the Medico-Legal report marked as P6, the prosecutrix was examined at the General Hospital of Badulla on 29.12.2005, just two days after the incident.

The Learned Counsel for the petitioner submitted the case of **Hewageganage Nihal Shantha V. The Attorney General (CA 145/2014 – decided on 05.04.2017)**, in which it was held that,

“Further, it is prudent to note that PW2's evidence reveals an inconsistency relating to when the alleged incident was complained to the Police. The alleged incident occurred on 10.11.1998. In evidence PW2 states that the victim informed her of the alleged incident on the same day and that she delayed going to the Police directly since her Husband (PW3 whose evidence was not led) was not at home and that after her husband returned she informed him of the alleged incident and that she complained to the Police on the next day i.e. 11.11.1998 (vide page 82 of the Appeal brief). However the evidence of PW4 and PW5 (the Police Officers) reveal that the complaint was only made on 12.11.1998 two days after the alleged incident. PW2 does not provide any explanation as to why the alleged incident was not reported to the Police after her Husband was informed. It seems that the victim's parents complained of the said incident only after the attack on their house on 11.11.1998 when they lodged a complaint relating to the said attack...”

However we observe that the instant case is quite different from the facts of the above case. Above Nihal Shantha case was related to an incident of grave sexual abuse where there were major contradictions in the testimonies of the witnesses. There had been a delay of two days in filing the complaint as well. However we observe that in the instant case the prosecutrix had made the complaint to the Police on the date of incident itself.

In the case of **Karnel Singh V. The State of M.P [1995 AIR 2472, 1995 SCC (5) 518]**, it was held that,

*“...Taking advantage of the prosecutrix being alone in their company the appellant picked her up and took her inside the machine room, laid her on a pile of sand, removed her saree and petticoat, and had sexual intercourse with her against her wish. After he had satisfied his lust, he called his companion but before the latter could have her, she ran away and narrated the incident to Multanabai and then went in search of her husband, a rickshaw puller. After narrating the incident to him, both of them went to the police station and lodged the complaint, Exhibit P.1, at about 4.10 p.m. It was said that there was considerable delay and sufficient time for tutoring and therefore her evidence could not be belivered. There is no merit in this contention. The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. **Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathize with her.** Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false. The possibility of*

tutoring is ruled out because the evidence does not show that her husband knew the appellant and his companion before the incident...” (Emphasis added)

We observe that the prosecutrix in the instant case was a lady from a rural area in Monaragala. Therefore the High Court Judge was correct in considering the probable reasons for the delay in a similar manner like Indian Courts have considered the background from which the prosecutrix comes. The Learned High Court Judge of Monaragala has observed that;

“...විත්දින තැනැත්තිය කරදරයකට පාත්‍ර වූ ස්වභාවයෙන් සිටීම මේ අවස්ථාව වන විටත් පැ.සා. 02 නිරීක්ෂණය කර ඇත. තමාට ලිංගික ප්‍රවේශයක් අන්‍ය අයෙකු විසින් සිදු වූ විට භාර්යාවක් ලැජ්ජාවකට පත්වීමත්, පුරුෂයා දුටු පමණින්ම මට යමෙකු ලිංගික ප්‍රවේශයක් කළ බව එකහෙළා ප්‍රකාශ නොකර තම පුරුෂයාට එය මේ ආකාරයට හෙළිදරව් කිරීමත් අප සමාජයේ අසාමාන්‍ය ලෙස සැලකීමට නොහැකි කාරණයකි...” (Page 224 of the brief)

The Learned Counsel for the petitioner contended that the Learned High Court Judge failed to consider a very material contradiction with regard to conversation prosecutrix had with Nandawathi (PW 03). Accordingly it was contended that the prosecutrix has magnified the assault incident in to gruesome rape incident subsequently.

As per the evidence of the prosecutrix the accused had held the prosecutrix by her neck and had pulled her to the ‘මැස්ස’ at the වාඩිය (page 44 of the brief). The accused tightened the grip on her neck when she tried to scream. The police officer (PW 05) who recorded the complaint had observed that there was an abrasion on the upper part of the right elbow and another abrasion below the left ear of the prosecutrix (page 113 of the brief). Further Dr. Ruwanpura who examined the

prosecutrix about 2 days after the incident had observed a scab formed abrasion on the back of the right upper arm (page 259 of the brief). When SI Chandrapala (PW 08) visited the scene of crime he had observed that the prosecutrix to have plucked yardlong beans (මැ කරළි) and those had fallen on ground (page 130 and 146 of the brief).

