# CHAMINDA VS REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW. J
ABEYRATNE. J
CA 248/2007
HC MATARA 63/2005
OCTOBER 13, 2009

*Rape - Ingredients? - Subsequent conduct - Test of probability - Impugning a Judicial record - Contradiction of the record - Demeanour - Testimonial trustworthiness - Primary facts.*

The accused-appellant was convicted of raping a woman named L. The contention of the accused-appellant was that, he performed sexual intercourse on the woman with her consent.

**Held:**

(1) In order to establish a charge of rape, the prosecution must prove that (1) the accused performed sexual intercourse on the woman (2) the accused did the above sexual act without her consent beyond reasonable doubt. When one considers the subsequent conduct of the prosecutrix it does not satisfy the test of probability. It raises a reasonable doubt whether there was consent, and the 2nd ingredient has not been proved beyond reasonable doubt.

(2) A litigant is not entitled to impugn a judicial record by making a convenient statement before the Court of Appeal.

(3) An appellate Court will not lightly disturb the findings of a trial judge who had come to a favourable finding with regard to testimonial trustworthiness of a witness whose demeanour and deportment had been observed by the trial judge. Findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal.

Per Sisira de Abrew. J.

> "When a judge who after observing demeanour and deportment of witness decides to convict an accused person in a criminal case and if his decision is proved to be wrong, Court of Appeal should interfere with such decision".

**APPEAL** from a judgment of the High Court of Matara.

Cases referred to:-

1. *OIC Ampara Police Station vs. Bamunusinghe Arachchige Jayasinghe* - CA 37/98 HC (PHC) APN 38/98 CAM 8.9.98
2. *Gunawardane vs. Kellart* 48 NLR 52
3. *Alwis vs. Piyasena Fernando* 1993 1 Sri LR 119

*Kapila Suriyaarachchi* with *Anuradha Bandara* for accused-appellant

*V. K. Malalgoda* DSG for Attorney General.

Cur. adv. vult

November 9, 2009

**SISIRA DE ABREW, J.**

The accused appellant (the appellant) in this case was convicted for raping a woman named Thanuja Lakmali and was sentenced to a term of eighteen years rigorous imprisonment (RI) and to pay a fine of Rs. 1000/- carrying a default sentences of three months RI. Being aggrieved by the said conviction and the sentence the accused appellant has appealed to this court.

According to the prosecution case the appellant entered the house of the prosecutrix's through the roof of her house and raped her. The appellant had removed the glass sheet placed on the roof and entered the house. At the time of the incident her husband was not at home since one or two days prior to this date he had gone to Deniyaya to do his usual work.

The appellant, in his evidence, admitted that he performed sexual intercourse on the woman with her consent. According to the appellant this was the 4th time that he performed sexual intercourse on her. On all four occasions he, with her consent, performed sexual intercourse. He takes up the position that on all four occasions he came through the roof in the night after removing the glass sheet on the roof. It was not difficult, according to the appellant, to

come through the roof as there was a table right under the place where the glass sheet was kept. He climbs the orange tree adjacent to the roof and comes to the roof. According to the appellant who was living in the neighborhood of the prosecutrix when he met her on 22.10.2000 around 12.00 noon, she invited her to come around 9.00 p.m. as her husband was not at home. She further instructed him to tap twice on the door and if she did not wake up to enter the house as he previously did (through the roof). However he told her that he would not come around 9.00 p.m. as he would be watching the match and would come late in the night. As arranged, he tapped on the door twice and since she did not wake up, he entered the house through the roof and woke her up by shaking her leg. Thereafter he waited in the hall till she put her child to sleep. After having sexual intercourse with her consent he adjusted the glass sheet. It could be done when one stands on the table. This was the summary of the appellant's evidence.

In order to establish a charge of rape, the prosecution must prove the following ingredients beyond reasonable doubt:

1. The accused performed sexual intercourse on the woman.

2. The accused did the above sexual act without her consent.

If there is a reasonable doubt on one of the ingredients the accused must be acquitted. Further if the evidence indicates that sexual intercourse was performed with her consent, the accused must be acquitted. The most important question that must be decided in this case is whether the prosecution has proved the 2nd ingredient beyond reasonable doubt. I now advert to this question. In order to decide whether the 2nd ingredient has been proved

beyond reasonable doubt her subsequent conduct must be examined. Learned Counsel for the appellant contended that her evidence did not satisfy the test of probability especially when one considers her subsequent conduct. I now advert to this contention.

The appellant entered the prosecutrix's house through the roof. Both the prosecutrix and the appellant admit this fact. After the appellant performed sexual intercourse on the woman the appellant got on to the said table and adjusted the glass sheet. She was watching when the appellant adjusted the glass sheet. Vide page 100 and 102 of the brief. She says after the incident the appellant opened the front door and left the house. Vide page 57 of the brief. But she contradicts this position at page 103 of the brief. She says that she opened the door when the appellant could not open it. Following day one Chaminda who was working with her husband at Deniyaya came to her house. But she did not send a message through Chaminda asking her husband to come home. Vide page 75 of the brief. No one can expect her to divulge the incident to Chaminda but it was natural for her to send a message to her husband. Following day she went to the Grama Sevaka's house but she did not complain about the incident. She says she went to the Grama Sevaka's house in order to complain about the incident but did not do so. She was frightened to complain since her husband was not at home. She went and slept with her sister on the following day but she did not tell her about the incident. When one considers her subsequent conduct, her evidence that sexual intercourse was performed without her consent, does not satisfy the test of probability. Her subsequent conduct raises a reasonable doubt whether there was consent to the sexual intercourse. In fact her subsequent conduct indicates that sexual intercourse was performed with her consent.

When I consider all these matters I hold the view that the prosecution has not proved the 2nd ingredient beyond reasonable doubt. On this ground alone the accused must be acquitted.

There is a very important item of evidence that must be considered. When questioned as to what happened to her clothes soon before the sexual intercourse she said that she lifted both her underskirt and the frock. Vide page 53 of the brief. Learned DSG contended that this was a typing mistake. If that is so the prosecuting State Counsel would have moved to amend the proceedings. But no such thing has been done. In my view a litigant can't make a convenient statement in court and contradict a judicial record. In this regard I am guided by the following judicial decisions. *OIC Ampara police Station Vs. Bamunusinghe Arachchige Jayasinghe*[1] Jayasuriya J remarked: "A litigant is not entitled to impugn a judicial record by making a convenient statement before the Court of Appeal." In *Gunawardane vs Kelart*[2] Supreme Court held: "The Supreme Court will not admit affidavits which seek to contradict the record kept by the Magistrate"

In my view, Court cannot disregard an item of evidence which shakes the entire prosecution case on the contention that it was a typing mistake. Although the learned DSG contended that this was a typing mistake the appellant in his evidence says that the prosecutrix raised her frock a little and the rest was raised by him. Vide 158 of the brief. Prosecutrix's evidence therefore suggests that the sexual intercourse was performed with her consent. On this evidence alone the accused must be acquitted. It appears that no one has drawn the attention of the learned trial judge to this point. For the above reasons I further hold that the evidence of the prosecutrix that the sexual intercourse was performed

without her consent cannot be accepted beyond reasonable doubt.

The learned trial judge rejected the appellant's evidence. According to him the appellant had selected the most difficult method to enter the house and had not explained the reasons for doing so. But the appellant at pages 176 and 178 explained the reasons. According to the appellant he had received instructions from the prosecutrix to enter the house through the same way that he had entered earlier if she would not wake up after tapping on the door. Further he says that he did not tap hard on the door since the people in the neighbourhood would hear the sound. Therefore it appears that the reason given by the learned trial judge to reject the appellant's evidence is wrong. Learned trial judge in dealing with the appellant's evidence further observed that the appellant had the opportunity of getting the door opened after tapping on the window of the room where the prosecutrix was sleeping but he had not explained the reasons why he did not do so. But the appellant at page 178 says that if he tapped on the window Nancy whose house was very close to this house would hear the sound. IP Caldera who visited the scene says that there were houses adjacent to this house. Thus the said reasons given by the learned trial judge are wrong. Learned trial judge considered certain contradictions marked with the statement of the appellant made to the police and decided to discredit the appellant's evidence on the basis that they were vital contradictions. I have gone through these contradictions and am of the opinion that they are not vital contradictions when I consider the entire evidence led at the trial. I have gone through the appellant's evidence and see no reasons to reject it.

For the above reasons, I hold that the decision of the learned trial judge to convict the appellant for the offence

is wrong. Learned trial judge observed the demeanour of the prosecutrix and came to a favourable finding with regard to her testimonial trustwortheness. Court of Appeal will not lightly disturb the findings of a judge who had come to a favourable finding with regard to the testimonial trustworthiness of a witness whose demeanour and deportment had been observed by the trial judge. This view is supported by the judicial decision in *Alwis Vs. Piyasena Fernando*[3] wherein G.P.S. de Silva CJ remarked thus: "It is well established that findings of primary facts by a trial judge who hears and sees witness are not to be lightly disturbed on appeal." But when a judge who after observing demeanour and deportment of witness decides to convict an accused person in a criminal case and if his decision is proved to be wrong, Court of Appeal should interfere with such decision.

I have gone through the evidence led at the trial and hold the view that the prosecution has not proved beyond reasonable doubt that sexual intercourse was perfórmed on the prosecutrix without her consent. In fact the evidence indicates that sexual intercourse was performed on the prosecutrix with her consent. For the above reasons I hold that the charge of rape has not been proved beyond reasonable doubt. I therefore set aside the conviction and the sentences and acquit the appellant of the charge with which he was convicted.

**ROHINI MARASINGHE, J.** - I agree

*Appeal allowed.*