

SAVINDA VS. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW. J.
LECAMVASAM. J.
CA 212/2007
HC COLOMBO 2848/2006
OCTOBER 28, 2009
NOVEMBER 6, 9, 20, 2009

Penal Code – Section 364(4) – Rape – Ingredients – Reasonable doubt – Charge should fail? Credible witness – Test of probability – Compensation – default sentence in excess of 2 years – validity?

The accused-appellant was convicted for raping a woman inside a bus and was sentenced to 20 years R. I. and to pay a fine of Rs. 25,000/- carrying a default sentence of 2 years R. I., in addition, he was ordered to pay a sum of Rs. 500,000/- to the victim as compensation carrying default sentence of 5 years R. I.

The respondents' position was that he had sexual intercourse with consent.

Held

- (1) To establish a charge of rape, the prosecution must establish the following ingredients.
 - (i) The appellant committed sexual intercourse on the woman.
 - (ii) The said intercourse was performed without her consent.

If there is reasonable doubt in one of the ingredients the charge should fail.

- (2) The story of the prosecutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. The prosecutrix was not a credible witness.

Per Sisira de Abrew. J.

"In my view in a charge of rape if the evidence of the prosecutrix does not satisfy the test of probability and or the prosecutrix is not a credible witness, Court should reject her evidence and acquit the accused".

Held further:

- (3) The default sentence of 5 years R. I. is illegal since the maximum sentence that could be imposed for non payment of compensation is two years.

Gayan Perera for accused-appellant

Ayesha Jinasena SSC for Attorney General.

January 21, 2010

SISIRA DE ABREW, J.

The accused appellant (the appellant) in this case was convicted for raping a woman named Amarasinghe Mudiyansele Lalini and was sentenced to a term of twenty years rigorous (RI) and to pay a fine of Rs. 25,000/- carrying a default sentence of two years RI. In addition to the above sentence he was ordered to pay a sum of Rs. 500,000/- to the victim as compensation carrying a default sentence of five years RI. This appeal is against the said conviction and the sentence. At the very inception I would like to state here that the default sentence of five years RI is illegal since the maximum default sentence that could be imposed for non payment of compensation under Section 364(4) of the Penal Code is two years.

Facts of this case may be briefly summarized as follows: Lalani, working in Katunayake, on 24.5.2005 boarded a Colombo bound bus at Bodagama, her hometown in Thanamalwila police area in order to come to Colombo. After

the bus was stopped at police check point at Udawalawa, the driver of the bus, the appellant in this case, requested her to come and sit on a small seat behind the driver's seat as she could not continue to stand in the bus. She was, at this time, standing on the foot board. She thereafter got off the bus, got in from the driver's door, occupied the said seat and continued to be on the seat until she came to Colombo. When passengers were getting off at Pattah, she requested him to open the driver's door but he refused to do so as it would disturb the people moving on the road. She says that the front section of the bus was separated from the rear section of the bus by an iron fence and therefore she could not go to the rear section and could not get off from the normal passenger door. However she later says that she jumped over this fence. Vide page 89 of the brief. The driver at this stage asked her to get off at Gunasingherpura which is also in pettah. The driver did not stop the bus at Gunasinghepura but drove to Bastian Mawatha in Pettah and stopped the bus. Thereafter the driver jumped over the fence and went to the rear section of the bus. She too jumped over the fence. The driver then dragged her the rear seat and started fondling her breast. He then got up, put a mat on the floor and pushed her to the mat. Whilst she was on the ground, he pulled her pair of jeans, tie short and panty and raped her.

The appellant in his evidence admitted that he had sexual intercourse with her consent.

Soon after the incident she made a complaint to the police. This is in her favour. The appellant in his evidence says that after the sexual act she kept on asking whether he is married. According to the accused she later addressed him in the following language: "Did you love me to do this? People in the bus trade are like this. "She got off the bus saying

that she would find whether he is married. The appellant further says that he did not give his telephone number to her although she asked for it. From this evidence it appears that her hopes of having a hold on him perhaps hopes of getting married to him have shattered. According to the appellant both of them were having a friendly chat from Udawalawa to Colombo. It appears from the above evidence that friendly association has turn out to be anger when she got off the bus. This is evident from the language used by her soon before she got off the bus. These were the reasons for her to make a prompt complaint to the police.

The appellant had a laceration on his lower lip and a bit mark on his shoulder. This evidence was in favour of the prosecutrix. The appellant says in this evidence that whilst he was performing sexual act with her consent she kept on chewing his shoulder and the lip. Thus the fact that the appellant had injuries is something that can be understood. This evidence of the appellant cannot be an afterthought since the prosecution did not mark any contradiction or omission in his evidence.

The prosecutrix had four contusions and one abrasion on the chest. The appellant says that he fondled her breast with her consent. However she says he did it without her consent. Doctor says that if the sexual act was performed after removing her clothes, injuries could not have been restricted only to these injuries. The prosecutrix says that she was dragged from the iron fence of the bus to the rear of the bus, pushed her to the rear seat thereafter pushed her to the floor of the bus and removed her pair of jeans, tie short, and the panty while she was on the floor. All these things were done against her will. She further says that sexual intercourse was performed on the space between the two sets of seats where the passengers

stand. If this was the situation how did she receive injuries only on her chest? Doctor at page 178 of the brief says that injuries found on the prosecutrix are compatible with the short history given by her. But in her short history given to the doctor she had not said all the details that I stated earlier. She had not even said that she was pushed to the floor of the bus. She had told the doctor that the sexual intercourse was committed whilst she was on a seat. Vide page 159 of the brief. But at the end of cross-examination doctor says that if sexual intercourse was performed after removing her clothes there would have been more injuries than the injuries found on her. The above observation raises a serious doubt about the truthfulness of the story of the prosecutrix that sexual intercourse was performed without her consent.

According to witness Premasiri to whom the prosecutrix complained that she was subjected to a sexual harassment, the bus was parked on Bastian Mawatha facing Fort railway station. She met Premasiri soon after she got down from the bus. At this time he was walking from the direction of Fort railway station towards Court. The bus was on his left hand side. This shows that the doors of the bus were facing the road. The bus was parked 30 feet away from the petrol station at Bastian Mawatha. Although the prosecution relying on IP Ovitigama's evidence, tried to contend that this place was a lonely place, this was negated by the evidence of PC 12717 Kumara who said that this place was a crowded place. PC Kumara was on duty from 2.00 p.m. onwards on the day of the incident (24.5.2005). He said that this place was usually a crowded place and did not notice any change on this day. IP Ovitigama said in evidence that police post at Bastian Mawatha was located 20 meters away from the place where the bus had been parked at the time of the incident. It is therefore seen that at the time of the sexual intercourse the

bus was parked at a crowded place at Bastian Mawatha and that this place was 20 meters away from the police post and 30 feet from the petrol station. The doors of the bus were facing the road. Thus the question that has to be asked: would the appellant select this type of the place to commit sexual intercourse on a woman if it was against her will. Even after an attempt to commit a sexual act thinking that she was consenting, would he continue to do it at this place if he felt that she was not consenting. This question will have to be answered in the negative. I therefore hold that the story of the prosecutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. For these reasons I hold that there is a very serious doubt in the truth of the prosecutrix's story that sexual intercourse was performed against her will. The appellant must be acquitted on this ground alone.

To establish a charge of rape, the prosecution must establish the following ingredients. (1). The appellant committed sexual intercourse on the woman. (2) The said intercourse was performed without her consent. If there is a reasonable doubt in one of the ingredients the charge should fail. The above observations would show that there is reasonable doubt in the 2nd ingredient. Therefore the Court has to conclude that the charge of rape has not been proved beyond reasonable doubt. The appellant is, then, entitled to be acquitted.