After the incident, the prosecutrix had run about 1km to the 'hena' (හේන) of Nandawathi and informed her about the incident. Nandawathi corroborated that the prosecutrix came to her 'hena' (හේන) on this particular day who did not normally visit her. Therefore Nandawathi inquired the prosecutrix whether she was suffering from any illness since the prosecutrix seemed to be in fear and crying (Page 76 of the brief). The prosecutrix had responded that 'නැන්දේ කමල් මට හිරිහැර කරන්න ආවා' and then Nandawathi had instructed the prosecutrix to go home and inform family members (page 76 and 80 of the brief). The Learned Counsel for the petitioner highlighted that Nandawathi had not corroborated the prosecutrix that she particularly told Nandawathi that she was raped by the accused.

In the case of **B. Bhoghinbhai Hirjibhai V. State of Gujarat (AIR) 1983 SC 753**, it was held that,

"...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."

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.

*In the case of **Gurcharen Sing V s. 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.*

*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."*

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 Lokesh Mishra V. State of New Delhi [CRL. A. 768/2010 – decided on 12.03.2014], it was held that,

"In any case of rape, the evidence of the prosecutrix is of utmost importance. As per the settled legal position the conviction of perpetrator of the crime can be based even on uncorroborated testimony of the prosecutrix. The prime reason for attaching such an importance to the testimony of the prosecutrix is that a girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant to falsely implicate or even to admit any incident, which is likely to reflect on her chastity or to put at risk her own image, dignity and prestige in the society..."

Taking a similar view, the Learned High Court Judge in the instant case analyzed the evidence of rape with a special consideration about how a married woman from a rural area would behave. The mindset of Sri Lankan women with regard to the rape has been evaluated by the Learned High Court Judge in his judgment at pages of 215, 218, 221 and 224 of the brief.

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)

These decisions amply demonstrate that corroboration in rape cases should not be stressed upon especially when the Legislature of Sri Lanka by bringing in an amendment (Act No. 22 of 1995) has clarified that evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.

We are mindful of the fact that Nandawathi had made her statement to the Police after about 10 months from the date of incident since she was away from the area. Further the evidence of Nandawathi corroborated the prosecutrix on several facts such as the prosecutrix came to Nandawathi's 'hena' (හේන) on this particular day, the prosecutrix seemed to have cried and in fear, the prosecutrix revealed the name of the accused to Nandawathi and Nandawathi instructed the prosecutrix to go home and inform her family. Therefore the Learned High Court Judge was correct in refusing to consider a minor difference in the conversation of Nandawathi and the prosecutrix as a vital contradiction.

The Learned Counsel for the petitioner submitted as third ground of revision that the Learned High Court Judge has considered uncorroborated testimony of the prosecutrix and thereby caused a miscarriage of justice. It was argued that such material can be used only in the course of the trial and not whilst writing the judgment.

We observe that in the instant case, the prosecutrix had testified before the predecessor of the trial judge who wrote the judgment. Therefore the omissions had come in to the attention of the Learned High Court Judge only when he was writing the judgment. The Learned High Court Judge did not have the opportunity of observing the demeanor of very first witnesses. It was necessary for the Learned High Court Judge to consider the impact of the omission in order to examine the credibility of the prosecutrix.

In the instant case, the Learned High Court Judge had considered two omissions at page 216 of the brief. The omissions were pointed out with regard to the police statement of the prosecutrix which was not a part of the proceedings, but was a part of the IBE. After perusing the IBE, the Learned High Court Judge concluded that the prosecutrix had been consistent in her police statement on this issue and therefore there was no valid omission.

Thereafter the trial judge perused the IBE for the second time as follows:

“...ඉන් අනතුරුව තමා මරණ බවට තර්ජනය කළ බව සාක්ෂියේ සඳහන් කර ඇතත් ඒ බව පොලීස් ප්‍රකාශය සඳහන් නොවීම උනතාවයක් වශයෙන් මතු කර ඇත. මෙය ඇත්ත වශයෙන්ම උනතාවයක් වන්නේද යන කාරණාව සලකා බැලීමට පමණක් මා පැ.සා. 01 ගේ ප්‍රකාශය පරීක්ෂා කර බලමි...” (page 216 of the brief) (Emphasis added)

It appears that the Learned High Court Judge perused the IBE again for the purpose of ascertaining whether the omission in issue was indeed an omission.

