[COURT OF CRIMINAL APPEAL]

1971 *Present :* **Alles, J. (President), Weeramantry, J., and Thamotheram, J.**

PREMASIRI and another, Appellants, *and* THE QUEEN, Respondent

C. C. A. 49 AND 52 OF 1971, WITH APPLICATIONS 71 AND 74

S. C. 286/66—M. C. Gampaha, 8216/A

Evidence—Charge of rape—Uncorroborated testimony of the prosecutrix regarding the sexual act—Validity of conviction based thereon—Requirement of evidence of identification of the accused—Court of Criminal Appeal Ordinance, s. 5 (1)—" Unreasonable verdict ".

Where, in a prosecution instituted against two or more persons for rape, the case for the prosecution regarding the sexual acts depends entirely on the uncorroborated evidence of the prosecutrix, it is the duty of the Judge to direct the jury clearly that the evidence of the prosecutrix must establish not only that intercourse took place without her consent but also that she identified the accused who ravished her.

A verdict of the jury would be " unreasonable " within the meaning of Section 5 (1) of the Court of Criminal Appeal Ordinance if the jury viewed the evidence in sections and accepted and convicted the appellant on those parts that were satisfactory and disregarded those facts which pointed to the improbability of the story put forward by the Crown.

In a charge of rape it is proper for a jury to convict on the uncorroborated evidence of the complainant only when such evidence is of such a character as to convince the jury that she is speaking the truth.

APPEALS against two convictions at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, *T. Joganathan*, *M. Devasagayam*, *S. C. B. Walgampaya* and *W. H. O. Perera* (assigned), for the accused-appellants.

Ian Wikramanayake, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

December 6, 1971. ALLES, J.—

The appellants, who were the 2nd and 5th accused at the trial, were convicted by divided verdicts of unlawful assembly and rape. The 2nd appellant was convicted by a 5 to 2 verdict of unlawful assembly and a 6 to 1 verdict of rape. The 5th appellant was convicted by 5 to 2 verdicts of both offences. At the conclusion of the arguments in appeal we set aside the convictions of the appellants and stated that we would give our reasons later. We now set down the reasons for our order.

This case has had a chequered career. These two appellants with four others were indicted before the Assizes at Negombo and at the previous trial the jury convicted all six accused of unlawful assembly, acquitted them of robbery, convicted the 1st, 2nd and 5th accused of rape and acquitted the 3rd, 4th and 6th accused on the same charge. The Court of Criminal Appeal set aside the convictions on the ground that inadmissible evidence was led at the trial and ordered a retrial. At the retrial all six accused were again charged with unlawful assembly and the 1st, 2nd and 5th accused with rape. At the conclusion of the prosecution case the 1st accused died and the trial was continued against the remaining accused on an amended indictment. At the retrial the 2nd, 3rd, 4th, 5th and 6th accused were again convicted of unlawful assembly and the 2nd and 5th accused of rape. On the latter charge they were sentenced to nine years rigorous imprisonment.

The accused were residents of the village of Obawatte, Kiribathgoda, in the Kadawata police area. The 1st accused is the paternal uncle of the 4th, 5th and 6th accused. The case for the prosecution depended almost entirely on the evidence of the prosecutrix, Soma Liyanage. She was a married woman, 27 years of age with one child and was adopting another, and lived in a house in a fairly populated area. According to her evidence her husband had left for Galgamuwa in the Kurunegala District on the morning of 11th June and the only inmates of her house on the night in question—11th June 1966—were her two children and a servant girl, aged 11 years called Karunawathie. According to Soma Liyanage's story, about 11 p.m. the 1st accused Abraham Dissanayake, whom she had known previously, came to her house, banged at the door, abused her in obscene language and forced her to open the door. There was a lamp lit at the time and as she opened the door a gang of nine or ten people rushed in. The 1st accused struck her on the face and the 3rd accused, whom also she had known before, struck her on the head with a club. The others assaulted her. She was then bodily dragged out of the house towards the lavatory behind the house. She was wearing a black skirt and a bodice at the time and the assailants removed the skirt and the bodice leaving her naked. Although she resisted and raised cries nobody came to her rescue. Soma Liyanage purported to identify all six accused as persons who at various stages had forcible sexual intercourse with her. She stated that it was the 1st accused, who apparently was the ring leader of the gang, who was the first person to rape her. While one might assume that she was in a position to identify the first person to commit an offence on her, especially when that person was known to her and had been identified by her in the house earlier, it seems to us a well nigh impossible task for her to identify the other persons who ravished her having regard to her helpless condition and the state of the light outside and the accused surrounding her. She stated in evidence that she was able to identify her ravishers by the light of torches and also because the persons who committed offences on her were in close proximity to her; she purported to give the order in which she was ravished and naturally hopelessly contradicted herself;