Learned SSC pointed out that he was arrested whilst hiding on the ceiling of the appellant's house. She tried to contend that he went into hiding because of the guilty mind. But when considering this contention one must one forget the fact that his wife was present at the time of the arrest. No

man will admit in the presence of his wife that he committed sexual intercourse on a woman with or without consent. Therefore the fact he was hiding in the ceiling is understandable.

When the appellant stopped the bus at Pettah the passengers started getting off. At this time the prosecutrix, according to her, requested the appellant to open the driver's door for her to get down. The appellant had refused to do so as it would disturb the people moving on the road. The fact that she did not make an attempt to get off from the driver's door can be understood as he was a person who had helped her to give a seat. If her intention was, as stated by her, to go to Katunayake why didn't she get off from the passenger door? Her explanation to this was that she could not jump over the iron fence which separated the driver's section and the rear section. Vide page 52 of the brief. But this evidence is belied by her evidence at page 56 and 89 of the brief where she says that she jumped over the iron fence and came to the rear section of the bus. If her intention was to go to Katunayake and she was not permitted to get off the bus through the driver's door, why couldn't she jump over the iron fence when the passengers were getting off at Pettah? She could have easily done this since, according to her evidence, her seat was behind the driver's seat. Vide her evidence at page 48 of the brief. Further she could have easily got the help of the passengers to jump over the fence. Even the appellant could not have done anything to block this attempt since he was on the driver's seat at this time. She herself admits that later at Bastian Mawatha she jumped over the iron fence. Was it natural for this woman to remain in the bus with two men (the driver and the conductor) when she had the opportunity of getting off the bus? I think not. This shows that she was

willing to enjoy the company of the appellant. This raises a reasonable doubt in the truth of her story that she was not a willing partner to the sexual act. According to the prosecutrix, when the passengers were getting off at Pettah, the appellant requested her to get off at Gunasinghepura. But when the bus went to Gunasinghepura it did not stop there, instead the appellant turned the bus at Gunasinghepura and come to Bastian Mawatha. By this time she should know that something serious was going to happen to her. Then why didn't she jump over the iron fence which she did later? I ask the question why she didn't jump over the iron fence at least during the journey from **Gunasinghepura to Bastian Mawatha**. She claims that: she could not jump over the iron fence because the driver was there (page 56) But this cannot be accepted since she admitted that her seat was behind the driver's seat (page 48) During the journey from Gunasinghepura to Bastian Mawatha the driver (the appellant) was driving and if she was seated behind the driver how could the driver do anything to her? This observation would raise a serious doubt about the truth of her story that she was not a willing partner to the sexual intercourse. The above observation would show that the prosecutrix is not a credible witness. As I pointed out earlier if there is a reasonable doubt on the 2nd ingredient of the offence of rape, the appellant should be acquitted.

According to the prosecutrix when the appellant was inserting his male organ to her vagina she shouted. Then he squeezed her neck and addressed her in the following language. "Don't shout. People will hear. If that happens I will have to open the door." This was the evidence of the prosecutrix. Learned Counsel contended that this was a request by the appellant to the prosecutrix and if it was against her will this kind of request would not have been made by him. This evidence too creates a reasonable doubt in

the truth of the prosecutrix's evidence that the sexual intercourse was committed without her consent.

I have earlier pointed out that the story of the prosecutrix that sexual intercourse was performed without her consent does not satisfy the test of probability. Further I have pointed out that the prosecutrix was not a credible witness. In my view, in a charge of rape if the evidence of the prosecutrix does not satisfy the test of probability and/or the prosecutrix is not a credible witness, court should reject her evidence and acquit the accused. For the above reasons, I hold that the prosecution has not proved its charge beyond reasonable doubt. I therefore set aside the conviction and the sentence and acquit the appellant of the charge with which he was convicted.

LECAMWASAM, J. – I agree.

Appeal allowed.