The Learned SDSG for the respondent, answering the above contention of the Learned Counsel for the petitioner, raised a question whether the term ‘trial’ denotes only the leading of evidence of the prosecution and the defence and

whether it does not encompass all proceeding and instances until the judgment is delivered.

The Learned SDSG further contended that as per section 167 of the Code of Criminal Procedure Act “*any court may alter any incident or charge at any time before judgment is pronounced.*” Thus if it is legal for a charge or the indictment to be amended at any time prior to the judgment, is any injustice caused if the term ‘trial’ is given a wider interpretation?

We observe that the term ‘trial’ is not interpreted in the Code of Criminal Procedure Act. The definition of ‘*trial*’ in following dictionaries will be reproduced here;

1. Black’s Law Dictionary (9th edition – 2009)

“A formal judicial examination of evidence and determination of legal claims in an adversary proceeding.”

2. Jowitt’s Dictionary of English Law (2nd edition – Sweet and Maxwell)

“The hearing of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the law of the land. A trial is the finding out by due examination the truth of the point in issue or question between the parties, whereupon the judgment may be given.

A trial is that step in action, prosecution or other judicial proceeding, by which the questions of facts in issue are decided.”

Thus until the establishment of guilt/innocence of an accused in a criminal case, the legal process seems to continue. The Learned SDSG argued that the omission of interpretation of the term ‘trial’ by the Legislature seem to be a deliberate

omission as the Legislature did not have any intention of dictating terms to parties how a trial should run.

Therefore it is unwise to interpret the term trial in a restrictive manner that it confines to the proceedings in the well of the court.

In the case of **Keerthi Bandara V. Attorney General (2000) 2 Sri L.R. 245**, it was held that,

“We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on the law in this respect is binding on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When the matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether the illegal and inadmissible opinions expressed orally by police officers (who are not experts but lay witnesses) in the witness box on this point.(Emphasis added)

In the case of **Banda and others V. Attorney General (1999) 3 Sri L.R. 168**, it was observed that,

“...Justice Alles related the right to mark omissions and proof of omissions to the right of the Judge to use the Information Book to ensure that the interests of justice are satisfied. Omissions do not stand in the same position as contradictions and discrepancies. Thus, the rule in regard to consistency and inconsistency is not strictly applicable to omissions. His Lordship remarked that the Judge who has the use of the Information Book, ought to use this book to elicit any material and prove any flagrant omissions between the testimony of the witness at the trial and his police statement in the discharge of his judicial duty and function in terms of section 122 (3) of the Criminal Procedure Code...”

In the case of **Kahandagamage Dharmasiri Bogahahena V. The Republic (S.C. Appeal 04/2009 decided on 03.02. 2012)**, it was held that,

“The Appellant could not bring to the notice of the trial Judge any material in contradictions in the evidence which assailed, in any manner, the credibility of the witnesses. Nevertheless, in the event the Appellant fails to mark out discrepancies and if the trial Judge perceives contradiction in evidence that is likely to hinder the interest of justice he may inspect the Information Books.”

In the case of **Galathu Aratchige Nimal Priyantha V. Attorney General (CA No: 312/2009 – Decided on 17.12.2014)**, it was held that,

“...thereafter the next sub-section, section 110(4) contemplates to give the trial Judge assistance in the conduct of the trial or inquiry and permit the judge to peruse the statements only to aid it in such trial or inquiry. The

strict limitation placed under the said section is to prevent the Judge using such material as evidence...A mere perusal by the trial Judge of I.B. Extracts, for purpose of clarification would not be objectionable as per section 110(a) of the Code.

...therefore the trial Judge would be entitled to clarify such a position, since he never had the opportunity to hear the evidence witness Rajitha and Bogamuwa and test their demeanor and deportment. The question of a woman being used in the raid was denied by the prosecution witnesses and that was not the case of the prosecution. Limitation if at all under section 110(4) is not to use it as evidence. The procedure adopted is not illegal or unjustifiable... ”

In light of above it is understood that our Courts have consistently allowed trial judges to peruse the IBE, under limited circumstances, if he is of the view that it could aid him to arrive at an accurate decision on the culpability of the accused.

We observe, in the instant case, the Learned High Court Judge did not use the IBE as evidence in the case but simply had perused it as permissible under section 110(4) of the Code of Criminal Procedure Act. Therefore we are of the view that such perusal of the IBE for the purpose of ascertaining an omission did not cause any miscarriage of justice but it was in the interest of justice.

