SANA
vs
REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW. J
ABEYRATNE. J
CA 141/2001
HC ANURADHAPURA 196/99
DECEMBER 17, 18, 2008

Sexual assault - Conviction - Is corroboration necessary? - Can evidence of a victim be corroborated by a subsequent statement made by her?- Using a statement by a witness to discredit her evidence - Not produced at the trial - Permissibility.

The accused-appellant was convicted for committing the offence of grave sexual abuse on a girl - C, and was sentenced. It was contended that, the trial Judge erred by considering the statement made by the prosecution witness Iresha to the police as confirming and corroborating the story of the victim, and that the trial Judge erred by considering the conclusion of the medical officer as confirming and corroborating the story of the victim.

Held:

(1) The corroborative facts and evidence must proceed from someone other than the witness to be corroborated. This means that his previous statements, even when admissible cannot be used to corroborate him, such as proof of a complaint in a sexual case or a previous act of identification is not corroborative of the evidence of the witness, even though by showing consistency, it can to some extent strengthen his credibility.

Where 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.

Per Sisira De Abrew. J:

"Evidence of a victim in a case of sexual assault cannot be corroborated by a subsequent statement made by her. The learned trial Judge was wrong when he concluded that the evidence of the victim had been corroborated by her short history given to the doctor".

(2) Witness Iresha's statement was not produced in evidence, but the trial Judge utilized Iresha's statement to the Police to discredit her evidence given at the trial. The trial Judge cannot use a statement made by a witness to the Police which is not produced in evidence to discredit the witness. The procedure adopted by the trial Judge to discredit Iresha is improper and not permitted by law.

APPEAL from a judgment of the High Court of Anuradhapura.

Case referred to:

1. *Fernando vs. Republic of Sri Lanka* - (1979) 2 NLR 313 at 397, 398
2. *K vs. Athukorale* - 50 NLR 256

Dr. Ranjith Fernando for the appellant
Dappula de Livera DSG for Attorney General

Cur.adv.vult.

February 02, 2009

SISIRA DE ABREW, J.

The accused appellant, in this case, was convicted for committing the offence of grave sexual abuse on a girl named Mallika Arachchige Harshani Chandrarathne and was sentenced to a term of ten years rigorous imprisonment [RI]. In addition to the above sentence, the accused appellant was ordered to pay a sum of Rs. 3500/- as compensation to the victim carrying a default sentence of six months simple imprisonment. This appeal is against the said conviction and the sentence. Facts of this case may be briefly summarized as follows:

Six year old Harshani was a pupil of the appellant's sister who conducted scholarship classes for grade five students. On 8.1.99 when Harshani and her three friends Indika, Inoka and Gayani were in the class, the appellant's

sister left the class leaving the children under the care of the appellant. Whilst the appellant-conducting the class, he took the victim to a room, kept her on his lap, allowed his male organ to touch her vagina and moved her up and down. Victim says at one stage male organ of the appellant went little inside her vagina. The appellant thereafter let her go to the class. She complained to the mother about the incident when she went home.

Learned counsel for the appellant urged two grounds as militating against the maintenance of the conviction. I shall now deal with the first ground which is as follows: "Learned trial judge erred by considering the conclusion of the medical officer as confirming and corroborating the story of the victim."

Learned Counsel contended that the conclusion reached by the learned trial judge, at page 219 of the brief, that the short history corroborated the evidence of the victim was wrong. The learned trial judge, at page 219 of the brief, came to the conclusion that the evidence of the victim had been corroborated by the short history given by the victim and the observation and the conclusion reached by the doctor. I shall now consider whether the evidence of a victim in a case of sexual assault could be corroborated by the short history given by her. In answering this question, I must first consider the meaning of corroboration. His Lordship Justice Vithyalingam in *Fernando vs. Republic of Sri Lanka*[1] at 397 and 398 remarked thus: "In our law of evidence corroboration is a term which has a special significance. In the conventional sense as used in our Courts it means other independent evidence which confirms or supports or strengthens the evidence which is required to be corroborated."

"The corroborative facts and evidence must, however, proceed from someone other than the witness to be corroborated. This means that his previous statements, even

when admissible, cannot be used to corroborate him, such as proof of a complaint in a sexual case or a previous act of identification is not corroborative of the evidence of the witness, even though by showing consistency it can to some extent strengthen his credibility." Vide Law of Evidence by E:R.S.R Coomaraswamy Vol. 2 (book 2) page 627.

In *King vs Athukorale*[2] Court of Criminal Appeal held: "Where 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."

Applying the principles laid down in the above legal literature, I hold that evidence of a victim in a case of sexual assault cannot be corroborated by a subsequent statement made by her. I therefore hold that the learned trial judge was wrong when he concluded that the evidence of the victim had been corroborated by her short history given to the doctor.

Learned trial judge, at page 219, further concluded that her evidence had been corroborated by the observation and the conclusion reached by the doctor. According to the doctor there were no signs of sexual intercourse being performed on the girl. But the doctor says that sexual abuse of other forms could not be excluded. There were no injuries in her genital area. Doctor further stated that there were no anal tears. It appears from the medical evidence that the doctor did not come to any conclusion that the victim had been subjected to sexual assault. Therefore in my view conclusion reached by the learned trial judge that her evidence was corroborated by the observation and the conclusion of the doctor is wrong.

I shall now consider the 2nd ground urged by the learned counsel for the accused appellant which is as follows: " The

learned trial judge erred by considering the statement made by the prosecution witness Iresha to the Police as confirming and corroborating the story of the victim." I shall now consider this ground. The story of the victim is that when Iresha and her two sisters were in the class, the accused appellant took her to the class and committed the sexual assault. Iresha, in her evidence, says that the accused appellant did not take the victim to the room. Learned Prosecuting State Counsel, on this answer, treated her as a hostile witness to the prosecution. Learned Prosecuting State Counsel did not mark her statement made to the police when she gave evidence. Learned DSG too admitted that her statement was not produced in evidence. But the learned trial judge utilized Iresha's statement made to the Police to discredit her evidence given at the trial. Learned DSG contended that the learned trial judge was entitled to use her statement made to the police to discredit her evidence. It has to be stressed here that her statement was not produced in evidence. If the statement was not produced in evidence, how did the learned trial judge use this statement to discredit her evidence? If the evidence of Iresha given in court is believed, it creates a reasonable doubt in the evidence of the victim and then the accused appellant would be entitled to be acquitted of the charge. In my view a judge cannot use a statement made by a witness to the police which is not produced in evidence to discredit the witness. In the instant case the procedure adopted by the learned trial judge to discredit Iresha is improper and is not permitted by law. The above procedure adopted by the learned trial judge has caused grave prejudice to the accused. It was the duty of the learned trial judge to consider whether the evidence of Iresha creates a reasonable doubt in the evidence of the victim. For these reasons, I hold that the rejection of Iresha's evidence is wrong. I have earlier pointed out that the learned trial judge came to the wrong conclusion when he decided that victim's evidence had been corroborated by medical

evidence. For these reasons, the conviction of the accused appellant cannot be permitted to stand. I therefore set aside the conviction and the sentence of the appellant.

The next question that should be considered is whether I should acquit the accused or order a retrial. As I pointed earlier the rejection of Iresha's evidence is wrong. Whether Iresha's evidence could be rejected on other grounds is a matter for the trial judge. Further the trial judge must consider whether he could accept the evidence of the victim without any corroboration. When I consider all these matters, I hold the view that ordering a retrial is the best step. For these reasons I order that the accused appellant be tried afresh on the same indictment.

ABEYRATHNE, J. - I agree.

Trial de novo ordered.