KAMAL ADDARAARACHCHI
v.
STATE

COURT OF APPEAL
HECTOR YAPA, J(P/CA)
KULATILAKE, J.
CA NO. 90/97
HC COLOMBO 7710/96
27TH, 28TH, 29TH MARCH, 2000
25TH, 30TH MAY, 2000
02ND, 21ST JUNE, 2000
12TH, 19TH, 20TH, 21ST, 26TH, 27TH JULY, 2000
02ND, 03RD, 28TH, 30TH, 31ST AUGUST, 2000

Penal Code. S. 357, S. 364 - Abduction - Illicit Intercourse - Rape - Testimonial trustworthiness - test of probability and improbability - material contradictions - delay in making complaint - post traumatic experience - misdirections - proof beyond reasonable doubt - special treatment to prosecutrix - fair trial.

The Accused Appellant was indicted on two counts - S. 357 and S. 364 Penal Code. High Court sitting without a jury convicted the accused appellant on both counts, in addition the accused appellant was asked to pay Rs. One Million as a fine, out of which a sum of Rs. 900, 000/- was to be paid to the prosecutrix as compensation. On Appeal,

Held :

(1) Trial Judge's failure to appreciate that the meeting of the Accused Appellant by the prosecutrix was a thought out act has undoubtedly prejudiced the case of the accused appellant from the very beginning.

(2) The Court has misapplied the test of probability and improbability, if this test was properly applied, there was no difficulty in coming to the conclusion that the evidence of the prosecutrix was untrustworthy and hence cannot be acted upon.

(3) There is no other way to apply the test of probability and improbability except by considering the yardstick of accepted and expected behaviour of women in society. It is the application of the test of normal human conduct.

(4) Trivial contradictions can be ignored but not contradictions which go to the very core of the Accused Appellant's case.

Per Yapa, J.

"Holding the trial in camera was unnecessary for the reason that the prosecutrix had earlier given the same evidence in a crowded court house before the Magistrate - steps taken by the trial Judge, to give special treatment to the prosecutrix at the expense of the Accused Appellant who was entitled to a fair trial cannot be approved no court should try to molly - coddle a witness as has happened in this case - the result would be very dangerous in that the Prosecutrix would have got wrong signals to lie in Court."

(5) It is an imperative requirement in a criminal case that the prosecution case must be convincing no matter how weak the defence is, before a court is entitled to convict an accused, what the Court has done in this case is to bolster up a weak case for the prosecution by referring to the weakness in the defence case - that cannot be permitted: the prosecution must establish its case beyond reasonable doubt."

(6) Absence of tell - tale marks is a circumstance that was supportive of the sexual act having taken place with consent.

(7) It is a grave error for a trial judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution.

(8) The trial Judge has made use of inadmissible material referred to by the State Counsel in his written submissions on the subject of disorders known as 'Post traumatic experience' Counsel is not entitled to read to the jury extracts from any scientific treaties unless such extract had been produced by way of evidence in the course of trial.

(9) The trial judge has misdirected herself on the law relating to consent by holding that "the law has no place for tacit consent."

APPEAL from the Judgment of the High Court of Colombo.

Cases referred to :

1. *Wickremasuriya v. Dedoleena* - (1996) 2 SLR 9
2. *Karunasena v. Republic of Sri Lanka* - 78 NLR at 65
3. *K v. Atukorale* - 50 NLR 256 at 257
4. *Karunadasa v. OIC, Nittambuwa Police* - (1987) 1 SLR 159 at 160.
5. *James Silva v. Republic of Sri Lanka* - (1980) 2 SLR 167
6. *Regina v. Pinhamy* - 57 NLR 169 at 176

D. S. Wijesinghe, P.C., with *Wijaya Wickremaratne P.C., Dr. Jayampathy Wickremaratne, Ms. Chandrika Silva, Ms. Priyadarshani Dias* and *Ms. Chamindi Samaranayake* for Accused - Appellant.

Palitha Fernando, D.S.G. for the Attorney General.

Cur. adv. vult.

December 15, 2000.

HECTOR YAPA, J.

The accused-appellant in this case was indicted in the High Court of Colombo under two counts. In the first count he was indicted with the abduction of Inoka Gallage on 25. 08. 1993, 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 he was indicted with having committed rape on Inoka Gallage, on the said date an offence punishable under Section 364 of the Penal Code. Learned High Court Judge after trial, sitting without a jury, convicted the accused-appellant on both counts and sentenced him to a term of two years rigorous imprisonment on the 1st count and to a term of 10 years rigorous imprisonment on the 2nd count, both sentences to run concurrently. In addition accused-appellant was ordered to pay a fine of rupees one million with a default term of 2 years rigorous imprisonment. It was further ordered that out of the said fine of rupees one million a sum of Rs. 900,000/= to be paid to the prosecutrix Inoka Gallage as compensation. The present appeal is against the said conviction and the sentence.