she even purported to state which of the accused passed semen into her vagina and which not, and she stated that at the end of the episode she became unconscious, but was not sure whether it was the 2nd or the 6th accused who was the last person to have intercourse with her. If this was the case there must be grave doubts about the identity of the 2nd accused as one of the ravishers. When she regained consciousness she states that the accused had left her, she found herself nude, she ran into the house and put on some clothes, she found her house ransacked and some of her property missing and her son and adopted son had fled from the house. She then went in search of her son and found him at the Obawatte Temple. Soon afterwards her adopted son also came out from concealment and they all hid themselves in the shrub jungle close by through fear. She tried to get a car to go to the Police but having failed continued to remain in the jungle until dawn. At dawn she met Revd. Sangananda and also a woman called Seelawathie close to the temple premises. She then hired a car and went with Revd. Sangananda, another priest, her children and Karunawathie in search of her husband to Kegalle, Mawanella, Kurunegala and Galgamuwa. Close to Galgamuwa she met Revd. Indrajoti in another car and having failed to meet her husband returned to Colombo with Revd. Indrajoti, met the Inspector-General of Police, obtained a letter from him and made her first complaint at the Kadawata Police soon after midnight on the 12th June. In her first complaint, which has been produced P3, she mentioned the names of the 1st and 3rd accused and said that a person whose name she did not know but who was wearing a red shirt also raped her. She said she did not know the others who raped her and could not describe their features but could identify them if seen. After the complaint was recorded she was sent to the Ragama Hospital for medical examination. The Doctor examined her at 10.55 a.m. on the 13th June, and found abrasions on her forehead, contusions on the upper lip and left forearm, on the right arm, abrasions on the chest, left buttock and left hip bone. He also found contusions on the inner aspect of the right and left thighs which he thought could have been caused if pressure was used to separate the thighs. The vagina was normal and did not indicate any traces of rape. Any inflammation of her parts would have subsided at the time of the Doctor's examination.

Karunawathie supported Soma Liyanage in regard to the entry of the crowd into the house—she reckoned the number as being about 25—the use of violence on her mistress and that she was dragged forcibly towards the rear compound. She identified the 1st, 3rd and 6th accused among the crowd. She also speaks of the events that transpired subsequent to the acts of rape.

The evidence of rape against the 2nd and 5th accused depended entirely on Soma Liyanage's uncorroborated testimony and at an early stage of the summing up the learned Commissioner warned the jury that it was unsafe to convict on her uncorroborated testimony and repeated this warning several times in the course of his charge. In dealing with

corroboration he said " corroboration means something to support or strengthen her evidence in regard to the offence itself, that is the offence of rape, and also something to connect each of these accused with that offence " and again that " corroboration is something independent of her testimony which strengthens the story in relation to the offence and connecting the accused with the offence ". No criticism can be made about these directions which correctly sets out the law in regard to corroboration. Learned Counsel for the appellants, however, submitted that in the circumstances of the present case these directions were inadequate and relied on the recent decision of the Privy Council in *James v. R*[1] (1970) 55 Cr. A. R. 299 which was an appeal from the Court of Appeal of Jamaica where, as in the present case, the conviction depended solely on the question of identification.

It is not disputed that the main question that arose for the consideration of the jury in regard to the culpability of the 2nd and 5th accused was the question whether they were properly identified by the prosecutrix. In regard to the 2nd accused she said she had known him by sight and that he had come on one occasion with the 1st accused to her house about a month prior to the incident. In regard to the 5th accused she stated that she had seen him on several occasions at the boutique of the 1st accused when she had gone to buy provisions. The identification of the 5th accused is subject to certain infirmities. In P3 she referred to one of her ravishers as a person who was wearing a red shirt. When she was being examined by Crown Counsel the question was pointedly put to her in a leading form whether there was a person wearing a red shirt who raped her and it was thereafter that she identified that person as the 5th accused. The learned Commissioner also presented the case of the identification of the 5th accused to the jury on the same lines. Since P3 was made over 24 hours after the alleged rape it should not have been difficult for Soma Liyanage to give a more detailed description of her ravishers, having regard to her previous knowledge of the 2nd and 5th accused. Soma Liyanage's identification of the accused who committed offences on her is certainly unsatisfactory. She shifted her position at the trial from the evidence she gave in the Magistrate's Court and as her evidence progressed at the trial she referred to further details which she had not mentioned earlier and one gets the impression from her evidence that she was prone to exaggeration and became reckless in her evidence in identifying the persons who committed offences on her. It was the suggestion of the defence that some of the accused had been falsely implicated at the instance of Revd. Indrajoti, who at the time of the transaction had been disrobed ; that this ex-monk was the paramour of Soma Liyanage and the political rival of the 1st accused and that her visit to Galgamuwa was not for the purpose of meeting her husband but of meeting this ex-monk who accompanied her to Colombo and who had tutored her to implicate some of the accused falsely.

[1] *(1970) 55 Cr. A. R. 299.*

In *James v. R.* (supra) the conviction for rape rested on the uncorroborated testimony of the prosecutrix, Miss Hall, and the main question for the decision of the jury was whether the accused was properly identified as the ravisher. In that case the questions that arose for the consideration of the jury were whether there was consent or no consent, whether the Doctor's evidence in relation to the finding of semen on the various garments and objects was corroborative evidence of rape and finally the important question whether the accused had been properly identified. The learned trial Judge gave proper directions on the law of corroboration but the Privy Council held that " in sexual cases, in view of the possibility of error in identification by the complainant, corroborative evidence confirming in a material particular her evidence that the accused was the guilty man is just as important as such evidence confirming that intercourse took place without her consent. " The Privy Council criticised the charge of the trial Judge because he not only failed to tell the jury that there was no evidence capable of amounting to corroboration of the prosecutrix's evidence but went on to tell them wrongly that the medical evidence could amount to corroboration, and having said that, stated that the only two questions that remained to be considered were whether the act was committed without her consent and whether the accused was the guilty party. On both these questions he failed to direct the jury as to the need for corroboration. The Privy Council was of the view that the directions of the trial Judge might well have given the impression to the jury that, if they accepted the medical evidence, they were entitled to disregard the warning he had given against the danger of acting on uncorroborated evidence.

In the instant case the medical testimony would seem to indicate that not only were the injuries found on Soma Liyanage received when she was assaulted and forcibly dragged from the house, but also that some of the injuries were caused as the result of forcible sexual intercourse. This would particularly be the case in regard to the contusions found by the Doctor on the inner aspect of the thighs, supporting Soma Liyanage's version that one or more of the accused forcibly separated her legs when she was put on the ground prior to the ravishment. The learned Commissioner also quite justifiably posed the question to the jury that the only reasonable inference to be drawn from the fact that she was dragged out of the house by several males, that her clothes were removed, and that she was in distress can only mean that she was taken out of the house for the purpose of forcible sexual intercourse. In regard to the culpability of the 2nd and 5th accused the learned Commissioner categorically directed the jury that " there is no support from an independent source that connects the 2nd and 5th accused with the crime " and " that there was no corroborative evidence connecting the 2nd and 5th accused with the offence of rape ". To this extent therefore the directions differ from those which formed the subject matter of criticism in *James v. R.*, but the principles laid down by the Privy Council would appear to be applicable on a lesser key to the approach of the learned Commissioner to the prosecution in the present

case, which may have persuaded the jury unjustifiably to accept Soma Liyanage's uncorroborated testimony that the 2nd and 5th accused were two of her ravishers. He presented the case to the jury on the basis that the entire transaction could be divided into five stages—what happened outside the door before it was opened, what happened inside the hall when it was opened, what happened near the lavatory, the night travails of Soma Liyanage before she set out in the morning and finally her peregrinations before she made her statement to the Kadawata Police soon after midnight on the 12th. In regard to the first, second, fourth and fifth stages there was evidence to support Soma Liyanage's testimony but in regard to the third stage it depended solely on Soma Liyanage's uncorroborated testimony. The 2nd and 5th appellants were not identified by Soma Liyanage or Karunawathie in the house. The evidence of a forcible sexual act near the lavatory is consistent with the 1st accused or some of the other unidentified persons being the ravishers. Even the convictions of the 2nd and 5th accused on the charges of unlawful assembly must depend on Soma Liyanage's evidence that they were identified near the lavatory. In dealing with the cases of the 2nd and 5th appellants the learned Commissioner directed the jury in the following terms :—

> " You may ask yourselves the question, 'Why should a woman, in the absence of her husband, be taken outside ? ' Of course, as I told you in the morning, the only person who says what happened outside the house is Soma Liyanage. If you are satisfied beyond reasonable doubt on Soma Liyanage's evidence, then you can find the 2nd and 5th accused guilty."

and again

> " therefore you have to accept the evidence of Soma Liyanage with absolute certainty that the act was committed. In so doing, you can take into consideration the fact that she was taken out of the house. That does not mean necessarily that an offence was committed but Soma Liyanage says that offences were committed on her and she specifies the 2nd and 5th accused."

These directions would have been appropriate, if the 2nd and 5th accused were identified in the house as being the *only* two persons who dragged her out and, in such an event, the jury may well have been justified in accepting Soma Liyanage's uncorroborated testimony that these two accused committed offences on her. When, however, the evidence disclosed that several persons dragged the prosecutrix out of the house and persons other than the appellants are also alleged to have ravished the woman the jury may too readily accept the position on such a direction that if rape did take place (and there was sufficient material to come to such a conclusion) that the evidence of Soma Liyanage, even though not corroborated on the question of identification, must be accepted in regard to the identity of the 2nd and 5th accused, in spite of the warning given by the learned Commissioner.

We might have not interfered with the convictions of the appellants, in spite of these criticisms had it not been for the unsatisfactory nature of Soma Liyanage's evidence. In our view the learned Commissioner put the case to the jury very fairly, even if he was inclined sometimes to commend too favourably the evidence of Soma Liyanage, but the evidence of Soma Liyanage was of such a calibre that it could hardly have inspired confidence with a reasonable jury. We are conscious of the fact that the Court of Criminal Appeal has stated in no uncertain terms that it is not the function of this Court to retry a case which has already been decided by the jury—*Andris Silva* [1]—and that on questions of fact we should not lightly interfere with the verdict of the jury, who on a proper direction, are entitled to accept questions of fact. Soma Liyanage's evidence is however so full of infirmities and her account appears so improbable that we think this is an appropriate case in which we must exercise our powers under Section 5 (1) of the Court of Criminal Appeal Act and set aside the verdict of the jury on the ground that it is unreasonable. Learned Crown Counsel too was constrained to admit that her evidence was not of the kind on which the Crown could confidently rely.