The Learned Counsel for the petitioner, in his oral submissions, pointed out that the Learned High Court Judge erred by considering the MLR when the doctor who prepared the report did not testify at the trial.

As per the Medico-Legal Report marked as P6, the prosecutrix was examined at the General Hospital of Badulla on 29.12.2005 whereas the incident had been on 27.12.2005. Dr. Ruwanpura had obtained the history from the prosecutrix (page

258 of the brief). Accordingly Doctor has mentioned that there was a scab formed abrasion on the back of the right upper arm (page 259 of the brief).

Dr. Ruhul Haq (PW 10) had presented the Medico-Legal Report and testified in Court since Dr. Ruwanpura who prepared the MLR had not been available at the time of the trial. As per the evidence of Dr. Ruhul, he had worked with Dr. Ruwanpura and therefore was familiar with the hand writing of Dr. Ruwanpura (page 166 of the brief).

In the MLR, Doctor had stated that there was no sign of sexual activities on her genital area and it is possible for such signs to be absent since she was a married woman. It was further stated that the allegation could not be excluded by medical evidence (Page 174 of the brief).

The Learned High Court Judge has considered the legal admissibility of the history recorded by DR. Ruwanpura in his ordinary course of business. Such statements are admissible under section 32(2) of the Evidence Ordinance. The prosecution led the evidence of Dr. Ruhul even though The Medico- Legal report could have been admitted in terms of section 414(1) of the Code of Criminal Procedure Act as amended. Further it is noteworthy that the Counsel who appeared for the petitioner in the High Court did not object to the application made by the prosecution to amend the list of witnesses and to insert PW 10 to testify about the MLR.

Therefore we are of the view that the Learned High Court did not err in law when he allowed the MLR to be marked in Court by the PW 10.

The Learned Counsel for the petitioner contended that the Learned High Court Judge erred in law by concluding that the prosecution has proven the case beyond reasonable doubt in the absence of any material evidence and thereby caused a miscarriage of justice.

We observe that the Learned High Court Judge has evaluated the evidence and ascertained the credibility of witnesses through the tests such as the test of promptness, the test of consistency and the test of probability (Page 204 of the brief). Further we observe that few omissions and contradictions were pointed out by the defence as follows;

- I. An omission was highlighted on the fact that, 'petitioner made an inappropriate request to fulfill sexual desires' on the basis that it has not been mentioned in the police statement.
- II. An omission was highlighted that the petitioner threatened her to death if divulged to anyone of the incident.
- III. It was suggested that prosecutrix did not tell Nandawathi that the petitioner in fact committed rape on the prosecutrix.
- IV. A contradiction was marked with regard to the manner in which the prosecutrix reacted to the incident when PW 02 went to see her at his mother's place (Page 98 of the brief).

In the case of **A.K.K. Rasika Amarasinghe V. Officer-in-Charge, Special Investigation Unit and another [S.C. Appeal 140/2010 – decided on 18.07.2018]**, it was held that,

"We note that learned Magistrate who heard the case has considered all the above contradictions and the learned High Court Judge has also considered the said contradictions. We note that the learned Magistrate who heard the case has convicted the Accused. Therefore the learned Magistrate who saw the deportment and demeanor of the witnesses has the opportunity to assess the evidence. In this regard I would like to consider a judgment of the Privy

Council reported in 20 NLR page 282 Fradd V. Brown & Co. Ltd. wherein the Privy Council held as follows:-

“It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity, so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance.”

In Alwis V. Piyasena Fernando [1993] 1 SLR 119 His Lordship Justice G. P.S. de Silva, Chief Justice made the following observation; “it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal”

*When I consider the above judicial literature and the contradiction that had been brought to the notice of this Court, **I hold that the contradictions submitted by learned President’s Counsel are not vital and they do not go to the root of the case...***

In the case of Attorney General V. Sandanam Pitchi Mary Theresa [S.C. Appeal No: 79/2008 – Decided on 06.05.2010], it was held that,

“Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic

version of the witness cannot be given too much importance (Vide, Boghi Bhai Hirji Bhai v. State of Gujarat, AIR 1983 SC 753).

Witnesses should not be disbelieved on account of trifling discrepancies and omissions (Vide, Dashiraj v. the State AIR (1964) Tri. 54). When contradictions are marked, the judge should direct his attention to whether they are material or not and the witness should be given the opportunity of explaining that matter (Vide, State of UP v. Anthony AIR 1985 SC 48; A.G. v. Visuvalingam 47 NLR 286). It is dangerous to presume or assume that because two witnesses contradict each other, one of them must be a false witness and reject the testimony in its entirety. The judge has a duty to probe into whether the discrepancy occurred due to a lack of observation or defective memory or a dishonest motive (Vide, Colin Thom'e J in Bandaranaike v. Jagathsena 1984 2 Sri LLR 397).

