

SAMAN KUMARA
VS
REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW. J
UPALY ABEYRATNE. J
CA 29/04
HC RATNAPURA 107/2002
JULY 7, 2009

Evidence Ordinance Section 120 (2), 120 (3) - Penal Code 363 (a) - Rape - Both get married - Convicted - Prosecutrix wife of accused? - Is the prosecutrix a competent witness to give evidence against the accused - Does Section 120 (3) apply when sexual intercourse is performed on his wife by the husband? - Marriage Registration Ordinance Section 19, Section 42 - Criminal Procedure Code, Section 607.

The accused - appellant was convicted for raping a girl. Two years after the incident both of them got married. The trial Judge concluded that, the prosecutrix was a competent witness to give evidence.

It was contended that, the prosecutrix being the wife of the accused is not a competent witness, and the trial Judge had used illegal evidence to convict the accused.

Held:

- (1) It cannot be concluded that sexual intercourse was performed by the accused on the prosecutrix without her consent.
- (2) To call the wife of the husband under Section 120 (3), it should be proceedings instituted against the husband for causing bodily injury or violence to the wife. Section 120 (3) envisages a situation where husband or wife assaults his or her spouse - but not when sexual intercourse was performed on his wife by the husband.
- (3) The prosecution in a case of rape cannot call the wife of the accused to give evidence against her husband. The prosecutrix is not a compatible witness against the accused unless and until the marriage is declared void by the District Court.

APPEAL from a judgment of the High Court of Ratnapura.

Case referred to:

K. C. Morjan vs. Attorney General - CA 3/2002-CAM 13.1.2003

Dharmasiri Karunaratne for accused-appellant
Sarath Jayamane DSG for AG

July 16, 2007

SISIRA DE ABREW, J.

Heard both counsel in support of their respective cases.

The accused-appellant in this case, was convicted for raping a girl named Kuttigahawattalage Chandrika Priyadharshani and was sentenced to a term of 10 years rigorous imprisonment and to pay a fine of Rs. 10,000/- carrying a default sentence of one years imprisonment. This appeal is against the said conviction and the sentence.

Learned Counsel for the accused-appellant submits that the prosecutrix is not a competent witness to give evidence against the accused-appellant since she is the wife of the accused-appellant. Therefore the most important question that must be decided in this case is whether the prosecutrix is a competent witness to give evidence against the accused-appellant. The prosecutrix in her evidence admitted that the accused-appellant was her husband (vide page 49-51). She has further admitted that the said marriage was in existence at the time she gave evidence.

In order to find an answer to the question that must be decided in this case, it is necessary to consider section 120(2) and 120(3) of the Evidence Ordinance.

120(2) of the Evidence Ordinance read as follows:-

“In criminal proceedings against any person the husband or wife of the such person respectively shall be a competent witness if called by the accused, but in that case all communications between them shall cease to be privileged”.

120(3) reads as follows:-

“In criminal proceedings against a husband or wife for any bodily injury or violence inflicted on his or her wife or husband, such wife or husband shall be a competent witness and compellable witness.”

It is necessary to mention here that according to her evidence she is not judicially separated from the accused-appellant. Therefore section 363(a) of the Penal Code does not apply to the facts of this case.

In order to find an answer to the question that must be decided, it is also necessary to find out whether the sexual intercourse was performed on the prosecutrix with or without her consent. Prosecutrix says that the sexual intercourse was performed without her consent.

According to Agoris who is the grandfather of the prosecutrix, the accused-appellant on the day of the incident came to the prosecutrix's house and thereafter both the prosecutrix and the appellant disappeared from the house. Later when Agoris went in search of them, he found the accused-appellant and the prosecutrix behaving as husband and wife. When both of them saw Agoris they ran away from the place.

When we consider the said evidence, we are unable to conclude beyond reasonable doubt that the appellant performed sexual intercourse on the prosecutrix without her consent. Two years after the incident, both of them got married. When one considers section 120(3) of the Evidence Ordinance it is possible to argue that bodily injury would be caused to the female when the sexual intercourse was

performed and therefore wife is a competent witness to give evidence against the husband. Can bodily injury be caused to a person with his consent? The answer is No.

In this case, we are unable to conclude that the sexual intercourse was performed by the appellant on the prosecutrix without her consent. When we consider the evidence, we feel that sexual intercourse was performed with her consent. Therefore we are unable to conclude beyond reasonable doubt that bodily injury or violence has been caused to the prosecutrix.

Further to call the wife of the accused under section 120(3) of Evidence Ordinance, it should be the proceedings instituted against the husband for causing bodily injury or violence to the wife. Section 120(3) of the Evidence Ordinance envisages of a situation where husband or wife assaults his or her spouse, but not when sexual intercourse was performed on his wife by the husband.

For the above reasons, I hold that the section 120(3) of the Evidence Ordinance is not applicable to the facts of this case. The prosecutrix in this case was called to give evidence not by the accused but by the prosecution. It is therefore clear that the prosecution in a case of rape cannot call the wife of the accused to give evidence against her husband.

For the above reasons, I hold that the prosecutrix in this case was not a competent witness to give evidence against the accused-appellant. When this question was raised before the learned trial Judge, he concluded that the prosecutrix was a competent witness to give evidence. We have gone through the reasons given by the learned trial Judge and we are unable to agree with the said reasons.

In the case of **K. C. Morgan vs. Attorney-general**⁽¹⁾ the same question arose for consideration. In the said case, the prosecutrix was the legally married wife of the accused. When the matter was brought to the notice of the trial Judge, he

over-ruled the objection raised by the defence. His Lordship Justice Raja Fernando held as follows:- "In terms of section 19 of the Marriage Registration Ordinance or section 607 of the Civil Procedure Code it is only the District Court that has the jurisdiction to either dissolve or annul a marriage. Further section 42 of the Marriage Registration Ordinance makes the certificate of marriage proof of marriage. We hold the prosecutrix was not a compellable witness against the accused unless and until the marriage is declared void by the District Court".

In the instant case the marriage between the prosecutrix and the accused-appellant has not been dissolved by the District Court. I have earlier held that the prosecutrix in this case was not a competent witness to give evidence against the accused-appellant. I therefore hold that the learned trial Judge had used illegal evidence to convict the accused-appellant. This is sufficient to vitiate the conviction.

For above reasons, we set aside the conviction and the sentence and acquit the accused-appellant of the charge levelled against him.

We would like to mention here that the Commissioner General of Prisons is not entitled to keep the accused-appellant in his custody once he receives a copy of this judgment. It is not necessary for the Prison Authorities to produce the accused-appellant in the High Court and get an order of release.

UPALY ABEYRATHNE, J. - I agree.

Appeal allowed.