INOKA GALLAGE
v.
KAMAL ADDARARACHCHI AND ANOTHER

SUPREME COURT
S. N. SILVA, CJ.,
BANDARANAYAKE, J. AND
J. A. N. DE SILVA, J.
SC LEAVE TO APPEAL NO. 30/2001
CA CASE NO. 90/97
HC COLOMBO NO. 7710/96
OCTOBER 23 AND NOVEMBER 09, 2001 AND
FEBRUARY 08, MARCH 13 AND MAY 08, 2002

Penal Code – Abduction and rape – Sections 357 and 364 of the Code – Consent – Rule regarding corroboration – Whether weakness of the defence would improve a weak case for the prosecution.

The accused was indicted in the High Court on two counts (i) abduction of Inoka Gallage on 25. 08. 1993 in order that she may be forced or reduced to illicit intercourse, punishable under section 357 of the Penal Code and (ii) committing rape on her on the same date, punishable under section 364 of the Penal Code. The trial of the case was by the High Court, without a jury.

The prosecutrix said that she offered vigorous resistance to the alleged rape. But, she had no injuries. The doctor's evidence was that she was still a virgin. Subashini, a friend of the prosecutrix said that on 26th Inoka came to her place around 11 am and whilst talking she said that the previous day she went to the accused's house. The accused was not there but his aunt was there and treated her well. The accused arrived around 9.30 pm and after having dinner all three of them spent the entire night by having a "cosy chat" in that house. The impression created was that she was under the watchful eye of the old lady. She did not mention the incident of rape which she later alleged had taken place a few hours earlier.

Held:

(1) Consent to sexual intercourse is a defence to a charge of rape. Consent requires voluntary participation as against passive giving in. A mere act of submission does not involve consent. Consent may be expressed or implied.

(2) Corroboration is not a *sine qua non* for a conviction in a rape case. It is only a rule of prudence. If the evidence of the victim does not suffer from basic infirmity and the probability factor does not render it unworthy of credence, as a general rule there is no reason to insist on corroboration. But, in a trial without a jury there must be an indication in the judgment that the judge had this rule in mind.

(3) In the circumstances of the case the prosecutrix was an unreliable witness and it was unsafe to act on her sole testimony.

(4) The prosecutrix had testified during the non-summary inquiry in a crowded court but the trial in the High Court where the acused was convicted was held in camera. Thus, she had been treated by the trial Judge in a special way, which was unwarranted.

(5) In the case of rape the onus is on the prosecutix to prove affirmatively, beyond reasonable doubt each ingredient of the offence beyond reasonable doubt and such onus never shifts. The weakness of the defence case can never bolster up a weak case for the prosecution.

Cases referred to :

1. *Regina v. Lucas* – (1981) QDB 720.
2. *Rao Harnarian v. State – AIR* 1958 Panjab 123.
3. *AIR 1948 Oudh 1* – Cr. LJ. 542.

LEAVE to appeal from the judgment of the Court of Appeal.

Ranjith Abeysuriya, PC with *Miss Lanka de Silva* and *Miss Shamini Gunaratne* for prosecutrix-petitioner.

D. S. Wijesinghe, PC with *Priyantha Jayawardena* and *Miss Chandrika Silva* for accused-respondent.

Yasantha Kodagoda, Senior State Counsel for Attorney-General.

Cur. adv. vult.

May 30, 2002

J. A. N. DE SILVA, J.

This is a Special Leave to Appeal application filed by one Inoka Gallage, the prosecutrix in a rape case, against the decision of the Court of Appeal acquitting the accused-appellant, respondent (hereinafter referred to as the accused).

The acused was indicted in the High Court of Colombo on two counts. In the first count he was indicted with the abduction of Inoka Gallage on 25. 08. 1983 in order that she may be forced or seduced to illicit intercourse, an offence punishable under section 357 of the Penal Code. In the second count the accused was indicted with having committed rape on the petitioner on the said date, an offence punishable under section 364 of the Penal Code.

After trial the learned High Court Judge, sitting without a Jury convicted the accused on both counts. The accused was sentenced to a term of two years' rigorous imprisonment on the first count and to a term of 10 years' rigorous imprisonment on the second count, both sentences to run concurrently. In addition the accused was ordered to pay a fine of rupees one million with a default term of two years' rigorous imprisonment. It was further ordered that out of the said fine of rupees one million a sum of Rs. 9,000,000 to be paid to the prosecutrix as compensation.

The accused appealed against the said conviction and sentence. The appeal was fully argued for nearly 18 days in the year 2000 and on the 15th of December, 2000, the Court of Appeal allowed the appeal and set aside the said conviction and sentence and acquitted the accused.

The Attorney-General who appeared for the State did not challenge the judgment of the Court of Appeal. However, the prosecutrix filed

a petition and affidavit seeking leave from this court against the said acquittal. It is relevant at this stage to mention that before filing the indictment in the High Court there was a non-summary inquiry in the Magistrate's Court of Colombo. In that case, after recording the evidence of the prosecutrix, the learned Magistrate discharged the accused as he did not place any reliance on the testimony of the prosecutrix. Thereafter, the Attorney-General having considered the material available, indicted the accused in the High Court, Mr. Abeysuriya, President's Counsel, on behalf of the prosecutrix urged the following grounds in support of this application :

(1) That the Court of Appeal has wrongly interpreted the true meaning of the phrase 'without her consent' and in particular that there could be tacit and implied consent.

(2) That Court of Appeal has erroneously ruled that the absence of injuries on the body of the prosecutix strongly suggested consensual sexual intercourse.

(3) That the Court of Appeal has wrongly ruled that the law of Sri Lanka has a legal requirement for corroboration of the testimony of the prosecutrix.

(4) That the Court of Appeal has misdirected itself in holding that the trial Judge was wrong in ordering that the trial be held in camera.

(5) That the Court of Appeal has failed to consider the contention on behalf of the prosecutix that the proved lies uttered by the accused would amount to corroboration of the version of the prosecutrix on the authority in the decision of *Regina v. Lucas.*[1]

The first and second grounds urged by the learned counsel for the petitioner are considered together for convenience. Consent to

sexual intercourse on the part of the woman is a good defence to a charge of rape unless the woman is unable to consent or dissent by reason of (*a*) extreme youth (*b*) unconciousness (*c*) idiocy or imbecility or (*d*) consent obtained by force. Consent on the part of the woman as a defence to an allegation of rape requires voluntary participation. A woman is said to consent when she freely agrees to submit herself. It is always a voluntary and concious acceptance of what is proposed to be done by another and concurred in by the former. There is a difference between consent and submission to sexual intercourse. Every consent involves submission but the converse does not follow and a mere act of submission does not involve consent. It will be, therefore, proper to have a correct concept of what should be treated as consent on the part of the prosecutrix. In the case of *Rao Harnarian v. State,*[2] Justice Tek Chand referred to the distinction between 'passive submission' and 'consent' in the following words :

> "a mere act of helpless resignation in the face of inevitable compulsion, quiesence, non-resistance or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress cannot be deemed to be consent as understood in law. Consent on the part of a woman as a defence to an allegation of rape requires voluntary participation, not only after the exercise of intelligence based on the knowledge of the significance and moral quality of choice between resistance and assent. Submission of her body under the influence of fear or terror is no consent."

When the court is confronted with a situation where the victim says that the act was done without her consent and the accused takes up the position that it was done with her consent, then consent becomes a matter of inference to be made from evidence of previous or contemporaneous acts and conduct and other attendant circumstances. In considering the question of 'consent' it will also be useful to refer to some observations made by Dr. Gour's *Penal Law* (Seventh Edition, page 1845).

"The question of consent is by far the most important in the case. Of course, such consent may be express or implied. If it is an express consent a case will be seldom taken to court. If it is taken to court, it will have to consider if such consent was likely to have been given by the prosecutrix. Excepting, of course, the case of prostitutes and other mercenaries, women are seldom prone to translate their thoughts in these matters into words. They usually leave the matter of consent to tacit understanding. In such cases consent becomes a matter of inference to be made from evidence of previous or contemporaneous acts and conduct and other surrounding circumstances."

In a decided case of alleged rape of a girl, evidence showed that the girl left home without compulsion, that she journeyed with the accused from place to place, she never complained of any ill treatment by the accused to any of the people she met and there was only her evidence that alleged sexual intercourse was without her consent, it was held that the circumstances indicated that if there was any sexual act it was with her consent.[3]

In the instant case too the Court of Appeal has taken into consideration the previous and subsequent conduct of the prosecutrix. The court also has considered the absence of injuries on the prosecutrix despite the fact of her saying that she offered vigorous resistance. The doctor's evidence was that she is still a virgin. In this backdrop the Court of Appeal had come to the conclusion that if any sexual act had taken place it had been with her consent.

The 3rd ground raised by the learned counsel for the petitioner was that the Court of Appeal wrongly ruled that the law of Sri Lanka has a legal requirement for corroboration of the testimony of the prosecutrix.

It is to be noted that corroboration is not a *sine qua non* for a conviction in a rape case. In the Asian set up refusal to act on the

evidence of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury. If the evidence of the victim does not suffer from basic infirmity and the probability factor does not render it unworthy of credence, as a general rule there is no reason to insist on corroboration. The principles that have to be borne in mind when considering the evidence of the prosecutrix have been clearly laid down in several decisions of the Supreme Court. It has been held that the prosecutrix cannot be considered to be an accomplice. As a rule of prudence, however, it has been emphasized that courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and the person accused of abduction or rape has not been falsely implicated. The view that no conviction without corroboration was possible has not been accepted. The only rule of law is the rule of prudence, namely the advisability of corroboration should be present in the mind of the Judge. Where the case is tried with the aid of a jury it is necessary that the Judge should draw the attention of the jury to the advisability of looking for corroboration, wherever corroboration is needed. But, where the case is tried by a Judge alone as it is now being done in our country there must be an indication in the course of the judgment that the trial Judge had this rule in mind when he or she prepared the judgment. In a given case if the Judge thinks that there is no need of corroboration he should give reasons for dispensing with the necessity of such corroboration. But, if a conviction is based on the evidence of the prosecutrix without any corroboration it will not be illegal on the sole ground of absence of corroboration. However, it is always safe to look for corroboration.

Generally, a conviction for rape almost entirely depends on the credibility of the woman so far as the essential ingredients are concerned, the other evidence being merely corroborative. There may be many factors in a case tending to show that the testimony of the prosecutrix suffers from infirmities or defects in a manner so as to make it either unsafe or impossible to base a conviction on her evidence.

In the instant case the Court of Appeal has clearly stated that the prosecutrix is unworthy of credit and her evidence cannot be relied upon. Apart from the reasons adduced by the Court of Appeal the following items of evidence demonstrates this fact beyond any doubt. Devika Subaashini, the friend of the prosecutrix has stated that on the 26th Inoka came to her place around 11. am and whilst talking she had said that the previous day she went to the accused's house and the accused was not there but his aunt who was there treated her well. The accused came to the house around 9.30 pm and after having dinner all three of them spent the entire night by having a "cosy chat" in that house. The impression she has created is that she was under the watchful eye of the old lady the whole night. She has not uttered anything about the incident of rape which she later alleged had taken place a few hours earlier. Furthermore, according to Devika she had been told that the accused suggested to Inoka to stay at Devika's place and continue her studies. According to the evidence it is the prosecutrix who had suggested that she would stay at Devika's place and continue her studies, when the accused told her to go back home and study. It thus appears that the prosecutrix is a person who changes her version of the events when it suits her. In these circumstance one cannot disagree with the findings of the Court of Appeal that she is an unreliable witness and it is unsafe to act on her sole testimony.

The next point raised by the learned President's Counsel was that the Court of Appeal misdirected itself in holding that the trial Judge was wrong in ordering that the trial be held in camera.

On a careful consideration of the judgment of the Court of Appeal we find that what the Court of Appeal has stated is that the prosecutrix has given the same evidence in a crowded court house on an earlier occasion and therefore in those circumstances the prosecutrix need not be given special treatment in the High Court. The High Court record bares ample testimony to the fact that this witness has been treated by the trial Judge in a special way. The observation by the Court

of Appeal that the witness had been mollycoddled by the Judge therefore is warranted.

The final ground urged by the learned Counsel was that the Court of Appeal has failed to consider that the lies uttered by the accused would amount to corroboration of the version of the prosecutrix. In this matter the learned counsel drew the attention of Court to the decision in *R. v. Lucas* (*supra*).

In a case of rape the onus is always on the prosecution to prove affirmatively, beyond reasonable doubt each ingredient of the offence and such onus never shifts. Since the Court of Appeal had considered the prosecutrix as an unreliable witness not worthy of credit, there was no duty cast on the Court of Appeal to consider the evidence of the accused. The weaknesses in the defence case can never bolster up a weak case for the prosecution. Therefore, on a consideration of all these matters we see no merit in this application. Special leave is refused. We order no cost.

SARATH N. SILVA, CJ. – I agree.

BANDARANAYAKE, J. – I agree.

Special leave to appeal refused.