In State of UP v. Anthony the Indian Supreme Court stated that 'while appreciating the evidence of a witness, the approach must be whether the evidence...read as a whole appears to have a ring of truth'. The Court went on to elaborate further that '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'...”

In the case of **Bhoghinhai Hirjibhai (supra)**, it was held that,

“...Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue

importance. More so when the all-important "probabilities- factor" echoes in favour of the version narrated by the witnesses."

These decisions suggest that a Judge should be very considerate to distinguish deliberate falsehood and genuine errors of the witnesses. It is possible that there could be errors of memory. As it is already decided by Courts, there is also a possibility for a witness who comes to Court for the first time to be distracted by the atmosphere of the Court and make slightly different testimonies than of the original incident out of confusion. This does not by any means suggest that Court should disregard blatant lies told by the witnesses who deliberately try to mislead a Court. Considering above, we are of the view that the Learned High Court Judge was correct in concluding that the aforesaid minor discrepancies did not shake the credibility of the prosecutrix's version of evidence since such discrepancies did not go to the root of prosecution case.

After concluding the prosecution case, the petitioner made a dock statement denying the allegation against him and further explained that the prosecutrix fabricated this story against him since he had slapped her one day. However the Learned High Court Judge has considered that defence, at any point of the trial, did not suggest about such incident to the prosecutrix.

In the case of **Don Shamantha Jude Anthony Jayamaha V. Attorney General [CA 303/2006 and C.A.L.A. 321/06]**, it was held that,

"Finally having considered the case for the prosecution as well as the dock statement it is only then the learned Judge can decide whether or not the dock statement is sufficient to create a doubt in the case for the prosecution. One cannot isolate or disregard the prosecution case completely and consider only the dock statement in deciding whether

the dock statement is sufficient to create a doubt provided it is so obvious that the dock statement is only a bare denial or is irrational or palpably false, in which case it could be rejected without even considering the evidence for the prosecution...

Failure to evaluate a dock statement in the proper perspective shall not ipso facto vitiate a conviction if the dock statement is

a) A bare denial

b) Palpably false and unbelievable.

In Simonge Ekanayake Vs The Attorney General C.A.129/2005 C.Anuradapura142/200 it was held that even though the Trial Judge has not considered the dock statement, if no miscarriage of justice had taken place due to the lapse of the Trial Judge and there is material to say that the dock statement is palpably false then the findings of the original court should not be overturned... ”

In the instant case, the Learned High Court Judge held as follows;

“...ඒ අනුව පොදුවේ තරහක් තිබුණු බවට යෝජනා කර ඇති නමුත් පහරදීමක් සම්බන්ධයෙන් මුල් අවස්ථාවේ වින්දිත තැනැත්තියට යෝජනා නොකර නඩු කටයුතු අවසානයේ විත්තිය කැඳවූ පසු මෙවැනි නව සිද්ධි මාලාවක් ගෙනහැර දැක්වීමෙන් එය ඒකාකාරීභාවයකින් තොරව පසු සිතුවිල්ලක් මත පිහිටා ගොතන ලද විත්තිවාචකයක් බවට ඒ හේතුව නිසා ගම්‍ය වේ...” (Page 227 of the brief)

We observe that the Learned High Court Judge had refused the dock statement after considering the accurate legal principles which relates to admissibility of dock statements. (Page 228 of the brief)

It is imperative to note that the Learned High Court Judge has evaluated all the evidence placed before him very cautiously. Further the Learned High Court Judge

had been conscious of the social background of the victim and reaction of our society on rape. He held that there is definite identification of the accused and there had been a sexual intercourse against consent of the prosecutrix (page 231 of the brief). Lastly, the Learned High Court Judge concluded that the defence did not create a reasonable doubt in the case of the prosecution.

After perusing the judgment and the evidence of the whole trial, we are of the view that the Learned High Court Judge came to the right conclusion and was correct in convicting the accused for committing rape on the prosecutrix. There had been no exceptional circumstances which warrant this Court to invoke the revisionary jurisdiction. Therefore we see no reason to interfere with the findings of the Learned High Court Judge of Monaragala. We affirm the judgment dated 11.06.2014 in case No. HC 22/2010.

Accordingly this revision application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL