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.15/1979 against the judgment, conviction and sentence imposed by the High Court of Kalmunai in case No. HC/KAL/30/2008.

C.A.No.142A,B/2014

H.C. Kalmunai No. HC/KAL/30/2008

Athambawa Naeem Ismail

2ndAccused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

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BEFORE : **ACHALA WENGAPPULI, J.**

K. PRIYANTHA FERNANDO, J.

COUNSEL : Nayantha Wijesundera for the 2nd Accused-Appellant.

P. Kumararatnam S.D.S.G. for the Complainant-Respondent

ARGUED ON : 21st September, 2020

DECIDED ON : 16th November, 2020

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ACHALA WENGAPPULI, J.

The 2nd accused-appellant (hereinafter referred to as the Appellant) had preferred the instant appeal, challenging the validity of the conviction entered against him by the High Court of *Kalmunai* on 25.06.2014 and the imposition of an imprisonment for a period of ten years, a fine of Rs. 15,000.00 and Rs. 500,000.00 as compensation.

In the indictment presented to the High Court of *Kalmunai,* the Appellant and three other accused were charged for committing robbery and gang rape. The indictment was served on all four accused. They all elected a trial without a jury. Having accepted the indictment, the Appellant had absconded thereafter and was tried in *absentia.* At the conclusion of their trial, all four accused, including the Appellant were convicted as charged.

At the hearing of the appeal, learned Counsel who appeared for the Appellant, upon a letter of authority to represent him in his absence, had challenged the validity of his conviction on the following grounds of appeal;

a. the trial Court had failed to evaluate the credibility of the prosecution evidence especially the omissions and contradictions that were highlighted by the Appellant,
b. the trial Court had failed to consider the evidence in favour of the Appellant,
c. the judgment of the trial Court is not in compliance with Section 283 of the Code of Criminal Procedure Act No. 15 of 1979, in view of the binding judicial precedents.

The prosecution case was that the four accused, whilst being armed with firearms, have stormed the house of one *Hussain Seinul Abdeen Thuan Farook* in the night of 07.01.2001, robbed jewelry of its inmates and have gang raped his daughter *Thuan Farook Nurul Nizama.*

It is the evidence of *Farook* and *Nizama* that their house was surrounded by four persons and demanded them to open its front door. As *Farook* did not comply and with the demand, a shot was fired at, compelling him to open it. Four unknown persons have thereafter walked in and forced the inmates out into their compound. They were armed with guns and hand bombs. The 1st accused and the Appellant have ransacked their house and took away all valuable items, while other two guarded the inmates, who were herded to a corner in their compound. They also removed ear studs of two girls, including that of *Nizama.* Thereafter, the

inmates were ordered to go inside and the Appellant had picked *Nizama* and took her to the back of their house. She was forcibly undressed and the Appellant had sexual intercourse with her. The other three had taken turns on her thereafter. Both *Farook* and *Nizama* saw the faces of their robbers from the electric lights.

After the robbers have left, *Farook* rushed to Police and complained of the robbery and rape. Since the lodgment of the Police complaint, *Nizama* was produced to the local hospital. After initial investigations by the resident medical officer, who observed that there was fresh bleeding from her vagina, she was transferred to *Kalmunai* Hospital, where she was examined by a Consultant Gynecologist.

The four accused were arrested by the *Samanthurai* Police at a later point of time and the Appellant had pointed out a shop from which certain items of jewelry were recovered by the investigators. These items were later identified by *Farook* and *Nizama.* The four accused were identified by *Farook* and *Nizama* during identification parades as well as in the High Court, except for the Appellant, due to his absence.

Returning to the grounds of appeal, the contention that the trial Court failed to evaluate the credibility of the prosecution evidence especially in the light of omissions and contradictions that were highlighted by the Appellant needs to examine at the outset.

It is correct that several omissions were highlighted off the evidence of *Farook* on behalf of the Appellant. Whether the witness had switched off the lights under threat, whether the 1st accused had chased the Appellant after he removed the TV set, whether ear studs were forcibly removed,

whether the items of jewelry were kept in a glass jar by *Farook,* whether *Farook* learnt that his daughter was raped through her mother were the omissions that were marked off the peripheral matters of his testimony. The omissions that are having some significance in relation to the Appellant are whether *Nizama* was threatened by the Appellant as she screamed and whether it was the Appellant who dragged her away.