At the outset it is not out of place to state that the verdicts of the jury against the appellants are divided, that a previous jury did not accept Soma Liyanage's evidence that there was a robbery or that the 3rd, 4th and 6th accused raped her. Learned Counsel of the appellants also commented on the unlikelihood of the 4th, 5th and 6th accused having raped the woman in the presence of their paternal uncle the 1st accused. I have already commented on the unsatisfactory nature of the light that was available to make identification in the vicinity of the lavatory possible ; she contradicted herself in regard to the identity of the last person to rape her—a contradiction which affects the identity of the 2nd accused ; she said it was the 4th accused who removed her talisman and at another stage she fathered this act on the 6th accused ; in the Magistrate's Court she did not mention that the 3rd accused raped her—a position which she took up for the first time when she gave evidence before the Supreme Court, and finally her conduct subsequent to the transaction creates considerable doubt on the accuracy of her identification. Although she was living in a populated locality and the Grama Sevaka lived only two miles away she made no complaint to the authorities that night. When cross-examined on this point she gave the lame excuse that she did not go to the Police through fear. She met Revd. Sangananda, a woman Seelawathie and her younger brother Somaratne in the course of the morning but did not mention to any of them that she had been raped. She was a married woman and, if she intended to ultimately inform the Police of what had happened to her, there was no reason why she should not have disclosed to the persons who accompanied her in the car that she had been raped. Her peregrinations in search of her husband, her failure to meet him, her

[1] *(1949) 41 N. L. R. 433.*

chance meeting with Revd. Indrajoti, her return to Colombo to get the assistance of the Inspector-General of Police, lends colour to the suggestion that Revd. Indrajoti may have had a hand in implicating some of the accused falsely. In fairness to the learned Commissioner it must be stated that he did refer to most of these infirmities when he dealt with Soma Liyanage's evidence and left it open to the jury to accept or reject her evidence. We think however, having regard to the unsatisfactory nature of her evidence the verdict of the jury was unreasonable.

The principles which the Court of Criminal Appeal should follow in such a case have been set down in the case of *Andris Silva* (supra) referred to earlier in this judgment. In *Buckley* [1] where the accused was convicted of rape by a divided verdict this Court stated that " there is no doubt that in the present case the jury have arrived at their verdict upon evidence properly admitted and after a correct direction by the Judge. If, however, the Court thought, after reviewing the whole of the evidence, that the verdict could not be supported, the Court was not only entitled, but was bound, to exercise the powers conferred upon it by Section 5 (1) of the Ordinance and allow the appeal." In that case the Court of Criminal Appeal thought that the jury had viewed the evidence in sections and accepted and convicted the appellant on those parts that were satisfactory and disregarded those facts which pointed to the improbability of the story put forward by the Crown—an observation that could well apply to the evidence of Soma Liyanage in the present case. In *Musthapa Lebbe* [2], also a case of rape, the Court of Criminal Appeal was of opinion that there was a real doubt as to the appellant's guilt and the Court cited with approval the decisions of the English Court of Criminal Appeal in *Rex v. Isaac Schrager* [3] and *Rex v. John Reuben Parker* [4]. In the former case the principle enunciated was that " in all the circumstances (of the case) it did seem to the Court that there was a reasonable and substantial amount of doubt as to the guilt of the appellant ", and in the latter case the Court was entitled to give the benefit of the doubt to the accused because " there was held to be sufficient doubt as to the accuracy of the verdict..... ". The principles laid down by this Court in the above cases are applicable to the evidence of the Crown in the present case, particularly when one considers the unsatisfactory nature of Soma Liyanage's evidence. In *Themis Singho* [5] this Court held that in a charge of rape it is proper for a jury to convict on the uncorroborated evidence of the complainant *only when such evidence is of such a character as to convince the jury that she is speaking the truth.* In our view Soma Liyanage's evidence does not pass this test. To use the language of the Lord Chief Justice in *Rex v. John Alfred Bradley* [6] " on the whole we think it safer that the conviction should not be allowed to stand."

[1] *(1942) 43 N. L. R. 474.*

[2] *(1943) 44 N. L. R. 505.*

[3] *6 Cr. A. R. 253.*

[4] *6 Cr. A. R. 285.*

[5] *(1944) 45 N. L. R. 378.*

[6] *4 Cr A R 328.*

For the above reasons we set aside the convictions of the 2nd and 5th appellants and allow their appeals.

Appeals allowed.