At the trial prosecution led the evidence of the prosecutrix Inoka Gallage, Dr. Abeysinghe, Devika Subashani, Indrani Thirimanna, Police Matron Karunawathie, Sub Inspector of Police Randeniya and Court official Kinsley Udaya. When the defence was called, the accused-appellant gave evidence and called two witnesses namely Mulin Seneviratne and Miriyan de Silva to testify on his behalf. The prosecution case as stated by the prosecutrix Inoka Gallage briefly is as follows. According to her, on 25th August 1993, she was living with her aunt

Dammika Thirimanna at Rajagiriya. She was 16 years of age then and was attending school. On the said date she decided to run away from her aunt's house in order to go to her grandmother's house situated at 4th lane Pitakotte. She decided to leave her aunt's house as there were constant quarrels between her and her aunt, since her aunt's husband who was employed in the middle-east did not like Inoka staying in their house. Furthermore her aunt's husband was scheduled to return home shortly. When the prosecutrix left her aunt's house in the morning of 25. 08. 1993, she had carried with her a travelling bag containing some of her clothes and an exercise book which contained the names and addresses of cricketers and film stars which included the name and address of the accused-appellant. After leaving her aunt's house, she proceeded first to her friend Devika Subashani's house at Angoda and spent some time there. Around noon after lunch she left Devika's place to visit her grandmother who was at 4th lane, Pitakotte. When she reached her grandmother's place at Pitakotte, she found that her grandmother's house demolished and the place deserted. On further inquiry from a passerby she was informed that the grandmother had left the house after the death of her husband. At that stage prosecutrix had disclosed to a passerby a lady, that she was in search of employment, even though her original plan when she left her aunt's house was to go to her grandmother for schooling. The passerby had then given her an address in the same lane i. e. 26/1, 4th lane and told her to look for a job there. Prosecutrix having gone to the said address and finding that there was no one in that house, had made inquiries from the lady next door, who had referred her to the front house. When she inquired from the lady in the front house, she had informed the prosecutrix that the inmates of 26/1, 4th lane had moved house and given her the new address which was No. 66, Rampart Road, Pitakotte. It was then that the prosecutrix had come to know that the accused-appellant Kamal Addararachchi had been occupying the house No. 26/1, 4th lane. According to the prosecutrix the house

No. 66 Rampart Road was about 3/4 mile away from the house No. 26/1, 4th lane and she had walked to the said house No. 66 Rampart Road, knowing that she was going in search of the accused appellant. Having gone to the accused-appellant's house at No. 66, Rampart Road she had inquired from the lady in the house for a job. When the lady in that house told her that there were no jobs available, prosecutrix did not go away, since it was getting late and the lady in the house had agreed to keep her there that night. At about 9.00 or 9.30 p.m. the accused-appellant had come home and on seeing the prosecutrix, inquired from his aunt, as to who the visitor was and the aunt informed him that she had come to meet him. Thereafter the accused-appellant had spoken to the prosecutrix and their discussion lasted for about two hours. At this discussion the prosecutrix had informed the accused-appellant that she was looking for a job. The accused-appellant had discouraged her from seeking employment and advised her to continue with her studies promising to help her, and had infact given her Rs. 1000/= on that occasion. At the discussion the prosecutrix had not told the accused-appellant that she had left her aunt's house in search of her grandmother and how she ultimately came to the accused-appellant's house. According to the prosecutrix the lady in the house who had initially agreed to keep her for the night had told the accused-appellant to drop the prosecutrix at her house. However the prosecutrix had refused to go to her aunt's house and requested the accused-appellant to drop her at her friend Devika Subashanie's house. At that point of time the accused-appellant had asked the prosecutrix to get into the front seat of his car. While proceeding the prosecutrix had observed the car going towards Nugegoda and so she told the accused-appellant that it was not the road to Devika's house. At that stage the accused-appellant had told the prosecutrix that he would take her to Devika's place on the following day, because the people at

Devika's house might be suspicious if she was dropped at that time of the night. Therefore accused-appellant told her that he would take her to a friend's house. Since accused-appellant was not willing to take her to Devika's house she kept silent and finally the accused-appellant stopped the car at a friend's place. He left the car and came back after about five minutes and told her to get down from the car saying that she could stay in the friend's house that night and on the following morning he would drop her at her house. Accused-appellant took her to a room where there was a table, two chairs, two beds and then left the room saying that he would meet the friend and come back. After about 15 minutes he came back with a bag which was marked P3 at the trial. At that time she was dressed in a T-shirt, skirt, under skirt, brassiere and a nicker. The nicker was marked P5 and the under skirt was marked P4. In the room they talked about tele dramas where the accused-appellant had acted. Thereafter accused-appellant pulled out an over-sized denim shirt from the bag and requested her to wear it. Despite several requests when she refused a struggle ensued as the accused-appellant had tried to pull out the T-shirt the prosecutrix was wearing. Then only she realized that he was trying to molest her. But since he said there was nobody there, she did not raise cries. In the course of the struggle at one stage she fell from the bed. Ultimately he managed to pull out her T-shirt and then forced her to put on the denim shirt to cover herself. Accused-appellant who was wearing a T-shirt and shorts was then wearing a white bed sheet. Then he held on to her and removed her under skirt (P4) using his toes. As they struggled on the bed her brassiere came out. Further he removed her nicker in the same way as he removed the under skirt by using his toes. Thereafter the accused-appellant had pulled her on to the bed and after some struggle he had sexual intercourse with her against her will. After the sexual act both of them had fallen asleep and in the

morning when she got up she found the accused-appellant already up. Sometime later he went out and had brought her tooth paste and a brush and told her to wash herself and to take a bath which she did. Later a person in a white dress had brought two cups of tea and the accused-appellant requested her to have tea. Both of them had tea together and left the place in the accused-appellant's car. On the way the accused-appellant wanted to drop her at her aunt's house but since the prosecutrix was not willing to go there, he agreed to drop her at Devika's house. Even at that point of time since the accused-appellant had promised to help her in her studies she still believed and trusted him. Finally the accused-appellant drove her through Kirulapana Road and dropped her at Nugegoda and she was asked to go to Devika's house and continue her studies. He further told her to meet him later so that he could help her. Thereafter she had taken a bus to Devika's place and reached there by about 10.00 a.m. on 26. 08. 1993. The prosecutrix did not disclose to Devika or to her sister the alleged act of rape committed on her by the accused-appellant. All that she told Devika was that since her grandmother was not there, she had been directed by some lady to the accused-appellant's house, in order to look for a job. Thereafter she went to the accused-appellant's house and stayed there for the night and was able to talk to the accused-appellant. She further said that she did not tell Devika about the incident of rape due to fear of embarrassment. The prosecutrix was at Devika's house the whole day until the evening, when at about 7.00 p.m. Devika's father had come with some police officers. Thereafter she had been taken to the Welikada Police Station. That night she was at the Welikada Police Station with the police matron, seated on a bench and then she was produced before a Senior Police Officer who recorded a statement from her. Sometime later she was examined by a doctor. Prosecutrix further said that she continued to remain at the Police Station for about 11 days.

Dr. Nilukshi Abeysinghe in her evidence stated that she examined the prosecutrix on 27. 08. 1993 and observed that her vagina was an unusual one. It was so because her vaginal channel was unusually wide and could admit two fingers with ease. On examination of her labia minora and majora and the wave indentations on the walls of the orifice revealed that the prosecutrix was not a person who has had regular acts of sexual intercourse. Further according to the doctor the prosecutrix had a "convoluted hymen" where the first act of intercourse may not cause any bleeding. In fact the doctor said that at the time of the examination the prosecutrix was a virgin and her hymen was intact, and this situation was due to the unusual nature of her hymen. Dr. Abeysinghe also said that she examined the accused-appellant on 06. 09. 1993 and he had no injuries.

Devika Subashani gave evidence and admitted the position that on 25. 08. 1993, the prosecutrix came to her house in the morning at about 11.00 a.m. and left her house after lunch stating that she was going to her grandmother's place. She did not bring anything with her. On the following day i.e. on 26. 08. 1993 she came at about same time as on the previous date and told her that her grandmother was not there and further that she went to the house of the accused-appellant and stayed there that night talking to the accused-appellant and his aunt. The accused-appellant had given her Rs. 1,000/= asking her to go to school from her (Devika's) house. Prosecutrix never told her that the accused-appellant had committed rape on her that night or even the fact that she had left her aunt's house for good. Later in the evening the police had come and taken her away. Indrani Tirimanna the mother of the prosecutrix testified to Court that the prosecutrix stayed in her sister's house and attended school. She used to visit the prosecutrix once a week. When she found that the prosecutrix was missing, she made a complaint at the Welikada

Police Station on 25. 08. 1993, and later on 26. 08. 1993, the police had informed her that the prosecutrix was found. However the police did not allow her to speak to her daughter. According to this witness she had no relation at 4th Lane, Pitakotte. However she had heard of a grandmother with whom she had no contact. Further she stated that she had no knowledge as to why the prosecutrix ran away from her sister's place.

Karunawathie the Police Matron testified that on the evening of 26. 08. 1993 she went with the police to Walpola and brought the prosecutrix to the Welikada Police Station. Prosecutrix was in her custody on the night of 26. 08. 1993, till the following morning. On that night prosecutrix did not talk with her. However on the following night i.e. on 27. 08. 1993 prosecutrix started crying and when she questioned her, she told the witness how she went in search of her grandmother and then how she was directed to the house of the accused-appellant in order to find a job. The accused-appellant had then taken her in his car saying that he would drop her at her house and had taken her somewhere else and had committed rape on her. When the witness had informed the O.I.C. about this incident a statement was recorded from the prosecutrix. S.I. Randeniya of the Welikada Police gave evidence in relation to the conduct of the investigations in respect of this case and the recording of the statements of various witnesses and the fact of the accused-appellant surrendering to the police on 06. 09. 1993. He admitted that the prosecutrix was kept at the Welikada Police Station for 11 days after she was brought to the Police Station on 26. 08. 1993. Finally the Court official Kinsley Udaya gave evidence referring to the contradictions marked V2 and V3, and the medical report of the accused-appellant marked V5. Thereafter the prosecution case was closed leading in evidence P1 to P8.

When the defence was called the accused-appellant gave evidence to the following effect. The prosecutrix had come to his house in search of a job. He had advised her to study and gave her Rs. 1,000/= on that occasion. When he wanted to drop her at her aunt's house on the night of 25. 08. 1993 she had refused and wanted her to be dropped at her friend Devika's house. When he had taken her close to her friend's house, she had refused to get down giving him the impression that she wanted to stay with him for the night. Hence he took her to a room in a guest house and spent the night there with her. On that night both of them willingly had sexual intercourse. He had sexual intercourse with her twice and on both occasions he wore a contraceptive. Next morning both of them after a bath had a cup of tea and left the guest house and the prosecutrix was dropped at the Nugegoda Junction. He denied the two charges against him in the indictment. Accused-appellant also called two other witnesses to give evidence on his behalf, i.e. Mulin Seneviratne and Mirian de Silva. Mulin Seneviratne said that one day the prosecutrix came to her gate and asked for the accused-appellant's address and so she gave her the Rampart Road address of the accused-appellant. Mirian de Silva stated that on 25th August at about 3.30-4.00 p.m. the prosecutrix came to her gate looking for the accused-appellant's house and she told her that the accused-appellant was not living there and wanted her to ask the front house for his address. Thereafter the defence case was closed leading in evidence V1 to V5.

At the hearing of this appeal learned Counsel for the accused-appellant submitted that the central issue in this case revolves on the question of the credibility of the prosecutrix Inoka Gallage. Counsel contended that whatever test one applies to assess her evidence, it would appear that her evidence is untrustworthy and unreliable. Therefore he submitted that it is unsafe to act on her evidence, and that a

conviction based on her testimony cannot be allowed to stand. Initially it would be necessary to consider whether the story of the prosecutrix is true when she says, that she ran away from her aunt's house to her grandmother to continue her schooling. On the other hand can it be said that the prosecutrix left her aunt's house for the sole purpose of meeting the accused-appellant as suggested by the defence. In this connection the evidence of the prosecutrix that she carried the note book which contained the name and the address of the accused-appellant cannot be ignored. Besides she thought it fit to carry this note book but not her school books. This note book was marked by the defence as V1. It is also significant that this note book though marked by the prosecution at the non-summary inquiry had been deleted from the list of productions attached to the indictment. The defence had to go out of its way to have this note book marked and produced at the High Court trial. This note book contained the name and address of the accused-appellant admittedly written in her own hand writing. However she tried to make out that the note book had no relevance to her on that occasion, since her meeting the accused-appellant was a chance meeting. On this point the evidence of the defence witnesses Mulin Seneviratne and Mirian de Silva appears very significant. Mirian de Silva testified that on 25th August when the prosecutrix came to her looking for the accused-appellant's house, she told her that he was not living there and to inquire from the front house. The evidence of Mulin Seneviratne the lady in the front house was that when the prosecutrix came to her asking for the accused-appellant's address she had given her the Rampart Road address. Therefore the evidence of these two witnesses is indicative of the fact that the prosecutrix having failed to locate the accused-appellant at 26/1, 4th Lane, had sought help from Mirian de Silva and Mulin Seneviratne to get at his new address. Even though the evidence of these two witnesses appeared to be very favourable to the defence, the learned trial

Judge has taken a contrary view, when she stated in her judgment as follows: "the defence called two witnesses Muriel Silva and Mulin Seneviratne who corroborated the prosecutrix in her evidence as to the events that preceded her meeting with the accused". (Vide Page 608 of the Judgment). This in our view is a serious misdirection on the part of the learned trial Judge. She has failed to appreciate the defence evidence which was most favourable to the accused-appellant. The evidence of these two witnesses ruled out the prosecution story that the meeting of the accused-appellant by the prosecutrix on that day in question was a chance meeting and supported the defence suggestion that the meeting of the accused-appellant by the prosecutrix on 25. 08. 1993, was a thought out act. Trial Judge's failure to appreciate this position has undoubtedly prejudiced the case of the accused-appellant from the very beginning.

It was submitted by learned Counsel for the accused-appellant that the story of the prosecutrix that she went in search of "a grandmother" to stay with her for the purpose of schooling was highly improbable. According to Indrani Tirimanna the mother of the prosecutrix, she had no relation living at 4th lane, Pitakotte. She had heard of a grandmother with whom they had no such contact. According to the prosecutrix herself, the woman described by her as grandmother is not her mother's mother but a distant relative. Therefore there was the possibility that the prosecutrix was really unaware whether such a grandmother was among the living when she allegedly set off in search of her house on 25. 08. 1993. Further it would appear from the evidence of the prosecutrix that her grandmother was living in a shanty type of house and the question would arise as to whether the prosecutrix could have attended school from there and that whether the grandmother could have spent for her schooling and other needs, a consideration which cannot be overlooked.

Also one cannot be blind to the fact that here was a girl who had an aunt to look after her, she had her mother living close by visiting her every week, leaving the aunt and the mother for good, in search of a distantly connected grandmother, about whom she had not heard for more than three years. Surprisingly the prosecutrix who was keen on continuing her studies from her grandmother's place never carried a single book except the note book containing the address of the accused-appellant. This conduct is highly improbable. Therefore her alleged trip to "a grandmother' appears to be a pretext to meet the accused-appellant.

Another matter referred to by Counsel for the accused-appellant was the subsequent conduct of the prosecutrix after finding that her grandmother was not there at 4th lane, Pitakotte. The prosecutrix who wanted to attend school from her grandmother's place suddenly changed her plans and wanted to find a job. It is in search of a job that she proceeded on foot from the 4th Lane, a distance of 3/4 mile to the new residence of the accused-appellant. Since the accused-appellant was not in the house, she met his aunt who told her that there were no jobs available. If her idea was to find a job, there is no reason why she should remain there for four long hours waiting for the accused-appellant even after she became aware from the aunt that there were no jobs available. Thus to wait for the accused-appellant who was a total stranger to her to get a job was a remote possibility. This conduct of the prosecutrix showed that even going in search of a job appears to be a cover up. When the accused-appellant came home four hours later, the next thing that happened was a two hour discussion between the prosecutrix and the accused-appellant. At the discussion the prosecutrix did not say anything about her leaving the aunt's house in search of her grandmother. Any person with common sense in such a situation would have disclosed this fact, for such a disclosure

would have got more sympathy towards the prosecutrix. This conduct would support the defence suggestion that her trip to 4th lane, Pitakotte was to meet the accused-appellant. After the discussion that night at about 11.00 or 11.30 p.m. the prosecutrix had set off with the accused-appellant in his car to go to Devika's house. It was a late night ride with a man whom she had come to know just two hours earlier, a total stranger but a film star she adored. There was nothing to prevent the prosecutrix staying over the night in the accused-appellant's house and proceeding to Devika's house on the following morning. In fact accused-appellant's aunt had earlier agreed to keep the prosecutrix in the house for the night. Any way prosecutrix left with the accused-appellant and as she said on the way the plans were changed, accused-appellant deciding to take her to a friend's place and she agreeing to go with him without much ado. The fact that the prosecutrix went into the room of this unknown house with the accused-appellant in the dead of the night, without making any fuss, makes her version that she was an unwilling party to sexual intercourse highly improbable, having regard to the normal conduct and behaviour patterns of women and girls in Sri Lankan society. It is common sense that both of them went into this room for sensual enjoyment. Therefore when the prosecutrix says that accused-appellant had sexual intercourse with her against her will or without her consent, her story becomes unacceptable.

It was also submitted by Counsel that in the room after two acts of rape, both the prosecutrix and the accused-appellant slept and then they brushed their teeth, had a bath, enjoyed a cup of tea served by a waiter and left the place in the car. Finally the prosecutrix was dropped at the Nugegoda Junction. Prosecutrix then proceeded to Devika's house and told her that she spent the night at the accused-appellant's house chatting with him and his aunt. Not one word about

rape being committed on her by the accused-appellant. She spent the whole day at Devika's place but never cared to tell Devika, Devika's sister or Devika's father about her plight. Surely this is not the behaviour of a rape victim. Perhaps, if Devika's father did not contact the police due to some unknown reason, this case may not have seen the light of day. It would appear that the conduct of the prosecutrix in relation to the events that took place after meeting the accused-appellant on the night of 25. 08. 1993, till she was removed by the Welikada Police from Devika's house on the following day, i.e. 26. 08. 1993 around 7.30 p.m., cannot be the conduct expected of a person who had been subjected to an act of abduction and rape. On the contrary it would appear to us as the learned Counsel for the accused-appellant commented, that their conduct was more analogous to the conduct of a "honeymoon couple". Only sensible conclusion that could be arrived at is that, the prosecutrix had lied to Court when she said she was abducted and raped.

In judging the testimonial trustworthiness of the prosecutrix one of the possible tests that could safely be applied would be the test of probability and improbability. The defence made the submission that the evidence of the prosecutrix was untrustworthy in that her conduct was most improbably. It was contended by counsel that the learned trial Judge has not correctly applied this test of probability and improbability in order to determine the creditworthiness of the prosecutrix as evident from the following passage of her judgment which reads as follows: "In this case, Inoka's evidence when taken in conjunction with the evidence of the two defence witnesses and other witnesses of the prosecution, reveal that the "probabilities factor" echo's in favour of the version narrated by the witness." (Vide page 619 of the Judgement). Learned Counsel submitted that this finding of the learned trial judge that the "probabilities factor" echoes in

favour of the version of the prosecutrix is totally erroneous, unwarranted and do not find support from the evidence in the case. This finding of the learned trial Judge in our view is unrealistic and does not reflect the correct conclusion one could come to on the evidence of the prosecutrix. It is very unfortunate that the Court has misapplied the test of probability and improbability. If this test was properly applied there was no difficulty in coming to the conclusion that the evidence of the prosecutrix was untrustworthy and hence cannot be acted upon. It would appear that she had lied to Court on several material issues. As learned Counsel submitted the approach of the learned trial Judge in applying the test of probability and improbability is flawed by reason of applying a subjective test. This is clear from the following passage cited by Counsel from the judgment of the trial Judge which reads as follows." The defence suggested that her version of the incident was improbable, when considered in the light of the probability improbability test, as it went against the behaviour of any reasonable person. He clearly based this on the stereotype accepted and expected behaviour of women in society." (Vide Page 621 of the Judgment.) Counsel submitted that in applying the test of probability and improbability the test to be applied is an objective test and not a subjective test which has been erroneously applied by the learned trial Judge. In support of this contention Counsel cited the observation of Justice Mackenna referred to by E.R.S.R. Coomaraswamy, the Law of Evidence Vol. II (Book 2) Page 1052 which reads as follows: "When I have done my best to separate the truth from the false by these more or less objective tests, I say which story seems to me the more probable, the plaintiff's or the defendant's, and if I cannot say which, I decide the case, as the law requires me to do in the defendant's favour".

In our view there is no other way to apply the test of probability and improbability except by considering the

yardstick of accepted and expected behaviour of women in society. In other words it is the application of the test of normal human conduct. As Jayasuriya J. observed in the case of *Wickramasuriya v. Dedoleena & others*[1]" A judge in applying the test of probability and improbability relies heavily in his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate." In this case it would appear that both the trial Judge and the learned Senior State Counsel who prosecuted (as observed from his written submissions) seem to have been imbibed with an erroneous notion that when applying the test of probability and improbability it is the subjective test and not the objective test that has to be resorted to, so much so that the learned Senior State Counsel seems to have pleaded before the trial Judge not to reject the evidence of the prosecutrix by applying the objective test when he stated in his written submissions as follows:" Hence it is submitted that through an objective assessment of the prosecutrix's conduct her evidence should not be rejected." What is inherent in this submission of learned Senior State Counsel is that if an objective test was applied in assessing the evidence of the prosecutrix, then her evidence had to be rejected. This is where the confusion arose.

A submission was made by Counsel for the accused-appellant that the two contradictions (V2 & V3) marked in relation to the use of the contraceptives and the two acts of sexual intercourse committed by the accused-appellant, had the effect of showing or highlighting the probability of consent on the part of the prosecutrix. In cross examination when the prosecutrix was asked whether any contraceptives were used by the accused-appellant, her reply was that she could not remember. However it was proved at the trial that at the non summary inquiry she had stated to Court that "He took from the bag a yellow elastic thing. He took it out of the packet. I saw

it was as a circular thing. He put it to his male organ" This contradiction was marked as V2. The other contradiction arose in view of her evidence in the High Court that she was subjected to one act of rape, where as in the Magistrate's Court she has stated that there was a second act of sexual intercourse using a contraceptive. This contradiction was marked V3. It is strange that prosecutrix having told the Magistrate that the accused-appellant used contraceptives at the time of rape, to have forgotten this vital fact when she gave evidence before the High Court, for the reason that according to her this was the first time she had ever slept with a man. Further according to her evidence, it would appear that she had seen a contraceptive for the first time only on that night. It is to be noted that the prosecutrix would have seen a contraceptive for the second time, when the accused-appellant used a contraceptive for the second act of sexual intercourse. It is also very surprising that after having told the Magistrate about the second act of sexual intercourse using a contraceptive the prosecution has forgotten it and said one act of rape at the trial before the High Court. To us it would appear that the reason for her forgetfulness lies elsewhere. As Counsel submitted if the prosecutrix admitted the use of contraceptives and the second act of sexual intercourse, the probability of consent would have been far greater. Besides the second act of sexual intercourse took place after they had slept for some time, a type of conduct which is very suggestive of sexual intercourse having taken place with consent. Surely any woman after the first act of rape would not think of sleeping with the rapist again unless at gun point. Further if the accused-appellant attempted to ravish her for the second time, prosecutrix would have yelled and cried for help. Human conduct is such, that, when there is danger it is natural for a human being to cry for help whether there were people around or not. In this case prosecutrix tried to tell the world that she did not raise cries because the accused-appellant had told her

earlier that there were no one around. This evidence and the reasoning is unacceptable. Common sense will tell us that the prosecutrix did not shout or cry as she was a willing party to the sexual conduct. Even though these two contradictions were very suggestive of the sexual acts having taken place with the consent of the prosecutrix, it was most unfortunate that the trial Judge has glossed over the two contradictions when she stated in her judgment as follows: "The Learned Counsel for the defence also submitted that the prosecutrix in her testimony, under cross examination denied that the accused had worn a contraceptive during intercourse and marked a contradiction in her testimony given at the non summary trial on this point. In considering this contradiction, I hold that it is not a material contradiction." . . . "Be that as it may according to the facts of this case and taking into consideration the several traumatic events that had occurred from 25th to 26th of August 1993, in the life of the prosecutrix I hold that she may have with time reasonably forgotten the exact number of the several acts of sexual intercourse." (Vide pages 609 and 610 of the judgment). With very great respect to the judge, we cannot agree with her. Trivial contradictions can be ignored, but not contradictions which go to the very core of the accused-appellant's case. (Vide *Wickremasuriya v. Dedoleena and others*). In this case, the two contradictions were material contradictions which go to the very root of the accused-appellant's case of consent and therefore very favourable to the accused-appellant. However the two contradictions were grievously overlooked by the trial Judge. Further on a reading of the judgment it would appear that the learned trial Judge has been misled and dazzled by some wrong notion of gender inequality.

Another important submission that was advanced by learned Counsel for the accused-appellant which was very supportive of the theory of consent was the absence of injuries

on the prosecutrix. This submission has to be considered in the light of the evidence that was elicited from the prosecutrix. It was her evidence that she struggled with the accused-appellant when she realized that he was trying to molest her and at one stage she even fell from the bed. To escape from his grip she even had scratched the accused-appellant. She had put up a fierce resistance before he managed to enter her. Hence one would expect some injury, even a scratch mark, on some part of her body or even on the body of the accused-appellant. Absence of such tell-tale marks is a circumstance that was strongly supportive of the sexual act having taken place with her consent. (Vide the case of *Karunasena v. Republic of Sri Lanka*[2] at 65). Therefore we are of the view that there is much merit and substance in this submission of Counsel and very clearly supportive of the defence case that the sexual act was committed with the consent of the prosecutrix. If that be the case the resulting position would be that the prosecutrix has lied to court when she painted a picture of grim and fierce resistance inside the room prior to the act of rape.

Another matter that was raised by the learned Counsel was the absence of corroboration to show that the sexual act was committed on the prosecutrix against her will or without her consent. The law regarding to the requirement of corroboration in rape cases is well settled. As observed by Gratiaen J. in the case of *King v. Attukorale*[3] at 257. "The corroboration which should be looked for in cases of this kind is some independent testimony which affects the accused by connecting or tending to connect him with the crime, and it is settled law that although the particulars of a complaint made by a prosecutrix shortly after the alleged offence may be given against the person 'as evidence of the consistency of her conduct with her evidence given at the trial,' such complaint 'cannot be regarded as corroboration in the proper sense in

which that word is understood in cases of rape and it is misdirection to refer to it as such . . . such evidence is not corroboration because it lacks the essential quality of coming from an independent quarter." These are much hallowed principles enunciated by erudite Judges of our Superior Courts which cannot be and should not be just ignored. In this case where the sexual act has been admitted and the matter in issue is whether it was done with consent or without consent one possible area which could have provided independent corroboration was the medical evidence. However according to medical evidence there being no injuries either on the prosecutrix or on the accused-appellant there appears to be no independent corroboration relating the act of sexual intercourse having been committed on the prosecutrix against her will or without her consent. This vital aspect has not been considered by the trial Judge.

Another matter of significance referred to by learned Counsel was the prosecutrix's delay in making a prompt complaint about the incident of rape. She kept mum when the waiter brought tea to the room in the morning. She spent the whole day at Devika's house on 26. 08. 1993, without telling anybody of the incident of rape. Even when she was taken to the Welikada Police Station at about 7.30 p.m. on the 26th night, in her short statement recorded by the police she did not refer to the act of rape. It was on the following day i.e. on 27. 08. 1993, in her second statement that the prosecutrix had thought it fit to mention about the act of rape. Under normal circumstances, one would have expected the prosecutrix to have come out with the incident of rape to the police at the first opportunity and that is what the test of spontaneity and contemporaneity requires. Surprisingly it did not happen in that way. It happened only on the 27th night as stated by the police matron Karunawathie in her evidence, a fact not corroborated by the prosecutrix herself. According to the

prosecutrix on the 26th night when she was seated on a bench at the police station she said she spoke to the police matron Karunawathie. No body knows what she spoke to Karunawathie. All that the learned Senior State Counsel elicited amidst objections from the defence was the affirmative answer "yes" to the leading question put to the prosecutrix whether what she told the matron was true. Thus there is no evidence from the prosecutrix that she told Karunawathie about an incident of rape committed on her by the accused-appellant. On the other hand Karunawathie's evidence was that on the 27th night at the police station prosecutrix told her that she was raped by the accused-appellant. This evidence of the matron is heresay, since the prosecutrix did not say what she told the police matron. Hence this item of evidence elicited from the police matron is inadmissible evidence. The next thing the police matron stated in her evidence was that she brought it to the notice of the O.I.C. Wekadapola next morning and that would be 28th morning. On this matter Police matron Karunawathie was very clear that on the 26th night prosecutrix did not talk to her. It was on the 27th night that the prosecutrix cried and came out with the story of rape by the accused-appellant. However as learned Counsel pointed out that these contradictory positions have not been resolved or considered by the trial Judge. Learned trial Judge has simply taken things for granted, when she considered the case on the basis that on the 26th night the prosecutrix was seated on a bench at the police station with the police matron, the prosecutrix started crying and stated that the accused-appellant had raped her, that on the following morning the police matron brought it to the notice of the O.I.C. with all these inconsistences, we are at a loss to understand how the trial Judge could have stated in her judgment as follows: "The evidence to the sequel of events that had occurred after she had been dropped off by the accused was corroborated in great detail by both Devika and the matron." (Vide page 607 of the judgment). Far from

corroborating, the prosecutrix stands contradicted by the matron. In our view it is a serious misdirection by the trial Judge having regard to the evidence in the case.

Learned Counsel complained that the trial Judge has meted out special treatment to the prosecutrix at the trial. It was to the following effect:- (A) That the trial was held in camera, (B) That when the prosecutrix did not come out with the story of rape an adjournment was given for the following day in spite of the objections raised by the defence Counsel, followed by a change of prosecuting Counsel on the next date of trial, (C) That the court facilitated the prosecutrix to adduce evidence from the platform occupied by the Registrar without using the witness box, (D) That the prosecutrix was informed that if necessary she could even have her mother or a close relation accommodated in the Court, (E) That the Court gave the prosecutrix an assurance that she had the protection of the Court, (F) Finally inquiring from the prosecutrix when she became tongue-tied whether the accused had threatened her. In view of the special treatment afforded to the prosecutrix, learned Counsel complained that the accused-appellant was deprived of a fair trial. In our view, holding the trial in camera was unnecessary for the reason that the prosecutrix had earlier given the same evidence in a crowded Court house before the Magistrate. Infact the learned Magistrate had disbelieved her then. Further at the High Court trial prosecutrix was a woman of 20 years of age. We cannot approve these steps taken by the learned trial Judge to give special treatment to the prosecutrix at the expense of the accused-appellant who was entitled to a fair trial. No Court should try to molly-coddle a witness as has happened in this case. The result would be very dangerous in that the prosecutrix would have got wrong signals to lie in Court. It is very important in a criminal trial that an accused should have a fair trial and therefore situations should be avoided so that no complaint of

discrimination, bias or injustice could be made. It may be that the Court involuntarily allowed these things to happen with a feeling of sympathy to the prosecutrix. However the net result is that the Counsel for the accused-appellant complained that his client was denied of a fair trial.

It was also contended by the counsel for the accused-appellant that with all the proddings in the High Court the prosecutrix was evasive, there was reluctance and silence on her part to give evidence, there were times when she became tongue-tied, there were two serious contradictions in her story and there was a very high degree of improbability in her story. All these features in her conduct collectively reflected the demeanour of the prosecutrix. However with all these weaknesses in her evidence, we are unable to appreciate the reasoning of the learned trial Judge when she stated in her judgment as follows: "The testimony of the complainant Inoka was in my findings a testimony that was truthful and honest. Her demeanour, conduct and the manner in which she gave her testimony was straight forward and she was never evasive nor did she appear to hide anything . . ." (Vide page 618 of the Judgment). This is certainly not a realistic assessment of the evidence of the prosecutrix.

Another argument advanced by counsel was that there were several factual misdirections on the part of the learned trial Judge which has caused prejudice to the accused-appellant's case. For example it was submitted that the trial Judge has stated in her judgment that the prosecutrix had left the house with the consent of the aunt, a fact not borne out by her evidence. Trial Judge has also stated in her judgment that the prosecutrix had left home to seek employment when the evidence was that the prosecutrix left home for the purpose of schooling. Similarly there were several other factual inaccuracies referred to by Counsel (vide written

submissions). However it is unnecessary to go into all these details here. Suffice to state that these fatal misdirections have caused serious prejudice to the accused-appellant as submitted by Counsel.