This Court had examined *Farook's* statement recorded in Sinhala, in order to assess the weightage that should be attached to the two omissions and found that the witness had in fact said so in his statement. The witness had stated to Police "ඔලුවෙ ලේන්සුවක් බැඳගෙන හිටි අය නිසාමා ගෙයි පිටු පස්සට කෑ ගහන්න එපා කියල අතින් ඇදගෙන ගියා". It is correct that the witness did not mention that it was the Appellant by his name. This was due to the fact that the Appellant was not known to the witness prior to the incident. The witness did clearly describe an act by one of the robbers who had a scarf tied around his head. The witness identified that person as the Appellant. In these circumstances, the trial Court should not have accepted those two portions of her statement as omissions.

During the evidence of *Nizama,* the Appellant highlighted the omissions whether her father had switched on the lights and then opened the door, whether she cried out for help, whether it was a same person who had sex with her holding her against a wall, whether she cried during the incident, and whether another person held her legs with hands. Clearly these were minor details of a traumatic incident faced by a young girl from a conservative society and the failure to mention these details immediately after the incident to Police, alone will not make her testimony unworthy of credit.

In addition to these omissions, the Appellant also marked contradictions 1A1, 1A2 on the basis that whether the witness and her family were made to sit in the veranda of their house or made them to sit outside of their house. Whether they sat on the veranda or outside the house will not alter the basic version of the witness who had otherwise gave consistent evidence on all important aspects and these inconsistencies will have no adverse impact on her credibility.

The trial Court, having examined these omissions and contradictions and guided itself with the reasoning of the judgment in ***Bandara v The State*** (2001) 2 Sri L.R. 64, where this Court had held that "*our Courts have laid down the principle that the discrepancies and inconsistencies which do not relate to the core of the prosecution case ought to be disregarded especially when all probabilities factor echoes in favour of the version narrated by a witness*" and had rightly concluded that they are incapable of creating a doubt as to the truthfulness of her assertion of forcible sexual intercourse.

In view of the above considerations, this Court is of the considered view that the first ground of appeal is clearly devoid of any merit.

The complaint that the trial Court had failed to consider the evidence in favour of the Appellant was in turn based on the contention that the Court was not alive to the contradictory medical evidence in relation to the alleged hymeneal tear, in addition to the challenge on identity.

Learned Counsel had brought to the attention of this Court to the evidence of Dr. *Abdul Aziz,* who said in evidence that the bleeding he had noted in the genital area of *Nizama* was due to penetration of her vagina by

a male organ is clearly an unreliable item of evidence as the said opinion was based on hearsay material as he admitted that he did not examine her vagina, internally.

Perusal of the evidence of Dr. *Aziz* revealed that he had examined *Nizama* at *Sammanthurai* Hospital. He had examined her vagina *"externally and there was fresh bleeding"*. He clarified with *Nizama* and excluded its probability due to menstrual bleeding. Then he had sent her to Dr. *Gunasekara,* a Consultant Gynecologist attached to *Kalmunai* Hospital. Dr. *Gunasekara,* after returning *Nizama* back to *Sammanthurai* Hospital, had indicated in his report that there was hymeneal damage. The relevant documents relating to this subsequent medical examination were however destroyed due to the Tsunami disaster.

It appears that the contention advanced by the learned Counsel for the Appellant is based on the underlying notion that in order to prove a charge of rape, there must be medical evidence in support of vaginal penetration.

This question had already received judicial consideration. In ***Perera v Attorney General*** (2012) 1 Sri L.R. 169, this Court, having quoted from the following text that;

> *"The slightest penetration of the penis within the vulva, such as the minimal passage of glans between the labia with or without the emission of semen or rupture of hymen constitutes Rape. There need not be a completed act of intercourse. Rape can be committed even when there is inability to produce a penile erection. Rape can occur*

without causing any injury and as such negative evidence does not exclude Rape. (vide page 308 of the Book entitled The essentials of Forensic Medicine and Toxicology by Dr.K.S. Narayan Reddy)",

had stated thus;

"... one should analyse the evidence in this case in the light of the above mentioned expert medical opinion as the opinion expressed above is the opinion of almost all the text writers on Forensic Medicine and it has gained such notoriety that any court can take judicial notice of the same."

In the instant appeal, even if the observation of the Consultant Gynecologist, in the absence of direct evidence as to the outcome of his internal vaginal examination, is excluded as hearsay, yet the observations made by the Dr. *Aziz* to the effect that "*there was fresh bleeding*" with the exclusion of the probability it being menstrual blood, and in the absence of any external injury to explain any bleeding, it is reasonable for the trial Court to infer that the bleeding was due to vaginal penetration as *Nizama* alleges.

This is exactly what the trial Court had decided. It had found that the evidence of *Nizama* is corroborated by the evidence of the medical officer. It had not even referred to the evidence of the examination by the Consultant Gynecologist, in coming to that finding of fact.

Hence, this ground of appeal too is without any merit.

Lastly, the third ground of appeal, that the judgment of the trial Court is not in compliance of Section 283 of the Code of Criminal Procedure Act No. 15 of 1979, in view of the applicable and binding judicial precedents, should be considered.

Learned Counsel for the Appellant relied on the judgments of ***Chandrasena & Others v Munaweera*** (1988) 3 Sri L.R. 94 and ***Moses v The State*** (1993) 2 Sri L.R. 401, in support of his submission that although the judgment contains a detailed reference to the judicial precedents on some of the applicable legal principles, it is bereft of any detailed analysis of the evidence presented especially by the accused and in particular the 1st accused. Learned Counsel highlighted the portion of the judgment that states " *the evidence adduced on behalf of the 1st accused did not rebut the evidence of the prosecution*" and " *the 3rd and 4th accused made dock statement respectively. Their evidence and dock statements could not rebut the evidence of the prosecution*", and contended that these conclusions of the trial Court are not supported by any process of reasoning upon which it had arrived at such conclusions.

Learned Counsel also highlighted the fact that all accused claim that they were shown to the prosecution witnesses before they were paraded for identification and therefore the evidence of the prosecution witnesses before the trial Court were not considered in relation to this particular contention and even if it did, that evidence should not have been accepted.

In his reply, learned Senior Deputy Solicitor General submitted to Court that only the 1st accused was represented during the identification

parades and there was no complaint by him that any of the then suspects were shown to the prosecution witnesses and therefore the position advanced by the Appellant is not an acceptable contention.

The Appellant was absconding his trial and he did not give evidence. Therefore, in advancing the said contention before this Court, he had to rely on the evidence of the 1st accused, who opted to give evidence under oath. It is correct that the 1st accused claimed that the prosecution witnesses who identified him, have already seen him prior to the identification parade when the Police took him to their house after his arrest. He also claims that all five of the then suspects were shown to the witnesses at the Police Station. It is this item of evidence the Appellant seeks to rely on in support of his contention.

As correctly pointed out by the learned Senior Deputy Solicitor General, the 1st accused was represented by his Counsel during the identification parade. Another suspect too was represented by Counsel. None of them objected to the identification parade on the basis that they were shown to the witnesses either at their house or at the Police after their arrest.

When witness *Farook* was cross-examined by the 1st accused, it was suggested to him when he visited the Police, the suspects were shown. The witness replied that he heard that about 15 suspects were rounded up by the Police over this incident but did not seen any suspects. During cross- examination of *Nizama,* the 1st accused suggested that he was shown to her at the Hospital. She specifically denied having seen him either at the Hospital or at the Police Station.

This clearly indicates that the claim of showing the accused prior to their identification at the parade was introduced during the trial before the High Court. That too had been done without any consistency. The place of showing ranges from the house, the hospital and the Police. Clearly the evidence on this aspect is introduced belatedly and inconsistently by the 1st accused, justifying its rejection by the trial Court.

However, the trial Court only indicates that it rejects the defence evidence but unfortunately did not attribute any reasons for its decision.

In the judgment of *Abrahams* CJ in ***The King v Eliyathamby*** 39 NLR 53, it is stated that;

> *"It was the duty of the District Judge to consider that evidence. Either he has ignored it completely or he has rejected it without properly considering it. It is elementary that the evidence for the defence must be scrutinized as well as the evidence for the Crown. Failure to do so is an injustice to the accused unless it is overwhelmingly obvious from the record that the witnesses are so contradictory of each other so as not to be worthy of credit or that they contribute nothing of any relevancy to the case for the defence."*

In ***The King v Tholis Silva*** 39 NLR 267, *Hearne* J re-emphasised the importance of considering the defence evidence and giving reasons of its rejection following upon the above judgment as it is stated that;

> *"The evidence for the defence must be scrutinized and failure to do so is an injustice to the accused " unless it is*

overwhelmingly obvious " as the Chief Justice remarked in a recent case "that the witnesses are so contradictory of each other so as not to be worthy of credit...". That would not be a fair criticism of the witnesses in the present case. They were not contradictory and if their evidence was believed the first appellant would have been entitled to be acquitted. A defence, and that applies as much to an alibi or to any other defence, unless it is on the face of it fantastic or contradictory, must be properly examined, and ,if it is rejected reasons must be given".

In ***Ibrahim v Inspector of Police, Police Station Ratnapura*** 59 NLR 235, *de Silva* J cited ***Thuraiya v Pathaimany*** (1939) 15 C. L. W. 119, where *Nihill* J had observed thus;

"A mere outline of the case for the prosecution and the defence embellished by such phrases as ' I accept the evidence for the prosecution ', ' I disbelieve the defence ', is by itself an insufficient discharge of the duty cast upon a Magistrate by section 306 (1) of the Criminal Procedure Code. "

A divisional bench of Court of Appeal, in its judgment of ***Lionel & Another v Attorney General*** (1988) 1 Sri L.R. 4 noted that;

"... the failure of the learned trial Judge to point out to the jury that the 1st appellant has set up an alibi is not a non-direction of a kind which, could reasonably be said to have

resulted in actual prejudice or caused a miscarriage of justice in so far as the 1st appellant is concerned."

In a relatively a recent pronouncement, the Supreme Court in ***Jayathunga v Attorney General & Another*** (2002) 1 Sri L.R. 197 stated;

"In this case, it is to be observed that the learned High Court Judge makes no reference at all to the defence evidence in his judgment. The failure to consider the defence evidence was a serious injustice done to the accused-appellant who had taken up the position that he was not at the scene, when the attack on the injured took place. It is to be remembered that when evidence is presented by an accused person in his defence, it is the duty of the Judge to consider it however weak that defence may be, before deciding whether the prosecution has succeeded in proving the case against the accused. On the other hand, if the High Court Judge decided to reject the evidence of the defence (accused-appellant) he should say so, giving reasons. Therefore, as submitted by learned President's Counsel, the failure of the learned High Court Judge to give due consideration to the defence evidence is fatal to the conviction of the accused- appellant in this case."

Therefore, in view of the above judicial precedents, it is hardly necessary for this Court to re-emphasise of the requirement of

consideration of the defence case effectively by a trial Court and the specific reasons for its acceptance or rejection.

In this appeal, although the trial Court had considered the evidence of the defence, it had failed to give reasons for rejecting it. Upon consideration of the evidence, this Court is of the view that the rejection of the defence evidence is quite justified and if the trial Court had properly considered that evidence, it would still come to the same conclusion.

Therefore, the third ground of appeal fails on the basis that the failure of the trial Court to indicate its reasons for rejecting the defence evidence did not cause any material prejudice to the Appellant.

The claim that the judgment of the trial Court did not confirm to the statutory provisions contained in Section 283 of the Code of Criminal Procedure Act No. 15 of 1979, in view of the binding judicial precedents apparently is based on the manner of presentation of its judgment by the trial Court. The trial Court, having referred to the items of evidence in respect of each aspect it had considered only in point form, and had quoted several judgments both relevant and irrelevant, giving it an impression to a reader that it is a compendium of case law on many aspects, rather than the judgment of a trial Court. However, interspaced with extensive judicial quotations, the trial Court in fact had considered the prosecution as well as defence evidence and had arrived at the finding that the Appellant was guilty as charged.

Therefore, the third ground of appeal also fails.

The conviction and sentence imposed on the Appellant is accordingly affirmed.

Appeal of the Appellant stands dismissed.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL