

**ATTORNEY GENERAL**

**v.**

**PRIYANTHA**

COURT OF APPEAL.

HECTOR YAPA, J. (P/CA)

KULATILAKE J.

C.A. [P.H.C.] APN 19/99.

H.C. KURUNEGALA 51/97

7<sup>TH</sup>, 25<sup>TH</sup>, 26<sup>TH</sup> SEPTEMBER, 2000.

*Rape - S. 364(2) - Penal code - Amendment 22 of 1995 - Statutory Rape - Consent immaterial - Medical evidence not supportive of sexual act.*

The Accused - Respondent was indicted for committing Rape, punishable under S. 364(2)(e) of the Penal Code as amended by Act 22 of 1995. Judge sitting without a jury acquitted the accused.

The Attorney General moved in Revision

**Held :**

(i) As seen from the evidence the complaint of rape was made to the Police not at the instance of the prosecutrix but at the instance of her parents.

(ii) Medical evidence had very clearly contradicted the evidence of the prosecutrix.

**APPLICATION** in Revision from the Judgment of the High Court of Kurunegala.

*Sarath Jayamanne, S.S.C for the Petitioner.*

*L.V.P. Wethasinghe with Dr. Ranjit Fernando, Ms. Anoja Jayaratne and Ms Sandamali Munasinghe for Accused - Respondent*

*Cur. adv. vult.*

September 26, 2000.

**HECTOR YAPA, J. (P/CA)**

The accused-respondent in this case was indicted in the High Court of Kurunegala for committing rape on Delpachithra Archarige Ramani Wijeratne an offence punishable under Section 364(2) (e) of the Penal Code as amended by Act No. 22 of 1995. After trial before the High Court Judge sitting without a jury the accused-respondent was acquitted by the learned High Court Judge on 14.12.1998. In this application the Hon. Attorney General is seeking to revise the said verdict of acquittal.

At the trial the prosecution led the evidence of Dr. Senaka Senanayake, the prosecutrix Ramani Wijeratne, mother of the prosecutrix Kumusawathi, Manageress of the Guest House Omega Inn, Somalatha Sendanayake. Briefly the evidence of the prosecutrix was that she and the accused-respondent had a love affair for about a month before the date of the incident which was on 18.09.1996. On the said date accused-respondent wanted the prosecutrix to meet him at Kuliyaipitiya and when she met him there at about 8.30 a.m. he had taken her to the guest house referred to as "Omega Inn" at Aswedduwa Kuliyaipitiya. Having gone to the guest house accused-respondent had taken the prosecutrix into a room and after removing her clothes by force had sexual intercourse with her. After the act of sexual intercourse there was bleeding and there was blood in her trouser (meaning the nicker) which she had washed after returning home. However it is to be noted that at one stage in her evidence, she had taken up the position that she was not wearing a nicker on the said date. It was the evidence of the prosecutrix that the act of sexual intercourse was committed on her by the accused-respondent on the promise that he would marry her. She testified to the fact that it was for the first time she ever had any sexual relationship in this manner and thereby tried to impress upon the Court that she was a virgin. Prosecutrix further said that after the sexual act at the guest house she came back home and had written

a letter to the accused-respondent. While she was reading the said letter, the mother of the prosecutrix had seen it and had grabbed it despite her attempt to destroy it by putting it into the fire. When the parents of the prosecutrix came to know about the said act of sexual intercourse with the accused-respondent a complaint had been made to the Kuliyaipitiya Police. Thereafter police commenced investigations and the prosecutrix came to be examined by the doctor. According to the evidence of Doctor Senanayake who had examined the prosecutrix on 23.09.1996, he found no injuries on the prosecutrix and in addition her hymen was absent. Doctor said that the absence of her hymen would have taken place on a date very much before the date of the alleged act of sexual intercourse on 18.09.1996. Due to the absence of any injuries the doctor was unable to say with certainty whether penetration had taken place on 18.09.1996.

When the defence was called the accused-appellant made a dock statement denying the said incident and stated that he was innocent of the charge.

At the hearing of this application learned Senior State Counsel submitted that the verdict of acquittal arrived at by the learned High Court Judge on 14.12.1998 should be set aside and further that a retrial be ordered on the same indictment. Learned Senior State Counsel's argument was that the prosecutrix being under 16 years of age at the time, her consent was immaterial and therefore it was a case of statutory rape. Hence Counsel contended that the learned trial Judge was in error when he concluded that there was no material to corroborate the evidence of the prosecutrix.

Learned Senior Counsel for the accused-respondent on the other hand argued that on the medical evidence alone the prosecution case had to fail in the High Court. Counsel submitted that according to Dr. Senanayake who examined the prosecutrix he had observed that there was an absence of the hymen which had taken place before the alleged sexual act

complained of by the prosecutrix, i.e. on 18.09.1996. Besides the doctor was not in a position to state clearly as to whether any sexual act had taken place on 18.09.1996 due to the absence of any injuries on the body of the prosecutrix and more specially in her private parts. Counsel also referred to the fact that the accused-respondent in his dock statement had denied any such incident (act of sexual intercourse) having taken place on 18.09.1996.

We have carefully considered the evidence and the submissions of Counsel in this case. It is to be noted that the doctor had testified very clearly that the prosecutrix had no injuries. Besides her hymen was absent and according to the doctor it had happened on a date prior to the alleged act of sexual intercourse by the accused-respondent. Under these circumstances the evidence of the prosecutrix that she was bleeding soon after the alleged act of sexual intercourse by the accused-respondent becomes unreliable. Furthermore the prosecutrix went to the extent of saying that there was blood in her trouser (nicker) which she had washed after returning home. If that was the case, the doctor should have observed some injuries. On this matter one cannot ignore her evidence (initially) where she said that she was not wearing a nicker on the date of the alleged sexual act. All these matters go to show that she has not been truthful to Court. Besides it is to be remembered that as seen from the evidence the complaint of rape against the accused-respondent was made to the police not at the instance of the prosecutrix but at the instance of the parents of the prosecutrix. Further due to the absence of any injuries on the body of the prosecutrix doctor was not in a position to state with certainty whether penetration had taken place on 18.09.1996. Normally one would not expect any external injuries to be found on the prosecutrix since it would appear that she had consented to the sexual act. However in view of her evidence that she was a virgin until 18.09.1996 and the fact that after the sexual act she was bleeding, one would have expected some injuries or evidence of bleeding coming

from the doctor. Therefore it would appear that the medical evidence had very clearly contradicted the evidence of the prosecutrix. Hence learned trial Judge was correct when he observed that the evidence of the prosecutrix had not been corroborated by the medical evidence. On the contrary as stated before medical evidence had the effect of contradicting the evidence of the prosecutrix. Further the trial Judge has mentioned the fact that there is a serious doubt as to whether the complaint made to the police by the prosecutrix and her mother was made voluntarily or not and hence there is a doubt as to whether the incident has taken place in the way as described by them in Court.

Learned Counsel for the accused-respondent made further submissions with regard to failure of the prosecution to produce the original birth certificate of the prosecutrix, contradictory nature of her evidence relating to the nicker she was wearing on the date in question and the delay of over 5 months to file this revision application. However having regard to the main weakness in the prosecution case as referred to above, it is unnecessary to consider these submissions of the learned Counsel for the accused-respondent. Therefore in the attendant circumstances of this case, we are of the view that the learned trial Judge has acted correctly when he came to the conclusion that the medical evidence was not supportive of the sexual act having taken place on 18.09.1996 in the manner as testified by the prosecutrix. Hence it would appear that the prosecution has failed to establish the case against the accused-respondent beyond reasonable doubt.

For the above reasons, we are unable to interfere with the verdict of acquittal arrived at by the learned trial Judge on 14.12.1998. Therefore this application is refused and accordingly it is dismissed.

**KULATILAKA, J.**

- I agree

*Application dismissed.*