Learned Counsel for the accused-appellant complained that the trial Judge has rejected the evidence of the accused-appellant for two reasons. Firstly that the defence of consent taken by the accused-appellant was belated, in that it was taken for the first time after the close of the prosecution case. It was said that the suggestion of consent was not put to the prosecutrix though she was cross examined at great length. Counsel submitted that even though there is no burden on the accused-appellant to put forward his defence to the prosecutrix, it is clear from the nature of the cross examination done relating to what took place in the room, detailed questioning was done to show that there was consensual intercourse when defence elicited material such as brushing her teeth, having a bath, partaking of tea and leaving the room without a fuss. The second ground for rejecting accused-appellant's evidence was that he had denied it in his police statement that he had sex with the prosecutrix. However accused-appellant's evidence was that he advisedly did not admit it at that stage. It would appear from her judgment that the trial Judge seems to have gone on the basis that the prosecution could profit from this alleged weakness in the defence case. It is an imperative requirement in a criminal case that the prosecution case must be convincing, no matter how weak the defence is, before a Court is entitled to convict an accused. What the Court has done in this case is to bolster up a weak case for the prosecution by referring to the weaknesses in the defence case. This cannot be permitted. The prosecution must establish its case beyond reasonable doubt. There is no escape from this requirement. (Vide the case of *Karunadasa v. O.I.C. Nittambuwa Police*[4] at 160). Besides a comparison of the defence case and

the prosecution case is not permissible. In the case of *James Silva v. The Republic of Sri Lanka*[5], the trial Judge stated that "I had considered the evidence of the accused and I hold that it is untenable and false in the light of the evidence led by the prosecution." The Court held that there is a serious misdirection in law. It is a grave error for a trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence. It is to be observed that the trial judge in this case too has done the very same error which is not permitted in law when she stated in her judgment as follows: "Having carefully considered his evidence, and having evaluated it with the rest of the evidence I reject his testimony as being unworthy of credit." (Vide Page 620 of the judgment). This is a serious misdirection in law. Therefore by reason of the learned trial judge misdirecting herself on the law as stated above, she has failed to consider whether the evidence of the accused-appellant created a reasonable doubt in the prosecution case. Undoubtedly this erroneous approach of the trail Judge has seriously prejudiced the accused-appellant's case.

One other matter that needs our attention relates to the complaint of learned Counsel for the accused-appellant that the learned trial Judge has made use of inadmissible material referred to by learned Senior State Counsel in his written submissions on the subject of disorders known as "Post traumatic experience". However no such material was elicited from the doctor or from any other medical witness. Such behavioural patterns attributed to rape victims surfaced for the first time in the written submissions of learned Senior State Counsel. It would appear that the trial Judge has profited from this inadmissible material when she stated in her

judgment as follows: "State Counsel made reference to several well known concepts relating to the offence of rape which describe how rape victims go into denial or seek escape or oblivion in order to deliberately erase the event from their mind." (Vide page 610 of the judgment). It is well to remember that in the case of *Regina v. Pinhamy*[6] at 176 it was held in very clear terms that Counsel is not entitled to read to the jury extracts from any scientific treaties unless such extract had been introduced by way of evidence in the course of a trial . . . Hence it is to be noted that the trial judge has used inadmissible evidence in coming to an adverse finding against the accused-appellant.

On a careful consideration of all these matters it is absolutely clear that the evidence of the prosecutrix is unreliable and untrustworthy. The learned trial judge has totally misdirected herself in the assessment of her evidence. Further the judgment is unreasonable and cannot be supported having regard to unsatisfactory nature of evidence in the case. Besides the learned trial Judge has misdirected herself on the law relating to consent in rape cases by holding that "the law has no place for tacit consent" It is a serious misdirection in law. This erroneous view on the part of the trial Judge prevented her from considering even a single item of the numerous items available in this case to decide the issue of consent. This was a grave non direction amounting to a misdirection. The notion of tacit consent or implied consent was too glaring in this case to be disregarded. Hence it has caused very serious prejudice to the accused-appellant.

There were other submissions made on matters such as keeping the prosecutrix in police custody for 11 days, the refusal by Court to forward the letter marked P4 (alleged to have been written by the prosecutrix to the appellant) to the E.Q.D. as requested by the defence. However it is unnecessary

to go into all these matters in view of the material already considered. We have given our careful consideration to the submissions made by learned Deputy Solicitor General in his customary thoroughness of facts and presentation. However we are unable to accept his submissions in view of the unsatisfactory nature of the evidence given by the prosecutrix.

One last word relating to the conduct and the behaviour of the accused-appellant on this occasion would be appropriate in the circumstances of this case. Undoubtedly the accused-appellant in the situation he was placed did not conduct himself as a cultured man to say the least. After all, the prosecutrix was a young school girl immature and foolish, trying to force herself on him. Accused-appellant being a more mature person should have acted with restraint. Indeed that was his failing. However, in the final analysis, the law is not so unkind as to call him a rapist, for his failure to behave as a cultured man which the situation grievously demanded.

For the aforesaid reasons we allow the appeal, set aside the conviction and sentence. The accused-appellant is acquitted.

KULATILAKA, J. - I agree.

Appeal allowed.